# NORTH CAROLINA REPORTS

VOLUME 211

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# NORTH CAROLINA REPORTS
## VOL. 211

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

**FALL TERM, 1936**
**SPRING TERM, 1937**

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1937

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# JUSTICES

OF THE

# SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1937.

---

CHIEF JUSTICE:

W. P. STACY.

---

ASSOCIATE JUSTICES:

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

---

ATTORNEY-GENERAL:

A. A. F. SEAWELL.

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ASSISTANT ATTORNEYS-GENERAL:

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ROBERT C. STRONG.

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# JUDGES

OF THE

# SUPERIOR COURTS OF NORTH CAROLINA

## EASTERN DIVISION

| *Name* | *District* | *Address* |
|---|---|---|
| WALTER L. SMALL | First | Elizabeth City. |
| M. V. BARNHILL | Second | Rocky Mount. |
| R. HUNT PARKER | Third | Roanoke Rapids. |
| CLAWSON L. WILLIAMS | Fourth | Sanford. |
| J. PAUL FRIZZELLE | Fifth | Snow Hill. |
| HENRY A. GRADY | Sixth | Clinton. |
| W. C. HARRIS | Seventh | Raleigh. |
| E. H. CRANMER | Eighth | Southport. |
| N. A. SINCLAIR | Ninth | Fayetteville. |
| MARSHALL T. SPEARS | Tenth | Durham. |

### SPECIAL JUDGES

| | |
|---|---|
| G. V. COWPER | Kinston. |

## WESTERN DIVISION

| | | |
|---|---|---|
| JOHN H. CLEMENT | Eleventh | Winston-Salem. |
| H. HOYLE SINK | Twelfth | Lexington. |
| F. DONALD PHILLIPS | Thirteenth | Rockingham. |
| W. F. HARDING | Fourteenth | Charlotte. |
| FRANK M. ARMSTRONG | Fifteenth | Troy. |
| WILSON WARLICK | Sixteenth | Newton. |
| J. A. ROUSSEAU | Seventeenth | Wilkesboro. |
| J. WILL PLESS, JR. | Eighteenth | Marion. |
| P. A. MCELROY* | Nineteenth | Marshall. |
| FELIX E. ALLEY, SR. | Twentieth | Waynesville. |

### SPECIAL JUDGE

| | |
|---|---|
| FRANK S. HILL | Murphy. |
| SAM J. ERVIN, JR. | Morganton. |

### EMERGENCY JUDGES

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

*Resigned, succeeded by A. Hall Johnston, Asheville.

# SOLICITORS

## EASTERN DIVISION

| *Name* | *District* | *Address* |
|---|---|---|
| HERBERT R. LEARY | First | Edenton. |
| DONNELL GILLIAM | Second | Tarboro. |
| W. H. S. BURGWIN | Third | Woodland. |
| CLAUDE C. CANADAY | Fourth | Benson. |
| D. M. CLARK | Fifth | Greenville. |
| JAMES A. POWERS | Sixth | Kinston. |
| WILLIAM Y. BICKETT | Seventh | Raleigh. |
| JOHN J. BURNEY | Eighth | Wilmington. |
| T. A. MCNEILL | Ninth | Lumberton. |
| LEO CARR | Tenth | Burlington. |

## WESTERN DIVISION

| | | |
|---|---|---|
| ALLEN H. GWYN | Eleventh | Reidsville. |
| H. L. KOONTZ | Twelfth | Greensboro. |
| ROWLAND S. PRUETTE | Thirteenth | Wadesboro. |
| JOHN G. CARPENTER | Fourteenth | Gastonia. |
| CHARLES L. COGGIN | Fifteenth | Salisbury. |
| L. SPURGEON SPURLING | Sixteenth | Lenoir. |
| JNO. R. JONES | Seventeenth | N. Wilkesboro. |
| C. O. RIDINGS | Eighteenth | Forest City. |
| Z. V. NETTLES | Nineteenth | Asheville. |
| JOHN M. QUEEN | Twentieth | Waynesville. |

# SUPERIOR COURTS, SPRING TERM, 1937

The numerals in parentheses 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, 1937—Judge Williams.**

Beaufort—Jan. 11* (2); Feb. 15† (2); Mar. 15* (A); April 5†; May 3† (2).
Camden—Mar. 8.
Chowan—Mar. 29.
Currituck—Mar. 1; April 26†.
Dare—May 24.
Gates—Mar. 22.
Hyde—May 17.
Pasquotank—Jan. 4†; Feb. 8†; Feb. 15* (A); Mar. 15†; May 3† (A) (2); May 31*; June 7† (2).
Perquimans—Jan. 11† (A); April 12.
Tyrrell—Feb. 1†; April 19.

### SECOND JUDICIAL DISTRICT

**Spring Term, 1937—Judge Frizzelle.**

Edgecombe—Jan. 18; Mar. 1; Mar. 29† (2); May 31 (2).
Martin—Mar. 15 (2); April 12† (A) (2); June 14.
Nash—Jan. 25; Feb. 15† (2); Mar. 8; April 19† (2); May 24.
Washington—Jan. 4 (2); April 12†.
Wilson—Feb. 1*; Feb. 8†; May 10*; May 17†; June 21†.

### THIRD JUDICIAL DISTRICT

**Spring Term, 1937—Judge Grady.**

Bertie—Feb. 8; May 3 (2).
Halifax—Jan. 25 (2); Mar. 15† (2); April 26*; May 31† (2).
Hertford—Feb. 22*; April 12‡ (2).
Northampton—Mar. 29 (2).
Vance — Jan. 4*; Mar. 1*; Mar. 8†; June 14*; June 21†.
Warren—Jan. 11 (2); May 17 (2).

### FOURTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Harris.**

Chatham—Jan. 11; Mar. 1†; Mar. 15†; May 10.
Harnett—Jan. 4*; Feb. 1† (2); Mar. 29† (A) (2); May 3†; May 17*; June 7† (2).
Johnston—Jan. 4† (A) (2); Feb. 8 (A); Feb. 15† (2); Mar. 1 (A); Mar. 8; April 12 (A); April 19† (2); June 21*.
Lee—Jan. 25† (A); Mar. 22 (2).
Wayne—Jan. 18; Jan. 25†; Mar. 1† (A) (2); April 5; April 12†; May 24; May 31†.

### FIFTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Cranmer.**

Carteret—Mar. 8; June 7 (2).
Craven—Jan. 4*; Jan. 25† (3); April 5‡; May 10†; May 31*.
Greene—Feb. 22 (2); June 21.
Jones—Mar. 29.
Pamlico—April 26 (2).
Pitt—Jan. 11†; Jan. 18; Feb. 15†; Mar. 15 (2); April 12 (2); May 3† (A); May 17† (2).

### SIXTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Sinclair.**

Duplin—Jan. 4† (2); Jan. 25*; Mar. 8† (2).
Lenoir—Jan. 18*; Feb. 15† (2); April 5; May 10† (2); June 7† (2); June 21*.
Onslow—Mar. 1; April 12† (2).
Sampson—Feb. 1 (2); Mar. 22† (2); April 26† (2).

### SEVENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Small.**

Franklin—Jan. 11 (2); Feb. 15† (2); May 10.
Wake—Jan. 4*; Jan. 25†; Feb. 1*; Feb. 8†; Mar. 1*; Mar. 8† (2); Mar. 22† (2); April 5*; April 12† (2); April 26†; May 3*; May 17† (2); May 31*; June 7† (2).

### EIGHTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Small.**

Brunswick—Jan. 4†; April 5; June 14†.
Columbus—Jan. 25; Feb. 15† (2); April 26 (2); June 21*.
New Hanover—Jan. 11*; Feb. 1† (2); Mar. 1† (2); Mar. 15*; April 12† (2); May 10*; May 24† (2); June 7*.
Pender—Mar. 22 (2).

### NINTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Barnhill.**

Bladen—Jan. 1; Mar. 8; April 26.
Cumberland — Jan. 11*; Feb. 8† (2); Mar. 1* (A); Mar. 22† (2); May 3† (2); May 31*.
Hoke—Jan. 18; April 19.
Robeson—Jan. 25* (2); Feb. 22† (2); April 5†; April 12*; May 17†; May 24*; June 7†; June 14*.

### TENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Parker.**

Alamance — Jan. 25† (A); Feb. 22*; Mar. 29†; May 10* (A); May 24† (2).
Durham—Jan. 4† (3); Feb. 15*; Feb. 22† (A); Mar. 1† (2); Mar. 15† (A); Mar. 22*; April 19† (A); April 26† (2); May 17*; May 24† (A) (3); June 21*.
Granville—Feb. 1 (2); April 5 (2).
Orange—Mar. 15; May 10†; June 7; June 14†.
Person—Jan. 18 (A); Jan. 25†; April 19.

## WESTERN DIVISION

### ELEVENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Harding.**

Ashe—April 12*; May 24† (A) (2).
Alleghany—April 26.
Caswell—Mar. 15.
Forsyth—Jan. 4 (2); Jan. 18† (A) (2); Feb. 1 (2); Feb. 15† (2); Mar. 1 (A) (2); Mar. 15† (A); Mar. 22†; Mar. 29 (2); April 12† (A) (2); May 3 (2); May 24† (2); June 7 (A) (2); June 21† (2).
Rockingham—Jan. 18* (2); Mar. 1† (2); May 3† (A) (2); May 17*; June 7† (2).
Surry—Feb. 15 (A) (2); April 19; April 26 (A).

### TWELFTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Armstrong.**

Davidson—Jan. 25*; Feb. 15† (2); April 5† (A) (2); May 3*; May 24† (2); June 21*.
Guilford—Jan. 4† (2); Jan. 18*; Feb. 1† (2); Feb. 15† (A) (2); Mar. 1* (2); Mar. 15† (2); Mar. 29† (A) (2); April 12† (2); April 26*; May 10† (2); May 31† (A); June 7†; June 14*.
Stokes—Mar. 29*; April 5†.

### THIRTEENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Warlick.**

Anson—Jan. 11*; Mar. 1†; April 12 (2); June 7†.
Moore—Jan. 18*; Feb. 8† (A); Mar. 22† (A) (2); May 17*; May 24†.
Richmond—Jan. 4*; Feb. 1† (A); Mar. 15†; April 5*; May 24† (A); June 14†.
Scotland—Mar. 8; April 26†; May 31.
Stanly—Feb. 1† (2); Mar. 29; May 10†.
Union—Jan. 25*; Feb. 15† (2); Mar. 22†; May 3†.

### FOURTEENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Rousseau.**

Gaston—Jan. 11*; Jan. 18† (2); Mar. 8* (A); Mar. 15† (2); April 19*; May 17† (A) (2); May 31*.
Mecklenburg—Jan. 4*; Jan. 11† (A) (2); Jan. 25† (A) (2); Feb. 1† (3); Feb. 8† (A) (2); Feb. 22† (A) (2); Feb. 22*; Mar. 1† (2); Mar. 8† (A) (2); Mar. 22† (A) (2); Mar. 29† (2); April. 26† (2); May 10*; May 17† (2); June 7*; June 14†; June 21†.

### FIFTEENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Pless.**

Cabarrus—Jan. 4 (2); Feb. 22†; Mar. 1† (A); April 19 (2); June 7† (2).
Iredell—Jan. 25 (2); Mar. 8†; May 17 (2).
Montgomery—Jan. 18*; April 5† (2).
Randolph—Mar. 15† (2); Mar. 29*.
Rowan—Feb. 8 (2); Mar. 1†; Mar. 8† (A); May 3 (2).

### SIXTEENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge McElroy.**

Burke—Feb. 15; Mar. 8† (2); May 31 (3).
Caldwell—Feb. 22 (2); May 17† (2).
Catawba — Jan. 11† (2); Feb. 1 (2); April 5† (2); May 3† (2).
Cleveland—Jan. 4; Mar. 22 (2); May 17† (A) (2).
Lincoln—Jan. 18 (A); Jan. 25†.
Watauga—April 19 (2); June 7† (A) (2).

### SEVENTEENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Alley.**

Alexander—June 14 (2).
Avery—April 5*; April 12†.
Davie—Mar. 15; May 24†.
Mitchell—Mar. 22 (2).
Wilkes—Mar. 1 (2); April 26 (2); May 31† (2).
Yadkin—Feb. 22*; May 10† (2).

### EIGHTEENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Clement.**

Henderson—Jan. 4† (2); Mar. 1 (2); April 26† (2); May 24† (2).
McDowell—Dec. 28*; Feb. 8† (2); June 7 (3).
Polk—Jan. 25 (2).
Rutherford—April 12† (2); May 10 (2).
Transylvania—Mar. 29 (2).
Yancey—Jan. 18†; Mar. 15 (2).

### NINETEENTH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Sink.**

Buncombe—Jan. 11† (2); Jan. 25; Feb. 1† (2); Feb. 15; Mar. 1† (2); Mar. 15; Mar. 29; April 5† (2); April 19; May 3† (2); May 17; May 31; June 7† (2); June 21 (2).
Madison—Feb. 22; Mar. 22; April 26; May 24.

### TWENTIETH JUDICIAL DISTRICT

**Spring Term, 1937—Judge Phillips.**

Cherokee—Jan. 18† (2); Mar. 29 (2); June 14† (2).
Clay—April 26; May 3 (A).
Graham—Jan. 4† (A) (2); Mar. 15 (2); May 31† (2).
Haywood—Jan. 4† (2); Feb. 1 (2); May 3† (2).
Jackson—Feb. 15 (2); May 17 (2).
Macon—April 12 (2).
Swain—Mar. 1 (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.

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# CASES

ARGUED AND DETERMINED
IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

# RALEIGH

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## FALL TERM, 1936

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ETHEL KELLY, MRS. G. C. HUNT AND HUSBAND, G. C. HUNT; MRS. LUOLA MUSE AND HUSBAND, J. B. MUSE; ANNIE McDUFFIE AND HUSBAND, DR. W. N. McDUFFIE, v. CARL DAVIS, EXECUTOR OF THE LAST WILL AND TESTAMENT OF S. G. GARNER, DECEASED.

(Filed 16 December, 1936.)

**1. Estoppel § 2—Grantor in warranty deed later acquiring title from purchaser at foreclosure held estopped to assert title as against grantee.**

Partners executed a mortgage on a tract of land in which each partner owned an undivided half interest, and the proceeds of the loan were used for the benefit of both. Thereafter, the partnership was dissolved, and in the division of the property one partner deeded his interest in the tract of land in question to the other partner by full warranty deed, and each thereafter recognized the debt secured by the mortgage by making payments to the mortgagee. After the death of the partners, the mortgage was foreclosed, and the executor of the grantor partner, upon paying the balance due on the debt, had the bid assigned and deed made to him in his representative capacity. *Held:* The heirs at law of the grantee partner, upon paying into court one-half the balance of the debt paid by the executor upon the assignment of the bid, are the owners of the land and are entitled to have the mortgage and deed to the executor canceled of record, the executor being estopped by his testator's deed from asserting the after acquired title as against the heirs at law of the grantee partner.

**2. Partition § 11—Deed from one tenant to the other may operate to estop grantor tenant from asserting after acquired title against grantee tenant.**

The rule that partition among tenants in common merely allots the land in severalty without creating any title, does not apply to prevent a

deed from one tenant to the other from operating to estop the grantor tenant from setting up title to the property later acquired by transfer of a bid at the foreclosure sale of a mortgage executed on the property by both tenants, the proceeds of the loan secured by the mortgage having been used by both tenants, and the deed from the grantor tenant expressly warranting that the grantor would warrant and defend the title against the lawful claims of all persons.

APPEAL by defendant from *Moore, Special Judge,* at March Term, 1936, of MOORE. Affirmed.

The plaintiffs and defendant agreed to certain facts, and it was further agreed that the court below might render judgment thereon, with the right of the parties to except and assign error and appeal from the findings of the court.

The judgment of the court below is as follows: "This cause coming on to be heard and being heard before the undersigned judge, and a jury, after the jury had been duly selected, lawfully sworn, and regularly impaneled, the parties in open court waived a trial by the jury and agreed to and signed the statement of facts set out in the record and requested the court to render and enter such judgment thereon as the court might deem proper, each side reserving in open court the right to except and appeal to such judgment as the court might render and enter, whereupon, the court, upon such statement of facts, concludes and holds as a matter of law as follows:

"1. That the testator of the defendant Carl S. Davis, executor, having executed and delivered to Hugh M. Shields, deceased, predecessor in title of the plaintiffs, a warranty deed, dated 18 March, 1932, registered in the office of the register of deeds for Moore County, in Deed Book 111, at page 367, therein conveying the lands described in paragraph 4 of the complaint, the defendant is now estopped to deny plaintiffs' title to said land in said deed described, and any title the defendant, as executor of S. G. Garner, deceased, may have acquired by and through the Bank of Pinehurst, mortgagee, by foreclosure sale by it under said mortgage deed executed by S. G. Garner and Hugh M. Shields and wife, Kate M. Shields, bearing date of 15 July, 1926, and registered in Book of Mortgages 43, at page 480, and the deed from said Bank of Pinehurst, mortgagee, dated 24 June, 1935, and registered in Deeds Book 121, at page 346, office register of deeds of Moore County, fed the estoppel and inured to the benefit of the plaintiffs in this action.

"2. The court further holds as a matter of law that the said Hugh M. Shields and S. G. Garner in their lifetime having executed a mortgage deed to the Bank of Pinehurst for the purpose of securing money for their joint use and the use and benefit of the said Shields & Garner, and having agreed between themselves upon the dissolution of said partner-

ship in the spring of 1932 that they still owed said debt and that as to said indebtedness said partnership was not dissolved, and the parties agreed to remain jointly bound therefor, and having subsequently made payments on said indebtedness after said dissolution, and whatever Hugh M. Shields or S. G. Garner in their lifetime may have done in regard to said indebtedness inured to their benefit, and that since the death of said Hugh M. Shields payments were made on said indebtedness by his administrator *c. t. a.* and C. S. Davis as agent of S. G. Garner, deceased, and whatever payment or payments made by said administrator of said Hugh M. Shields, deceased, *c. t. a.*, or C. S. Davis as executor of the last will and testament of S. G. Garner, deceased, was made for the use and benefit of both and not for individual members of the partnership or their representatives, and when the said Carl S. Davis, executor of the last will and testament of S. G. Garner, deceased, caused title to the lands described in the complaint to be transferred to and assigned to him by the assignment of Dwight Scotten and deed procured to be made to him by reason of such assignment he took and now holds the title thereto in trust for the benefit of Hugh M. Shields, deceased, and his heirs at law him surviving, and in protection of the covenants of warranties made by S. G. Garner and Hugh M. Shields, his heirs and assigns.

"Wherefore, upon the foregoing conclusions of law drawn from the said agreed statement of facts, it is considered, ordered, and adjudged and decreed by the court that the plaintiffs are the owners in fee and entitled to the immediate possession of the lands described in paragraph 4 of the complaint, and the defendant is not the owner thereof and has no right, title, or interest therein, except a lien thereon for the sum of $116.03, being one-half of the amount of $221.00 and interest on said sum from 30 May, 1935, to date, by reason of the defendant's payment of said sum to the Bank of Pinehurst in payment of the mortgage deed made by Shields and Garner, the plaintiffs having paid said sum into court for the use and benefit of the defendant in full settlement, satisfaction, and accord of said lien and deed from the Bank of Pinehurst to Carl S. Davis, executor of S. G. Garner, deceased, recorded in Deed Book 121, at page 346, register of deeds' office for Moore County, is hereby declared null and void and ordered canceled, and the mortgage deed from S. G. Garner and Hugh M. Shields and wife, Kate M. Shields, to the Bank of Pinehurst, recorded in Book of Mortgages, at page 480, office of register of deeds for Moore County, and the lien declared for $116.03 are canceled and removed of record as a cloud on plaintiff's title, and the register of deeds is hereby authorized and directed to mark upon the margin of the deed from the Bank of Pinehurst, mortgagee, to Carl S. Davis, deceased, as it appeared on the record in the book afore-

said, 'This deed canceled by judgment of the Superior Court of Moore County, March Term, 1936, in an action therein pending, entitled "Ethel Kelly *et al. v.* Carl S. Davis, executor of the last will and testament of S. G. Garner, deceased," ' and will also mark the index and cross index of said deed on the index and cross index of real estate conveyances in his office 'Canceled,' and to mark upon the margin of said mortgage deed from Garner and Shields to the Bank of Pinehurst as it appears of record in Mortgage Deed Book 43, at page 480, 'This mortgage deed, being fully paid and satisfied, is canceled of record,' and to mark the index and cross index of said mortgage deed on the index and cross index of such conveyances in his office 'Canceled.' The clerk of this court will mark the index and cross index of this judgment as it relates to the amount due the defendant by the plaintiffs, 'Canceled.' The clerk of this court will tax the costs of the action against the defendant and the plaintiffs will have and recover their costs against the defendant.

"And this cause is retired from the docket.

CLAYTON MOORE,
*Special Judge, Presiding.*"

The only exception and assignment of error made by defendant in the court below is to the "signing and entering the judgment as appears in the record."

*Gavin & Jackson for plaintiffs.*
*Mosley G. Boyette for defendant.*

CLARKSON, J. This is an action brought by plaintiffs against defendant to remove a cloud from the title to certain land and to declare a certain deed from the Bank of Pinehurst, mortgagee, to the defendant Carl Davis, executor of S. G. Garner, deceased, void.

The court below decided that defendant was estopped from claiming title to the land in controversy. In this we can see no error.

In the agreed statement of facts are the following:

(1) On 5 July, 1926, Hugh M. Shields and S. G. Garner made a mortgage to the Bank of Pinehurst, to secure the sum of $3,000, on the land in controversy for borrowed money, each of them being equally responsible for the payment of same.

(2) For a long time prior to 22 April, 1932, Shields and Garner were copartners, owning a mercantile business and certain real estate, including that in controversy, each owning one-half undivided interest in the partnership property.

(3) That during the spring of 1932 the partnership was dissolved by mutual consent and in the division Garner conveyed to Shields the land

in controversy with full covenants of warranty. By the terms of the dissolution agreement, Shields and Garner were to pay off and discharge the indebtedness to the Bank of Pinehurst—the mortgage indebtedness being for the benefit of both.

(4) Hugh M. Shields died on 20 February, 1934, and left the land in controversy to his wife, Kate M. Shields, Ethel Kelly, and Annie McDuffie. W. N. McDuffie duly qualified as administrator *c. t. a.* on 1 March, 1934. Kate M. Shields died on 22 June, 1935, intestate, leaving as her heirs at law and next of kin the plaintiffs Ethel Kelly, Mrs. G. C. Hunt, and Mrs. Luola Muse. S. G. Garner died on 12 December, 1934, leaving a last will and testament wherein Carl Davis was named executor, and he duly qualified on 19 December, 1934.

(5) Both Shields and Garner before they died made certain payments to the Bank of Pinehurst on its indebtedness secured by mortgage on which both were liable. After the death of Hugh M. Shields and before the death of S. G. Garner, W. N. McDuffie, administrator *c. t. a.* of Hugh M. Shields, and the defendant C. S. Davis, as agent of S. G. Garner, made one or more payments on said mortgage to the Bank of Pinehurst on or prior to 24 July, 1934, and no other payment was made on said mortgage after that date. The plaintiffs and W. N. McDuffie, administrator *c. t. a.* of Hugh M. Shields, and the defendant C. S. Davis, executor of the last will and testament of S. G. Garner, were not notified of this sale and had no notice of the foreclosure of the mortgage of the Bank of Pinehurst until about 3 weeks after said mortgage had been foreclosed by sale of said lands on 30 May, 1935.

(6) The land was foreclosed by the Bank of Pinehurst. The Bank of Pinehurst, by W. D. Sabiston, Jr., reported said foreclosure sale as having been made by it 30 May, 1935, under the said mortgage above referred to, and that at said sale Dwight Scotten became the last and highest bidder in the sum of $221.00. After said sale the defendant C. S. Davis, executor, negotiated with the Bank of Pinehurst and Dwight Scotten and caused to be transferred the bid of Dwight Scotten to the defendant as executor as aforesaid on 21 June, 1935, and pursuant to said assignment the Bank of Pinehurst executed and delivered to the said C. S. Davis, executor, deed dated 24 June, 1935, therein conveying to said Davis, executor, the aforesaid lands described in said mortgage deed.

(7) At the time of said sale on 30 May, 1935, the said Shields and Garner were indebted to the said Bank of Pinehurst in the sum of $200.00 and interest and cost of such sale amounting to $221.00. The plaintiffs have tendered to C. S. Davis, executor, one-half of the principal, interest, and cost, and offer to pay into court the said sum in cash.

The deed from S. G. Garner (single) to Hugh M. Shields, dated

18 March, 1932, covering the land in controversy, has this in it: "And the said party of the first part covenants that he is seized of said premises in fee, and has the right to convey the same in fee simple, that the same is free and clear from all encumbrances, and that he will warrant and defend the said title to the same against the lawful claims of all persons whomsoever."

S. G. Garner owed one-half the debt as between him and Hugh M. Shields. On the record there is no dispute as to this either by Shields or Garner before they died, or by their respective administrator *c. t. a.* or executor, the defendant.

The land in controversy was worth not less than $2,000. S. G. Garner owed the debt as well as Hugh M. Shields. When he died his estate was liable for the payment. This was recognized by the defendant executor, Garner, who was joint and severally liable on the note secured by mortgage to the Bank of Pinehurst. Then, again, Garner made a covenant with Shields that he would "warrant and defend the said title to the same against the lawful claims of all persons whomsoever." We think under the facts and circumstances there was such a trust relationship existing that the defendant is estopped to claim title to the land in controversy.

In *Speight v. Trust Co.,* 209 N. C., 563, a wife was surety on the note of her husband and executed a mortgage on her land as security for his debt, and the husband subsequently bought the land at a sale under the mortgage, paid off the debt with his own money, and took title to the land to himself. This Court held that a court of equity will impress on the legal title thus acquired a trust in favor of the wife, quoting at pp. 565-566, 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." *Bechtel v. Bohannon,* 198 N. C., 730 (732-3).

We have here a debt which Garner's estate owed and he and his executor were in duty bound to pay. The total due of $221.00 and interest from 30 May, 1935, without notice to the executor of Shields, or the heirs at law, and contrary to the express warranty in the deed, defendant as executor purchased the land, worth not less than $2,000, and now

claims same. In good conscience, equity, and justice this cannot be done. He holds the legal title as trustee for the plaintiffs and is estopped to claim an adverse title against plaintiffs. The judgment provides for the payment of one-half by each, which is fair dealing and honesty—not the *best* policy but the *only* policy in dealings between man and man.

The defendant cites *Jones v. Myatt,* 153 N. C., 225 (230), where it is said: "It is settled by several decisions of this Court that actual partition merely designates the share of the tenant in common and allots it to him in severalty. *Harrison v. Ray,* 108 N. C., 215; *Harrington v. Rawls,* 136 N. C., 65; *Carson v. Carson,* 122 N. C., 645. It does not create or manufacture a title." *Power Co. v. Taylor,* 191 N. C., 329; *Burroughs v. Womble,* 205 N. C., 432 (434); *Insurance Co. v. Dial,* 209 N. C., 339 (348). These cases are not applicable to the present case. When Garner made the deed to Shields the Bank of Pinehurst had a lien on the property and Garner, with knowledge that he and Shields were both liable on same, expressly covenanted that he would warrant and defend the title to the same against the lawful claims of all persons whomsoever. In the face of this warranty it would be inequitable and unconscionable for his executor to buy in the land when the Bank of Pinehurst sold same. There was a trust relationship, and he is estopped to do this. In *Bailey v. Howell,* 209 N. C., 712 (715), it is said: "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. Postuski,* 179 Ill., 177, 20 Am. St. Rep., 98."

In the present case, we think, under all the facts and circumstances, there was such a trust relationship that forbids a hostile attitude. The instant case is different from *Everhart v. Adderton,* 175 N. C., 403.

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

Affirmed.

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MARY C. PARRISH v. THE BOYSELL MANUFACTURING COMPANY ET AL.

(Filed 16 December, 1936.)

**1. Master and Servant § 23: Principal and Agent § 10—Liability of master or principal for wrongful acts of servant or agent.**

A master or principal is liable for torts committed by his servant or agent in the scope of his employment and in furtherance of the superior's business, or which are authorized or ratified by the superior, but the master or principal is not liable to third persons for wrongful acts of the

servant or agent committed outside the legitimate scope of the employment and without specific authority from or ratification by the superior.

**2. Principal and Agent § 7—**

Testimony of declarations of an alleged agent are incompetent to prove either the fact of agency or the nature and extent of the authority, but the direct testimony of the alleged agent is competent on either question.

**3. Same—Evidence held to disclose that agent was not authorized to imprison plaintiff.**

Plaintiff testified that the individual defendant, an assistant superintendent, stated she had talked with the manager of the corporate defendant over the phone and had been authorized to search plaintiff and others for wages paid two employees which had been lost. The individual defendant testified that she had not been authorized to search plaintiff. *Held:* The testimony of the declarations of the individual defendant was incompetent as hearsay, while her direct testimony as to the nature and extent of her authority was competent, and the competent evidence establishes that the corporate defendant did not authorize or ratify the individual defendant's act of searching plaintiff.

**4. Master and Servant § 23: Principal and Agent § 10—Evidence held to disclose that search of plaintiff was outside scope of agent's authority.**

The evidence disclosed that the wages of two employees which had been paid them by the corporate defendant had been lost and that all employees in the room had been searched in an effort to recover the money, and plaintiff contended that she did not voluntarily submit to the search but was forced to submit thereto by the assistant superintendent of the corporate defendant. *Held:* The money did not belong to the corporate defendant, but to the two employees who had lost it, and the search of plaintiff was outside the scope of the assistant superintendent's authority, the recovery of the money not being in furtherance of the corporate defendant's interest, or within the scope of the assistant superintendent's authority.

**5. False Imprisonment § 2—**

Conflicting evidence on the question of whether the individual defendant forced plaintiff to submit to a search for money of two employees which had been lost, takes the case to the jury as to the individual defendant, and the fact that the liability of the corporate defendant was erroneously submitted to the jury in the action cannot avail the individual defendant.

**6. False Imprisonment § 1—**

Involuntary restraint and its unlawfulness are the two essential elements of the offense of false imprisonment, which generally include assault and battery, and must include a technical assault at least.

APPEAL by defendants from *Hill, Special Judge,* at May Term, 1936, of GASTON.

Civil action for false imprisonment or false arrest.

The corporate defendant is engaged in the manufacture of rugs, mats, bedspreads, etc., and employs a number of women, 40 or 50, to operate

its sewing machines. The night shift works from 5:15 p.m. to 1:45 a.m., with half an hour for lunch from 9:30 to 10:00 o'clock. The plaintiff was so working on the night of 8 February, 1936, when Miss Elaine Tucker, "Assistant Superintendent in Charge of the Girls' Room," or "Instructor" to see that right colors are used, announced that two of the girls had lost their weekly wages, which had been paid to them that night, and suggested that a search be made to see if the money could be found. This was done. They went through each spread which had been made that night.

Plaintiff testifies: "Miss Tucker said that she had talked with Mrs. Fuller over the phone and that Mrs. Fuller had given her instructions to fasten the doors and search everyone. (Objection and motion to strike; overruled; exception.) . . . I said, 'Well, she can't do that.' . . . I told Miss Tucker that I did not want to be searched and that I did not have the money and knew nothing about it. . . . Then I said, 'Well, if it has to be done and I can't go home, come on and let's get through with it, so that I can go home.' . . . It was after 2 o'clock and we went over into another room where Miss Tucker searched me. . . . Miss Tucker said she had called two policemen."

Cross-examination: "We were all wanting the girls to get their money. We were all willing to coöperate. I wanted to be free from suspicion, but I was not willing to be searched."

Miss Tucker's testimony is somewhat different: "All the employees in the room unanimously asked to be searched. No one objected to being searched. Mrs. Parrish asked to be searched. . . . I did not touch her; she asked me the second time to search her. . . . I did not have authority to search them. . . . I was not carrying out Mrs. Fuller's instructions."

Mrs. L. B. Fuller is secretary and treasurer and local manager of the corporate defendant. She was at home on the night in question, confined to her bed with the "Flu." She knew nothing of the occurrence until it was all over. Miss Tucker never talked with her until after the search had been made, and no authority was given to Miss Tucker to make the search. "The Boysell Company had no interest in this money. . . . It did not belong to the Boysell Company, but to the girls. . . . Neither was it of any benefit to Elaine or myself whether they found it." No money was ever found.

At the close of all the evidence, the motion for judgment of nonsuit was allowed as to Mrs. L. B. Fuller, and overruled as to the other defendants.

The jury, in response to issues submitted, found that the plaintiff had been "unlawfully arrested and falsely imprisoned" by the defendants, Elaine Tucker and the Boysell Company, and awarded compensatory damages in the sum of $116.00.

Judgment for plaintiff, from which the defendants appeal, assigning errors.

*A. E. Woltz and A. C. Jones for plaintiff, appellee.*
*S. B. Dolley and P. W. Garland for defendants, appellants.*

STACY, C. J., after stating the case: Two questions are presented by the appeal of the corporate defendant.

1. Was Elaine Tucker acting within the course of her employment or the scope of her authority as an employee of the defendant company in searching the plaintiff? The answer is, "No." *Lamm v. Charles Stores Co.*, 201 N. C., 134, 159 S. E., 444; *Daniel v. R. R.*, 136 N. C., 517, 48 S. E., 816.

2. Was Miss Tucker specifically authorized to make the search in question? The answer is, "No."

We had occasion to examine anew the meaning of the expression "course of employment," or "scope of authority," as applied to variant fact situations, in the recent cases of *Robertson v. Power Co.*, 204 N. C., 359, 168 S. E., 415; *Lamm v. Charles Stores Co., supra; Dickerson v. Refining Co.*, 201 N. C., 90, 159 S. E., 446; *Martin v. Bus Co.*, 197 N. C., 720, 150 S. E., 501; *Grier v. Grier*, 192 N. C., 760, 135 S. E., 852; *Gallop v. Clark*, 188 N. C., 186, 124 S. E., 145. An exhaustive discussion of the subject appears in *Stewart v. Lbr. Co.*, 146 N. C., 47, 59 S. E., 545. See, also, *Sawyer v. R. R.*, 142 N. C., 1, 54 S. E., 793.

"A servant is acting in the course of his employment when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interpretation of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct." Tiffany on Agency, p. 270.

It is elementary that the master is responsible for the tort of his servant which results in injury to another when the servant is acting by authority or within the scope of his employment and about the master's business. *Roberts v. R. R.*, 143 N. C., 176, 55 S. E., 509. Thus, where a servant, acting with authority or within the scope of his employment, wrongfully procures the arrest of a person, the master is liable in damages for such arrest and imprisonment. The position finds support in the following cases: *Brockwell v. Tel. Co.*, 205 N. C., 474, 171 S. E., 784; *Kelly v. Shoe Co.*, 190 N. C., 406, 130 S. E., 32; *Riley v. Stone*, 174 N. C., 588, 94 S. E., 434; *Bucken v. R. R.*, 157 N. C., 443, 73 S. E., 137;

*Berry v. R. R.*, 155 N. C., 287, 71 S. E., 322; *Jackson v. Tel. Co.*, 139 N. C., 347, 51 S. E., 1015; *Lovick v. R. R.*, 129 N. C., 427, 40 S. E., 191; *Hussey v. R. R.*, 98 N. C., 34, 3 S. E., 923; *Sawyer v. Jarvis*, 35 N. C., 179; Annotation, 35 A. L. R., 647; 25 C. J., 500.

On the other hand, it is equally well established that the master is not liable if the tort of the servant which caused the injury occurred while the servant was engaged in some private matter of his own, or outside the legitimate scope of his employment, and without specific authority from the master. *Bucken v. R. R., supra.* As illustrative of this position, the following cases are apposite: *Ellis v. Trust Co.*, 209 N. C., 247, 183 S. E., 368; *Lamm v. Charles Stores Co., supra; Butler v. Mfg. Co.*, 182 N. C., 547, 109 S. E., 559; *Powell v. Fiber Co.*, 150 N. C., 12, 63 S. E., 159; *West v. Groc. Co.*, 138 N. C., 166, 50 S. E., 565; *Daniel v. R. R., supra; Moore v. Cohen*, 128 N. C., 345, 38 S. E., 919.

Coming, then, to the record before us, it is a rule of universal acceptance that extrajudicial declarations of an alleged agent are inadmissible to establish either the fact of agency or its nature and extent, such statements being regarded as hearsay and offered for the purpose of proving the truth of the factual matter therein asserted. *S. v. Lassiter*, 191 N. C., 210, 131 S. E., 577; *Fay v. Crowell*, 184 N. C., 415, 114 S. E., 529; *Adams v. Foy*, 176 N. C., 695, 97 S. E., 210; *Jackson v. Tel. Co., supra; West v. Grocery Co., supra; Daniel v. R. R., supra; Summerrow v. Baruch*, 128 N. C., 202, 38 S. E., 861; *Taylor v. Hunt*, 118 N. C., 168, 24 S. E., 359; *Gilbert v. James*, 86 N. C., 245; Annotation, 80 A. L. R., 604; 2 Am. Jur., 352. "That an agency must be proven *aliunde* the declarations of the alleged agent is elementary law (*Grandy v. Ferebee*, 68 N. C., 362; *Taylor v. Hunt*, 118 N. C., 168), and this is true both as to the establishment of the agency and the nature and extent of the authority"—*Clark, C. J.*, in *West v. Grocery Co., supra.* Hence, the testimony of the plaintiff, quoting Miss Tucker as saying "she had talked with Mrs. Fuller over the phone and Mrs. Fuller had given her instructions to fasten the doors and search everyone" was inadmissible as against the Boysell Company, and should have been excluded as to it. It will be disregarded in considering the appeal of the corporate defendant. *Mason v. Texas Co.*, 206 N. C., 805, 175 S. E., 291.

Conversely, proof of agency, as well as of its nature and extent, may be made by the direct testimony of the alleged agent. Therefore, the testimony of Miss Tucker was competent. *Jones v. Light Co.*, 206 N. C., 862, 175 S. E., 167; *Allen v. R. R.*, 171 N. C., 339, 88 S. E., 492; *Sutton v. Lyons*, 156 N. C., 3, 72 S. E., 4; *S. v. Yellowday*, 152 N. C., 793, 67 S. E., 480; *Hill v. Bean*, 150 N. C., 436, 64 S. E., 212; *Machine Co. v. Seago*, 128 N. C., 158, 38 S. E., 805; 2 Am. Jur., 353.

Viewed in the light of the above principles, it appears that the record is barren of any authorization or ratification on the part of the Boysell Company of plantiff's alleged arrest and imprisonment. *Dickerson v. Refining Co., supra.* It is the holding in *Md. Cas. Co. v. Woolley,* 36 Fed. (2d), 460, that "liability of the principal for act of the agent in causing false arrest or imprisonment is dependent on whether principal previously authorized or subsequently ratified act, and whether act was within scope of agent's employment." All the competent evidence tends to show that Miss Tucker was without authority from her employer to make the search in question; also that she went beyond the course of her employment and for the moment departed from her master's business. *Grier v. Grier, supra.* It was no part of her duty to recover the lost wages of the two employees, even if it had been the money of her employer, which it was not. The money belonged to the two girls who had lost it, and not to the defendants. It would not have profited them had the money been found. Its loss was not their loss. " 'In the absence of express orders to do an act, in order to render the master liable, the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment.' Wood, Master and Servant, 546. For illustration, a clerk to sell goods suspects that goods have been stolen, and causes an arrest to be made. The master is not liable for the imprisonment or for the arrest, because the arrest was an act which the clerk had no authority to do for the master, express or implied"—*Faircloth, C. J.,* in *Willis v. R. R.,* 120 N. C., 508, 26 S. E., 784.

It follows, therefore, from what is said above, the demurrer to the evidence interposed by the corporate defendant should have been allowed.

The case against Elaine Tucker stands on a different footing. She assumed responsibility for the search, and while the plaintiff, on cross-examination, very nearly testifies to a voluntary search, which would have rendered it harmless on the principle of *volenti non fit injuria, Riley v. Stone, supra,* still, taken as a whole, the evidence on the point is sufficiently equivocal to require its submission to the jury. It is unfortunate, perhaps, that the corporate defendant was allowed to remain in the case, nevertheless, as presently presented, this cannot avail the individual defendant. As to her, the demurrer to the evidence was properly overruled. *Riley v. Stone, supra.*

"False imprisonment is the illegal restraint of the person of any one against his will"—*Ashe, J.,* in *S. v. Lunsford,* 81 N. C., 528. It generally includes an assault and battery, and always, at least, a technical assault. *S. v. Reavis,* 113 N. C., 677, 18 S. E., 388. Involuntary restraint and its unlawfulness are the two essential elements of the offense. *Riley v. Stone, supra;* 25 C. J., 443; 11 R. C. L., 791. Where no force

or violence is actually used, the submission must be to a reasonably apprehended force. *Powell v. Fiber Co., supra.*

The result, then, is an affirmance in part and a reversal in part of the judgment below. The costs of the appeal will be divided between the plaintiff and the individual defendant.

On appeal of the Boysell company, Reversed.

On appeal of Elaine Tucker, No error.

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LUMBERMEN'S MUTUAL CASUALTY COMPANY, C. M. ALLRED, AND HENRY E. FISHER, TRUSTEE FOR C. M. ALLRED AND LUMBERMEN'S MUTUAL CASUALTY COMPANY, v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 16 December, 1936.)

**1. Torts § 6—Insurer of one joint tort-feasor paying judgment held not entitled to assignment of judgment as against insurer of other tort-feasor.**

A person injured in a collision between two cars obtained judgment against the drivers of the cars as joint tort-feasors. Thereafter, the injured person sued the driver of one of the cars and the insurer in a liability policy on the car driven by him, and the insurer paid the total amount of the judgment, and had one-half the judgment assigned to a trustee for its benefit, and instituted this action against the insurer in a policy of liability insurance on the other car, contending that it was entitled to contribution under the provisions of C. S., 618. *Held:* The statute providing for contribution among joint tort-feasors does not apply to insurers of joint tort-feasors, and the demurrer of defendant insurer was properly granted on the allegations in plaintiff insurer's action to force contribution.

**2. Insurance § 51—Insurer of one joint tort-feasor paying judgment held not entitled to subrogation as against insurer of other tort-feasor.**

The right to contribution among joint tort-feasors exists solely by provision of statute, C. S., 618, and an insurer of one joint tort-feasor paying the judgment recovered against both joint tort-feasors is not entitled to equitable subrogation as against the insurer of the other tort-feasor, there being no relation between the tort-feasors outside the provision of the statute upon which the doctrine of equitable subrogation can be based, and the insurers of the tort-feasors not coming within the provision of the statute in regard to contribution.

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

APPEAL by plaintiffs from *Shaw, Emergency Judge,* at June Term, 1936, of MECKLENBURG. Affirmed.

The facts alleged in the complaint in this action are as follows:

An action entitled "Janet Gaffney *v.* Z. B. Phelps, John Wilson, G. R. Leiter, and C. M. Allred," begun in the Superior Court of Mecklenburg County, and pending therein, was tried at June Term, 1934, of said court.

The action was to recover damages for personal injuries suffered by the plaintiff as the result of a collision between two automobiles in the city of Charlotte, on 20 August, 1933, one owned by the defendant Z. B. Phelps and driven by the defendant John Wilson, and the other owned by the defendant G. R. Leiter and driven by the defendant C. M. Allred. It was alleged in the complaint that the collision was caused by the joint and concurrent negligence of the drivers of the said automobiles.

At the close of the evidence, on the motion of the defendants Z. B. Phelps and G. R. Leiter, the action was dismissed as to said defendants by a judgment as of nonsuit.

On the verdict, there was a judgment that the plaintiff Janet Gaffney recover of the defendants John Wilson and C. M. Allred the sum of $5,000 as damages for the personal injuries which the plaintiff suffered as the result of the collision. The jury found that the collision and the resulting personal injuries suffered by the plaintiff were caused by the joint and concurring negligence of the defendants John Wilson and C. M. Allred. On the appeal of the defendant C. M. Allred to the Supreme Court of North Carolina, the judgment was affirmed. See *Gaffney v. Phelps et al.*, 207 N. C., 553, 178 S. E., 231.

After the judgment was affirmed by the Supreme Court, an execution was issued on the judgment against the defendant John Wilson. This execution was returned unsatisfied, because of the insolvency of the said defendant.

At the date of the collision, which resulted in the personal injuries suffered by the plaintiff, the automobile owned by the defendant G. R. Leiter, and driven by the defendant C. M. Allred, was covered by a policy of liability insurance issued by the Lumbermen's Mutual Casualty Company, and the automobile owned by the defendant Z. B. Phelps, and driven by the defendant John Wilson, was covered by a policy of liability insurance issued by the United States Fidelity and Guaranty Company. Each of said policies of insurance contained the "omnibus clause" by which the insurer agreed to pay any judgment recovered against the owner of the automobile or against any person driving the automobile with the permission of the owner, for damages caused by the operation of the automobile covered by the policy.

After the execution against the defendant John Wilson had been returned unsatisfied, because of his insolvency, the plaintiff Janet Gaffney instituted an action in the Superior Court of Mecklenburg County

against the Lumbermen's Mutual Casualty Company and C. M. Allred, to recover of said defendants the amount of her judgment, to wit: $5,000. After the institution of said action, on motion of the defendants, the United States Fidelity and Guaranty Company and John Wilson were made parties defendant in the action, and the defendant Lumbermen's Mutual Casualty Company filed a cross complaint in said action, praying that it recover judgment against the defendants, United States Fidelity and Guaranty Company and John Wilson, for the sum of $2,500, one-half the amount of the judgment which the plaintiff Janet Gaffney had recovered against the defendants John Wilson and C. M. Allred, at June Term, 1934, of the Superior Court of Mecklenburg County. The defendant United States Fidelity and Guaranty Company demurred to the said cross complaint. Judgment overruling the demurrer was reversed on the appeal of the defendant United States Fidelity and Guaranty Company to the Supreme Court of North Carolina. See *Gaffney v. Casualty Company et al.*, 209 N. C., 515, 184 S. E., 46.

After the demurrer of the defendant United States Fidelity and Guaranty Company to the cross complaint of the defendant Lumbermen's Mutual Casualty Company had been sustained, and the action dismissed as to the defendant United States Fidelity and Guaranty Company, the defendants, Lumbermen's Mutual Casualty Company and C. M. Allred, paid the judgment recovered at June Term, 1934, of the Superior Court of Mecklenburg County for the sum of $5,000, and caused said judgment to be assigned by the plaintiff Janet Gaffney to Henry E. Fisher, trustee for C. M. Allred and Lumbermen's Mutual Casualty Company.

The defendant John Wilson did not file an answer to the cross complaint of the defendant Lumbermen's Mutual Casualty Company. Judgment by default was rendered against the defendant John Wilson and in favor of the defendants, Lumbermen's Mutual Casualty Company and C. M. Allred, for the sum of $2,500.

At the date of the collision, which resulted in personal injuries suffered by Janet Gaffney for which she recovered judgment against John Wilson and C. M. Allred, at June Term, 1934, of the Superior Court of Mecklenburg County, the defendant John Wilson was driving the automobile owned by Z. B. Phelps and covered by the policy of insurance issued by the United States Fidelity and Guaranty Company, with the permission of the owner.

On the foregoing facts, the plaintiffs in this action pray judgment that they recover of the defendant United States Fidelity and Guaranty Company the sum of $2,500, with interest from 4 June, 1934, and costs.

The action was heard on the demurrer of the defendant to the com-

plaint on the ground that the facts stated therein are not sufficient to constitute a cause of action. The demurrer was sustained and the action dismissed.

The plaintiffs appealed to the Supreme Court, assigning as error the judgment dismissing the action.

*Goebel Porter for plaintiffs.*
*J. Laurence Jones for defendant.*

CONNOR, J. On their appeal to this Court, the plaintiffs contend that there is error in the judgment dismissing their action against the defendant, for that the facts alleged in the complaint are sufficient to constitute a cause of action under the provisions of C. S., 618. This contention cannot be sustained.

The facts alleged in the complaint in this action are substantially the same as the facts alleged in the cross complaint in the action instituted in the Superior Court of Mecklenburg County by "Janet Gaffney *v.* Lumbermen's Mutual Casualty Company and others." A judgment overruling the demurrer filed by the defendant herein to the cross complaint of the Lumbermen's Mutual Casualty Company in that action was reversed by this Court. See *Gaffney v. Casualty Company et al.*, 209 N. C., 515, 184 S. E., 46. In the opinion in that case by *Schenck, J.*, it is said:

"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 all 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 judg-

ment and demand in writing transfer thereof to trustee for their benefit, and are refused such transfer by judgment creditors, may not hereafter have execution against him 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 of the insurance carrier of tort-feasors when only tort-feasors and judgment debtors are numbered therein."

The decision of this Court in *Gaffney v. Casualty Co., supra,* is conclusive against the first contention of the plaintiffs.

The plaintiffs further contend that there is error in the judgment, for that the facts alleged in the complaint are sufficient to constitute a cause of action against the defendant for contribution on the equitable principle of subrogation, without regard to the provisions of C. S., 618. This contention cannot be sustained.

There is no relationship between joint tort-feasors which entitles one joint tort-feasor to contribution from the other joint tort-feasor. Neither is liable as surety for the other. Each is liable for the damages caused by their joint and concurring negligence. But for the statute, neither is entitled to contribution from the other.

In the instant case the defendant is liable only under its contract. There is no provision in the contract which extends its liability to include the plaintiffs, or either of them. See *Peeler v. Casualty Co.,* 197 N. C., 286, 148 S. E., 261.

There is no error in the judgment.

Affirmed.

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

D. O. COWAN v. SECURITY LIFE AND TRUST COMPANY.

(Filed 16 December, 1936.)

**1. Usury § 1—C. S., 6291, does not exempt insurance companies from the provisions of C. S., 2305, or C. S., 2306.**

C. S., 6291, providing that where an insurance company requires as a condition precedent to the lending of money that the borrower take out a policy of life insurance and assign it to insurer as security for the loan, the premiums paid on such policy shall not be considered as interest on the loan when such premiums do not exceed premiums charged on like policies issued to persons who do not obtain loans, *is held* not to exempt insurance companies from the provisions of C. S., 2305, 2306, relating to usury, the purport and effect of the statute being merely to allow insurance companies to require as a condition precedent to the loan of money that the borrower take out a policy of insurance and assign same as security for the loan, and the statute does not authorize insurance companies to charge interest in excess of six per cent on loans made by them, C. S., 2305, or exempt insurance companies from the penalties for usury when such companies charge an illegal rate of interest on loans, C. S., 2306. If C. S., 6291, did provide that insurance companies should be exempt from C. S., 2305, 2306, it would be void. N. C. Const., Art. I, secs. 7 and 31.

**2. Same—Endowment policy held life insurance policy within meaning of C. S., 6291.**

A ten-year endowment policy comes within the provisions of C. S., 6291, allowing insurance companies to require a borrower to take out and assign a life insurance policy to the insurer as collateral security for a loan, when such endowment policy provides that the face amount thereof shall be paid to the beneficiary if insured dies during the ten-year period while the policy is in force.

**3. Usury § 2—Insurance company requiring borrower to take out life policy held not subject to penalty for usury.**

An insurance company required a borrower to execute a deed of trust on realty and to take out an endowment life insurance policy and to assign same as collateral security as a condition precedent to making the loan. The borrower paid the premiums for a number of years, and then canceled the policy, and had the cash surrender value credited to the loan. *Held:* The borrower may not recover the penalty for usury upon his contention that the amount the insurance company reserved upon the cancellation of the policy as its profit therefrom, and interest on the premiums paid, were amounts received by the insurance company as interest in excess of the six per cent interest charged on the note, since C. S., 6291, expressly authorizes insurance companies to require a borrower to take out and assign a life insurance policy as a condition precedent to making a loan.

APPEAL by plaintiff from *Alley, J.*, at March Term, 1936, of IREDELL. Affirmed.

This is an action to recover the statutory penalty for usury. C. S., 2306.

The action was begun in the Superior Court of Iredell County on 5 December, 1935.

The facts alleged in the complaint as constituting plaintiff's cause of action are as follows:

1. On 12 February, 1926, the plaintiff D. O. Cowan and his wife, Mary O. Cowan, residents of Iredell County, North Carolina, executed their note by which they promised to pay to the order of the defendant Security Life and Trust Company, at its home office in the city of Winston-Salem, N. C., on 12 February, 1936, the sum of $7,500, with interest from date on said sum at the rate of six per centum per annum, payable semiannually. The consideration for said note was the sum of $7,500, which was loaned by defendant to plaintiff, at the date of said note, at his request, and pursuant to his application to the defendant for said loan.

2. Simultaneously with the execution of said note, and for the purpose of securing the payment of the same, according to its terms, the plaintiff and his wife executed a deed of trust by which they conveyed to George A. Grimsley, trustee, certain lots of land situate in the city of Statesville, in Iredell County, North Carolina, together with the buildings located on said lots of land, all of which are fully described in said deed of trust. The property conveyed by said deed of trust at the date of its execution was reasonably worth the sum of $15,000, and was full and adequate security for the payment of said note. The deed of trust was duly recorded in the office of the register of deeds of Iredell County.

3. By the terms of said deed of trust, and in order to protect and maintain the security provided therein for said note, the plaintiff agreed to pay all taxes and assessments levied on said property, to keep the buildings located on said lots of land insured against loss by fire in the sum of $6,500, and to assign the policy or policies providing such insurance to the defendant. The payment by the plaintiff of said taxes and assessments and of the premiums for said insurance was secured by said deed of trust. These agreements have been fully performed by the plaintiff.

4. As a condition precedent to its making said loan, the defendant required the plaintiff to agree to apply for and to procure from the defendant a ten-year endowment policy of insurance on his life, for the face amount of $7,500, and to assign said policy when issued to the defendant as additional security for said loan. The defendant further required the plaintiff to agree that he would pay the premiums on said policy as the same became due, and that upon his failure to pay said premiums, in accordance with said agreement, the note should become

due and payable and the condition of said deed of trust should be broken, at the option of the defendant. The plaintiff applied for and procured said policy and, immediately upon its issuance, assigned the same to the defendant in accordance with his agreement with the defendant.

5. From the date of its issue, to wit: 12 February, 1926, to 17 October, 1934, the plaintiff paid to the defendant as premiums on said policy of life insurance the total sum of $4,990.47, and thereby kept the said policy of life insurance in full force and effect according to its terms and provisions.

6. On 22 May, 1935, the plaintiff surrendered said policy of life insurance, and the same was duly canceled by the defendant. Upon the surrender and cancellation of said policy of life insurance, the defendant, out of the amount then due the plaintiff under its terms and provisions, applied the sum of $4,402.50 as a payment on the principal and accrued interest on said note, and retained and reserved the balance, to wit: The sum of $587.97, as its profit on its contract with the plaintiff.

The premiums charged by the defendant and paid by the plaintiff for said policy of life insurance were the highest premiums charged by the defendant for any type or kind of policy issued by it. The cash surrender values of said policy from year to year were the highest provided in any type or kind of policy issued by the defendant. The sums paid by the plaintiff to the defendant, from time to time, as premiums on said policy were not applied by the defendant as payments on said note, nor did the defendant credit the plaintiff with interest on said sums. The interest on said sums from the dates of their respective payments to 22 May, 1935, amounts to the sum of $1,921.28, which sum has been retained and reserved by the defendant as profit upon its contract with the plaintiff.

7. The plaintiff paid to the defendant, on the principal of his note, on 22 May, 1935, out of the proceeds of the insurance policy on his life, which was surrendered and canceled at said date, the sum of $3,938.94; the balance of said principal, to wit: The sum of $3,561.06, was paid on 22 August, 1935.

The plaintiff has paid all the interest which accrued on his note from its date to its final payment, the amount of said interest paid during the two years next preceding the commencement of his action being $999.95.

It is alleged in paragraph 14 of the complaint "that the sum of $587.97, and the sum of $1,921.63, retained and reserved by the defendant on 22 May, 1935, were in truth and in fact compensation for the use of the money loaned to the plaintiff in addition to the legal rate of interest prescribed by law, and that the defendant at the time of making said loan intended to profit by the sale of said insurance policy in addition to the interest paid as herein alleged."

On these facts the plaintiff demands judgment that he recover of the defendant the sum of $7,017.30, the same being twice the amount charged, retained, and reserved by the defendant as interest in excess of the legal rate on the loan made by the defendant to the plaintiff.

The action was heard on defendant's demurrer *ore tenus* to the complaint, on the ground, among others, that by reason of the provisions of C. S., 6291, the facts stated therein are not sufficient to constitute a cause of action.

The demurrer was sustained. The plaintiff excepted and appealed to the Supreme Court, assigning as error the judgment in accordance with the ruling of the trial court on defendant's demurrer *ore tenus.*

*Raymer & Raymer and Dewey L. Raymer, Jr., for plaintiff.*

*Jack Joyner, Manly, Hendren & Womble, and I. E. Carlyle for defendant.*

CONNOR, J. The first contention of the plaintiff on his appeal to this Court is that C. S., 6291, which is chapter 8, Public Laws of North Carolina, 1915, as amended by chapter 61, Public Laws of North Carolina, 1917, is void, for that its enactment was in violation of section 7, Article I, of the Constitution of North Carolina, which is as follows:

"No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

If the effect of C. S., 6291, is to exempt insurance companies from the provisions of C. S., 2305, which provides that the legal rate of interest in this State shall be six per centum per annum, for such time as interest may accrue, and no more, and also from the provisions of C. S., 2306, which prescribes penalties for usury, and thereby to authorize insurance companies to charge, retain, or receive interest on loans made by them in this State at a greater rate of interest than six per centum per annum, this contention must be sustained. See *Edgerton v. Hood, Comr.,* 205 N. C., 816, 172 S. E., 481; *Plott v. Ferguson,* 202 N. C., 446, 163 S. E., 688; *Motley v. Warehouse Co.,* 122 N. C., 347, 30 S. E., 3; *Rowland v. B. & L. Assn.,* 116 N. C., 877, 22 S. E., 8; *Meroney v. B. & L. Assn.,* 116 N. C., 882, 21 S. E., 924; and *Simonton v. Lanier,* 71 N. C., 503. In the last cited case it is said that if the provision in the charter of the Bank of Statesville, which was involved in that case, must be construed as authorizing the bank to charge, retain, or receive interest at a greater rate than six per centum per annum, as contended by the plaintiff, then such provision was void, for the reason that it was in violation of section 7, and also of section 31, of Article I of the Constitution of this State.

If C. S., 6291, is void, then the judgment in the instant case must be reversed on the authority of *Carter v. Insurance Co.*, 122 N. C., 338, 30 S. E., 341; *Miller v. Insurance Co.*, 118 N. C., 612, 24 S. E., 484; and *Roberts v. Insurance Co.*, 118 N. C., 429, 24 S. E., 780.

C. S., 6291, is as follows: "Where an insurance company, as a condition for a loan by such company, of money upon mortgage or other security, requires that the borrower insure either his life or that of another, or his property, or the title to his property, with the company, and assign or cause to be assigned to it a policy of insurance as security for the loan, and agree to pay premiums thereon during the continuance of the loan, whether the premium is paid annually, semiannually, quarterly, or monthly, such premium shall not be considered as interest on such loan, nor will any loan be rendered usurious by reason of any such requirements, when the rate of interest charged for the loan does not exceed the legal rate, and when the premium charged for the insurance does not exceed the premium charged to other persons for similar policies, who do not obtain loans."

Chapter 8, Public Laws of North Carolina, 1915, and chapter 61, Public Laws of North Carolina, 1917 (now C. S., 6291), were both enacted subsequent to the decisions of this Court in *Carter v. Insurance Co., supra; Miller v. Insurance Co., supra;* and *Roberts v. Insurance Co., supra.* Their enactment was manifestly in consequence of the decisions in those cases. The statutes do not purport to exempt, nor do they exempt insurance companies from the provisions of C. S., 2305, and C. S., 2306. An insurance company which charges, retains, or receives interest on a loan made by it in this State, to a policyholder or other person, at a rate in excess of six per centum per annum, is subject to the penalties prescribed by C. S., 2306, notwithstanding the provisions of C. S., 6291. The contention of the plaintiff that the provisions of this statute should be construed to the contrary, and are for that reason void, cannot be sustained.

The second contention of the plaintiff is that if C. S., 6291, is valid, its provisions are not applicable to the instant case, for the reason that the policy which the defendant required the plaintiff to procure from it, as a condition precedent to its making the loan to the plaintiff, and which the plaintiff did procure, is not a policy of insurance on the life of the plaintiff, but is an investment contract.

This contention cannot be sustained. It is true that the policy is described as a ten-year endowment policy, and matures at the expiration of ten years from its date, if the plaintiff shall be living at that time. It is, however, provided in the policy that if the plaintiff shall die during the ten-year period, and the policy shall be in force at the date of his death, the face amount of the policy shall be paid by the defendant to

the beneficiary named in the policy. The policy insures the life of the plaintiff within the meaning of C. S., 6291. 37 C. J., 362. The statute is applicable to the instant case, and by reason of its provisions the plaintiff cannot recover in this action. See *Sledd v. Pilot Life Insurance Co.* (Ga.), 183 S. E., 199, and *Heaberlin v. Jefferson Standard Life Insurance Co.* (W. Va.), 171 S. E., 419.

There is no error in the judgment in the instant case. It is

Affirmed.

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W. I. ANDERSON & COMPANY v. AMERICAN MUTUAL LIABILITY INSURANCE COMPANY OF BOSTON.

(Filed 16 December, 1936.)

**1. Insurance § 43—Question of identity of truck as the truck insured held for jury under evidence in this case.**

Plaintiff insured testified that the truck which was covered by the policy of liability and property damage insurance had been repaired by having a second-hand motor installed in place of the original motor in the truck, and a part of the cab replaced with second-hand parts, but that the truck involved in the accident was the same truck which was insured, although the serial numbers on the engine and cab, as set out in the policy, were not the same. *Held:* The serial numbers on the engine and cab as set out in the policy were solely for the purpose of identification, and the question of the identity of the truck as the truck insured was a question for the jury under plaintiff's evidence.

**2. Insurance § 45—Notice that truck insured was involved in collision held sufficient.**

The truck covered by a policy of liability and property damage insurance was repaired by having the motor and parts of the cab replaced by second-hand motor and cab parts, so that the serial numbers of the motor and cab were not the same as those set out in the policy. The truck was involved in a collision and notice thereof was sent insurer in less than 17 days, and notice of suit by the injured third party was given insurer immediately and before the time for answering expired. Insurer denied liability on the ground that the truck involved in the collision was not covered by the policy. *Held:* Although denial of liability was a waiver of notice, notice was given within a reasonable time, and the notice that a truck insured under the policy was involved in a collision was sufficient under the terms of the policy.

APPEAL by plaintiff from *Hill, Special Judge,* at March Term, 1936, of GUILFORD. Reversed.

This action is brought by plaintiff against defendant to recover the sum of $2,323.20 paid by plaintiff for bodily injury damage, on account

of an accident that is alleged to be covered by the liability insurance policy issued by defendant to plaintiff.

The defendant, on 5 October, 1932, made, executed, and delivered to plaintiff its automobile liability policy No. AL-148419, in which defendant contracted and agreed, among other things, to pay, within the policy limits applying thereto, each loss by reason of liability imposed upon the plaintiff by law for damages, not only on account of bodily injury or death of a person or persons not therein excepted, but also on account of damages to the property of others, and the resulting loss of use thereof caused by any accident accruing within the policy period by reason of the use, ownership, maintenance, or operation of the motor vehicle or trailer mentioned or referred to in said policy.

The policy became effective at 12:01 a.m., 5 October, 1932, and expired 5 October, 1933. Advance premium of $770.25 was paid by plaintiff to defendant for the protection under the policy. The premium for public liability was $508.95, property damages $261.30. The policy covered 23 automobiles. One of them was "G.M.C. 2-T truck 1927 serial No. 50574, Motor No. 1991549." Premium, $27.50. It was in evidence that by reason of engine trouble it was necessary to use another engine in connection with the above described truck. Some time in November, 1932, plaintiff purchased from Charlotte a motor and chassis of a 2-ton G.M.C. truck, Motor No. 1954668, Serial No. T-50379, which was placed in the truck which bore Motor No. 1991549, Serial No. 50574. G.M.C. 2-T truck, 1927, was used in plaintiff's business before and after repairing the truck by placing the motor and chassis—substituting the new engine for the old.

A. G. Ellington testified for plaintiff: "I was at the scene of the accident probably 30 minutes or a little more thereafter, and we had no other car in that community on that evening. I saw no other car at the same place at the scene of the collision—no more than passenger cars. The one that collided with this same truck was there; it belonged to Mr. B. E. Brown, and I noticed the damage to the cars and the truck in the highway and the road, and I could tell that the cars had collided. The truck involved in the collision was the one that belonged to us. The body of this car that was involved in the collision was the body of the car referred to in the policy as Engine No. 1991549. The wheels were the same as the one included in the policy. I am not certain about the top. There had been repairs made to the automobile referred to in the policy as the G.M.C. 2-ton truck bearing Engine No. 1991549. We had some engine trouble and I instructed the mechanic to go to Charlotte and buy parts to overhaul the engine, included in the truck; but, instead, when he got there he bought a second-hand engine of the same type, which he installed. There was no difference in the truck before and

after, other than the changes which I have mentioned. That is, the engine and a part of the cab was changed. The portion of the cab that was changed evidently had the serial number on it. . . . I signed the Report of Automobile Accident. It was sent to the company prior to 20 June, 1933. It was made up by the young lady in the office, under my supervision, and I signed it. It is dated 5 June. When I first made out the report the engine number given as the automobile involved in the accident was 1991549."

The accident which the controversy is over took place on 3 June, 1933, about 2:00 o'clock p.m. The report was made up on 5 June and signed and sent to the defendant prior to 20 June, 1933. Actions were brought against plaintiff on 14 September, 1935, by parties injured in the collision. Immediately, and before the time for answering, notice was given defendant. The defendant refused to defend. Later the actions were compromised by plaintiff and this action is brought to recover under the policy the amount paid the injured parties.

At the close of plaintiff's evidence, the court below sustained a motion for judgment as in case of nonsuit made by defendant, C. S., 567. The plaintiff excepted, assigned error, and appealed to the Supreme Court.

*Frazier & Frazier for plaintiff.*
*Sapp & Sapp for defendant.*

CLARKSON, J. We cannot sustain the nonsuit as we construe the record. If the car in the collision was G.M.C. 2-T truck 1927, Serial No. 50574, Motor No. 1991549, on which plaintiff had liability insurance in defendant company, the matter of identification was for the jury to determine. When the new engine was installed in the truck, the Motor No. 1954668 and Serial No. T-50379 did not change it, as it was the same truck with repairs. Repairing the truck by placing a motor and chassis in it did not make a new car. The number of an automobile is inserted generally for the purpose of identification. The matter of identification of the truck in the collision was for the jury.

In *Motor Co. v. Motor Co.*, 197 N. C., 371, there was installed in the car in controversy, to repair same, a new engine or motor. At p. 374 we find: "In *Gregory v. Stryker,* 2 Denio (N. Y.), at p. 630, speaking to the subject, it is said: 'But it is equally clear, as a general proposition, that where the owner of a damaged or worn-out article delivers it to another person to be repaired and renovated by the labor and materials of the latter, the property in the article, as thus repaired and improved, is all along in the original owner, for whom the repairs were made, and not in the person making them.' *Comins v. Newton,* 10 Allen (Mass.), 518; *Southworth v. Isham,* 5 N. Y. Supp., 448."

A case analogous is *Reimers v. International Indemnity Co.* (Wash.), 254 Pac. Rep., 852 (853-4): "Perhaps, if needed, another argument might be advanced as being not wholly illogical. Respondent might have repaired his truck, piece by piece and part by part, until the old chassis was wholly superseded by a new. If, instead of doing it piecemeal, it was done all at once, was it any less a repair? The discarded parts were certainly not a truck, and the original truck either then ceased to exist or continued as the repaired truck."

In the automobile liability policy is the following: "To serve the insured by such investigation of each alleged accident and such negotiation or settlement of each claim as the company may deem expedient. To defend, in behalf of the insured, each suit, even though wholly groundless, brought against the insured to enforce a claim for such injury, death, or damage, and, as respects each suit, to pay the entire premiums on attachment, removal, and appeal bonds, costs taxed against the insured, and interest accruing on the entire judgment up to the date of payment by the company of its share of the judgment." Notice of the claims made by parties injured was given by plaintiff to defendant under the terms of the policy, we think, in a reasonable time.

In *Lowe v. Fidelity & Casualty Co.*, 170 N. C., 445, at p. 446, we find (plaintiff's appeal): "An insurance company cannot deny all liability under a contract of insurance and then be heard to say, after it has repudiated the contract, that assured should have given it notice when the action was instituted, so that it could have defended the action in accordance with the terms of the contract. Having denied any liability under the policy, it was neither necessary nor proper to notify defendant again," quoting authorities. At p. 447 (defendant's appeal): "The defendant appeals because the judge rendered judgment in favor of the plaintiff, receiver, for costs, expenses, and attorney's fees incurred by plaintiff in defending the Marcus suit. The plaintiff's costs, expenses, and attorney's fees incurred by him in defending the suit amount to $352.95, of which he has paid $140.00. The contract makes it the duty of defendant, at its expense, 'to defend in the name and on behalf of the assured any suit brought against the assured to enforce a claim, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, through the assured's negligence, by the persons described in subsections (a) and (b) of the preceding paragraph, at the places and under the circumstances therein described, and as the result of an accident occurring while this policy is in force.' The failure of the defendant to defend the suit, after repudiating its liability to the assured, constituted a distinct breach of contract and justified the plaintiff in defending it at his own expense. *Beef Co. v. Casualty Co.*, 201 U. S., 173. These costs

and expenses constitute a primary liability of defendant that plaintiff may recover as damages for the breach of the contract. *Power Co. v. Casualty Co.*, 153 N. C., 279." *Insurance Co. v. Harrison-Wright Co.*, 207 N. C., 661.

The defendant denied liability in the *Lowe case, supra,* and it was said that notice was not necessary, but, going further, we think, under the facts and circumstances of this case and the terms of the policy, the notice was sufficient. *Mewborn v. Assurance Corp.*, 198 N. C., 156.

It goes without saying that the compromise amount sued for by plaintiff, which was paid by plaintiff to those injured, must be reasonable and made in good faith. Defendant contends in its brief that plaintiff knew that the truck involved in the collision was not insured at the time of the collision, 3 June, 1933, and "is established by the evidence." We cannot so hold. We think this is a matter for the jury on the facts appearing in the record.

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

Reversed.

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AMERICAN TRUST COMPANY, ADMINISTRATOR C. T. A. OF THE ESTATE OF SALLIE B. TARVER, v. ROSALIE TARVER WADE ET AL.

(Filed 16 December, 1936.)

**Executors and Administrators § 24—Family agreement for distribution of estate approved under facts of this case.**

Upon supporting evidence the trial court found that the son of testatrix intended to file a caveat to the will, that there was a *bona fide* dispute as to the validity of the will, that the beneficiaries under the will and the heirs at law were *sui juris* and had been duly made parties, that unborn contingent remaindermen were duly represented by guardians *ad litem*, and that the parties, other than the unborn contingent remaindermen, had executed a contract for the distribution of the estate, and that it would be to the interest of all parties, including the unborn contingent remaindermen, for the contract to be approved by the court, and that the intent of testatrix would more nearly be effectuated by distributing the estate in accordance with the contract rather than by remitting the parties to long, expensive, and bitterly fought litigation over the validity of the will, and that the approval of the contract would tend to preserve the family harmony, honor, and peace. *Held:* Upon the facts found, judgment approving the contract and directing the administrator *c. t. a.* to distribute the estate in accordance therewith was properly entered by the court in its chancery jurisdiction.

APPEAL by Charles W. Bundy and R. A. Wellons, guardians *ad litem*, from *Cowper, Special Judge,* at September, 1936, Extra Term of MECKLENBURG. Affirmed.

The judgment of the court below is as follows:

"This cause coming on to be heard before the undersigned judge presiding at the 14 September, 1936, Extra Term of Mecklenburg Superior Court, and all the parties being represented by counsel, and in open court having waived any right that they might otherwise have to have any of the matters involved in this action tried by a jury, and having agreed that the matter should be heard both as to law and facts by the undersigned judge, which agreement, made in open court, is ordered entered in the minutes, and the court having heard evidence, hereby makes the following findings of fact:

"1. That Sallie B. Tarver, late of Mecklenburg County, N. C., died on 23 July, 1935, leaving a last will dated 27 January, 1931, and which has been duly probated in common form before the clerk of the Superior Court of Mecklenburg County, N. C., and is recorded in the office of said clerk in Will Book X, page 455; that a correct copy of said will is attached to the complaint herein, marked 'Exhibit A.'

"2. That the defendants Rosalie Tarver Wade, William H. Tarver, and Clifford Tarver are the sole surviving children of the said Sallie B. Tarver, and are her heirs at law and distributees in case of intestacy; that the defendant Howard M. Wade is the husband of Rosalie Tarver Wade, and that Isabelle Tarver Wade is the only child of Rosalie Tarver Wade; that the defendant Katherine J. Tarver is the wife of William H. Tarver; that the only child of William H. Tarver is James B. Tarver, and that his wife is the defendant Elizabeth M. Tarver; that Elizabeth M. and James B. Tarver have no children; that Isabelle Tarver Wade and Clifford Tarver are now unmarried and that neither of them has any children; that the defendants herein named are all the persons in being who have any interest, vested or contingent, in the estate of Sallie B. Tarver, either under her will or by intestacy; that all of said persons are of full age and *sui juris,* the ages of said defendants being as follows: Rosalie Tarver Wade is 56 years of age; Isabelle Tarver Wade is 25 years of age; William H. Tarver is 51 years of age; James B. Tarver is 25 years of age; Clifford Tarver is 49 years of age.

"3. That the American Trust Company, a banking corporation organized and existing under the laws of North Carolina, and fully authorized and empowered to act as administrator, has duly qualified as administrator *c. t. a.* of the will of Sallie B. Tarver; that Independence Trust Company, the executor and trustee named in said will, was placed in liquidation by the Commissioner of Banks prior to the death of Sallie B. Tarver, and the liquidation was completed shortly thereafter, and the liquidating agent of said Independence Trust Company declined to qualify as executor, or as trustee, and that no trustee has been appointed to succeed Independence Trust Company.

"4. That the defendant Clifford Tarver has expressed the purpose of filing a caveat to the will of Sallie B. Tarver, and the court finds that there is a *bona fide* dispute as to the validity of said will.

"5. That the estate of Sallie B. Tarver consists principally of corporate stocks, most of which have a ready market on recognized stock exchanges; that the gross value of her estate at the time of her death was approximately $93,000, and the net value of said estate at the present time is $100,000.

"6. That the contract referred to in the complaint herein, and marked 'Exhibit B,' was duly executed by all persons in being having any interest in the estate of Sallie B. Tarver, either vested or contingent, and the American Trust Company, administrator *c. t. a.*, is willing to carry out the provisions of said contract and distribute the estate in accordance therewith, provided it is legally authorized to do so.

"7. The court finds as a fact that it will be for the best interest of all parties concerned that said contract be carried out and performed; that it will settle a family dispute and avoid very vexatious litigation and waste of the estate thereby.

"8. The court further finds that, because of the dissolution of the Independence Trust Company, the trustee named in said will, and because of the dispute between the children of Sallie B. Tarver, that the ultimate purpose of the testatrix will be more nearly effectuated by carrying out said contract than by leaving the parties to work out their rights through litigation.

"9. That the unborn issue of each of the children of Sallie B. Tarver are properly represented by guardians *ad litem,* who have filed answers and are at the hearing in person; that the possibility of any part of said estate ever vesting in any person not now in being is very remote; the validity of the will is uncertain; that a settlement of the family dispute will be beneficial to such contingent remaindermen in that pleasant family relations will thereby be maintained, and the court finds as a fact that the interests of all parties now concerned, or who might hereafter be concerned, will be best subserved by carrying out such contract.

"10. That unless the proposed settlement is made, a caveat to the will of Mrs. Tarver will be filed by her son, Clifford Tarver, with the prospect of long and bitter and expensive litigation tending to disrupt family ties, and to injure and damage the dignity, honor, and peace of the family; that the parties, all being members of the family circle, have made earnest and determined efforts to avoid such litigation and have endeavored to settle and compose their differences for the purpose of avoiding expensive, destructive, and uncertain litigation. In the opinion of the court, this settlement will be for the best interest of the entire family, including its present and future members; it will prevent family dis-

sensions, tend to strengthen the ties of the family affection, preserve the dignity, honor, and peace of the family, and tend to promote the primary objects of the testatrix.

"It is by the court, upon the foregoing findings of fact and upon the record, concluded as matters of law and adjudged as follows:

"1. The court holds that in its chancery jurisdiction, looking to the interests of the family as a whole, and exercising the power of courts of chancery to approve family settlements and thereby preserve family ties and preserve the honor and dignity of the family, the court has the power in this case to approve the settlement and to bind the unborn contingent remaindermen thereto.

"2. That the said contract referred to in the complaint, and a copy of which is hereto attached, marked 'Exhibit B,' is legally binding upon the parties thereto, and the same is hereby approved by the court and made legally binding upon the American Trust Company, administrator *c. t. a.* of the estate of Sallie B. Tarver and all other persons in interest, including unborn contingent remaindermen.

"3. That the said American Trust Company, administrator *c. t. a.* of the estate of Sallie B. Tarver, is hereby ordered and directed to recognize said contract as a valid and binding contract, and to distribute the estate of Sallie B. Tarver in accordance with the terms thereof, after paying all debts and costs and expenses of administration, including costs of this proceeding to be taxed by the clerk. This 26 September, 1936. G. V. Cowper, Judge presiding."

The guardians *ad litem* excepted and assigned error to the judgment as signed, and appealed to the Supreme Court.

*John M. Robinson for plaintiff.*

*Adlai S. Grove and Clyde R. Hoey for Clifford Tarver et al.*

*Charles W. Bundy, attorney and guardian ad litem for the unborn issue of Rosalie Tarver Wade, and for the unborn issue of Wm. H. Tarver.*

*Robert A. Wellons, attorney and guardian ad litem for the unborn issue of Clifford Tarver.*

CLARKSON, J. Sallie B. Tarver, deceased, on 27 January, 1931, made an alleged last will and testament. Clifford Tarver, a son, denied the validity of the will. The court below found the following fact: "That the defendant Clifford Tarver has expressed the purpose of filing a caveat to the will of Sallie B. Tarver and the court finds that there is a *bona fide* dispute as to the validity of said will."

All the parties to the action were of full age and *sui juris,* except the unborn issue of Rosalie Tarver Wade, Wm. H. Tarver, and Clifford

Tarver, who were represented by guardians *ad litem.* All the parties interested in the controversy are parties to this action and have filed pleadings.

To settle the family dispute over the validity of the will, all the parties, except the unborn issue above set forth, executed a contract, as set forth in the record. From the findings of fact by the court below, can we sustain the conclusions of law made by the court below? We think so. There was plenary evidence in the record to support the findings of fact of the court below.

In *Spencer v. McCleneghan,* 202 N. C., 662 (671), it is said: "We think those *in esse* or *in posse* are properly represented in this proceeding; all parties who could possibly have any interest in the estate are parties to this action and the infant and all unborn children who might have any interest are properly represented. From a careful examination of the facts as found by the court below, and the judgment rendered, we think a court of equity has jurisdiction in the matter. . . . The policy of the law is to encourage settlement of family disputes like the present, so as to promote peace, good will, and harmony among those connected by consanguinity or affinity. Equity favors amicable adjustments."

The whole matter of settlements of this kind has been fully gone into recently and cases cited in *Reynolds v. Reynolds,* 208 N. C., 578 (p. 620, *et seq.*).

The court below found that the approval of this settlement will eliminate long, bitter, and expensive litigation between members of the same family. The settlement itself will bring peace and harmony. The court below found it to be fair and just to all parties in interest. We see no reason why the settlement should not be approved.

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

Affirmed.

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O. C. DEESE AND ELLEN DEESE v. TOWN OF LUMBERTON, A MUNICIPAL CORPORATION, AND E. M. JOHNSON, MAYOR; W. A. ROACH, J. R. McLEOD, A. M. HARTLEY, AND WILLIAM BEST, COMMISSIONERS OF SAID TOWN, AND AS INDIVIDUALS.

(Filed 16 December, 1936.)

**1. Statutes § 2—Statute enlarging jurisdiction of town to include sidewalks and alleys held not special act inhibited by Art. II, sec. 29.**

A municipal corporation was given jurisdiction by its charter over streets, and the act provided machinery for laying out, opening, altering,

and maintaining its public streets. (Ch. 343, Private Acts of 1907.) Thereafter, a private act was passed enlarging the town's jurisdiction so as to include therein sidewalks and alleys, but prescribed no method for condemnation of lands for alleys. (Ch. 216, Private Laws of 1925.) *Held:* The later act merely enlarged the jurisdiction of the town to include sidewalks and alleys under the machinery set out in the prior act, and the later act is not a special statute relating to roads inhibited by Art. II, sec. 29, of the State Constitution, the act not relating to the laying out, opening, altering, or discontinuance of any particular and designated highway, street, or alley.

**2. Eminent Domain § 3—Contribution by property owners whose lands are benefited does not affect question of whether taking is for public purpose.**

The fact that property owners along one side of a proposed municipal alley agree to pay the damages assessed in favor of the property owners along the other side of the proposed alley does not affect the question of whether the taking of the land for the alley is for a public purpose, the contribution by the property owners whose land would be enhanced in value by the alley being proper, and the municipal authorities finding that the growth of the city and the desirability of the alleyway for business property made the acquisition of the land for the alley necessary in the public interest.

APPEAL by plaintiffs from *Williams, J.*, at May Term, 1936, of ROBESON. Affirmed.

The judgment of the court below is as follows: "By consent, the hearing upon the temporary restraining order issued in this cause by Hon. N. A. Sinclair, resident judge of the Ninth Judicial District, was continued and heard by the undersigned judge presiding over the courts of the Ninth Judicial District, at Chambers in Lumberton, N. C., on this 29 May, 1936. Upon consideration of the complaint and answer filed herein, treated as affidavits, and the argument of counsel for plaintiffs and defendants, the court finds the following facts:

"1. That the commissioners of the town of Lumberton acted within their discretion and without any abuse of the same in finding as a fact that the public necessity requires and demands that a new street or alley be opened in the town of Lumberton, bounded and described as particularly set out in paragraph four of the complaint; there was no allegation nor evidence before the court to the contrary, and the court refuses to review the findings of the commissioners of the town of Lumberton with respect to public necessity requiring that said alleyway be opened. The court finds as a fact the defendants and plaintiffs herein cannot agree in regard to the value of land or property damaged, and that the property owners immediately to the south of said proposed alleyway agreed to save the town harmless from any expense of said condemnation proceeding; that said agreement was made in good faith and not by any collu-

sion between the town of Lumberton and said property owners, and in no way affected the *bona fides* of the exercise of their discretion in adjudging that the public necessity required the opening of said alleyway in said transaction, the commissioners of the town of Lumberton were merely trading with the abutting property owners, who would be particularly benefited by virtue of the opening of said alleyway adjacent to and immediately north of any business houses they might erect upon their said property.

"2. The proposed alleyway is within the fire limits of the town of Lumberton, directly in front of and across the street from the United States post office, and within two blocks of the courthouse of Robeson County. The property owners to the south of said proposed alleyway desire to develop said property by building thereon business houses, including a funeral home. The business section of the town of Lumberton, because of the unusual growth of the town, is expanding to the north, where said proposed alleyway is situate.

"3. In condemning the lands described in paragraph four of the complaint for a public alleyway, the commissioners of the town of Lumberton proceeded in accordance with the authority granted by chapter 343, Private Laws of North Carolina, Session of 1907 (the charter of the town of Lumberton), particularly section 48 of said chapter, as amended by chapter 216, Private Laws of North Carolina, Session 1925. The court is of opinion that this last named act in no way prescribes the manner, method, way, or means of laying out, opening, altering, maintaining, or discontinuing of streets or alleys, but said act merely adds to the jurisdiction previously given the commissioners of the town of Lumberton by chapter 343, Private Laws of North Carolina, Session 1907, by giving them authority over sidewalks and alleys to the same effect and in the same manner as that previously granted the said commissioners of the town of Lumberton over streets under the Act of 1907, and this enlargement of jurisdiction, without changing the method, manner, way, or means of laying out streets previously authorized by the Act of 1907, does not contravene or conflict with section 29, Article II of the Constitution of North Carolina.

"4. Plaintiffs do not contend that defendant town of Lumberton has not properly proceeded to condemn the necessary lands for said alleyway, in accordance with section 48, chapter 343, Private Laws of 1907, as amended by chapter 216, Private Laws of 1925, and the court finds as a fact that defendant town of Lumberton has properly proceeded with said condemnation proceeding, in accordance with said acts, the only contention of plaintiffs with reference thereto being that chapter 216, Private Laws of 1925, is in conflict with section 29, Article II of the Constitution of North Carolina.

"Upon the foregoing findings of fact it is ordered, adjudged, and decreed that the temporary restraining order heretofore issued in this cause by the Hon. N. A. Sinclair, resident judge of the Ninth Judicial District, be and the same is hereby dissolved, and that plaintiffs be taxed with the cost of this action. Clawson L. Williams, Judge presiding over the courts of the Ninth Judicial District."

To the foregoing judgment, and each and every finding of fact and ruling thereon, the plaintiffs excepted and assigned error, and appealed to the Supreme Court. The plaintiffs excepted and assigned error in detail to the findings of fact by the court below.

*F. D. Hackett and Varser, McIntyre & Henry for plaintiffs.*
*McLean & Stacy for defendants.*

CLARKSON, J. (1) Is Private Laws of 1925, chapter 216, which amends chapter 343, Private Laws 1907, invalid under Article II, section 29, Constitution of North Carolina? We cannot so hold.

Chapter 216, Private Laws of 1925, amends chapter 343, Private Laws of 1907 (charter of the town of Lumberton), by adding the words "side walks, alley" between the word "new" and the word "street" in line two of section 48 of said chapter 343, Private Laws of 1907. This act merely increases the jurisdiction and authority already granted the commissioners of the town of Lumberton under its charter. (Chapter 343, Private Acts of 1907.) All the machinery for laying out, opening, altering, and maintaining streets is set out in the charter of the town of Lumberton, and the Act of 1925 only enlarges the jurisdiction of the commissioners of the town so as to include sidewalks and alleys. Chapter 216, Private Laws of 1925, does not attempt to prescribe the method by which the town of Lumberton may condemn lands for alleys, but merely increases the authority already conferred by the charter of the town of Lumberton in the way, manner, and means prescribed by the Act of 1907. Before chapter 216, Private Laws of 1925, could be in violation of Article II, section 29, of the Constitution, it would have to relate to laying out, opening, altering, or discontinuing of a *given particular and designated* highway, street, or alley.

We think the contentions of defendants are sustained by a long line of decisions in this jurisdiction, since the passage of the constitutional amendment, section 29, Article II, which was ratified 28 February, 1917, and became effective 10 January, 1917. *Brown v. Comrs.*, 173 N. C., 598; *Hill v. Comrs.*, 190 N. C., 123; *S. v. Horne*, 191 N. C., 375. See concurring opinion and cases cited in *Webb v. Port Commission*, 205 N. C., 663, p. 678, *et seq.* See, also, *Glenn v. Board of Education*, 210

N. C., 525. Under the above authorities, plaintiffs lose on this aspect and by the *Holton case* below cited.

In *Holton v. Mocksville,* 189 N. C., 144 (149), we find: "Section 4 of Article VIII of the Constitution imposes upon the General Assembly the duty to provide by general law for the improvement of cities, towns, and incorporated villages. It does not, however, forbid altering or amending charters of cities, towns, and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. We find nothing in section 4, Article VIII of the Constitution rendering this act unconstitutional, nor does the act relate to any of the matters upon which the General Assembly is forbidden by section 29, Article II, to legislate. *Kornegay v. Goldsboro,* 180 N. C., 441." *Webb v. Commission,* 205 N. C., 663 (673).

(2) The court below found that the whole matter was done in the discretion of the town of Lumberton and in good faith. *Durham v. Rigsbee,* 141 N. C., 128.

In *Stratford v. Greensboro,* 124 N. C., 127 (131), it is said: "There can be no objection to the contributing of an individual to the expense of laying out or altering a street, nor will such an act prove that the property was taken for the accommodation of private individuals and not for public use. If in point of fact the public necessity and convenience require the improvement of a street or the opening of one, it can make no difference who pays the damages of condemnation. It might be that a party contributing a part or the whole of the assessed damages in the condemnation of land for a public street when the public necessity requires such street, might have lands adjacent which might be improved by the opening of the street, and surely if nothing else appeared it would not be either immoral or illegal for him to pay the damages growing out of the condemnation proceedings," citing authorities. At p. 133: "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 on Em. Domain, sec. 158; Cooley on Taxation, 110, 120; *Clark v. Sanders,* 74 Mich., 692." *Reed v. Highway Com.,* 209 N. C., 648.

The findings of fact by the court below were supported by the evidence in the case. For the reasons given, the judgment is

Affirmed.

H. L. BOWLES v. FAYETTEVILLE GRADED SCHOOLS AND J. R. HARRISON.

(Filed 16 December, 1936.)

**Schools § 15—Trustees of school district may not delegate power to sell realty belonging to the district to a member of its property committee.**

A chartered school district acquired the property in question by foreclosure of a loan made from its sinking fund, the property thus acquired being in no way connected with the operation of its schools. The trustees of the district instructed the property committee of the district to investigate the legality of a private sale, to consider any offers for the property in excess of a stipulated sum, and delegated "power to act" in the matter. The chairman of the property committee thereafter entered into a contract for the sale of the property for the stipulated price. Plaintiff taxpayer of the district instituted this suit to restrain conveyance to the purchaser in the contract. *Held:* The trustees of the district were without power to delegate authority to sell the school property, and the district was not bound by the contract entered into by the chairman of the property committee, and decree restraining the execution of the contract was proper. Whether the property could be sold by private sale, *quære*.

APPEAL by defendants from *Sinclair, J.*, at Chambers, in Fayetteville, N. C., 12 August, 1936. Affirmed.

Action to restrain defendants from carrying out an alleged contract on the part of the Fayetteville Graded Schools to convey certain real estate to defendant Harrison.

Plaintiff, a citizen and taxpayer residing within the Fayetteville Graded School District, alleges the purported contract was not executed by the board of trustees of said schools in the manner authorized by law and is not sufficient to entitle defendant Harrison to a conveyance.

Temporary restraining order was issued and made returnable before Judge Sinclair, who, after hearing the matter upon the pleadings and affidavits, adjudged that the attempted contract was void, and that the defendants be restrained and enjoined from completing the same.

The facts found by the court below were substantially these:

The corporate defendant is a chartered school district, incorporated under the name of Fayetteville Graded Schools, governed by a board of eleven trustees. In 1931, upon foreclosure of a deed of trust, which secured a loan from its sinking fund, defendant graded schools acquired title to the described property in order to protect its debt. The property is an unimproved vacant lot in the city of Fayetteville, not adjacent to nor connected with the school property. At a special meeting of the defendant's trustees on 20 May, 1936, W. C. Downing, chairman of the

property committee of said board, which consisted of himself and three other trustees, notified the board that he had an offer for the property, and the property committee was instructed to investigate the legality of private sale and to consider any offers for the property not less than $3,500, "with power to act."

On the afternoon of 22 May, 1936, the chairman of the property committee consulted an experienced real estate dealer and was advised that the property was worth $3,960, and the said chairman thereupon told him if he could sell it for that price a commission would be allowed him. Thereupon, the real estate dealer talked to the plaintiff about the property, and on the following morning secured his offer to buy, but when he communicated same to said chairman, was advised that the property had already been agreed to be sold to defendant Harrison.

It was not disclosed to the general public that the property was for sale. The property is worth considerably more than $3,500.

The agreement to sell to Harrison was in the form of a letter reading as follows: "This will acknowledge receipt of your check in the sum of $50.00 as a deposit to close the trade on the sale of Franklin Street lot belonging to Fayetteville Graded Schools to you for the sum of $3,500. We will proceed with the matter as soon as certain tax matters can be cleared up with the city. Signed: W. C. Downing, Chairman of Property Committee."

Defendant's charter provides that "all agreements affecting real estate and other obligations shall be deemed sufficiently executed when signed by the chairman and secretary of said board and attested by the seal of said corporation."

The plaintiff, on 23 May, 1936, filed a bid with the chairman of the board of trustees for the property at the price of $3,700, which was refused.

The judgment of the court below then proceeds to set forth the reasons for its conclusion, as follows:

"The question arises, was the transaction between Downing and Harrison, in Downing's home the night of 22 May, the action of the defendant's board of trustees, or that of the property committee? Another interesting question presents itself upon the face of the record: Is it legal for the trustees of public property to sell it at private sale, while withholding from the public the knowledge that the property is for sale? While in the view of the court the decision of this question is not necessary to a determination of this case, it ought not to be altogether ignored, as it is not unrelated to other questions of moral propriety on the part of the trustees of public property. It must be admitted that this question is not free from difficulty.

"Chapter 136, Public Laws of 1923, relating to the powers of the county boards of education and the sale by such board of school property, was amended by section 2, chapter 494, Public Laws of 1933, but not materially in the respect we are considering it. That section appears as C. S., 5470 (a), and is set down by Michie under the chapter on Education, still in juxtaposition with other sections relating to the county boards of education. Clearly, if the sale of school property were made by the county board of education, it would have to be at public auction. Generally speaking, the law requires the title of public school property to be in the county board of education; but, under section 4 of the School Machinery Act of 1933, and under a similar portion of the School Machinery Act of 1935, where all districts, both special, charter, and otherwise, were abolished, the law provides that the title to school property shall remain in the trustees of the special charter district when that district is included in a city administrative unit. The law seems to be silent as to the manner of disposition of property so held when it ceases to be used or useful as school property, although taking a general view of all the school legislation to date, it would seem that the State has adopted as its public policy that all public school property should be sold at public auction. It is, however, only by analogy that it could be said that the trustees of a city administrative unit, or city board, would be restricted to a sale by public auction, although the analogy is so strong and the reasons for such restrictions so manifest and so urgent, it would seem that the courts might well declare it to be the law of the land.

"The defendants demurred *ore tenus* to the complaint that it did not state facts sufficient to constitute a cause of action, and challenged the plaintiff's right to maintain his action. While it is elementary that the courts have no power under the Constitution to control the exercise of discretion vested in subordinate departments, such as the Fayetteville Graded Schools (*Broadnax v. Groom,* 64 N. C., 244), there is no attempt here to control any exercise of discretion. The plaintiff, who brings this suit in behalf of himself and other citizens and taxpayers within said charter district, charges in effect that the acts of the defendant's board of trustees and their agents are *ultra vires,* and indicate the pursuit of an illegal course of conduct in the name of the Fayetteville Graded Schools, in violation of the rights of the plaintiff and other taxpayers. The plaintiff does not charge the defendant with actual fraud, nor with corruption or moral turpitude. Constructive fraud need not originate in any actual evil design. 'It is sufficient in a court of equity to allege acts, omissions, or concealments which involve a breach of legal or equitable duty, trust, or confidence, and tend to the injury of another or to the bringing about of an undue and unconscien-

tious advantage.' *Jones v. North Wilkesboro,* 150 N. C., 647. It is also alleged and admitted by both demurrer and answer that before the contract was made with Harrison the defendant's board of trustees, by a resolution, delegated the entire matter of the sale of the property to a committee of four, with the sole limitation that the price should not be less than $3,500, and declared that the action of the committee should be final. This is an allegation and admission that the trustees attempted to delegate a nondelegable power and responsibility. It means that they attempted to abdicate their solemn trust by a delegation of their authority. 'The principle is a plain one that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall deem best, cannot be delegated to others. This principle may not prevent the delegation of duties which are ministerial, but where the trust committed to the governing body involves the exercise of functions which partake of a judicial character, it may not be delegated.' *Murphy v. Greensboro,* 190 N. C., 269.

"Here the trustees not only attempted to delegate their trusts to the property committee, but all the evidence would seem to indicate that the property committee attempted to delegate their alleged power, even though it was void, to its chairman.

"It is therefore considered, adjudged, and decreed that the demurrer be and it is hereby overruled, and that the defendants be and they are hereby restrained and enjoined from perfecting or completing the attempted contract of sale complained of, and that the contract entered into by and between the chairman of the property committee and J. R. Harrison be and it is hereby canceled, and declared null and void."

From the foregoing judgment defendants appealed.

*John H. Cook for plaintiff, appellee.*
*Rose & Lyon and Dye & Clark for defendants, appellants.*

DEVIN, J. The findings of fact of the court below were supported by the pleadings and affidavits presented to him, and his conclusions and judgment thereon are fully sustained by the authorities and statutes cited and by his clear and accurate reasoning therefrom.

While the good faith of the board of trustees of the Fayetteville Graded Schools and of the chairman of the property committee is in no way impugned, it is apparent that the words "with power to act" inserted in the record of the motion to instruct the property committee to investigate the legality of a privae sale and to consider offers for the property should not be construed to constitute the valid delegation of power to the chairman of the property committee to execute a contract

for the sale of the property in a manner contrary to the method set out in the statute. The Fayetteville Graded Schools cannot in law be bound thereby.

The judgment, restraining the conveyance of the property pursuant to the attempted contract complained of, must be

Affirmed.

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HARRIET DOWNING v. H. J. WHITE.

(Filed 16 December, 1936.)

**1. Judgments § 22—**

A judgment against a party who has not been brought into court in some way sanctioned by law, or who has not made a voluntary appearance, is void and may be treated as a nullity without any direct proceeding to vacate it.

**2. Same—Where record does not show that defendant was a party, defendant may attack the judgment by independent action.**

Action was brought by a creditor to set aside a deed from the debtor to his daughter for fraud. All papers in the action were lost except the judgment setting aside the conveyance, and the judgment did not disclose that the daughter was a party to the action. The daughter instituted this action to set aside the judgment as a cloud upon her title, and introduced testimony that she had never been served with summons in the action to set aside the conveyance to her. *Held:* The record as constituted fails to disclose that the daughter was a party to the action, and therefore she may attack the judgment by independent action, although if the papers in the action should be found and should disclose on their face that she was served with summons in the action, her sole remedy would be by motion in the cause to establish the fact of nonservice or "false return."

**3. Judgments § 26—Burden is on party attacking judgment to establish asserted nonservice.**

Where the record does not disclose that a person whose vested rights were involved in the action was made a party thereto, such person attacking the judgment on the ground that she was not a party to the action, has the burden of overcoming the *prima facie* presumption of jurisdiction arising from the rendition of the judgment.

APPEAL by plaintiff from *Williams, J.*, at Special June Term, 1936, of BLADEN.

Civil action in ejectment to redeem and to remove cloud on title.

The *locus in quo* consists of two tracts of land situate in Bladen County—one a 36-acre tract; the other containing 140 acres.

It is admitted that June Dix acquired title to the 40-acre tract in 1887, and to the 140-acre tract in 1888. He conveyed both tracts to

Harriet Dix, now Harriet Dix Downing, by deed dated 7 November, 1921, duly registered in Bladen County. Plaintiff and defendant both claim title from a common source.

Thereafter, it is alleged, suit was brought by Bridger Corporation against June Dix and Harriet Dix, first, to recover on a note given by June Dix to the Bridger Corporation, and, second, to set aside the aforementioned deed from June Dix to Harriet Dix as a fraudulent conveyance so far as creditors were concerned. *Carswell v. Talley,* 192 N. C., 37, 133 S. E., 181. There was a judgment for the plaintiff in said action, rendered at the January Term, 1924, decreeing the deed in question to be null and void and ordering its cancellation. All the papers in this proceeding, save the judgment, seem to have been lost.

The plaintiff testified that no summons was ever served on her in the case of "Bridger Corporation *v.* Dix," the only title appearing on the judgment, and this was corroborated by her father, with whom she lived at the time. The court held that the judgment rendered in said action, canceling plaintiff's deed, was a bar to her right to recover in the present proceeding, and instructed the jury accordingly.

Verdict and judgment for defendant, from which plaintiff appeals, assigning errors.

*A. M. Moore for plaintiff, appellant.*
*H. H. Clark for defendant, appellee.*

STACY, C. J. This is the same case that was before us on a procedural question at the Spring Term, 1934, reported in 206 N. C., 567, 174 S. E., 451.

It is elementary that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, a judgment rendered against him is void for want of jurisdiction. *Dunn v. Wilson,* 210 N. C., 493; *Guerin v. Guerin,* 208 N. C., 457, 181 S. E., 274; *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 238; *Clark v. Homes, Inc.,* 189 N. C., 703, 128 S. E., 20; *Pinnell v. Burroughs,* 168 N. C., 315, 84 S. E., 364; *Card v. Finch,* 142 N. C., 140, 54 S. E., 1009; *Bernhardt v. Brown,* 118 N. C., 700, 24 S. E., 527, 715; *Armstrong v. Harshaw,* 12 N. C., 187.

True, "where it appears from the record that a person was a party to an action, when in fact he was not, the legal presumption that he was properly a party is conclusive until removed by a correction of the record itself, by a direct proceeding for that purpose." *Smathers v. Sprouse,* 144 N. C., 637, 57 S. E., 392; *Doyle v. Brown,* 72 N. C., 393. In other words, where it affirmatively appears from the record in a case that one was duly served or made a party thereto, the remedy for establishing the

fact of nonservice or "false return," if such be the fact, is by motion in the cause and not by an independent action. *Davis v. Brigman,* 204 N. C., 680, 169 S. E., 421; *Long v. Rockingham,* 187 N. C., 199, 121 S. E., 461; *King v. R. R.,* 184 N. C., 442, 115 S. E., 172; *Eure v. Paxton,* 80 N. C., 17. Here, however, it does not appear that Harriet Dix was ever a party, or attempted to be made a party, to the action of "Bridger Corporation *v.* Dix." The papers have been lost, with the exception of the judgment, and the only title to the judgment is "Bridger Corporation *v.* Dix." So, under the circumstances, it not appearing that Harriet Dix was ever a party to said proceeding, we apprehend her right presently to attack the judgment rendered therein as a cloud on her title ought not to be denied. *Stocks v. Stocks,* 179 N. C., 285, 102 S. E., 306; *Truelove v. Parker,* 191 N. C., 430, 132 S. E., 295. Nothing was said in *Clark v. Homes, Inc., supra; Pinnell v. Burroughs, supra; Bailey v. Hopkins,* 152 N. C., 748, 67 S. E., 569; *Hargrove v. Wilson,* 148 N. C., 439, 62 S. E., 520; *Rackley v. Roberts,* 147 N. C., 201, 60 S. E., 975; *Brickhouse v. Sutton,* 99 N. C., 103, 5 S. E., 380; or *Sumner v. Sessoms,* 94 N. C., 371, which militates against this position.

The laboring oar, of course, is with the plaintiff, as a *prima facie* presumption of jurisdiction arises from the exercise of it, and throws the burden of disproving its existence upon the party denying it. *Starnes v. Thompson,* 173 N. C., 466, 92 S. E., 259.

Should the papers be found, and the fact of nonservice appear on the face of the record, plaintiff's right to attack the judgment would *ipso facto* be established. *Graves v. Reidsville,* 182 N. C., 330, 109 S. E., 29. *Non constat* that this right should be denied simply because the papers have been lost. *Pinnell v. Burroughs, supra; Massie v. Hainey,* 165 N. C., 174, 81 S. E., 135; *Card v. Finch, supra.*

In *Bernhardt v. Brown, supra,* there is an observation to the effect that "in the absence of the transcript of the proceedings therein, the presumption of law is that it is regular in all respects, including service," but this was said in reference to one who appeared to be a party to such proceeding, and not to one who did not so appear, nor did it have reference to lost records.

It is well established here and elsewhere that "a judgment rendered by a court against a citizen affecting his vested rights, in an action or proceeding to which he is not a party, is absolutely void, and may be treated as a nullity whenever it is brought to the attention of the court." *Johnson v. Whilden,* 171 N. C., 153, 88 S. E., 223.

Again, in *Doyle v. Brown, supra,* it was held that "when a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void, and may be so treated whenever and wherever offered, without any direct proceeding to vacate it."

Similarly, in *Condry v. Cheshire,* 88 N. C., 375, it was held (as stated in third headnote): "A judgment against a party upon whom no service of process has been made nor appearance entered, is absolutely void, and may be so treated without any direct proceeding to vacate it."

In this view of the matter, considering the present state of the record, it would seem the plaintiff is entitled to question the judgment in the *Bridger Corporation case,* to show its invalidity, if she can, and if found to be void, to have it removed as a cloud on her title. *Johnson v. Whilden, supra; Oliver v. Hood, Comr.,* 209 N. C., 291, 183 S. E., 657. Of course, if, upon the discovery of the lost papers in said suit, it should appear that the plaintiff was duly or ostensibly made a party thereto, a different principle would prevail. *Davis v. Brigman, supra; Dunn v. Wilson, supra.*

New trial.

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J. C. PAYNE v. DR. D. A. STANTON.

(Filed 16 December, 1936.)

**1. Damages § 2—Charge held for error in failing to confine quantum of damages to injuries sustained as direct result of alleged negligence.**

In this action to recover of a physician for alleged negligence in diagnosis and treatment of plaintiff's shoulder, which had been injured by a run-away mule, the charge of the court *is held* for error in inadvertently failing to confine the *quantum* of damages to the suffering and injury resulting from defendant's alleged negligence in diagnosis and treatment, and in embracing in the *quantum* of damages recoverable the suffering and injury caused by the injury inflicted by the run-away mule, plaintiff being entitled to recover, if at all, only for those injuries which proximately and naturally resulted from the wrong complained of.

**2. Appeal and Error § 46—**

Where a new trial is awarded for error in the instructions on the issue of damages, alleged error in the instructions on the issue of negligence need not be decided.

STACY, C. J., dissents.

CONNOR, J., concurring in part and dissenting in part.

APPEAL by defendant from *Cowper, Special Judge,* at July Term, 1936, of RANDOLPH. New trial.

Action to recover damages for negligence on the part of defendant, a practicing physician, upon allegations of failure to properly diagnose and treat plaintiff's dislocated shoulder. The injury to the plaintiff's shoulder was caused by a run-away mule.

The allegations of negligence were denied in the answer. Upon issues submitted to the jury, there was verdict for the plaintiff, and from judgment in accord therewith defendant appealed.

*York & York and Moser & Miller for plaintiff, appellee.*
*D. H. Parsons and J. A. Spence for defendant, appellant.*

DEVIN, J. The evidence offered in support of plaintiff's allegations of negligence was sufficient to entitle him to have it submitted to the jury, its probative force being for them to determine.

Appellant, however, assigns as error certain portions of the court's charge to the jury. He notes exceptions to the following portions of the charge on the issue of damages:

"Plaintiff is to have a reasonable satisfaction, if he is entitled to recover at all, for loss of both bodily and mental powers, or for actual suffering, both of body and mind, which are the immediate and necessary consequences of his injury. And, gentlemen of the jury, it is for the jury to say, under all the circumstances, what is a fair and reasonable sum that the defendant should pay to the plaintiff by way of compensation for the injuries sustained, if the plaintiff is entitled to recover at all."

"If the jury shall find, by the greater weight of the evidence, that the injuries to the plaintiff be permanent and continuous in their nature, there is no fixed date upon which they all occurred, and, respecting the damages, if any, which may accrue, in the future, the plaintiff can only be awarded the present cash value or the present worth of such damages; for if the jury assess any prospective damages, the plaintiff is being paid now in advance for future loss. The sum fixed by the jury, if you come to this issue, should be such as fairly compensates the plaintiff for injuries suffered in the past and for those likely to occur in the future, that is, if the jury shall so find injuries in the future. The verdict is to be rendered on the basis of a cash settlement for plaintiff's injuries, past, present, and prospective, if you find from the evidence, and by its greater weight, that there are future and prospective damages to which the plaintiff is entitled."

It is apparent that the court in this portion of his charge inadvertently omitted to distinguish injuries and sufferings resulting from the violent action of the run-away mule from those resulting from the failure of the defendant to exercise due care in the subsequent treatment. The instructions allowed the jury to consider as an element of damages all the injuries suffered by plaintiff, and permitted them to award compensation for all loss and suffering endured by him, whether caused by the mule or by defendant's negligence.

If plaintiff was entitled to recover anything, he was entitled to recover compensation only for those injuries which proximately resulted from defendant's negligent treatment. Only such damages are allowable as are the natural and proximate consequence of the wrong complained of. *Newbold v. Fertilizer Co.,* 199 N. C., 552; *Lane v. R. R.,* 192 N. C., 287; *Van Dyke v. Chadwick-Hoskins Co.,* 187 N. C., 695; *Johnson v. R. R.,* 184 N. C., 101.

The appellant's exception to this portion of the charge must be sustained.

The defendant also assigns as error a portion of the charge to the jury on the first issue. He complains that in the portion of the charge in which the court undertook to set out in detail what facts evidencing negligence the jury must find before they could answer the first issue in favor of the plaintiff, he omitted to instruct them that the negligence of the defendant in the respects alleged must be found, by the greater weight of the testimony, to have been the proximate cause of the injury complained of.

However, the record shows that in another portion of the charge the court stated generally the elements of actionable negligence and properly defined "proximate cause" as necessary to be found to establish plaintiff's cause of action.

Whether this was sufficient to constitute inconsistent instruction and to call for the application of the rule laid down in *Young v. Commissioners,* 190 N. C., 845, and cases there cited, it is unnecessary to decide, as there must be a new trial for the error in the charge on the third issue, as hereinbefore pointed out.

New trial.

STACY, C. J., dissents.

CONNOR, J., without conceding that there was evidence at the trial of this action sufficient to support the allegations in the complaint that plaintiff was injured by the negligence of the defendant, as alleged in the complaint, concurs in the opinion of the Court that there was error in the charge of the trial judge to the jury for which the defendant is entitled to a new trial. He was of opinion that there was error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit, at the close of all the evidence.

J. ROSENBLOOM v. E. I. SINKOE.

(Filed 16 December, 1936.)

**Contracts § 25b: Brokers and Factors § 8—Action held for breach of contract entitling plaintiff to recover selling price agreed upon by parties.**

Plaintiff contended that he left certain personal property with defendant under a contract by which defendant agreed to sell the property upon commission at a price not less than that agreed upon, and that defendant had sold the property and failed to account to plaintiff. The record disclosed that the case was tried upon the theory of breach of the express contract alleged in the complaint. *Held:* Under the theory of trial, the measure of damages was the price agreed upon by the parties for the sale of the property, plaintiff being entitled to be put in the position he would have been in if the contract had been performed, and defendant's contention that the damages should be measured by the rule governing damages for breach of contract by a factor by selling at a price less than that stipulated cannot be sustained.

APPEAL by the defendant from *Harding, J.*, at February Term, 1936, of MECKLENBURG. No error.

This was a civil action wherein the plaintiff sued the defendant to recover damages alleged to have been caused by a breach of contract in selling certain machinery for a price less than that agreed upon by the parties when the machinery was left with the defendant by the plaintiff for the purpose of sale; and for selling a certain bench and tools left with the defendant by the plaintiff without authority to make a sale thereof.

The plaintiff alleged that the defendant agreed to store the machinery without charge and to sell it for the plaintiff at not less than the minimum prices marked thereon, amounting to $945.00, for a commission of 10 per cent; and that the defendant further agreed to store and hold the bench and tools without charge; and that the defendant has sold both the machinery and the bench and tools and has failed to account to the plaintiff, notwithstanding demand for settlement has repeatedly been made by the plaintiff upon the defendant.

The defendant denied that he made the agreement or contract alleged by the plaintiff.

The issues submitted and answers made thereto were as follows:

"1. Did the plaintiff and defendant enter into a contract whereby plaintiff would deliver to the defendant machinery, as set out in the complaint, and defendant was to sell the same at a price not less than the amount set out in the complaint, as alleged, and charge ten per cent commission for such sale, as alleged? Answer: 'Yes.'

"2. Did defendant breach the said contract? Answer: 'Yes.'

"3. What damage, if any, is plaintiff entitled to recover of defendant by reason of the breach, as alleged? Answer: '$945.00.'

"4. Did defendant wrongfully sell and dispose of the bench and miscellaneous tools of the plaintiff, as alleged? Answer: 'Yes.'

"5. What damage, if any, is plaintiff entitled to recover of defendant for such wrongful sale? Answer: '$25.00.'"

From a judgment that the plaintiff have and recover of the defendant the sum of $970.00, the defendant appealed, assigning errors.

*Guthrie, Pierce & Blakeney for plaintiff, appellee.*
*Fred B. Helms for defendant, appellant.*

SCHENCK, J. The plaintiff introduced evidence from which the jury might have found that the defendant agreed to store and to sell the machinery at not less than the prices marked on the individual articles, aggregating $945.00, for a commission of 10 per cent, and further, that the defendant agreed to store the bench and tools. The defendant, on the contrary, introduced evidence from which the jury might have found that no such agreement was made, and that the machinery and the bench and tools were left with the defendant by the plaintiff as security for loans made to the plaintiff by the defendant, with the understanding that if said loans were not paid within a reasonable time the property should be sold and proceeds applied on said loans, and that after two years or more the property was so sold and the proceeds of the sale so applied.

The jury, after hearing the evidence, answered the issues in favor of the plaintiff, as hereinbefore set forth.

The exceptions principally urged on appeal are those which assail the charge of the court upon the third issue relative to the measure of damage. His honor held and charged the jury to the effect that if they answered the first and second issues in favor of the plaintiff their answer to the third issue would be the price at which the defendant agreed to sell the machinery. The only evidence relating to the price at which the defendant agreed to sell the machinery was that of the plaintiff, since the defendant denied the existence of any such agreement. The jury answered the issue in accord with the contention of the plaintiff, namely, $945.00.

It is the contention of the defendant that the measure of damage was the market value of the machinery, and not the price at which the defendant agreed to sell it, in the event that the jury found he agreed to sell it.

While there is a diversity of holdings in the different jurisdictions in cases between principals and factors, particularly where principals are in default to their factors, as to whether the measure of damage for the breach of the contract to sell, by selling at a lower price than stipulated, is the difference between the price at which the sale was made and the market value of the property sold, or, is the difference between the price

at which property is sold and the price stipulated, this case was not tried upon the theory involved in such cases.

This case was tried upon the theory of a breach of the expressed contract alleged in the complaint to the effect that the defendant would sell the machinery at not less than the price agreed upon. This is apparent from the following excerpt from the record: "At this point counsel for plaintiff, upon being questioned by the court, announced that the plaintiff elected to and would rely solely upon the expressed contract, as alleged in the complaint as to all of the items referred to in the complaint, except as to the bench and tools."

The plaintiff was entitled to be put in the position he would have been in if the contract had been performed. *Newby v. Realty Co.*, 180 N. C., 51; *Machine Co. v. Tobacco Co.*, 141 N. C., 284. "For the injury caused by the nonperformance of most contracts the primary if not the only remedy of the injured party is an action for damages for the breach. In fixing the amount of these damages, the general purpose of the law is, and should be, to give compensation—that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract." Williston on Contracts, Vol. 3, sec. 1338, p. 2392. Therefore, we think, and so hold, that his Honor was correct when he ruled and charged that the measure of damage was the price agreed upon by the parties.

We have examined the other assignments of error relating both to the admission and exclusion of evidence and to the charge. Most of these are disposed of by the disposition made of those assailing his Honor's ruling upon the measure of damage. Those assignments of error relating to the market value of the machinery, even if well taken, are harmless, since the market value was immaterial under the theory upon which the case was tried. The other assignments of error have been examined by us and we have found in them

No error.

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H. M. CHAMBLEE, ADMINISTRATOR OF ESTATE OF LAWRENCE DICKS, DECEASED, v. SECURITY NATIONAL BANK, GUARDIAN OF THE PROPERTY OF LAWRENCE DICKS.

(Filed 16 December, 1936.)

**1. Death § 1—**

The presumption of death from seven years absence is a presumption of fact which may be rebutted, but the presumption stands in the absence of any evidence to weaken the presumption or prohibit it from applying to the facts of the case.

**2. Executors and Administrators § 3—Administrator may be appointed upon presumption of death from seven years absence.**

The clerk of the Superior Court has jurisdiction to appoint an administrator for an estate upon his finding that the person in question is dead and died intestate, C. S., 28, 1, upon affidavit showing that such person had been absent for over seven years and had not been heard from by relatives or friends, and the fact that at the time of the appointment it was contemplated that an action should be brought to determine any question that might arise contrary to the legal presumption does not invalidate the appointment or nullify the proof afforded by the jurisdictional affidavit.

**3. Executors and Administrators § 8—Administrator of person presumed dead held entitled to assets of estate under the evidence in this case.**

An administrator appointed by the clerk for the estate of a person presumed dead under the presumption of death from seven years absence is entitled to judgment for the recovery of the assets of the estate against the guardian of such person upon the verdict of the jury in his favor upon evidence showing that the person in question had been absent for seven years, and had not been heard from by relatives or friends, when the guardian controverts the fact of death for its own protection, but introduces no evidence weakening the presumption or prohibiting it from applying to the facts established by plaintiff's evidence, and the guardian's contention that the recovery of the assets was without due process of law in that the person alleged to be dead was not served with summons is without merit.

APPEAL by defendant from *Shaw, Emergency Judge,* at September Term, 1936, of GUILFORD. No error.

Action instituted to recover, for the purpose of administration, property of plaintiff's intestate, Lawrence Dicks, in the hands of defendant bank, guardian of the property of said Lawrence Dicks.

Defendant denied, on information and belief, the death of said Lawrence Dicks, and alleged that the appointment of plaintiff as administrator was void, and that plaintiff's attempt to take possession of Lawrence Dicks' property was without due process of law.

The jury answered the issues as follows:

"1. Did H. M. Chamblee qualify as administrator of the estate of Lawrence Dicks, deceased, on 28 April, 1936? Ans.: 'Yes.'

"2. Was Lawrence Dicks dead at the date on which H. M. Chamblee was appointed administrator of the estate of Lawrence Dicks, to wit, 28 April, 1936? Ans.: 'Yes.'

"3. Is the plaintiff entitled to recover from the defendant all money, securities, and property held by it for the benefit of Lawrence Dicks and/or his heirs? Ans.: 'Yes.'"

*Caffey & Stanley, E. D. Broadhurst, and Younce & Younce for plaintiff.*

*King & King and J. A. Cannon, Jr., for defendant.*

DEVIN, J. Appellant challenges the validity of the appointment of plaintiff as administrator of the estate of Lawrence Dicks, and contends that this action cannot be maintained.

There was no positive proof of the death of Lawrence Dicks, but plaintiff relied upon the presumption arising from his seven years absence without having been heard from. As stated by *Adams, J.*, in *Beard v. Sovereign Lodge,* 184 N. C., 154, "The absence of a person from his domicile, without being heard from by those who would be expected to hear from him, if living, raises a presumption of his death, that is, that he is dead at the end of seven years." *Steele v. Ins. Co.,* 196 N. C., 408; *University v. Harrison,* 90 N. C., 387.

It appears that Lawrence Dicks, a resident of Greensboro, N. C., was in 1923 committed to the United States Veterans' Hospital at Tuskegee, Alabama; that he was suffering with an advanced stage of dementia præcox, and had theretofore been declared incompetent, and defendant appointed guardian of his property; that on 19 April, 1927, he escaped from the hospital and has not been seen or heard from since; that five brothers and a sister reside in Guilford County. It was in evidence that a person in his condition could not have endured long.

On 28 April, 1936, nine years later, the plaintiff made affidavit that Lawrence Dicks was dead, without leaving a last will and testament, and applied to the clerk of the Superior Court of Guilford County for letters of administration on his estate.

Thereupon, the clerk of the Superior Court made this order: "It being satisfactorily proven to the undersigned clerk of the Superior Court of Guilford County that Lawrence Dicks, late of said county, is dead, . . . and it appearing that H. M. Chamblee is entitled to the administration of the estate of the deceased, and having qualified as administrator according to law; now these are therefore to empower the said administrator to enter in and upon all and singular the goods and chattels, rights, and credits of the deceased, and the same to take into possession, . . . and distribute same according to law."

Required bond was given and approved.

On 25 June, 1936, plaintiff instituted his action to recover from the defendant bank decedent's property remaining in its hands as guardian.

On the trial there was evidence tending to support the allegations and contentions of plaintiff. No evidence, *contra,* was offered by defendant. There was nothing in the evidence to weaken the presumption or prohibit it from applying to the facts presented. Following a correct charge by the court, the jury by their verdict found that Lawrence Dicks was dead at the time the plaintiff was appointed administrator of his estate.

The clerk of the Superior Court had jurisdiction to appoint an administrator and to grant letters of administration, upon ascertaining

from the affidavit of the applicant that decedent was dead, intestate. C. S., 28; C. S., 1. This he has done. His order and appointment could only be avoided by showing that Lawrence Dicks was not in fact dead. The presumption of his death, arising from seven years absence under the rule, is a presumption of fact which may be rebutted. *Clark v. Holmes,* 189 N. C., 703; *Trimmer v. Gorman,* 129 N. C., 161; *Springer v. Shavender,* 116 N. C., 12; *Springer v. Shavender,* 118 N. C., 33; *Dowd v. Watson,* 105 N. C., 476; *Moore v. Parker,* 34 N. C., 123.

Following his appointment, plaintiff administrator instituted this action, setting out all the facts, and asked that he recover from the guardian the estate of decedent for the purpose of administration according to law. It seems to have been contemplated when letters of administration were applied for that such action would be brought for the determination of any question that might be raised contrary to the legal presumption. This could not be held to invalidate the proceeding or nullify the proof afforded by the jurisdictional affidavit that Lawrence Dicks was dead.

The defendant guardian, concerned for its own protection, very properly put the plaintiff to the proof. This burden he has borne by evidence offered to the satisfaction of the triers of the facts and of the learned judge who presided.

We find nothing in the proceeding to justify us in disturbing the result.

The suggestion that due process of law was wanting for failure to serve notice on the alleged decedent is without merit. The plaintiff had the right to invoke and rely upon the presumption of death and to proceed accordingly in the manner prescribed by the statute.

The appellant did not, and does not now, offer evidence to controvert the facts upon which the right of action accrued. Its objections to the judgment are procedural. It excepts to the conclusion. The assignments of error based upon these exceptions cannot be sustained.

No error.

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F. L. PREISTER v. STANLY BANK AND TRUST COMPANY, A. P. HARRIS, TRUSTEE BY ORDER OF THE COURT, AND A. P. HARRIS, TRUSTEE BY DEED.

(Filed 16 December, 1936.)

**1. Reference § 3—**

A compulsory reference may not be ordered prior to the determination of defendant's plea in bar when such plea, if determined in defendant's favor, entirely destroys plaintiff's right of action, and renders an accounting useless.

**2. Same—Order of compulsory reference prior to determination of defendant's plea in bar held error in this case.**

Plaintiff alleged that he purchased, at the sale of a bankrupt's estate, certain stocks and bonds which had been given as collateral security for a note by the bankrupt, that subsequent credits had paid the note in full, and that defendant bank had sold certain of the security without notice and purchased same at its own sale, and refused to surrender the securities to plaintiff. Defendant bank filed answer alleging that plaintiff was not the owner of the securities, but that defendant bank purchased the securities at the sale conducted by the payee of the note upon default after due advertisement. *Held:* The answer raised issues which are determinative of the entire controversy, and an order for compulsory reference prior to the determination of the question of title to the securities is erroneous.

APPEAL by defendants from *Hill, Special Judge,* at September Term, 1936, of STANLY. Reversed.

A compulsory reference was ordered over the objection of defendants.

Defendants excepted to the order on the ground that pleas in bar had been set up, and that a reference was improper until the pleas had been determined.

From an adverse ruling, defendants appealed.

*Vann & Milliken and W. E. Smith for plaintiff, appellee.*
*Brown & Brown and Stahle Linn for defendants, appellants.*

DEVIN, J. It is an elementary rule of procedure, upheld by many decisions of this Court, that when the answer sets up a plea in complete bar of plaintiff's action, a compulsory reference should not be ordered until the plea, which may defeat the action entirely and render an accounting useless, has been determined. McIntosh Prac. & Proc., sec. 523; *Smith v. Goldsboro,* 121 N. C., 350; *R. R. v. Morrison,* 82 N. C., 141.

What constitutes a plea in bar has been considered and accurately defined by this Court in *Bank v. Evans,* 191 N. C., 538, as follows: "In a legal sense it is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action, a special plea constituting a sufficient answer to an action at law, and so called because it barred—*i.e.,* prevented—the plaintiff from further prosecuting it with effect, and, if established by proof, defeated and destroyed the action altogether." *Haywood Co. v. Welch,* 209 N. C., 583; *Jones v. Beaman,* 117 N. C., 259.

It then becomes necessary to examine the pleadings in the instant case in order to determine whether a plea in bar, as defined, has been raised.

The complaint alleges in substance that the Albemarle Grocery Com-

pany, a corporation, being indebted to the defendant Stanly Bank and Trust Company, executed its note to said bank and, as collateral security therefor, delivered certain securities, notes, and stocks belonging to said grocery company; that the said grocery company became entitled to credits from various sources and payments sufficient to pay said note in full; that thereafter said grocery company was adjudicated a bankrupt, and the plaintiff, with the approval of the bankrupt court, purchased from the trustee in bankruptcy all the choses in action of the bankrupt grocery company, and is now the owner thereof; that the defendant bank, without proper notice, sold the collateral securities of the grocery company which had been pledged to it, and purchased same at its own sale for the sum of five hundred dollars, which was credited on the note; that the said defendant bank thereafter disposed of some of said securities for about five thousand and five hundred dollars, and now wrongfully holds the remainder of said securities.

The plaintiff's prayer is that he recover of defendants $5,500, less $500, and that the remainder of said securities be delivered up.

The answer of defendants denies that plaintiff is the owner of the described securities, and alleges that the defendants are the rightful owners thereof; that the note of the grocery company was not paid; that the Page Trust Company was the lawful owner of said securities, and that it lawfully and properly advertised and sold same on 24 February, 1933, and defendants purchased same for the fair and reasonable value of same at that time. It is further alleged in the answer that the plaintiff purchased from the trustee in bankruptcy for $200.00 only the choses in action which had arisen out of the open accounts of the bankrupt, and that plaintiff's purchase did not include the securities described in the complaint, and that he never acquired title thereto.

It is obvious from an examination of the pleadings that issues are therein raised which are determinative of the entire controversy, and that the litigated question of title to the described choses in action must first be decided before a compulsory reference may properly be ordered to state an account between the parties. *Austin v. Stewart,* 126 N. C., 526; *Commissioners v. White,* 123 N. C., 534.

It must be held for error to order a reference, over objection of defendants, before the pleas in bar set up in the answer have been properly determined.

Reversed.

CHOATE RENTAL COMPANY v. E. R. JUSTICE, TRADING AS JUSTICE HOTEL,

and

CHOATE RENTAL COMPANY v. E. R. JUSTICE, TRADING AS SILVER DIME CAFE.

(Filed 16 December, 1936.)

**1. Ejectment § 5—**

Although an agent of the lessor may make the oath in writing required in summary ejectment, C. S., 2367, the action must be prosecuted in the name of the lessor as the real party in interest, C. S., 446, and it may not be maintained in the name of the lessor's rental agent.

**2. Parties § 1—**

The requirement that an action must be maintained by the real party in interest, C. S., 446, means some interest in the subject matter of the litigation and not merely an interest in the action.

**3. Trial § 21—**

Where defendant moves for nonsuit after the close of plaintiff's evidence but fails to renew the motion after the introduction of his evidence, he waives his motion and is not entitled to have the action dismissed thereon. C. S., 567.

APPEAL by the defendant from *Harding, J.*, at May Term, 1936, of MECKLENBURG. New trial.

There were two actions in summary ejectment instituted before a justice of the peace under C. S., 2367, by the same plaintiff against the same defendant for different portions of the same building. From judgment in the justice of the peace court, adverse to it in each case, the plaintiff appealed to the Superior Court. In the Superior Court the cases were consolidated for trial in accordance with stipulation entered into by counsel for plaintiff and defendant, and were tried upon the following issue:

"Is the plaintiff entitled to immediate possession of the property in controversy set out in the complaint?"

The jury answered the issue in the affirmative, and from judgment based upon the verdict the defendant appealed to the Supreme Court, assigning error.

*Taliaferro & Clarkson for plaintiff, appellee.*
*G. T. Carswell and Joe W. Ervin for defendant, appellant.*

SCHENCK, J. The evidence of the plaintiff established that the Life Insurance Company of Virginia was the owner of the demised premises from which it was sought to eject the defendant, while the actions were

instituted in the name of Choate Rental Company, which was the rental agent of the Life Insurance Company of Virginia, and the affidavits prescribed by the statute were made by "Choate Rental Company by Jno. G. Turner," and John G. Turner "worked for" and "collected rents for" the Choate Rental Company.

The following excerpt from his Honor's charge is made the basis of an exceptive assignment of error: "And the court charges you, gentlemen of the jury, that if you believe the evidence and all of it and find the facts to be true as testified to by the witnesses, under all of the evidence, it would be your duty to answer the issue 'Yes.' You can answer the issue, gentlemen."

This assignment of error presents the question brought forward in the brief as to whether these actions in summary ejectment can be maintained in the name of the Choate Rental Company, rental agent, when the property is owned by the Life Insurance Company of Virginia.

C. S., 2367, prescribes the manner of removal by his landlord of any tenant who remains in the demised premises after the expiration of his lease, as follows: "When the lessor or his assigns, or his or their agent or attorney, makes oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the above cases described, and describing the premises and asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time, . . . to answer the complaint."

While the statute clearly provides that the agent or attorney of the lessor may make the oath in writing required in actions in summary ejectment, it does not, in our opinion, provide an exception to the requirement of C. S., 446, that "every action must be prosecuted in the name of the real party in interest."

In speaking of section 55 of the Code of Civil Procedure, which was substantially the same as C. S., 446, *Ruffin, J.*, says: "Under The Code there is no middle ground; for whenever the action can be brought in the name of the real party in interest, *it must be so done.*" *Rogers v. Gooch,* 87 N. C., 442.

A real party in interest is a party who is benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. The real party in interest in this action is the Life Insurance Company of Virginia and not its rental agent, the Choate Rental Company, and it was, therefore, error to charge the jury that under all the evidence they should answer the issue in the affirmative.

The defendant is not entitled to have the actions dismissed on his motion to dismiss upon the evidence for the reason that the motion was not renewed at the close of all the evidence, but lodged only at the close of the plaintiff's evidence. The introduction of evidence by the defendant constituted a waiver of the motion in absence of a renewal thereof. C. S., 567. *Bordeaux v. R. R.,* 150 N. C., 528; *Wooley v. Bruton,* 184 N. C., 438.

For the error assigned, the defendant is entitled to a

New trial.

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EAST COAST FERTILIZER COMPANY, INC., v. NORMAN F. HARDEE.

(Filed 16 December, 1936.)

**1. Reference § 4a—Where judgment on report expressly reserves cause for jury trial on issue of fraud, and is unexcepted to, the provision for jury trial may not be disregarded by another judge of Superior Court.**

This cause involving plaintiff's claim for goods sold on consignment and defendant's alleged conversion of the proceeds was referred to a referee by consent. Upon the filing of the report by the referee, judgment was entered for plaintiff for a stipulated sum in accord with the report, and the cause was expressly retained for jury trial upon the issue of fraud raised by the pleadings. No exception was entered to this judgment and no appeal taken. At a subsequent term, plaintiff's motion for a jury trial was refused on the ground that the consent reference waived the right to have any of the matters tried by jury. *Held:* The judge of the Superior Court at the later term was without authority to disregard the express provision of the judgment entered at the prior term that the cause be retained for jury trial on the issue of fraud, there being no exception to the judgment or appeal therefrom, and the judgment being *res judicata* as to the matters therein determined.

**2. Courts § 3—One Superior Court judge may not review judgment of another.**

A judge holding a succeeding term of the Superior Court has no power to review or disregard a judgment affecting substantial rights entered at a former term by another judge upon the ground that such judgment is erroneous, since a judgment may be reviewed for error only upon appeal to the Supreme Court upon exceptions duly noted.

APPEAL by plaintiff from *Parker, J.,* at April Term, 1936, of NEW HANOVER.

The action was instituted to recover balance due for commercial fertilizers sold on consignment, alleging fraudulent conversion of the proceeds.

By consent, the cause was referred to Kenneth O. Burgwin "to hear the testimony of all the parties, to render an accounting, and to report his findings of fact and conclusions of law to the court."

The referee duly reported his findings of fact and conclusions of law, in which he found that defendant was indebted to the plaintiff in the sum of $907.58, and concluded that plaintiff was entitled to judgment therefor. No exceptions to said report were filed by either party.

At May Term, 1935, of said court, Frizzelle, J., entered judgment in favor of the plaintiff and against the defendant in accord with said report, and added, as a part of said judgment, the following: "It is further ordered and adjudged that the issue of fraud arising on the pleadings be and same is hereby retained on the civil issue docket to be submitted to a jury at a subsequent term of the Superior Court of New Hanover County, and this cause is retained for further orders."

No exception was made to the judgment of Judge Frizzelle and no appeal was taken therefrom. Counsel for defendant was not present when the judgment was signed, though notified the cause was on the calendar for judgment.

At April Term, 1936, Judge Parker presiding, plaintiff moved for trial by jury of the issue of fraud, and the defendant objected. Thereupon, the court, after setting out the facts in full, entered the following order:

"The court being of the opinion that a reference of a cause made by consent is a waiver of the right of trial by jury, and neither party can afterwards demand a jury trial as a matter of right, nor has the judge the power, at his discretion and against the will of either party, to set aside or discontinue an order of reference entered by the written consent of the parties, the motion of the plaintiff is hereby denied."

The plaintiff excepted to this order and appealed to this Court.

*E. K. Bryan and Hackler & Allen for plaintiff, appellant.*
*S. H. Newberry and J. Frank Wooten for defendant, appellee.*

DEVIN, J. The only question presented by this appeal is the validity of the order of Judge Parker denying plaintiff's motion for jury trial upon an issue in the cause, which, by the judgment of Judge Frizzelle, had been ordered retained on the civil issue docket for that purpose.

While the reference ordered by Frizzelle, J., in the first instance, was by consent, it may be open to debate whether the order to the referee to "hear the testimony, render an accounting, and report his findings" contemplated the consideration and decision by him of the issue of fraudulent conversion raised by the pleadings. But, however that may be, the judgment of Judge Frizzelle, at April Term, 1935, confirming

the report of the referee, definitely ordered that the issue of fraud arising on the pleadings be retained on the civil issue docket for jury trial at a subsequent term; and, even if this portion of the judgment was erroneous, no exception was noted thereto nor appeal taken. The judgment was not void. It could not be treated as a nullity. It could not be set aside as erroneous at a subsequent term by another judge.

In *Edwards v. Perry,* 206 N. C., 474, a similar question was so decided by this Court. In that case there was an order of reference by consent. At a later term an order was made by Judge Harris, by consent, that certain issues be submitted to a jury. Subsequently, at another term, by order of Judge Barnhill, then presiding, the order of Judge Harris was disregarded on the ground that a jury trial was not in order, as the original reference was by consent and both parties had waived their rights to a jury trial. This was held to be error.

The decision in *Edwards v. Perry, supra,* is determinative of the question here. It is well settled that a decision of one judge of the Superior Court is not reviewable by another judge. Since the power of one judge is equal to and coördinate with that of another, a judge holding a succeeding term of the Superior Court has no power to review or disregard a judgment rendered at a former term affecting substantial rights upon the ground that such judgment is erroneous. *Wellons v. Lassiter,* 200 N. C., 474; *Caldwell v. Caldwell,* 189 N. C., 805; *Dockery v. Fairbanks,* 172 N. C., 529; *Bland v. Faulkner,* 194 N. C., 427; *Rutherford College v. Payne,* 209 N. C., 792.

A judgment of the Superior Court, rendered in term by the judge, can be reviewed for error only upon appeal to the Supreme Court upon exceptions duly noted. *S. v. Lea,* 203 N. C., 316; *Power Co. v. Peacock,* 197 N. C., 735; *Phillips v. Ray,* 190 N. C., 152; *Live Stock Co. v. Atkinson,* 189 N. C., 250; *May v. Lumber Co.,* 119 N. C., 96; *Roulhac v. Brown,* 87 N. C., 1.

The judgment of Judge Frizzelle at April Term, 1935, not having been excepted to or appealed from, became *res judicata.* To sustain the order of Judge Parker at April Term, 1936, would result in inconsistent adjudications on the same subject matter, which this Court has consistently sought to prevent by the enforcement of the rule herein stated. *S. v. Evans,* 74 N. C., 324; *Wilson v. Lineberger,* 82 N. C., 412; *Scroggs v. Stevenson,* 100 N. C., 354; *Cobb v. Rhea,* 137 N. C., 295; *Broadhurst v. Drainage Comrs.,* 195 N. C., 439; *Power Co. v. Peacock, supra; Revis v. Ramsey,* 202 N. C., 815; *Myers v. Causeway Co.,* 204 N. C., 260.

We conclude that the learned judge was in error in denying plaintiff's motion for trial by jury of the issue of fraud arising on the pleadings, as required by the judgment in the cause rendered at a previous term of the court.

Reversed.

STATE v. OLLIE BEAN.

(Filed 16 December, 1936.)

**Criminal Law § 50—Interrogatories by court addressed to defendant testifying in his own behalf held for error as expression of opinion on evidence.**

Defendant, charged with homicide, testified as to his version of the fatal killing upon his contention of self-defense, and narrated the actions of himself, his oldest son, and the deceased. Upon the conclusion of his testimony the court, by interrogation objected to by defendant's counsel, brought out the fact that the son was seventeen years old, and was present in the courtroom. In his charge the court set forth the contention of the State that defendant's testimony could not be relied upon because uncorroborated, notwithstanding the fact that defendant's oldest son, who saw what happened, was present in the courtroom. *Held:* Although the prosecuting attorney might impeach defendant's testimony by developing the fact that defendant's son was not called as a witness to corroborate defendant's testimony, the interrogatories by the court to the same effect, emphasized by the statement of the State's contentions, constitute reversible error, the statute, C. S., 564, inhibiting an expression or showing of opinion by the court as to whether a fact is fully or sufficiently proven by interrogation as well as by statement or action.

APPEAL by defendant from *Phillips, J.*, at May Term, 1936, of MOORE. New trial.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*J. H. Scott and W. R. Clegg for defendant, appellant.*

SCHENCK, J. This is an appeal from a judgment of imprisonment upon a conviction of manslaughter.

The State's evidence tended to show that the defendant shot and killed the deceased near the home of the defendant, and that the defendant told the witness, Mrs. Adeline McNeill, that "Andrew (the deceased) didn't see me and there wasn't a word spoke—said Edward (son of the defendant) had been out to the chicken house and told him (defendant) that he (deceased) was coming with a gun and he (defendant) went in the kitchen and cracked the door open, and when he (deceased) got even with the well he downed him (deceased), and he fell like a beef shot, and there wasn't a word spoken and Andrew (the deceased) didn't see him (defendant) when he shot."

The defendant admitted that he fired the fatal shot, and relied principally upon his own testimony to establish his plea of self-defense. The defendant testified that about 3:30 o'clock in the afternoon of 31 Decem-

ber, 1935, Andrew Comer, the deceased, came to his home and cursed and abused the defendant, and that about 7:00 o'clock of the same day his oldest boy had been out to the chicken coop and he (defendant) went into the cook room and "saw Mr. Comer coming before he got to the wagon shelter and he stopped there and viewed the house I guess for a couple of minutes. I was in the door with no light in the room; the light was in the other part of the house and so he come up the path where we had drug the snow off, right by the steps, and placed himself under the well shelter, or the shadow of it. . . . It was a very bright moon-shining night and I could see Mr. Comer as he approached the house, and he was carrying that gun there. Comer hailed me, 'Hey, come out!' I recognized his voice; it was Andrew Comer's voice. When I spoke, I says, 'Hey!' And when I spoke he riz with his gun stooped over like this. He was standing behind the well, and I saw his gun, and I shot him. I shot him when he was raising the gun and pointing it right towards me. He could see me from where he was and I could see him from where I was.

"After I shot he fell and I stood there for about two minutes, then I went out to where he was and he was breathing; wasn't any further down than his throat. I went back in the house and sent my boys after a doctor and the law."

The following appears in the record:

"By the court: How old is your oldest boy?

"A. Seventeen years old in September.

"Q. Is he here?

"A. Yes, sir.

"To the foregoing questions and answers the defendant objects; objection overruled; defendant excepted."

His Honor charged the jury that "The State insists and contends, gentlemen of the jury, that there were people there who knew about the facts; that there was a 17-year-old boy who the defendant himself says knew all about the circumstances; that he was the one who notified the defendant that the deceased was coming; that he was the one who notified him that the deceased had a shotgun; that he was the one who notified him of the deceased's approach, and that he was here in the courtroom in your presence and was not called by the defendant to testify as to these material facts when the burden of proof was upon him."

The exception must be sustained, as the questions propounded by the court to the defendant clearly had the effect of impeaching his testimony as a witness in his own behalf, and were, therefore, in violation of C. S., 564. *S. v. Winckler,* 210 N. C., 556, and cases there cited. That these questions had this effect is emphasized by the fact that the court in the charge set forth as a contention of the State that the testimony of the

defendant could not be relied upon because it was uncorroborated, notwithstanding the fact that the oldest boy of the defendant, who saw what happened, was present in the courtroom, and was not called to testify.

The failure of the defendant to avail himself of the opportunity to place his son upon the stand in corroboration of his own testimony was a fact proper for the prosecuting attorney to develop, since partisan counsel are permitted to impeach the testimony of any adverse witness, but this right to impeach a witness does not extend to the trial judge, who is inhibited by the statute from giving "an opinion whether a fact is fully or sufficiently proven," and this inhibition is against expressing or showing such an opinion by interrogation, as well as by statement or action.

For the error assigned, the defendant is entitled to a

New trial.

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STATE v. TOY NALL.

(Filed 16 December, 1936.)

**1. Criminal Law § 18—**

Under the plea of not guilty the defense of insanity and every other defense to the charge in repelling, mitigating, or reducing the offense to a lower grade is admissible.

**2. Criminal Law § 7—Defendant may testify as to injuries received by him and their effect on his mind upon his plea of insanity.**

Testimony by defendant as to injuries received by him and the effect of such injuries upon his mind and ability to know what he was doing is competent upon his plea of insanity as tending to establish facts from which the jury might infer, in connection with other evidence, that defendant was insane, and the exclusion of his testimony is reversible error.

**3. Criminal Law § 31b—Witness held to have shown sufficient observation of defendant to testify as to defendant's mental irresponsibility.**

A nonexpert witness who testifies that he had known defendant all his life and had a number of conversations with him, but that he had not talked with him much during the prior year, but who has an opinion satisfactory to himself from his observation of defendant as to defendant's mental condition, is competent to give his testimony on the question, and the exclusion of his testimony that defendant was irresponsible for his actions is reversible error upon defendant's exception.

**4. Criminal Law § 81d—**

Where a new trial is awarded upon certain exceptions, other exceptions relating to matters not likely to arise upon a subsequent hearing need not be determined.

STATE *v.* NALL.

APPEAL by the defendant from *Phillips, J.,* at May Term, 1936, of MOORE. New trial.

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

*J. H. Scott and W. R. Clegg for defendant, appellant.*

SCHENCK, J. This is an appeal from a judgment of death based upon a conviction of murder in the first degree.

The defendant entered a plea of not guilty. After testifying that the fatal shot was fired by another person than himself, the defendant, through his counsel, announced to the court that he pleaded insanity, that is, the defendant pleaded not guilty, first, upon the ground that he did not commit the act, and, second, upon the ground that if the jury should find he committed the act, that he was not responsible for the reason that he was insane. Under the plea of not guilty, the defense of insanity and every other defense to the charge in repelling, mitigating, or reducing the offense to a lower grade was admissible. *S. v. Potts,* 100 N. C., 457. "Insanity at the time of the homicide could, of course, be set up as a defense on the other issue as to the prisoner's guilt." *S. v. Sandlin,* 156 N. C., 624.

The following appears in the record of the defendant's testimony as a witness in his own behalf:

"I was hit on the head with a baseball bat at West End about eight years ago and have been hit in the head with an axe twelve years ago and I had the measles to settle in my head.

"Q. What effect, if any, have those things had on your mind?" Objection by the State sustained, exception.

"Had he been permitted to do so, the witness would have testified substantially as follows: They have had a bad effect on my mind. Sometimes I lose all my sense of recollection and do not know what I am doing and I cannot remember what I have done during the time my mind is gone away from me. There have been hours at a time when I did not know a thing."

This evidence as to the injuries received by the defendant and the effect of such injuries upon his mind and ability to know what he was doing was competent upon the plea of insanity, since it tended to establish facts from which, when taken into consideration with other evidentiary facts, the jury might have inferred that the defendant was insane, and its exclusion was error.

In the record of the testimony of C. J. Smith, called as a witness for the defendant, the following appears:

"I live at Putnam, where I was raised, but have been away until about a year ago. I am a locomotive engineer and have known Toy Nall all his life. I have had an opportunity to observe his mental and physical condition since I have been acquainted with him. I have talked with him but have not had much conversation with him in the last year, but until that time I had had quite a number.

"Q. What has been your observation of his mental and physical condition?" Objection by the State sustained, exception.

"Q. Mr. Smith, have you got an opinion satisfactory to yourself as to his mental condition?" Objection by the State sustained, exception.

"Had he been permitted to do so, the witness would have answered that he had an opinion satisfactory to himself as to the mental condition of the defendant, and would have testified that from his observation of him and his knowledge of him through observation and conversation that he was not mentally competent, but was irresponsible for his action."

The exclusion of this evidence was error. A person, though not an expert, who has had opportunity to observe the defendant, and who has an opinion satisfactory to himself, is competent to express his opinion as to the defendant's sanity or insanity. *S. v. Banner,* 149 N. C., 519; *S. v. Journegan,* 185 N. C., 700; *S. v. Hauser,* 202 N. C., 738.

For the exclusion of the proffered evidence the defendant is entitled to a new trial, and since this is so, no useful purpose can be served by comment upon the other assignments of error in the record, as the questions presented thereby are not likely to arise in another trial.

New trial.

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STATE v. LATTIMER B. SPAULDING.

(Filed 16 December, 1936.)

**Receiving Stolen Goods § 2—Charge must direct that guilty knowledge, express or implied, must exist at time of receiving stolen property.**

Knowledge that the goods were stolen at the time of receiving them is an essential element of the offense of receiving stolen goods, and although guilty knowledge may be inferred from incriminating circumstances, a charge that such knowledge might be actual or implied, without specifying that it would have to exist at the time of the receiving, is erroneous.

APPEAL by defendant from *Parker, J.,* at May Term, 1936, of NEW HANOVER.

Criminal prosecution, tried upon warrant charging the defendant with "receiving stolen goods knowing them to have been stolen," cigars, etc.,

of the value of $10.00, the property of Fannie Burnett. The warrant was amended in the Superior Court with a view to charging a violation of C. S., 4251.

The evidence on behalf of the State tends to show that the defendant is a merchant in the city of Wilmington; that on 6 April, 1935, he purchased from one Henry Brown a box of Lillian Russell cigars, some smoking tobacco, and twelve packages of raisins, for $1.25, which the said Brown had stolen from Fannie Burnett. The retail price of said cigars is "two for a nickel," and the raisins sell for five cents a package. The defendant's "reputation is bad for handling stolen goods and whiskey."

The defendant offered evidence in denial of the State's case.

Verdict: "Guilty of receiving stolen property, knowing it to have been stolen, as charged in the warrant."

Judgment: Four months on the roads.

Defendant appeals, assigning errors.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Herbert McClammy for defendant.*

STACY, C. J. Touching the question of *scienter,* the court instructed the jury as follows: "It is necessary to establish either actual or implied knowledge. . . . This knowledge that the goods were stolen may be actual or it may be implied. . . . The test is as to the knowledge, actual or implied."

This instruction, it would seem, was prejudicial to the defendant. *S. v. Morrison,* 207 N. C., 804, 178 S. E., 562. True, the jury is at liberty to infer guilty knowledge from circumstances justifying the inference, *S. v. Wilson,* 176 N. C., 751, 97 S. E., 496, but the knowledge inferred must be such as to bring it within the condemnation of the statute. *S. v. Lowe,* 204 N. C., 572, 169 S. E., 180; *S. v. Stathos,* 208 N. C., 456, 181 S. E., 273, properly interpreted, is accordant herewith.

Knowledge that the goods were stolen at the time of receiving them is an essential element of the offense. *S. v. Barbee,* 197 N. C., 248, 148 S. E., 249; *S. v. Dail,* 191 N. C., 231, 131 S. E., 573; *S. v. Caveness,* 78 N. C., 484.

The sufficiency of the warrant, as amended, is not questioned.

New trial.

W. A. SMITHERMAN v. MORRIS PLAN BANK OF GREENSBORO, N. C., E. C. McLEAN, TRUSTEE, GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, ON RELATION OF MORRIS PLAN BANK OF GREENSBORO, N. C., JOSEPH G. RUTLEDGE, LIQUIDATING AGENT OF MORRIS PLAN BANK OF GREENSBORO, N. C.; W. D. BARTLETT, BERTHA F. BARTLETT, AND A. W. SAPP, TRUSTEE, AND J. F. STEVENS, TRUSTEE.

(Filed 16 December, 1936.)

**1. Appeal and Error § 45e—**

Plaintiff's appeal from judgment of nonsuit presents the question whether plaintiff's evidence, taken in its most favorable light for him, is sufficient to entitle him to have it submitted to the jury.

**2. Mortgages § 39e—Evidence held sufficient to be submitted to jury in trustor's action for damages for wrongful foreclosure.**

Evidence that after substantial payments on the debt secured by the deed of trust, the *cestui* took possession of the property and collected the rents and profits, with demand for an accounting upon allegation that the rents were sufficient to pay the balance of the debt, *is held* sufficient to overrule the *cestui's* motion to nonsuit in the trustor's action for damages for wrongful foreclosure, although the intervention of the rights of innocent purchasers for value precludes trustor from setting aside the foreclosure.

APPEAL by plaintiff from *Rousseau, J.*, at April Term, 1936, of GUILFORD. Reversed.

The action was instituted to recover damages for alleged wrongful foreclosure of deed of trust on plaintiff's land, and for an accounting for payments and rents collected by defendants from plaintiff's land, alleged to have been sufficient to have paid the debt.

The defendants' answer alleges that the foreclosure was legal and proper, that it was duly advertised, and that the amount at which it was bid off, including taxes, was less than the debt due defendant bank, and that the title to the land has since been conveyed to innocent purchasers for value.

At the close of the evidence motion for judgment of nonsuit was sustained, and plaintiff appealed.

*N. L. Eure and Hoyle & Hoyle for plaintiff, appellant.*
*York & Boyd for defendants Morris Plan Bank of Greensboro et al.*
*Thos. J. Hill for defendants W. D. Bartlett and Bertha F. Bartlett.*

DEVIN, J. The plaintiff's appeal from the judgment of nonsuit presents the question whether the plaintiff's evidence, taken in its most favorable light for him, is sufficient to entitle him to have it submitted to the jury.

From the record before us, it appears that the plaintiff offered evidence tending to show that he borrowed from the defendant bank, in 1930, $2,000; that on 1 October, 1932, the amount had been reduced to $980.00; that thereafter he paid $100.00 at one time and $15.00 every two weeks until 5 April, 1933, when at the instance of defendant bank he turned over the rents on his property to be applied on the note; that the rents were thereafter collected each week by defendants; that in February, 1935, he was informed that the property had been sold in foreclosure under the deed of trust; that he had had no notice of foreclosure; that if he had, he would have arranged it; that ten dollars per week was collected from the rents.

Conceding that pursuant to the foreclosure sale the title to the property has passed to an innocent purchaser for value, it is apparent that the evidence of the plaintiff was sufficient to have entitled him to have it submitted to the jury under appropriate instructions, at least on the question of accounting with defendant bank and its successor, the defendant Commissioner of Banks, and there was error in entering judgment of nonsuit.

The judgment of nonsuit must be

Reversed.

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STATE v. ALFRED PUCKETT.

(Filed 6 January, 1937.)

**1. Criminal Law § 56—Motion in arrest of judgment will not be allowed for defects in indictment which do not vitiate.**

Defendant was tried for murder under an indictment charging disjunctively murder with malice, premeditation, and deliberation and murder in the perpetration of a robbery. C. S., 4614. After the return of a verdict of guilty of murder in the first degree, defendant moved in arrest of judgment for that the indictment was alternative, indefinite, and uncertain. *Held:* Although the indictment was alternative, either charge constituted murder in the first degree, C. S., 4200, informing defendant of the crime charged, and defendant's remedy, if he desired greater certainty, was by motion for a bill of particulars, C. S., 4613, or to require the solicitor to elect at the close of the evidence, but the charge in the alternative was not a vitiating defect, and the motion in arrest after verdict was properly denied, such motion being available only for vitiating defects upon the record proper. C. S., 4625.

**2. Homicide § 14—Indictment charging disjunctively premeditated murder and murder in perpetration of robbery held not void for uncertainty.**

An indictment charging defendant disjunctively with murder committed with malice, premeditation, and deliberation and with murder committed in the perpetration of a robbery, is not void for uncertainty, since either charge constitutes murder in the first degree, and defendant's remedy, if

he desires more specific information in order to prepare his defense, is by motion for a bill of particulars, C. S., 4613, but a motion in arrest of judgment after a verdict of guilty of murder in the first degree, is properly denied.

**3. Homicide § 20—Evidence that defendant had same amount of money after crime that was on person of deceased held competent.**

Evidence that prior to the commission of the homicide deceased had a certain amount of money on his person, largely in twenty-dollar bills, which was gone after the commission of the crime, and that prior to the crime defendant was without money, but that soon thereafter he had about the same amount of money that was missing from the person of the deceased, and that the money in defendant's possession was largely in twenty-dollar bills, *is held* competent, in connection with the evidence identifying defendant as the perpetrator of the crime, to show that the motive of the crime was robbery as charged in one count of the bill of indictment, the weight and credibility of the evidence being for the jury.

**4. Homicide §§ 2, 27a—Charge on aspect of guilt of each person taking part in robbery in which victim was killed held sufficient.**

The State's evidence tending to show that defendant, in company with two others, went to a filling station with the purpose of robbing the owner, that in execution of their purpose, all being present and participating in the crime, the owner was killed. The court charged the jury that defendant would be guilty of first degree murder even if one of the others fired the fatal shot, if it was fired in the execution of their unlawful conspiracy and agreement. Defendant excepted on the ground that the court did not define "conspiracy." *Held:* The exception cannot be sustained, in the absence of a special request for instructions, the term "conspiracy" being used synonymously with "agreement," and the charge being clear and easily understood, and defendant being guilty of murder in the first degree under the evidence regardless of the existence of a technical conspiracy.

**5. Criminal Law § 53d—**

In the absence of a special request for instructions, the failure of the charge to define certain terms constituting a subordinate feature of the charge will not be held for error.

APPEAL by defendant from *Rousseau, J.*, and a jury, at July Term, 1936, of RICHMOND. No error.

The defendant was indicted with Foyle M. Cox and Paul Mackey for the murder, on 2 May, 1936, of Roy Rhyne. The defendant was convicted of murder in the first degree and duly sentenced to be gassed in accordance with law. Cox submitted to murder in the second degree. Paul Mackey has not been taken.

The bill of indictment is as follows:

"STATE OF NORTH CAROLINA—SUPERIOR COURT.
RICHMOND COUNTY—JULY TERM, 1936.

"The jurors for the State, upon their oath, present: That Alfred Puckett, Foyle M. Cox, and Paul Meckling, *alias* Paul Mackey, late of

the county of Richmond, on the 2nd day of May, 1936, with force and arms at and in the county aforesaid, willfully, unlawfully, and feloniously, with premeditation and deliberation, and of their malice aforethought, or while engaged in the perpetration or attempted perpetration of robbery, did kill and murder one Roy Rhyne, against the form of the statute in such case made and provided, and against the peace and dignity of the State. PRUETTE, *Solicitor.*"

The deceased, Roy Rhyne, ran a service station and had a tourist camp two and a half miles west of the town of Rockingham, on State Highway No. 74, formerly No. 20.

Lee Morse testified for the State, in part: "I worked for Roy Rhyne 2 May, 1936, and had been off and on for four and a half years. . . . Roy and I were at the filling station the afternoon of 2 May. I was about 15 steps from it lying on a single bed or cot, and Roy was sitting on it—the side towards Rockingham. About 4:45 or 4:30 Roy said there was a car at the front, and I told him to wait on it, I was tired. He said 'O.K.' and I saw him go in the back door of the station. Red Puckett (Alfred Puckett, defendant) comes from the opposite side and walks in back of Roy about three feet, and when I walks in Roy called me—called me before I went in. Neither had a gun in sight then. When this other fellow I identified as Swain—of course, I could be mistaken, covered me, Roy there grabbed at the barrel of the gun, when Puckett told him to give him his cash. Roy was two feet from the side door of the station (pointing out). Puckett was about two and a half feet from Roy when he threw the gun, in about two and a half feet of Roy when I walked in, and I got in three feet of Puckett when he grabbed his gun. Roy backed to the side door and went in his room. When I got inside the door Puckett began shooting and shot twice. He had Roy by the shoulder and put the gun in his stomach the last time I saw him. Three shots were fired; I saw the first one; it did not hit Roy. I examined the building later to see where the bullets went in, and found signs, one in the bedroom facing of the north window, and one right below it about eight inches. I heard Roy fall and in two or three seconds Puckett comes out of that side room. I looked back at him but was scared to move away from this other man, Swain, and he said, 'I have killed that one in there,' and he ran his hand in my pocket and said, 'I had better search you,' and turns and walks out the back door and told this other fellow Swain to 'make him throw up his hands and walk to the back door and not look back,' and naturally I did it. When Puckett went out the back door and told me to march out after he got out I went and marched out, and I heard the front door screen slam, heard the motor start up, and I went to the side of the filling

station to see what kind of car they were in. I did not see but two men in the car and saw them in a '36 Buick. Looked like they were taking off with as much speed as a car could do. . . . I went in and looked at Roy and seen he was dead, and I drove to Five Points and called the sheriff. . . . There was a pistol at the station that day, under the pillow in my bedroom, in the front room on the left as you go in the station; saw it 30 or 40 minutes before it took place. After Puckett left I looked and it was not there. Roy got that pistol from Mr. Finch; saw him deliver it. . . . The other man was across the show case and had a .45 in my face. They took between $41 and $46 off of me, part in paper, part in silver. Do not know whether Mr. Rhyne had any money on his person that day; saw him with a pretty good roll on him Friday morning; looked like a lot of twenties. Don't know how much he had. Saw a lot of twenties Friday when I checked the money with him and gave him some money." The witness, Lee Morse, was asked: "How much money did you see him count out there in your presence?" The defendant objected; the objection was overruled, and he was permitted to answer: "It looked like $800 or $900; that was Friday, the day before. After he was shot, Mr. King, the coroner, searched him, in my presence, and found $1.00 on his person. Both his hip pockets were turned right side outwards. Rhyne carried his money in his left hip pocket. His pocketbook was not on his person after he was shot. . . . I sold whiskey in this station; not such large quantities; do not know how much I would sell on an average each week; I would keep up with it. I could not say how many gallons a week we sold; sold liquor and not beer; kept it in different places under the ground. Had no license; handled liquor and got a profit out of it."

Foyle M. Cox testified, in part: "I lived at Fayetteville, N. C., on 2 May, 1936, this year; operated the Blue Moon Filling Station on the Lumberton road, a mile and a half or two miles from Fayetteville. Rex Swain was my partner. I was indicted in this case with defendant Puckett and entered a plea of guilty in the second degree. I saw Red Puckett on Saturday, 2 May, this year, at the filling station, around noon. Do not know where his home was, but he came to the filling station a week before this; I had known him about a week. He came out by the house and I had not got up. He called me and told me he wanted me to go off with him and I got up and carried my wife and Swain's sister to town to the beauty parlor and told her if I was not there when she got through to meet me at Doc Bennett's; it is a mile or more from the Blue Moon. I went back to Doc's and Puckett came while I was there, with a man called Paul, in a Plymouth sedan. . . . Swain was driving a '36 Ford Coach, black. Puckett said come on and

let's go; one of them stated that. I made no inquiry as to where they were going, but got in the Plymouth with them, headed towards Lumberton. Puckett was driving. We came on down to Jerome Pate's, a mile from the Blue Moon, and met Swain coming from Lumberton. We stopped and talked with him a while about the two automobiles. Puckett asked Swain about driving his car, as he wanted to try it out, and Puckett told Swain he was figuring on trading his car off, and Swain told him he could have the car provided he would let me drive, and Swain took the Plymouth and Puckett the V-8, and Puckett drove to Maxton and Laurinburg and Hamlet and Rockingham; nothing was said as to where we were going. We first stopped at Five Points, in the western edge of Rockingham. We ate barbecue and drank a can of beer apiece at a place on the left-hand side of the road at the forks of the road at Five Points. Puckett did not say there where we were going. We left the place in the car and he said, 'Let's go and get that money'; him and the other fellow were talking; the fellow called Paul. . . . Nothing was then said as to where we would go or what we would do. When we got back to Roy's filling station the car was stopped in the center of the driveway that entered into the cabins on the Rockingham side of the filling station. The only thing that was said was by Paul, 'Stay in the back.' I had been riding in the back seat and Paul in the front. Puckett and Paul got out and I was told to get under the steering wheel and not to leave it, and I did not get out of the car. They both went in the filling station. Roy was lying on the cot there. He went in the back. . . . I could hear some talking but could not hear what was said; heard a fuss and it sounded like chairs turned over and heard someone say, 'Ah, Lee'; that is Lee Morse; heard someone say, 'Stand still,' and then another gun fired and I heard someone else say 'Stand still.' I could not recognize the voices; heard two shots only, fired just a few seconds between the two reports. After the last shot, saw Puckett come from the back of the station from the side towards Rockingham; he came on around the car and said, 'Are you ready to go?' and someone answered, 'Yes,' and he said, 'Come on.' I saw the other man come out of the station backwards with a gun in his hand. Puckett came out with two and a half pints of Wilson whiskey both in one hand and I saw a gun in his belt. Puckett had on a coat. He did not say anything to me until he had called the other fellow out of the station. Paul got in the car first, in the back. Puckett told me, 'Drive and drive like hell,' and 'I shot him in the arm,' and Paul slapped his hands together and said, 'You are damn right'; said, 'If you ever tell this I will put one through you'; said, 'I killed him.' Paul said that. From Five Points I turned towards Ellerbe to West End, in Moore County, and stopped for gas and to get some water for the radiator. It was a

Standard station. I poured water in the radiator and busted two cylinder heads. I stayed at West End a few minutes and headed north, about 50 yards, and pulled to the right towards Carthage; went across to a cross-roads that said '11 miles to Carthage'; and took the right-hand and came out through Pinehurst, Taylortown, a colored section there. Did not stop at Pinehurst; went straight down the highway towards Laurinburg, going through Aberdeen without stopping and saw officers as we passed through standing at the forks of the road, one coming towards Rockingham and the other going towards Pinehurst, and headed from Aberdeen towards Raeford. The car broke down four miles from Raeford."

The above evidence was corroborated in every respect as to the identity of the defendant and in detail. The car "was going over the hill towards Raeford, traveling at a high rate of speed, 65 to 70 miles an hour," defendant speeding to avoid detection.

Sultan Penny testified, in part: "I live at Laurinburg, but worked at the Blue Moon Filling Station on 2 May, this year. It was in control of Rex Swain and Foyle Cox. I had been knowing Red Puckett about two weeks. I had been there about two or three weeks and Puckett had come four or five times. Saw him three times on Saturday, 2 May, the first time before dinner at a crap game at the filling station, in which there were so many I could not count them. Puckett said he lost what he had. When he walked out of the station he said, 'I got to go uptown and see my trigger-man; when I come back I will have some money.' Right after he left, I went out to the house and had some dinner. Red came back between 2:00 and 2:30, asked me where Jim Cox was at. Jim Cox was at the house then and I went there and told him Red Puckett wanted to see him. . . . I next saw him between 8:00 and 8:30 that night at the Blue Moon. Some fellow was with him, whom Puckett called Paul. Puckett first come out and asked me was there any whiskey there and I told him yes, and he said bring me a drink, and I got a 16-ounce pint of whiskey and carried it out and Red took the first drink and left about an inch in the bottle, a big pint is what you call it, and he handed it to this fellow Paul and he drank the rest. . . . He (Puckett) come in the station and started counting out his money and said, 'Well, I got plenty of damn money to gamble with.' I counted $720.00. There were 40 one-dollar bills, a bunch of fives and tens, and five or six twenty-dollar bills, which he had in three different pockets. The large bills in one pocket, the fives and tens in a side pocket, and the one-dollar bills in his coat pocket. . . . Puckett stayed out there at the house, back of the station where they were gambling, around an hour and a half. That house is run in connection with the Blue Moon. There were so many out there I could

not tell who all were. Before he went, I asked him did they have anything they wanted me to lock up or to look after, and some of them gave me pocket knives and Puckett gave me two pistols, one a long barrel gun 32-20 and one a short barrel gun 32-20, one about four and a half inches and one about six or eight inches. I took these pistols to the house and locked them up, and while they were locked up this Swain boy came out there. I got one pistol Puckett gave me and gave to Swain, the short barrel one. The next time I saw it, Mr. Patrick had it in the sheriff's office. Puckett left in an automobile by himself, going towards Fayetteville. His car was there."

Mrs. Roy Rhyne testified, in part: "Q. Do you know whether or not your husband had on his person any sum of money that day or day before? Ans.: No, sir, not that day. He did have about $750.00 on Friday, the night before. I do not know about any money he had that day. He had $750.00 the night before, in a pocketbook fold around." Exception by defendant.

A pistol which had been in the possession of Roy Rhyne, the deceased, was found in the Blue Moon Filling Station. It was left there by Puckett after the homicide. The defendant introduced no evidence, but rested after the State introduced its evidence. The defendant made numerous exceptions and assignments of error, the material ones will be considered in the opinion.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*W. Louis Ellis, Jr., and Dye & Clark for defendant.*

CLARKSON, J. *First contention of defendant:* After the verdict the defendant made a motion in the court below "that the judgment be arrested for the reason that the bill of indictment upon which the defendant was tried, is indefinite and uncertain, in the alternative, containing two theories upon which the State was to move, thereby depriving the defendant of his right to know upon which theory the State was moving and to prepare his defense accordingly, the motion in arrest of judgment being made because the bill charges the defendant killed Roy Rhyne 'with premeditation and deliberation, and with malice aforethought, *or* while engaged in the perpetration or in the attempt to perpetrate a robbery.'" The motion was denied by the court below, and in this we can see no error.

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 pre-*

*meditated 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 for not less than two nor more than thirty years in the State's Prison." (Italics ours.)

Section 4614 is an abbreviated form for a bill of indictment for murder, and the first part of the present bill of indictment is drawn in the very language of the statute. The second part, commencing with "or" was drawn to cover the other aspect of the crime under sec. 4200, *supra.* Under a conviction on either, it was murder in the first degree. The defendant was given full information of the crime on which he was being tried. There was nothing indefinite or uncertain about the bill of indictment. It was in the alternative, but this was merely two counts in one bill of indictment.

Section 4642 is as follows: "Nothing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." The defendant, under sec. 4613, could have made a motion for a bill of particulars. Bills of indictment not quashed for informality, sec. 4623; nor after verdict for defects which do not vitiate, C. S., 4625.

In *S. v. Leeper,* 146 N. C., 655 (659), citing authorities, we find: "If, however, failure 'to erect' were one offense, and failure 'to repair' were another, being cognate offenses, the remedy was not to quash, but to require the solicitor to elect at the close of the evidence." The indictment followed the words of the statute creating the crime, and also on the first aspect followed the abbreviated form of bills of indictment for murder.

In *S. v. Wilson,* 121 N. C., 650 (655), it is said: "Besides, duplicity is ground only for a motion to quash. Being cured by the verdict, it cannot be used as ground for a motion in arrest of judgment. Whar. Cr. P. L. and Pr., secs. 255, 760." 16 C. J., p. 1258, sec. 2791.

On both aspects in the bill of indictment, the court below charged the law applicable to the facts.

*Second contention of defendant:* Lee Morse testified that the day before the homicide, Roy Rhyne, the deceased, had some $800.00 or $900.00, and described the kind of money it was. Mrs. Rhyne testified that the night before the homicide, defendant had $750.00 "in a pocketbook fold around." The defendant excepted and assigned error, which we cannot sustain.

The charge on which defendant was tried was twofold: (1) The killing with premeditation and deliberation; (2) in the perpetration or attempt to perpetrate robbery. From the evidence in the record there was no doubt that defendant killed Roy Rhyne, and the jury so found. As to his identity there could be no question. Sultan Penny, who worked at the Blue Moon Filling Station, testified that after the homicide, later in the evening, "He (Puckett) come in the station and started counting out his money, and said, 'Well, I got plenty of damn money to gamble with.' I counted $720.00. There were 40 one-dollar bills, a bunch of fives and tens, and five or six twenty-dollar bills, which he had in three different pockets. The large bills in one pocket, the fives and tens in a side pocket, and the one-dollar bills in his coat pocket." The evidence beyond question was competent—the weight and credibility was for the jury to determine.

In *S. v. Atwood,* 176 N. C., 704 (705-6), it is said: "The first three assignments of error are to the admission of testimony that about a week before the homicide the deceased had $65.00 or $70.00 on his person; that on the afternoon of the homicide he was seen with a roll of greenbacks, and that he was paid $3.50 that afternoon. The sheriff testified that only $2.00 or $3.00 was taken out of the deceased's pockets at the undertaker's. There was evidence that, the evening before, the prisoner had $180.00 on his person, and that when arrested he had $246.00. This evidence was competent upon the State's theory, upon the indictment for murder in the first degree, that robbery was the motive of the homicide."

There are several exceptions and assignments of error as to the charge, none of which can be sustained, taking the charge as a whole. The court below, in a careful charge, applied the law applicable to the facts. The court defined the words "deliberation" and "premeditation"; defined murder in the first degree, murder in the second degree, and manslaughter.

*Third:* The court below charged: "It would be your duty to convict Puckett of first degree murder even if one of the others actually fired the shot that killed, if it was done after they agreed and conspired to commit the offense of robbery and while attempting to rob and in the perpetration of robbery death ensued to the deceased, Roy Rhyne, while carrying out and putting into execution their unlawful agreement, whether Puckett did the killing or whether the man Paul did the killing, or the man referred to as Swain did the killing, makes no difference, it would be murder, gentlemen, in the first degree. And if the State has satisfied you beyond a reasonable doubt of these facts, it would be your duty to return a verdict of guilty of murder in the first degree." Prior to the above portions of the charge, the court used the words "at the time they went to the filling station of Rhyne that they had a con-

spiracy between themselves of doing an unlawful act of robbery," etc. "The court charges you, gentlemen, that if Mr. Puckett had conspired and agreed with Mr. Cox, or with the man Paul referred to as 'Paul,' or the man Swain referred to by Morse as 'Swain,' and they went to the filling station to carry out the unlawful purpose of robbery, and to perpetrate robbery, and while in the attempt to perpetrate robbery, he put into execution the unlawful conspiracy and agreement, that the man referred to as 'Paul' or the man referred to as 'Swain,' or any of the coconspirators who may have been with him, if while in the act of perpetrating a robbery or in the attempt to perpetrate a robbery," etc. The defendant excepted and assigned error and contends that the court below should have defined "conspiracy," "coconspirators," etc. The words were used synonymous with "agreed" and "agreement." This was simple language and the meaning readily understood. A similar charge was held free from error in *S. v. Donnell,* 202 N. C., 782 (784).

In *Moss v. Brown,* 199 N. C., 189 (192), we find: "'In *Bank v. Rochamora,* 193 N. C., at p. 8, quoting numerous authorities, the law is thus stated: "Where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it." This applies to subordinate elaboration, but not substantive material and essential features of the charge. C. S., 564.' *McCall v. Lumber Co.,* 196 N. C., at p. 602."

In the present case, if defendant desired fuller or more elaborate definitions, he should have asked for them by proper prayers for instruction, and not waited until the verdict went against him. *S. v. Graham,* 194 N. C., 459 (467); *Sherrill v. Hood, Comr. of Banks,* 208 N. C., 472 (477).

The law is so plain as to the other matters in defendant's brief, and in fact as to all the matters complained of, that we do not think it necessary to consider same further. The defendant did not introduce any evidence; all the evidence of the State showed a horrible murder with premeditation and deliberation, and also to rob. In the record we find

No error.

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STATE v. E. D. WARREN.

(Filed 6 January, 1937.)

**1. Constitutional Law § 13—Statute providing for licensing of real estate brokers in designated counties held unconstitutional as discriminatory.**

Ch. 241, Public-Local Laws of 1927, requiring real estate brokers and salesmen in certain designated counties of the State to be licensed by a real estate commission on the basis of moral character and proficiency

in the public interest, and requiring the payment of a license fee in the designated counties in addition to the State-wide license required by ch. 371, Public Laws of 1935, *is held* unconstitutional as being in contravention of Art. I, sec. 7, of the State Constitution in that it applies only to real estate brokers and salesmen in the designated counties and not to those in the other counties of the State, and is therefore discriminatory. Art. I, secs. 17, 31; Art. V, sec. 3, of the State Constitution; 14th Amendment to the Federal Constitution.

**2. Statutes § 6—**

An act of the General Assembly will not be declared unconstitutional unless plainly and clearly so.

**3. Taxation § 2c—**

While the General Assembly may authorize municipalities to tax trades and professions, it may not impose, in addition to the State-wide license tax, a special tax upon those following a particular trade or profession in certain designated counties while not requiring such tax of others following the same trade or profession in other counties of the State.

DEVIN, J., dissenting.

SCHENCK, J., concurs in dissenting opinion.

APPEAL by defendant from *Harris, J.*, at September Special Criminal Term, 1936, of GUILFORD. Reversed.

The defendant was found guilty and sentenced for violating chapter 241, Public-Local Laws of 1927, to wit: "An Act to define, regulate, and license real estate brokers and real estate salesmen; to create a State real estate commission and to provide a penalty for a violation of the provisions hereof," applicable to certain designated counties—8 in number. The defendant contends that the act is unconstitutional.

*Attorney-General Seawell and Hoyle & Hoyle, amicus curiæ for the State.*

*F. F. Myrick for defendant.*

CLARKSON, J. The sole question involved in this appeal: Is the act in controversy unconstitutional? We think so.

The Constitution of N. C., Art. I, sec. 7, is as follows: "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." Art. I, 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." Sec. 31: "Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed." Art. V, sec. 3: "Taxation shall be by uniform rule and *ad valorem,* with certain exemptions." 14th Amendment to the Constitution of the U. S.

In Public Laws, 1935, chapter 371, we find under License Taxes, sec. 100, p. 450, the following: "Taxes in this article or schedule shall be imposed as a State License Tax for the privilege of carrying on the business, exercising the privilege, or doing the act named, and nothing in this act shall be construed to relieve any person, firm, or corporation from the payment of the tax prescribed in this article or schedule."

Section 109, in part: "Every person, whether acting as an individual, as a member of a partnership, or as an officer and/or agent of a corporation, who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, or who is engaged in the business of leasing or offering to lease, renting or offering to rent, or of collecting any rents as agent for another for compensation, or who is engaged in the business of soliciting and/or negotiating loans on real estate as agent for another for a commission, brokerage and/or other compensation, shall apply for and obtain from the Commissioner of Revenue a State-wide license for the privilege of engaging in such business or profession, or the doing of the act named, and shall pay for such license twenty-five dollars ($25.00)."

The above is a State-wide act, and a State-wide license is issued to the real estate salesmen, applicable to the whole State. The act in controversy, chapter 241, Public-Local Laws of 1927, sec. 1, in part is as follows: "On and after May first, one thousand nine hundred and twenty-seven, it shall be unlawful for any person, copartnership, association, or corporation to act as a real estate broker or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman without a license issued by the North Carolina Real Estate Commission. No copartnership, association, or corporation shall be granted a license unless every member or officer of such copartnership, association, or corporation who actively participates in the brokerage business of such copartnership, association, or corporation shall hold a license as a real estate broker, and unless every employee who acts as a salesman for such copartnership, association, or corporation shall hold a license as a real estate salesman." The contents of the act: Sec. 3, Creation of commission, details of same; Sec. 4, Qualifications for license; Sec. 5, Application for license; Sec. 6, Procedure when license is refused applicant; Sec. 7, Details relating to license; Sec. 8, Suspension or revocation of license for causes enumerated; Sec. 9, Provision for hearing before application is refused or license suspended or revoked; Sec. 10, Nonresident brokers and salesmen; Sec. 11, Publication of list of licenses; Sec. 12, Penalties; Sec. 13, Saving clause; Sec. 14, Repealing clause; Sec. 15, Interpretation of act; Sec. 16, Date effective; Sec. 17: "This act shall apply only to the counties of Buncombe, Durham, Forsyth, Guilford, Henderson, Lee, Rowan, and Wake." Some counties

have been withdrawn from the act and some added. It is operative in only a few counties of the State.

In sec. 3 is the following: "All fees and charges collected by the commission under the provisions of this act shall be paid into the general fund in the State Treasury. All expenses incurred by the commission under the provisions of this act, including compensations to members, secretaries, clerks, and assistants, shall be paid out of the general fund in the State Treasury upon warrants of the State Auditor from time to time when vouchers therefor are exhibited and approved by the commission: *Provided,* that the total expense for every purpose incurred shall not exceed the total fees and charges collected by the commission."

Section 4: "A license shall be granted only to persons who bear a good reputation for honesty, truthfulness, and fair dealing, and are competent to transact the business of a real estate broker or a real estate salesman in such a manner as to safeguard the interests of the public." The act provides for suspension or revocation of license on its own motion or upon written complaint for 10 reasons—setting them forth.

It has long been settled in this State that under the police power of the State to protect the health, comfort, safety, and welfare of the people, general acts have been passed and held constitutional, relating to professions and trades that require skill, learning, and training; such as attorneys at law, physicians, dentists, surgeons, accountants, osteopaths, chiropractors, opticians, cosmetologists, barbers, plumbers, etc. *Roach v. Durham,* 204 N. C., 587; *Allen v. Carr,* 210 N. C., 513.

If the present act in controversy were applicable to the whole State we are not called upon here to decide the constitutionality of same.

In *Rawls v. Jenkins,* 212 Ky., 287 (279 S. W., 350), at p. 292, it is said: "If occasional opportunity for fraud is to be the test, then there is no reason why every grocer, every merchant, every automobile dealer, every keeper of a garage, every manufacturer, and every mechanic who deals more frequently with the public in general, and whose opportunities for fraud are far greater than those of the real estate agent or salesman, may not be put on the same basis. If that be done, then only those who, in the opinion of certain boards or the courts, have the necessary moral qualifications will be permitted to engage in the ordinary occupations of life. The result will be that all others who fail to establish their moral fitness will not only be deprived of their means of livelihood, but will become a burden either on their families and friends or the community at large. In our opinion, the right to earn one's daily bread cannot be made to hang on so narrow a thread. Broad as is the police power, its limit is exceeded when the State undertakes to require moral qualifications of one who wishes to engage or continue in a business which as usually conducted is no more dangerous to the public

than any other ordinary occupation of life. As said of the real estate agent in *Hager, State Auditor, v. Walker,* 128 Ky., 1, 107 S. W., 254, 15 L. R. A. (N. S.) 195, 'The occupation taxed is essentially a harmless one. It has none of the features requiring police regulations, and there is no reason why the police power should be invoked concerning it.' Of course, moral fitness on the part of the real estate broker, and every other business man, is a thing greatly to be desired, but, unless the business as ordinarily conducted is unusually dangerous to the public, we shall have to leave something to religious and moral training, to public opinion, and to the ordinary laws of the land. For the reasons given we are constrained to the view that the statute, in so far as it makes the obtainment or retention of a license depend on the moral fitness of the applicant or licensee, is unconstitutional."

On the other hand, general State acts of this nature have been held constitutional. In *Bratton v. Chandler,* 260 U. S., 110, 68 Law Ed., 157, a State-wide act of Tennessee is upheld. *Roman v. Lobe,* 243 N. Y., 51, 152 N. E., 461; 50 A. L. R., p. 1329 *et seq.*

In this State, certain Public-Local acts have been held constitutional, as in *S. v. Moore,* 104 N. C., 714; *S. v. Blake,* 157 N. C., 608, and cases cited therein, but these matters were local in their nature. The sale of real estate is a business applicable to the whole State, and the State licenses those engaged in the business and issues them a "State-wide license." The State can, no doubt, in a State-wide act, make reasonable regulations in regard to the real estate business. Those desiring real estate licenses to do business have to obtain same from the State, and in addition those living in these counties, under the act in question, must obtain additional licenses and are subject to an act which, to say the least, is burdensome and discriminatory, before they can sell real estate. We think the act unconstitutional. Real estate dealers who have licenses from the State are not confined to any particular county in the State to do business. Attorneys at law, physicians, etc., are not confined to any particular county to practice their profession in the State. Suppose certain counties would set up, as the present act does for real estate dealers, that attorneys at law, physicians, etc., could not practice their professions unless complying with the terms of a special act like the one in controversy, we would unhesitatingly say that the act was unconstitutional—as we do in this case. Acts of the General Assembly ought not to be declared unconstitutional unless plainly and clearly so. *Glenn v. Board of Education,* 210 N. C., 525. Of course, the General Assembly can confer power on municipalities to tax trades, professions, etc. *Hilton v. Harris,* 207 N. C., 465.

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

Reversed.

DEVIN, J., dissenting: The majority opinion bases its reversal of the judgment of the court below on the sole ground that the statute under which the defendant was convicted is unconstitutional.

This statute imposes a license fee of ten dollars for carrying on the business of a real estate broker, and five dollars for that of real estate salesman, with regulations for determining the qualifications therefor, under the direction of a real estate commission, "in such a manner as to safeguard the interests of the public."

It is axiomatic that since all political power is derived from the people and all government originates from them (Const. N. C., Art. I, sec. 2), the sovereign power of the people, expressed through their chosen representatives in the General Assembly, is supreme, and a law by them enacted may not be set aside by the courts unless it contravenes some prohibition or mandate of the Constitution by which the people of the State have elected to be limited and restrained, or unless it violates some provision of the granted powers contained in the Constitution of the United States.

It is equally well settled that no act of the General Assembly ought to be declared violative of any constitutional provision unless the conflict is so clear that no reasonable doubt can arise. *Coble v. Comrs.*, 184 N. C., 342; *Gunter v. Sanford*, 186 N. C., 452; *S. v. Yarboro*, 194 N. C., 498; *Plott v. Ferguson*, 202 N. C., 446; *Glenn v. Board of Education*, 210 N. C., 525.

It seems to be conceded that chap. 241, Public-Local Laws of 1927, would be constitutional if it were made applicable to the entire State. Similar statutes have been enacted in many of the states and their constitutionality upheld by an almost unbroken line of decisions of the state courts and by the Supreme Court of the United States. *Bratton v. Chandler*, 260 U. S., 110; *Roman v. Lobe*, 243 N. Y., 51; *Riley v. Chambers*, 181 Cal., 589.

It is uniformly held that requirements of license fees from real estate brokers and regulations subjecting those of that profession or business to tests of character and competency in the interest of the public are within the power of State Legislatures. Cooley Const. Lim. (8th Ed.), p. 1332.

In an illuminating opinion by *Cardozo, J.*, in *Roman v. Lobe*, 243 N. Y., 51, 50 A. L. R., 1329, the reasons therefor are clearly stated, as follows:

"The intrinsic nature of the business combines with practice and tradition to attest the need of regulation. The real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. . . . With temptation so aggressive, the dishonest or un-

trustworthy may not reasonably complain if they are told to stand aside. No less necessary are safeguards against the perils of incompetence. The business of the broker is distinct from occupations which by general acquiescence are pursued by common right without regulation or restriction."

The acts of the legislatures of many states are cited and the decisions of the courts sustaining them are noted in *Roman v. Lobe, supra.*

In the statute under consideration it clearly appears that the license fee of ten dollars and the regulations to secure honesty, truthfulness, integrity, and competency are "enacted with due regard to the paramount interests of the people." Statutes, held by this Court to be valid, have been enacted in North Carolina, requiring license fees and establishing regulations and governing boards with respect to many professions, businesses, and callings; physicians, lawyers, dentists, osteopaths, chiropractors, barbers, cosmetologists, pilots, engineers, druggists, accountants, plumbing and heating, callings affecting the public and requiring honesty and proficiency. *S. v. Van Doran,* 109 N. C., 864; *S. v. Call,* 121 N. C., 643; *S. v. Hicks,* 143 N. C., 689; *S. v. Siler,* 169 N. C., 314; *S. v. Scott,* 182 N. C., 865; *S. v. Lockey,* 198 N. C., 551; *Roach v. Durham,* 204 N. C., 587.

Does the act, then, valid as applicable to the whole State, become invalid because it applies only to certain designated counties and does it for that reason offend against Art. I, sec. 7, of the Constitution of North Carolina? In my opinion the decisions of this Court authoritatively construing this section of the Constitution do not sustain the view expressed by a majority of this Court in this case.

Speaking of laws applicable to particular localities or particular classes, *Judge Cooley* says: "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application; and they are then public in character, and of their propriety and policy the Legislature must judge." Cooley Const. Lim. (8th Ed.) pp. 806-807; *Kornegay v. Goldsboro,* 180 N. C., 441.

"It (the Constitution) does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." Cooley Const. Lim. (8th Ed.), pp. 824-825.

"Laws public in their object may, unless express constitutional provisions forbid, be either general or local in their application. The Legislature must determine whether particular regulations shall extend to the whole State or to a subdivision of the State." Cooley Const. Lim. (8th Ed.), pp. 803-804.

In *S. v. Moore,* 104 N. C., 714, *Judge Avery,* speaking for the Court, uses this language: "Public-local laws, if they operate uniformly and subject all persons, who come within the defined locality and violate their provisions, to indictment in the same way and to the same punishment, are not repugnant to the Constitution of North Carolina. *S. v. Muse,* 20 N. C., 463; *S. v. Chambers,* 93 N. C., 600. But the objection that the prohibition is restricted to particular counties is met by the decisions of this Court more directly in point. *S. v. Joyner,* 81 N. C., 534; *S. v. Stovall,* 103 N. C., 416; *Intendant v. Sorrell,* 46 N. C., 49."

To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act. *Power Co. v. Power Co.,* 175 N. C., 668; *S. v. Barrett,* 138 N. C., 630.

In *S. v. Barrett, supra, Connor, J.,* speaking for the Court, uses this language: "This power (to pass statutes of local application) has been so long recognized by the Court and exercised by the Legislature that we do not deem it necessary to examine the foundations upon which it rests."

"Legislation, which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment (14th Amendment to Const. of U. S.). *Barbier v. Connolly,* 113 U. S., 32. It merely requires that all persons subject to such legislation shall be treated alike. *Hayes v. Missouri,* 120 U. S., 71." *Broadfoot v. Fayetteville,* 121 N. C., 418.

When every citizen, who comes within the sphere of its operation, is alike amenable for violation of its provisions, an act could not be declared void on the ground that it abridged the privileges or immunities of citizens of the United States in violation of the Constitution of the United States. *Missouri v. Lewis,* 101 U. S., 22; *Mugler v. Kansas,* 123 U. S., 663; *S. v. Moore, supra; Colgate v. Harvey,* 296 U. S., 404.

In *S. v. Joyner,* 81 N. C., 537, it is said: "The law, local in its application, and clear and positive in its mandates, cannot be controlled by provisions and restraints found in similar enactments, general or special, passed for the regulation or prohibition of the traffic in other parts of the State, and must be enforced upon a fair and reasonable interpretation of its own terms. Nor is the competency of the legislature to pass local acts, such as the present, now an open question. The power has been so long and so often exercised and recognized in cases coming before this and other courts, that its existence must be considered as settled." *S. v. Blake,* 157 N. C., 608; *Newell v. Green,* 169 N. C., 462.

It is only when persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the

same condition can the discrimination be said to impair that equal right to the protection of the laws. *S. v. Denson,* 189 N. C., 173; *Soon Hing v. Crowley,* 113 U. S., 703.

It was said in *S. v. Blake, supra:* "Public-local acts passed in the exercise of the police power, which apply only to certain localities, are valid." And *Clark, C. J.,* cites many cases in which it has been so held by this Court. *S. v. Barringer,* 110 N. C., 526; *S. v. Snow,* 117 N. C., 774; *Harriss v. Wright,* 121 N. C., 173; *Lyon v. Comrs.,* 120 N. C., 237; *McCormac v. Comrs.,* 90 N. C., 441; *Guy v. Comrs.,* 122 N. C., 471; *Tate v. Comrs.,* 122 N. C., 812; *Lumber Co. v. Hayes,* 157 N. C., 333.

In Connor and Cheshire's Constitution of North Carolina we find on p. 14 this expression of the law: "A public-local act, making that an offense in one district which is not an offense in another, is a constitutional exercise of the police power and not in violation of Art. I, sec. 7, if it bears alike on all persons in a defined locality," citing *S. v. Stovall,* 103 N. C., 416, and *S. v. Moore, supra.*

There have been some decisions of this Court apparently stating a contrary view, but the opinions in those cases should be interpreted in the light of the facts upon which the statement of applicable law was based.

In *S. v. Fowler,* 193 N. C., 290, it was held that the Legislature could not make the punishment for an offense, which had been defined by a State-wide act, different in one county from that of another.

In *S. v. Divine,* 98 N. C., 778, an act making the officials of a railroad indictable in certain counties for cattle killed by its cars was held invalid, but not because the act was applicable to certain counties only.

In *Plott v. Ferguson,* 202 N. C., 446, an act relating to one county requiring that the sureties on contractors' bonds be confined to corporations licensed to do business in North Carolina was held invalid, and to the same effect was *S. v. Sasseen,* 206 N. C., 644, where the act required taxicab operators to file policy of liability insurance with a reliable company.

In the instant case, since the license fee of ten dollars fixed by the statute is uniform on all real estate brokers in the named counties, this provision cannot be said to violate the rule of uniformity ordained in Art. V, sec. 3, of the Constitution. *Roach v. Durham, supra.*

The statute in its general terms and purposes does not, in my opinion, violate any constitutional provision, and it is not rendered invalid because its sphere of operation is limited to certain counties, since its provisions affect all real estate brokers and salesmen alike within the territory defined.

SCHENCK, J., concurs in dissenting opinion.

HANNAH LEE BELL STEPHENS v. LANELLE MARTIN CLARK AND HUSBAND, CORNELIUS CLARK; AGNES MARTIN LEE AND HUSBAND, CLEON LEE; GRACE MARTIN STEWART AND HUSBAND, JOHN W. STEWART; ALAN EDWARD SEPHES (HUSBAND OF MELBA MARTIN SEPHES, DECEASED), AND HOMER J. INGLE, GUARDIAN AD LITEM OF THOMASENA MARSHALL AND DURAND SEPHES, HEIRS AT LAW OF MELBA MARTIN SEPHES.

(Filed 6 January, 1937.)

**1. Wills § 33a—Rule that devise shall be construed to be in fee held inapplicable to language creating active trust with provision vesting estate in others upon termination of the trust.**

Testatrix died seized of certain lands, including the "homestead" devised to her by her father's will, with an equitable charge thereon for the benefit of his widow, testatrix' stepmother. Testatrix' will provided that her husband should have full and entire possession of her realty and certain personalty, and that the rents therefrom should be used in keeping up the "homestead" during the life of her stepmother, and after the death of her stepmother the lands should go to her heirs. *Held:* The devise created no interest in the lands in favor of testatrix' husband, but devised the lands to him in an active trust for the purpose of carrying out the wishes of her father for the care of his widow, and the rule that an unrestricted devise will be construed to be in fee simple, C. S., 4162, has no application to the devise to the husband as trustee in an active trust with direction for the vesting of the lands in her heirs upon the termination of the trust.

**2. Wills § 33d—Trust is created by language evincing intent to do so.**

A devise of land to one person with direction that the rents therefrom be used for the benefit of another, creates an active trust in accordance with the express intention of the testator, even though the testator does not use the words "trust" or "trustee," no particular language being necessary for the creation of a trust if the intent to do so is evident.

**3. Adverse Possession § 4a—One tenant may not hold adverse to other tenant until there has been an ouster.**

The possession of one tenant in common is the possession of all, and one tenant may not hold adversely to his cotenant until there has been an ouster, which is possession accompanied by acts evincing an intent to hold solely for the possessor in the character of sole owner to the exclusion of and in opposition to the claims of all others, and the evidence in this case *is held* insufficient to establish such ouster.

**4. Adverse Possession § 12a—**

Where a will creates an active trust in the lands and provides that title should not vest in the ultimate takers until the termination of the trust, the statute will not run against a remainderman until the termination of the trust and the vesting of his right to possession.

**5. Wills § 34—Devise to "legal heirs" in absence of clearly expressed intention to contrary vests the land in accordance with canons of descent.**

Testatrix created an active trust and provided that, upon the termination of the trust upon the death of the beneficiary, all her property should go "to the legal heirs." *Held:* In the absence of language clearly showing a contrary intent, the words "legal heirs" will be given their definite legal meaning, and take the property to testatrix' heirs according to the canons of descent as of the date of testatrix' death, and testatrix' brother living at the time of testatrix' death is entitled to an undivided interest in the estate with the children of testatrix' sister, who predeceased testatrix.

**6. Wills § 33c—**

A devise of an estate to a class described as heirs or legal heirs, either immediately or after the termination of a particular estate, passes the property or the remainder to testatrix' heirs as determined by the canons of descent as of the date of the death of testatrix.

**7. Wills § 34—**

Where a will devises property after the termination of an active trust to testatrix' heirs or legal heirs, who are the legal heirs under the canons of descent is a question of law for the courts, after the jury has determined the identity of persons claiming relationship with testatrix.

**8. Wills § 31—Where language of will is not ambiguous, parol evidence is not competent to contradict, add to, or explain its meaning.**

Where a will devises property to testatrix' heirs without expressions limiting or qualifying the phrase, the estate goes to the heirs as determined by the canons of descent, and the language being clear and unequivocal, parol evidence tending to show that testatrix intended to limit the term to include children of a deceased sister to the exclusion of testatrix' brother her surviving, is properly excluded.

APPEAL by defendants from *Hill, Special Judge,* at January Term, 1936, of FORSYTH. No error.

This cause was instituted originally by William T. Butler, Jr., the predecessor in title of the plaintiff, for partition of described lands. The defendants denied plaintiff's title and pleaded *sole seisin.*

Issues were submitted to the jury and the following verdict rendered:

"1. Was the William T. Butler, Jr., under whom the plaintiff claims, the brother of and did he survive Isabella Wyche, deceased, as alleged in the complaint? Ans.: 'Yes.'

"2. Is the plaintiff, Hannah Lee Bell Stephens, the successor in title to such interest as the said William T. Butler, Jr., had, if any, in the lands described in the complaint, at the time of the institution of this action? Ans.: 'Yes.'"

From judgment on the verdict decreeing plaintiff entitled to an undivided interest in the land and remanding the cause to the clerk of the Superior Court for further proceedings in partition, the defendants appealed.

*Parrish & Deal for plaintiff.*
*Benbow & Hall and Ingle & Rucker for defendants.*

DEVIN, J. The original owner of the land described in the complaint and the ancestor from whom the parties in interest claim descent, was William T. Butler, Sr., who died testate in 1905, leaving him surviving his widow, Theresa Butler; a daughter, Isabella Wyche; a son, William T. Butler, Jr., and four grandchildren the issue of a deceased daughter. The grandchildren, and the heirs of one of them who has died, are defendants in this action, and the plaintiff claims under William T. Butler, Jr.

By the will of William T. Butler, Sr., he devised certain lands to his said grandchildren, and one-half interest in certain other lands to his daughter Isabella Wyche, and to Isabella Wyche, also, his home place, with the following qualification: "And my daughter, Belle Wyche, shall give to my wife, Teressa Butler, a home and support from all my land, so long as she remains my widow and no longer." To his son, William T. Butler, Jr., who was then and continued to be a resident of the State of California, he bequeathed one dollar.

Isabella Wyche died in 1906. She had no children, and her will, duly admitted to probate, is in the following words:

"I, Isabella B. Wyche, being of a sound mind, doth hereby make and declare my last will and testament. My husband, Robert P. Wyche, shall have full and entire possession of all of my property including my bank account with the First National Bank of Charlotte, North Carolina, and also my account with the Loan and Savings Bank of Charlotte, North Carolina. All my money in the First National Bank of Charlotte, North Carolina, shall be devoted to keeping up the old homeplace during the life of my stepmother. After her death, the remainder of the specified amount shall go to the support of the heirs according as they may need and deserve it. My money in the Savings Bank of Charlotte, N. C., I give and bequeath to my husband, Robert P. Wyche. The rents from my interest in tenement houses now in the possession of my husband shall go also to keeping up the old homeplace during the life of my stepmother, Theresa K. Butler. And in case my husband die before my stepmother, then all the property or money belonging to my estate at the time of his death shall go to keep up the old homestead, and then at the death of my stepmother all of the property shall go to the legal heirs. My husband shall be the counselor and adviser of my stepmother in all her business affairs. It is my desire, also, for him to be the counselor and adviser of my nieces, Louella, Agnes, Grace, and Melba Martin, concerning the property left for them by my father, William T. Butler."

Theresa Butler, widow of William T. Butler, Sr., and stepmother of Isabella Wyche, died in 1926. William T. Butler, Jr., after instituting this proceeding for partition in 1930, died leaving a last will and testament in which he devised all his estate of every kind and wherever situated "including my interest in the estate of Isabella Wyche" to his wife, Laura Butler, who was substituted as party plaintiff, and on the death of Laura Butler, her daughter and only heir at law, Hannah Lee Bell Stephens, was substituted as party plaintiff. The issues submitted to the jury were addressed to the question of the identity of the plaintiff, and were answered in her favor. There were no exceptions to the charge of the court and there was competent evidence to support the verdict. It has therefore been established that the plaintiff is the successor in title to William T. Butler, Jr., who was the brother of Isabella Wyche.

Robert P. Wyche, the husband of Isabella Wyche, now eighty-five years of age, is still living, and has executed quit-claim deed for whatever interest he might have in the land to the defendants. Robert P. Wyche and the defendants have been in possession of the lands, receiving the rents therefrom, since the death of Isabella Wyche.

There was correspondence by letter between William T. Butler, Jr., and his nieces, the defendants, in 1928, 1929, and 1930, some of the letters containing references to the land and admissions of his interest therein. However, it was testified that the references in the letters to his interest in the land were due to erroneous advice as to the law.

It is apparent that the rights of the parties in the described lands are to be determined largely by the construction to be put upon the will of Isabella Wyche.

The provisions in the will of William T. Butler, Sr., for his widow, Theresa Butler, created an equitable charge upon the land in her favor, and the will of Isabella Wyche, to whom the land was devised subject to the charge for the purposes named, provided in her will for the continuation of this trust, and directed that the rents from the property should go to keeping up the home place during the life of her stepmother.

The defendants contend that the provision in the will of Isabella Wyche for her husband, Robert P. Wyche, should be construed to constitute a devise to him of the land in fee simple, in accord with the rule prescribed by C. S., 4162.

The pertinent portions of the will relating to him are as follows:

"My husband, Robert P. Wyche, shall have full and entire possession of all my property including bank account with the First National Bank of Charlotte. All my money in the First National Bank of Charlotte shall be devoted to keeping up homeplace during life of my stepmother. After her death, the remainder shall go to the support of the heirs

according as they may need and deserve it. The rents from my interest in tenement houses now in possession of my husband shall also go to keeping up old homeplace during life of my stepmother. And in case my husband die before my stepmother, then all the property or money belonging to my estate at time of his death shall go to keep up old homestead, and then at death of my stepmother all the property shall go to the legal heirs."

The rule that, when real estate shall be devised to any person, the same shall be construed to be a devise in fee simple is inapplicable here as the words used in the will of the testatrix negative the idea of the investiture of title in fee, or for life, or the granting of any other beneficial interest in the real property to Robert P. Wyche, and express the intent, rather, to impose upon her husband duties as executor and trustee of an active trust, with directions as to the use of the property real and personal, and as to how the income shall be applied during his life and after his death, in case he should die before her stepmother.

It seems that one of the principal objects she had in view at the time of making her will was to carry out the wishes of her father for the care of his widow, her stepmother, and the possession of her real property in the hands of her husband was definitely limited to this specific purpose. The bequest of personal property to him was couched in different language. As to that, she said: "My money in the Savings Bank of Charlotte I give and bequeath to my husband, Robert P. Wyche." While the testatrix does not use the word trust or trustee, it is well settled that no particular language is required to create a trust relationship if the intent to do so is evident. If it appears that the intention is that the property be held or dealt with for the benefit of another, a court of equity will affix to it the character of trust. *Waldroop v. Waldroop,* 179 N. C., 674; *Benevolent Society v. Orrell,* 195 N. C., 405.

It is true it has been uniformly held since the passage, in 1784, of the act, now codified as C. S. 4162, that an unrestricted devise of real estate passes the fee (*Bell v. Gillam,* 200 N. C., 411; *Barbee v. Thompson,* 194 N. C., 411; *Roane v. Robinson,* 189 N. C., 628), but the construction required by this statute may not be invoked where no such estate is attempted to be devised and where the plain intent is not to grant an estate but to impose a trust and direct the collection of rent for application to a specific purpose. *Young v. Young,* 68 N. C., 309; *Witherington v. Herring,* 140 N. C., 495; *Fellowes v. Durfey,* 163 N. C., 305.

If an instrument is expressly and exclusively intended to create a trust, it confers upon the trustee no beneficial interest, and after a trust has terminated, the trustee cannot claim to be the beneficial owner of the property held in trust unless it clearly appears to have been the intention of the donor. 65 C. J., 527; *Newton v. Hunt,* 134 App. Div. (N. Y.), 325; 201 N. Y., 599.

The contention that plaintiff's right has been barred by the adverse possession of the defendants for more than twenty years cannot be sustained. While twenty years adverse possession by one tenant in common will ordinarily toll the entry of his cotenant (*Alexander v. Cedar Works,* 177 N. C., 137; *Lester v. Harward,* 173 N. C., 83), this rule may not be held applicable to the uncontroverted facts here.

It is elementary that the possession of one tenant in common is for the benefit of all. Tenants in common are placed in confidential relation to each other by operation of law as to the joint property, and the possession of one is in law the possession of all, until there has been an ouster. *Bailey v. Howell,* 209 N. C., 712; *Conkey v. Lumber Co.,* 126 N. C., 499.

To constitute adverse possession sufficient to oust the rightful owner, the possession must be accompanied by acts evincing an intent to hold solely for the possessor, to the exclusion of and in opposition to the claims of all others, and must afford unequivocal indication that he is exercising the dominion of sole owner. *Locklear v. Savage,* 159 N. C., 236; *Shermer v. Dobbins,* 176 N. C., 547.

The evidence offered here fails to measure up to this requirement. The possession was not adverse to the plaintiff. On the contrary, the evidence indicates it was in recognition of plaintiff's rights.

Furthermore, the fact that it is provided in the will of William Butler, Sr., that Isabella Wyche should give her stepmother a home and support from the land so long as she remains a widow, and the additional provision in the will of Isabella Wyche for the stepmother that the rents from her property should go to keeping up the old homeplace during the life of her stepmother, lend support to the view that as long as Theresa Butler lived there was no right to the possession of the lands upon which to base an action for recovery of the land, and that such an action would have constituted an infringement on the possession of the trustee who was holding for the purpose of carrying out the directions of the will. *Joyner v. Futrell,* 136 N. C., 301; *Woodlief v. Wester,* 136 N. C., 162; *Cole v. Bank,* 186 N. C., 514; *Chinnis v. Cobb,* 210 N. C., 104.

It is evident from consideration of the entire will that the intention of the testatrix, to be gathered from the language used, was that the ultimate takers of the property should be "the heirs" or "the legal heirs."

It is provided that after the death of her stepmother "all of the property shall go to the legal heirs."

This calls for the application of the rule of construction that the words "the heirs" or "the legal heirs" are to be given their legal significance, rather than to be understood as the expression of a supposed intention to limit the class denoted thereby to particular persons.

As was so well said by *Stacy, J.*, in *Witty v. Witty*, 184 N. C., 375: "The words (lawful heirs) have a well defined meaning. Their significance is fixed by law, and when they are used in a deed or will without any superadded words or phrases, indicating a different meaning, they are to be understood as having been used in their ordinary sense, and according to their legal acceptation." *Rives v. Frizzle*, 43 N. C., 237; *Jenkins v. Lambeth*, 172 N. C., 466.

The words used have a definite legal meaning. *Stith v. Barnes*, 4 N. C., 96.

"The word (heir) has a technical signification, and, when unexplained and uncontrolled by the context, must be interpreted according to its technical sense, or its strict legal import." 29 C. J., 293.

This is a rule of interpretation adopted and followed by the courts with practical unanimity. *Jenkins v. Lambeth, supra.*

Under this general rule, in the absence of a contrary intention clearly expressed in the will or to be derived from its context, an estate devised to a class described as heirs or legal heirs would pass to those who would take under the canons of descent, either in right or in possession, at the death of the testator, at which time the members of the class are to be ascertained and determined. *Witty v. Witty, supra.*

So, in the case at bar, those who could take under the phrase "the legal heirs" at her death, embraced all whom the law includes in that class, and the words cannot be construed to exclude the brother under whom plaintiff claims, in favor of the defendants, her nieces. *Grantham v. Jinnette*, 177 N. C., 229.

There was no error in the exclusion of the parol evidence offered to show that the persons intended to be included under the designation, "the legal heirs," were limited to the defendants. *Grantham v. Jinnette, supra.*

The intent of the testator is to be ascertained from the consideration of the words in which the will is expressed, and parol evidence may not be adduced to contradict, add to, or explain its contents. *Holt v. Holt*, 114 N. C., 241; *McIver v. McKinney*, 184 N. C., 393; *Jolley v. Humphries*, 204 N. C., 672. There is no ambiguity. The devise is to a class, "the legal heirs"; who they are is a matter of law. Who are the heirs after the identity of the person is established is not a question for the jury but a matter for the court. *Blacknall v. Wyche*, 23 N. C., 94; *Bradford v. Erwin*, 34 N. C., 291; *Morrison v. McLauchlin*, 88 N. C., 251; *Wooten v. Hobbs*, 170 N. C., 211; 94 A. L. R., 35; *Kidder v. Bailey*, 187 N. C., 505.

After a consideration of all the assignments of error pressed on the argument and by brief, we conclude that they cannot be sustained, and in the rulings of the court below we find

No error.

MARY J. LEACH MORGAN AND HER HUSBAND, W. J. MORGAN, v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL PAGE TRUST COMPANY, W. P. COVINGTON, AND D. J. DALTON, JR., AND NOLA B. DALTON.

(Filed 6 January, 1937.)

**Judgments § 4—Agent authorized to handle litigation has no authority to enter consent judgment on behalf of his principal.**

An attorney employed to defend an action may not enter a consent judgment therein without special authority, nor may an agent authorized to look after and handle the litigation give the attorney employed by him for his principal authority to enter a consent judgment, and where the court finds that a party did not consent to the judgment which was entered by consent of her agent authorized to handle the litigation, it is error for the court to deny the party's motion, aptly made, to set aside the judgment.

APPEAL by defendant Nola B. Dalton from *Williams, J.*, at April Term, 1936, of HOKE. Reversed.

This action was heard at April Term, 1936, of the Superior Court of Hoke County on the motion of the defendant Nola B. Dalton that a judgment rendered in the action at January Term, 1936, of said court, purporting on its face to be a judgment by consent of the plaintiffs and of the defendants D. J. Dalton, Jr., and Nola B. Dalton, be vacated and set aside, on the ground that she did not consent to said judgment.

At the hearing the court found among other things that the action was begun in the Superior Court of Hoke County on 27 July, 1935; that both the summons and the complaint in the action were duly served on the defendants, D. J. Dalton, Jr., and Nola B. Dalton, who are brother and sister; that the defendant Nola B. Dalton, after the summons and complaint had been served on her, conferred with the defendant D. J. Dalton, Jr., and authorized him to look after and handle the litigation for her; that thereafter the defendant D. J. Dalton, Jr., employed an attorney-at-law, who resided in Hoke County, to represent the said defendants jointly; that pursuant to said employment, the said attorney prepared an answer to the complaint for said defendants, in which all the allegations of the complaint which constitute a cause of action in favor of the plaintiffs and against the said defendants were denied; that said answer was duly verified by the defendant D. J. Dalton, Jr., and was duly filed by said attorney, acting for and in behalf of both said defendants; and that the defendant Nola B. Dalton was advised by the defendant D. J. Dalton, Jr., that said answer had been prepared and duly filed.

The court further found that the action was on the calendar for trial at January Term, 1936, of said court, and was duly called for trial at

said term; that the plaintiffs and all the defendants except Nola B. Dalton were present in court when the action was called for trial; that the defendant Nola B. Dalton had not been notified that the action was on the calendar for trial at January Term, 1936, of the court, and did not know that the action would be tried at said term; that during the progress of the trial, a compromise of the matters in controversy between them was agreed upon by the plaintiffs, and the defendant D. J. Dalton, Jr., acting for himself and for the defendant Nola B. Dalton; and that pursuant to said compromise a judgment purporting to be by consent of the plaintiffs and of the defendants D. J. Dalton, Jr., and Nola B. Dalton was prepared and signed by the judge presiding. This judgment was duly filed in the action.

The court further found that the compromise was not submitted to the defendant Nola B. Dalton, for her approval, and that she did not know that the judgment had been signed by the judge and filed in the action, until after the court had been adjourned for the term; that immediately upon learning that the judgment had been signed and filed, she employed counsel, and promptly filed her motion that said judgment be vacated and set aside; and that she had a meritorious defense to the cause of action alleged against her in the complaint.

On the facts as found by it, the court was of opinion "that D. J. Dalton, Jr., was the agent of his sister and codefendant, Nola B. Dalton, to handle the litigation for her and to look after her interests, and as such had authority to agree to its termination by compromise or otherwise," and accordingly adjudged "that the motion to vacate and set aside the consent judgment rendered at January Term, 1936, of this court be and the same is hereby denied, and the said motion is dismissed."

From this judgment the defendant Nola B. Dalton appealed to the Supreme Court, assigning error in the judgment.

*No counsel, contra.*
*Varser, McIntyre & Henry for appellant.*

CONNOR, J. At the hearing of appellant's motion that the judgment rendered in this action at the January Term, 1936, of the Superior Court of Hoke County, and purporting on its face to be a judgment by consent of the plaintiffs and of the defendants D. J. Dalton, Jr., and Nola B. Dalton, be vacated and set aside on the ground that appellant did not consent to said judgment, the court did not find that the attorney who was employed by the defendant D. J. Dalton, Jr., to represent himself and the appellant jointly, as authorized by her, compromised the matters involved in the action and consented to the judgment in her behalf, solely by reason of his employment as her attorney. The court

found that the defendant D. J. Dalton, Jr., compromised the action and consented to the judgment in behalf of the appellant, as her agent, and that for that reason appellant is bound by the judgment.

It is well settled that an attorney-at-law has no authority to compromise his client's case, or to consent to a judgment which will be binding on his client, founded upon such compromise, unless he had been specially authorized so to do by his client. Such authority will not be presumed from his employment, and a judgment by consent of the attorney founded upon a compromise made by him, without such authority, will ordinarily be vacated and set aside on motion of the client made in apt time. See *Bank v. Trotter,* 207 N. C., 442, 177 S. E., 325; *Chavis v. Brown,* 174 N. C., 122, 93 S. E., 471; *Bank v. McEwen,* 160 N. C., 414, 76 S. E., 222; *Morris v. Grier,* 76 N. C., 410; *Moye v. Cogdell,* 69 N. C., 93. In the last cited case, it is held that authority to compromise a case, and to consent to a judgment founded on such compromise, cannot be conferred upon an attorney by an agent who was authorized by his principal to employ an attorney. In that case a compromise made by an attorney as authorized by the agent was set aside on motion of the principal. She had not consented to the compromise and was therefore not bound by its terms.

The finding by the court in the instant case, that the defendant D. J. Dalton, Jr., was authorized by the appellant to employ an attorney-at-law to represent her in the action, does not support the conclusion by the court that the said D. J. Dalton, Jr., had authority to agree to a termination of the action by compromise or otherwise.

In view of the finding by the court that appellant did not consent to the compromise and to the judgment, there is error in the judgment denying her motion which was made in apt time. The judgment is

Reversed.

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STATE v. CHARLES SMITH.

(Filed 6 January, 1937.)

**1. Criminal Law § 32a—**

Intent, being a mental attitude, must ordinarily be proven by circumstantial evidence, that is, by proof of facts from which intent may be inferred.

**2. Burglary § 9—Evidence held for jury on question of defendant's intent to commit felony when he broke and entered dwelling.**

Evidence tending to identify defendant as the person who broke and entered a dwelling in nighttime, and that after he had broken and entered

he went to the bed in which prosecutrix was sleeping and grabbed her by the feet, and, after threatening to kill her if she got up, he grabbed her around her waist, that he fought her for a considerable length of time, dragged her from her home and released her only after light, *is held* sufficient to be submitted to the jury on the question of defendant's intent, at the time of breaking and entering, of committing rape as charged in the bill of indictment, and defendant's motion to nonsuit on the ground that there was not sufficient evidence of felonious intent, was correctly denied.

**3. Criminal Law § 29c—Defendant's evidence tending to raise mere conjecture that crime charged was committed by another held incompetent.**

Defendant, charged with burglary, relied upon an alibi, and offered evidence tending to show that another was in the neighborhood of the scene of the crime at the time it was alleged to have been committed. *Held:* The evidence was properly excluded, since evidence that another had committed the crime charged is competent only when it points unerringly to the guilt of such other person and raises a reasonable inference of defendant's innocence, and evidence which merely creates an inference or conjecture as to the guilt of such other person is inadmissible.

**4. Burglary § 10—Charge held to have correctly instructed jury that defendant must have intended to commit specific crime charged in house entered.**

In this prosecution for burglary, the charge to the jury *is held* to have sufficiently and correctly instructed the jury that in order for a conviction the jury must find that at the time of breaking and entering defendant must have had the specific intent to commit the crime of rape as charged in the bill of indictment and have had the intent to commit the crime in the house broken and entered, it not being necessary that the charge negative the intent to commit the crime in a place other than the house broken and entered in the absence of a special request for instructions.

**5. Criminal Law § 53c—**

Where the charge is without error when read contextually as a whole, exceptions to unconnected portions of the charge cannot be sustained.

**6. Criminal Law § 81a—Verdict of jury on conflicting evidence is conclusive.**

The State offered plenary evidence of defendant's guilt of the crime charged. Defendant relied chiefly upon an alibi. The evidence was submitted to the jury in a charge free from prejudicial error, and the jury returned a verdict of guilty. *Held:* The verdict of the jury in a trial free from error of law is conclusive on appeal.

APPEAL by the defendant from *Barnhill, J.*, at August Term, 1936, of COLUMBUS. No error.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*R. H. Burns & Sons for defendant, appellant.*

SCHENCK, J. The defendant is appellant from judgment of death predicated upon conviction of burglary in the first degree.

The State offered evidence tending to show that about 3:30 o'clock a.m., on 7 June, 1936, in the nighttime, the house which was occupied by Mrs. Sarah Lyles and her children was broken and entered by the defendant, and that the defendant came to the bed of Mrs Lyles and caught her about her legs and then about her waist and told her not to get up, that a struggle ensued, and that in the course of the struggle Mrs. Lyles struck the defendant in the head with a hatchet, and that the defendant struck Clarence Lyles, the 14-year-old son of Mrs. Lyles, who had come to the rescue of his mother, with the hatchet. The bill of indictment charged that the house was broken and entered by the defendant with the intent "to forcibly and violently and feloniously ravish and carnally know Mrs. Sarah Lyles, a female occupying and sleeping in said dwelling house at the time, without her consent and against her will."

The defendant testified and offered corroborative evidence tending to show that he was elsewhere at the time the offense was alleged to have been committed.

The first exceptive assignments of error are to the refusal of the court to grant the motion of the defendant to dismiss the action properly lodged when the State had produced its evidence and rested its case, and renewed after all of the evidence in the case was concluded. C. S., 4643.

The argument urged by the appellant under these assignments is that the evidence failed to establish that the person who broke and entered the dwelling house of Mrs. Lyles had the intent to ravish and carnally know her in the house at the time of such breaking and entry. Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred. As was said by this Court in a case wherein the defendant was charged with burglary, "It must ordinarily be left to the jury to determine, from all the facts and circumstances, whether or not the ulterior criminal intent existed at the time of the breaking and entry." *S. v. Allen,* 186 N. C., 302.

In the present case there is evidence tending to show that when the prisoner broke and entered Mrs. Lyles' dwelling house he went over to the bed in which she was lying and caught her by the feet, and, after threatening to kill her if she got up, he grabbed her around her waist. There is further evidence tending to show that he fought her for a considerable length of time, never quite subduing her, and that he dragged her from her home and children, and released her only after darkness had faded away. We are of the opinion, and so hold, that this evidence was sufficient for the jury to reasonably infer that the breaking

and entering of the dwelling house was accompanied with the intent to commit the felony specified in the bill of indictment, namely, rape.

The second exceptive assignments of error urged by the appellant are to the refusal of the court to allow him to introduce evidence which he contended tended to show that one J. W. Yates committed the crime with which the appellant is charged, if such crime was committed.

While under certain circumstances it has been held by this Court competent for the defendant to introduce evidence tending to show that someone else than he committed the crime charged, *S. v. Davis,* 77 N. C., 483, it is well settled that such evidence is not admissible unless it points directly to the guilt of the third party, evidence which does no more than create an inference or conjecture as to such guilt is inadmissible.

The rule is stated in 16 C. J., p. 560, as follows: "At any rate, the evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." To the same effect is Wharton's Criminal Evidence (11th Ed.), Vol. 1, par. 274, p. 349, where it is said: "In any event, before such testimony can be received, there must be such proof of connection with the crime or such a train of facts or circumstances as tends to point out someone other than the accused as the guilty party. Remote acts, disconnected from and outside of the crime itself, cannot be separately proved for such a purpose."

All that the excluded evidence tended to show was that J. W. Yates was in the neighborhood of the scene of the crime at the time it is alleged to have been perpetrated. From this the inference might have been drawn that he had an opportunity to commit the crime, but the record discloses that there was no evidence offered tending to show that he did actually commit it. Therefore, we are of the opinion, and so hold, that the evidence offered by the defendant falls clearly within the rule that evidence which tends to raise no more than an inference or a conjecture of the guilt of a third party is inadmissible, and that the court was without error in excluding it.

The third exceptive assignments of error urged by the appellant are to portions of the charge. The first of which are to the alleged failure of the court to instruct the jury that at the time of the breaking and entering of the dwelling house of Mrs. Lyles the appellant must have had the specific intent to commit the crime of rape. An examination of the charge discloses that this element of the offense was considered and clearly set forth in the charge. The second assignments of error

to the charge are to the asserted failure of the court to charge the jury that the intent of the defendant must have been to commit the felony charged within the house broken and entered. We are not in accord with this argument of the appellant. A reading of the entire charge leaves the clear impression that the intent required to constitute the crime of burglary must be to commit in the house broken and entered the crime charged in the bill of indictment. If the appellant desired more specific and detailed instructions in this regard, it was his duty to have requested them as provided by statute. It has never been intimated in the adjudicated cases that the intent to commit the felony in another place than in the house broken and entered must be negatived in the charge.

There are many assignments of error to the charge, numbers 11 to 53, inclusive, some of which, if considered alone, might be subject to criticism, but when the charge is considered as a whole in the same connected way in which it was given it presents the law fairly and correctly, and, therefore, affords no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. *S. v. Exum,* 138 N. C., 599.

The trial of this case resolved itself into a pure issue of fact as to whether the defendant was present and committed the crime charged, or whether the defendant was elsewhere at the time the crime is alleged to have been committed.

The State's evidence, consisting principally of the testimony of Mrs. Sarah Lyles and her 14-year-old son, Clarence, corroborated by certain facts and circumstances, amply justified a conviction. The identification of the defendant by these two witnesses was positive and complete. The defendant's evidence, consisting principally of the testimony of himself and other witnesses tending to establish an alibi, would have completely justified an acquittal. The jury observed the witnesses and heard their testimony, and, after a charge free from prejudicial error, returned a verdict of guilty of the felony as charged in the bill of indictment.

We see in the trial no error of law, and therefore, notwithstanding the gravity of the result thereof to the defendant, the judgment of the Superior Court must be affirmed.

No error.

RALPH PRATHER, BY HIS NEXT FRIEND, J. T. PRATHER. v. UNION NATIONAL BANK AND HOME REALTY AND MANAGEMENT COMPANY.

(Filed 6 January, 1937.)

**Negligence § 4d—Injury to child must be reasonably foreseeable in order for doctrine of attractive nuisance to apply.**

The complaint alleged that one defendant owned and the other defendant had control as realty agent of a certain house and lot within the city limits, that the house had become dilapidated and had been condemned as unfit for occupation by the city, that defendants knew of its condition, and that children were attracted thereto and were in the habit of playing on the lot and in the house, that plaintiff, a child of seven years, while playing with other children on the premises, climbed up the inside wall to the ceiling, and out over the ceiling into the loft, and that the ceiling was rotten and gave way, causing plaintiff to fall to his injury. Defendants demurred to the complaint. *Held:* The demurrers should have been sustained, since the complaint fails to state facts from which it can be held that defendants were under duty to foresee that a child would climb up the inside wall of the house and then crawl out on the ceiling under the roof, and the doctrine of attractive nuisance cannot be extended to apply to injuries which could not have been reasonably foreseen.

APPEAL by defendants from *McElroy, J.*, at June Term, 1936, of MECKLENBURG. Reversed.

This is an action to recover damages for personal injuries which the plaintiff, a child seven years of age, suffered when he fell through the ceiling from the loft to the floor of a house, in the city of Charlotte, which was owned by the defendant Union National Bank, and was at the time under the control of its codefendant, Home Realty and Management Company, as its agent, while he was playing with other children in said house.

The facts alleged in the complaint as constituting plaintiff's cause of action against the defendants are as follows:

On 14 July, 1935, the defendant Union National Bank was the owner of a lot of land which fronts on an alley in the city of Charlotte. There was located on said lot a house, which was unoccupied. The said house and lot were under the control of the defendant Home Realty and Management Company, as the agent of its codefendant. The said house was old and in a dilapidated condition. Both defendants knew that said house was unoccupied, and in an unsafe and dangerous condition. It had been condemned by the city of Charlotte as unfit for occupancy because of its condition.

On said day, to wit: 14 July, 1935, the plaintiff, a child seven years of age, was playing with other children of tender years on said lot and in and around said house. They were playing a childish game known as

"hide and seek." The plaintiff entered said house and climbed up the inside wall to the ceiling. He then crawled out over the ceiling into the loft, for the purpose of hiding from the other children. The ceiling was rotten and gave way under the weight of plaintiff's body, causing him to fall through the ceiling from the loft to the floor. As the result of his fall, the plaintiff suffered serious and permanent injuries, by reason of which he has sustained damages in the sum of $10,000.00.

For some time prior to the date of his injuries, the plaintiff and other children of tender years, had been in the habit of going upon the lot on which the house was located for the purpose of engaging in play. They were attracted to said lot because of the condition of the house. They played not only on the lot but also from time to time in the house. Both defendants knew that children of tender years were in the habit of playing on said lot and in and around said house. Neither of the defendants had done anything to prevent children from going on said lot and into said house for the purpose of play.

Both defendants demurred to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action. The demurrer was overruled, and defendants appealed to the Supreme Court, assigning as error the overruling of their demurrer.

*Hiram P. Whitacre and James L. DeLaney for plaintiff.*
*Whitlock, Dockery & Shaw for defendants.*

CONNOR, J. In this case it is contended on behalf of the plaintiff that the defendants are liable to him for the damages which he has sustained by reason of the injuries which he suffered, as alleged in the complaint, on the principle on which the attractive nuisance doctrine is founded. See *Sioux City & Pacific Railroad Company v. Stone,* 17 Wall., 657, 21 L. Ed., 745. This doctrine has been repudiated by the courts of many of the states, but has been recognized by this Court as sound in principle and humane in policy. Thus, in *Briscoe v. Lighting & Power Co.,* 148 N. C., 396, 62 S. E., 600, it is said:

"It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane in policy. We have no disposition to deny it or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation, or license, or relation to the premises or its owner, is as essentially a trespasser as an adult; but, if to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon, and is injured by the failure of the

owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether, under all of the circumstances, he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury."

In the instant case, no facts are alleged in the complaint upon which it can be held that any duty was imposed by the law upon the defendants, or either of them, to foresee that a child who had gone upon the premises of the defendants to play with other children would climb up the inside wall of the house and then crawl out on the ceiling under the roof. Conceding that the defendants knew that the ceiling was rotten and defective, it does not follow that defendants owed to the plaintiff the duty to foresee that he would crawl between the ceiling and the roof of the house, and to guard against the danger which the plaintiff would thereby incur.

The "attractive nuisance doctrine" cannot be extended to apply to the facts alleged in the complaint and admitted by the demurrer in this case, and thereby impose liability upon the defendants for injuries which they could not have foreseen would be suffered by the plaintiff.

The demurrer should have been sustained. The order overruling the demurrer is

Reversed.

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## IN THE MATTER OF CARL OGDEN, MINOR.

(Filed 6 January, 1937.)

**1. Parent and Child § 4: Habeas Corpus § 3—Habeas corpus does not lie to determine custody of child as between divorced parents.**

*Habeas corpus* is not available to determine the custody of a child as between its divorced parents, C. S., 2241, 2242, and where the divorce is granted in another state of which the parents were residents, the writ is not available to enforce the provisions of the divorce decree relating to the custody of the child as against the mother moving to this State and bringing the child with her.

**2. Habeas Corpus § 8—Decree awarding custody of minor child as between divorced parents is not appealable.**

A decree in *habeas corpus* proceedings to determine the custody of a child as between its divorced parents is not appealable, since the proceeding does not come within the provisions of C. S., 2241, 2242, nor will the provisions made for the child be considered when the judge below finds that the child is in school and is being properly cared for by the parent having its custody, and awards its custody to such parent during the school term, the sole remedy being by *certiorari* to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts, N. C. Constitution, Art. IV, sec. 8.

IN RE OGDEN.

APPEAL by petitioner, Garrett F. Ogden, from *Armstrong, J.*, 12 October, 1936. From FORSYTH. Appeal dismissed.

Heard upon writ of *habeas corpus* to determine the custody of Carl Ogden, infant son of petitioner and his divorced wife, the respondent. The petitioner is a resident of the State of Florida, and the respondent, since her divorce in Florida, has married William F. Slack and is now residing with her present husband and the said Carl Ogden in Mount Airy, North Carolina.

Petitioner appealed.

*Elledge & Wells for petitioner, appellant.*
*E. C. Bivens for respondent, appellee.*

DEVIN, J. The constitutional and statutory provisions with respect to writs of *habeas corpus* are made applicable to controversies as to the custody of children when the parents are "living in a state of separation without being divorced." C. S., 2241. And in such cases, by virtue of C. S., 2242, when a contest has arisen, "either party may appeal to the Supreme Court from the final judgment."

The court below found as a fact that the petitioner, the husband and father, resides in the State of Florida, and that by a decree of a court of competent jurisdiction in that state the bonds of matrimony were dissolved between him and his wife, the respondent and mother of the infant, Carl Ogden.

It was further found as a fact that in the divorce decree of the Florida court custody of the child, the subject of this proceeding, was awarded to each of the parties for certain portions of each year; that thereafter the mother removed with the child to North Carolina and is now residing in the county of Surry; "that the said Carl Ogden has been residing with his mother and has been well cared for, and has entered school in Mount Airy." Thereupon, the judge below made an order awarding the custody of the child to the mother for the portion of the year from 1 September to 1 June of each year, and to the father for the remainder of the year, with certain requirements on the part of each parent to insure compliance with the order.

From this judgment and decree the petitioner appealed to this Court, contending that full faith and credit should be given the Florida decree, and that it should be held controlling in the North Carolina court.

It is obvious that this controversy does not come within the provisions of the statute (C. S., 2241). The husband and wife are not "living in a state of separation without being divorced."

While the courts are always open to an application for a writ of *habeas corpus* when it is alleged that the liberty of a person is being

unlawfully restrained, the procedure under this "high prerogative writ," as it has been well called (*People v. Zimmer,* 252 Ill., 9), may not be available for the determination of the custody of a child, as between a father and mother who were divorced in another state of which they were residents.

A similar situation was considered by this Court in *In re Alderman,* 157 N. C., 507. There the application for the enforcement of the decree of a Florida court as to the custody of a child was denied on the ground that there was no vested property right in a child, and that the Florida decree had no extraterritorial effect beyond the bounds of the state where rendered.

It will be noted, however, in that case that the judgment of the Superior Court, which was affirmed, held that the facts there did not present a proper case for a writ of *habeas corpus,* but in the event it might be determined otherwise, the trial judge proceeded to make suitable provisions for the care of the child.

And in *In re Blake,* 184 N. C., 278, it was held that the only object of the writ of *habeas corpus* was to set at large the person unlawfully restrained of his liberty, and that in case of a child the court cannot go further than fix his custody; that the powers of the court do not extend beyond that limit, and that other statutory provisions must be looked to in order to provide for the care, maintenance, and benefit of the child.

In *In re Parker,* 144 N. C., 170, *Clark, C. J.,* states the law as follows: "The object of the writ of *habeas corpus* is to free from illegal restraint. When there is none, the writ cannot be used to decide a contest as to the right of custody of a child except when the contest is between the parents of the child, Revisal, sec. 1853 (C. S., 2241)."

And in a concurring opinion in that case, *Hoke, J.,* uses this language: "Section 1853, Revisal (C. S., 2241), was enacted to enable the court to make proper regulations as to the care and custody of children as between husband and wife who are living in a state of separation without being divorced. It seems to be confined to such cases."

The court which has jurisdiction to grant divorces, incident to the decree, in proper cases may make ample provision for the care and custody of the children of the marriage.

It follows, therefore, that from the judgment in a *habeas corpus* proceeding, which is not within the provisions of C. S., 2241 and 2242, no appeal will lie. *In re Holley,* 154 N. C., 163; *S. v. Yates,* 183 N. C., 753.

The appeal in the instant case is accordingly dismissed, and it is unnecessary to consider the provisions made for the child, as was done in *In re Blake, supra,* since the judge below has found that the child is being properly cared for by his mother and is in school.

By this disposition of the case it is not to be understood that the constitutional power of this Court to exercise supervision and control over the proceedings of courts inferior may not be invoked by application for writs of *certiorari*. Constitution of N. C., Art. IV, sec. 8; *Walton v. Gatlin*, 60 N. C., 310; *Ex parte Biggs*, 64 N. C., 202; *S. v. Jefferson*, 66 N. C., 309; *S. v. Miller*, 97 N. C., 452; *S. v. Herndon*, 107 N. C., 934; *In re Holley, supra; In re Croom*, 175 N. C., 455; *S. v. Hooker*, 183 N. C., 763.

Appeal dismissed.

GURNEY P. HOOD, COMMISSIONER OF BANKS EX REL. NORTH CAROLINA BANK AND TRUST COMPANY, v. JOSEPH B. CHESHIRE, JR., TRUSTEE UNDER THE WILL OF A. B. ANDREWS, SR., ET AL.

(Filed 6 January, 1937.)

**1. Appeal and Error § 37—**

The amount of allowances by the Superior Court for attorneys' fees, trustees, and guardians *ad litem* in connection with an action involving the liability of an estate is reviewable by the Supreme Court.

**2. Executors and Administrators § 29—**

Allowances by the Superior Court for attorneys' fees, trustees, and guardians *ad litem* in connection with an action involving the liability of the estate should be fair and reasonable.

**3. Appeal and Error § 38—Allowances by Superior Court for attorneys' fees, trustees, and guardians ad litem are presumed correct.**

Allowances by the Superior Court for attorneys' fees, trustees, and guardians *ad litem* in connection with an action involving the liability of the estate are deemed *prima facie* correct, and the allowances will not be disturbed on a creditor's appeal in the absence of any finding or evidence to support such finding that the allowances were inadequate or excessive.

APPEAL by the plaintiff from *Small, J.*, at September Term, 1936, of WAKE. Affirmed.

The case of *Mrs. John S. E. Young et al. v. Gurney P. Hood, Commissioner of Banks, et al.*, is reported in 209 N. C., 801, in which it is held that the trust estate of A. B. Andrews, deceased, was liable to the plaintiff in this cause in the sum of $160,000, plus interest from 3 July, 1933, on account of the ownership by said trust estate of 16,000 shares of the common stock of the closed North Carolina Bank and Trust Company of the par value of $10.00 per share.

This action was instituted by the Commissioner of Banks against the trustee of the estate of A. B. Andrews, deceased, to require the sale of sufficient assets of said estate to satisfy the stock assessment judgment

in favor of the commissioner. An answer was filed by the trustee asking that all of the beneficiaries of said trust estate, together with A. J. Maxwell, Commissioner of Revenue of the State of North Carolina, and C. H. Robertson, Collector of Internal Revenue of the United States for the District of North Carolina, be made parties defendant, and that the court advise and direct him as to his duties. An order was entered making said beneficiaries and said commissioner and said collector parties defendant, and A. L. Purrington, Jr., was appointed guardian *ad litem* to represent the defendant beneficiaries who were infants. An answer was filed by said guardian *ad litem.* Thereafter judgment was entered ordering Joseph B. Cheshire, Jr., as trustee of the estate of A. B. Andrews, deceased, to sell sufficient assets of said estate to raise cash with which to pay said stock assessment judgment.

Subsequently, a petition was filed by Mr. Cheshire, as trustee, setting out that in connection with the litigation concluded by the decision of this Court referred to above, and in connection with this case, he had, under an order of court, employed Messrs. Paul F. Smith, Murray Allen, and Manning & Manning as attorneys to represent the interests of his trust; that he had paid to said attorneys on account of services rendered the sum of $1,000 each, and that he was of the opinion that an allowance to said attorneys of the further sum of $7,500 each would be fair and reasonable, and recommending that such allowances be made to be paid out of the assets of his trust before the stock assessment judgment of the plaintiff is paid, as according to the best information of the petitioner such assets are insufficient to satisfy in full such judgment.

To this petition the plaintiff filed an answer admitting the work done by the attorneys for the trustee, and that they, as well as the guardian *ad litem* and the trustee, were entitled to compensation fair, moderate, and reasonable under all of the circumstances, but alleging that the work by the attorneys for the trustee not only resulted in no benefit to the trust estate, but, on the contrary, incurred expenses, and that the fees suggested by the trustee were more than fair and reasonable, and that it would be inequitable to allow them to be paid out of the funds that would otherwise go to the plaintiff.

The issue raised was heard by the judge upon the petition and the answer and the record in this case, and the record in the case of *Mrs. John S. E. Young et al. v. Gurney P. Hood, Commissioner, et al., supra,* and an order was entered allowing to A. L. Purrington, Jr., as guardian *ad litem,* the sum of $500.00; to Joseph B. Cheshire, Jr., as trustee, 2 per cent of receipts of principal and 2 per cent of disbursements of principal; and to Paul F. Smith, Murray Allen, and Manning & Manning, as attorneys for the trustee, an additional sum of $5,000 each, to which order the plaintiff excepted and appealed to this Court, assigning errors.

*Kenneth C. Royall and Brooks, McLendon & Holderness for plaintiff, appellant.*

*J. S. Manning, Murray Allen, and Paul F. Smith for appellees.*

*A. L. Purrington, Jr., in propria persona.*

SCHENCK, J. That the amount of allowances by the Superior Court for attorneys' fees is reviewable by this Court is well settled, *In re Stone,* 176 N. C., 336; likewise, the amount of allowances for trustees is so reviewable, *Weisel v. Cobb,* 118 N. C., 11, and, by a parity of reasoning, the amount of allowances for guardians *ad litem* is so reviewable. However, the allowance of commissions and counsel fees to a receiver by the Superior Court is *prima facie* correct, and the Supreme Court will alter the same only when they are clearly inadequate or excessive. *Graham v. Carr,* 133 N. C., 449. The rule in this jurisdiction is that when the court is called upon to make an allowance for attorneys, trustees, or guardians *ad litem* such allowances should be fair and reasonable.

After giving due consideration to "the importance of the litigation and the amount involved and the length of time it required counsel to properly prepare and present the evidence at the trial, and also the authorities supporting the position in law and equity taken by the trustee" the judge found that the allowances made to the attorneys, trustee, and guardian *ad litem* were fair and reasonable, and in the absence of any findings of fact to the contrary, or of any evidence upon which such findings could be based, we are constrained to hold that the judgment of the Superior Court should be affirmed, and it is so ordered.

Affirmed.

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STATE v. BETTIE TRIPLETT, WALTER TRIPLETT, AND WILL DULA.

(Filed 6 January, 1937.)

**1. Homicide § 17—**

Where the indictment jointly charges several persons with premeditated murder, evidence of acts done in furtherance of a common purpose, design, or unlawful conspiracy, leading to the murder, are competent, although the indictment makes no specific charge of conspiracy.

**2. Homicide § 2: Criminal Law § 8—**

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty.

**3. Homicide § 18—Ruling admitting testimony of dying declaration is upheld on testimony showing declarant apprehended approaching death.**

Testimony that the victim of the fatal assault by defendants stated in the hospital that "he was killed" by defendants *is held* to show that he

appreciated the seriousness of his condition and apprehended his approaching dissolution, and the trial court's refusal to strike out testimony of his declaration thereafter made containing statements constituting *pars res gestæ* will not be disturbed on appeal.

**4. Homicide § 17—Testimony of conversation between victim and assailant immediately after altercation held competent.**

The evidence disclosed that immediately after the assault later causing death, the victim took refuge some distance from the house in which the altercation transpired, and called for help. The witness and one of the assailants went to his aid. The witness testified to the effect that when the assailant called to the victim to come to him and let him see how badly he was hurt, the victim refused and declared that he was afraid the assailant would continue the fight. *Held:* The testimony disclosing the victim's fear of the assailant was competent certainly as to the assailant referred to, and its admission solely against him is not error, either upon his exception or the exceptions of the other defendants.

APPEAL by defendants from *Clement, J.*, at August Term, 1936, of WILKES.

Criminal prosecution, tried upon indictment charging the defendants with the murder of one Cline Hall.

On the night of 18 July, 1936, the deceased, Cline Hall, and the defendants, Bettie and Walter Triplett and Will Dula, attended a dance at the home of Zeb Triplett in Wilkes County. A fight ensued in which the deceased used a fruit jar, Walter and Bettie Triplett knives, and Will Dula rocks. Walter Triplett inflicted the fatal wounds.

Over objection, G. C. Hall, father of the deceased, was permitted to give in evidence, as a dying declaration, the statement of his son, while in the hospital, to the effect that "he was killed," and that "Walter cut me. . . . Bettie stabbed me. . . . Will Dula hit me with his fist . . . and a couple of rocks."

Objection is also made to the admission of Gwyn Triplett's testimony: After the deceased had been stabbed, he went across the branch about fifteen yards from the house, "up on the hillside," and called for help. Walter and Gwyn went to his aid. Gwyn testifies: "Well, Walter, first, after he got over there, Walter says, 'Come down, I want to see what is the matter with you.' Cline says, 'No, I am afraid you will jump on me again.' Walter says, 'No, I won't bother you no more.'" Motion to strike; overruled; exception. Admitted only as to Walter Triplett.

Walter Triplett pleaded self-defense, and the other defendants that they were innocent bystanders.

Verdict: Guilty of murder in the second degree as to all three of the defendants.

Judgment: Imprisonment in the State's Prison, as to each of the defendants, for not less than fifteen nor more than twenty years.

The defendants appeal, assigning errors.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*W. H. McElwee, Trivette & Holshouser, and T. R. Bryan for defendants.*

STACY, C. J. It may simplify the objections to observe *in limine* that when three persons are jointly charged with a premeditated murder, as here, acts done in furtherance of a common purpose, design, or unlawful conspiracy, leading up to the murder, may be shown in evidence, though the bill contains only a general allegation of premeditation and deliberation, and makes no specific reference to the conspiracy. *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323; *S. v. Donnell,* 202 N. C., 782, 164 S. E., 352; *S. v. Mace,* 118 N. C., 1244, 24 S. E., 798; *St. Clair v. U. S.,* 145 U. S., 134; *Sprinkle v. U. S.,* 141 Fed., 811. Another principle, also applicable, is that where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Gosnell, supra; S. v. Donnell, supra; S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *S. v. Jarrell,* 141 N. C., 722, 53 S. E., 127.

Viewed in the light of these principles, the exceptions touching the matter of a conspiracy, though presented with much apparent diligence and research, are really too attenuate to require an extended discussion. Without elaboration, it is enough to say that they cannot be sustained.

The objection chiefly urged by the defendants is the one addressed to the refusal of the court to strike out the dying declaration of the deceased. It may be conceded that whether a proper foundation or predicate was laid for the admission of this testimony is fairly debatable. *S. v. Beal, supra.* However, it is thought that the ruling in favor of its admission must be upheld. The declaration was prefaced with the statement that "he was killed," which was equivalent to saying that the deceased appreciated the seriousness of his condition and apprehended his approaching dissolution. *S. v. Franklin,* 192 N. C., 723, 135 S. E., 859.

The testimony of Gwyn Triplett, at which the defendants complain, was admitted only as against Walter Triplett. It was clearly competent as to him. Indeed, it might well be considered as a part of the *res gestæ. S. v. Davis,* 87 N. C., 514. At least, the deceased feared Walter's presence was but a continuation of the original altercation. *S. v. Bailey,* 205 N. C., 255, 171 S. E., 81; *S. v. Bryson,* 203 N. C., 728, 166 S. E., 897.

A careful perusal of the entire record leaves us with the impression that no reversible error has been shown. The verdict and judgments will be upheld.

No error.

BEULAH GALLOP KNIGHT v. PILOT LIFE INSURANCE COMPANY.

(Filed 6 January, 1937.)

**1. Insurance § 30c—**

Evidence of duplicate payment of a monthly premium *held* insufficient to be submitted to the jury on plaintiff beneficiary's contention that the premium for the month was twice paid, and that if the duplicate payment were credited to a subsequent month the policy would have been in force on the date it was canceled by insurer for nonpayment.

**2. Insurance § 30a—**

The provision in a life insurance policy that the policy should be void if the stipulated premium is not paid on the due date or within the thirty-one days grace period thereafter is valid.

APPEAL by defendant from *Frizzelle, J.*, at April-May Term, 1936, of DURHAM.

Civil action to recover on a policy of life insurance.

Upon receipt in advance of the first annual premium of $91.40, the defendant, on 25 February, 1931, issued to Thomas W. Knight a $5,000 life insurance policy, payable to his wife, the plaintiff, as beneficiary.

Thereafter, in February, 1933, at the instance of the insured, a "monthly premium privilege" was made a part of said policy, by rider duly attached, and in which it provides: "Each annual premium may be paid in twelve (12) monthly installments of $8.10 each, due on the 25th day of each month. . . . Notice of any premium or installment due under this policy is hereby expressly waived. . . . Nonpayment of any installment when due, or within one month (not less than thirty-one days) thereafter, automatically voids this policy, except as provided by the policy or by law."

It is admitted that all monthly premiums or installments were paid from 25 February, 1933, up to and including the one due 25 August, 1934. None has been paid since this latter date.

On 5 November, 1934, the insured made application for reinstatement of the policy and executed a "Personal Health Certificate for Reinstatement of Lapsed Policy." This application was declined and the insured notified 14 November, 1934, that said policy had been canceled for nonpayment of premiums. The September installment tendered with this application was returned. The insured died 17 February, 1935.

It is contended that the November (1933) installment was paid twice, first by the plaintiff on 1 December, 1933, and again by her husband, out of loan on policy, either on 22 or 29 December, without knowledge of plaintiff's prior payment. Plaintiff says that if this duplicate payment were brought forward and applied to the installment due 25 September,

1934, the policy would have been in force (counting the days of grace) at the time of its cancellation. This contention prevailed in the court below.

From verdict and judgment for plaintiff, the defendant appeals, assigning errors.

*Hedrick & Hall for plaintiff, appellee.*

*Smith, Wharton & Hudgins and Fuller, Reade & Fuller for defendant, appellant.*

STACY, C. J. Was there a duplication of payment of the installment due 25 November, 1933? The question is answered in the negative by defendant's cashier, Miss Rachel Mullen, whom plaintiff called as a witness. She says: "The paper handed me is a check for $8.10 to cover the October 25, 1933, quarterly-monthly premium. It is dated December 1, 1933. . . . The receipt, marked 'P. Ex. 17,' for October, 1933, was the one given in exchange for that check." There was no showing by the plaintiff that the October installment was paid in any manner other than by this check dated 1 December. The confusion seems to have arisen from the fact that the October payment was made after the due date of the November payment. It is conceded that plaintiff's husband paid the November installment in December out of a loan on the policy. As we understand the record, the evidence on the alleged duplication of payment is not sufficient to warrant a finding in plaintiff's favor.

It is provided in the rider, attached to the policy at the instance of the insured and for his convenience, that the nonpayment of any installment when due, or within the period of grace thereafter, automatically voids the policy. Such provision is universally upheld. *Clifton v. Ins. Co.*, 168 N. C., 499, 84 S. E., 817; *Melvin v. Ins. Co.*, 150 N. C., 398, 64 S. E., 180; *Hayworth v. Ins. Co.*, 190 N. C., 757, 130 S. E., 612.

Speaking to a similar situation in *Hay v. Association*, 143 N. C., 256, 55 S. E., 623, *Clark, C. J.*, delivering the opinion of the Court, very pertinently said: "It is always sad when one who has made payments on his policy deprives his family of expected protection by failure to pay at a critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. It is a warning of which the company also has the right to take notice when asked to waive a forfeiture. It is the insured's own fault when he does not make a payment as he contracted."

A careful perusal of the record leaves us with the impression that the demurrer to the evidence should have been sustained.

Reversed.

ANNIE DOVE WILSON v. A. F. PERKINS.

(Filed 6 January, 1937.)

**Negligence § 19c—Doctrine of res ipsa loquitur held inapplicable to evidence in this case.**

Plaintiff's evidence tended to show that she sent her new dress to the cleaners, that after it was cleaned she tried it on at the cleaning plant, and then put it away, that she got the dress out about a week later and wore it to a party, and that the next morning she discovered brown spots on the dress which completely ruined it. *Held:* In plaintiff's action against the cleaners for alleged negligence, the doctrine of *res ipsa loquitur* is not applicable, since more than one inference can be drawn from the facts established by the evidence as to the cause of the injury, and since proof of the occurrence leaves the matter resting only in conjecture.

APPEAL by the defendant from *Parker, J.*, at September Term, 1936, of CUMBERLAND. Reversed.

*No counsel for plaintiff, appellee.*
*Malcolm McQueen for defendant, appellant.*

SCHENCK, J. This was a civil action to recover damages in the sum of $35.00, alleged to have been negligently caused by the defendant to a hand-knitted boucle dress of the plaintiff.

The evidence tended to show that the plaintiff sent the dress to the defendant, who was engaged in the cleaning business, in Fayetteville, on 1 June, 1936, and the plaintiff testified: "The dress was in good condition and had never been worn. I went for the dress the next day to Mr. Perkins' place in Fayetteville. I first put the dress on in a back room in his place to see if it fitted me. It was dark back there and we came up to the front to a window and large mirror. With Mrs. Perkins I tried the dress on, fitted it, and Mrs. Perkins wrapped it; I paid a dollar and took the dress home. The first time I saw anything wrong with the dress was about a week later at my sister's house in Kinston, North Carolina, after wearing the dress to a party. The dress was wrapped in brown paper and I kept it in the chifforobe drawer. I would say it was about a week before I took the dress out to wear it to the party at my sister's; the next morning I noticed the dress had brown-looking spots on it in front and in the back. . . . It was ruined. I don't know, it was three or four weeks before I next saw Mr. Perkins about it, after I came home from Kinston."

The issues submitted to and answers made by the jury were as follows:

"1. Was the plaintiff's dress damaged by the negligence of the defendant? Answer: 'Yes.'

"2. If so, what damage, if any, is the plaintiff entitled to recover? Answer: '$15.00.' "

From judgment based upon the verdict, the defendant appealed, assigning errors.

When the plaintiff had rested her case and at the close of all the evidence the defendant lodged and renewed a motion for judgment as in case of nonsuit. C. S., 567. His Honor denied the motion, announcing at the time that he held that the principle of *res ipsa loquitur* was applicable. His Honor also instructed the jury that this principle was applicable. The ruling of the court as to the applicability of the principle of *res ipsa loquitur* is the basis of exceptive assignments of error, which must be sustained.

In speaking to the subject of the principle of *res ipsa loquitur,* this Court said: "The principle does not apply: (1) When all the facts causing the accident are known and testified to by the witnesses at the trial, *Baldwin v. Smitherman,* 171 N. C., 772, 88 S. E., 854; *Orr v. Rumbough,* 172 N. C., 754, 90 S. E., 911; *Enloe v. R. R.,* 179 N. C., 83, 101 S. E., 556; (2) where more than one inference can be drawn from the evidence as to the cause of the injury, *Lamb v. Boyles,* 192 N. C., 542, 135 S. E., 464; (3) where the existence of negligent default is not the more reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture, *Dail v. Taylor,* 151 N. C., 285, 66 S. E., 135; (4) where it appears that the accident was due to a cause beyond the control of the defendant, such as the act of God or the wrongful or tortious act of a stranger, *Heffter v. Northern States Power Co.,* 217 N. W., 102, 25 A. L. R., 713, note 2; (5) when the instrumentality causing the injury is not under the exclusive control or management of the defendant, *Saunders v. R. R.,* 185 N. C., 289, 117 S. E., 4; (6) where the injury results from accident as defined and contemplated by law." *Springs v. Doll,* 197 N. C., 240. We are of the opinion, and so hold, that the instant case falls within the instances where the principle of *res ipsa loquitur* does not apply numbered (2) and (3).

The motions for judgment as in case of nonsuit should have been allowed, and for that reason the judgment below is

Reversed.

G. R. McNEELY, BY HIS NEXT FRIEND, VANCE McNEELY, v. H. F. WALTERS ET AL.

(Filed 6 January, 1937.)

**Estoppel § 6c—Plaintiff, having knowledge of facts, held estopped by his silence when his failure to speak resulted in disadvantage to defendants.**

Upon advertisement of the property for sale under the terms of the deed of trust securing the note in default, trustor requested and was granted forbearance. Upon a second advertisement, more than nine years thereafter, trustor instituted this action to restrain foreclosure on the ground that his brother, who had died subsequent to the first advertisement of the property, had executed the note and deed of trust in trustor's name without authority. *Held:* Trustor is estopped by his silence when he requested and accepted indulgence with knowledge of all the facts at the time his brother was living and the note was not barred by the statute of limitations, from asserting the alleged unauthorized execution of the instruments by his brother.

APPEAL by plaintiff from *Phillips, J.*, at May Term, 1936, of UNION.

Civil action to restrain sale under power in deed of trust.

It is alleged that on 14 January, 1925, the plaintiff executed and delivered to the defendant H. F. Walters promissory note in the principal sum of $1,816.20, due 14 January, 1926, and as security for the payment of same, executed and delivered deed of trust on real estate situate in Union County. This latter instrument was duly registered.

The defendant Alice R. Hodges alleges that she is the holder in due course of said note by endorsement and the owner of said deed of trust by proper assignment.

It is further alleged that in June, 1926, default having been made in the payment of said note, advertisement of sale under the deed of trust was duly published, but the power was not then executed, as the plaintiff craved additional time and was granted further indulgence.

Again, in August, 1935, the defendant advertised the property for sale under the power of sale contained in said deed of trust.

This sale the plaintiff seeks to restrain, alleging that said note and deed of trust were never executed by him, but were signed in his name by his brother, Grady McNeely, without authority. Grady McNeely died 1 January, 1928.

There was evidence in support of these allegations.

The defendants plead estoppel and the statute of limitations.

From judgment of nonsuit entered on demurrer to the evidence, plaintiff appeals, assigning errors.

*A. M. Stack for plaintiff, appellant.*
*Vann & Milliken for defendants, appellees.*

STACY, C. J. Conceding that the note and deed of trust were executed by Grady McNeely without authority, still we think the plaintiff must fail in his suit, if not upon the principle of ratification, then upon the doctrine of estoppel. *Sugg v. Credit Corp.,* 196 N. C., 97, 144 S. E., 554; *Lawson v. Bank,* 203 N. C., 368, 166 S. E., 177.

Plaintiff was fully aware of all the facts surrounding the transaction in June, 1926, when he accepted from the defendants further indulgence and forbearance. Grady McNeely was then living and the note was not barred by the statute of limitations. Plaintiff made no contention at that time that the note and deed of trust were not genuine. By remaining silent when it was his duty to speak, plaintiff has disadvantaged the defendants. He ought not to be heard now in repudiation of his former conduct. *Rand v. Gillette,* 199 N. C., 462, 154 S. E., 746; *Lewis v. Nunn,* 180 N. C., 159, 104 S. E., 470.

"If certain acts have been performed or contracts made on behalf of another without his authority, he has, when he obtains knowledge thereof, an election either to accept or repudiate such acts or contracts. If he accept them, his acceptance is a ratification of the previously unauthorized acts or contracts, and makes them as binding upon him from the time they were performed as if they had been authorized in the first place." *Gallup v. Liberty County,* 57 Tex. Civ. App., 175, 122 S. W., 291.

The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. *Boddie v. Bond,* 154 N. C., 359, 70 S. E., 824; 10 R. C. L., 688, *et seq.* Its compulsion is one of fair play.

In this view of the record, the judgment of nonsuit would seem to be correct.

Affirmed.

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DORA BOYKIN, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 6 January, 1937.)

**1. Railroads § 9—Evidence held insufficient to disclose contributory negligence as matter of law on part of ten-year-old boy.**

The evidence tended to show that plaintiff's intestate, a ten-year-old boy, was killed at a much used crossing within the corporate limits of a

city, that there were five tracks at the crossing, and that immediately after a shifting engine with several cars attached had cleared the crossing, intestate started across and was struck by defendant's train running on a parallel track at an excessive speed in violation of the city ordinance, and without giving warning by bell or whistle. *Held:* The issue of contributory negligence of intestate was for the jury under the evidence, and the granting of defendant's motion to nonsuit was error. *Tart v. R. R.*, 202 N. C., 52, distinguished in that in this case the crossing had just been obstructed by the shifting engine and cars, while in the *Tart case, supra*, plaintiff traversed a distance of 20 feet with unobstructed view before reaching the track on which the accident occurred.

**2. Negligence § 12—**

A minor is required to exercise that degree of care for his own safety which a child of his years, capacity, and experience may be expected to possess, and unless he is wholly irresponsible, the question is usually one for the jury.

APPEAL by plaintiff from *Williams, J.*, at May Term, 1936, of CUMBERLAND.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect, or default of the defendant.

Plaintiff's intestate, a boy ten years of age, was fatally injured on the afternoon of 24 April, 1935, when struck by defendant's train at Rowan Street crossing in the city of Fayetteville. There are five tracks at this crossing, two sidetracks, a pass track, and two main-line tracks. It is used extensively, day and night, by vehicular and pedestrian traffic, including children living in the vicinity as well as those attending the Normal School near the crossing. At this point the railroad runs practically north and south, while Rowan Street runs east and west.

Plaintiff's intestate was walking westwardly along Rowan Street. As he approached the crossing, a shifting engine, with cars attached, passed on the eastward track going in a northerly direction. As soon as this shifting engine and cars cleared the crossing, plaintiff's intestate started across the track, "running or walking," and was struck by the engine of No. 89, southbound passenger train on the westward track, which was running at a high rate of speed, in violation of city ordinance, and without signal or warning of its approach.

From a judgment of nonsuit entered upon demurrer to the evidence, plaintiff appeals, assigning error.

*Downing & Downing and Nimocks & Nimocks for plaintiff, appellant.*
*Rose & Lyon for defendant, appellee.*

STACY, C. J. The basis of the nonsuit is that plaintiff's intestate was contributorily negligent as a matter of law under authority of *Tart v.*

*R. R.*, 202 N. C., 52, 161 S. E., 720. The *Tart case, supra,* is distinguishable by reason of the fact that there the accident occurred 61 steps from the crossing and the plaintiff traversed a distance of 20 feet with unobstructed view before stumbling in front of an on-coming train. Here, the injury occurred at the crossing which had just been obstructed by the shifting engine and cars.

It was conceded on the argument that, had plaintiff's intestate been an adult, the judgment of nonsuit would probably have been correct. *Rimmer v. R. R.*, 208 N. C., 198, 179 S. E., 753; *Young v. R. R.*, 205 N. C., 530, 172 S. E., 177; *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800; *Pope v. R. R.*, 195 N. C., 67, 143 S. E., 350; *Davidson v. R. R.*, 171 N. C., 634, 88 S. E., 759; *High v. R. R.*, 112 N. C., 385, 17 S. E., 79. Without passing upon the suggested hypothesis, we are of opinion the issues should have been submitted to the jury under all the evidence in the case.

There is a presumption which comes to the aid of a child of tender years. *Caudle v. R. R.*, 202 N. C., 404, 163 S. E., 122; *Ghorley v. R. R.*, 189 N. C., 634, 127 S. E., 634; 20 R. C. L., 123; Note 27, Ann. Cas., 969.

Speaking to the subject in *Rolin v. Tob. Co.*, 141 N. C., 300, 53 S. E., 891, *Connor, J.*, delivering the opinion of the Court, quoted with approval: "It is hardly necessary to add that contributory negligence on the part of the minor is to be measured by his age and his ability to discern and appreciate the circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. 'As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, when the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and if such care were exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law exacts for determining what is ordinary care in a person of full age and capacity.' 7 A. & E., 409; *Plumly v. Birge,* 124 Mass., 57."

Likewise, in approval of the position are the decisions in *Morris v. Sprott,* 207 N. C., 358, 177 S. E., 13; *Alexander v. Statesville,* 165 N. C., 527, 81 S. E., 763; *Fry v. Utilities Co.*, 183 N. C., 281, 111 S. E., 354; *Brown v. R. R.*, 195 N. C., 699, 143 S. E., 536; *Hoggard v. R. R.*, 194 N. C., 256, 139 S. E., 372; *Murray v. R. R.*, 93 N. C., 92.

Reversed.

STATE v. FLAY HIATT.

(Filed 6 January, 1937.)

**Criminal Law § 68b—Defendant may appeal only from conviction or from prejudicial judgment final in its nature.**

In this prosecution under ch. 228, Public Laws of 1933, the jury answered the issues submitted in writing without objection that defendant was the father of prosecutrix' bastard child, but that he had not willfully failed and refused to support said child. Defendant appealed, alleging error in the overruling of his pleas in abatement and in the court's refusal to set aside the answer to the first issue. *Held:* The Supreme Court has no jurisdiction of the appeal and same is dismissed, since the right of appeal is statutory, C. S., 4650, and the statute gives no right of appeal by defendant from an acquittal, and whether the answer to the first issue will be conclusive on defendant or evidence against him in a subsequent action, civil or criminal, cannot be determined on the appeal.

APPEAL by defendant from *Rousseau, J.,* at June Term, 1936, of DAVIDSON. Dismissed.

The defendant was tried at June Term, 1936, of the Superior Court of Davidson County on a warrant issued by the recorder's court of the city of Thomasville, on 6 September, 1935. The warrant was issued on the affidavit of Mamie Dennis, who complained and said that the defendant, on or about 17 December, 1934, and thereafter, at and in the city of Thomasville, in Davidson County, North Carolina, did unlawfully and willfully fail, neglect, and refuse to support and maintain an illegitimate child which he had begotten on the body of the said Mamie Dennis, and which was born on 17 December, 1934, in violation of the provisions of chapter 228, Public Laws of North Carolina, 1933.

After his plea in abatement and his motions that the action be dismissed on grounds appearing in the record had been denied by the court, the defendant entered a plea of not guilty. The defendant duly excepted to the denial of his plea in abatement and to the refusal of the court to allow his motions that the action be dismissed.

The court submitted to the jury two issues, in writing, which were answered as follows:

"1. Is the defendant the father of the bastard child of Mamie Dennis, which was born on or about 17 December, 1934? Answer: 'Yes.'

"2. Has the defendant willfully failed and refused to support and maintain said child, as alleged? Answer: 'No.'"

The jury returned a verdict of not guilty. In apt time, the defendant moved the court to set aside the answer to the first issue and for a new trial of said issue. The motion was denied, and defendant excepted

and appealed to the Supreme Court, assigning as error the refusal of the court to sustain his plea in abatement, and to allow his motions that the action be dismissed, and that the answer to the first issue be set aside.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Don A. Walser for defendant.*

CONNOR, J. This appeal is dismissed on the authority of *S. v. Rooks,* 207 N. C., 275, 176 S.E., 752. In the opinion in that case it is said:

"It is provided by C. S., 4650, that the defendant shall have the right to appeal in case of conviction in the Superior Court for any criminal offense. Appeals in criminal cases are controlled by statutes on the subject; and it was said in *S. v. Webb,* 155 N. C., 426, 70 S. E., 1064, that 'an ordinary statutory appeal will not be entertained except from a final judgment on conviction, or from some judgment in its nature final.'"

In the instant case, the defendant was not convicted; he was acquitted. There was no judgment on conviction, or judgment prejudicial to the defendant in its nature final. The defendant therefore had no right to appeal to this Court. This Court is without jurisdiction to entertain the appeal, or to decide the questions presented by defendant's assignments of error.

Whether or not the defendant's apprehension that the answer to the first issue appearing in the record will be conclusive on defendant or evidence against him, upon the trial of an issue involving his paternity of the child of Mamie Dennis, in some subsequent action, civil or criminal, to which the defendant is a party, is well founded cannot be determined on this appeal. The defendant did not object to the submission of issues in writing to the jury. These issues involved the essential elements of the offense with which the defendant was charged. *S. v. Spillman,* 210 N. C., 271, 186 S. E., 322. See section 6, chapter 228, Public Laws of North Carolina, 1933. The appeal is

Dismissed.

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FIDELITY SECURITY COMPANY v. C. M. HIGHT ET AL.

(Filed 6 January, 1937.)

**Banks and Banking § 16—**

In this action to reform a statutory stock assessment against trustees so as to render them personally liable, defendants' demurrers *held* properly sustained on authority of *Jones v. Franklin Estate,* 209 N. C., 585,

and *held further*, such liability would have to be established prior to the effective date of ch. 99, Public Laws of 1935, relieving stockholders of double liability.

APPEAL by plaintiff from *Harris, J.*, at May-June Term, 1936, of DURHAM.

Civil action by plaintiff, as assignee of judgment for bank stock assessment, levied 3 November, 1931, against "C. H. Morrow and W. H. Smith, Trustees," to reform same so as to hold the defendants liable therefor as the real owners of said bank stock at the time of the assessment.

Demurrer *ore tenus* interposed on the ground that no cause of action is stated in the complaint. Demurrer sustained. Plaintiff appeals.

*Basil M. Watkins and Brawley & Gantt for plaintiff, appellant.*

*Hedrick & Hall for defendant Bettie Roney Dailey, appellee.*

*W. S. Lockhart for defendants C. M. Hight, J. C. Kluttz, C. E. Gerrard, J. B. Andrews, O. B. Dillehay, and Mamie Osborne, appellees.*

*A. H. Borland for defendant M. P. Harrell, appellee.*

PER CURIAM. It is not perceived wherein the present case differs in principle from the case of *Jones v. Franklin Estate*, 209 N. C., 585, 183 S. E., 732. Moreover, it is conceded that since the levy of the assessment in the instant case, 3 November, 1931, holders of bank stock have been relieved of their double liability by act of Assembly, ch. 99, Public Laws 1935. So, unless the defendants were rendered liable by the original assessment, they cannot now be made liable therefor.

Affirmed.

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RUSSELL H. TUCKER, JR., v. FRED M. ARROWOOD AND W. A. LANE, RECEIVER OF ARROWOOD DRUG COMPANY.

(Filed 6 January, 1937.)

**1. Landlord and Tenant § 15—**

Acceptance of rents after due dates *held* not a waiver by the landlord of his right under the terms of the lease to declare the lease void for lessee's failure to pay promptly the rent for a subsequent month.

**2. Receivers § 13—**

Contention that action could not be maintained against defendant corporation in receivership *held* untenable when the record discloses that the receivership was dissolved and the corporation made a party defendant before the trial in the Superior Court.

**3. Landlord and Tenant § 18b—**

Where the lease provides that the landlord shall have the option to declare the lease void upon failure of lessee to pay rent when due, and waives notice to vacate, lessee may not prevent forfeiture by tendering rents due upon the trial, C. S., 2372, nor claim the benefit of C. S., 2343.

APPEAL by defendants from *Warlick, J.*, at June Term, 1936, of ROCKINGHAM. No error.

*D. F. Mayberry and Hunter K. Penn for plaintiff, appellee.*
*F. Eugene Hester for defendants, appellants.*

PER CURIAM. This was an action in summary ejectment, instituted under C. S., 2365, *et seq.*, for nonpayment of rent under a lease containing the following stipulation: " . . . It is understood and agreed that if said lessee shall fail to pay said sum when due or fail to comply with any other provision of this lease, then and in that event, at the option of the lessor, this lease shall be null and void, and the said lessee hereby contracts and agrees to vacate the above described lot or parcel of land on demand of the lessor or his agent, and the said lessee hereby waives all notice to vacate same." Under the terms of said lease the rent was due on 4 April, 1936, and 4 May, 1936, and said rent was not paid when this action was instituted on 6 May, 1936.

The contract of lease was made with the individual defendant, and the corporate defendant was occupying the building involved with the knowledge of plaintiff, when a receiver therefor was appointed on 16 April, 1936.

It is the contention of the appellants that the plaintiff waived his option, under the lease, to declare the lease null and void by the acceptance of rents after the dates they were due prior to 4 April, 1936. Upon an examination of the record, we cannot agree with this contention.

It is also the contention of the defendants that the court is without jurisdiction over a receiver, an officer of the court, but it appears in the record that the receivership was dissolved and the corporation was made a party defendant before the trial in the Superior Court. Hence, this contention is without merit.

In view of the fact that the option of the plaintiff, the lessor, contained in the lease, to declare the lease forfeited had not been waived, the appellants are not entitled to the relief provided by C. S., 2372, by a tender of the rents due at the trial; and likewise, since in the lease the lessee waives all notice to vacate, C. S., 2343, has no application.

Since all of the evidence tends to show that there was a clear violation of the provision of the contract of lease by a failure to make the payment of the rent when due, and the contract of lease stipulates that

upon such failure, "at the option of the lessor this lease shall be null and void," we think, and so hold, that his Honor was correct when he charged the jury to the effect that if they found the facts to be as shown by all the evidence they should answer the issue of ownership and right of possession in favor of the plaintiff.

In the record we find

No error.

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B. BALDWIN DANSBY v. NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY.

(Filed 6 January, 1937.)

**1. Process § 8—Corporation may not defeat service by showing its own violation of statute requiring appointment of process agent.**

Where a statute provides that all insurance companies, as a condition precedent to doing business in the State, should constitute the insurance commissioner of that state agent for the service of process, an insurance company cannot maintain that service under the statute was void by showing its own violation of the statute in failing to so constitute the insurance commissioner its process agent.

**2. Judgments § 40—Recitation in foreign judgment of service under its laws is conclusive in absence of evidence that such service was not had.**

In an action on a judgment of another state in which defendant insurance company had been doing business at the time of the institution of the action, the recitation in the judgment that process had been served on defendant by service on the insurance commissioner of that state in accordance with a statute of the state, without evidence to controvert such service, is conclusive, defendant being precluded from showing its own violation of the statute requiring it to constitute the insurance commissioner its process agent as a condition precedent to doing business in that state.

APPEAL by defendant from *Frizzelle, J.*, at April-May Civil Term, 1936, of DURHAM. No error.

This was an action upon a Mississippi judgment in favor of plaintiff and against the defendant, resisted on the trial below on the ground that the record in the Mississippi court failed to show service of summons on the defendant in that state.

Upon issues submitted to the jury, there was verdict for plaintiff, and from judgment thereon defendant appealed.

*Hedrick & Hall for plaintiff, appellee.*

*Bryant & Jones for defendant, appellant.*

PER CURIAM. This case was before this Court at the Fall Term, 1935, on appeal by defendant from judgment overruling defendant's demurrer, and is reported in 209 N. C., 127, where the material facts are stated.

During the trial in the court below objections to evidence offered by defendant to show that the facts recited in the Mississippi judgment were insufficient to constitute service of summons in that state, were properly sustained.

The fact that the defendant, though doing business in the State of Mississippi for a number of years, had not, in fact, as required by the statute as a condition precedent to doing business there, formally constituted the insurance commissioner of that state its agent for service, could not avail the defendant as a defense against liability incurred while so engaged. It would be conclusively presumed, in favor of one seeking redress for the breach of an insurance contract in that state, that it was doing business there in compliance with the statute, and it should not be allowed now to show its own violation of law as a defense to an action brought by a policyholder. *Sparks v. National Masonic Acc. Assn.*, 100 Iowa, 458; *North American Union v. Oliphant*, 141 Ark., 346; *Flinn v. Western Mutual Life Association*, 187 Iowa, 507; *Old Wayne Mut. Life Assn. v. McDonough*, 204 U. S., 8.

The Mississippi judgment recited: "The defendant was duly and legally served with process in the manner and form required by section 497 of the Mississippi Code of 1930, by serving a true copy thereof on Geo. D. Riley, Insurance Commissioner of the State of Mississippi."

There was no evidence to controvert these facts.

Giving due faith and credit to the judicial proceedings of the State of Mississippi (*Milwaukee County v. White Company*, 296 U. S., 268), we find in the trial below

No error.

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WALTER SOUTHERN v. ESSIE L. FREEMAN AND JOHN FREEMAN.

(Filed 6 January, 1937.)

**1. Boundaries § 9—**

In this proceeding to establish a boundary line between the lands of the parties, testimony of a surveyor as to a line previously run by him in the presence of the parties *is held* competent.

**2. Trial § 21—**

An exception to the question only cannot be sustained when the answer is responsive to the purpose rather than to the form of the inquiry.

**3. Courts § 2c—**

A contention that the clerk was without jurisdiction in that the pleadings raised issues of fact which should have been transferred to the civil issue docket, and that therefore the Superior Court acquired no jurisdiction by appeal, is untenable, since the jurisdiction of the Superior Court on appeals from the clerk is not derivative.

APPEAL by plaintiff from *Warlick, J.*, at June Term, 1936, of FORSYTH. No error.

Proceeding to establish a boundary line between lands of plaintiff and defendants. Defendants pleaded adverse possession up to the line claimed by them. The matter was heard by the clerk of the Superior Court and judgment rendered for plaintiff, from which defendants appealed to the Superior Court. The trial in the Superior Court at term, upon issues submitted to the jury, resulted in verdict determining the true boundary line to be that claimed by defendants.

The judgment on the verdict described the true dividing line as "beginning at a stone—designated on map as point 'B,' and running eastwardly to a stake near an ash tree on bank of old run of Belew's Creek, point 'G.'"

Plaintiff appealed to this Court.

*William Graves and Wm. H. Boyer for plaintiff.*
*Jno. C. Wallace and Harvey A. Lupton for defendants.*

PER CURIAM. Plaintiff, appellant, assigns as error the overruling of his objection to the following question propounded to the witness F. O. Jones (a surveyor): "Q. I will ask you this question: Relating to the ash and the stone that you found, and on their agreement, what would you say as to the correct line that was pointed out to you then in 1934? A. Well, it looked like it was practically the line. In consequence of what they pointed out, I made markings all the way along the line from the point where I started, and they are there now. I found no other marks or markings anywhere except those, and there is none there now."

The witness had previously testified that in 1934, at the instance of plaintiff and in the presence of defendants, he had run the division line, which was pointed out by them, and had marked the same, beginning at a stone and running to a stake on the old run of the creek near an ash tree. It is obvious that the evidence elicited had reference to the identification of the line which the witness had previously surveyed.

Besides, the exception was to the question only. The answer, responsive to the purpose rather than the form of the inquiry, affords no just ground of complaint. *Luttrell v. Hardin,* 193 N. C., 266; *Martin v. Knitting Co.,* 189 N. C., 644; *Gilland v. Stone Co.,* 189 N. C., 786.

Appellant's contention that, since the defendants' answer raised issues which the clerk should have transferred to the civil issue docket instead of trying, the appeal from the clerk did not confer jurisdiction on the Superior Court, cannot be sustained.

The jurisdiction of the Superior Court on appeal from the clerk is not derivative. The case is still in the same court. McIntosh Prac. & Proc., 63; *Windsor v. McVay,* 206 N. C., 730.

No error.

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STATE v. MRS. R. D. HERNDON.

(Filed 6 January, 1937.)

**1. Criminal Law § 35—**

Where the State establishes a *prima facie* conspiracy to which defendant was a party, testimony of an alleged conspirator as to a conversation between him and another conspirator in the absence of defendant, is competent.

**2. Criminal Law § 53e—**

Exceptions to the statement of the contentions of the State must be taken in time to afford the trial court opportunity for correction.

**3. Criminal Law § 53d—**

An exception to the failure of the court to charge more fully on the weight to be given the testimony of a coconspirator will not be sustained in the absence of a special request for instructions.

**4. Criminal Law § 81a—**

The verdict of the jury on conflicting evidence is conclusive in the absence of error of law or legal inference in the trial.

APPEAL by the defendant from *Frizzelle, J.,* at May Term, 1936, of DURHAM. No error.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Walter D. Siler, R. M. Gantt, and James R. Patton, Jr., for defendant, appellant.*

PER CURIAM. This is an appeal from concurrent judgments of imprisonment passed upon conviction on two counts in a bill of indictment charging conspiracy to commit an assault with firearms and with an assault with firearms.

There are exceptions to the admission of testimony of an alleged conspirator as to conversations had between him and another conspirator, and particularly as to what the latter said in the absence of the defend-

ant. Prior to the admission of this testimony the State had offered competent evidence establishing *prima facie* the conspiracy to which the defendant was a party, and under these circumstances the ruling of the court was correct. *S. v. Beal,* 199 N. C., 278. Where a person enters into an agreement to do an unlawful act, he thereby places his safety and security in the hands of every member of the conspiracy, as the acts and declarations of each conspirator, done or uttered in furtherance of the common design, are admissible in evidence against all. *S. v. Anderson,* 208 N. C., 771.

There are exceptions to the charge, most of which relate to the contentions of the State as given by the court. These came too late when taken for the first time after verdict. In order to have these exceptions considered, it was necessary for the defendant to have called to the attention of the court the contentions she asserts were erroneous at the time they were given to afford the court an opportunity to correct them. *S. v. Johnson,* 193 N. C., 701.

There are exceptions to the failure of the court to charge more fully upon the weight to be given to the testimony of conspirators. If the defendant desired more particular and detailed instructions relative to this subject, it was her duty to have requested special instructions. *S. v. O'Neal,* 187 N. C., 22; *S. v. Anderson, supra.*

Notwithstanding no authorities are cited to support them, or any of them, in view of the gravity of the question involved on this appeal, we have carefully examined the twenty-seven assignments of error in the record and find in them no error prejudicial to the defendant. The case resolved itself into pure questions of fact. If the jury believed the evidence of the State, it was impelled to convict the defendant; if, on the contrary, it believed the evidence of the defendant, or doubted the truth of the State's evidence, it should have acquitted the defendant. The jury has returned a verdict of guilty on both counts in a trial in which we find no error of law or legal inference, and, therefore, we cannot interfere with the judgment, which is supported by the verdict.

No error.

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ANNYE U. ALEXANDER v. WILL ED THOMPSON AND VICTOR S. BRYANT, TRUSTEE.

(Filed 6 January, 1937.)

**Assistance, Writ of, § 1—Purchaser at foreclosure sale by action held entitled to writ of assistance against tenants at sufferance of trustor.**

The purchaser at a foreclosure sale by commissioners appointed by the court is entitled to a writ of assistance against persons in possession, even

though they were not parties to the action in which foreclosure was decreed, when it appears that prior to the institution of the action they had entered a consent judgment stipulating that they had no interest in the land other than tenants at sufferance of the trustor.

APPEAL by respondents, Margaret Umstead, J. N. Umstead, Jr., and Mrs. Elizabeth J. Umstead, from *Frizzelle, J.*, at June Term, 1936, of DURHAM. Affirmed.

This action was begun in the Superior Court of Durham County, on 15 September, 1934.

On the facts alleged in her complaint, the plaintiff prayed that the defendants be restrained and enjoined from selling the land described in the complaint under the power of sale contained in a deed of trust which was executed by the plaintiff to the defendant Victor S. Bryant, trustee, to secure the payment of her notes to the defendant Will Ed Thompson.

In their answer, the defendants denied the allegations of the complaint which constitute the cause of action alleged therein, and pleaded certain matters set out in the answer in bar of plaintiff's recovery in the action. They prayed judgment against the plaintiff on her notes held by the defendant Will Ed Thompson, and for the foreclosure of the deed of trust by which the said notes were secured.

Pursuant to a judgment and decree in the action, commissioners appointed by the court for that purpose, sold the land described in the complaint to the defendant Will Ed Thompson, who was the last and highest bidder for said land. The sale was duly confirmed, and the commissioners, as they were directed to do by the court, conveyed the said land to the defendant Will Ed Thompson by deed, which is dated 11 March, 1936.

The action was heard at June Term, 1936, of the Superior Court of Durham County on the return to a notice issued to the plaintiff Annye U. Alexander and her husband, W. J. Alexander, and to Margaret Umstead, J. N. Umstead, Jr., and Mrs. Elizabeth J. Umstead, to show cause why a writ of assistance should not be issued in the action on the petition of the defendant Will Ed Thompson, as purchaser of the land described in the complaint.

At the hearing, on the facts found by the court, it was ordered, adjudged, and decreed that Will Ed Thompson is the owner and is entitled to the possession of the land described in the complaint, under and by virtue of the deed executed to him by A. A. McDonald and Victor S. Bryant, commissioners, dated 11 March, 1936.

It was further ordered and decreed that the sheriff of Durham County be and he was instructed and directed to expel from said land the respondents, Annye U. Alexander and her husband, W. J. Alexander, and Margaret Umstead, J. N. Umstead, Jr., and Mrs. Elizabeth J. Umstead,

and all persons now in possession of said land claiming under the plaintiff Annye U. Alexander.

It was further ordered that the sheriff of Durham County be and he was authorized to enter upon said land for the purpose of expelling the respondents, and all persons claiming under them, from said land, and of putting the petitioner, Will Ed Thompson, in possession thereof.

The respondents, Margaret Umstead, J. N. Umstead, Jr., and Mrs. Elizabeth Umstead, excepted to the judgment and order, and appealed to the Supreme Court, assigning error on the judgment and order.

*E. L. Culbreth for respondents.*
*Bryant & Jones for petitioner.*

PER CURIAM. At the hearing of this matter, the court found that at January Term, 1936, of the Superior Court of Durham County, in an action entitled "W. J. Alexander and his wife, Annye U. Alexander, *v.* Will Ed Thompson, Victor S. Bryant, Trustee, N. V. Ray, Mrs. Elizabeth J. Umstead, J. N. Umstead, Jr., and Margaret Umstead," in which the title to the land described in the complaint in the action was involved, a judgment was rendered by consent of all the parties to said action. In said judgment there is a recital to the effect that neither Mrs. Elizabeth J. Umstead nor J. N. Umstead, Jr., nor Margaret Umstead has any interest in or title to the land described in the complaint, except as tenants by sufferance of the plaintiff, Annye U. Alexander.

By reason of this finding of fact, there was no error in the judgment and order that a writ of assistance be issued in this action. In *Bohannon v. Trust Company,* 207 N. C., 163, 176 S. E., 268, it is said: "That one who buys at a judicial sale is entitled to a writ of assistance is not questioned. *Bank v. Leverette,* 187 N. C., 743, 123 S. E., 68; *Knight v. Houghtalling,* 94 N. C., 408." On the facts found by the court in the instant case, the petitioner was entitled to the writ as prayed for by him.

Affirmed.

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F. A. PENDERGRAST v. THE HOME MORTGAGE COMPANY, NORTH CAROLINA MORTGAGE CORPORATION, AND JEFFERSON E. OWENS, TRUSTEE.

(Filed 6 January, 1937.)

**Mortgages § 13b—**

A trustee, duly substituted for the original trustee under the provisions of the deed of trust and the statute, may execute deed to the purchaser at a sale duly conducted by the original trustee. N. C. Code, 2583 (a).

APPEAL by plaintiff from *Williams, J.*, at September Term, 1936, of DURHAM. Affirmed.

This is an action to have a deed executed by the defendant, Jefferson E. Owens, Trustee, to the defendant North Carolina Mortgage Corporation declared void, and for other relief.

A deed of trust executed by the plaintiff to the First National Bank of Durham, Trustee, on 15 April, 1929, to secure a loan made to the plaintiff by the defendant, The Home Mortgage Company, was duly foreclosed by a sale of the land conveyed by said deed of trust by the said First National Bank of Durham, Trustee, on 7 November, 1931.

Before it had executed a deed to the defendant, North Carolina Mortgage Corporation, the purchaser at said sale, the First National Bank of Durham, ceased to do business because of its insolvency.

On 22 January, 1932, the defendant Jefferson E. Owens was duly appointed substitute trustee in the deed of trust from the plaintiff to the First National Bank of Durham, Trustee, and accepted said appointment. Thereafter the defendant North Carolina Mortgage Corporation duly complied with its purchase of the land sold by the First National Bank of Durham, Trustee, on 7 November, 1931.

On 8 June, 1932, the defendant Jefferson E. Owens, Trustee, executed and delivered to the defendant North Carolina Mortgage Corporation, a deed conveying to the said corporation the land described in the deed of trust from the plaintiff to the First National Bank of Durham, Trustee.

On the foregoing facts, which were found by the referee to whom the action was referred for trial, it was ordered, considered, and adjudged by the court that the deed from the defendant Jefferson E. Owens, Trustee, to the defendant North Carolina Mortgage Corporation, is valid in all respects.

From the judgment, the plaintiff appealed to the Supreme Court, assigning error in the judgment.

*Bennett & McDonald for plaintiff.*
*Fuller, Reade & Fuller for defendants.*

PER CURIAM. It is admitted by the plaintiff on his appeal to this Court, that the defendant Jefferson E. Owens was duly appointed substitute trustee in the deed of trust from the plaintiff to the First National Bank of Durham, and that the sale of the land conveyed by the deed of trust on 7 November, 1931, by the First National Bank of Durham, as Trustee, was regular in all respects.

The plaintiff contends, however, that the substitute trustee was without authority by reason of his appointment to execute a deed to the purchaser at the sale made by the original trustee. This contention cannot be sustained.

Under the provisions of the deed of trust which appear in the record, and under the provisions of the statute (chap. 78, Public Laws of N. C., 1931, N. C. Code of 1935, sec. 2583 [a]), the substitute trustee was authorized to complete the foreclosure of the deed of trust by the execution of a deed to the purchaser at the sale made by the original trustee, upon his compliance with his bid. See *N. C. Mort. Corp. v. Morgan*, 208 N. C., 743; 182 S. E., 450.

There is no error in the judgment.

Affirmed.

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STATE v. MACK RIGSBEE AND MRS. M. M. RIGSBEE.

(Filed 6 January, 1937.)

**Intoxicating Liquor § 4c—**

Where the husband, with full knowledge, permits his wife to possess intoxicating liquor on the premises for the purpose of sale, the husband is equally guilty with the wife.

APPEAL by defendant Mack Rigsbee from *Spears, J.*, at April Term, 1936, of GRANVILLE. No error.

The defendants were tried on an indictment in which they were charged with having intoxicating liquor in their possession for the purpose of sale.

The evidence for the State tended to show that on or about 19 December, 1935, the defendants, who are husband and wife, had in their home in Granville County, twelve one-half-gallon jars of whiskey; that these jars were concealed behind the chimney in the attic of their home; and that there was a number of empty jars in the attic and about the premises, all having the odor of whiskey about them.

The evidence for the defendants tended to show that the whiskey in the jars was purchased by the defendant Mrs. M. M. Rigsbee, for her own use, and that her husband, the defendant Mack Rigsbee, knew that she had the whiskey in their home.

Both defendants were convicted.

From judgment that he be confined in the county jail of Granville County for twelve months and be assigned to work on the public roads of the State, the defendant Mack Rigsbee appealed to the Supreme Court, assigning error in the instructions of the court to the jury.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Hugh Scarlett for defendant.*

PER CURIAM. At the trial of this action, the court instructed the jury as follows:

"Now, gentlemen of the jury, the court instructs you as a matter of law, that if you find from the evidence, beyond a reasonable doubt, that Mrs. M. M. Rigsbee had in her possession on the premises occupied by her husband, Mack Rigsbee, intoxicating liquor for the purpose of sale, and that he knew that she had it there and permitted her to keep it there, then upon that finding it would be your duty to return a verdict that he is guilty of having intoxicating liquor in his possession for the purpose of sale."

The defendant Mack Rigsbee excepted to this instruction, and on his appeal assigns same as error.

There is no error in the instruction. See *S. v. Hardy,* 209 N. C., 83, 182 S. E., 831.

No error.

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E. R. HANCOCK, ADMINISTRATOR OF THE ESTATE OF LUTHER H. HANCOCK, v. K. L. WILSON AND ATLANTIC GREYHOUND LINES, INC.

(Filed 27 January, 1937.)

**1. Trial § 22—**

On a motion to nonsuit, all the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

**2. Automobiles § 18g—Evidence held for jury on issues of negligence and proximate cause.**

Testimony that a bus was being operated on the wrong side of the highway at an excessive speed, and that it struck the car driven by plaintiff's intestate as it was being driven in the opposite direction at a lawful speed on its right side of the highway, *is held* sufficient to be submitted to the jury on the issues of negligence in the operation of the bus and proximate cause, and the fact that defendants introduced evidence in contradiction of plaintiff's evidence is immaterial on the question of the sufficiency of the evidence to overrule defendants' motions to nonsuit.

**3. Trial § 23—**

Where plaintiff's evidence is sufficient to be submitted to the jury, the fact that plaintiff's evidence is contradicted by evidence introduced by defendants does not entitle defendants to nonsuit, it being for the jury to determine which evidence they will believe.

**4. Trial § 19—**

The competency, admissibility, and sufficiency of the evidence is a matter for the court, its credibility, probative force, and weight is for the jury.

**5. Appeal and Error § 25—**

A contention of error in the charge will be deemed abandoned when the portion of the charge complained of is not assigned as error. Rule 19 (3).

**6. Automobiles § 11—Instruction in regard to passing vehicles on highway held without error.**

The charge of the court that drivers of cars going in opposite directions and passing on the highway should each turn to the right and give to the other one-half the main traveled portion of the roadway, and that upon approaching each other each may assume that, before the cars meet, the driver of the other car will turn to his right so that the cars may pass in safety *is held* without error. N. C. Code, 2621 (53).

**7. Trial § 32—**

A party desiring elaboration on a subordinate feature of the charge must aptly tender a proper prayer for instructions.

**8. Death § 8—Charge held to have sufficiently instructed jury that mortuary table was merely evidential and that jury was not bound thereby.**

The court instructed the jury in regard to the statutory mortuary table, that the table was based upon the experience of insurance companies, that under the statutory table a normal man of intestate's age would have a life expectancy of a stated number of years, that the jury could consider the table in making its verdict, but that the jury was not bound by it, and that the jury should consider not only the table, but the health, habits, and character of intestate. *Held:* The charge is not subject to the objection that it made the statutory mortuary table binding upon the jury in determining intestate's life expectancy. C. S., 1790.

**9. Same—Charge held not to have instructed the jury to consider intestate's family in determining the amount of damages.**

The court instructed the jury to consider intestate's age, strength, health, skill, industry, habits, and character to the end that they might determine his pecuniary worth to his family, how much net income might be reasonably expected, that the jury should rid itself of prejudice, if any, that the matter of damages was a practical question and not a question of sympathy, and that defendants contended that intestate made only enough for his living expenses, and that consequently there would be no net income. *Held:* The charge that the jury should determine intestate's pecuniary worth to his family is not objectionable, when read in connection with other portions of the charge, as allowing the jury to consider intestate's family in determining the amount of damages. *Kesler v. Smith*, 66 N. C., 154, cited and distinguished for that evidence of the number of intestate's children was admitted in that case.

**10. Trial § 36—**

A charge will be read contextually as a whole, and exceptions thereto will not be sustained when the charge, so construed, is not prejudicial.

APPEAL by defendants from *Grady, J.*, and a jury, at February Term, 1936, of CASWELL. No error.

This is an action for actionable negligence, brought by plaintiff against defendants for damages.

The plaintiff, among other things, made the following allegations in his complaint:

"That the defendant, K. L. Wilson, was, at the time of the injury hereinafter complained of, an employee and agent of the defendant Atlantic Greyhound Lines, and was employed as a bus driver.

"That on the night of September 6, 1935, about midnight, the plaintiff's intestate, Luther H. Hancock, together with three other persons, was driving a Chrysler sedan on Federal Highway No. 29, traveling in a southern direction toward Pelham, North Carolina; and while operating the said car in a careful, prudent, and lawful manner, as he reached a slight grade in the said highway, at a point near Pelham, North Carolina, the defendant K. L. Wilson, agent and employee of the defendant Atlantic Greyhound Lines, and while acting within the scope of his employment and while acting as the servant and agent of the defendant Atlantic Greyhound Lines, approached from the opposite direction, operating an Atlantic Greyhound bus, the property of the defendant Atlantic Greyhound Lines, at a terrific rate of speed and in a careless and reckless manner, proceeded, while operating the said bus on the left hand side of the said highway and in violation of law, carelessly and negligently struck the car of the plaintiff's intestate, almost completely demolishing the said Chrysler sedan and causing it to catch fire immediately, inflicting the injury to the plaintiff's intestate as hereinafter set out; that the bus continued on the left hand side of the road, after striking the car of the plaintiff's intestate, for a distance of approximately two hundred feet; that, at the time of the collision, the car of the plaintiff's intestate was entirely on the right side of the highway proceeding south in the direction of Greensboro.

"That, in the collision, the plaintiff's intestate, Luther H. Hancock, was either killed from the collision or burned to death as a result of the said collision.

"That the defendants were greatly negligent on the said occasion in the following particulars:

"In that they were operating the said Greyhound bus in a careless and reckless manner without due regard for the traffic conditions and the condition of the highway, and in utter disregard of the safety of others, and especially the plaintiff's intestate; and that the driver of the said bus failed to keep a proper lookout and failed to keep his bus under control, and that he failed to operate the car with the care and prudence necessary under the circumstances.

"In that they were operating the said Greyhound bus at an excessive rate of speed, greater than that allowed by law.

"In that they were operating the Greyhound bus on the left side of the highway and in violation of law.

"That the negligence of the defendants on the said occasion was the proximate cause of the death of the plaintiff's intestate, Luther H. Hancock, deceased.

"That, at the time of the injury causing the death of the plaintiff's intestate, he was 29 years of age, in perfect health, and was earning an average of twenty-five dollars per week; that he was an industrious, hard-working young man of good, steady habits.

"That, on account of the negligence of the defendants, the plaintiff has sustained damages in the sum of Twenty-five Thousand Dollars."

The defendants in their answer denied the material allegations of the complaint, and set up certain statutes in reference to the law of the road that plaintiff's intestate was violating when the collision occurred, and also set up contributory negligence, alleging "that the collision was caused by no fault or negligence on the part of the defendants or either of them, but was due to and proximately arose on account of the careless and negligent conduct of the plaintiff's intestate, Luther H. Hancock, the driver of the Washington taxicab," etc.

The issues submitted to the jury and the answers thereto were as follows:

"1. Was Luther H. Hancock killed by the negligence of the defendants, as alleged in the complaint? Answer: 'Yes.'

"2. If so, was said Luther H. Hancock also guilty of negligence, which contributed to his death, as alleged in the answer? Answer: 'No.'

"3. What damages, if anything, is the plaintiff entitled to recover of defendants because of the death of said Luther H. Hancock? Answer: '$5,000.'"

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 will be considered in the opinion.

*Wm. E. Comer, W. B. Horton, and Carlton & Upchurch for plaintiff.*
*Hutchins & Parker for defendants.*

CLARKSON, J. At the close of plaintiff's evidence, and at the close of all the evidence, the defendants made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom.

The evidence of plaintiff fully sustained the allegations in the complaint. The testimony of J. O. Franklin, witness for plaintiff, was to

the effect that Luther H. Hancock, plaintiff's intestate, was a taxicab driver in Washington, D. C., and drove a Diamond taxicab; that he was employed to drive his father, W. L. Franklin, and others to Gastonia, N. C., and they left Danville about 12:00 o'clock at midnight on Thursday, September 5, 1935. He testified in part as follows: "We were going toward Greensboro from Danville. The roads were a little slick; it was drizzling rain. We had an accident or a collision. We were going up this hill, and a bus was coming over the hill between Pelham and Ruffin. I think the highway is pretty straight there. Way down below this hill is a curve. I was riding in the front seat of the taxicab with the driver. I saw this Greyhound bus coming over the hill. *This bus was on the left-hand side of the road going north when it came over the hill on our side of the road, the right side going south; the Greyhound bus was on its left-hand side. Prior to the time we approached where I saw the bus we were on the right-hand side of the road going south in the direction of Greensboro. The bus was going north. This bus came over the hill and on the left-hand side of the road going north, and we ran a little off the road to the right to try to get out of the way and the bus crashed into us, and that is all I remember. I was unconscious twelve hours after that. I think this bus was making at least 50 or 55 miles an hour.* The speed of the taxicab in which I was riding was twenty-five or thirty miles an hour. We were going up hill. The collision occurred about 12:30. . . . I thought the bus was about ten feet from the car in which I was riding at the time I saw it approach. The highway north of the point of the collision is a grade. There is a curve at the bottom of the hill. At the point of the collision the road was straight. The occupants of the car I was in are all dead now. . . . At the time of the collision the Greyhound bus was on the left-hand side going north. We were on the right-hand side going south."

The taxicab caught on fire and the driver and another were burned to death.

The defendants in their brief say: "Nothing else appearing, we realize that this testimony is some evidence of negligence on the part of the defendants, but we think that something else does appear." This is the contradictory evidence on the part of the defendants. It is a matter long settled in this jurisdiction that the evidence is for the jury to determine.

The competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury.

In *Smith v. Coach Line,* 191 N. C., 589 (591), *Brogden, J.,* speaking for the Court, says: "In *Shell v. Roseman,* 155 N. C., 90, this Court has

held that conflicting statements of a witness in regard to or concerning a material or vital fact does not warrant a withdrawal of the case from the jury. It affects only the credibility of the witness, and therefore, where inconsistent and conflicting statements are made by a witness or a party, the judge has no power to determine which is correct. This function belongs exclusively to the jury. To the same effect is *Christman v. Hilliard,* 167 N. C., p. 5, where plaintiff testified on direct examination that he could not state whether the land in controversy was embraced in the deed or not. Thereafter, on cross-examination, he testified that the land was embraced in the deed. The trial judge thereupon nonsuited the plaintiff, and under the principles of law heretofore established by the Court, the nonsuit was held to be error," citing authorities.

The defendants contend that the court below instructed the jury that speed in excess of 45 miles an hour on a highway was negligence *per se,* when the act says that it is only *prima facie* evidence of negligence. N. C. Code, 1935 (Michie), sec. 2621(46), Public Laws of 1935, chap. 311, sec. 4(c); *Exum v. Baumrind,* 210 N. C., 650.

On appeal to this Court by defendants in their "assignments of error" this charge is not complained of, and therefore "will be deemed to be abandoned." 200 N. C., Rule 19(3): "All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned," etc.

We think the court below fully complied with the law by reading the statutes applicable to the facts in the case, viz.: N. C. Code, 1935 (Michie) sections 2621(45); 2621(46); 2621(51); 2621(53); the last mostly applicable to the facts in this case being as follows: "Drivers of vehicles, proceeding in the opposite directions shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible. (1927, chap. 148, sec. 11.) When the driver of one of the automobiles is not observing the rule of this section, as the automobiles approach each other, the other may assume that before the automobiles meet, the driver of the approaching automobile will turn to his right, so that the two automobiles may pass each other in safety." *Shirley v. Ayers,* 201 N. C., 51, 53. See, also, *James v. Carolina Coach Co.,* 207 N. C., 742.

If defendants wanted a more elaborate charge, they should have requested same by proper prayer for instructions.

It is contended by the defendants that the court erred in instructing the jury with reference to the mortality table. The clause complained of is as follows: "In other words, gentlemen, under the statute, a normal ordinary man of the age of Luther H. Hancock would have continued to

live, without accident, for thirty-six years." But the full charge is as follows: "We have in the law books of this State a statute and in that statute is a table which we call the table of mortality. This table, gentlemen, is based upon the experience of the large insurance companies, the life insurance companies. They will go back for years and years and take all of the people who have held policies and they will ascertain what the age of each one of those persons was, and how long they lived. And then they will make a calculation upon these facts as to what is the probable length of life of a man of any given age. The statute to which I have just referred, gentlemen, puts the expectancy of Luther H. Hancock at thirty-six years. In other words, gentlemen, under the statute a normal, ordinary man of the age of Luther H. Hancock would have continued to live, without accident, for 36 years.

"You have the right to consider that statute, gentlemen, in making up your verdict, but you are not bound by it. You have the right to consider not only the statute, but the habits, the character of the man who died. The plaintiff contends, gentlemen, that you ought to find as a fact that he was a strong, healthy young man, that he was a man of good habits, that he was at that time making around $25.00 per week, or something over $100.00 per month," etc.

In *Taylor v. Construction Co.*, 193 N. C., 775 (779), *Brogden, J.*, speaking for the Court, said: "In the language of *Hoke, J.*, in *Sledge v. Lumber Co.*, 140 N. C., 459: 'The error here consists in making the mortuary tables conclusive as to the plaintiff's expectancy; whereas, by the very language of the statute, they are only evidential to be considered with all other testimony relevant to the issue.' *Speight v. R. R.*, 161 N. C., 80; *Odom v. Lumber Co.*, 173 N. C., 134." *Hubbard v. R. R.*, 203 N. C., 675 (683); *Trust Co. v. Greyhound Lines*, 210 N. C., 293.

N. C. Code, 1935 (Michie, sec. 1790), is as follows: "Mortuary tables as evidence: Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution, and habits of such person, of such expectancy represented by the figures in the columns headed by the words, 'completed age' and 'expectation,' respectively," etc.

We think that taking the charge as a whole, the court below merely explained the statute, that the jury could consider the statute but are not bound by it. We think the statute was complied with.

The court below charged the jury, in part, as follows: "As a basis on which to enable you gentlemen to make this estimate, it is competent for

the plaintiff to show, and for you to consider, the age of the dead man, Luther H. Hancock. It is competent for you to consider his prospects of life, his habits, his character, his industry, and skill, the means he had for making money, the business in which he was employed, the end of it all, gentlemen, being to enable you to fix upon the net income which might be reasonably expected, if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family."

The defendants contend that this was error. In *Kesler v. Smith,* 66 N. C., 154 (159), *Reade, J.,* lays down the rule as follows: "It was competent to inquire into his age, his strength, his health, his skill and industry, his habits, and his character, the end of all being to get at his pecuniary worth to his family—how much net income might be reasonably expected."

In that case a new trial was granted on the ground that evidence was admitted to prove the number in the family of deceased. This was held error, as the necessities of the family and not the value of the life would constitute the rule.

In *Hicks v. Love,* 201 N. C., 773 (776-7), is the following: "The appellant excepted to evidence offered by the plaintiff that the deceased provided for his family, that he had a comfortable home, a 200-acre farm, and a plenty for his family to eat and wear.

"In determining the pecuniary advantage to be derived from the continuance of a human life, it is competent for the jury in an action for wrongful death under C. S., 160, to consider evidence as to the age, habits, industry, skill, means, and business of the deceased. *Burton v. R. R.,* 82 N. C., 505; *Carter v. R. R.,* 139 N. C., 499; *Carpenter v. Power Co.,* 191 N. C., 130.

"A part of this evidence has reference to the industry of the deceased and to the business in which he was engaged, and is clearly within the scope of the cases just cited; and we see no convincing reason for holding that the result of his toil as manifested in providing for the support of his family should not be considered as evidence of his constant attention to business. Certainly the admission of the evidence is not adequate cause for a new trial. 17 C. J., 1356, sec. 244(3). We are referred by the appellant to *Kesler v. Smith,* 66 N. C., 154; but a careful perusal of the case will show that the evidence held to be incompetent was, in the first place, proof of the number in the family of the deceased at the time of his death, the proposed argument being that the number in the family ought to affect the damages; and, in the next place, proof that the deceased 'was often engaged in fighting' and 'was often indicted,' which was offered in answer to the plaintiff's evidence that the deceased 'furnished supplies to his family and was seen carrying them provisions.' The case, therefore, is not in conflict with the conclusion above stated." *Hines v. Foundation Co.,* 196 N. C., 322 (323-4).

Further, the court below charged the jury: "It will be your duty, gentlemen, in arriving at a verdict upon this, or any other issue, to rid yourselves of any prejudices, if you possibly have any, to rid yourselves of any sympathy which you may possibly have. It is not a question of sympathy. It is just a plain, practical question, and you should give a reasonable and fair verdict upon all of the issues, according to the evidence in this case, gentlemen."

Further, we find that the court below said in regard to damage: "The defendant in this case contends, gentlemen, that an income of $25.00 per week in the city of Washington, that there would have been no net income. The defendant contends that you gentlemen ought to know as a matter of common knowledge and common sense that a person can hardly live in Washington City for $25.00 a week, and that in this case that there would have been no net income, and that the damage in this case can only be nominal. . . . That there would have been no net income, or, if any, that it would have been very small, taking into consideration the amount of his gross income."

Taking the charge as a whole, we see no ground for a new trial.

The many exceptions and assignments of error made by the defendants as to the expression of opinion by the court below, the admission and exclusion of evidence, and as to the measure of damages are without merit and not prejudicial. The defendants contend that the court below erred in failing to review the evidence and declare the law arising therefrom, and impinged C. S., 564. We cannot so hold. Taking the charge as a whole, the able and learned judge in the court below reviewed the evidence, gave the contentions fairly, and charged the law applicable to the facts. We can see no prejudicial or reversible error on the record. The matter was mainly one of fact for the jury to decide. Under the evidence they could have decided either way, but rendered verdict for the plaintiff.

In law, we find

No error.

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LAURA L. POWELL v. GURNEY P. HOOD, COMMISSIONER OF BANKS, EX REL. THE UNITED BANK & TRUST COMPANY AND W. P. DYER, JR., LIQUIDATING AGENT OF THE UNITED BANK & TRUST COMPANY.

(Filed 27 January, 1937.)

**1. Banks and Banking § 18—Where assets are more than sufficient to pay all claims of the class, such claims draw interest from date of insolvency.**

At the date of the closing of the bank in question, plaintiff had on deposit therein a certain sum, and was liable on notes executed to the bank

which had been hypothecated by it to the Reconstruction Finance Corporation. Plaintiff was thereafter forced to pay the notes to the Reconstruction Finance Corporation as the holder in due course without obtaining an offset for the amount of her deposit. Under the facts of the case, plaintiff was entitled to a preferred claim against the bank for the amount of her deposit, and the assets of the bank were more than sufficient to pay all claims of this class in full. *Held:* Plaintiff was entitled to interest on the amount of her preferred claim from the date of the closing of the bank, and not merely from the date of her payment of the notes to the Reconstruction Finance Corporation.

**2. Same—Depositor paying note assigned as collateral held entitled to preferred claim for amount of deposit upon bank's paying debt to assignee and having funds remaining for distribution to creditors.**

Plaintiff's note was assigned by the payee bank before its receivership to the Reconstruction Finance Corporation, with other notes, as collateral security for the bank's indebtedness to the corporation. Upon the bank's insolvency, plaintiff was forced to pay to the Reconstruction Finance Corporation, as the holder in due course, the full amount of the note, and was precluded from offsetting her deposit, outstanding at the time of the bank's closing, against the note. Plaintiff's payment resulted in a partial discharge of the bank's indebtedness to the Reconstruction Finance Corporation, and funds realized from other notes assigned, and assets not assigned, completely discharged the bank's indebtedness to the Reconstruction Finance Corporation, and assets and funds were left over exceeding the amount of plaintiff's claim for distribution to creditors. *Held:* Plaintiff's claim against the bank for the amount of her deposit was a preferred claim against the assets of the bank.

APPEAL by both plaintiff and defendants from *Shaw, Emergency Judge,* at September Term, 1936, of GUILFORD. Modified and affirmed.

This is a controversy without action. C. S., 626.

"Plaintiff and defendants, being parties to a question in difference which might be the subject of a civil action, and having agreed upon a case constituting the facts upon which the controversy between them depends, hereby without action, present the submission thereof to the Superior Court of Guilford County, to wit: The court which would have jurisdiction thereof if an action had been brought; and thereupon they set up the following as the facts upon which the controversy depends:

"1. Defendant Gurney P. Hood is the Commissioner of Banks of the State of North Carolina, and defendant W. P. Dyer, Jr., is the liquidating agent in charge of the liquidation of the United Bank & Trust Company, a banking institution chartered under the laws of the State of North Carolina, and from the first day of July, 1932, to the eighth day of February, 1933, engaged in the transaction of a general banking business with its principal office and place of business in the city of Greensboro, and with branches in the towns of Burlington, Reidsville, and Sanford, in said State.

"2. On the 8th day of February, 1933, said bank closed its doors and immediately thereafter said Hood, Commissioner, as aforesaid, pursuant to the statutes of the State of North Carolina, in such case made and provided, assumed the possession and control of said bank for purposes of liquidation, and placed in immediate possession and control of the assets and properties thereof one W. W. Woodley as his representative and as liquidating agent thereof. Said Woodley continued as such liquidating agent for a period of several months and was succeeded as such agent by one A. G. Small, and thereafter defendant W. P. Dyer, Jr., was placed in immediate possession and control of said assets and properties, as the representative of said Hood, Commissioner, and as liquidating agent thereof, and from that time until the present time, has been and is now such liquidating agent.

"3. At the time when said bank closed its doors and ceased to do business, plaintiff had on deposit in said bank the sum of $720.98, upon which she has heretofore received from said Commissioner two liquidating dividends, aggregating 35%, or the sum of $252.35, and said bank and said Commissioner and said liquidating agent, in their respective representative capacities, are now indebted to the plaintiff in the amount of $468.63, together with interest on $720.98 at the rate of six per centum per annum, from said 8th day of February, 1933, to the 5th day of April, 1934, the date of the payment of the first of said dividends, said dividend being ten per centum of the amount of said deposit, and interest on $648.88, at the rate of six per centum from the 5th day of April, 1934, to the 5th day of May, 1936, the date of the payment of the second of said dividends, said second dividend being twenty-five per centum of said deposit, and interest on $468.63, at the rate of six per centum per annum from said 5th day of May, 1936, until paid.

"4. Prior to the closing of said bank, and the beginning of the liquidation thereof, plaintiff became indebted to said bank in the principal sum of $780.00, and as evidence of such indebtedness she executed and delivered to said bank or its order her two promissory notes in the amounts respectively of $500.00 and $280.00, said notes being dated respectively 12 November, 1932, and 14 January, 1933, both bearing interest at the rate of six per centum per annum.

"5. After the execution and delivery aforesaid of said promissory notes and before their respective maturities, said bank, being indebted to the Reconstruction Finance Corporation, a corporation chartered under the laws of the United States of America, in an amount approximating $1,250,000, hypothecated, pledged, and delivered said notes, along with many other notes and collateral, in number more than one thousand, to said Reconstruction Finance Corporation, as collateral security for the payment of said bank's note or notes to said Reconstruction Finance

Corporation, evidencing said bank's indebtedness thereto; and by reason of the premises, said Reconstruction Finance Corporation became the holder of said promissory notes in due course.

"6. After the closing of said bank, and the assumption of possession and control of its assets by said Commissioner, as aforesaid, and after the maturity of said promissory notes, demand was made upon the plaintiff by said Reconstruction Finance Corporation for the payment thereof; thereupon, on 11 October, 1934, plaintiff demanded that the amount of her deposit aforesaid in said bank, be offset against her said promissory notes, but she was advised and informed that, because said Reconstruction Finance Corporation was the holder in due course of said promissory notes, by reason of their hypothecation, pledge, and delivery by said bank to said Reconstruction Finance Corporation, before maturity, she had no right in law to set up her said deposit in said bank as an offset against said promissory notes; and, peremptory demand having been made by said Reconstruction Finance Corporation upon her to pay said notes, she had no recourse save to pay said notes, in full, together with interest, or be subjected to a suit or suits for the collection thereof, and an execution against her property upon the judgment or judgments which would inevitably have been secured against her; and, thereupon, on 11 October, 1934, being solvent, she paid said notes and interest in full, at which time the said Reconstruction Finance Corporation still held as collateral securing said bank's indebtedness to it many hundreds of notes of debtors of said bank who were not also depositors therein.

"7. When plaintiff demanded as aforesaid that the amount of her said deposit be offset against her said notes, the liquidating agent in charge of said bank represented to her that the assets thereof were not sufficient to discharge the indebtedness of said bank to said Reconstruction Finance Corporation, and that since she could not offset her said deposit against the claim of said Reconstruction Finance Corporation, as the holder in due course of said promissory notes, she would have no opportunity of availing herself of her right as against said bank of offsetting her said deposit against her said promissory notes; she believed the representation aforesaid of said liquidating agent and in paying said promissory notes relied and acted thereupon, but developments subsequent to the time of such representations and such payment have demonstrated that said representation was untrue, although it is admitted that said liquidating agent verily believed said representation to be true; and but for said representation, plaintiff would not have paid her said promissory notes without the offset against them of her said deposit.

"8. There were many depositors in said bank who were also debtors thereto, who failed and refused to pay their several indebtedness to said bank, without the allowance of their said deposits as offsets and paid their indebtedness only to the extent of their several indebtedness less their several deposits in said bank, at the time of its closing as aforesaid; and on or about the 24th day of January, 1936, defendant with money derived from the liquidation of the assets of said bank pledged to said Reconstruction Finance Corporation, and with money derived from the liquidation of assets of said bank not pledged to said Reconstruction Finance Corporation, completed the payment in full of said bank's indebtedness to said Reconstruction Finance Corporation, whereupon defendants allowed in full to the debtors of said bank who were also depositors therein, aggregating in number approximately three hundred, the full amount of their several and respective deposits, which allowances approximated the sum of $70,000; said payment to said Reconstruction Finance Corporation was made out of the proceeds of sales or collections made of assets pledged to said Reconstruction Finance Corporation and of assets not so pledged; the value of the assets returned to the defendants after the payment of said indebtedness was equal to or in excess of the total amount collected by said Reconstruction Finance Corporation on items which would have been offset by deposit balances of debtors to said bank but for the pledge to said Reconstruction Finance Corporation of said assets and the amount paid by defendants to said Reconstruction Finance Corporation on said indebtedness out of the proceeds of the sale and collection of unpledged assets.

"9. The payment of said promissory notes by plaintiff, whether made directly to said Reconstruction Finance Corporation, or its representatives, or to defendants, was made and resulted in the partial discharge of said bank's indebtedness to said Reconstruction Finance Corporation and was in contemplation of law as if made to said bank or to defendants.

"10. The assets now remaining in the possession of the defendants are insufficient to pay in full claims of unsecured creditors of said bank; they are sufficient, however, to pay the remaining costs and expenses of liquidation, all unpaid preferred and secured claims, if any, in full with interest, and the claims of the plaintiff and all persons in like plight with her in full, with interest from the date on which said bank closed, after which there will remain a substantial amount for distribution to unsecured creditors and depositors, who have heretofore received two dividends, one of ten per centum, and another of twenty-five per centum, respectively, on claims aggregating one million two hundred and thirty-nine thousand dollars."

On the foregoing facts the court was of opinion that plaintiff is entitled to recover of the defendants (1) the sum of $468.63, this being

the amount of her deposit in the United Bank & Trust Company on 8 February, 1933, the date of the closing of said bank, to wit, the sum of $720.98, less the aggregate amount of the two dividends paid on said deposit by the defendants during the course of the liquidation of said bank, to wit, the sum of $252.35; (2) interest at the rate of six per centum per annum on the sum of $648.88, this being the amount of her said deposit less the first dividend of 10 per centum, to wit, the sum of $72.10, paid thereon prior to 11 October, 1934, the date of the payment by plaintiff of her notes held by the Reconstruction Finance Corporation, as holder in due course, from 11 October, 1934, to 5 May, 1936, the date of the payment by the defendants of the second dividend of twenty-five per centum, to wit, the sum of $180.25; and (3) interest at the rate of six per centum per annum on the sum of $468.63, this being the amount of said deposit less the aggregate amount of the two dividends paid therein, from 5 May, 1936, until paid.

The court was further of the opinion that plaintiff is entitled to a lien on all the assets of the United Bank & Trust Company, now in the possession of the defendants, for the full amount of her recovery, and to the payment of said amount by the defendants out of said assets, in preference to the claims of general and unsecured creditors of the United Bank & Trust Company.

From judgment by the court in accordance with its opinion, both plaintiff and defendants appealed to the Supreme Court, each assigning error in the judgment.

*Hobgood & Ward for plaintiff.*
*Smith, Wharton & Hudgins for defendants.*

CONNOR, J. It is conceded by both plaintiff and defendants that there is no error in the judgment in this case that plaintiff recover of the defendants the sum of $468.63. It was agreed by them that this is the amount now due the plaintiff on her deposit in the United Bank & Trust Company, at the date of the closing of said bank, to wit, 8 February, 1933. The judgment to that effect is affirmed.

The defendants contend that plaintiff is not entitled to recover interest on the amount of her deposit or any part thereof, and on their appeal to this Court assign as error in the judgment the allowance of interest on said amount, or any part thereof.

It was agreed that after the partial liquidation of the assets of the United Bank & Trust Company by the defendants, and the payment of two dividends on the claims of its creditors and depositors, aggregating 35 per centum of said claims, there now remains in the hands of the defendants sufficient assets for the payment in full of all the costs and

expenses of the liquidation of the United Bank & Trust Company, of all unpaid secured or preferred claims against said bank, with interest, and of the claims of the plaintiff and of all persons in like plight with her, with interest on such claims from the date of the closing of said bank, and that after the payment of said costs and expenses, and of said claims, with interest, there will remain in the hands of the defendants sufficient assets for the payment of a dividend in a substantial amount on the claims of depositors and creditors, which are not secured or entitled to preferential payment.

In view of this agreement, the contention of the defendants that plaintiff is not entitled to recover interest on the amount of her deposit in the United Bank & Trust Company, or any part thereof, cannot be sustained, if as adjudged by the court, the plaintiff is entitled to the preferential payment of the amount of her judgment. Conceding for the present that there is no error in the judgment to that effect, there is no error in the judgment that plaintiff recover interest on the amount of her deposit.

In *American Iron & Steel Manufacturing Company v. Seaboard Air Line Railway,* 58 L. Ed., 949, in the opinion of *Mr. Justice Lamar,* it is said:

"And it is true, as held in *Tredegar Co. v. Seaboard Air Line Railway Co.,* 105 C. C. A., 501, 183 Fed., 290, that as a general rule, after property of an insolvent is *in custodia legis,* interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But this is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone, or of principal and interest combined. But some of the debts might carry a high rate and some a low rate, and hence inequality would result in the payment of interest which accrued during the delay incident to collecting and distributing the funds. As this delay was the act of the law, no one should thereby gain an advantage or suffer a loss. For that and like reasons, in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt. But that rule did not prevent the running of interest during the receivership; and if as the result of good fortune or good management, the estate proved sufficient to discharge the claim in full, interest as well as principal should be paid. Even in bankruptcy, and in the face of the argument that the debtor's liability on the debt and its inci-

dents terminated at the date of adjudication, and as a fixed liability was transferred to the fund, it has been held, in the rare instances when the assets ultimately proved sufficient for the purpose, that creditors were entitled to interest accruing after adjudication. 2 Blk. Com. Cf. *Johnson v. Norris,* 1915-B, L. R. A. (N. S.), 884, 111 C. C. A., 291, 190 Fed., 460(5).

"The principle is not limited to cases of technical bankruptcy, where the assets ultimately prove sufficient to pay all debts in full, but principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full. *Central Trust Co. v. Condon,* 14 C. C. A., 314, 31 U. S. App., 387, 67 Fed., 84; *Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co.,* 34 L. R. A., 625, 15 C. C. A., 289, 31 U. S. App., 704, 68 Fed., 116; *First Nat. Bank v. Ewing,* 43 C. C. A., 150, 103 Fed., 190."

This principle was recognized and applied by this Court in *Hackney v. Hood, Commissioner of Banks,* 203 N. C., 486, 166 S. E., 323. In that case, the assets of an insolvent bank in the hands of the defendant for liquidation and distribution among its creditors and depositors, were sufficient for the payment of all claims against said bank, with interest from the date of its insolvency. It was held that the creditors and depositors were entitled to the payment of interest on their claims from date of the insolvency of the bank, in preference over the rights of stockholders to share in the distribution of said assets. In *In re Central Bank & Trust Company,* 206 N. C., 251, 173 S. E., 340, it was held that a preferred creditor was not entitled to the payment of interest after the insolvency of the bank, on his claim. In that case, the assets were not sufficient for the payment of all the preferred claims. For that reason, the principle was not applicable.

In the instant case, if her judgment is entitled to preferential payment by the defendants out of the assets of the United Bank & Trust Company now in their hands, the plaintiff is entitled to recover interest on the amount of her deposit from the date of the insolvency of the bank until paid. There is error in the judgment allowing plaintiff interest on her claim only from 11 October, 1934. The judgment should be modified and interest allowed on plaintiff's claim from 8 February, 1933, as contended by plaintiff on her appeal to this Court. As thus modified, the judgment should be affirmed, if plaintiff is entitled to the preferential payment of her claim, as adjudged by the court.

It was agreed that the payment by the plaintiff of her promissory notes, aggregating the sum of $780.00, and payable to the United Bank & Trust Company or its order, to the Reconstruction Finance Corporation, as the holder in due course of said notes, resulted in the partial discharge of the indebtedness of the bank to the said Reconstruction

Finance Corporation, and that after the payment in full of said indebtedness, assets of the United Bank & Trust Company, in the hands of the Reconstruction Finance Corporation as collateral security for said indebtedness, exceeding in value the amount of plaintiff's claim against said bank, were delivered by the Reconstruction Finance Corporation to the defendants.

In view of this agreement, the plaintiff has an equity to have the amount of her deposit applied as a payment on her notes, with the result that her deposit is entitled to preferential payment out of the assets of the United Bank & Trust Company, now in the hands of the defendants. There is no error in the judgment to that effect. On facts substantially identical with the facts of the instant case, it was so held in *Hall v. Burrell* (Colo.), 124 Pac., 751, and in *Becker v. Seymour* (Minn.), 73 N. W., 1096.

As modified in accordance with this opinion, the judgment is

Affirmed.

## IN THE MATTER OF THE LIQUIDATION OF THE NORTH CAROLINA BANK AND TRUST COMPANY.

(Filed 27 January, 1937.)

APPEAL by respondent from *Rousseau, J.*, at June Term, 1936, of GUILFORD. Affirmed.

This matter was heard on the petition of J. F. Cannon, for an order directing J. T. Gobbel, agent and conservator of the North Carolina Bank and Trust Company, an insolvent banking corporation, to pay his claim against said corporation out of certain assets in the hands of the respondent.

On the facts alleged in the petition and admitted in the answer, it was ordered by the court that respondent pay the claim of the petitioner out of assets in his hands, delivered to him by the Reconstruction Finance Corporation.

Respondent appealed to the Supreme Court, assigning error in the order.

*Lovelace & Kirkman for petitioner.*

*York & Boyd for respondent.*

CONNOR, J. There is no error in the order in the instant case. It is affirmed. See *Powell v. Hood, Comr. of Banks, ante,* 137.

Affirmed.

F. GORDON COBB v. MRS. ESTELLE LAND COBB.

(Filed 27 January, 1937.)

**1. Husband and Wife § 21—Deed of separation may be set aside only for fraud or mutual mistake.**

A deed of separation between husband and wife, duly executed and approved by the court, is a valid and binding contract between the parties, and may not be set aside upon application of either except for mutual mistake, or mistake of one party induced by the fraud, undue influence, etc., of the other, and mistake on one side alone without fraud on the other is insufficient ground for cancellation of the agreement.

**2. Appeal and Error § 40—**

Where the court hears the evidence by agreement of the parties, the court's findings of fact therefrom are as conclusive as the verdict of a jury, and will not be disturbed on appeal when they are supported by any competent evidence.

**3. Husband and Wife § 20—Court held to have had discretionary power to modify terms of deed of separation under its provisions.**

The deed of separation between plaintiff husband and defendant wife which was duly executed by the parties and approved by the court, provided that if in the future the husband's income should be materially reduced below the amount received by him in the twelve months preceding the execution of the deed of separation, he might apply to a court of competent jurisdiction for a reduction in the amount of the monthly payments to the wife provided in the instrument. The husband instituted action in this State after he had removed his residence to the State and had been living here more than twelve months preceding the institution of the action. Defendant filed answer, and both parties were present and represented in court. Upon evidence heard by him, the court found that plaintiff's income from all sources had been materially reduced, and reduced the monthly allowance to defendant by one-third, effective as of the date of the institution of the action. *Held:* The court had jurisdiction, in the exercise of its discretion, to enter the order reducing the allowance, and its judgment will not be disturbed on appeal of either party in the absence of any showing of arbitrariness or abuse of discretion.

**4. Appeal and Error § 37—**

A discretionary order of the trial court is conclusive on appeal in the absence of abuse or arbitrariness.

**5. Appeal and Error § 39e—**

Exceptions to the admission or exclusion of evidence which is immaterial or not prejudicial do not entitle appellant to a new trial.

APPEAL by plaintiff and defendant from *Pless, Jr., J.*, at September Term, 1936, of MECKLENBURG. Affirmed on both appeals.

This was a civil action instituted by the plaintiff to set aside and declare void a separation agreement and decree heretofore entered into by the parties, and to reduce the monthly payments of $300.00 per month, provided for in said separation agreement, dated 19 September, 1929, and the decree.

In the court below are the following findings of fact and judgment:

"This cause coming on to be heard before J. Will Pless, Jr., Judge presiding, upon agreement of counsel for plaintiff and defendant that same may be heard without a jury, and that the court should find these facts and state his conclusions of law arising thereon, and after hearing the evidence, both plaintiff and defendant being personally present and represented by counsel, the court finds the following facts:

"That the plaintiff and defendant were married to each other in the year 1909, each of the parties having been married to other persons theretofore, the plaintiff being the father of two sons by his first marriage and the defendant being the mother of a daughter by her first marriage, and that no children were born to the marriage of the parties hereto.

"That in the year 1929, the plaintiff and defendant entered into a contract whereby they agreed to live separate and apart, said contract being dated 19 September, 1929, and is hereby incorporated in these findings as fully as if set out herein, and that in the year 1929, the plaintiff and defendant separated from each other and have lived separate and apart ever since, and entered into a contract whereby they agreed to live separate and apart, said contract being dated 19 September, 1929.

"The court further finds as a fact that thereafter, to wit, on 7 October, 1929, the parties agreed that a decree should be entered in the court of common pleas of Lancaster County, South Carolina, which incorporated a part of the terms of the separation agreement, said decree being made a part of these findings as fully as if set out herein.

"The court further finds as a fact that no increase or decrease in the monthly allowance of $300.00 as provided for in the separation agreement, and in the decree has been made by any court or by consent since that date.

"It is further found as a fact, that at the date of said separation agreement and of the decree, that the plaintiff had an annual income of approximately $24,000, approximately $18,000 of which was received as salary and bonus as general manager of the Lancaster Cotton Mill, the remainder being derived from dividends, interests, and rents.

"The court further finds as a fact that from the years 1929 to July, 1934, the plaintiff continued in the employment of the Lancaster Cotton

Mill and that his income from all sources remained at approximately $24,000.

"The court further finds that the plaintiff is 56 years of age, is in good health, and that he is regarded as an expert textile manufacturer; and that his property is reasonably worth the sum of $150,000, and that he has no liabilities.

"The court further finds as a fact that the plaintiff's employment with said mill terminated in July, 1934, and that the mill paid him $500.00 per month from that date up to and including January, 1935, at which time the plaintiff was employed by the Pomona Mills in Greensboro, North Carolina, at a monthly salary of $500.00, which amount he continued to receive until and including July, 1936; whereupon his employment with the Pomona Mills terminated, and since said time plaintiff has received no salary from any source, but that he is entitled to receive from the Gordon Realty Company, a real estate business in Charlotte, North Carolina, salary and dividends totaling $250.00 per month.

"The court further finds as a fact that the income of the plaintiff from sources other than salaries has not been reduced since 1929, and that in addition thereto he has other incomes not received in 1929; the court finding as a fact that his income from July, 1934, to July, 1935, was $12,500, and that his income from July, 1935, to July, 1936, was $12,500, and that the income of the plaintiff for the year (from July 1, 1936, to July 1, 1937) may be reasonably expected to amount to $10,000. The court further finds as a fact that the plaintiff has paid the defendant the sum of $300.00 per month, as required by the separation agreement, up to and including the month of July, 1934, and that he has made no payments to the defendant since that date.

"The court further finds as a fact that this action was instituted by the plaintiff in the Superior Court of Mecklenburg County on 11 August, 1934, and that the answer therein was filed by the defendant within the time required by law, after plaintiff published notice of summons, the defendant not being a resident of the State of North Carolina.

"The court further finds as a fact that the plaintiff is a citizen and resident of Mecklenburg County, and that he maintained his residence in the State of North Carolina more than 12 months preceding the commencement of this action.

"Upon the foregoing findings of facts, the court is of the opinion and so holds that the plaintiff's income from any and every source has been materially reduced and diminished below the amount of such income received by him during the 12 months next preceding the date of the separation agreement and decree; that the Superior Court of Mecklenburg County, North Carolina, under the facts above found, is a court of

competent jurisdiction for the determination of monthly payments to be made by the plaintiff to the defendant following the said reduced income, and the court is further of the opinion and so holds as a matter of law, that upon such showing by the plaintiff that the amount of payments to be required of the plaintiff in the future are within the sound discretion of the court, and the court has the authority to reduce the said payments as of the date of the reduced income, and to award judgment to the defendant and against the plaintiff in the amount of said reduced payments over the period during which no payments have been made to the defendant by the plaintiff, and that in fixing the amount of said payments that the court should consider both the income and the assets of the plaintiff.

"Thereupon, the court concludes upon such findings of fact and conclusions of law and in its discretion, that the plaintiff is entitled to a reduction of $100.00 per month, which said reduction is made as of 1 August, 1934, to date, and until further orders of the court.

"The plaintiff specifically requests the court to hold as a matter of law that the separation agreement is void in whole or in part, and of no effect for that it appears on its face to be unjust, inequitable, and without legal effect. Upon the failure of the plaintiff to offer evidence tending to support his contentions, and in the absence of any evidence upon plaintiff's allegations that the same was induced through duress, and so forth, the court refuses to make such holding, and holds as a matter of law the contract is valid and binding upon the parties.

"It is thereupon considered, ordered, and adjudged, that the defendant, Mrs. Estelle Land Cobb, have and recover of the plaintiff the sum of $5,200, being 26 monthly payments at the rate of $200.00 per month, and that the plaintiff pay the cost of this action.

"The request of the defendant that allowance be made for counsel fees, for the services rendered by her counsel up to and including this hearing, is denied in the discretion of the court.

"It is further considered, ordered, and adjudged, that pending further orders of this court, that the plaintiff pay to the defendant, Mrs. Estelle Land Cobb, the sum of $200.00 per month on or before the 10th day of each calendar month at such place as the defendant may from time to time fix the first payment upon said allowance to be made on or before 10 October, 1936.

"This cause is retained for further orders, including such orders as the reasonable allowance for attorney fees to counsel for defendant, for any services rendered to the defendant from and after this date."

Defendant excepted and assigned errors, and appealed to the Supreme Court on the ground that the court committed error in its conclusions of law and in signing the judgment, in that the court failed to render judg-

ment in favor of the defendant and against the plaintiff for the sum of $7,800, with interest on each monthly installment of $300.00 from the time each installment was due, on the 10th of the month, until paid.

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

*Jake F. Newell for plaintiff.*
*G. T. Carswell, Joe E. Ervin, and W. C. McDow for defendant.*

CLARKSON, J. The plaintiff and defendant are husband and wife, and prior to 19 September, 1929, lived in the town of Lancaster, South Carolina, where plaintiff was employed in the Lancaster Cotton Mills. They lived together with two sons of plaintiff by a former marriage and one daughter of defendant by a prior marriage, there being no children by this marriage. Owing to differences they entered into a separation agreement, dated 19 September, 1929. The separation agreement seems to have been carefully drawn and executed by the parties. Section 3 of the separation agreement is as follows:

"The said husband shall, during the joint lives of himself and his said wife, pay to the said wife the sum of $300.00 per month, payable on or before the 10th day of each month, at such place as the wife may from time to time fix; provided, however, that if at any time in the future said husband's income from any and every source whatsoever shall be materially reduced or diminished below the amount of such income received by him during the 12 months next preceding the date of this instrument, then the husband shall have the right to apply to the court of competent jurisdiction for a reduction in the amount of the monthly payments provided for above, and such court may grant such reduction in the amount of said monthly payments as it in its discretion may find and determine to be in keeping with such reduced income of the husband."

Section 8: "Such legal steps may immediately be taken and/or proceedings had as will render this instrument a valid and legal contract, binding upon and enforceable against each of the parties hereunder under the laws of the State of South Carolina, and the husband shall pay the expense and costs of such proceeding."

A decree was signed in the Lancaster County, South Carolina, court by T. J. Maudlin, presiding judge of the 6th Circuit, embodying the above separation agreement by the parties, and duly witnessed and signed as follows: "We consent to the foregoing decree. Estelle Land Cobb, Plaintiff. F. Gordon Cobb, Defendant." In the decree, among other things, is the following: "It is ordered, adjudged, and decreed:

That the written agreement made and entered into by and between the plaintiff, Estelle Land Cobb, and the defendant, F. Gordon Cobb, be and the same is hereby ratified and confirmed in all respects and made the judgment of the court."

On 11 August, 1934, the plaintiff, who had become a resident of Mecklenburg County, North Carolina, brought this action in the Superior Court against the defendant.

The prayer of plaintiff's complaint is as follows:

(1) That the monthly payments of $300 in the separation agreement and the decree "be set aside, revoked, and diminished to nothing."

(2) That the separation agreement and decree "be set aside, revoked, canceled, and declared void."

(3) That the plaintiff in this action be allowed to go without day, "free from further harassment and annoyance by the defendant in this action."

The defendant denied the material allegations of the complaint and prayed the court as follows:

(1) "That the court will declare the contract between the parties hereto, a copy of which is attached to the complaint marked 'Exhibit A,' as the valid and binding obligation of plaintiff, and will enter an order requiring the plaintiff to fulfill and perform the terms and conditions thereof."

(2) "That the court will adjudge defendant entitled to recover of plaintiff the sum of $300.00 per month, beginning with the month of August, 1934, until the trial of this action, and will render judgment in favor of the defendant and against plaintiff therefor."

(3) "That by reason of the plaintiff's failure to make payments of $300.00 per month, as provided for in said contract, for the months of August, 1934, through August, 1936, the plaintiff is indebted to the defendant in the sum of $7,500, with interest."

From a careful reading of plaintiff's complaint, we cannot see how the separation agreement and decree can be set aside, revoked, canceled, and declared void. The plaintiff also brings this action to have the allowance diminished to nothing under section 3 of the separation agreement, and at the same time says the agreement is void. To set aside the separation agreement and decree, there must be allegation and proof of fraud or mistake.

Essential elements of "actionable fraud" are representation, falsity, *scienter,* deception, and injury. *Leggett Electric Co. v. Morrison,* 194 N. C., 316; *Evans v. Davis,* 186 N. C., 41; *Peyton v. Griffin,* 195 N. C., 685.

In order to entitle a party to the correction of a written contract, he must allege and prove a mistake of material facts on his part, and that

of the plaintiff as well, or mistake on his part, and some fraudulent practice or act on the part of the plaintiff, whereby he was misled. *McMinn v. Patton,* 92 N. C., 371, 374. A mistake of one party will not entitle him to correction of a written instrument, but when there is mutual mistake, or mistake on one side, and either fraud, surprise, undue influence, misapprehension, imposition, or like cause on the other, giving rise to the plaintiff's mistake, the court will give relief. *White v. Richmond, etc., R. Co.,* 110 N. C., 456, 460; *Day v. Day,* 84 N. C., 408; *Strickland v. Shearon,* 191 N. C., 560; *Crawford v. Willoughby,* 192 N. C., 269; *Insurance Co. v. Edgerton,* 206 N. C., 402 (407); *Oliver v. Hecht,* 207 N. C., 481; *Crews v. Crews,* 210 N. C., 217. Neither can the separation agreement or decree be set aside except for fraud or mistake.

In the pleading there is neither sufficient allegation of fraud or mistake or evidence sufficient to set aside the separation agreement or decree. It was agreed in the court below that the matter "may be heard without a jury, and that the court should find these facts and state his conclusions of law arising thereon." The court below heard the evidence, found the facts, and stated his conclusions of law. It is well settled that the findings of fact, if there is any evidence to sustain them, are as binding on us as if the facts were submitted to and found by the jury.

The facts found by the court below were supported by evidence, and we must sustain them. The question of how much the husband's income had been reduced was one of fact, and the court reduced same one-third and required plaintiff to pay $200.00 a month instead of $300.00. The separation agreement and decree gave the court discretion "to be in keeping with such reduced income of the husband." There is no evidence that the court abused its discretion or acted arbitrarily. The plaintiff chose the forum to be heard in and must abide the result. Under section 3 of the separation agreement the discretion is clearly given.

The exercise of this discretion, when not abused or arbitrary, is binding. The plaintiff is bound by the findings of the court below. The judgment of the court below was that the plaintiff recover $5,200, being twenty-six monthly payments at the rate of $200.00 a month. The defendant contends that the amount should be $300.00 a month. We cannot so hold. The defendant, as well as the plaintiff, gave the discretionary power in the separation agreement or decree and is bound by same. In rendering judgment for the deferred payments due defendant, we can see no error. The plaintiff himself submitted to the jurisdiction of the court, and from the separation agreement the implication was that whatever the court found to be due by plaintiff he had to pay, and judgment

was rendered accordingly. At least there is no reversible or prejudicial error. From the view we take of this case, we see no prejudicial or reversible error in any of the exceptions and assignments of error made by plaintiff or defendant. The plaintiff's exceptions and assignments of error were mostly made to the admission and exclusion of evidence, immaterial in its nature.

We find no error in either plaintiff's or defendant's appeal.

Affirmed.

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MRS. NADINE L. KELLY, ADMINISTRATRIX OF KEARNS LITTLE KELLY, v. J. C. HUNSUCKER AND DEWEY COOK.

(Filed 27 January, 1937.)

**1. Automobiles § 12c—Instruction that speed limit upon bridge was ten miles per hour held without error in cause arising prior to effective date of ch. 311, Public Laws of 1935.**

Chapter 140, sec. 15, Public Laws of 1917, providing a speed limit of 10 miles per hour in traversing a bridge, is not repealed by sec. 4, ch. 148, Public Laws of 1927, since the latter act does not purport to cover the whole field of speed regulation upon the State highways, and the provisions of the former act are not repugnant to those of the latter act, nor are the provisions of the Act of 1917 repealed by sec. 2, ch. 235, Public Laws of 1931, since this section is not inconsistent with the ten-mile limit, and in an action to recover for the death of plaintiff's intestate who was struck by a truck just after it had traversed a bridge entering an incorporated town, an instruction that the speed limit on the bridge was ten miles per hour, and that speed in excess of that limit constituted negligence *per se, is held* without error.

**2. Statutes § 10—**

Repeals by implication are not favored, and two acts relating to the same subject matter must be irreconcilable in order for the later to repeal the former.

**3. Automobiles § 18h: Appeal and Error § 39g—Alleged error in the charge held not prejudicial under the facts of this case.**

Where the court correctly charges that under the statutory provision applicable the legal speed limit at the *locus in quo* was ten miles per hour, error in the instructions in applying another provision of the statute limiting the speed to fifteen miles per hour approaching an intersection cannot be held for prejudicial error on defendant's appeal.

**4. Automobiles § 18g—Evidence of negligence in traveling at excessive speed and failing to keep proper lookout held sufficient for jury.**

Evidence that defendant drove his truck over a bridge entering an incorporated town at a speed in excess of that allowed by the applicable statute, and struck and killed plaintiff's intestate, a four-year-old boy, as

he was crossing an intersection made by a street entering, but not crossing, the highway immediately beyond the bridge, that defendant's view was unobstructed and that he could have seen intestate had he been keeping a proper lookout, and could have avoided the accident by turning a few feet to the left, with evidence raising a reasonable inference that defendant must have been looking at smoke boiling over the side of the bridge from a train passing under the bridge, and did not see intestate until upon him, when, because of excessive speed, he did not have time to turn to the left, but struck intestate about two and a half feet from the right side of the highway, although the whole of the eighteen-foot highway was open, *is held* sufficient to be submitted to the jury on the issues of negligence and proximate cause.

**5. Negligence § 12—**

A four-year-old boy is conclusively presumed to be incapable of negligence, primary or contributory.

APPEAL by defendants from *Harding, J.*, and a jury, at March 30 Term, 1936, of MECKLENBURG. No error.

This is an action for actionable negligence brought by plaintiff against defendants for damages.

Facts: Plaintiff's intestate, a four and one-half year old child, was struck down and killed by a truck driven by the defendant Dewey Cook, the employee of the defendant J. C. Hunsucker, at a street intersection in the residential district of the village of Mt. Gilead, North Carolina, on 25 July, 1933, about 1:00 p. m. in the afternoon. Dewey Cook and two other men were riding in the truck together. The middle man had a sandwich in a bag in his lap, eating his dinner. The point where plaintiff's intestate was struck is at the eastern end of a bridge, whereby the principal street of the town of Mt. Gilead (which is also a State highway) crosses over a deep railroad fill; the intersecting side street runs parallel to the railroad, south of the main street or highway, and joins but does not cross the main street at the east end of this bridge. The child started across the main street at this intersection, going from south to north, and was struck when about two and a half feet onto the highway. The bridge includes a regulation 18-foot highway, with sidewalks of 4½ feet on each side, and beyond this is a solid rail or parapet about 3½ feet high. The road is straight and level on both approaches to the bridge for several hundred yards, and the defendant was traveling in an easterly direction approaching the town of Mt. Gilead. A train was passing under the bridge at the same time that the defendant's truck was passing over the bridge, and train smoke was boiling up over the edge of the parapet.

Plaintiff's witness H. O. Holderfield testified that the truck entered the bridge traveling at from 35 to 40 miles an hour and that it did not stop until it had gone some 75 feet from where the child was lying. The

child was lying in the road where he was struck two feet from the south edge of the pavement, six to eight feet from the east end of the bridge. The evidence was to the effect that the truck did not turn out of its course to the left as it had room to do before it struck the child. The evidence was also to the effect that the child was in plain view of anyone coming up the highway for several hundred yards from the time he stepped out of the side road and passed the parapet of the bridge until he reached the place where he was struck.

The issues submitted to the jury and the answers thereto were as follows:

"(1) Was the plaintiff's intestate killed by the negligence of the defendants? Answer: 'Yes.'

"(2) Did the plaintiff's intestate by his own negligence contribute to his injury, as alleged in the answer? Answer: 'No.'

"(3) What damage, if any, is plaintiff entitled to recover? Answer: '$3,699.'"

The court below rendered judgment on the verdict. Defendants made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

*Pharr & Bell for plaintiff.*

*John M. Robinson and Hunter M. Jones 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. C. S., 567. The court below overruled these motions, and in this we can see no error.

The defendants contend that it was error in the court below to charge that the speed limit on the bridge was ten miles per hour. We cannot so hold. This charge was bottomed on ch. 140, part of sec. 15 of the Public Laws of 1917 (part N. C. Code, 1935 [Michie], sec. 2616), as follows: "Upon approaching an intersecting highway, a bridge, dam, sharp curve, or deep descent, and also in traversing such intersecting highway, *bridge,* dam, curve, or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, *not to exceed ten miles an hour,* having regard to the traffic then on such highway and the safety of the public." (Italics ours.)

Public Laws of 1927, chap. 148, is an act known as the Uniform Act Regulating the Operation of Vehicles on Highways. We quote in part: "Sec. 4—Restrictions as to Speed. (a) Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface, and width of the highway, and of any other conditions then ex-

isting, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb, or property of any person and in no event at a rate of speed greater than forty-five miles per hour.

"3. Fifteen miles an hour when approaching within fifty feet and in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any one time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupteed view of such intersection and of the traffic upon all the highways entering such intersection for a distance of two hundred feet from such intersection."

Section 66 of the act says: "All laws or clauses of laws in conflict with this act are hereby repealed."

It is well settled that repeals by implication are not favored, and the repugnancy between the later and the former act must be wholly irreconcilable in order to work a repeal of the former. In *S. v. Foster,* 185 N. C., 674 (677), speaking to the subject: "In Black on Interpretation of Laws, 579, p. 351, it is said, 'Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject.'"

Public Laws of 1927, chap. 148, did not intend to cover the whole subject; on the contrary, it says that only all laws or clauses of laws in conflict with the act are repealed.

Public Laws of 1931, chap. 235, sec. 2, reads as follows: ". . . The State Highway Commission, or other governmental agency having control over any bridge constituting a part of the highways of the State, may, by suitable signs or markers at each end of such bridge, post the safe speed and carrying capacity for such bridge, and no motor vehicle or trailer shall be operated over such bridge at a greater speed or with a total gross weight of vehicle and load greater than posted speed or carrying capacity."

Section 3 is as follows: "All laws or parts of laws inconsistent with the provisions of this act be and the same are hereby repealed." This section is not inconsistent with the ten-mile limit.

N. C. Code, 1935 (Michie), sec. 2598 (1917, chap. 140, sec. 1), in part defines a public road as follows: "The term 'public highway' or 'highways' shall be construed to mean any public highway, township, county, or State road, or any country road, any public street, alley, park, parkway, drive, or public place in any city, village, or town. The term and words 'business portion of any city or village' shall be construed to

mean the territory of a city or incorporated village contiguous to a public highway which is at that point either wholly or partially built up with structures devoted to business."

Chapter 311 of the 1935 Public Laws of North Carolina is in part as follows: "Sec. 1 (n). Street or Highway. The entire width between property lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic."

"Sec. 2. Amend article two of said act (Public Laws of 1927, chap. 148) by striking out sec. four, and substitute in lieu thereof new section four as follows: Sec. 4. Speed Restrictions. (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

"(b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful:

"1. Twenty miles per hour in any business district.

"2. Twenty-five miles per hour for motor vehicle designed, equipped for, or engaged in transporting property; and thirty miles per hour for such motor vehicle to which a trailer is attached.

"4. Forty-five miles per hour under other conditions.

"(c) The fact that the speed of a vehicle is lower than the foregoing *prima facie* limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements, and the duty of all persons to use due care," etc.

Section 6 is as follows: "That all laws and clauses of laws in conflict with the provisions of this act are hereby modified so as to conform to this act."

The killing of plaintiff's intestate took place on 25 July, 1933, before the above laws of 1935 were enacted.

Public-Local Laws of 1927, chap. 148, sec. 4, par. 3, is as follows: "Fifteen miles an hour when approaching within fifty feet and in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any one time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all the highways entering such intersection for a dis-

tance of two hundred feet from such intersection." This changed chap. 272, Public Laws of 1925 (D), which reads as follows: "(D) Fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view upon all of the highways entering such intersection for a distance of two hundred feet from such intersection."

The court below charged the jury as follows: "The court charges you under the law of this State, when a person driving a motor vehicle approaches a bridge it is his duty under the law to slow down to ten miles an hour.

"That when he approached an intersecting road where two roads come together and go on, both follow the same road, that is an intersection; it does not mean one road coming up the highway and following the highway; that is not an intersection under this statute. Upon approaching an intersection it is the duty of the driver to slow down to 15 miles an hour, if at any point within 100 feet from the intersection."

There was evidence to the effect that the intersection between the highway and the side road which entered the highway at the end of the bridge was obstructed within the terms of said statute. The charge as set forth was not in accordance with the statute. The plaintiff in her brief says: "It is frankly admitted that this instruction was not sufficiently clear for the jury to ascertain that the court intended to limit it to intersections where the driver's view is obstructed." We do not think it reversible or prejudicial error, as the law of the road only allowed defendants to travel 10 miles an hour when crossing the bridge. This charge, if correct, allowed them to travel faster, which was favorable to defendants.

On the aspect of nonsuit, which cannot be sustained, we may say: A careful reading of the record in this case shows that defendant Dewey Cook was driving down the highway at an excessive rate of speed and without keeping a proper lookout. It is a reasonable inference that he was watching the train. The evidence was that the train smoke was boiling over the edge of the bridge and the train was passing under the bridge at the same instant that the truck was crossing it. The noise and smoke, no doubt, attracted Dewey Cook's attention away from the road, and he did not see the child until he was right on him and it was too late either to stop the truck or to turn it out of the child's path. He had the entire width of an 18-foot highway within which to dodge the child, if he had been keeping a proper lookout. It is a reasonable inference that the child was within their vision for at least thirty or forty yards because an automobile going forty miles an hour would travel at least

that distance while a four and a half year old child was traveling seven or eight feet. All this was a matter for the jury to determine. The violation of the rule of the road was negligence *per se,* and if the proximate cause of the injury, defendants were liable for negligence. All this was left to the jury under proper instructions by the court below.

In *Goss v. Williams,* 196 N. C., 213 (221-2), this Court sustained Judge Sinclair's charge as follows: "You are instructed that even though the injured party through his own negligence placed himself in a position of peril, he may recover if the one who injured him discovers, or by the exercise of ordinary care, could have discovered him in time to have avoided the injury. The defendant would not be relieved of liability by reason of the fact that he did not see him, but the law holds him to the responsibility of seeing what he could have seen by keeping a reasonably vigilant and proper lookout. You are instructed that the mere fact that a child runs in front of a moving motor vehicle so suddenly that the driver had no notice of danger, does not necessarily relieve a defendant from liability. There still remains the question whether the negligent driving of the automobile made it impossible for the driver to avoid the accident after seeing the child, or when by the exercise of reasonable care, such driver could have seen the child in time to avoid the injury, there being a greater degree of watchfulness and care required of automobile drivers as to children than adults."

In that case the defendant tendered no issue as to contributory negligence, although the minor was between seven and eight years old. In this case the child was four and a half years old. *Moore v. Powell,* 205 N. C., 636.

*Varser, J.,* speaking for the Court in a well-considered opinion in *Campbell v. Laundry,* 190 N. C., 649 (651-2), citing a wealth of authorities, says: "There must, of necessity, be a period within which a child is incapable of exercising care to such a degree as may be otherwise legally applicable to the given situation. We are of the opinion that a child four years old is incapable of negligence, primary or contributory. . . . This ruling is in accord with the decisions throughout the country, as indicated by the following: *McDermott v. Severe,* 202 U. S., 600. In this case the Court affirmed the judgment for plaintiff, a boy six years and 10 months old. The trial court instructed the jury that, since plaintiff was under seven years of age, contributory negligence could not be attributed to him."

In *Bevan v. Carter,* 210 N. C., 291 (292), *Stacy, C. J.,* for the Court, said: "Was it proper to submit to the jury the contributory negligence of the plaintiff? The answer is, 'No.'

"It was said in *Campbell v. Laundry,* 190 N. C., 649, 130 S. E., 638, 'A child four years old is incapable of negligence, primary or con-

tributory.' Furthermore, there is no plea of contributory negligence. C. S., 523. Nor would such a plea avail as against a four-year-old plaintiff. *Jordan v. Asheville,* 112 N. C., 743, 16 S. E., 760." *Boykin v. R. R., ante,* 113 (115).

We have cited many statutes in reference to the law of the road and attempted to bring some of them up-to-date. We see no prejudicial or reversible error in any of the defendants' exceptions and assignments of error.

For the reasons given, we find

No error.

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RUFUS J. PICKETT v. W. A. FULFORD AND WIFE, ROSA L. FULFORD; W. J. BROGDEN, TRUSTEE; W. S. LOCKHART, TRUSTEE; T. L. RUSSELL; W. L. COPE AND WIFE, LOIS COPE; WILLIAM H. MURDOCK, TRUSTEE; C. B. SHERMAN AND W. K. RAND, LIQUIDATING TRUSTEES OF THE FIRST NATIONAL BANK OF DURHAM, AND THE BANK OF COOLEEMEE.

(Filed 27 January, 1937.)

**1. Bills and Notes § 9f—Purchaser not a holder in due course takes note free from agreement between maker and third person not a party to note in absence of notice at the time of assignment to purchaser.**

A purchaser of a note for value after maturity takes it subject to all equities and defenses which the maker might have against the original payee and all intermediate holders, since such purchaser has constructive notice of such antecedent equities, C. S., 446, 3039, but a purchaser for value after maturity takes the note free from an agreement by a third person to pay the note when such third person was never a purchaser or holder of the note and the purchaser has no knowledge of such agreement between the maker and the third person, and in an action on the note by such purchaser after maturity, where there is no evidence of knowledge of the alleged agreement between the maker and the third person, an instruction that if the jury answered in the negative the issue as to whether such third prson was ever a holder or purchaser of the note, that would end the case and they would not consider the subsequent issue as to the alleged agreement with the third person, is without error, since in such circumstances the alleged agreement would not affect the rights of plaintiff purchaser.

**2. Bills and Notes §§ 7, 28—Party having and offering in evidence note endorsed in blank by payee establishes prima facie ownership.**

Plaintiff's possession and offering in evidence the note sued on endorsed in blank by the payee establishes *prima facie* ownership, C. S., 2976, 3040, and in the absence of evidence in rebuttal, and where it appears that defendant makers contended that plaintiff acquired the note after maturity and was not a holder in due course, but admitted that plaintiff was a holder after maturity, defendants' objection to the recitation in the

judgment that it was admitted that plaintiff acquired the note, is without error, and judgment for the amount of the note and a decree that the deed of trust securing same should be foreclosed upon the jury's finding that defendants were not entitled to the equity asserted, is correct.

**3. Bills and Notes § 27—**

Where the charge states that defendant makers contended that plaintiff acquired the note sued on after maturity, defendants should aptly object and offer correction if they do not admit that plaintiff was a holder after maturity.

**4. Trial § 39—**

An exception to the refusal to submit issues tendered cannot be sustained when the issues submitted are identical with the issues tendered except for the addition of an issue determinative of the rights of the parties upon the evidence and theory of trial.

**5. Bills and Notes § 25—**

Evidence that taxes had not been paid on the land mortgage to secure the payment of the note sued on, and the financial credit of the makers *is held* competent in corroboration of plaintiff assignee's testimony as to what occurred at the time of the assignment.

**6. Appeal and Error § 39f—**

The admission of incompetent evidence is harmless where the facts thereby sought to be established are proven by other competent evidence.

APPEAL by defendants W. A. Fulford and Rosa L. Fulford from *Harris, J.*, at March Term, 1936, of DURHAM. No error.

This was an action to foreclose a deed of trust, executed 2 August, 1922, by appellants, conveying to W. J. Brogden, trustee, certain real property as security for a note or bond in the sum of $7,100, payable to one J. S. Perry, said note or bond being due twelve months after date.

Plaintiff alleged that on 29 September, 1926, he became the holder and owner of said note and deed of trust by purchase for full value from J. S. Perry, the payee, and that said note was on that date endorsed in blank and delivered to him by said Perry; that interest on the note was paid to 29 June, 1933, but nothing on principal.

Appellants in their answer admitted the execution of the note and deed of trust, and that the principal of the debt had not been paid; but they alleged that "if the plaintiff ever came into possession of said note, he did so after the maturity of same and with notice of the matters and things" set up in defense; that in September, 1926, J. S. Perry, the payee, demanded payment, and appellants made arrangements with R. H. Rigsbee, executor and trustee of the estate of A. M. Rigsbee, deceased, to take up and carry the note and deed of trust for them; that defendant Rosa L. Fulford was a daughter and devisee of said A. M. Rigsbee and entitled to one-sixth of the estate upon the termination of the trust in 1933; that R. H. Rigsbee agreed to take up and hold and

carry said Perry papers among the assets of said estate until the final settlement, and that R. H. Rigsbee, as executor and trustee, did, from the funds of said estate, purchase and hold the note and deed of trust sued on under agreement to postpone payment thereof until the termination of the said trust estate; that said estate has not yet been settled; and appellants allege in their answer that if plaintiff acquired said note and deed of trust, he took with knowledge of and subject to this agreement.

The following issues were submitted to the jury:

"(1) Did the defendants W. A. Fulford and wife, Rosa L. Fulford, execute the note dated 2 August, 1922, for $7,100, and the deed of trust securing the same, as alleged in the complaint?

"(2) Did R. H. Rigsbee, as executor and trustee of the estate of A. M. Rigsbee, purchase said note and deed of trust from J. S. Perry on or about the 29th day of September, 1936, as alleged in the answer?

"(3) Did R. H. Rigsbee and Mrs. Rosa L. Fulford have an understanding and agreement that said note would be held by the estate and paid at the time of the settlement of the estate of A. M. Rigsbee, as alleged in the answer?

"(4) Did Rufus J. Pickett acquire said note after 2 August, 1923?"

The court, among other things, charged the jury as follows:

"Now, gentlemen, I charge you that if a person receives a note, or purchases a note after its maturity, that means after it is due, he takes that note subject to any defenses and infirmities to which it was subject in the hands of the payee; that is, in this case it is admitted by Mr. Pickett that he bought this note after its maturity, then, if he did that, he bought it subject to any defenses and infirmities to which it was open in the hands of the payee, that means if he bought that after maturity and there was an agreement between R. H. Rigsbee, as executor and trustee, and Mrs. Fulford, then he bought it subject to that agreement if the estate owned the note or got it in its possession.

"But I charge you, before you can answer these issues and decide this case in favor of the contentions of the defendants, you must be first satisfied from this evidence that this note was purchased by the A. M. Rigsbee estate, and then, if you are satisfied that it was purchased by the A. M. Rigsbee estate, then, before the defendants can recover under their contentions, you have got to be satisfied that there was an agreement between Mr. R. H. Rigsbee, as executor and trustee, and Mrs. Fulford that he would purchase this note from the funds of the estate and hold it, as the defendants contend; that is, two things before she can recover, that there was an agreement and that the estate held this note. Even if you find or are satisfied from this evidence that there was an agreement between Mr. Rigsbee, as executor and trustee, that he would do this

for her as she says and yet he did not do it, he did not buy that note and make it the asset of the estate, then the defendants cannot recover, regardless of any agreement which they had, so I ask you to remember those two things."

To the second paragraph quoted above appellants noted exception.

Upon the second issue the court charged as follows:

"Now the burden of that issue is on the defendant, Mrs. W. A. Fulford. Before you can answer that issue 'Yes,' which would mean that you are finding from the evidence that R. H. Rigsbee did purchase the note as executor and trustee, the defendants must satisfy you from the evidence and by its greater weight that Mr. Rigsbee did purchase that note as executor and trustee of the estate, and if you are so satisfied, gentlemen, you will answer that issue 'Yes'; if you are not so satisfied, you will answer it 'No.'

"If you answer that issue 'No,' you need not consider the other issues, because that will end the case, because if he did not purchase it the defendants cannot recover under their contentions, but if you answer it 'Yes,' you will come to a consideration of the third issue, which is as follows."

The appellants noted exception to the last quoted paragraph.

The jury for their verdict answered the first issue "Yes" and the second issue "No."

The judgment, after setting out the verdict, recited: "And it further appearing to the court that it was admitted by counsel for W. A. Fulford and Rosa L. Fulford and counsel for plaintiff that plaintiff acquired said note and deed of trust after 2 August, 1923," and adjudged the amount of the debt to be $7,100, with interest from 29 June, 1933. Foreclosure sale of the land described in the deed of trust was decreed, together with payment of taxes and street assessments.

Defendants W. A. Fulford and Rosa L. Fulford appealed.

*Hedrick & Hall for plaintiff.*

*Bryant & Jones and Egbert L. Haywood for defendants.*

DEVIN, J. The principal question presented by the appeal is the correctness of the ruling of the court below that the note and deed of trust in the hands of the plaintiff, though acquired after maturity, were not subject to equities and defenses in favor of the makers by reason of an alleged agreement between them and R. H. Rigsbee, unless R. H. Rigsbee had purchased or become the holder of the note and deed of trust.

The controverted issue around which the trial below revolved was whether R. H. Rigsbee, pursuant to an agreement with the appellants, purchased the note and deed of trust with funds of the estate of which he

was executor and trustee, and became the holder of the note and deed of trust, and plaintiff had taken as transferee or assignee from him, or whether the plaintiff Pickett purchased and took the papers by assignment and delivery direct from the payee of the note, J. S. Perry.

Upon this issue, the decision by the triers of the facts was in favor of the plaintiff.

This determination of the litigated question by the jury was based upon sufficient competent evidence and followed a correct charge by the presiding judge. We see no valid ground upon which the result can be disturbed.

It is well settled that the assignment of a negotiable note after maturity subjects the holder to all equities and defenses which the maker might have had against the original payee and all intermediate holders at the time of the assignment, the assignee standing in the place of his assignor and taking with constructive notice of antecedent equities. C. S., 446; C. S., 3039; *Haywood v. McNair,* 14 N. C., 231; *Harris v. Burwell,* 65 N. C., 584; *Hill v. Shields,* 81 N. C., 250; *Capell v. Long,* 84 N. C., 17; *Bresee v. Crumpton,* 121 N. C., 122; *Bank v. Loughran,* 126 N. C., 814; *Thompson v. Osborne,* 152 N. C., 408; *Guthrie v. Moore,* 182 N. C., 24; *Whitman v. York,* 192 N. C., 87; *Barnes v. Crawford,* 201 N. C., 434; *Mansfield v. Wade,* 208 N. C., 790; *Hood, Comr., v. Tilley,* 209 N. C., 842; *Stegal v. Bank,* 163 Va., 417.

But this rule does not subject the assignee to an asserted equity or defense arising out of an agreement between the maker and a third person who did not become a purchaser or holder of the note and of which the assignee had no notice at the time of the assignment. 8 C. J., 741; Daniel on Negotiable Instruments (6th Ed.), sec. 726 (b).

The verdict of the jury has established the fact that R. H. Rigsbee did not purchase or become the holder of the note, and the evidence of the defendants as well as that of plaintiff negatives the suggestion of notice to plaintiff for Perry of the alleged agreement with Rigsbee at the time of the assignment of the note. *Hare v. Hare,* 208 N. C., 442. As to that, no issue was tendered and there was no evidence to support it. *Potts v. Insurance Co.,* 206 N. C., 257. The uncontradicted evidence shows unmistakably that plaintiff paid full value, $7,100, for the note, on 29 September, 1926.

The contention of appellants that the court erred in reciting in the judgment that it was admitted plaintiff acquired the note and deed of trust after 2 August, 1923, is without merit. In appellants' brief it was stated: "Defendants admitted that plaintiff was holder but denied he was holder in due course;" and further, "the uncontradicted evidence in this case is that the defendant (plaintiff) acquired the note in suit years after its maturity date, 2 August, 1923. His counsel admitted

this during the course of the trial, and this admission is carried forward into the judgment so that the record might not be ambiguous on this point."

Unquestionably plaintiff was not a "holder in due course," but was a holder. He came into court with the note and deed of trust endorsed in blank by the payee, J. S. Perry, and offered the papers in evidence. This imported that he was the lawful owner. C. S., 2976; C. S., 3040; 3 R. C. L., sec. 190. By presenting the paper he made out a *prima facie* case. As was held in *Trust Co. v. Bank,* 167 N. C., 260, "the production of the notes by the plaintiff was *prima facie* evidence of ownership." Here there was nothing to rebut the *prima facie* case. The date of the transfer was not in controversy. *Bank v. Drug Co.,* 152 N. C., 142.

In the charge of the court it was stated, without objection or offer of correction, that it was one of the contentions of the defendants that the plaintiff acquired the note after its maturity. *LaRoque v. Kennedy,* 156 N. C., 360; *Hardy v. Mitchell,* 161 N. C., 351; *Randolph v. Lewis,* 196 N. C., 51.

The case was tried below under the view of the presiding judge that the answer of the jury to the second issue was determinative, and he instructed them, if they answered the second issue "No," that would end the case. For, if R. H. Rigsbee acquired or held the note, his agreement (if he made the agreement alleged by appellants) would be binding on the plaintiff, the subsequent transferee. If Rigsbee did not acquire the note and never became the holder, such an agreement, even if established, would not, under the circumstances disclosed by the evidence in this case, constitute a defense against the plaintiff Pickett, the assignee of Perry, the payee.

The appellants excepted to the failure of the court to submit the issues tendered by them, but these omitted the determinative question embraced in the second issue, and were in other respects identical with those adopted by the court. No others were tendered.

Appellants assign error in the rulings of the court on the evidence, but these exceptions cannot be sustained. It was competent to show that the taxes on the land were, for several years, unpaid, and also the financial credit of appellants, in corroboration of plaintiff's testimony as to what occurred at the time of the assignment of the note. While it is true the admission of the copy of a letter from the president of the bank to the trustee, W. J. Brogden, would not be competent against the other defendants, the facts set out in the letter were in evidence otherwise, and appellants suffered no harm thereby.

We have examined all the exceptions noted and brought forward in the brief, and conclude that none of them are of sufficient moment to warrant us in disturbing the result.

No error.

MRS. FANNIE SMITH PEPPER v. WEST END DEVELOPMENT COMPANY, INC.

(Filed 27 January, 1937.)

**1. Deeds § 16—Covenant restricting residence to minimum cost stipulated held to apply only to lot conveyed by the deed.**

Plaintiff was the owner by *mesne* conveyances of a lot in a residential development which was originally owned and subdivided by defendant, the deed from defendant to plaintiff's grantor stipulating, among several other restrictive covenants running with the land, that no residence should be built on the lot therein conveyed costing less than $15,000. Before and after the execution of this deed, defendant sold other lots in the development by deeds containing, respectively, covenants restricting the costs of residences thereon to varying minimums, some in excess of and some less than that stipulated in the deed to plaintiff's grantor. Plaintiff brought this action alleging damage resulting from the erection of a dwelling costing less than $15,000 on another lot in the development, although the cost of the dwelling was in excess of the minimum cost stipulated in the deed to the purchaser of that lot. *Held:* Defendant's motion to nonsuit was properly granted, since the negative restrictive covenant in respect to the minimum cost of a dwelling on the lot conveyed is applicable only to the lot conveyed and not to other lots in the development, and since plaintiff failed to show that defendant, when it conveyed the lot to plaintiff's grantor, covenanted, expressly or by implication, that it would insert in deeds to other purchasers identical restrictive covenants in respect to minimum costs of dwellings on the respective lots.

**2. Same: Frauds, Statute of, § 9—**

A building restriction is a negative easement coming within the statute of frauds, and cannot be shown by parol.

APPEAL by plaintiff from *Warlick, J.*, at May Term, 1936, of FORSYTH. Affirmed.

This is an action to recover damages for the breach of a negative restrictive covenant contained in a deed by which the defendant conveyed the lot of land described in the complaint to a grantee, who thereafter conveyed said lot of land to the plaintiff by a deed containing the said negative restrictive covenant.

The facts shown by the evidence for the plaintiff are as follows:

Prior to 21 March, 1929, the defendant was the owner of a tract of land located immediately west of the city limits of the city of Winston-Salem, N. C., and lying between residential property situate on Stratford Road in said city and residential property owned by W. N. Reynolds, known as "Westview." The defendant had caused the said tract of land to be subdivided into lots to be sold for residential purposes and had designated said property as West Highlands, No. 3. A plat of said

property is recorded in the office of the Register of Deeds of Forsyth County, in Plat Book No. 7, at page 84.

On 21 March, 1929, the defendant sold to Francis Pepper, husband of the plaintiff, Lot No. 1, in Block 5 of West Highlands, No. 3, and in consideration of the sum of $5,000, paid to it by the said Francis Pepper, conveyed the said lot to him by a deed which is duly recorded in the office of the register of deeds of Forsyth County, in Book No. 312, at page 34. The said deed contains the following conditions:

"It is covenanted and agreed that this conveyance is made subject to the following provisions and restrictions, which are hereby expressly accepted and agreed to by the party of the second part:

"(1) The property shall be used for residential purposes only, and no building other than residences, except garages or outhouses for domestic purposes, shall be built on said premises for a period of 35 years from the date of this deed, provided this shall not apply to churches and schools.

"(2) No shop, store, factory, saloon, business house, or garage for commercial purposes of any kind shall be erected, suffered, or licensed to exist on the property above described, and no hospital, asylum, or institution of like or kindred nature shall be erected, suffered, or licensed to exist on the property above described, for a period of 35 years from the date of this deed.

"(3) The lot herein conveyed, or any part thereof, or any interest therein, shall not be leased, sold, or otherwise disposed of to or be occupied by any Negro, or any person, firm, or corporation for the use of any Negro, within 90 years from the date of this deed. This provision, however, shall not apply to Negro servants in the employ of the owners or occupant of the property who may occupy rooms on the premises.

"(4) No residence, or building of any kind, shall be erected on a frontage of less than 100 feet, no nearer to the street line than 50 feet, nor nearer either of said property lines than 10 feet, nor shall any garage or outhouse be erected nearer the street line than 100 feet until after the expiration of 35 years from the date of this deed.

"(5) No swine or cattle shall be kept on the premises and no enclosure for swine shall be erected and maintained on the land herein conveyed, and no stable for cattle or other live stock shall be erected or maintained thereon; except horses and ponies may be kept and stabled on said premises for pleasure purposes only, and not for hire.

"(6) No residence shall be erected on the property described in this deed that shall cost less than $15,000.

"(7) No subdivision of any lot shown on the map entitled 'West Highlands, section 3,' by sale or otherwise, shall be made for 25 years from the date of this deed, without the written consent of the West End Development Company, its successors and assigns.

"(8) No front fence built on said property shall exceed 3 feet in height, and no side fences shall exceed 3 feet in height for a distance of 75 feet from the street line.

"(9) It is expressly understood and agreed by the parties hereto that this deed is accepted subject to all the foregoing covenants, conditions, and restrictions, that they are for the protection and general welfare of the community, and shall be covenants running with the land, and shall be binding upon the party of the second part, his heirs, executors, administrators, and assigns."

Thereafter, to wit, on 14 October, 1931, Francis Pepper, the grantee in said deed, conveyed the lot described therein to the plaintiff, his wife, by deed which is recorded in the office of the register of deeds of Forsyth County, in Book No. 342, at page 63. It is provided in said deed that the lot described therein is conveyed to the plaintiff subject to all the conditions, restrictions, and covenants contained in the deed from the defendant to Francis Pepper, the grantor therein.

On 1 July, 1935, the defendant sold to F. S. Snyder and his wife, Sidney S. Snyder, a lot located and included within West Highlands, No. 3. The deed by which the defendant conveyed said lot to the said F. S. Snyder and his wife, Sidney S. Snyder, contains the identical conditions, restrictions, and covenants as those contained in the deed from the defendant to Francis Pepper and in the deed from Francis Pepper to the plaintiff, except with respect to the cost of the residence which may be erected on the said lot. It is provided in said deed that no residence shall be erected on the lot described in said deed that shall cost less than $10,000.

Both before and after 21 March, 1929—the date of its deed to Francis Pepper, the grantor of the plaintiff—the defendant sold and conveyed to various and sundry persons lots located and included within West Highlands, No. 3. The deeds by which these lots were conveyed are duly recorded in the office of the register of deeds of Forsyth County. Each of these deeds contains the identical conditions, restrictions, and covenants as those contained in the deed from the defendant to Francis Pepper, and in the deed from Francis Pepper to the plaintiff, except with respect to the cost of the residence which may be erected on the lot conveyed by said deed. Such cost varies from a maximum of $30,000 to a minimum of $8,000. Residences have been erected on said lots, respectively, costing not less than the minimum sum provided in the restrictions contained in the deed from the defendant for said lot.

After the conveyance to them by the defendant of the lot described in their deed, and prior to the commencement of this action, to wit: After 1 July, 1935, and prior to 1 November, 1935, F. S. Snyder and his wife, Sidney S. Snyder, erected on their said lot a residence which cost not to

exceed the sum of $13,500. This sum was not less than the sum prescribed in their deed from the defendant for said lot, as the minimum cost of a residence which could be erected on said lot, but is less than the minimum sum prescribed in the deed from the defendant to Francis Pepper as the cost of a residence which could be erected on the lot now owned by the plaintiff.

As the result of conveyances by the defendant of lots located and included within West Highlands, No. 3, by deeds containing negative restrictive covenants with respect to the cost of residences which may be erected on said lots, respectively, and providing that such cost may be less than $15,000, and as the result of the erection by F. S. Snyder and his wife, Sidney S. Snyder, on the lot conveyed to them by the defendant of a residence which cost less than $15,000, the value of the lot in West Highlands, No. 3, now owned by the plaintiff, has been reduced by a sum not less than $2,000.

Evidence offered by the plaintiff tending to show that prior to the execution by the defendant of the deed to Francis Pepper, the agent of the defendant who sold the lot described in said deed to the said Francis Pepper, as an inducement to him to purchase such lot, told him that the defendant would include in deeds subsequently executed by the defendant for lots in West Highlands, No. 3, a restriction that no residence should be erected on said lots costing less than $15,000, upon objection by the defendant, was excluded by the court, and plaintiff duly excepted to such exclusion.

Evidence offered by the plaintiff tending to show that subsequent to the execution of said deed, the vice-president of the defendant requested Francis Pepper to execute a paper writing providing that the minimum cost of a residence which might be erected on the lot conveyed by said deed should be reduced from $15,000 to a less sum, upon objection by the defendant, was excluded by the court, and the plaintiff duly excepted to such exclusion.

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

From judgment dismissing the action as of nonsuit, the plaintiff appealed to the Supreme Court, assigning errors in the trial and in the judgment.

*Elledge & Wells and Parrish & Deal for plaintiff.*

*Manly, Hendren & Womble and Thomas O. Moore for defendant.*

CONNOR, J. Whatever may be said with respect to the application of the other conditions, restrictions, and covenants contained in the deed

from the defendant to Francis Pepper, to lots located and included within West Highlands, No. 3, and subsequently conveyed by the defendant to other grantees, it cannot be held that the negative restrictive covenant contained in said deed, with respect to the minimum cost of a residence which may be erected on the lot conveyed by said deed is applicable to any of said lots except that conveyed by said deed. It does not appear upon the face of the deed that the defendant bound itself to impose upon other lots which it should subsequently convey a restriction uniform with the restriction in said deed with respect to the minimum cost of a residence which might be erected on said lots, respectively. The contrary appears, not only from the language of this deed, but also from an inspection of other deeds which the defendant executed both before and after the execution of said deed. For this reason, the principle invoked by the plaintiff, as stated in *Homes Company v. Falls,* 184 N. C., 426, 115 S. E., 184, and restated in *Bailey v. Jackson,* 191 N. C., 61, 131 S. E., 567 (see 18 C. J., 394), is not applicable in the instant case. See *Stephens Company v. Binder,* 198 N. C., 295, 151 S. E., 639; *Ivey v. Blythe,* 193 N. C., 705, 138 S. E., 2; *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697.

The evidence offered by the plaintiff for the purpose of showing that the defendant had agreed with Francis Pepper, before the execution of its deed to him, as an inducement to him to purchase the lot described in his deed, that it would include in its deeds for lots located and included within West Highlands, No. 3, the identical negative restrictive covenant as that contained in his deed, with respect to the cost of residences which might be erected on said lots, was properly excluded by the court.

A building restriction is a negative easement, and cannot be shown by parol. It is within the statute of frauds. *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697.

There is no error in the judgment dismissing this action as of nonsuit. The evidence for the plaintiff failed to show that the defendant, when it conveyed the lot now owned by the plaintiff, covenanted, expressly or by implication, with its grantee, his heirs and assigns, that it would include in all deeds which it might subsequently execute, conveying lots located and included within West Highlands, No. 3, a covenant for the benefit of its said grantee, his heirs and assigns, with respect to the minimum cost of residences which might be erected on said lots. For this reason, the judgment is

Affirmed.

GLADYS DUKE, BY HER NEXT FRIEND, ED WOODY, v. JOSEPH B. JOHNSTON.

(Filed 27 January, 1937.)

**1. Guardian and Ward § 3—Clerk is without authority to appoint guardian for minor having estate and residence in another county.**

A minor residing with her mother and having an inherited fund deposited in a bank in the city of her residence, was committed to an orphanage by the clerk of the court of that county. Upon her discharge from the orphanage after a number of years, she was returned to her mother, who still resided in the city and county in which the commitment was made. The orphanage was located in another county, and the superintendent of the orphanage had himself appointed guardian by the clerk of that county, received the funds belonging from the minor from the bank, and disbursed same in defraying the expenses of the minor for maintenance in the orphanage. *Held:* The appointment of the guardian by the clerk of the county in which the orphanage was located was void, N. C. Code, 2150, since it appeared that the minor was a resident of another county and that her estate was located in such other county, and in a suit by the minor by her next friend, the minor is entitled to recover from the superintendent the funds of her estate disbursed by him.

**2. Infants § 1—**

An unemancipated infant, being *non sui juris*, cannot of his own volition select, acquire, or change his domicile.

APPEAL by defendant from *Frizzelle, J.*, at January Civil Term, 1936, of DURHAM. Order signed 8 May, 1936. Affirmed.

The judgment of the court below is as follows:

"This cause coming on to be heard and being heard before his Honor, J. Paul Frizzelle, Judge presiding, and holding court in the Tenth Judicial District. The plaintiff and defendant waived a trial by a jury and agreed that the court should hear the evidence, find the facts, conclusions of law, and render judgment.

"The following facts were admitted by both the plaintiff and the defendant:

"1. It was admitted that the plaintiff Gladys Duke was, on 26 May, 1922, accepted at the Barium Springs Orphanage at the age of 7 years, having been committed to said orphanage by an order of the juvenile court of Durham County, North Carolina, dated 20 May, 1922, a true copy of which was admitted in evidence, and remained at said orphanage until she was discharged at the age of 16 years, and returned to the home of her mother about 4 June, 1931, in Durham, North Carolina.

"2. It is admitted that the defendant J. B. Johnston, on his own motion, was appointed and qualified as guardian of the plaintiff Gladys Duke, before the clerk of the Superior Court of Iredell County, on

13 July, 1927, and that the United States Fidelity and Guaranty Company executed a guardianship bond for the benefit of said ward in the sum of $3,000.

"3. It is admitted that the will of Victoria Duke is recorded in Durham County, in Book 3 of Wills, page 78, and that it was admitted to probate on 16 July, 1918, a true copy of the will having been admitted in evidence, and that by reason of said will there was deposited in the trust department of the Fidelity Bank, Durham, N. C., $2,705.60 for the plaintiff Gladys Duke, who was at that time a minor, about the age of three years, and that said money was in the trust department of the Fidelity Bank of Durham, N. C., at the time the said J. B. Johnston applied to the clerk of the Superior Court of Iredell County, and was appointed guardian by said clerk for the plaintiff Gladys Duke.

"4. It is admitted that the said J. B. Johnston received from the Fidelity Bank and disbursed the sum of $2,705.60, and that the reports filed by the said J. B. Johnston with the clerk of the Superior Court of Iredell County stating the amount received and disbursed are correct in form and amount.

"5. It is admitted that the money disbursed by the defendant J. B. Johnston was disbursed at the time and in the manner indicated in the several accounts of the guardian, none of which were pursuant to orders of the court duly obtained. No order, in fact, was obtained.

"6. The court further finds as a fact from the evidence that at the time the plaintiff Gladys Duke was committed to the orphanage by order of the juvenile court, that the mother of the plaintiff lived and continued to live in Durham County, and owned property in said county, and was employed, earning from $5.00 to $6.00 per week.

"7. That it is the custom and practice of the Barium Springs Orphanage to take children there without expense to the institution when they own property sufficient to defray their expenses, and to make charges against those who are able to bear their expenses; that Gladys Duke was admitted to the institution as a charity ward and remained there as such for five years before the defendant ascertained that she had a trust fund in the Fidelity Bank of Durham, N. C., in the approximate sum of $3,000, although a letter accompanying the commitment indicated that she had some money in said bank, and that during said period of five years no charges were made against said ward for her upkeep and maintenance.

"8. That at the time of the appointment of the said J. B. Johnston as guardian by the clerk of the Superior Court of Iredell County no notice was given the mother of the said Gladys Duke, and the said Gladys Duke did not know of the appointment for more than a year after the appointment was made.

"9. That the domicile and residence of the said Gladys Duke was at all times in Durham, North Carolina.

"10. That the said Gladys Duke remained at the Orphanage five years, without any charge for board or upkeep, before the said J. B. Johnston applied for the appointment of guardian and immediately upon the appointment received from the Fidelity Bank the sum of $1,550, and from time to time thereafter received the remainder of the *corpus* of the estate, and proceeded immediately to disburse the sum of $930.00 of the said amount, without an order of the court authorizing same to said orphanage for maintenance covering the period of five years prior to date of said appointment, and thereafter proceeded to disburse the funds from time to time without an order of the court until the entire fund was disbursed.

"11. That the said J. B. Johnston was superintendent of the said orphanage.

"12. That the reasonableness of the charge against said Gladys Duke, if valid, is not challenged.

"Upon the foregoing admitted facts and the facts found upon the evidence by the court, the court holds as a matter of law:

"1. That Gladys Duke was and remained domiciled and a resident of Durham County, and the *corpus* of her estate was situate in Durham County.

"2. That J. B. Johnston had no right or authority to disburse the funds without an order of the court directing said disbursements, it being admitted that no such authority was obtained from the court. Therefore, said disbursements were without authority and the defendant and his bondsmen are liable therefor.

"3. That Gladys Duke was a ward of the court, under the authority and supervision of the court; therefore, the said Gladys Duke is not liable to said orphanage for her support in the absence of appropriate orders of court having been obtained.

"4. It being admitted by the defendant that said orphanage did not make any charge for support and maintenance against the said Gladys Duke, the court holds that the said J. B. Johnston had no right to arbitrarily apply the estate of the said Gladys Duke for her support.

"It was agreed by counsel for the plaintiff and the defendant that judgment might be signed out of term and out of the district.

"It is therefore ordered, adjudged, and decreed that the plaintiff Gladys Duke recover of the defendant J. B. Johnston, guardian of Gladys Duke, the sum of $2,705.60, with interest on $1,550 from 20 July, 1927, and interest on $1,155.60 from 31 July, 1933, until paid.

"For the costs of this action, to be taxed by the clerk.

"This 8 May, 1936. J. PAUL FRIZZELLE,
*Judge Presiding.*"

The defendant excepted and assigned error to the court below, "signing the judgment set out in the record," and appealed to the Supreme Court.

*Bennett & McDonald and W. S. Lockhart for plaintiff.*
*Fuller, Reade & Fuller for defendant.*

CLARKSON, J. The court below, from the facts admitted and found from the evidence, made the following conclusions of law: (1) That Gladys Duke was and remained domiciled and a resident of Durham County, N. C., and the *corpus* of the estate was situate in said county. (2) That defendant had no right or authority to disburse the funds in controversy without an order of the court. (3) That Gladys Duke was a ward of the court, under its authority and supervision, and was not liable to the orphanage for her support in the absence of appropriate orders. (4) The orphanage did not make any charge for the support and maintenance of Gladys Duke, and therefore the defendant had no right to apply her estate for her support. We think the findings were supported by the evidence.

The sole question determinative of this controversy is: Was the defendant Joseph B. Johnston's appointment in Iredell County, N. C., as guardian of Gladys Duke valid? We think not. Gladys Duke's mother lived in Durham County. The personal property of Gladys Duke was in Durham County. Gladys Duke was domiciled in Durham County when accepted at the Barium Springs Orphanage, at the age of 7 years. She was committed to said orphanage by the juvenile court of Durham County, N. C., on 20 May, 1922, and remained there until discharged at the age of 16, on 14 June, 1931, when she returned to the home of her mother in Durham, N. C. Defendant, on his own motion, was appointed and qualified as guardian of Gladys Duke in Iredell County, N. C., by the clerk, on 13 July, 1927, the county in which Barium Springs Orphanage is located.

N. C. Code, 1935 (Michie), sec. 2150, is as follows: "The clerks of the Superior Court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates, and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell Training School: Provided, that guardians may be appointed either by the clerk of the Superior Court in the county in which the infants, idiots, lunatics, or inebriates reside, or if the guardian be the next of kin of the infant or a person designated by him or her in writing filed with the clerk, by the clerk of the Superior Court in any county in which is located a substantial part of the estate belonging to such infants, idiots, lunatics, or inebriates." Under chapter 467, Public Laws 1935, the above from the word "provided" was added to the section.

In *Thayer v. Thayer,* 187 N. C., 573 (574), it is said: "A domicile of choice is a place which a person has chosen for himself, but an unemancipated infant, being *non sui juris,* cannot of his own volition select, acquire, or change his domicile." *In re Reynolds,* 206 N. C., 276 (291).

In the present case defendant acted in good faith, but without authority of law. It is well said that "hard cases are the quicksand of the law." We must follow the beaten path.

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

Affirmed.

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FRANCES W. HAGEDORN v. HEYMAN HAGEDORN ET AL.

(Filed 27 January, 1937.)

**1. Appeal and Error § 39f: Trial § 16—Where incompetent evidence is stricken out, error in its admission is cured.**

In this action for alimony without divorce, C. S., 1667, plaintiff's counsel inadvertently examined plaintiff wife in regard to defendant husband's alleged adultery. Counsel, admitting the incompetency of the testimony under the provisions of C. S., 1801, asked that the testimony be stricken out, which was done by the court. *Held:* The error in the admission of the evidence was thus cured.

**2. Appeal and Error § 39j: Divorce § 13—Proof of one ground for divorce is sufficient under C. S., 1667.**

Where, in an action for alimony without divorce, C. S., 1667, plaintiff alleges two grounds for divorce, which are both found for plaintiff by the jury, error in the trial in regard to one of the grounds only does not entitle defendant to a new trial, since the establishment of the other ground is sufficient under the statute.

**3. Evidence § 12—Husband or wife may voluntarily disclose confidential communications.**

C. S., 1801, providing that no husband or wife shall be compelled to disclose any confidential communication made by one to the other during their marriage, does not render incompetent a voluntary disclosure of such communications, but only precludes involuntary testimony in regard thereto.

**4. Divorce § 14—Wife stands in position of creditor of husband in respect to claim for alimony without divorce.**

In an action for alimony without divorce, the wife stands in the position of a creditor of her husband, and as against her claim the husband's deed, absolute on its face, but intended only as security, will not avail, and where the grantee in the deed admits that title was placed in her name as security for money loaned the husband, she may not complain at the provision of the judgment reforming her deed so as to constitute it a mortgage for the debt in the amount ascertained by the jury.

HAGEDORN *v.* HAGEDORN.

APPEAL by defendants from *Rousseau, J.*, at June Term, 1936, of GUILFORD.

Civil action for maintenance and support under C. S., 1667, and for counsel fees, also to sequester certain property alleged to have been conveyed to *feme* defendant with intent to defraud plaintiff of her marital rights.

The gravamen of plaintiff's complaint is, that she and Heyman Hagedorn were married 24 January, 1912; that defendant has separated himself from plaintiff and has failed to provide her and the child of their marriage with necessary subsistence according to his means and condition in life, and that he has been guilty of misconduct constituting causes for divorce; wherefore, plaintiff brings this action to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband.

Plaintiff further alleges that in 1931 Heyman Hagedorn purchased two valuable tracts of land in Greensboro and placed title thereto in the name of his mother, Lula Hagedorn, with the ultimate intent of defrauding plaintiff of her marital rights.

The material allegations of the complaint were denied by Heyman Hagedorn.

The defendant Lula Hagedorn, answering the complaint, admitted that "Heyman Hagedorn caused deed to be made to this defendant . . . for the purpose of securing the replacement of moneys she had loaned her son." The *feme* defendant thereupon set up a cross action for $13,061, which amount, she asserted, was secured by the conveyance of the property in question and evidenced by notes held by her. It was also in evidence that she had paid taxes on said property to the amount of $677.96, and likewise held her son's note to cover this item.

The jury returned the following verdict:

"1. Were the plaintiff, Mrs. Frances Hagedorn, and defendant, Heyman Hagedorn, lawfully married? A. 'Yes.'

"2. Did the defendant Heyman Hagedorn commit adultery with Aileen Bennett, as alleged in the complaint? A. 'Yes.'

"3. If so, did the plaintiff Mrs. Frances Hagedorn condone the acts of adultery? A. 'No.'

"4. Did the defendant Heyman Hagedorn offer such indignities to the person of the plaintiff as to render her condition intolerable and her life burdensome? A. 'Yes.'

"5. If so, did the plaintiff Mrs. Frances Hagedorn forgive and condone the acts of the defendant Heyman Hagedorn? A. 'No.'

"6. Did the defendant separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life? A. 'Yes.'

"7. What amount, if any, is the defendant Mrs. Lula Hagedorn entitled to recover of the defendant Heyman Hagedorn? A. '$677.96.'"

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

*Herbert S. Falk for plaintiff, appellee.*
*Sapp & Sapp for defendant Heyman Hagedorn, appellant.*
*Frazier & Frazier for defendant Lula Hagedorn, appellant.*

STACY, C. J. In the companion case of *Hagedorn v. Hagedorn,* 210 N. C., 164, 185 S. E., 768, the plaintiff sought to reach certain property which, it was alleged, her husband had placed in corporate holding to defeat her marital rights. Here a similar effort is made to reach property, title to which plaintiff alleges her husband has placed in Lula Hagedorn with like intent and purpose.

HEYMAN HAGEDORN'S APPEAL.

The only exceptions requiring attention on Heyman Hagedorn's appeal are those directed to the plaintiff's testimony in which she undertakes to speak to the subject of adultery, in support of the second issue, and, also, certain alleged confidential communications.

Counsel for plaintiff freely conceded in the trial court that the examination of his client in support of the second issue was at first inadvertent, or without proper attention to C. S., 1801, which prohibits either spouse from testifying to the other's adultery, and asked that the same be stricken out. This was done. The error was thus cured. *Gray v. High Point,* 203 N. C., 756, 166 S. E., 911; *S. v. Lattimore,* 201 N. C., 32, 158 S. E., 741; *Nance v. Fertilizer Co.,* 200 N. C., 702, 158 S. E., 486; *Eaker v. Shoe Co.,* 199 N. C., 379, 154 S. E., 667; *Hyatt v. McCoy,* 194 N. C., 760, 140 S. E., 807; *S. v. Stewart,* 189 N. C., 340, 127 S. E., 260; *In re Will of Staub,* 172 N. C., 138, 90 S. E., 119. In *McAllister v. McAllister,* 34 N. C., 184, *Ruffin, C. J.,* said: "It is undoubtedly proper and in the power of the court to correct a slip by withdrawing improper evidence from the consideration of the jury, or by giving such explanations of an error as will prevent it from misleading a jury." He expressed the same opinion in *S. v. May,* 15 N. C., 328, and the practice has been observed since that time. *S. v. Davis,* 15 N. C., 612; *S. v. Collins,* 93 N. C., 564; *S. v. McNair, ibid.,* 628; *Bridgers v. Dill,* 97 N. C., 222, 1 S. E., 767; *S. v. Crane,* 110 N. C., 530, 15 S. E., 231; *Wilson v. Mfg. Co.,* 120 N. C., 94, 26 S. E., 629; *S. v. Lunsford,* 177 N. C., 117, 97 S. E., 682; *S. v. Dickerson,* 189 N. C., 327, 127 S. E., 256. But even if we should agree with the defendant that there was error in respect of the second issue, still this would not work a new trial

unless error were also committed in respect of the fourth issue, for in an action like the present, only one cause for divorce, either *a vinculo* or *a mensa et thoro,* need be alleged and shown. *Albritton v. Albritton,* 210 N. C., 111, 185 S. E., 762. In the instant case, the plaintiff has elected to make "assurance doubly sure" by alleging two causes for divorce—one absolute, the other from bed and board. Either would have sufficed under C. S., 1667. *Price v. Price,* 188 N. C., 640, 125 S. E., 264.

Plaintiff was allowed to testify to a number of conversations with her husband, which, it is contended, were of a confidential nature and should have been excluded under authority of *McCoy v. Justice,* 199 N. C., 602, 155 S. E., 452. It is provided by C. S., 1801 that "No husband or wife shall be compelled to disclose any confidential communication made by one to the other during their marriage." This means that neither shall be compelled to disclose any such confidential communication, but does not perforce render a voluntary disclosure thereof incompetent. *Nelson v. Nelson,* 197 N. C., 465, 149 S. E., 585.

Speaking to a similar situation in *Stickney v. Stickney,* 131 U. S., 227, *Mr. Justice Field,* delivering the opinion of the Court, said: "The general rule of the common law is, that neither husband nor wife is admissible as a witness for or against each other in any case, civil or criminal. This exclusion, as Greenleaf says, is founded partly upon the identity of their legal rights and interests, and partly on principles of public policy, that the confidence existing between them shall be sacredly protected and cherished to the utmost extent, as being essential to the happiness of social life. But this doctrine has been modified in several states, in many particulars, by direct legislation upon the subject, such as that neither husband nor wife shall be compelled to disclose any communication made to him or her during the marriage, as in New York. A voluntary statement is receivable under such a statute."

LULA HAGEDORN'S APPEAL.

The defendant Lula Hagedorn, in her answer, admits that Heyman Hagedorn caused title to the two lots in Greensboro to be placed in her name "for the purpose of securing the replacement of moneys she had loaned her son." Thus she only claims to hold the properties as security for loans, and concedes that the lots belong to her son. It has been found by the jury, however, upon ample evidence, that her claim of loans is fictitious, except as to the taxes advanced. Hence, the judgment would seem to be without prejudice to any of her rights. *Taylor v. Taylor,* 197 N. C., 197, 148 S. E., 171; *Sexton v. Farrington,* 185 N. C., 339, 117 S. E., 172; *Gentry v. Harper,* 55 N. C., 177; *Fahey v. Fahey,* 18 L. R. A. (N. S.), 1147, and note. She elected not to testify in the

case, notwithstanding plaintiff's evidence in denial of the genuineness of her supposed loans.

The plaintiff stands in the position of a creditor of her husband. *Walton v. Walton,* 178 N. C., 73, 100 S. E., 176. As against her claim, the deed to Lula Hagedorn, absolute on its face, but intended only as security, will not avail. *Foster v. Moore,* 204 N. C., 9, 167 S. E., 383; *Gulley v. Macy,* 84 N. C., 434; *Johnson v. Murchison,* 60 N. C., 292; *Holcombe v. Ray,* 23 N. C., 340; *Gregory v. Perkins,* 15 N. C., 50.

The result is that none of the exceptions can be held to work a new trial on either appeal.

No error.

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HENRY BLACKWELL INMAN v. THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD.

(Filed 27 January, 1937.)

**1. Insurance § 31a—Policy issued without medical examination may be avoided for misrepresentations relating to matters other than physical condition of applicant even in the absence of fraud.**

The policy in suit was issued without a medical examination upon an application signed by insured which stated that insured had never drawn disability compensation or pension, had never been under observation, care, or treatment in any hospital, sanatorium, asylum, or similar institution, and had not suffered any mental or physical disease, consulted a physician, or undergone a surgical operation in the prior five years. The evidence tended to show that insured had been gassed in the World War and drawn disability allowances from the Government, had been treated by physicians, and had been an inmate in a hospital for high blood pressure and other physical ailments less than five years prior to signing the application. *Held:* The application contained representations as to matters other than the physical condition of applicant, which, being material, entitled insurer to avoid the policy even though the misrepresentations were not fraudulent, C. S., 6460, not being determinative, since it relates solely to misrepresentations as to physical condition.

**2. Insurance § 31c—Knowledge of soliciting agent of misrepresentation in application signed by insured held not imputed to insurer.**

Knowledge of the soliciting agent of misrepresentations in an application for life insurance will not be imputed to insurer when the applicant represents in the application that the statements therein made are true and signs same without reading it or having it read to him and his failure to ascertain its contents is not induced by any fraud on the part of the agent.

CLARKSON, J., concurring.

APPEAL by plaintiff from *Grady, J.,* at September Term, 1936, of BRUNSWICK. Affirmed.

This is an action to recover on a certificate of insurance which was issued by the defendant on the life of Jesse L. Inman. The certificate was issued on 10 October, 1934. The insured died on 12 May, 1935. The plaintiff is the beneficiary named in the certificate, which is for the sum of $1,000.

The certificate was issued on the application of the insured, which is in writing and was signed by him.

It is alleged in the answer of the defendant that certain false and fraudulent representations as to matters which were material to its issuance were made by the insured in his application for the certificate, and that under its provisions the certificate was for that reason null and void at the date of its issuance.

The plaintiff in his reply admits that the answers to certain questions contained in the application are false, but denies that they were fraudulent. He alleges that true answers were made by the insured to the questions addressed to him by the agent for the defendant, who solicited the application, but that said agent, without the knowledge or procurement of the insured, wrote the false answers appearing in the application. He admits that the insured signed his name to the application, but alleges that the insured did not read the application or request that it be read to him before he signed the same.

The evidence at the trial tended to show that on or about 10 October, 1934, D. M. Thompson, agent of the defendant, called at the home of Jesse L. Inman in Brunswick County, and there solicited him for an application to the defendant for insurance on his life; that the insured told the agent of the defendant that he wanted some insurance, but doubted whether he could get it; that in response to questions of the agent, the insured told him that he was gassed while serving as a soldier during the World War, that he had drawn disability allowance from the Government of the United States for some time, but was not then drawing such allowances; that within the past two or three years he had been attended by Dr. Sadler and Dr. Goley, who had treated him for high blood pressure, and that neither of said doctors was then attending him. The agent replied to the insured: "I think I can get you by. You don't have to have a medical examination anyhow."

The evidence further tended to show that during the month of September, 1931, the insured had been an inmate of hospitals for veterans of the World War at Columbia, S. C., and at Atlanta, Ga., where medical examinations were made of the insured, disclosing that he was then suffering with high blood pressure and other physical ailments resulting from being gassed during the World War.

After questioning the insured, the agent of the defendant, in his presence, wrote the answers to the questions appearing in the applica-

tion at the time the application was received by the defendant at its home office in Omaha, Nebraska, and without reading the application to the insured, requested him to sign the application, which the insured did in his presence.

The application as signed by the insured contains the following questions and answers:

"2. Are you now or have you ever drawn disability compensation or pension? Answer: 'No.'

"6. Have you ever been under observation, care, or treatment in any hospital, sanatorium, asylum, or similar institution? Answer: 'No.'

"7. Have you within the past five years suffered any mental or bodily disease or infirmity? Answer: 'No.'

"8. Have you within the past five years consulted or been attended by a physician for any disease or injury, or undergone any surgical operation? Answer: 'No.'"

The certificate issued by the defendant on the application of the insured contains a provision as follows:

"If any of the statements or declarations in the application for membership shall be found in any respect untrue, the certificate shall be null and void and of no effect, and all moneys which shall have been paid, and all rights and benefits which have accrued on account of the certificate shall be absolutely forfeited without notice or service."

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

From judgment dismissing the action, the plaintiff appealed to the Supreme Court, assigning error in the judgment.

*Robert W. Davis and S. B. Frink for plaintiff.*
*C. Ed. Taylor for defendant.*

CONNOR, J. When the application on which the certificate sued on in this action was issued, was received by the defendant at its home office in the city of Omaha, Nebraska, it contained representations as to matters other than the physical condition of the applicant. These representations were false. For that reason C. S., 6460, if applicable to this case, is not determinative of the question presented by this appeal.

The representations were material to the issuance of the certificate. *Bryant v. Ins. Co.*, 147 N. C., 181, 60 S. E., 983. For that reason, notwithstanding the evidence for the plaintiff which tended to show that the representations, although false, were not fraudulent, under the provisions of C. S., 6289, and of the certificate, the certificate is null and void and of no effect. There is therefore no error in the judgment dismissing the action.

The knowledge which the evidence for the plaintiff tended to show the agent of the defendant who solicited the application had of the falsity of the representations contained in the application at the time it was signed by the applicant, cannot be imputed to the defendant. *Thompson v. Assurance Society,* 199 N. C., 59, 154 S. E., 21. The defendant had the right to rely and did rely upon the statements and representations contained in the application, which was in writing and signed by the applicant, at the time it was received at its home office.

The applicant did not read the application or request that it be read to him before he signed it. His failure to do either was not induced by any fraud on the part of the agent. When he signed the application, he knew that the agent had written answers to the questions contained in it. He represented to the defendant that these answers were true.

There is no error in the judgment. It is

Affirmed.

CLARKSON, J., concurring: In *Laughinghouse v. Insurance Co.,* 200 N. C., 434 (436), 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; *Colson v. Assurance Co.,* 207 N. C., 581; *Smith v. Insurance Co.,* 208 N. C., 99 (102); *Thompson v. Accident Association,* 209 N. C., 678 (680); *Williams v. Ins. Co.,* 209 N. C., 765; *Cox v. Assurance Society,* 209 N. C., 778.

In the present case it seems that there was such fraud or collusion as to take this case out of the decisions above set forth. "I think I can get you by" is the agent's language, not in his employer's interest, but that of the assured, and the assured knew this betrayal of the employer.

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ROBERT F. LEE v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 27 January, 1937.)

**Insurance § 34a—Insured's performance of work of permanent nature, although handicapped by disease, held to preclude recovery on disability clause.**

The complaint alleged that plaintiff, an employee in a cotton mill, while insured under a group policy, contracted bronchial asthma and became

totally and permanently disabled within the terms of the policy, that insurer failed to pass on his claim for three years, and that during this period plaintiff, in order to procure necessary subsistence, obtained and, by the periodic use of morphine, held for a period of nine months a job in another mill in spite of his disease. This job was obtained after the termination of his certificate under the group policy. *Held:* Defendant insurer's demurrer to the complaint should have been sustained, it appearing that insured did work "for compensation of financial value," and was not therefore totally disabled within the terms of the policy.

APPEAL by defendant from *Williams, J.*, at September Term, 1936, of ALAMANCE. Reversed.

This is an action brought by plaintiff against defendant to recover $1,000, pursuant to the terms of a group insurance policy contract. The plaintiff on or about 8 April, 1931, was employed as a textile worker in the mill of E. M. Holt Plaid Mills, Inc., and E. M. H. Knitting Mills, at Burlington, N. C. The plaintiff's employer entered into a certain contract with the defendant corporation by the terms of which The Equitable Life Assurance Society of the United States issued group insurance policies to all employees of the said E. M. Holt Plaid Mills, Inc., and E. M. H. Knitting Mills. Pursuant to said contract the plaintiff was issued a policy of The Equitable Life Assurance Society of the United States, designated as No. 3084-263, for the sum of One Thousand ($1,000) Dollars. Among the provisions of said policy is the following: "Total and Permanent Disability Provision. In the event that any employee while insured under the aforesaid policy and before attaining age 60, becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation *or performing any work for compensation of financial value,* upon receipt of due proof of such disability before the expiration of one year from the date of its commencement, the Society will, in termination of all insurance of such employee under the policy, pay equal monthly disability-installments, the number and amount of which shall be determined by the table of installments below—amount of insurance, $1,000—number of monthly disability-installments, 20—amount of each monthly disability-installments, $21.04. The first installment shall be due upon receipt of said proofs and shall be for the amount of monthly disability-installments accrued from the commencement of said total and permanent disability, and subsequent installments shall be paid monthly during the continuance of said disability until the completion of said installments."

The plaintiff alleged in his complaint that "while employed by the E. M. Holt Plaid Mills, Inc., at Burlington, N. C., and while said policy was in force and effect, 'this plaintiff having a portion of his weekly wage deducted in order to assist in payment of premiums on said pol-

icy,' was taken so ill with bronchial asthma on or about the first day of September, 1932, that he was unable to work any longer, and has since said time been totally and permanently disabled, and has been advised, believes, and therefore alleges that he will be totally and permanently disabled for life from engaging in any regular occupation or performing any work for compensation of financial value. That the plaintiff immediately notified the defendant of his condition and furnished a statement of Dr. F. O. Bell of Burlington, N. C., his attending physician, to the effect that the plaintiff was totally and permanently disabled, and that said condition was presumably of a permanent nature. That the said defendant, instead of paying the monthly installments as provided under the terms of said policy, extended the said period from time to time to observe the plaintiff's condition, for the alleged purpose of determining whether or not said condition was of a temporary or permanent nature, without ever making any definite decision as to the probable permanency of this plaintiff's physical disability, from the latter part of August, 1932, until 10 December, 1935, at which time the claim of this plaintiff under said policy was disallowed."

Among other things, the plaintiff alleges in his complaint that: "On account of his said destitute condition and the fact that the nation-wide depression had so destituted his relatives that they could not assist him, this plaintiff, in order to secure necessary subsistence upon which to live, and in spite of his physical disability to do so, went to the Dan River Cotton Mills in the city of Danville, Virginia, and applied for work at said mills. That this plaintiff, in order to pass the physician at the mills, took a dose of morphine that morning in order to attempt to conceal his acute asthmatic condition so that he could secure some food for himself, and was successful in securing employment. That by taking morphine regularly this plaintiff was halfway able to stay on the job until the latter part of November, 1934, although he had to stay out sometimes two and three days a week, and at other times was forced to stay out as much as a week on three or four different times from January through the month of November, 1934, and during all of said time was only able to secure enough money to barely keep body and soul together, and during all of the time of his actual employment, was laboring under great pain and terrific physical disability, all on account of the negligence of the defendant and its obstinate refusal to abide by and carry out the terms of its insurance contract hereinbefore mentioned and described. That in the latter part of November, 1934, the foreman at said mill reprimanded this plaintiff severely about a piece of cloth, and at the time this plaintiff, although he was doped with morphine, became so choked with his acute asthmatic condition that he could not reply or talk to his said foreman. Thereupon the said foreman immediately dis-

charged him and said that this plaintiff 'wasn't any account nohow.' That ever since the month of January, 1935, this plaintiff had to totally rely for the meager food, scant clothing, and medical treatment upon the Danville Welfare Department of the city of Danville, Virginia. That this plaintiff has been forced to undergo all of the excruciating pain and physical handicaps, as hereinbefore set out, unnecessarily, on account of the gross carelessness, negligence, and refusal of the defendant to abide by and carry out the terms of its insurance policy, as hereinbefore alleged."

The defendant demurred to the complaint, as follows:

"1. According to the complaint, the plaintiff ceased to work for the E. M. Holt Plaid Mills, Inc., the latter part of August, 1932, and that his insurance certificate, set forth in the complaint, expired and terminated as of 10 June, 1933, or prior to that time. That thereafter, in January, 1934, the plaintiff went to work for the Dan River Cotton Mills in Danville, Virginia, and continued in employment of said mills until the latter part of November, 1934, and thereby performed 'work for compensation of financial value.' That, as provided in the said policy, and as set forth in paragraph four of the complaint, in order to obtain disability benefits under the said policy it was necessary that the insured: 'Before obtaining 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.' That on account of said facts the defendant is estopped from claiming total and permanent disability by reason of claim made and filed by him, as alleged in paragraph six of the complaint.

"2. That from the complaint, it does not appear that the plaintiff at the time of making the claim, and for considerable time thereafter, was totally and permanently disabled under the meaning and terms of said policy, and is therefore not entitled to the relief asked for."

The court below overruled the demurrer. The defendant excepted, assigned error, and appealed to the Supreme Court.

*J. Elmer Long, Clarence Ross, and C. Stuart Wheatley, Jr., for plaintiff.*

*Shepherd & Shepherd for defendants.*

CLARKSON, J. We think the plaintiff alleged too much in his complaint to recover on the policy in controversy, and the demurrer of defendant must be sustained. The allegations in the complaint appeal to the humane attitude, but we are not permitted to go beyond the terms of the contract. When plaintiff's claim was disallowed, he worked from

January to the latter part of November, 1934, in the Dan River Cotton Mills and performed work "for compensation of financial value."

In *Smith v. Assurance Society,* 205 N. C., 387 (393), this Court said: "The evidence in all the above cases and in the present case indicates that the jobs were of a trifling nature. Is it possible to construe a policy like the present to say that a man, although death-doomed with tuberculosis, and having a wife and seven children needing, as the plaintiff testified, 'something to eat,' if he should attempt in his wasted condition to try in a feeble way to do trifling work, that this was a forfeiture of his policy? Such a holding would be contrary to the spirit, if not the letter, of the contract."

When the plaintiff's claim was disallowed he could have at once sued defendant and recovered, if it was liable on the contract. He did not do this but took a permanent job for some nine months. The pathos is that innumerable men and women like plaintiff have had to work, and do now work, for their daily bread, handicapped by disease. The action is on a contract which we think the allegations of plaintiff exclude him from its provisions. We think the case of *Thigpen v. Ins. Co.,* 204 N. C., 551, determinative of this cause. In that case a "court crier" received $40.00 a month for his services.

For the reasons given, the demurrer is sustained and the judgment of the court below is

Reversed.

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J. R. WHITE, ADMINISTRATOR OF SARAH ELIZABETH WHITE, MINOR, DECEASED, v. THE CITY OF CHARLOTTE AND CHARLOTTE PARK AND RECREATION COMMISSION.

(Filed 27 January, 1937.)

**1. Municipal Corporations § 12—**

A municipality is not necessarily relieved of liability as a matter of law for negligence proximately causing injury in the maintenance of a public park, even if the maintenance of the park be a governmental function.

**2. Municipal Corporations § 17: Negligence § 19a—Where evidence leaves cause of injury in conjecture, nonsuit is proper.**

The evidence tended to show that plaintiff's intestate was fatally injured in a fall from a swing in a municipal park, that intestate and a companion were standing on the seat of the swing "pumping," so that the swing was caused to move rapidly from side to side, that the swing was so constructed that the links in the chain were loose and would slip and cause the swing to jerk when the seat had reached the maximum height on each side, and that while so swinging intestate was thrown or fell therefrom to her fatal injury. *Held:* The evidence fails to show whether intestate's fall was the result of a jerk caused by the slipping

of the chain of the swing, or was the result of some inadvertence on the part of intestate or her companion, and defendant municipality's motion to nonsuit was properly granted, since the cause of the fatal accident is a matter of conjecture on the evidence.

APPEAL by plaintiff from *Cowper, Special Judge,* at September Term, 1936, of MECKLENBURG. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, who died on 18 August, 1933, as the result of personal injuries which she suffered when she fell or was thrown from a swing in Independence Park in the city of Charlotte on 13 August, 1933.

Independence Park is owned by the defendant city of Charlotte, a municipal corporation. It is a public park and is controlled and operated by the defendant Charlotte Park & Recreation Commission, a corporation created by the General Assembly of this State, as an agency of the city of Charlotte. Independence Park and its facilities are owned, controlled, and operated by the defendants for use by the public, for purposes of recreation. The defendant Charlotte Park & Recreation Commission is authorized to charge and in some instances does charge fees for the use of certain of the facilities provided by said commission in Independence Park.

It is alleged in the complaint that the death of plaintiff's intestate, who was about fifteen years of age at the time she suffered her fatal injuries, was caused by the negligence of the defendants in failing to exercise reasonable care to provide for her, and others who had the right to use the facilities of Independence Park, a reasonably safe swing.

It is further alleged that the swing from which plaintiff's intestate fell or was thrown was defective in that the links which make up the chains in said swing were loose, causing the links to slip when the swing was used, and thereby to give a violent jerk, and that plaintiff's intestate fell or was thrown from said swing by a jerk as she was using it.

These allegations are denied in the answer. In further defense of plaintiff's recovery in this action, the defendants allege in their answers that plaintiff's intestate by her own negligence contributed to her fatal injuries. They also allege that Independence Park and its facilities, including the swing from which plaintiff's intestate fell or was thrown, were owned, controlled, and operated by the defendants in the exercise of a governmental function, and that for that reason they are not liable to plaintiff in this action.

The action was begun in the Superior Court of Mecklenburg County on 12 February, 1934.

It was admitted that prior to the commencement of the action, the plaintiff caused notice of his claim to be served on the defendants as required by the provisions of the charter of the city of Charlotte, and that defendants denied liability and declined to allow or pay said claim.

At the trial, the evidence for the plaintiff tended to show that on 13 August, 1933, while plaintiff's intestate and a companion were swinging in a swing in Independence Park, plaintiff's intestate fell or was thrown from the swing into a concrete ditch, and that she thereby suffered personal injuries from which she died on 18 August, 1933; that immediately before she fell or was thrown from the swing, she and her companion, who were standing on the seat of the swing, facing each other, were "pumping," or causing the swing by the motions of their bodies, to move rapidly through the air, from side to side; and that while so using the swing, plaintiff's intestate was suddenly thrown or fell from the swing into a concrete ditch at a distance of about 16 feet from the swing.

There was evidence tending to show that the links in the chains which were attached to the seat, were loose, and at times while the swing was being used, would slip, causing the swing to give a violent jerk. There was no evidence, however, tending to show that plaintiff's intestate fell or was thrown from the swing by a jerk, caused by the slipping of the links. All the evidence showed that immediately before she fell or was thrown from the swing, plaintiff's intestate and her companion were causing the swing to move rapidly from side to side, through the air, as high on each side as they could.

At the time she was injured, plaintiff's intestate was about 15 years of age. She was a normal girl of that age, both physically and mentally. She had frequently used the swings in Independence Park for play and recreation. She knew the conditions in the park surrounding the swings. No charge was made by the defendants or either of them for the use of the swings. There were no defects in the swings. They were so constructed that the links in the chains were loose, and would slip, when the seat had reached the maximum height on each side, causing the swing to jerk as the seat returned to the other side.

At the close of the evidence for the plaintiff, defendants moved for judgment dismissing the action as of nonsuit. The motion was allowed, and plaintiff duly excepted.

From judgment dismissing the action, plaintiff appealed to the Supreme Court, assigning as error the judgment dismissing the action as of nonsuit.

*John Newitt for plaintiff.*
*Scarborough & Boyd for defendants.*

CONNOR, J. Conceding that Independence Park and its facilities, including the swing from which plaintiff's intestate fell or was thrown with the result that she suffered the injuries from which she died, are

owned, controlled, and operated by the defendants in the exercise of a governmental function, and not for a corporate purpose (*Atkins v. Durham*, 210 N. C., 295, 186 S. E., 330; *Parks-Belk Co. v. Concord*, 194 N. C., 134, 138 S. E., 599), it does not follow as a matter of law that defendants owed no duty to the plaintiff's intestate and others who had the right to use said facilities for purposes of play or recreation, to exercise reasonable care to provide facilities which were reasonably safe, or that defendants would not be liable to plaintiff for a breach of such duty, if such breach was the proximate cause of injuries which resulted in the death of his intestate (*Fisher v. New Bern*, 140 N. C., 506, 53 S. E., 342; *Warden v. City of Grafton* [W. Va.], 128 S. E., 375).

We are of opinion and so hold that there was no error in the judgment in this case, dismissing the action as of nonsuit, for the reason that there was no evidence at the trial tending to show that the death of plaintiff's intestate was caused by the negligence of the defendants or of either of them. If there was negligence on the part of the defendants, with respect to the construction of the swing, or its location in the park, as contended by the plaintiff, there was no evidence from which the jury could have found that such negligence was the proximate cause of the death of plaintiff's intestate. Whether she fell or was thrown from the swing while she and her companion were standing on the seat, and "pumping," because of a jerk which resulted from the slipping of the links in the chains, or because of some inadvertence on her part or on the part of her companion, is purely a matter of conjecture. Juries, as the finders of facts, ought not to be required or permitted to find facts on which legal liability arises, when they must conjecture what the facts are. In the absence of any evidence tending to show negligence on the part of the defendants which was the proximate cause of the death of plaintiff's intestate, there was no error in the judgment dismissing this action. The judgment is

Affirmed.

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STATE v. RAYMOND EARLY, ALIAS DUMMY MOORE.

(Filed 27 January, 1937.)

**1. Criminal Law § 16—Arraignment of deaf mute and acceptance of plea of not guilty through interpreter held without error in this case.**

The court, upon his finding that defendant is a deaf mute, subpœnaed an interpreter, who after being duly sworn and after the reading of the indictment, interpreted and explained the indictment to defendant. After defendant had indicated to the interpreter that he understood the indictment, the interpreter translated the solicitor's question of whether de-

fendant was guilty or not guilty, and upon a negative reply given through the interpreter, a plea of not guilty was entered. No contention or plea involving defendant's sanity or his capacity to understand the nature of the crime charged or the purpose and effect of the trial, was tendered by defendant's counsel. *Held:* There was no error on the arraignment of defendant or in the acceptance of his negative answer as a plea of not guilty. C. S., 4632.

**2. Criminal Law § 67—Supreme Court has no authority to determine whether clemency should be extended to a defendant.**

Where there is no error of law in the trial, the judgment appealed from must be affirmed, the question of whether clemency should be extended defendant not being determinable by the Supreme Court, but being a matter for the Governor if and when it shall be duly presented to him for official action.

APPEAL by defendant from *Clement, J.*, at August Term, 1936, of YADKIN. No error.

This is a criminal action in which the defendant was tried on an indictment for rape.

Prior to his arraignment, it was made to appear to the court that the defendant is deaf and dumb. Upon so finding, the court ordered a subpœna to be issued for Rome C. Fortune, who was represented to the court to be qualified to act as an interpreter for deaf and dumb persons.

On the arraignment of the defendant, Rome C. Fortune, who was present in response to the subpœna, was found by the court to be qualified by training and experience to act as interpreter for the defendant in this action. He was thereupon duly sworn, and at the request of the court, acted as interpreter for the defendant on his arraignment and during his trial.

The indictment appearing in the record was read to the defendant by the solicitor for the State, and in the presence of his counsel was interpreted and explained to him by Rome C. Fortune. After the defendant had replied in the affirmative to the question of the interpreter as to whether he understood the indictment and the charge made against him therein, the solicitor asked the defendant the following question:

"Raymond Early, alias Dummy Moore, are you guilty of the rape and felony whereof you are charged, or not guilty?"

The defendant replied, "No," and was thereupon put upon his trial on a plea of "not guilty."

At the conclusion of his arraignment, defendant's counsel objected thereto, and duly excepted to the refusal of the court to allow his objection.

At the trial, the evidence for the State tended to show that some time between 1 and 3 o'clock, during the night of 16 August, 1936, the prosecutrix, a married woman, who had been asleep in a bed in her

home, was awakened by a man who had entered the home while she was asleep; that the man who awoke her threw a sheet over her head, and after awaking her, assaulted her on her bed; that by force and violence, and against her will, he had sexual intercourse with her; that her husband, who was sleeping in an adjoining room, was awakened by her cries, and that when he came into the room in response to her cries, was knocked down and rendered unconscious by the man who had assaulted and raped his wife; that her husband had been rendered unconscious by him, and while he was lying on the floor, the man again assaulted and raped the prosecutrix; that there was no light in the room when the crime was committed, and for this reason the prosecutrix did not discover the identity of the man who assaulted and raped her, although she did discover that he was a negro; and that after the man who had assaulted and raped her, ran from the room to the porch, where an electric light was burning, the prosecutrix discovered that the defendant was the man. The prosecutrix testified that she had known the defendant for several years; that he lives about a mile from her home. She informed the officers, who began an investigation of the crime immediately after its commission, about 7 or 8 o'clock the next morning, that the defendant was the man who had assaulted and raped her.

The testimony of the prosecutrix both as to the commission of the crime and as to the identity of the defendant as the man who had committed the crime, was corroborated by evidence offered by the State.

The defendant did not testify as a witness in his own behalf. Evidence offered by him tended to show that he was not at the home of the prosecutrix at any time during the night the crime was committed, but that he was at his home from 11 or 12 o'clock that night until the next morning when he went to his work as usual.

The defendant was arrested by the sheriff of Yadkin County some time between 7 and 8 o'clock on the morning after the crime was committed. He then claimed as his own a cap which the sheriff testified he had found in the room of the prosecutrix soon after the commission of the crime.

The evidence for both the State and the defendant was submitted to the jury under a charge by the court, to which there were no exceptions by the defendant.

The jury returned a verdict of "guilty of rape."

From judgment that he suffer death by means of asphyxiation as prescribed by statute, the defendant appealed to the Supreme Court, assigning errors in the trial.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Ottis J. Reynolds and George P. Pell for defendant.*

CONNOR, J. It was not contended on behalf of the defendant on his trial in the Superior Court, nor is it contended on his appeal to this Court, that the defendant, because of his infirmity, was incapable of understanding the nature of the crime with which he was charged in the indictment, or the purpose and effect of his trial. No plea involving his capacity to plead to the indictment, or his sanity was tendered by his counsel. For this reason, the procedure approved by this Court in *S. v. Harris,* 53 N. C., 136, was not followed by the trial court. In that case, upon its finding that the defendant who was charged in the indictment with murder, was deaf and dumb, and upon the suggestion of his counsel that because of his infirmity he was incapable of pleading to the indictment, the court submitted issues to the jury involving his capacity to plead, and his sanity at the time of the trial. After hearing evidence pertinent to these issues and instructions by the court, the jury answered both issues favorable to the contentions of counsel for the defendant. The court thereupon declined to proceed with the trial, and ordered that the defendant be confined for safe keeping.

There was no error on the arraignment of the defendant in this action, nor in the acceptance by the court of his plea of not guilty. The suggestion that his negative answer to the question addressed to him by the solicitor, as to whether he was guilty or not guilty of rape and felony with which he was charged in the indictment, does not seem to call for comment. The negative answer of the defendant was properly accepted by the court as a plea by defendant of not guilty. C. S., 4632.

Assignments of error on behalf of the defendant, based upon exceptions to the admission or exclusion of testimony as evidence at the trial, have been carefully considered. They cannot be sustained.

We find no error in the trial, and for that reason the judgment must be affirmed. Whether or not clemency should be extended to the defendant because of his infirmity, cannot be determined by this Court. Under the Constitution of this State, that question must be determined by the Governor when and if it shall be duly presented to him for official action. See *S. v. Jackson, post,* 202.

No error.

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ETHEL S. HAYES ET AL. v. WESTERN UNION TELEGRAPH CO. ET AL.

(Filed 27 January, 1937.)

**1. Negligence § 19b—**

A motion to nonsuit on the ground of contributory negligence may be allowed only when plaintiff's own evidence establishes contributory negligence and there is no conflict in the evidence as to the pertinent facts. C. S., 567.

**2. Automobiles § 18c—Evidence held not to disclose contributory negligence as matter of law on part of pedestrian.**

Plaintiff's evidence tended to show that plaintiff attempted to cross a street in a city in the middle of the block, with bundles in her arms, and that as she came from between parked cars, she was struck by a messenger boy riding a bicycle at a high rate of speed, without lights. *Held:* Plaintiff's evidence fails to show contributory negligence as a matter of law, and defendant's motion to nonsuit was correctly denied.

APPEAL by defendants from *Frizzelle, J.*, at April Term, 1936, of DURHAM.

Civil actions by *feme* plaintiff and her husband to recover damages for personal injuries, loss of services, hospitalization, etc., alleged to have been caused by the negligence of the defendants, consolidated and tried together, as both causes of action arise out of the same injury. *Fleming v. Holleman,* 190 N. C., 449, 130 S. E., 171.

On the evening of 3 November, 1934, about 8 o'clock, the *feme* plaintiff emerged from an A. & P. store on the south side of West Chapel Hill Street in the city of Durham, and started across the street, in the middle of the block, with bundles in her arms, and coming from between parked cars. At the same time Marshall Hartsell, a messenger boy of the corporate defendant, came down the street riding a bicycle at a high rate of speed, without lights, and in violation of city ordinance, struck the *feme* plaintiff as she was attempting to cross the street, and inflicted serious injuries.

The cases were tried upon the usual issues of negligence, contributory negligence, and damages, and resulted in verdict and judgment for plaintiffs.

Defendants appeal, assigning errors.

*Basil M. Watkins for plaintiffs, appellees.*
*R. O. Everett for defendants, appellants.*

STACY, C. J. The battleground of debate is whether the alleged contributory negligence of *feme* plaintiff should be held to bar recovery as a matter of law. *Holton v. R. R.,* 188 N. C., 277, 124 S. E., 307. It is conceded that ordinarily the issue is for the twelve. *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601; *Butner v. R. R.,* 199 N. C., 695, 155 S. E., 601; *Smith v. R. R.,* 200 N. C., 177, 156 S. E., 508. See, also, *Davis v. R. R.,* 187 N. C., 147, 120 S. E., 827, where the question is discussed at length by *Hoke, J.*, with full citation of authorities.

Originally, under C. S., 567, in cases to which it was applicable, there was considerable doubt as to whether a plea of contributory negligence—the burden of such issue being on the defendant—could be taken ad-

vantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is established by his own evidence, as he thus proves himself out of court. *Wright v. R. R.*, 155 N. C., 325, 71 S. E., 306; *Horne v. R. R.*, 170 N. C., 645, 87 S. E., 523, and cases there cited.

Speaking to the subject in *Battle v. Cleave*, 179 N. C., 112, 101 S. E., 555, *Hoke, J.*, delivering the opinion of the Court, said:

"It is earnestly insisted for defendant that judgment of nonsuit should have been entered by reason of contributory negligence on the part of the plaintiff. Such a judgment has been given in rare instances on the grounds suggested, and where, from the proof offered in support of plaintiff's cause of action, it clearly appears that his own negligence has been the proximate cause of the injury or one of them. *Dunnevant v. R. R.*, 167 N. C., 232; *Mitchell v. R. R.*, 153 N. C., 116; *Strickland v. R. R.*, 150 N. C., 4.

"The burden of showing contributory negligence, however, is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof, nor where it is necessary in support of the motion to rely, in whole or in part, on evidence offered for the defense. *Russell v. R. R.*, 118 N. C., 1098; *House v. R. R.*, 131 N. C., 103."

Again, in *Moseley v. R. R.*, 197 N. C., 628, 150 S. E., 184, *Clarkson, J.*, speaking for the Court, observed: "A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence, and certain conduct of a plaintiff contributory negligence, and take away the question of negligence and contributory negligence from the jury. The right of trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the court."

The issue of contributory negligence in the instant case was for the jury.

Whether the defendant's violation of the traffic ordinance should be regarded as negligence *per se*, or only *prima facie*, is controlled by what was said in *Hinshaw v. Pepper*, 210 N. C., 573; *Goss v. Williams*, 196 N. C., 213, 145 S. E., 169; *S. v. Cope*, 204 N. C., 28, 167 S. E., 456. Compare *Exum v. Baumrind*, 210 N. C., 650; *Kelly v. Hunsucker, ante*, 153.

No error.

W. E. CASON v. J. R. SHUTE, JR., TRUSTEE, ET AL.

(Filed 27 January, 1937.)

**1. Judgments § 4: Execution § 11—**

The procedure to attack a consent judgment on the ground that the party did not in fact consent thereto, and to recall execution issued thereon is by motion in the cause.

**2. Execution § 11—Where consent judgment does not show amount for which execution should issue, jury must determine controverted amount.**

It is error for the clerk to issue execution on a consent judgment without notice and a hearing when the amount for which execution should issue is not determinable from the face of the instrument, but must be ascertained by evidence *dehors* or *aliunde*, and a motion in the cause to recall the execution should be allowed until the controverted amount is determined by a jury. In this case the judgment provided for contribution by other defendants upon default of any one of them and for subrogation against defaulting defendant or defendants, and execution was issued against movant for his *pro rata* part of the amount charged against a defaulting defendant.

**3. Judgments § 1—**

A consent judgment is a contract of the parties recorded with the sanction and permission of the court, and should be construed and dealt with as if the parties had entered into a written contract embodying the terms of the judgment.

APPEAL by plaintiff from *Rousseau, J.*, at October Term, 1936, of UNION.

Civil action to restrain execution and to vacate alleged consent judgment on ground that plaintiff did not consent thereto.

At the October Term, 1931, Union Superior Court, judgment was entered in the case of *Hood, Comr., v. W. S. Blakeney, et al., Directors of the Bank of Union,* ostensibly by consent, in which the defendants therein agreed to pay the plaintiff $40,000, the amount to be paid by each defendant being stipulated therein. The judgment also provided for contribution among the other defendants in case any should default, and subrogation against any defaulting defendant or defendants.

Default having been made by one of the defendants, and contributory payment by the others, with the exception of W. E. Cason, execution was issued by the clerk against the said W. E. Cason for the calculated amount of $3,432.22 with interest and costs.

Upon the hearing, after the jury had been impaneled, the court reversed its ruling as to a jury trial, asked counsel for plaintiff if the action might be treated as a motion in the original cause, to which counsel consented "if the court deems a motion in the original cause the

proper procedure," but demanded a jury trial on the issues tendered. This was refused; whereupon counsel for plaintiff declined to proceed further and gave notice of appeal. The court thereupon proceeded "to consider the complaint and petition and other papers herein, and treat them as evidence in the hearing of a motion in the cause," denied the same, dissolved the injunction, and dismissed the action.

Plaintiff appeals, assigning errors.

*A. M. Stack and C. E. Hamilton for plaintiff, appellant.*
*O. L. Richardson for defendants, appellees.*

STACY, C. J. It is apparent that on the hearing the matter became entangled in the net of form. This ought not to deprive the parties of their rights.

On the question of recalling the execution, *Williams v. Dunn,* 158 N. C., 399, 74 S. E., 99; *S. c.,* 163 N. C., 206, 79 S. E., 512, and whether plaintiff consented to the judgment of 1931, *Morgan v. Hood, Comr., ante,* 91, the proper procedure is by motion in the cause. *Deitz v. Bolch,* 209 N. C., 202, 183 S. E., 384; *Bank v. Penland,* 206 N. C., 323, 173 S. E., 345; *Register Co. v. Holton,* 200 N. C., 478, 157 S. E., 433; *Weir v. Weir,* 196 N. C., 268, 145 S. E., 281; *Aldridge v. Loftin,* 104 N. C., 122, 10 S. E., 210; *Long v. Jarratt,* 94 N. C., 443.

As we understand the record, the execution issued by the clerk would seem to be irregular, as the amount could only be determined by evidence *dehors* or *aliunde.* The clerk was not authorized to make this determination, which apparently he undertook to do without notice or opportunity to be heard. In any event, the motion to recall, until the controverted amount could be ascertained by a jury, should have been allowed. *Stanley v. Parker,* 207 N. C., 159, 176 S. E., 279.

The judgment entered at the October Term, 1931, being a consent judgment, is to be construed, and accordingly dealt with, as if the parties had entered into a written contract, duly signed and delivered, embodying therein the terms of said judgment. *Bunn v. Braswell,* 139 N. C., 135, 51 S. E., 927. It stands as the agreement of the parties, made a matter of record at their request, and with the permission and approval of the court. Speaking to the question in *Wilcox v. Wilcox,* 36 N. C., 36, *Gaston, J.,* says a consent judgment "is in truth the decree of the parties"; and *Dillard, J.,* in *Edney v. Edney,* 81 N. C., 1, defines it as follows: "A decree by consent is the decree of the parties, put on file with the sanction and permission of the court; and, in such decree, the parties, acting for themselves, may provide as to them seems best concerning the subject matter of the litigation." *Vaughan v. Gooch,* 92 N. C., 524. "Consent judgments are, in effect, merely contracts of the parties, acknowledged in open court and ordered to be recorded."

*Clark, C. J.,* in *Bank v. Comrs.,* 119 N. C., 214, 25 S. E., 966. "A judgment by consent is not the judgment or decree of the court. It is the agreement of the parties, their decree, entered upon the record with the sanction of the court. It is the act of the parties rather than that of the court." *Brown, J.,* in *Belcher v. Cobb,* 169 N. C., 689, 86 S. E., 600. See, also, *Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350; *Bank v. Mitchell,* 191 N. C., 190, 131 S. E., 656; *Distributing Co. v. Carraway,* 189 N. C., 420, 127 S. E., 427; *Morris v. Patterson,* 180 N. C., 484, 105 S. E., 25; *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955; *Harrison v. Dill,* 169 N. C., 542, 86 S. E., 518; *Lynch v. Loftin,* 153 N. C., 270, 69 S. E., 143; *Henry v. Hilliard,* 120 N. C., 479, 27 S. E., 130; 15 R. C. L., 645.

Error.

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H. W. ANDERSON v. J. A. McRAE.

(Filed 27 January, 1937.)

**1. Reference § 9—Court must pass upon exceptions in consent reference and review the evidence relevant to the findings excepted to.**

It is error for the court to refuse to pass upon exceptions to the report in a consent reference, or to approve the findings excepted to simply because they are supported by the evidence, the findings of the referee not being binding on the court even if supported by evidence, but it being the duty of the court to review the evidence and judicially determine the facts as established by the preponderance of the evidence, C. S., 578, and in passing upon the exceptions, he may affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of the referee.

**2. Reference § 8—**

In the absence of exceptions to the factual findings of the referee, his findings are conclusive, and the case must be determined upon the facts found by him.

**3. Reference §§ 4, 9—**

By consenting to a reference the parties waive the right to have issues of fact determined by a jury, C. S., 572, and the tender of issues on exceptions in a consent reference may be treated as surplusage.

APPEAL by plaintiff from *Clement, J.,* at March Term, 1936, of ROCKINGHAM.

Civil action for partnership accounting, by consent referred to Jule McMichael, Esq., to state the account and report the same to the court, together with his conclusions of law.

Upon the coming in of the report, the plaintiff filed a number of exceptions thereto, and "moved the court to consider and pass upon the

exceptions filed to the report of the referee. . . . This his Honor did not do. Plaintiff excepts."

The court modified the report in respect of two small items, and entered judgment:

"It further appearing, with the exception of the two above items, that the finding of facts by the said referee, as set out in his report, was supported by the evidence; . . . It is, therefore, adjudged . . . that the said referee's report, except as herein above modified, be and the same is hereby approved and confirmed."

Plaintiff appeals, assigning errors.

*Sharp & Sharp for plaintiff, appellant.*
*D. F. Mayberry and Hunter K. Penn for defendant, appellee.*

STACY, C. J. The record states that "his Honor did not . . . pass upon the exceptions," and in effect that he approved the factual findings of the referee, with two slight changes, because they were "supported by the evidence." This is not in keeping with the usual practice in such cases.

True, in a consent reference, upon exceptions duly filed, the judge of the Superior Court, in the exercise of his supervisory power and under the statute, C. S., 578, may affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. *Contracting Co. v. Power Co.*, 195 N. C., 649, 143 S. E., 241; *S. v. Jackson*, 183 N. C., 695, 110 S. E., 593; *Vaughan v. Lewellyn*, 94 N. C., 472. See, also, *Maxwell, Comr., v. R. R.*, 208 N. C., 397, 181 S. E., 248; *Corbett v. R. R.*, 205 N. C., 85, 170 S. E., 129; *Wilson v. Allsbrook, ibid.*, 597, 172 S. E., 217. This he may do, however, only in passing upon the exceptions, for in the absence of exceptions to the factual findings of a referee, such findings are conclusive, *Bank v. Graham*, 198 N. C., 530, 152 S. E., 493, and where no exceptions are filed, the case is to be determined upon the facts as found by the referee. *Salisbury v. Lyerly*, 208 N. C., 386, 180 S. E., 701; *Wallace v. Benner*, 200 N. C., 124, 156 S. E., 795.

Nor is it accordant with precedent for the judge of the Superior Court, in considering exceptions to the factual findings of a referee, to approve such findings simply because they are supported by the evidence. *Thompson v. Smith*, 156 N. C., 345, 72 S. E., 379.

Speaking to the subject in *Dumas v. Morrison*, 175 N. C., 431, 95 S. E., 795, *Walker, J.*, delivering the opinion of the Court and pointing out the difference between the duties of the trial court and the appellate court in dealing with exceptions to reports of referees, said:

"It must be remembered that a judge of the Superior Court in reviewing a referee's report is not confined to the question whether there is any

evidence to support his findings of fact, but he may also decide that while there is some such evidence, it does not preponderate in favor of the plaintiff, and thus find the facts contrary to those reported by the referee. The rule is otherwise in this Court, when a referee's report is under consideration. We do not review the judge's findings, if there is any evidence to support them, and do not pass upon the weight of the evidence."

Again in *Thompson v. Smith, supra,* the same learned justice said: "When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases, use his own faculties in ascertaining the truth, and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot *review* the referee's findings in any other way."

The proper procedure in reference cases, relative to the questions here presented, was succinctly stated by *Davis, J.,* in *Miller v. Groome,* 109 N. C., 148, 13 S. E., 840, as follows: "This was a reference under the Code, and the referee, as was his duty, reported the facts found and his conclusions of law separately, and he also reported the evidence upon which he found the facts, and, as a matter of right, either party could file exceptions, appeal, and have the report reviewed by the judge of the Superior Court, whose duty it is to consider the exceptions and set aside, modify, or confirm the report, according to his judgment, and his ruling upon the findings of fact is conclusive upon this Court, but his ruling upon questions of law are subject to review here. . . . It was perfectly competent, upon review, if he so thought, to adopt the findings of fact and conclusions of law of the referee, and then they would become the findings and conclusions of the court; but it was error in his Honor to summarily dispose of the exceptions by overruling them and confirming the report, without reviewing and passing upon them judicially."

It is perhaps needless to add that, in a consent reference, the parties waive the right to have the issues of fact determined by a jury. C. S., 572; *Carr v. Askew,* 94 N. C., 194; *Green v. Castlebury,* 70 N. C., 20. Hence, issues tendered on the exceptions in such a case may be treated as surplusage. The tender of issues is appropriate only in a compulsory reference when a jury trial is demanded. *Cotton Mills v. Maslin,* 200 N. C., 328, 156 S. E., 484; *Booker v. Highlands,* 198 N. C., 282, 151 S. E., 635; *Robinson v. Johnson,* 174 N. C., 232, 93 S. E., 743; *Driller Co. v. Worth,* 117 N. C., 515, 23 S. E., 427.

The judgment will be vacated and the cause remanded for further proceedings accordant herewith.

Error and remanded.

MRS. R. CLIFFORD YATES v. THOMASVILLE CHAIR COMPANY.

(Filed 27 January, 1937.)

**1. Automobiles § 18g—Evidence held sufficient for jury on issues of negligence and proximate cause.**

Evidence that the automobile driven by one defendant in the course of his employment and owned by the other defendant was being operated at unlawful speed at the time of the accident in suit, and that the brakes thereon were inadequate and not sufficient to control it, *is held* sufficient to be submitted to the jury on the issues of negligence and proximate cause and to overrule defendants' motions to nonsuit.

**2. Evidence § 51—Opinion of expert on facts within his knowledge need not be predicated upon hypothetical questions.**

An expert may give his opinion directly on facts within his knowledge, and may give his conclusion or opinion on facts outside his knowledge upon proper hypothetical questions reciting the facts, and an exception to the expert testimony of a doctor who had treated and observed plaintiff after the accident in suit that at the time plaintiff signed the release in question she did not have sufficient mental capacity to understand the nature and effect thereof, cannot be sustained, the opinion being based on facts within the knowledge of the expert.

APPEAL by defendant from *Rousseau, J.*, at February Term, 1936, of DAVIDSON. No error.

This is a civil action to recover damages for personal injuries alleged to have been proximately caused by the negligence of the defendant. There was evidence tending to show that on 15 December, 1934, a Chevrolet sedan automobile in which the plaintiff was a passenger and which was driven by her husband on Randolph Street in Thomasville, while being turned into the entrance to the plaintiff's home on the east side of said street, was violently struck by a truck driven by the agent and servant of the defendant; that the impact of the two automobiles threw the plaintiff out upon the street and her leg was run over by the truck and so injured as to necessitate amputation.

There was allegation and evidence that on 20 December, 1934, the plaintiff, in consideration of $485.00, signed a full and final release of all claims which she had against the defendant, and on 24 December, 1934, plaintiff endorsed a draft sent her in compliance with the terms of the release. There was further evidence that at the time plaintiff signed such release and endorsed such draft, she did not have mental capacity to know what she was doing.

The issues submitted to and answers made by the jury were as follows:

"1. Did the plaintiff sign and execute the release introduced in evidence? Answer: 'Yes.'

"2. Did the plaintiff, at the time of the signing of the release introduced in evidence, have sufficient mental capacity to understand the nature and legal effect of said release? Answer: 'No.'

"3. Did the plaintiff ratify the release by accepting and retaining the consideration thereof, after having knowledge of the nature and contents of said release? Answer: 'No.'

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

"5. What damages, if any, is the plaintiff entitled to recover? Answer: '$8,000.'"

From judgment based upon the verdict, the defendant appealed, assigning errors.

*Phillips & Bower and H. R. Kyser for plaintiff, appellee.*
*Don A. Walser and Sapp & Sapp for defendant, appellant.*

SCHENCK, J. The appellant assigns as error the refusal of the court to grant its motion for judgment as of nonsuit lodged and renewed when the plaintiff had rested her case and at the close of all of the evidence. C. S., 567. These assignments of error cannot be sustained. There is evidence tending to show that the defendant's truck was being operated at a greater rate of speed than was allowed by law, and that the brakes thereon were inadequate and not sufficient to control it when in use. It was therefore proper to submit the questions to the jury as to whether the defendant was negligent and as to whether this negligence was a proximate cause of the plaintiff's injuries. *Newman v. Coach Co.*, 205 N. C., 26.

The appellant also assigns as error the refusal of the court to sustain its objections to certain questions and answers propounded to and made by witnesses for the plaintiff, relative to their opinion as to the mental capacity of the plaintiff at the time she signed the release of the defendant from any claims arising out of the collision between the two automobiles, and at the time she endorsed the draft sent her in payment of the release. The witnesses were the physicians who saw and treated the plaintiff in the hospital and were admitted experts, and were interrogated and answered substantially as follows:

"Q. Doctor, do you have an opinion satisfactory to yourself whether or not Mrs. Yates on 20 December, 1934, and on 24 December, 1934, had sufficient mental capacity to execute the release and endorse the draft, and to understand the nature and full extent and effect thereof?

"A. I have.

"Q. What is your opinion?

"A. She did not have."

These answers were based upon the personal observation of the expert witnesses of the plaintiff, and come within a well-recognized exception to the general rule that a witness can speak only of facts within his knowledge. As was said in *Summerlin v. R. R.*, 133 N. C., 551, "Succinctly stated, the rule is that the expert must base his opinion upon facts within his own knowledge, or upon the hypothesis of the finding by the jury of certain facts recited in the question." The testimony which is the subject of these exceptive assignments of error falls within the first category, as it is all based upon facts within the knowledge of the witnesses. N. C. Handbook of Evidence (Lockhart), par. 204, p. 243, and cases there cited. See, also, *Winborne v. Lloyd,* 209 N. C., 483.

A careful examination of the record discloses no reversible or prejudicial error, and for that reason the judgment of the Superior Court must be affirmed.

No error.

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STATE v. WILLIAM JACKSON.

(Filed 27 January, 1937.)

**1. Witness § 4—**

The competency of a nine-year-old girl to testify is a matter resting in the sound discretion of the trial court.

**2. Criminal Law § 67—**

The jurisdiction of the Supreme Court upon appeal in criminal cases is limited to matters of law or legal inference. N. C. Constitution, Art. IV, sec. 8.

APPEAL by defendant from *Armstrong, J.,* at September Term, 1936, of FORSYTH.

Criminal prosecution tried upon indictment charging the defendant with rape, in violation of C. S., 4204.

Verdict: Guilty.

Judgment: Death by asphyxiation.

Defendant appeals, assigning errors.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Williams & Bright for defendant.*

STACY, C. J. The prosecuting witness is a negro girl nine years of age; the defendant, a negro preacher. The testimony of the prosecutrix in support of the offense charged is positive and direct; that of the defendant in denial, equally positive and direct. The trial of the cause

resolved itself into a controverted issue of fact, determinable alone by the jury. It is a sordid story, and no useful purpose would be served by soiling the pages of our reports with a detailed recitation of the facts.

The competency of the prosecutrix to testify as a witness in the case was a matter resting in the sound discretion of the trial court. *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257. "There being now no arbitrary rule as to age, and it being a question of capacity and of moral and religious sensibility in any given case whether the witness is competent, it must of necessity be left mainly, if not entirely, to the discretion of the presiding judge. *S. v. Manuel,* 64 N. C., 601. It may be stated, however, that a child of tender years ought to be admitted with great caution; and where there is doubt, it ought to be excluded." *Reade, J.,* in *S. v. Edwards,* 79 N. C., 648.

The testimony of Dr. H. M. Hankins, a medical expert, offered by the State, "She had been penetrated. . . . Won't swear male did it. . . . I don't believe an adult of normal development could have intercourse with the prosecutrix," taken in connection with the child's apparent immaturity of judgment, or slight appreciation of the effect of her testimony, makes the case quite an unusual one. It will doubtless be reviewed by the commuting authority. Our jurisdiction is limited to reviewing, on appeal, decisions upon matters of law or legal inference. Const., Art. IV, sec. 8; *S. v. Whiteside,* 204 N. C., 710, 169 S. E., 711; *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643.

A searching investigation of the record leaves us with the impression that no reversible error has been made to appear.

No error.

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BERTHA T. RIERSON, ADM'X., v. E. J. HANSON ET AL.

(Filed 27 January, 1937.)

**Executors and Administrators § 16—Secured creditor must exhaust security and file claim only for balance due after credit of proceeds of sale.**

The holder of a note secured by a mortgage must first exhaust the security and apply same on the debt, and may then file claim against the estate of the deceased maker only for the balance due on the note, and he may not file claim and receive *pro rata* dividend on the basis of the full claim. The Chancery rule, followed in receiverships and assignments for benefit of creditors, not being applicable, claims against an estate being governed by the administration laws, C. S., 93, which have been construed to favor the Bankruptcy rule.

RIERSON *v.* HANSON.

APPEAL by Massachusetts Bonding & Insurance Company from *Pless, J.*, at October Term, 1936, of MECKLENBURG.

Civil action brought by administratrix under Declaratory Judgment Act, ch. 102, Public Laws, 1931, to obtain advice in settlement of estate, and to determine controversy between secured and unsecured creditors.

The facts are these: Plaintiff is administratrix of the estate of W. P. Rierson, late of Mecklenburg County, who died intestate and insolvent in July, 1934, leaving unsecured debts of approximately $8,500, and one note of $4,500, secured by deed of trust on real estate worth less than the amount of said debt. The Massachusetts Bonding & Insurance Company is now the holder of said note and deed of trust. The estate consists of approximately $7,000 and the encumbered real estate, which has not yet been sold. The widow makes no claim for dower.

It is the contention of the secured creditor that it should be allowed to prove and receive *pro rata* dividend on the basis of its full claim before resorting to its security, while the petitioner and the unsecured creditors contend that the secured creditor should first be required to exhaust its security and then prove its claim for any balance still remaining or unpaid.

There was judgment declaring that the secured creditor should "first exhaust the security which it holds and should then be permitted to file with the administratrix herein a claim against the general assets of the estate only for the balance remaining due after the said security has been applied on the said secured claim," from which the Massachusetts Bonding & Insurance Company appeals, assigning error.

*J. F. Flowers and J. Louis Carter for appellant.*
*McDougle & Ervin for plaintiff, appellee.*
*Guthrie, Pierce & Blakeney for all other appellees.*

STACY, C. J. Several lines of thought abound among the decisions on the question presently presented. The position of the secured creditor is supported by what is known as the Chancery rule, while that of the unsecured creditors is favored by what is generally denominated the Bankruptcy rule. The subject is exhaustively treated in *Merrill v. Bank,* 173 U. S., 131, and in note, with full citation of the authorities appearing in L. R. A., 1918 B, 1024-1042. The question here presented is whether the Chancery rule or the Bankruptcy rule shall be applied in the settlement of an insolvent estate, where there is no claim for dower, and the security is insufficient to pay the secured debt. We regard the matter settled in favor of the Bankruptcy rule by what was said in the following cases: *Chemical Co. v. Walston,* 187 N. C., 817, 123 S. E.,

196; *Askew v. Askew,* 103 N. C., 285, 9 S. E., 646; *Moore v. Dunn,* 92 N. C., 63; *Creecy v. Pearce,* 69 N. C., 67.

Speaking to the point in the last cited case, *Pearson, C. J.,* delivering the opinion of the Court, said: "We considered the question whether in the distribution of the personal estate the Roberts debt (the secured debt) ought to be taken *pro rata* on the whole debt or on the debt minus the amount that may be realized out of the mortgage. We are satisfied the latter is the true principle; . . . and we adopt the analogy in bankrupt cases where a creditor having collateral security is only allowed to prove the balance after exhausting the collateral security."

The secured creditor points out, however, that in receiverships and assignments for the benefit of creditors, our decisions favor the Chancery rule, *Bank v. Jarrett,* 195 N. C., 798, 143 S. E., 827; *Winston v. Biggs,* 117 N. C., 206, 23 S. E., 316, and stressfully contends that one rule ought not to apply to an obligor, while living, and another when he is dead. The argument overlooks the fact that upon the death of an obligor the administration laws, C. S., 93, step in and determine the settlement of his estate. These have heretofore been construed by us to favor of the Bankruptcy rule. Compare *Guaranty Co. v. Hood, Comr.,* 206 N. C., 639, 175 S. E., 135. Nothing was said in *Fertilizer Co. v. Bourne,* 205 N. C., 337, 171 S. E., 368, which militates against this position.

The appropriateness of the proceeding has not been questioned. *Light Co. v. Iseley,* 203 N. C., 811, 167 S. E., 256; *Walker v. Phelps,* 202 N. C., 344, 163 S. E., 727; *Trust Co. v. Lentz,* 196 N. C., 398, 145 S. E., 776.

Affirmed.

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MEMORIAL HOSPITAL v. ROCKINGHAM COUNTY.

(Filed 27 January, 1937.)

**Appeal and Error § 52—**

Where the judgment entered by the court after waiver of trial by jury does not contain sufficient facts to enable the Supreme Court to decide the question of law sought to be determined, the case will be remanded.

APPEAL by plaintiff from *Shaw, Emergency Judge,* at September Term, 1936, of ROCKINGHAM.

Civil action to determine liability of plaintiff's predecessor in title, Ann Penn Memorial Hospital, for *ad valorem* taxes assessed in 1931.

Upon the hearing, a jury trial was waived and the parties agreed to submit the facts and the law to the court for determination.

The judgment recites that after hearing the cause "upon pleadings, admissions, evidence, and argument of counsel," the court being of

opinion that the hospital referred to in the pleadings was "not exempt from taxation," entered judgment accordingly, from which the plaintiff appeals, assigning error.

*D. F. Mayberry and Hunter K. Penn for plaintiff, appellant.*
*Brown & Trotter for defendant, appellee.*

STACY, C. J. We deem it inadvisable to make final disposition of the question sought to be presented, because the record is barren of any factual determination. It was agreed that this should be done by the court, but in drawing the judgment, which was evidently prepared by counsel, the factual basis of the judgment was omitted. A finding of the facts is desirable in order that we may determine the question of law or legal inference which the parties wish decided. *Refining Co. v. McKernan,* 178 N. C., 82, 100 S. E., 121; *Trust Co. v. Transit Lines,* 198 N. C., 675, 153 S. E., 158; *S. c.,* 200 N. C., 415, 157 S. E., 62, and cases there cited. To this end, the judgment will be vacated and the cause remanded to the Superior Court of Rockingham County for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

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STATE v. R. C. SMITH.

(Filed 27 January, 1937.)

**1. Constitutional Law § 6c—Supreme Court will dismiss action in exercise of supervisory power when warrant fails to charge offense for which defendant was tried.**

Defendant was tried for the violation of an ordinance upon a warrant which was insufficient to charge the offense. An appeal was taken to test the constitutionality of the ordinance. *Held:* The Supreme Court will not decide the constitutional question sought to be presented, but will dismiss the action in the exercise of its supervisory power over proceedings of lower courts.

**2. Constitutional Law § 6b—**

The constitutionality of an ordinance will not be decided upon an appeal from a conviction obtained upon an invalid warrant, since the appeal does not properly invoke the exercise of the judicial power.

APPEAL by defendant from *Harris, J.,* at September Special Term, 1936, of GUILFORD.

Criminal prosecution tried upon warrant charging defendant with violation of traffic ordinance of city of Greensboro, to wit, "park taxi in block with more than two others."

The ordinance alleged to have been violated provides that "Not more than two taxicabs owned by the same company shall be parked in one block at the same time," except at established taxi stands, etc.

Verdict: Guilty.

Judgment: Fine of $1.00 and costs.

Defendant appeals, assigning errors.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Shelley B. Caveness for defendant.*

STACY, C. J. The defendant by his appeal seeks to test the constitutionality of the traffic ordinance which makes it unlawful for more than two taxicabs, *owned by the same company,* to be parked in a single block in the city of Greensboro at the same time. The warrant is not sufficient to charge a violation of the ordinance. Indeed, it charges no offense at all. The action will be dismissed on authority of *S. v. Beasley,* 196 N. C., 797, 147 S. E., 301, and *S. v. Shipman,* 203 N. C., 325, 166 S. E., 298.

It is not after the manner of appellate courts to decide constitutional questions except in the exercise of judicial power properly invoked. *S. v. Williams,* 209 N. C., 57, 182 S. E., 711; *In re Parker, ibid.,* 693, 184 S. E., 532; *Newman v. Comrs.,* 208 N. C., 675, 182 S. E., 453; *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529. A warrant that charges no offense will not suffice for such invocation, even though its invalidity be observed *sua sponte. S. v. Beasley, supra.*

Action dismissed.

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W. M. LEACH, ADMINISTRATOR OF LOIS LEACH, DECEASED, v. FRED VARLEY.

(Filed 27 January, 1937.)

**1. Negligence § 12—Instruction on question of contributory negligence on part of eight and a half years old child held without error.**

Evidence held properly submitted to jury on issue of contributory negligence of eight and one-half year old intestate, struck by car while skating in street after dark, under instruction correctly charging that intestate was not held to same degree of care as adult, but was required to exercise care and prudence according to her maturity and capacity.

**2. Negligence §§ 10, 20—**

The court is not required to charge the jury on the question of last clear chance when there is no pleading or evidence entitling plaintiff to the issue, and no request for instructions or tender of issue on the question.

**3. Trial § 32—**

If a party desires more detailed instructions on different aspects of the evidence, he must request same by proper prayers.

APPEAL by plaintiff from *Spears, J.*, and a jury, at March Term, 1936, of ALAMANCE. No error.

This is an action for actionable negligence, brought by plaintiff against defendant to recover damages.

The issues submitted to the jury and their answers thereto, were as follows:

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

"2. If so, did the plaintiff's intestate, by her own negligence, contribute to said injury, as alleged in the answer? Ans.: 'Yes.'

"3. What damage, if any, is the plaintiff entitled to recover of defendant? Ans.: ....."

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

*Leo Carr, Thomas C. Carter, and John H. Vernon for plaintiff.*
*Long, Long & Barrett for defendant.*

CLARKSON, J. In the plaintiff's brief the main question involved is stated as follows: "Did the court discharge its duty as directed by sec. 564 of the Consolidated Statutes of North Carolina, in the various aspects of the case, as set forth in plaintiff appellant's exceptions?" We think so.

Fred Varley, the defendant, owned a 1929-model Dodge sedan automobile, and at the time that the plaintiff's intestate, Lois Leach, was killed, it was being driven by his son, Robert Varley, who was some nineteen years of age and living with his father. There was plenary evidence to the effect that the automobile was in general use for the pleasure and convenience of the defendant and his family, and came under the "family car" doctrine, which is the settled law in this jurisdiction. *Matthews v. Cheatham,* 210 N. C., 592. Further, the evidence was to the effect that the automobile, at the time of the accident, was being driven with the express permission and consent of the defendant.

The evidence was also to the effect that W. M. Leach, the plaintiff, was the father of Dorothy and Lois Leach. Dorothy was 12 years of age and Lois was 8½ years of age. The plaintiff sent Dorothy with a message to a neighbor, and Lois was permitted to go with her. This was on 26 December, 1934, about a quarter to six o'clock in the afternoon. The two children were on new roller skates given them Christ-

mas. It was dark and the accident occurred on their way home at about 6:00 o'clock. Robert Varley had driven the car across the Haw River bridge and was proceeding on Highway No. 10, going west. The two children, the older one in front, were coasting down grade within 18 inches or two feet of the northern side of the hard-surface highway, going east meeting Robert Varley. It was dark and the only light was that furnished by the death car and some other cars passing at the time. Dorothy was in front of Lois and as the death car approached she stepped up on the sidewalk, but Lois was struck and died shortly thereafter in a hospital. Robert Varley, the driver of the car, immediately stopped the car he was driving some 50 steps away and went back and helped to take Lois to the hospital in his car. It was in evidence that Lois was in the third grade at school and her health was good. She "was a bright child, physically normal and had good grades in school." She was often on the "honor roll." The hard surface at the point of the accident was 18 feet wide—the shoulder on the north side of the highway was 4 feet wide and was used as a walkway—and the driver of the death car, after he left the Haw River bridge, could see for 500 feet ahead. The children in skating had passed pedestrians walking. The death car was traveling 35 or 40 miles an hour at the time of the accident. "At the time the Varley boy came one (car) was in the act of passing him and the other was behind, they were meeting."

One of the witnesses for plaintiff, L. A. Barham, testified, in part, on cross-examination: "They were skating there coming and, of course, I observed them there, because to my mind I thought it was dangerous to be on skates. I thought it was dangerous for those children to be out there on that road skating, and that is what caused me to notice as close as I did. There were three cars, the lights of three cars going east, but one of them was right smart ahead of the other two and, of course, it passed me and the children before Mr. Varley's car coming on meeting them. . . . There were no stationary lights along that road; no lights other than passing automobile lights to light the road. There are no houses on either side of this road to light the road. . . . It looked like they were rolling down that grade, one behind the other."

On this evidence, and other similar evidence, the above issues were submitted to the jury. The jury found that the defendant was guilty of negligence and the plaintiff's intestate was guilty of contributory negligence. Of course, plaintiff has no complaint to make on the finding of the jury on the first issue of negligence. From a careful reading of the entire record and charge of the court, we think the whole controversy was one for the jury to determine on the issues submitted.

In regard to what extent an infant of the age of plaintiff's intestate can be guilty of contributory negligence, the court below charged the

jury as follows: "As to the second issue: 'If so, did the plaintiff's intestate by her own negligence contribute to said injury, as alleged in the answer?' Gentlemen, on this issue the burden of proof is on the defendant to satisfy you by the greater weight of the evidence that plaintiff's intestate, Lois Leach, by her own negligence, contributed to said injury, as alleged in the answer. Contributory negligence is the negligent act of the plaintiff, or, in this case, the negligent act of plaintiff's intestate, which, concurring and coöperating with the negligent act of defendant, is the proximate cause of the injury. The same rule of due care which the defendant is bound to observe applies equally to the plaintiff, except as I shall explain to you later in the case of infants. There is really no distinction between negligence in the plaintiff and negligence in the defendant, except plaintiff's negligence is called contributory negligence. The law recognizes that contributory negligence is due to either acts of omission or acts of commission. In other words, the lack of diligence or want of due care on the part of the plaintiff, in this case the plaintiff's intestate, may consist in doing the wrong thing at the time and place in question, or it may consist in doing nothing when something should have been done.

"The test is, Did the plaintiff's intestate fail to exercise that degree of care which an ordinarily prudent man would have exercised or employed under similar circumstances, and was his failure to do so the proximate cause of his injury? If this be answered in the affirmative, plaintiff cannot recover.

"Now, gentlemen, the evidence in this case is that plaintiff's intestate was a child eight and one-half years old at the time. The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly and cannot be visited upon another. Of a child of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years, less caution would be required than one of seven, and of a child of seven, less than one of 12 or 15. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case. All that is required of an infant is that he exercise care and prudence equal to his capacity."

The above charge is almost in the exact language used in *Alexander v. Statesville,* 165 N. C., pages 535-6, quoting from *R. R. v. Gladmon,* 15 Wall. (U. S.), 401 (21 L. Ed., 114). The charge has been frequently approved in this jurisdiction and the *Alexander case, supra,* recently in *Boykin, Administrator, v. A. C. L. Railroad Co., ante,* 113.

The case was tried on the theory of negligence and contributory negligence. They were the only issues submitted and without objection. There was no request made by the plaintiff to the court below to charge on the last clear chance and no pleading or evidence entitling plaintiff to the issue. The court below, in a very careful charge, set forth the law applicable to the facts and fully complied with C. S., 564. The issues were ones of fact for the jury to determine. If the plaintiff desired, on different aspects of the evidence, more detailed instructions by the court below, he should have requested same by proper prayers. The court below, with unusual care and accuracy, set forth the facts and charged every material question of law applicable to the facts.

On the entire record we find no error in law.

No error.

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D. J. BREECE v. THE STANDARD OIL COMPANY OF NEW JERSEY, INC.

(Filed 27 January, 1937.)

**Cancellation of Instruments § 2—**

Plaintiff is not entitled to set aside an instrument for fraud when it appears that plaintiff is an intelligent man, able to read and write, and signed the instrument, and that there was no trick or connivance to prevent his reading the instrument.

APPEAL by plaintiff from *Parker, J.*, at September Term, 1936, of CUMBERLAND. Affirmed.

This is an action brought by plaintiff against defendant to recover for certain rent of a filling station. The defendant set up a receipt, dated 3/20/31, addressed to Standard Oil Co. of N. J., Charlotte, N. C., Gentlemen: "We, the undersigned, D. J. Breece, owner and lessor of that 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 $1,500.00 to be applied on the basis of 1c per gallon on the gasoline and other motor fuel sold through the said station from the date that certain sublease 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 sublease 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.

C. H. FARRELL,
D. J. BREECE.

"H. T. SAWYER,
H. T. SAWYER."

The plaintiff set up the plea that the receipt was obtained by fraud and deceit. The $1,500 has not been paid in cash or otherwise refunded, or paid by the payment of 1c per gallon of gasoline. The $1,500 was advanced on the basis of this receipt.

Defendant, at the close of plaintiff's evidence and at the close of all the evidence, made motions in the court below for judgment as in case of nonsuit (C. S., 567). The motion was granted at the close of all the evidence. The plaintiff excepted, assigned error, and appealed to the Supreme Court.

*Downing & Downing and Dye & Clark for plaintiff.*
*Rose & Lyon and Varser, McIntyre & Henry for defendant.*

CLARKSON, J. This cause has heretofore been before this Court, *Breece v. Oil Co.*, 209 N. C., 527. At p. 530 we said: "The allegations in plaintiff's reply setting forth the fraud is well pleaded. Whether on a trial it can be substantiated is another question."

We do not think that on the trial the plaintiff's plea of actionable fraud or deceit can be sustained. Plaintiff could read and write, was an intelligent man, had been in business for 55 years, was formerly a school teacher, has served as United States Commissioner for 12 years, and now holds said office. There was no trick or connivance to prevent him from reading the receipt which he signed. *Colt v. Kimball*, 190 N. C., 169; *Dorrity v. Building & Loan Assn.*, 204 N. C., 698. Allegation without proof is as unavailing as proof without allegation.

The judgment of the court below is

Affirmed.

# CASES

ARGUED AND DETERMINED
IN THE

# SUPREME COURT

OF

# NORTH CAROLINA

AT

## RALEIGH

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## SPRING TERM, 1937

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MEBANE GRADED SCHOOL DISTRICT AND THE TOWN OF MEBANE v. COUNTY OF ALAMANCE AND THE BOARD OF EDUCATION OF ALAMANCE COUNTY; COUNTY OF ORANGE AND THE BOARD OF EDUCATION OF ORANGE COUNTY.

(Filed 24 February, 1937.)

**1. Mandamus § 1—**

*Mandamus* will lie only to compel the performance of a clear legal duty at the instance of a party having a legal right to demand its performance.

**2. Mandamus § 2b: Counties § 10—Mandamus held to lie under facts of this case to compel county to assume indebtedness incurred by special charter district to provide constitutional school term.**

The evidence disclosed that a special charter school district, comprising territory lying in two counties, voted and issued bonds for a school building and equipment, which were necessary to the maintenance of the constitutional school term in the district, that appellant county had assumed the indebtedness of all of its school districts with the exception of that of plaintiff district and three others, and that it levied a special tax in plaintiff district to pay debt service for the district's indebtedness. *Held:* Under provision of the State Constitution, Art. IX, it was the duty of the county as an administrative agency of the State to provide the constitutional school term in the district, and plaintiff district is entitled to *mandamus* to compel the county to assume the indebtedness incurred by the district for this purpose, and the defense that the duty to assume the debt was discretionary and that *mandamus* does not lie to compel the performance of a discretionary duty is untenable, it being mandatory on the county, having assumed the indebtedness of some of its districts, to

assume the indebtedness of all its districts, and the courts having jurisdiction in the matter to hear evidence and determine whether the indebtedness was incurred by the district to provide the constitutional school term.

**3. Evidence § 47—**

Experts in the administration of public schools may testify from their own knowledge as to whether the expenditure of funds by a school district was necessary for the maintenance of the constitutional school term in the district.

**4. Appeal and Error § 42—**

The exclusion of opinion evidence will not be held for error when the proffered testimony is vague, uncertain, and immaterial, and has little or no probative force or value on the issues.

**5. Evidence § 38—**

Foundation for the admission of secondary evidence *held* sufficiently laid under authority of *Chair Co. v. Crawford*, 193 N. C., 531.

**6. Trial § 29a—Form and sufficiency of charge in general.**

Under C. S., 564, it is the duty of the court to charge in a plain and correct manner the evidence in the case and explain the law arising thereon, and he is required to give a correct charge on these substantive features without tender of prayers for instructions, but a party desiring a fuller explanation on some subordinate feature of the case or some particular phase of the testimony should aptly tender request therefor, and the charge in this case *is held* not to impinge the statute.

**7. Appeal and Error § 39—**

A judgment will not be disturbed for error which is not prejudicial or material.

APPEAL by defendants from *Williams, J.*, and a jury, at August Civil Term, 1936, of ALAMANCE. No error.

From a careful review of the record (containing some 268 pages) we think plaintiffs' statement of facts substantially correct:

"The Mebane District was created under authority of chapter 165, Private Laws of 1903, and operated under the provisions of that act and as amended by chapter 81, Private Laws of 1920, until the enactment of the Griffin Act by the General Assembly of 1933.

"The Act of 1903 described the territory which constitutes the Mebane District, said district comprising territory lying in both Alamance and Orange Counties, and all the territory within the corporate limits of the town of Mebane. The act provided for a vote of the qualified voters of the district, and if a majority voted 'for graded schools' it should thereafter be the duty of the board of commissioners of the counties of Orange and Alamance to levy, annually, a special tax of not less than 30c nor more than 33⅓c on the $100.00 valuation of the taxable property of the district, and upon each poll not less than 90c nor more than $1.00; it provided further, that all funds derived from such district

taxes and received for school purposes from the State and from the counties were to be used for the benefit of the graded schools of that district.

"The act further conferred upon the board of trustees, which was self-perpetuating, 'the power to establish and maintain such schools as they shall deem necessary.' Chapter 81 of the Private Laws of 1920 amended the original act by providing for the issuance of bonds by said school district in an amount not to exceed $75,000, upon a majority vote of the qualified voters of the district. . . .

"The school site in the Mebane District was donated to the district and the original school building was constructed by Mr. Stephen White, a citizen of the district. The population grew very rapidly, and by 1919 the school attendance had increased so much that it became necessary to provide additional school room, and the trustees built a four-room frame structure for temporary use and also used three Sunday school rooms in the Baptist church, which was located on an adjoining lot. About 1920, an effort was made to raise some money to build a new building by obtaining $40,000 or $50,000 from the State Department of Education and by the issuance of bonds of the district in the amount of $25,000.

"These plans did not materialize, and the trustees then considered the construction of a new building, but finally, in the interest of economy, decided to retain the old building and to build an addition to it at a cost of $75,000. To have constructed an entirely new building would have cost $100,000. This decision was reached prior to 1922.

"At that time, in order to accommodate the school children of the district, use was being made of the four regular class rooms in the old building, which had been built by Mr. White, without cost to the district or to the county, and the auditorium on the second floor had been divided into four rooms by canvassed partitions; the four rooms in the temporary frame structure were in use and three rooms in the Baptist church. At that time the school buildings were not equipped with water and sewerage, and drinking water was obtained from a neighboring lot. The buildings were heated by stoves and the old building was 'a dangerous fire trap.'

"Pursuant to the authority conferred by chapter 81 of the Private Laws of 1920, a bond election was held in the Mebane District with the result that the issuance of bonds was authorized. Mr. Chester Masslich, a New York bond attorney, was employed to supervise the election and the issuance of the bonds. A competent architect was employed to prepare the plans, and when bids were received the lowest bids ran in excess of $80,000. Later, the board of trustees, by making certain changes in the plans, was able to get the lowest bidder to build the building within

the amount of the bond issue, consisting of eleven class rooms on the first and second floors with an auditorium and an unfinished basement, the building being of standard brick construction. The new building was an addition to the old building, and in order to maintain the first floor level of the old building it was possible to provide space in the basement of the new building for five class rooms, but there was not money available to finish the basement rooms.

"At that time the community was growing very rapidly, and it was believed that the additional space in the basement would be needed in the near future. All of the proceeds from the sale of the bonds were used in the construction of the building, but there was not enough money to pay for the building and its equipment. The auditorium curtain and stage setting were bought with money raised by the Parent-Teacher Association and donated to the school. Approximately $2,000 in addition to the proceeds of the bonds was raised from subscriptions and entertainment. No additional land was purchased. The trustees borrowed, personally, about $4,000 from a local bank to build a teacherage.

"The building was extremely plain with no ornaments whatsoever and all of the space utilized. For the school year 1922-23 the total enrollment in the school was 557; in 1923-24, 576; in 1925-26, 570; from 1926 to 1933 the enrollment was approximately 550, and for the year 1933-34, was 602; and for the year 1935-36, 697. Before the new building was erected no children were admitted to the schools who lived outside of the district, but after it was erected a few were admitted and these were charged tuition.

"The contract price for the building was $72,000, including the heating plant, but excluding all equipment, the lighting, and the excavation. The auditorium in the new building seats 750 people on the main floor and 280 in the balcony. It was frequently used to its capacity.

"The bonds were sold for a small premium—approximately $1,000. Thereafter, each year the county commissioners of Alamance and Orange Counties levied and are still levying a special tax of 12c on the $100 valuation to meet the debt service on the bond issue. The county of Alamance collected these taxes and the checks or vouchers stated the purpose of the levy by reciting, 'To apply on bond issue $75,000 dated February 1, 1922.' Of the total bond issue, $57,000 is still outstanding—$2,000 of this amount being in default with interest due from February 1, 1934, and the interest is due on the remaining $55,000 from February 1, 1936 (the findings of fact made by the court).

"Beginning with the year 1933, the special tax in the Mebane District for school maintenance was abandoned, as required by the Griffin Act, but the counties of Alamance and Orange continued to levy the 12c tax for debt service. The Mebane District received no financial contribu-

tion from the counties of Alamance or Orange for debt service purposes prior to 1927, but beginning with 1927 and continuing to the present time, it has received its per capita allotment of the county-wide tax levied for school debt service. The county assumed all of the debts of the local school districts of Alamance County, whether they were represented by bonds or by loans made by the State Literary Fund or by loans made by the State Building Fund, and in each annual audit of the county made for the year 1932 and continuing through 1935, all of said indebtedness was shown as county indebtedness. Prior to 1932, there were a number of local tax districts in Alamance County in which a local tax was levied, but beginning with the fiscal year July 1, 1933, all these local taxes were abandoned except in the special districts of Mebane and Burlington. Beginning with the year 1933, the records of the county show that all the debt service requirements of all the local tax districts in Alamance County, other than the four charter districts of Mebane, Burlington, Haw River, and Graham, have been paid out of the county's general school fund, and that the special charter districts have, since said time, received the per capita allotment of the county-wide levy for debt service.

"The county commissioners prepared a refunding plan in 1933, in which the total indebtedness of the county and the indebtedness of each incorporated town in the county is shown, and in which it was stated that the school district indebtedness assumed by the county amounted to $247,650. In 1932, the total special tax levy in the Mebane District was 41c, and in that year there were 17 other special tax districts in which local levies were made. For the year 1932, the county-wide debt service tax rate was .172. The following year, 1933 (the first year under the Griffin Act), the county-wide school debt service tax was .205, and in that year no levy was made in any of the other 17 special school tax districts except Burlington and Mebane, and all debt service requirements of all other districts of the county were paid out of the county-wide debt service levy; and that practice has been followed thereafter.

"On July 3, 1933, the county board of education of Alamance County, by resolution regularly adopted and recorded in its minutes, endorsed and transmitted to the board of county commissioners its approval of the proposal of the board of trustees of the Mebane School District to surrender to the county all of the assets of the district upon condition that the county assume the outstanding bonded indebtedness. This resolution listed the current assets at $15,717.86, current liabilities at $10,929.66, capital assets at $120,413.68, and capital liabilities at $62,-194.72. It was stipulated by counsel that the records of the proceedings of the board of county commissioners of Alamance County, since July 3, 1933, do not show any action, having been taken on the foregoing resolution of the county board of education.

"Evidence showing that the building, site, and equipment of the Mebane District were necessary for the conduct of the constitutional public school term—

"Four of the six members of the board of trustees of the Mebane District are still living, and each of them testified that they had personal knowledge of the school conditions prevailing in the Mebane District at the time of the expenditure from the proceeds of the $75,000 bond issue; that they knew the number of pupils enrolled, the number of teachers employed, the space available for school purposes, the condition of the building, the growth of the community, and other relevant facts; and each testified that in his opinion the building, equipment, and site were reasonably necessary for the conduct of the constitutional school term in that district. In addition to these witnesses, W. F. Credle, qualified expert, who has been employed by the State Department of Public Instruction since July 1, 1921; Mr. J. Henry Highsmith, director of educational inspection service of the State Department of Public Instruction, and also an expert, and Dr. A. M. Proctor, a member of the faculty of Duke University, who was for six years a director of the division of county school organization of the State Department of Education, and also an expert, all testified of their personal knowledge of the Mebane District building, equipment, and site, and that in their opinion all were necessary at the time acquired and are still necessary for the conduct of the constitutional school term for the children of that district.

"The jury found, in answer to the issues submitted, that the building, site, and equipment, at the time acquired, were essential and necessary for the conduct of the constitutional school term, and that they are now reasonably essential and necessary. Neither Orange County nor Alamance County have ever provided in said Mebane District any school facilities whatsoever."

The judgment of the court below was as follows: "This cause coming on to be heard at this term before the undersigned judge presiding, and the defendants having demanded a trial of the issues of fact arising upon the pleadings by a jury, a jury was duly impaneled and answered the issues as follows:

" '1. Have the counties of Orange and Alamance or either of them provided necessary school buildings and equipment for the conduct of the constitutional six months school term for the children of the Mebane Graded School District? Ans.: "No."

" '2. Did the plaintiff Mebane Special Charter or Graded School District issue and sell $75,000 of bonds for the purpose of providing sites, buildings, and equipment for the schools conducted and operated within said district, as alleged in the complaint? Ans.: "Yes."

" '3. If so, was the debt of the Mebane Special Charter or Graded School District represented by said bonds lawfully incurred at the time of their issuance? Ans.: "Yes."

" '4. Were the proceeds of said bonds used by the 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? Ans.: "Yes."

" '5. What amount of the said bonds and interest thereon so issued and used by said plaintiff are still outstanding and unpaid? Ans.: "$57,000."

" '6. Are the buildings, equipment, and school facilities acquired by the Mebane Graded or Special Charter School District now being used for the conduct of the constitutional six months school term in said district? Ans.: "Yes."

" '7. Were the sites, buildings, and equipment acquired, constructed, and used by the plaintiff Mebane Special Charter or Graded School District reasonably essential and necessary for the conduct and operation of the six months school term at the time the said sites, buildings, and equipment were acquired and constructed, as contemplated by Article IX, section 3, of the Constitution for the State of North Carolina, and the statutes enacted pursuant thereto? Ans.: "Yes."

" '8. Are the school buildings, school sites, and facilities of the Mebane Graded or Special Charter School District reasonably necessary for the conduct of the constitutional six months school term for said district? Ans.: "Yes."

" '9. Did the defendants, in the year 1933 or theretofore, assume the payment of bonds and interest thereon issued and sold by other local taxing school districts in Alamance County, as alleged in the complaint? Ans.: "Yes."

" '10. Are the plaintiffs estopped by their course of conduct and dealings from asserting their claim and demand that the defendants assume the payment of their bonded indebtedness, as alleged in the answer? Ans.: "No."

" '11. Did the plaintiffs waive their right by their course of conduct and dealings to demand that the defendants assume the payment of its bonded indebtedness, as alleged in the answer? Ans.: "No."

" '12. Is the plaintiffs' right to maintain this action barred by the statutes of limitations in not filing their claims within two years after its maturity, as provided in section 442 of Consolidated Statutes, and not bringing their action within 3 years after their right of action accrued, as provided in section 441 of Consolidated Statutes and other statutes of limitations, as prescribed in the laws of the State of North Carolina, as alleged in the answer? Ans.: "No." '

"Independently of the verdict rendered by the jury, the court, upon careful consideration of the evidence, finds the following facts:

"1. That the facts found by the jury, as embraced in the issues submitted to the jury, are found to be true and correct.

"2. That the bonded indebtedness of the Mebane Graded School District or Special Charter District in the principal sum of $75,000, with interest as hereinbefore stated, represents the unpaid balance of the original bonded indebtedness in the principal sum of $75,000, represented by seventy-five bonds in the denomination of $1,000 each, and due and payable as follows: $2,000 annually 1 February, 1925, to 1 February, 1938, inclusive; $3,000 annually 1 February, 1929, to 1 February, 1947, inclusive; $4,000 annually 1 February, 1948, to 1 February, 1952, inclusive.

"3. That both the county board of education and the county commissioners of Alamance County have, since 1922, known that the Mebane Graded School or Special Charter School District had issued said bonds in the principal sum of $75,000, and the county commissioners have annually levied a tax in said school district for the payment of debt service on account of said bonds, and for other school expenses. That beginning with the year 1933 the county commissioners of Alamance County have levied a tax rate of 12c in said special school district for the sole and exclusive purpose of paying the debt service on said bonded indebtedness. That the board of education of Alamance County has received annually an audit of the financial affairs of said Mebane Graded or Special Charter School District, and has also received a budget from said district, which audits and budgets have disclosed the debt service requirements of said school district on account of said indebtedness, and the county of Alamance, in remitting collections of taxes levied in said school district, has recognized the existence of said bonded indebtedness by stating on the vouchers, delivered in payment of said taxes, that certain of said taxes were collected on account of said bonded indebtedness.

"4. That the defendants county of Orange and the board of education of Orange County were properly served with summons in this action, and with copy of the complaint. That neither of said defendants have filed answer or other pleadings.

"Upon the verdict of the jury and the additional findings of fact made by the court, the court being of the opinion that the plaintiffs are entitled to the writ of *mandamus* requiring the defendants Alamance County and Orange County to assume and pay the bonded indebtedness of the Mebane Graded School or Special Charter District, as prayed in the complaint.

"It is now therefore ordered, adjudged, and decreed that the counties of Alamance and Orange shall forthwith assume and pay the bonded

indebtedness of the Mebane Graded School or Special Charter District in the principal sum not exceeding $57,000, with interest on $55,000 from 1 February, 1936, and on $2,000 from 1 February, 1934, as and when the same matures and becomes payable.

"It is further ordered, adjudged, and decreed that the counties of Alamance and Orange shall not make any levy or collection of taxes exclusively in said Mebane Graded School or Special Charter District for the purpose of paying said indebtedness, or any part thereof, and the property owners in said district are relieved of the payment of any tax which might otherwise be levied in said district exclusively for the year 1936, or any subsequent year, on account of said debt, and said debt and interest thereon shall be paid by the counties of Alamance and Orange out of their respective revenues lawfully provided for that purpose. This judgment shall not affect the right of the counties of Orange and Alamance and said Mebane Graded School or Special Charter District to collect all taxes levied exclusively upon the property in said district for the year 1935, or any prior year, for the purpose of providing revenue for the payment of said debt and interest. The defendants will pay the costs of this action, to be taxed by the clerk. This 7 August, 1936. CLAWSON L. WILLIAMS,

*Judge Presiding.*"

The defendant, County of Alamance and the Board of Education of Alamance County, made numerous exceptions and assignments of error and appealed to the Supreme Court. The necessary facts and law applicable thereto will be set forth in the opinion.

*Thos. C. Carter and Brooks, McLendon & Holderness for plaintiffs.*
*Rhodes & Shoffner and Long, Long & Barrett for defendants.*

CLARKSON, J. The prayer of the complaint indicates the controversy: "Plaintiffs pray that a writ of *mandamus* be issued against the counties of Alamance and Orange, and the boards of education of said counties, demanding them to forthwith assume the payment of the school building and equipment indebtedness of the plaintiffs, and requiring the defendants, counties of Alamance and Orange, to levy such county-wide *ad valorem* tax upon the taxable properties within the counties as may be necessary to pay such indebtedness and interest thereon when the same becomes due and payable, and further requiring the defendants, counties of Alamance and Orange, to proceed to collect through its authorities the said taxes so levied, . . . and such other and further relief as they are entitled in law and equity."

The defendants denied the material allegations of the complaint, and contended they acted in good faith and in their discretion, and *mandamus*

would not lie. The defendants, county of Orange and the board of education of Orange County, were both duly served with summons and copies of the complaint, but neither filed an answer or other pleadings. Therefore, there is no controversy as to the judgment against them. This appeal alone concerns the county of Alamance and the board of education of Alamance County.

The defendants, at the close of plaintiffs' evidence and at the close of all the evidence, made motions in the court below for dismissal of the action and for judgment as in case of nonsuit. C. S., 567. The court below refused these motions and in this we see no error.

The defendants, in their question one, ask: "Did the court err in overruling defendants' motion to dismiss this action, and in overruling their motions for judgment as of nonsuit, for the reason that the question as to whether or not the board of commissioners may include in the debt service fund in the budget the indebtedness of the Mebane School District is within the discretion of the board of commissioners of the defendant Alamance County, and *mandamus* is not the proper remedy and will not lie without the allegations and proof of abuse of such discretion?" On this record, we cannot agree with the contention of defendants.

In *Person v. Doughton,* 186 N. C., 723 (724), it is said: "*Mandamus* lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced. *Missouri v. Murphy,* 170 U. S., 78; *Withers v. Comrs.,* 163 N. C., 341; *Edgerton v. Kirby,* 156 N. C., 347; *Betts v. Raleigh,* 142 N. C., 229." *Umstead v. Board of Elections,* 192 N. C., 139; *Braddy v. Winston-Salem,* 201 N. C., 301; *Hammond v. Charlotte,* 206 N. C., 604; *Stone v. Comrs.,* 210 N. C., 226; *Allen v. Carr,* 210 N. C., 513 (519).

This action was instituted by Mebane Graded School District and the town of Mebane, for the purpose of obtaining a writ of *mandamus* requiring the defendants to assume the payment of the bonded indebtedness of the Mebane Graded School District, alleged to have been incurred by it for the purpose of providing school buildings, sites, and equipment within the said special charter district necessary for the operation of the six months school term.

In *Julian v. Ward,* 198 N. C., 480 (482), is the following: "Under Article IX, 'Education,' in the Constitution of North Carolina, we find the following sections: 'Section 1. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. Sec. 2. The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of

public schools, wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race. Sec. 3. Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year, and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment.' Under these and other pertinent sections of the Constitution, it has been held in this jurisdiction that these provisions are mandatory. It is the duty of the State to provide a general and uniform State system of public schools of at least six months in every year wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one. It is a necessary expense and a vote of the people is not required to make effective these and other constitutional provisions in relation to the public school system of the State. Under the mandatory provision in relation to the public school system of the State, the financing of the public school system of the State is in the discretion of the General Assembly by appropriate legislation, either by State appropriation or through the county acting as an administrative agency of the State. *Lacy v. Bank,* 183 N. C., 373; *Lovelace v. Pratt,* 187 N. C., 686; *Frazier v. Commissioners,* 194 N. C., 49; *Hall v. Commissioners of Duplin,* 194 N. C., 768." *Castevens v. Stanly County,* 209 N. C., 75.

The duty imposed on the State, under Art. IX of the Constitution of North Carolina, is mandatory. This sacred duty was neglected by the State for long years, for various reasons, chiefly on account of the lack of means—the State having been crushed and impoverished by four years of war. In different parts of the State, as they became more prosperous, patriotic men and women obtained acts from the General Assembly by which schools could be established for the education of the children of their communities—these communities being taxed for the upkeep and bonds issued to build schoolhouses, as was done in this case.

On this record it appears that "The county of Alamance has assumed every school debt of every school district in the county except the debts of the special charter districts of Mebane, Haw River, Graham, and Burlington." Having assumed some, we think it mandatory on the county commissioners to assume all, if the Mebane District building, site, and equipment are necessary for the conduct of the constitutional school term.

In *Reeves v. Board of Education,* 204 N. C., 74 (77), it was said: "The maintenance and construction of school buildings for the six

months public school term being prescribed by the Constitution, the county commissioners could have been compelled to have provided the school buildings in Buncombe County as a county-wide charge, and could have been compelled to have provided the money therefor by the issuance of county-wide bonds; therefore, it would follow that if the various buildings in the various school districts are a county charge, it is proper for the county to assume this obligation which has heretofore been attempted by the districts. There is no sound reason why a school district should have to pay out of its own taxable property a debt which the Constitution and laws of the State impose upon the county," etc.

We think the whole matter has been threshed out, and against defendants' contentions, in *Hickory v. Catawba County,* 206 N. C., 165 (173-4). We find there the following: "When the indebtedness of 'all the districts' lawfully incurred for the necessary buildings and equipment is taken over for payment by the county as a whole, the local districts are relieved of their annual payments. Sec. 5599. This is not a problem to be solved by the defendants in the exercise of their discretion, or one in the solution of which the courts are shorn of jurisdiction. The exercise of jurisdiction implies the right to hear evidence on the question whether buildings and equipment of certain types are essential to the operation of the schools, and as the witnesses who testified as to these buildings were qualified to speak, the exceptions addressed to the admissibility of their testimony cannot be sustained. . . . It is suggested that relief cannot be obtained by *mandamus.* The writ, issuing from a court of competent jurisdiction, is directed to a person, officer, corporation, or inferior court commanding the performance of a particular duty which results from the official station of the party to whom it is directed or from operation of law. It is a writ of right to which everyone is entitled when it is appropriate process for enforcing a demand. *Burton v. Furman,* 115 N. C., 166; *Lowery v. School Trustees,* 140 N. C., 33. The defendants are public agencies charged with the performance of duties imposed by the Constitution and by statutes, and upon their failure or refusal to discharge the required duties resort may be had to the courts to compel performance by the writ of *mandamus.* It is contended that the plaintiffs' remedy is by indictment (Const., Art. IX, sec. 3) and not by *mandamus.* There are decisions in which the writ was denied on the ground that the complaining party had a remedy by indictment; but the weight of authority sustains the position that to supersede the remedy by *mandamus* a party must not only have an adequate legal remedy but one competent to afford relief on the particular subject matter of his complaint. Punishment of the defendants would not provide the relief to which the plaintiffs are entitled. 38 C. J., 565, sec. 35; *Fremont v. Crippen,* 70 A. D., 711; *Com. ex rel.*

*Schaffer v. Wilkins,* 19 A. L. R., 1379, and annotation." *Greensboro v. Guilford County,* 209 N. C., 655; *Marshburn v. Brown,* 210 N. C., 331 (338); chapter 455, Public Laws 1935, sec. 5.

The first issue submitted to the jury and their response thereto is as follows: "Have the counties of Orange and Alamance, or either of them, provided necessary school buildings and equipment for the conduct of the constitutional six months school term for the children of the Mebane Graded School District? Ans.: 'No.'"

Seventh issue: "Were the sites, buildings, and equipment acquired, constructed, and used by the plaintiff Mebane Special Charter or Graded School District reasonably essential and necessary for the conduct and operation of the six months school term at the time the said sites, buildings, and equipment were acquired and constructed, as contemplated by Article IX, section 3, of the Constitution of the State of North Carolina, and the statutes enacted pursuant thereto? Ans.: 'Yes.'"

We think there was ample and plenary competent evidence to support the finding of facts on the above issues, but defendants say that on the trial the court below erred in admitting and excluding evidence, as follows: "(a) In admitting opinion evidence of witnesses for plaintiffs. (b) In excluding opinion evidence of witnesses for defendants." None of these contentions of defendants can be sustained. The question of what is and what is not opinion evidence is too well settled to be restated here. *Yates v. Chair Co., ante,* 200; *Keith v. Gregg,* 210 N. C., 802. As to the exclusion of certain alleged opinion evidence of witnesses for defendants, we think this evidence vague, uncertain, and immaterial, and it had little or no probative force or value on the issues. (c) "In excluding all of defendants' evidence with reference to schools and school buildings other than Mebane Special Charter School District." We think this kind of evidence not germane to the issue. It was comparative evidence and its exclusion on this record is not prejudicial error. As to (d) "In admitting secondary evidence to show that the debt of Mebane Graded School District was lawfully incurred"—in the admission of this evidence there was no error. We think from the evidence the foundation was sufficiently laid for the admission of secondary evidence. *Chair Co. v. Crawford,* 193 N. C., 531 (532), controlling principle 4.

Beginning with the year 1933, the records of the county show that all the debt service requirements of all the local tax districts in Alamance County, other than the four charter districts of Mebane, Burlington, Haw River, and Graham, have been paid out of the county's general school fund, and that the special charter districts have, since said time, received the per capita allotment of the county-wide levy for debt service. In the refunding plan prepared by the county commissioners in 1933,

it was stated therein that the school district indebtedness assumed by the county amounted to $247,650, and that Mebane Graded School indebtedness was $59,000. (The judgment in this case states a less amount.)

The defendants contend that "the court erred in its failure to charge the jury in accordance with the provisions of Consolidated Statutes, section 564." We cannot so hold.

The principle is laid down in *S. v. Merrick,* 171 N. C., 788 (793): "And further, the authorities are at one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. Charged with the duty of seeing that impartial right is administered, it is a requirement naturally incident to the great office he holds and made imperative with us by statute law. Revisal, 545 (C. S., 564): 'He shall state in a plain and correct manner the evidence in the case and explain the law arising thereon,' and a failure to do so, when properly presented, shall be held for error. When a judge has done this, charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but, as stated, on the substantive features of the case arising on the evidence, the judge is required to give correct charge concerning it. *S. v. Foster,* 130 N. C., 666; *S. v. Barham,* 82 Mo., 67; *Carleton v. State,* 43 Neb., 373; *Simmons v. Davenport,* 140 N. C., 407."

The above is well settled law in this jurisdiction. The court below, in an elaborate and carefully prepared charge of some 24 pages, gave the contentions fairly for both sides, set forth the law applicable to the facts, and did not impinge C. S., 564.

The plaintiffs contend: "That the judgment of the Superior Court should be affirmed, first, because as a matter of law arising upon the whole record the plaintiffs are entitled to the relief prayed for; and, secondly, because there is no reversible error appearing in the record."

The evidence excluded by the court below, complained of by defendants, had little, if any, probative force. All the evidence was to the effect that the school building and equipment of the Mebane District, when built, was then, and we may say now, necessary for the six months school term under the Constitution. The evidence shows unusual care in the selection of plans and economy in the Mebane District project. The progressive, intelligent, and patriotic men and women wanted to educate the children of the Mebane community. They established the school and operated same especially with efficiency since the bonds were issued in 1922. Under legal authority, the county of Alamance has assumed

almost every school debt of every school district except the Mebane District. Having assumed part, it is the duty, under the facts in this case, to assume the indebtedness of the Mebane District, and from the findings of the jury *mandamus* will lie to compel them to do so. Technicalities and refinements should not be seriously considered in a case like this involving a constitutional mandate, but the record should be so interpreted that substantial justice should be done. Under the facts in this case and the findings of the jury, it would be inequitable and unconscionable for defendants to assume part and not all of the indebtedness of the school districts of Alamance and not assume the plaintiffs' indebtedness and give them the relief demanded. It is well settled that defendants are not entitled to be heard on their appeal unless the errors complained of are prejudicial or material.

For the reasons given, we see in the judgment below, no prejudicial or reversible error.

No error.

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MAGGIE E. HOLLOWAY v. THE DEPOSITORS NATIONAL BANK.

(Filed 24 February, 1937.)

**1. Assignments § 5—**

An assignee of shares of the capital stock of a bank with knowledge that the bank had denied the assignor's ownership of the stock and had refused to issue the stock to him on his prior demand, is not an innocent purchaser of the stock, and takes only such right, title, and interest in the shares of stock as the assignor had on the date of the assignment.

**2. Corporations § 12—Individual subscribing to stock in his name held to acquire no interest therein where another pays purchase price under agreement that stock should be issued as directed by him.**

In the reorganization of a bank a creditor of the bank agreed to purchase a stated number of shares of the capital stock of the proposed new bank, but upon being advised of the statutory liability on the stock, refused to have same issued in its own name, but paid for same and agreed that the new capital stock should be subscribed for and issued in the name of an individual, and that after the issuance of the stock it should be assigned to trustees for the benefit of the creditors of the old bank. After the organization of the new bank its directors refused to issue the stock to the named individual, but issued same to the trustees for the benefit of creditors of the old bank. Thereafter, the individual assigned his subscription to plaintiff, who brought suit on the assignment against the new bank, demanding the issuance of the stock certificates to her or the recovery of the value of the stock. *Held:* The individual had no right, title, or interest in the capital stock of the new bank which was paid for by the creditor of the old bank, either at the time of the organization of the new bank or at the time of the assignment, and plaintiff assignee, with notice, is not entitled to recover on the assignment.

HOLLOWAY *v.* BANK.

APPEAL by defendant from *Frizzelle, J.*, at March Term, 1936, of DURHAM. Reversed.

This action was begun in the Superior Court of Durham County on 22 August, 1935.

The plaintiff is a citizen of the State of North Carolina, and a resident of Durham County in said State.

The defendant is a banking corporation, duly organized and now doing business under and pursuant to the laws of the United States, with its principal place of business in the city of Durham, North Carolina. The defendant began business on 10 January, 1933, its organization having been completed at said date.

In her complaint plaintiff alleges:

"3. That at the time said defendant bank opened for business, to wit: On 10 January, 1933, one George H. Salmon had purchased and paid for and was the owner of 1,378 shares of the capital stock of said defendant bank of the par value of $30.00 per share, and that certificates for all said shares of stock, with the exception of 733⅓ shares, have been issued by the defendant to the said George H. Salmon, or to his nominees or assignees, but that the defendant has declined to issue to the said George H. Salmon a certificate for the said 733⅓ shares of stock."

"4. That the said George H. Salmon, for valuable consideration, has sold, transferred, and assigned the said 733⅓ shares of the capital stock of the defendant bank to the above named plaintiff, together with all rights thereto, and all rights and interests which he has or might have to bring any action for the possession of said shares of stock, or the value thereof, and that plaintiff has made demand on the defendant for a certificate for said 733⅓ shares of the capital stock of the defendant, or the value thereof, and that the defendant bank has failed and refused to issue to the plaintiff such certificate, although by reason of the assignment of said shares of stock to her by the said George H. Salmon, the plaintiff is now the owner of said 733⅓ shares of stock, and is justly and legally entitled to a certificate for the same."

"7. That if defendant bank has placed itself in a position where it cannot now deliver a certificate for said 733⅓ shares of its capital stock to the plaintiff, then and in that event the plaintiff, by reason of the assignment of said shares of stock to her by the said George H. Salmon, is entitled to recover of the defendant the sum of $22,000, the par value of said shares of stock, at the date of the opening of defendant bank for business."

On these allegations the plaintiff prays judgment:

"1. That the defendant be directed to issue to the plaintiff a certificate for 733⅓ shares of its capital stock; or,

"2. If the defendant has placed itself in a position where it cannot now deliver to the plaintiff a certificate for said shares of its capital

stock, that plaintiff recover of the defendant the sum of $22,000, together with all dividends which have been declared by the defendant on said shares of stock since the opening of the defendant bank.

"3. That plaintiff recover of the defendant the costs of the action, and that she have such other and further relief as she may be entitled to in the premises."

In his answer the defendant denied that at the date of its opening for business, to wit: 10 January, 1933, George H. Salmon had purchased and paid for and was the owner of the 733⅓ shares of its capital stock, referred to in the complaint; the defendant admitted that it had declined and refused to issue to the said George H. Salmon a certificate for said shares of stock.

The defendant further denied that the said George H. Salmon had sold, transferred, and assigned the said 733⅓ shares of its capital stock to the plaintiff, and that plaintiff is now the owner of said shares of stock; the defendant admitted that it had declined and refused to issue to the plaintiff a certificate for said 733⅓ shares of its capital stock.

The defendant prays judgment that plaintiff recover nothing by her action, and that defendant go hence without day and recover of the plaintiff her costs.

At the trial the evidence for both the plaintiff and the defendant showed the following facts:

On 18 January, 1932, the First National Bank of Durham closed its doors and ceased to do business. The Comptroller of the Currency took possession of said bank and on 19 January, 1932, put in charge of said bank a receiver, who had been duly appointed by him. The said receiver took possession of the assets of the First National Bank of Durham, and held the same subject to the orders of the Comptroller of the Currency.

Some time thereafter George H. Salmon, of New York City, came to the city of Durham and submitted to creditors, depositors, and stockholders of the First National Bank of Durham a plan for its reorganization, which had been approved in its general outlines by the Comptroller of the Currency.

Creditors and depositors of the bank were apprehensive that they would suffer heavy losses by the closing of the bank, and its stockholders were confronted with the probability that they would not only lose their stock, but would also be assessed the par value of their stock, as provided by law, in the event of the insolvency of the bank. At meetings of creditors, depositors, and stockholders the plan submitted to them by George H. Salmon for the reorganization of the First National Bank of Durham was fully discussed and finally approved. In accordance with said plan, a reorganization committee was formed, and George H. Salmon was chosen as manager of said committee. The said George H.

Salmon, as manager of the reorganization committee, at once proceeded, with the approval of the Comptroller of the Currency, to perfect said plan.

The plan for the reorganization of the First National Bank of Durham provided for the organization of a new bank, to be known as the Depositors National Bank of Durham, with a capital stock and surplus of $300,000. It was provided in said plan that as soon as the said Depositors National Bank was organized, it should pay to creditors and depositors of the First National Bank of Durham 50 per cent of their claims, in installments, as set out in said plan, and that the assets of the First National Bank of Durham, then in the hands of the receiver of said bank, should be assigned by said receiver to the Depositors National Bank, which should retain a sufficient amount of said assets to reimburse the said bank for sums paid by it on claims of creditors and depositors of the First National Bank of Durham. The remainder of said assets should be assigned and delivered by the Depositors National Bank to liquidating trustees, to be named by said bank, to be held by said liquidating trustees in trust for the creditors and depositors of the First National Bank of Durham. It was further provided in said plan for the reorganization of the First National Bank of Durham that one-half of the capital stock of the Depositors National Bank should be assigned by the subscribers for said capital stock to the liquidating trustees, to be held by said liquidating trustees in trust for the creditors and depositors of the First National Bank of Durham. It was contemplated that by these provisions the amounts remaining due on the claims of creditors and depositors of the First National Bank, after the payment of 50 per cent of said claims by the Depositors National Bank, would ultimately be paid, in whole or in part.

After the plan for the reorganization of the First National Bank of Durham, which was submitted by George H. Salmon to creditors, depositors, and stockholders of said bank, had been approved by the required number of said creditors and depositors, as evidenced by creditors' agreements duly executed by them, George H. Salmon proceeded to secure subscriptions for the capital stock of the Depositors National Bank. He secured subscriptions for $278,000 of said capital stock. There was a deficiency of $22,000. Because of this deficiency, the Depositors National Bank was not organized at the date first set for such organization. Thereupon, George H. Salmon procured agreements for the extension of the date for the organization of said bank, the date finally set for such organization being 10 January, 1933.

After George H. Salmon had procured from creditors and depositors of the First National Bank of Durham, agreements for the extension of the date for the organization of the Depositors National Bank to 10

January, 1933, in accordance with the plan for the reorganization of the First National Bank of Durham which had been approved by creditors, depositors, and stockholders of said bank and by the Comptroller of the Currency, he renewed his efforts to procure subscriptions for stock in the Depositors National Bank of the par value of $22,000, such subscriptions being required to meet the requirements of said plan.

At the date of the closing of the First National Bank of Durham, the Commercial Casualty Company, of Newark, N. J., as insurer of the deposit in said bank of the American Tobacco Company, had a claim against said bank for a large sum of money. Because of said claim, the Commercial Casualty Company was interested in the reorganization of the First National Bank of Durham in accordance with the plan which had been approved by the creditors, depositors, and stockholders of said bank, and the Comptroller of the Currency. Upon the solicitation of George H. Salmon, the said company agreed to subscribe and pay for stock in the Depositors National Bank of the par value of $22,000, thus assuring the successful completion of the reorganization of the First National Bank of Durham, in the interest of its creditors, depositors, and stockholders. On 24 December, 1932, while negotiations for the organization of the Depositors National Bank were pending, the Commercial Casualty Company wrote a letter to the reorganization committee of the First National Bank of Durham, in which said company said:

"In order to coöperate toward the opening of the new bank, for the good of all concerned, we hereby offer to subscribe for $22,000 of the capital stock of the new bank, and to accept $183,250, in cash, in full settlement of our claim against the old bank. Such stock when received by us as fully paid stock is to be transferred to the liquidating trust of the old bank."

After the said letter was written by the Commercial Casualty Company and received by the reorganization committee of the First National Bank of Durham, the said company was advised by its counsel that if the stock in the Depositors National Bank, for which it had agreed to subscribe, was issued to the company in its own name, the company would be subject to the statutory stockholder's liability, in the event of the subsequent insolvency of the bank. Acting upon this advice, the Commercial Casualty Company notified George H. Salmon that it was not willing to take said stock in its own name, and thereby assume statutory liability for its par value, in addition to the amount which it would be required to pay for said stock. It was thereupon agreed by and between the said company and the said George H. Salmon that the subscription for said stock should be made by George H. Salmon in his own name, and that the company should pay for said stock. Pursuant to this agreement, George H. Salmon signed the certificate for the organization

of the Depositors National Bank, which was dated 6 January, 1933, as a subscriber for 1,378 shares of the capital stock of said bank. These shares included the 733⅓ shares of the par value of $22,000, which are involved in this action. The Commercial Casualty Company paid for said shares of stock, and after the organization of the Depositors National Bank received from the reorganization committee of the First National Bank of Durham the sum of $183,250, in full settlement of its claim against said bank.

The Depositors National Bank was finally organized with a paid-in capital stock and surplus of $300,000. It began business on 10 January, 1933. At that date, the stock book of the said bank showed that George H. Salmon had subscribed for, and upon his payment of the amount due therefor, would be the owner of 1,378 shares of its capital stock. Certificates for all said shares, except 733⅓, have been duly issued and delivered to George H. Salmon, or to his nominees or assignees. Certificates for the 733⅓ shares were filled in the name of George H. Salmon by an employee of the bank, but have never been issued or delivered to him. These certificates were subsequently canceled. New certificates for said shares were filled in in the name of the liquidating trustees of the First National Bank of Durham, and were subsequently issued and delivered to said liquidating trustees. They are now held by said trustees in trust for the creditors and depositors of the First National Bank of Durham in accordance with the agreement of the Commercial Casualty Company and the reorganization committee of said bank. Demand was first made on the defendant by attorneys for George H. Salmon for the issuance to him of certificates for said shares, on 1 December, 1934. This demand was refused. Prior to that date George H. Salmon had been informed by the president of the defendant bank that the directors of said bank declined to recognize him as the owner of said shares of stock.

Some time prior to 10 January, 1933, the date of the opening of the defendant bank for business, George H. Salmon executed and delivered to the Durham Loan and Trust Company his note for the sum of $15,000. The payment of this note was secured by certificates for 300 shares of the American Tobacco Company, which were owned by the plaintiff, Miss Maggie E. Holloway, and which she had loaned to the said George H. Salmon in order that he might deposit the same with the Durham Loan and Trust Company as security for his note. The said note has not been paid. The certificates for 300 shares of the stock of the American Tobacco Company, owned by the plaintiff and loaned by her to George H. Salmon for deposit by him with the Durham Loan and Trust Company as security for his note, are now held by the Durham Loan and Trust Company. George H. Salmon is now unable to pay said note, and thereby redeem said certificates of stock in the American Tobacco Company.

On 27 July, 1935, George H. Salmon executed a paper writing which in form is an assignment by him to the plaintiff of all his right, title, and interest in and to the 733⅓ shares of the capital stock of the defendant bank, covered by his subscription, but paid for by the Commercial Casualty Company. By said paper writing the said George H. Salmon authorized and directed the defendant to issue and deliver to the plaintiff a certificate for said 733⅓ shares of its capital stock. The plaintiff has demanded that the defendant issue and deliver to her a certificate for said shares of stock. The defendant has refused said demand.

The paper writing executed by George H. Salmon includes a paragraph as follows:

"In the event it should be impossible or impracticable to obtain the stock, this assignment includes all rights or claims which I may have for the recovery of the value of said stock, and the said Maggie E. Holloway is fully authorized to include in any suit brought for the recovery of said stock the claim for the value of the same at the time the same should have been issued and delivered."

At the close of the evidence showing the foregoing facts, the defendant moved that the action be dismissed by judgment as of nonsuit. This motion was denied, and the defendant duly excepted.

The issues submitted to the jury were answered as follows:

"1. On 10 January, 1933, had George H. Salmon purchased and paid for and did he own the 733⅓ shares of the capital stock of the Depositors National Bank, as alleged in the complaint? Answer: 'Yes.'

"2. Did George H. Salmon assign to the plaintiff 733⅓ shares of the capital stock of the Depositors National Bank of Durham, as alleged in the complaint? Answer: 'Yes.'"

Judgment was thereupon rendered as follows:

"This cause coming on to be heard, and being heard before his Honor, J. Paul Frizzelle, and a jury, and the following issues having been submitted to the jury:

"(1) On 10 January, 1933, had George H. Salmon purchased and paid for and did he then own the 733⅓ shares of the capital stock of the Depositors National Bank of Durham, as alleged in the complaint?

"(2) Did George H. Salmon assign to plaintiff 733⅓ shares of the capital stock of the Depositors National Bank of Durham, as alleged in the complaint?

"And the jury having answered the first issue 'Yes,' and the second issue 'Yes'; and

"It appearing to the court and the court finding as a fact from the admissions of the defendant that no part of said 733⅓ shares of stock of

the Depositors National Bank referred to in the pleadings has ever been issued by the defendant to George H. Salmon, or the plaintiff, his assignee;

"Now, therefore, it is ordered, considered, adjudged, and decreed by the court that the plaintiff, Miss Maggie E. Holloway, is the owner and entitled to the possession of the 733⅓ shares of capital stock of the Depositors National Bank referred to and described in the complaint, and it is further ordered and decreed by the court that the defendant Depositors National Bank of Durham shall, within 60 days from 8 April, 1936, issue and deliver to the plaintiff, Miss Maggie E. Holloway, a certificate or certificates representing 733⅓ shares of the capital stock of the Depositors National Bank of Durham, N. C.

"It is further ordered that this cause be retained to the end that if the said defendant Depositors National Bank of Durham, N. C., has placed itself in a position where it is unable to make delivery of said stock, that an appropriate issue may be submitted to a jury to determine the value of the same.

"It is further ordered that the cost of the action be taxed against the defendant."

From this judgment the defendant appealed to the Supreme Court, assigning errors in the trial and in the judgment.

*Brawley & Gantt and Bryant & Jones for plaintiff.*
*Fuller, Reade & Fuller for defendant.*

CONNOR, J. By the terms of the assignment to her executed by George H. Salmon on 27 July, 1935, the plaintiff has only such right, title, and interest in the shares of stock described in the complaint, as the said George H. Salmon had at the date of the said assignment. She is not an innocent purchaser of said shares of stock. She took the said assignment with notice on its face that the defendant had denied that George H. Salmon was the owner of said shares of stock, and had refused his demand for a certificate for the same. It follows that if George H. Salmon had no right, title, or interest in said shares of stock, at the date of the assignment, the plaintiff cannot recover in this action, and there was error in the refusal of the trial court to dismiss the action by judgment as of nonsuit.

All the evidence showed that George H. Salmon paid nothing for the shares of stock which he undertook to assign to the plaintiff, and that when he subscribed for said shares of stock he did so upon the agreement of the Commercial Casualty Company that it would pay for said shares of stock, and that when a certificate was issued for said shares, it would be transferred to the liquidating trustees of the First National Bank of

Durham. George H. Salmon had no right, title, or interest in said shares of stock, at the date of the organization of the defendant bank or at the date of his assignment to the plaintiff.

There was error in the refusal of the trial court to allow the defendant's motion for judgment as of nonsuit, and in the judgment appearing in the record. For this error the judgment is reversed and the action remanded to the Superior Court of Durham County that judgment may be entered in said court dismissing the action.

Reversed.

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STATE v. W. I. BRIDGERS.

(Filed 24 February, 1937.)

**Municipal Corporations § 42—Statute prohibiting municipal peddlers' tax held not to preclude municipal privilege tax upon bakeries.**

Defendant, an employee of a bakery located in another city, was indicted for engaging in the bakery business in complaining city without a license as prescribed by its ordinance. Defendant, in the course of his employment, delivered bread and bakery products daily by truck, collected for products sold, and solicited orders in complaining city. *Held:* C. S., 7880 (51) (e) (g), prohibiting a tax by municipalities upon peddlers of bakery and other products, does not preclude the levying of the privilege tax, since the prohibition of the statute applies exclusively to peddlers, while the tax levied by the ordinance is a privilege tax upon bakeries and wholesale dealers in bakery products using the streets of the city for delivery of same, and a prohibition upon the levying of a tax upon one aspect of a business does not necessarily preclude the levying of a tax upon another aspect of the business, and complaining city being given the power by its charter and by C. S., 2677, to levy the privilege tax imposed by its ordinance.

APPEAL by defendant from *Barnhill, J.*, and a jury, at August Term, 1936, of NASH. No error.

The defendant was tried before the recorder of Rocky Mount on a warrant for violating an ordinance of the city of Rocky Mount, N. C., by engaging in the business of wholesale dealer in bread and bakery produce without securing a license, as required by the city of Rocky Mount. On the trial before the recorder the defendant pleaded not guilty, but was found guilty and required to pay the license and cost of $4.50. Defendant appealed to the Superior Court and the following special verdict by the consent of the State and defendant is set forth in the record:

"The jury, duly sworn and impaneled, after hearing the evidence for both the State and defendant, find the following facts, beyond a reason-

able doubt, and return the same as a special verdict: First. The jury finds as a fact, beyond a reasonable doubt, that the city of Rocky Mount is a municipal corporation authorized and existing under a charter contained in chapter 209 of the Private Laws of 1907, and the amendments thereto. Second. That on or about 18 June, 1936, the board of aldermen of the city of Rocky Mount, enacted its annual revenue ordinance, the pertinent sections of which are as follows:

" 'An ordinance to provide for license tax upon certain trades and business operations in the city of Rocky Mount, North Carolina.

" 'Section 1. That in addition to the tax on property and polls, as otherwise provided for, and under the power and authority conferred in the charter of the city of Rocky Mount, and the Revenue Act of 1935, there shall be levied and collected annually, or oftener, where provided for, a privilege license tax on trades and business operations as set out in the following sections and schedule. Every license shall be a personal privilege and shall not be transferable to any other person, firm, or corporation, but licensee may have it transferred to another location.

" 'Section 2. Unlawful to conduct business without a license. It shall be unlawful for any person, firm, or corporation or the agent or servants thereof to engage in or carry on any business in the city of Rocky Mount for which there is required a license, without first having paid the license tax and obtained the license, under a penalty of $25.00 for each offense. For the purpose of this section the opening of a place of business, or offering to sell, followed by a single sale, or, the doing for profit of any act pertaining to the business, trade, employment, or profession for which a license is required shall be construed to be engaging in or carrying on such business; and each day that such person, firm, or corporation shall engage in or carry on such business as aforesaid, shall be construed to be a separate offense.

" 'Section 4. That in order to defray the expenses of the city there shall be levied and collected the following privilege license taxes for each year commencing 1 July, 1936, on trades, agencies, and business as hereinafter set forth: 9. (b) Bakery and/or wholesale dealer in bakery products, using the streets of the city for delivery of same— $25.00. The term "bakery products" as used herein shall be construed to include bread, rolls, cakes, pies, cookies, doughnuts, and similar products and other sweet yeast-raised goods baked by commercial bakeries, but shall not be construed to include biscuits, crackers, pretzels, or ice cream cones or products baked in private homes.'

"Third. Staudt's Bakery, Inc., is a corporation engaged in a general bakery business, baking and selling bakery products, including bread, rolls, cakes, pies, and other sweet yeast-raised products, with its bakery and place of business in the city of Raleigh, Wake County, North Carolina, and maintain no bakery or place of business in the city of Rocky

Mount, but operate a truck from its plant in Raleigh to the city of Rocky Mount daily, carrying bread and other bakery products and delivering same to grocery stores and cafes in said city. Its salesmen sell its bread, cakes, and pies and make deliveries from its trucks operating over the streets of the city of Rocky Mount and collect therefor at the time of delivery, and also solicit from its customers orders to be delivered at some later date. From time to time its customers discontinue buying bakery products from it, and also from time to time its salesmen, by solicitation in the city of Rocky Mount, obtain new accounts which are served in said city.

"Fourth. On or about 12 August, 1936, the defendant W. I. Bridgers, a resident of Wake County, was employed as the agent of and salesman of the said bakery, receiving as his compensation a salary and commission on sales made by him, and at said time was in charge of the truck of the said bakery on the streets of the city of Rocky Mount, acting as its salesman in the disposal of its bakery products and performing the usual duties of its salesmen as more fully hereinbefore set forth. At said time neither Staudt's Bakery, Inc., nor the defendant W. I. Bridgers had applied for or procured the privilege license required by subdivision 9 of section 4 of the revenue ordinance of the city of Rocky Mount, as hereinbefore set forth, and the defendant W. I. Bridgers was indicted for engaging in the said business without obtaining the license required.

"Fifth. The jury finds as a fact, beyond a reasonable doubt, that the defendant sold and delivered bakery products as defined in said ordinance from a truck in the city of Rocky Mount on 12 August, 1936, and used the streets of the city of Rocky Mount for the delivery of the same without having paid for or procured the privilege license tax demanded by the city of Rocky Mount for the purpose of selling bread or other bakery products within the city.

"Upon the foregoing findings of facts, if the court shall be of the opinion that the defendant is guilty, we, the jury, find him guilty, and if, upon the foregoing findings of facts, the court shall be of the opinion that the defendant is not guilty, we find him not guilty. Upon the coming in of the special verdict, the court directs a verdict of guilty.

M. V. BARNHILL,
*Judge Presiding.*

"And it is thereupon ordered and adjudged by the court that said defendant pay a fine of $10.00, and the costs."

To the action of the court in directing a verdict of guilty upon the special verdict rendered by the jury, the defendant excepted, assigned error; and also to the judgment pronounced the defendant excepted, assigned error, and appealed to the Supreme Court.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Thorp & Thorp for the city of Rocky Mount.*

*Gilbert B. Swindell and Willis Smith for defendant.*

CLARKSON, J. The defendant concedes that the city of Rocky Mount may lawfully tax any business, trade, or profession carried on or enjoyed within its corporate limits, which is not otherwise prohibited by the general laws of the State; but contends that C. S., 7880 (51), paragraphs e and g (Public Laws N. C., 1935, ch. 371, sec. 121 [e] and [g]), prohibits the city of Rocky Mount from collecting the tax in controversy. We cannot so hold.

In *S. v. Langston,* 88 N. C., 692 (694), the law is well settled, as follows: "The power conferred upon the municipal body is presumed to be in subordination to a public law regulating the matter for the entire State, unless a clear intent to the contrary is manifest."

C. S., 2677, is as follows: "The board of commissioners may annually levy and cause to be collected for municipal purposes a tax not exceeding fifty cents on the hundred dollars, and one dollar and fifty cents on each poll, on all persons and property within the corporation, which may be liable to taxation for State and county purposes; and may annually lay a tax on all trades, professions, and franchises carried on or enjoyed within the city, unless otherwise provided by law; and may lay a tax on all such shows and exhibitions for reward as are taxed by the General Assembly; and on all dogs, and on swine, horses, and cattle, running at large within the town."

We think that C. S., 7880 (51), paragraphs e and g (section 121 of the Revenue Acts of 1931, 1933, and 1935), relate exclusively to privilege tax upon peddlers. The question therefore narrows down to this: Does the prohibition of section 121 of the Revenue Acts of 1931, 1933, and 1935, prohibiting a peddler's tax upon dealers in bread prohibit a municipality from requiring the payment of a privilege tax by bakeries pursuant to the general authority given in its charter and by Consolidated Statutes, 2677, *supra,* to tax trades and occupations? We think not. Such a construction would prohibit the imposition of a privilege tax by a municipality upon dealers in all the other articles enumerated in this section. For instance, a municipality could not require the payment of a privilege tax on markets, since "beef, fish, mutton, and pork" are enumerated. It could not levy a tax upon slaughter houses, since "live stock" is included; it could not require the payment of a privilege tax by dairies, since "products of dairy" are included. The Court has consistently upheld in numerous cases the validity of ordinances imposing privilege taxes upon markets, slaughter houses, and dairies. The

tax complained of is a privilege tax imposed upon "bakeries and/or wholesale dealers in bakery products using the streets of the city for the delivery of same." It is not a peddlers' tax and it is to the imposition of a peddlers' tax alone that section 121 of the Revenue Act is applicable.

We call attention to three very important words appearing in subdivision g, section 121, as follows: "No county, city, or town shall levy any license tax *under this section* upon a person so exempted in this section, nor upon drummers selling by wholesale." It seems clear, therefore, that the prohibition relates to license taxes levied *"under this section."* The tax complained of is not levied *"under this section."* The tax is levied under the general authority given the city of Rocky Mount in its charter, chapter 209 of the Public Laws of 1907, as amended, and C. S., 2677, authorizing the levying of a tax upon trades and businesses carried on within its corporate limits. A business may have several aspects for tax purposes. *Auto Trade Association v. Sheriff,* 186 N. C., 159; *Bottling Co. v. Doughton,* 196 N. C., 791.

When a business is subject to two or more privilege taxes, the prohibitions relating to one tax do not necessarily prohibit or affect the other tax. *Guano Co. v. Tarboro,* 126 N. C., 68; *Guano Co. v. New Bern,* 158 N. C., 354; *Express Co. v. Charlotte,* 186 N. C., 668; *S. v. Evans,* 205 N. C., 434.

We think that *Hilton v. Harris,* 207 N. C., 465, decisive of this case. It is there held (headnote): "The charter of a city giving it certain powers in respect to the levying of franchise taxes on trades and professions, etc., and C. S., 2677, will be construed together in determining the legislative grant of power to the municipality to levy taxes of this class, and construing the charter of the city of Concord *in pari materia* with C. S., 2677, it is held the city is given authority by the Legislature to levy a tax upon bakeries operating or delivering in the city, the Legislature being given the power to levy such taxes by Art. V, sec. 3, of the Constitution, and having the power to delegate this authority to counties, cities, and towns as administrative agencies of the State." At p. 473, it is said: "If the plaintiffs were not required to pay this tax for the trade or business it carries on in Concord, a situation would arise that those living in Concord and carrying on this kind of trade or business, who paid the tax—it would injure their business, as they would have to pay a tax of $100.00 and the plaintiffs would not; consequently, the plaintiffs would undersell the Concord bakers. Such favoritism would tend to monopolize and, in time, destroy competition, which is sometimes called 'the life of trade.'"

For the reasons given, there is no error in the judgment of the court below.

No error.

CLINTON B. CLEVENGER, ADMINISTRATOR OF THE ESTATE OF HELEN IRENE CLEVENGER, v. JAMES H. GROVER AND ST. LOUIS UNION TRUST COMPANY, TRUSTEES UNDER THE WILL OF E. W. GROVE, DECEASED, KNOTT HOTEL COMPANY, A CORPORATION, AND P. H. BRANCH.

(Filed 24 February, 1937.)

**1. Removal of Causes §§ 4a, b—**

Whether a controversy is separable is to be determined by the complaint, and whether resident defendants are joined fraudulently to prevent removal is to be determined by the petition, which must allege facts leading to that conclusion apart from the pleader's deduction.

**2. Master and Servant § 20b—**

The omission of an employee, while acting in the scope of his employment, to perform a legal duty owed to a third person, ordinarily imposes liability on the employee as well as the employer.

**3. Same: Removal of Causes § 4b—Held: Petition failed to show that resident employee was joined fraudulently to prevent removal.**

The complaint alleged that plaintiff's intestate, while a guest in a hotel, was attacked and killed by an employee of the hotel late at night, that defendants, the owners and proprietors of the hotel and its resident manager, were negligent in knowingly keeping in its employ a vicious employee, in failing to properly guard and supervise the halls and entrances, and in permitting numerous pass-keys to be distributed to employees, with the result that the vicious employee was enabled to gain access to intestate's room. The nonresident defendants filed a petition for removal, alleging that the resident manager was not on duty at the time intestate was killed, that he did not hire the vicious employee, that the vicious employee was not on duty at the time, and that the manager had no knowledge that intestate was a guest in the hotel or had been killed until the morning after the crime, and that he was charged in the complaint with no immediate act or omission constituting negligence. *Held:* The petition does not allege facts requiring the conclusion that the resident manager was not personally liable and was therefore fraudulently joined, since, notwithstanding the fact that the manager was not on duty at the time of the commission of the crime, such fact is not inconsistent with his failure as manager to exercise due care in the operation, management, and supervision of the hotel, nor negative his alleged negligence in retaining the vicious employee and in permitting master keys to be distributed among employees, and the petition for removal was properly denied.

APPEAL by defendants James H. Grover and St. Louis Union Trust Company, trustees, from *Phillips, J.*, at December Term, 1936, of BUNCOMBE. Affirmed.

The case was heard upon petition for removal of the cause to the United States District Court for the Western District of North Carolina, on the ground of diverse citizenship and fraudulent joinder of resident defendant. Motion for removal denied, and petitioners appealed.

*Jones & Ward, Weaver & Miller, and Brooks, McLendon & Holderness for plaintiff, appellee.*

*Adams & Adams and Johnston & Horner for defendants, appellants.*

DEVIN, J. This action was instituted by plaintiff, administrator of Helen Irene Clevenger, to recover damages for the wrongful death of his intestate, alleged to have been caused by the joint negligence of the defendants, who are the owners, proprietors, and managers of the Battery Park Hotel in the city of Asheville, North Carolina.

The material allegations of the complaint are that the defendants James H. Grover and St. Louis Union Trust Company, trustees, and the Knott Hotel Company were, on the occasion alleged, the owners, operators, and proprietors of said hotel, and that defendant P. H. Branch was manager in charge of the operation of the hotel; that on the morning of 16 July, 1936, about 1:00 o'clock a.m., plaintiff's intestate, while a guest of said hotel, was wrongfully killed and murdered by one Martin Moore, a Negro employee of the defendants.

The acts and omissions on the part of the defendants constituting negligence were stated substantially as follows:

1. That defendants permitted the rear entrance of said hotel to remain open and unguarded on the night of 15-16 July, constituting an invitation to persons with evil intent to enter, and by reason thereof enabled said Martin Moore to enter the hotel room and slay plaintiff's intestate.

2. That defendants failed to guard, supervise, and inspect the halls, corridors, and entrances of said hotel.

3. That defendants, through their employee and night watchman, failed to guard and inspect the portion of the hotel where plaintiff's intestate was lodged and to visit said floor for the space of more than two hours.

4. That defendants, through their employees, notwithstanding report of screams and cries for help on said morning, failed to send anyone to investigate or assist.

5. That defendants permitted numerous master or pass-keys, capable of opening room doors, to be distributed among various servants and employees, and as a result thereof said Martin Moore was enabled to obtain one of said master keys and to enter the room of plaintiff's intestate and kill and murder her.

6. That defendants employed and retained in their employment the said Martin Moore when they knew or should have known that he was a person of evil and vicious character.

7. That defendants failed to exercise proper care in the management, operation, and supervision of said hotel, proximately resulting in the death of plaintiff's intestate.

Plaintiff asks that he recover of the defendants damages in the sum of fifty thousand dollars.

In apt time the defendants James H. Grover and St. Louis Union Trust Company, trustees, filed petition, with proper bond, for removal of said action from the Superior Court of Buncombe County to the United States District Court for the Western District of North Carolina.

The petition for removal sets forth the following material facts:

That the petitioners, as trustees under the will of E. W. Grove, are citizens and residents of the State of Missouri, that the Knott Hotel Company (which it is alleged has not been served with summons) is a corporation organized and existing under the laws of the State of New York, that the defendant Branch is a citizen and resident of Buncombe County, North Carolina, and that the amount in dispute exceeds three thousand dollars.

That the defendant Branch is not personally or individually liable on account of any of the matters and things alleged in the complaint.

"Your petitioners would further respectfully show that the said P. H. Branch had no personal knowledge that the plaintiff's intestate was in said hotel, as a guest or otherwise, at or before the time of her alleged injury and death, and that the said P. H. Branch was not actually on duty as manager of said hotel, or otherwise, at the time of said alleged injury to plaintiff's intestate, and that he had no knowledge, or cause to have knowledge thereof until about 8:00 o'clock on the morning following said injury; that at the time the injury is alleged to have been inflicted upon plaintiff's intestate, the said hotel was under the immediate charge of an employee other than the said P. H. Branch, and the said P. H. Branch had no direct contact with or participation in the wrong complained of, did no act or deed in connection therewith or relating thereto, and was on the occasion of said injury guilty of no omission of duty with which he was personally charged, and on the occasion of said injury, or at any other time, was guilty of no omission of duty with which he was personally charged; and that no personal negligence in any immediate act, command, or omission of the said P. H. Branch is alleged as, or was, or could have been, the efficient or coefficient cause of the injury complained of, and he is not therefore personally liable for the alleged injury to plaintiff's intestate."

Petitioners further allege that the said Martin Moore was not employed by defendant Branch, and that he was not an employee on duty at said hotel at the time of the alleged injury, and was not there by permission or knowledge of said Branch; that said Branch had no financial interest in the ownership or management of the hotel and was merely employed as submanager of said hotel by a corporation having the duty and responsibility to manage same.

Petitioners aver that this action involves a separable controversy, and that said Branch was wrongfully joined as party defendant, with the fraudulent purpose of preventing the removal of this cause to the United States District Court.

It appears from an examination of the pleadings that the petition for removal is based on the ground that no cause of action will lie as to the resident defendant, and that he was joined as a party defendant for the fraudulent purpose of preventing the exercise by the nonresident defendants of their right to remove the case to the United States District Court.

The principles of law involved, as established by the decisions of this Court and by the Supreme Court of the United States, are well settled. The application of these principles to particular cases often presents difficulty.

As was said in *Hughes v. Railroad,* 210 N. C., 730, the last case wherein this Court considered the question of removal of cases to the Federal Court: "It seems to be well settled that whether there is a separable controversy is to be determined by the complaint, and that whether resident defendants are joined fraudulently for the purpose of preventing removal of the cause to the United States Court is to be determined by the facts alleged in the petition for removal. *Morganton v. Hutton,* 187 N. C., 736; *Culp v. Ins. Co.,* 202 N. C., 87; *Tate v. R. R.,* 205 N. C., 51; *Trust Co. v. R. R.,* 209 N. C., 304; *Powers v. R. R.,* 169 U. S., 92; *Southern Ry. v. Lloyd,* 239 U. S., 496; *Wilson v. Republic Iron & Steel Co.,* 257 U. S., 92. The petitioner must not only allege fraudulent joinder, but must state facts leading to that conclusion, apart from the pleader's deduction. *Crisp v. Fibre Co.,* 193 N. C., 77."

"In order to warrant the removal on the ground of alleged fraudulent joinder, the petition must contain statements of the relevant facts and circumstances, with sufficient minuteness of detail, and be of such kind as rightly to engender or compel the conclusion that the joinder has been made in bad faith and without right." *Crisp v. Fibre Co.,* 193 N. C., 77; *Fore v. Tanning Co.,* 175 N. C., 583; *Cogdill v. Clayton,* 170 N. C., 527; *Smith v. Quarries Co.,* 164 N. C., 338; *R. R. v. Lloyd,* 239 U. S., 496.

The omission of an employee, while acting in the scope of his employment, to perform a legal duty owed to a third person ordinarily imposes liability on both employee and employer. *Trust Co. v. R. R.,* 209 N. C., 304; *Hollifield v. Telephone Co.,* 172 N. C., 714; *Hough v. Railroad,* 144 N. C., 692.

When the facts set forth in the petition in the instant case as the basis for the allegation of fraudulent joinder are considered and analyzed in their relation to the cause of action alleged in the complaint, it is apparent that they are insufficient for that purpose under the rule laid down in *Crisp v. Fibre Co., supra,* and *Trust Co. v. R. R.,* 209 N. C., 304.

The averment that defendant Branch was not actually on duty as manager of the hotel at the time of the injury; that at that time the hotel was under the immediate charge of another employee; that defendant Branch did no act in connection with the alleged injury, and that no personal negligence in any immediate act, command, or omission, as alleged, was the cause of the injury does not constitute such statement of facts and circumstances (aside from the deductions of the pleader) as would require the conclusion that Branch was not liable for any of the acts and omissions alleged in the complaint.

Notwithstanding he was not actually on duty as manager at the precise moment of the injury, this fact would not be inconsistent with his failure as manager of the hotel to exercise due care in the operation, control, management, and supervision of the hotel, nor negative his alleged failure to exercise due care with respect to retaining vicious employees, and permitting the distribution of master keys whereby the killer was enabled to gain access to the room of plaintiff's intestate and perpetrate the wrong complained of.

In *Johnson v. Lumber Co.,* 189 N. C., 81, the foreman (the resident defendant) was absent at the time of the particular act of negligence alleged. This was held to warrant the removal of the case on the ground of improper joinder. To the same effect is *Cox v. Lumber Co.,* 193 N. C., 28, and other like cases. But here the facts were different and we conclude a different rule applies. The complaint alleges a joint tort, and upon its face does not show a separable controversy. The facts set forth in the petition as ground for removal on account of the alleged fraudulent joinder of the resident defendant are not such as to compel the conclusion that the joinder has been made in bad faith.

The judgment denying the motion to remove must be

Affirmed.

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PARK VIEW HOSPITAL ASSOCIATION, INCORPORATED, v. PEOPLE'S BANK AND TRUST COMPANY, EXECUTOR OF C. C. WARD, DECEASED.

(Filed 24 February, 1937.)

**Executors and Administrators § 16—Hospital expenses reasonably necessary for care of deceased within year prior to death held preferred claim.**

Medical services rendered deceased within a year prior to his death are payable in the sixth class of priority by provision of the statute, C. S., 93, and the term "medical services" includes hospital expenses incurred within the twelve months period which are reasonably necessary for the care and comfort of deceased while under treatment by his physician, and which are incurred upon the physician's advice, and where the condition of

deceased necessitates the constant attendance of trained nurses, the hospital may properly include the charges for board for such graduate nurses as an item of its charges included in the sixth class of priority.

APPEAL by both plaintiff and defendant from *Spears, J.*, at October Term, 1936, of NASH. Reversed in plaintiff's appeal; modified and affirmed in defendant's appeal.

This is a controversy without action, submitted to the court on a statement of facts agreed. C. S., 626.

The facts agreed are as follows:

1. The plaintiff is a nonprofit corporation, organized under the laws of North Carolina, with its principal place of business in Nash County, North Carolina.

2. The defendant is a banking corporation, organized under the laws of North Carolina, with its principal place of business in Edgecombe County, North Carolina.

3. This controversy arises out of a contract between the plaintiff and one C. C. Ward. The amount involved in the controversy exceeds the sum of $200.00.

4. C. C. Ward died on 26 July, 1935. Prior to his death he was a resident of Nash County. The defendant qualified as his executor on 2 August, 1935, before the clerk of the Superior Court of Nash County, who issued to the defendant letters testamentary. On 8 August, 1935, the defendant began and thereafter completed publication of the notice to creditors of the estate of the said C. C. Ward, as required by C. S., 45.

5. The said C. C. Ward owned no real estate at the date of his death. His personal property was not sufficient in value for the payment of his debts. After the payment of his preferred debts, as admitted by the defendant, and the costs and expenses of the administration of his estate, the defendant will have in hand, belonging to his estate, the sum of $1,376.78. Claims against his estate, which have been admitted by the defendant, but which have not been paid, amount to $2,400.28.

6. Within the time fixed in the notice to creditors for filing their claims against the estate of C. C. Ward, deceased, the plaintiff filed with defendant its claim amounting to $665.60. Plaintiff contends that said claim, being for medical services rendered to deceased within the twelve months preceding his death, is entitled to priority under the provisions of C. S., 93.

7. On or about 1 September, 1936, the defendant notified the plaintiff that its claim was admitted by the defendant as a valid claim, but that defendant denied that plaintiff was entitled to priority in payment of its claim under the provisions of C. S., 93. The defendant contends that the said claim is within the Seventh Class, and not within the Sixth Class of the debts of C. C. Ward, deceased, as provided by C. S., 93.

If plaintiff's claim is properly payable as a debt of the deceased in the Sixth Class, the plaintiff will receive payment in full of its claim, while common creditors of the estate of C. C. Ward, deceased, will receive approximately 40 per cent of the amounts of their claims, respectively.

If plaintiff's claim is properly classified as included within the Seventh Class of the debts of C. C. Ward, deceased, plaintiff and other creditors, who are not entitled under the statute to priority in the payment of their claims, will receive approximately 57 per cent of the amounts of their claims, respectively.

8. On 13 December, 1934, the said C. C. Ward, being ill and then requiring hospital treatment, was referred by his personal physician to plaintiff's hospital, and on that day was admitted to said hospital; he remained in said hospital until 7 March, 1935. During that period the said C. C. Ward was suffering from rheumatic fever; cystitis (inflammation of the bladder); singulus (hiccoughs); and erythema nodosum (painful lumps in the legs, a sequel of rheumatic fever).

On 7 March, 1935, the said C. C. Ward returned to his home in Nash County and remained there until 14 April, 1935, on which day he was readmitted to plaintiff's hospital. He was then suffering from bulbar palsy (paralysis of the throat). He was also afflicted with urinary incontinence. By 27 April, 1935, it was realized that the condition of the said C. C. Ward was hopeless. He was again returned to his home and remained there until his death on 26 July, 1935.

The treatment of the said C. C. Ward, while he was in plaintiff's hospital, required a number of blood transfusions and cystoscopic treatments. The prolonged hiccoughs were finally relieved by the administration of carbon dioxide from tanks.

9. There has been filed with the defendant and admitted by it as a valid preferred claim against the estate of its testator, as a debt within the Sixth Class, C. S., 93, a bill from Boice-Willis clinic for the sum of $310.00. Boice-Willis clinic is a group of physicians who practice in plaintiff's hospital.

Plaintiff's bill filed with the defendant, in support of its claim against the estate of C. C. Ward, deceased, is itemized as follows:

| | |
|---|---|
| "97 days private room at $4.50 | $ 436.50 |
| Use of operating room | 12.50 |
| Drugs | 16.60 |
| Special laboratory examinations | 27.50 |
| Board for graduate nurses | 159.00 |
| Meals for wife | 3.50 |
| | $ 655.60" |

(It is conceded by the plaintiff that the last item for $3.50 should be classified as a debt of the deceased under the Seventh Class. C. S., 93.)

11. The claim of the plaintiff represents the reasonable value of services rendered to C. C. Ward, deceased, by the plaintiff, as shown on the itemized bill filed with the defendant. During the time he was in plaintiff's hospital, C. C. Ward was under constant observation and treatment by his physician, who visited him daily. His presence in plaintiff's hospital (or in some similar hospital) was reasonably necessary for his proper treatment by his physicians. He could not have had such treatment, safely and conveniently, at his home.

The question of law presented to the court, for its decision, was whether, on the facts agreed, plaintiff's claim for $652.10 should be classified for payment by the defendant as a debt of the deceased, included within the Sixth Class or the Seventh Class, as provided by C. S., 93.

The court was of opinion that on the facts agreed, all the items included in the bill filed with the defendant by the plaintiff, except the items of $159.00 and $3.50, aggregating the sum of $162.50, constitute a debt of the deceased for medical services rendered to him by the plaintiff within twelve months preceding his death, and that said debt, amounting to the sum of $493.10, should be classified for payment as included within the Sixth Class of the debts of the deceased, and accordingly adjudged that defendant pay the plaintiff the sum of $493.10 as a debt included within the Sixth Class, and the sum of $162.50, as a debt included within the Seventh Class of the debts of the deceased, and that the costs be taxed against the defendant.

From this judgment both plaintiff and defendant appealed to the Supreme Court, each assigning error in the judgment.

*Battle & Winslow for plaintiff.*
*Thorp & Thorp for defendant.*

CONNOR, J. The order in which the debts of a deceased person shall be paid by his administrator or executor is prescribed by statute. C. S., 93. For the purpose of determining the priority of such debts, they are classified as follows:

"First Class. Debts which by law have a specific lien on property to an amount not exceeding the value of such property.

"Second Class. Funeral expenses.

"Third Class. Taxes assessed on the estate of the deceased previous to his death.

"Fourth Class. Dues to the United States or to the State of North Carolina.

"Fifth Class. Judgments of any court of competent jurisdiction within this State, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death.

"Sixth Class. Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year preceding the death; or if such servant or laborer was employed during the year current at the decease, then from the time of such employment; for medical services within twelve months preceding the decease.

"Seventh Class. All other claims and demands."

It is provided by statute that "no executor, administrator, or collector shall give to any debt any preference whatever, either by paying it out of its class, or by paying thereon more than a pro rata proportion in its class." C. S., 94.

Speaking of the statutory preference of a debt incurred by a decedent for medical services rendered to him within twelve months preceding his death, *Clark, C. J.*, in *Baker v. Dawson,* 131 N. C., 227, 42 S. E., 588, said:

"It must be noted that there is no priority even for medical services rendered the deceased personally, unless he dies. In all other cases, the physician's bill is like any other debt. If the physician wishes to secure such debts, he must exact security or proceed to collect by law. When the patient is in his last illness, this might be inconvenient or indecent, and as such illness might extend to twelve months, the law endeavors to secure for the patient medical attention by giving a legal priority for such services if rendered to the patient within twelve months preceding his decease. But such reason does not apply to services rendered his wife and children, as to which the physician has extended credit, relying upon the father or husband himself paying the debt incurred. There are no words extending the meaning to such debts other than for personal services to the debtor, and the language of the statute is restrictive—'for medical services within twelve months prior to the decease'—meaning the decease of the debtor, not of his wife or child. The statute being in derogation of the equity of a pro rata distribution, should be strictly construed so as not to confer a priority over other creditors unless clearly called for."

This principle was properly applied in *Baker v. Dawson, supra.* The decision in that case was manifestly correct. The principle does not require, however, a restricted construction of the words "medical services," in the instant case, which will exclude from the provisions of the statute services rendered to the deceased within twelve months preceding his death, by the plaintiff, which were rendered upon the advice of his physician, and were reasonably necessary, because of his illness, for his

care and comfort, while he was under treatment by his physicians. The purpose of the statute would be defeated by such construction. When the plaintiff admitted C. C. Ward into its hospital, it doubtless felt assured that if he recovered from his illness and was restored to his health, he would pay his hospital bill, and that if he died within twelve months from the date of his admittance, it would have a preferred claim for its services upon his estate.

The words "medical services," as used in the statute, include all services rendered to the deceased, because of his illness, upon the advice of his physician, which were reasonably necessary for his care and comfort, and for his proper treatment by his physicians.

There is error in the judgment in the instant case excluding from the provisions of the statute the amount due the plaintiff for board of graduate nurses who attended the deceased while he was a patient in plaintiff's hospital. It is manifest from the facts agreed and submitted to the court that it was reasonably necessary that his nurses should attend C. C. Ward constantly while he was a patient in plaintiff's hospital. It was therefore not only convenient but reasonably necessary for the plaintiff to furnish board for said nurses.

There is no error in the judgment with respect to the payment by the defendant of the amount due to the plaintiff for services rendered to the deceased. The judgment should, however, include the item of $159.00.

In accordance with this opinion, the judgment in plaintiff's appeal is reversed; in defendant's appeal the judgment is modified and affirmed.

Reversed on plaintiff's appeal.

Modified and affirmed on defendant's appeal.

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L. C. REED v. WM. V. FARMER, CHAIRMAN OF BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY.

(Filed 24 February, 1937.)

**1. Counties § 17—Mandamus will not lie to compel chairman to sign county voucher since county commissioners are vested with control of finances.**

The auditor of Madison County instituted this proceeding in *mandamus* against the chairman of the board of county commissioners to compel him to sign a salary voucher made out to the auditor (Public-Local Laws of 1917, ch. 201, as amended by Public-Local Laws of 1931, ch. 341). *Held:* Defendant chairman has no power or authority to pass upon the claim of plaintiff, but by constitutional provision such power is vested in the board of county commissioners, N. C. Constitution, Art. VII, sec. 2, and *mandamus* will not lie against defendant chairman, plaintiff's remedy, if he has a claim against the county, being to present it for approval to the county, and if not approved and paid, to institute action against the county.

**2. Mandamus § 1—**

*Mandamus* will lie only to compel the performance of a legal duty of defendant at the instance of a party having a clear legal right to demand its performance, and where the party sought to be coerced has no power or duty to perform the act, his demurrer is properly sustained.

APPEAL by defendant from *Phillips, J.*, 18 September, 1936, at Chambers. From MADISON. Reversed.

The complaint of plaintiff is as follows:

"1. That the plaintiff is a citizen and resident of the county of Madison, North Carolina.

"2. That the defendant is a resident and citizen of the county of Madison and State of North Carolina.

"3. That Wm. V. Farmer is the chairman of the board of county commissioners of Madison County, North Carolina.

"4. That on 24 April, 1933, L. C. Reed was duly inducted into the office of auditor for Madison County, North Carolina, and has performed and carried out all the duties of said office up to the present time, that some of the duties of said auditor are to keep all accounts of the county, audit the books of the different governmental departments of the county, draw checks for the payment of official salaries, and for the payment of accounts, and to present same to the chairman of the county commissioners for his signature, and this plaintiff, in the course of his official duty, drew a voucher or check in favor of himself for part of his services and presented same to the chairman of the board of county commissioners for his signature, and that the defendant arbitrarily and without any good and valid reason refused to sign same.

"5. That the General Assembly of North Carolina, at its regular session of 1917, duly passed an act, which was ratified on 9 January, entitled 'An act appointing an auditor for Madison County and defining the duties of the position,' same being chapter 201, in words and figures (in part) as follows, to wit: 'Section 14. That the auditor of Madison County shall receive as full compensation for his services the sum of three dollars per day and mileage for the days actually engaged in the performance of his duties, said mileage to be the same as that received by the members of the board of county commissioners.'

"6. That the General Assembly of North Carolina, at its regular session of 1931, duly passed an act, which was ratified on 30 March, entitled 'An act to fix the fees of certain officials of Madison County whose salaries have been abolished and define the duties of certain officials and boards,' same being chapter 341, in words and figures (in part) as follows, to wit: 'Section 4. That from and after the ratification of this act no auditor or tax collector shall be elected for Madison County in any other way or manner save that provided in this section.

That on the first Monday in December, one thousand nine hundred and thirty-two, the chairman of the board of education, the chairman of the board of county commissioners, the chairman of the board of health, the chairman of the sinking fund commission, and their successors in office, and the chairman of any other board that may be created by the Legislature for Madison County, shall meet and elect an auditor by a majority of the votes of the various chairmen, and said auditor shall serve and draw compensation provided for in the act creating the auditor's office for Madison County and that part of said act that provides for the election of said auditor at the general election is hereby repealed.'

"Wherefore, the plaintiff makes this application, praying:

"1. That a writ of *mandamus* be issued out of this court, directed to the defendant Wm. V. Farmer, chairman of the board of county commissioners, commanding him to sign the check or voucher for the services of L. C. Reed, auditor for the said county of Madison, as provided by law.

"2. For such other and further relief as the court may deem just and proper.

"3. For the costs of this action, to be taxed by the clerk."

The demurrer of defendant is as follows:

"1. That this court has no jurisdiction of the person of the defendant or of the subject matter of this action, in that this application for a writ of *mandamus* is an application to enforce a money demand against Madison County, and as such is not within the jurisdiction of this court.

"2. That there is a defect in parties defendant, in that the Madison County board of county commissioners is the real party in interest and not Wm. V. Farmer, chairman.

"3. That the petition does not state a cause of action, in that:

"A. It does not show that the board of county commissioners of Madison County has ever ordered the payment to the petitioner of the voucher set up in his petition, or ordered the chairman to sign such voucher.

"B. It does not show any particular voucher which has been presented to the defendant or any specified amount in any voucher.

"C. It shows on its face that the writ of *mandamus* requested seeks to enforce a money demand *ex contractu* against Madison County and fails to show that any claim of petitioner has been reduced to judgment as required by law.

"D. It asks for *mandamus* to require the defendant to sign a check upon the funds of Madison County, and does not show in its face that the county of Madison has any funds available to meet said check if signed.

"Wherefore, the defendant asks that the petition be dismissed and he go without day and recover his costs in this behalf incurred."

The court below, after finding certain facts, rendered judgment, in part, as follows: "It further is ordered and adjudged that a *mandamus* issue, directed to Wm. V. Farmer, chairman of the board of county commissioners as aforesaid, commanding him to sign the said voucher or check for the amount due the plaintiff under ch. 201 of the Public-Local Laws of 1917; and ch. 341 of the Public-Local Laws of 1931; and it is further ordered by the court that the clerk of the Superior Court of Madison County deliver a copy of the within judgment to the sheriff of Madison County, and that he be directed to carry out the mandate and orders of this court. It is further ordered that the defendant pay the costs of this action.

F. DONALD PHILLIPS,
*Judge Presiding.*"

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

*No counsel for plaintiff.*
*Roberts & Baley for defendant.*

CLARKSON, J. There are several grounds of demurrer and the only ones we think necessary to consider are under C. S., 511 (6). "The complaint does not state facts sufficient to constitute a cause of action" in that:

"A. It does not show that the board of county commissioners of Madison County has ever ordered the payment to the petitioner of the voucher set up in his petition, or ordered the chairman to sign such voucher.

"B. It does not show any particular voucher which has been presented to the defendant, or any specified amount in any voucher.

"C. It shows on its face that the writ of *mandamus* requested seeks to enforce a money demand *ex contractu* against Madison County, and fails to show that any claim of petitioner has been reduced to judgment as required by law.

"D. It asks for *mandamus* to require the defendant to sign a check upon the funds of Madison County, and does not show on its face that the county of Madison has any funds available to meet said check if signed."

Const. of N. C., Art. VII, sec. 2: "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." Sec. 8: "No money shall be drawn from any county or township treasury, except by authority of law." N. C. Code, sec. 1297, Power of Board, subsec. 5,

says: "To provide by taxation or otherwise for the prompt and regular payment, with interest, of any existing debt owing by the county."

In *Martin v. Clark,* 135 N. C., 178 (179), is the following: "The law commits to the board of commissioners the power and duty of auditing and passing upon the validity of claims. If they refuse to audit or act upon a claim, *mandamus* will lie to compel them to do so. *Bennett v. Comrs.,* 125 N. C., 468. If after the hearing they refuse to allow or issue a warrant for its payment, an action will lie against the commissioners to establish the debt and for such other relief as the party may be entitled to. *Hughes v. Comrs.,* 107 N. C., 598."

Public-Local Laws of N. C., 1917, ch. 201, sec. 1, is as follows: "That permanent office of 'Auditor of Madison County, North Carolina,' be and the same is hereby created and established." Sec. 12: "That the auditor of Madison County shall O.K. all vouchers issued by any of the boards of commissioners thereof, and in the discharge of this duty may administer oaths to any person presenting any voucher." Sec. 14: "That the auditor of Madison County shall receive as full compensation for his service the sum of three dollars per day and mileage for the days actually engaged in the performance of his duties, said mileage to be the same as that received by the members of the board of county commissioners of Madison County."

Public-Local Laws of N. C., 1931, ch. 341—the title: "An act to fix the fees of certain officials of Madison County whose salaries have been abolished, and to define the duties of certain officials and boards." Sec. 4 provides the method of electing the auditor.

In a careful examination of the acts set forth in the complaint, we can find no power or authority of the defendant chairman of the board of county commissioners to pass on the claim of plaintiff. It would, in fact, be questionable if the General Assembly had power to pass such an act. From the constitutional provisions above quoted, the county commissioners have the general supervision and control over the "finances of the county." If plaintiff had a claim against the county, it should have been presented to and approved by it, and if not approved and paid, an action would lie against the county, as said in the *Martin case, supra.*

It is well settled in *Person v. Doughton,* 186 N. C., 723 (724): "*Mandamus* lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced." *Mebane School District v. County of Alamance, ante,* 213, citing authorities. See *Woodmen of the World v. Comrs. of Lenoir,* 208 N. C., 433.

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

Reversed.

J. K. WILSON v. WM. V. FARMER, CHAIRMAN OF THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY.

(Filed 24 February, 1937.)

APPEAL by defendant from *Phillips, J.*, 18 September, 1936, at Chambers. From MADISON. Reversed.

This is a petition for writ of *mandamus* by the acting tax collector of Madison County against the chairman of the board of county commissioners of Madison County to force the defendant to sign a check for a sum of money alleged to be due the petitioner as salary. From the judgment for plaintiff defendant excepted, assigned error, and appealed to the Supreme Court.

*No counsel for plaintiff.*
*Roberts & Baley for defendant.*

CLARKSON, J. For the reasons given, in *Reed v. Wm. V. Farmer, Chairman of Board of County Commissioners of Madison County, ante,* 249, the judgment in this cause is

Reversed.

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J. W. MORROW, CARL MORROW, AND ITASCA MORROW, BY THEIR NEXT FRIEND, J. W. MORROW, v. FRANK CLINE AND SOUTHERN RAILWAY COMPANY.

(Filed 24 February, 1937.)

**1. Appeal and Error § 45f—On appeal from judgment overruling demurrer, sole question presented is sufficiency of complaint to state cause.**

Upon appeal from judgment overruling a demurrer the sole question presented is whether the complaint states a cause of action in favor of plaintiffs against defendants, and whether the action should have been brought by another party is not necessary to be determined when the complaint does not allege facts disclosing that such other party had the sole or prior right to prosecute the action.

**2. Dead Bodies § 5—Minor children may maintain action for mutilation of dead body of their father.**

Minor children have a right to maintain an action for the mutilation of the dead body of their father, and a demurrer to their complaint in such action on the ground that the complaint should allege facts showing that a widow with right to maintain the action did not survive, and that plaintiffs were all the children of deceased, is properly overruled, since it does

not appear from the face of the complaint that a widow having a prior right to maintain the action survived or that there were other children surviving deceased, the defense that plaintiffs are not the real parties in interest being new matter which may be taken advantage of only by positive allegations in the answer disclosing such defense.

**3. Pleadings § 18—Where complaint states cause in plaintiffs' favor, demurrer on ground that they are not real parties in interest is bad.**

Where the allegations of the complaint are sufficient to state a cause of action in favor of plaintiffs, the defense that another party had a prior right to maintain the action, or that there were others of the class having an equal right to sue who were not made parties, may not be taken advantage of by demurrer when the allegations of the complaint do not show such prior or coördinate right in other parties, such demurrer being bad as a "speaking demurrer," and in such instance the defense being available only by positive allegations in the answer disclosing such right of action in parties other than plaintiffs.

APPEAL by defendants from *Harding, J.*, at October-November Term, 1936, of SWAIN. Affirmed.

The allegations of the complaint, in part, are as follows: "That they are citizens and residents of Swain County, State of North Carolina, and that J. W. Morrow is the father of Robert Morrow, deceased, and Carl Morrow and Itasca Morrow are the minor children of the said Robert Morrow; that the said J. W. Morrow has been duly appointed by the clerk of the Superior Court of Swain County as next friend of the said Carl Morrow and Itasca Morrow. That the defendant Frank Cline, as plaintiffs are informed and believe, is a citizen and resident of Buncombe County, State of North Carolina; that the defendant Southern Railway Company is a corporation, owning and operating a line of railway from Asheville, North Carolina, to Murphy, North Carolina, and at the time of the grievance hereinafter complained of owned and operated said line of railway as aforesaid." Then specific allegation is made showing actionable negligence and damages for the mutilation of the body of Robert Morrow.

The defendants demurred to the complaint on several grounds. The demurrer as to the plaintiff J. W. Morrow, father of Robert Morrow, deceased, was sustained by the court below. He did not appeal.

The judgment of the court below is as follows: "This cause coming on to be heard, and being heard upon the demurrer of the defendants to the complaint, and the court being of the opinion, after hearing arguments of counsel for plaintiffs and defendants, that the demurrer should be sustained in so far as it alleges that J. W. Morrow is an improper and unnecessary party, but should be overruled in all other respects. It is therefore ordered and adjudged by the court that J. W. Morrow, personally, be stricken from the record as a party to the action, and it is

further ordered and adjudged that the demurrer in all other respects be and the same is hereby overruled and disallowed.

WM. F. HARDING,
*Judge Presiding.*"

The defendants excepted and assigned as error: "That his Honor erred in overruling the demurrer filed by the defendants, and in signing the judgment."

*T. D. Bryson and T. D. Bryson, Jr., for plaintiffs.*
*R. C. Kelly and Jones & Ward for defendants.*

CLARKSON, J. The *first* question presented by defendants: "In an action for damages, where it is alleged a dead body has been mutilated, must the action be brought by the widow of deceased or by the minor children?"

The defendants demurred to the complaint of plaintiffs, so on this record it is not necessary to answer this question. The sole question on this record: Are the allegations in the complaint sufficient to sustain the action? We think so.

In *Stephenson v. Duke University*, 202 N. C., 624 (625), is the following: "This action was brought to recover damages for the mutilation or autopsy of the dead body of a child. The plaintiffs were the child's parents. The court adjudged in effect that the father may maintain the action and that the complaint does not state a cause of action in behalf of the mother. The plaintiffs appealed; the defendant did not appeal. We therefore treat as conceded the defendant's satisfaction with the judgment and its acquiescence in the conclusion that the action may be prosecuted by the male plaintiff, and that as to him the complaint states a cause of action. The right to bury the dead is generally treated as a *quasi*-right of property. *Floyd v. R. R.*, 167 N. C., 55. If the father has a right of action we need discuss neither the divergent views expressed in regard to the right of property in the dead body of a human being, nor the legal right of the proper person to prosecute a suit for its mutilation. In this State the right to maintain an action for such mutilation has been recognized for almost a third of a century. *Kyles v. R. R.*, 147 N. C., 394. The single question with which we are now concerned is whether upon the allegations in the complaint the *feme* plaintiff, the mother of the deceased child, has a cause of action. . . . (p. 628). Our conclusion is that the father's relation to the child and the consequent duties imposed upon him by the law, some of which have been enumerated, are of such character as to clothe him with a preferential right of action, and that the judgment should be affirmed." On demurrer by defendants in the court below, "The court sustained the

demurrer as to *feme* plaintiff's alleged cause of action and overruled it as to the cause stated by C. H. Stephenson." To this the plaintiff excepted and assigned error and appealed to the Supreme Court. The judgment of the court below was affirmed.

In *Bonaparte v. Funeral Home,* 206 N. C., 652, it is settled in this jurisdiction that a wife has the right to possession of the dead body of her husband and may recover punitive damages for its wrongful detention.

In the present case the demurrer against the plaintiff J. W. Morrow, father of the mutilated son, was sustained and he did not appeal. As the cause now stands, therefore, this is an action by two minor children of deceased in which they claim damages for the mutilation of the body of their father. J. W. Morrow has been duly appointed next friend of Carl Morrow and Itasca Morrow, and the complaint alleges that "Carl Morrow and Itasca Morrow are the minor children of the said Robt. Morrow."

The *second* question presented by defendant: "Should the complaint allege that the plaintiffs, children of the decedent, are the only children left by said decedent, and should it further allege that there was no widow who could bring the action at the time of the alleged mutilation?"

We think the allegations of the complaint, liberally construed, would imply that they are the only children left by decedent, Robert Morrow—a reasonable inference. This phase of the demurrer is too technical and attenuated. We do not think that it was necessary to allege that there was no widow who could bring the action at the time of the alleged mutilation. The defendants further contend: "If the action has to be brought by the widow, if she is alive, or not divorced, it is not necessary for the plaintiffs to allege and prove her death or divorce, and further allege that they are the only children of decedent, in order to maintain a cause of action? We think this is jurisdictional, and without an allegation of the kind the action cannot be maintained, and hence the demurrer should have been sustained *in toto.*" We cannot so hold. We think that this would be a "speaking demurrer."

McIntosh, N. C. Practice and Procedure in Civil Cases, part sec. 436, p. 447, lays down the following rule: "A speaking demurrer is one which, as a ground of objection, states facts which do not appear in the pleading to which the demurrer is filed. This is not a demurrer, and will not be considered by the court. It is not the function of a demurrer to allege facts, and thereby challenge the validity of the opponent's claim, but to admit the truth of the facts alleged and question their legal sufficiency."

It nowhere appears upon the face of the complaint that the deceased had a wife surviving him, or that if she did survive, that they had been

divorced, or that she had not abandoned him and separated herself from him. Nor does it appear that the deceased left surviving him children other than the plaintiffs Carl Morrow and Itasca Morrow; this is a matter of special defense and not by speaking demurrer. *Brick Co. v. Gentry,* 191 N. C., 642; *Justice v. Sherard,* 197 N. C., 237.

"The rule stated and applied in most of the cases is that the defense of the real party in interest may only be made by affirmative allegation by the defendant." Clark on Code Pleading, p. 136; *Willey v. Cameron Michel Co.,* 217 App. Div., 651, 217 N. Y. S., 248. Mr. Pomeroy says on this subject: "The defense that the plaintiff is not the real party in interest is new matter. A general averment, however, to that effect, is not enough; the facts must be stated which constitute the defense, and which show that he is not the real party in interest." Pomeroy Remedies and Remedial Rights (5th Ed.), sec. 587; Maxwell on Code Pleadings, pp. 66-7; Phillips Code Pleadings (2d Ed.), sec. 348, p. 379; *Phœnix Bank v. Donnell,* 40 N. Y., 410.

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

Affirmed.

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REBECCA C. NALL v. R. B. McCONNELL, FRANK B. COOK, GEORGE B. BENSEL, AND HENRY ROBERTSON.

(Filed 24 February, 1937.)

**1. Judgments §§ 16, 22—**

A judgment in a special proceeding rendered less than ten days after service of summons is irregular, C. S., 753, but not void, and the judgment may not be attacked collaterally, but only by motion in the cause.

**2. Mortgages § 13b—Judgment appointing substitute trustee entered less than ten days from service of summons is irregular but not void.**

Judgment appointing a substitute trustee entered less than ten days after service of summons upon the trustor is irregular, C. S., 753, but not void, and such irregularity will not support an action, instituted some four years after such substitution, to set aside the foreclosure sale conducted by the substitute trustee, the trustor's remedy to correct such irregularity being by motion in the cause and the right to complain being barred by laches.

**3. Judgments § 16: Process § 1—Summons in this proceeding for appointment of substitute trustee held to give trustor sufficient notice.**

A summons in a proceeding for the appointment of a substitute trustee which commands the trustor to appear and answer the petition of the *cestui que trust* and show cause why a trustee should not be appointed in the stead of the original trustee in the deed of trust referred to in the petition filed, *is held* to give full notice to the trustor and to sufficiently

comply with the statutory provision that the summons must state in substance that if defendant fails to answer plaintiff would apply to the court for the relief demanded in the complaint, N. C. Code, 476, the petition filed being accessible to the trustor if she desired more information, and the trustor's contention that the judgment appointing the substitute trustee was void for failure of the summons to give the requisite notice is untenable.

**4. Pleadings § 18—The question of real party in interest may not be presented by demurrer.**

Where, in an action attacking the validity of a foreclosure sale, defendants file answer alleging that the substitute trustee who conducted the sale was duly appointed by the clerk upon petition in a special proceeding in which plaintiff trustor was served with summons, plaintiff's demurrer to the answer on the ground that the alleged appointment of the substitute trustee was void for that the personal representative of the deceased original trustee was not served with summons, N. C. Code, 2578, 2583, is bad as a "speaking demurrer."

APPEAL by plaintiff from order made by *Harding, J.*, at August Term, 1936, of MACON. Order dated 3 September, 1936. Affirmed.

The allegations of the complaint are to the effect that the plaintiff Rebecca C. Nall purchased a piece of land, about 22 acres, from the defendant R. B. McConnell. She paid part of the purchase price and made notes secured by deed of trust to A. W. Horn, trustee, to secure the deferred payments on same. That all of said notes are paid except the sum of $500. That the land in controversy was sold by Henry G. Robertson, alleged substitute trustee, on 5 January, 1932, and purchased by defendant George B. Bensel.

The plaintiff alleged, in substance, in her complaint: "That the defendants Cook and McConnell led her to believe that she would have more time in which to pay the balance; that plaintiff then went to Washington City, where she remained for a number of months, and upon her return found that her land had been advertised and sold by Henry G. Robertson, calling himself substituted trustee, the defendant A. W. Horn having died some time prior to the sale, or attempted sale, of the land under the deed of trust; and the plaintiff brought this action to recover the land, and alleged, in substance, that no title passed by the advertisement and sale under the deed of trust by Robertson, and that this was a void sale, and all that the defendants are entitled to is the balance of the purchase money in the sum of $500.00, and the interest on this amount."

The defendants set up an answer (amended) at length, pleading, in substance: (1) Estoppel by judgment; (2) equitable estoppel *in pais*.

The following judgment was rendered in the court below: "This cause came on to be heard at August Term, 1936, of Macon Superior Court, before his Honor, W. F. Harding, Judge presiding, upon the demurrer *ore tenus* of the plaintiff to the defendants' amended answer, the grounds

of the demurrer *ore tenus* being set out and filed with the pleadings. After having heard read the pleadings in this action and argument of counsel, the court is of the opinion that the demurrer *ore tenus* should not be sustained. It is therefore ordered and adjudged by the court that the plaintiff's demurrer be and the same is hereby overruled.

W. F. HARDING,
*Judge Presiding.*"

To the foregoing order and ruling of the court below the plaintiff excepted, assigned error, and appealed to the Supreme Court.

*Moody & Moody for plaintiff.*
*Jones & Jones for defendants.*

CLARKSON, J. 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. See *S. v. McCanless,* 193 N. C., 200 (206); *Bowling v. Bank,* 209 N. C., 463 (469).

On this record, for the purpose of this demurrer, we will only consider the plea of estoppel by judgment. On this aspect the demurrer of plaintiff cannot be sustained. The plaintiff's demurrer is based on several grounds:

(1) That the judgment appointing a substitute trustee was void for the reason that the statutory time for the running of the summons was not given. We cannot so hold. The alleged defect in the summons served on plaintiff in the petition before the clerk, of G. R. McConnell, owner of the unpaid note, to have a substituted trustee for A. W. Horn, deceased, is not well taken by the plaintiff. The summons is full and plenary. The summons served on plaintiff gave full notice to her of the purpose of the proceedings, and also in it made reference "in the petition filed." N. C. Code, 1935 (Michie), sec. 753, latter part, is as follows: "And provided further, that the summons in special proceedings shall command the sheriff or other proper officer to summons the defendant, or defendants, to appear and answer the complaint of the plaintiff within ten (10) days after its service upon defendant or defendants in

lieu of thirty (30) days, as required in civil actions." The summons was served on 11 November, 1930; the judgment was signed 17 November, 1930.

The case of *Stafford v. Gallops,* 123 N. C., 19, is a suit involving the appointment of a substitute trustee where the original trustee had died. In this case the summons was served on 11 December, and judgment was taken on 19 December, 1891, and the defendants took the position that the judgment was void, as they had not had the 10-day notice required. The Court said, at pp. 23-34: "When the time between service and the return day of the summons is less than the time allowed by the Code, the clerk is not bound to dismiss the action, but should allow the time allowed by the Code to the defendant for an appearance. *Guion v. Melvin,* 69 N. C., 242. The object of service of process is to advise the defendant of the plaintiff's action, and that he must appear at the time and place named and make his defense, and in default therein judgment will be prayed. If he attends, as he should, he can defend on the merits or have irregularities corrected. Failing in this does not affect the jurisdiction or judgment as long as it stands unreversed. A service of four days notice, when the law requires five, is sufficient to support a justice's judgment. *Ballinger v. Tarvell,* 85 Am. Dec., 527; 1 Freeman, *supra* (1 Freeman on Judgments, 4th Ed.), sec. 126. Applying these principles to the present case, his Honor committed error in excluding the judgment of the clerk appointing a trustee. That judgment, although irregular, is valid until reversed or vacated by a direct action, and cannot be collaterally attacked."

"If a judgment is irregular, the remedy is by a motion in the case made within a reasonable time; if erroneous, the remedy is by appeal." *Finger v. Smith,* 191 N. C., 818 (820).

(2) "That said judgment was void for the reason that the summons failed to contain a notice stating in substance that if the defendants failed to answer, the plaintiff would apply to the court for the relief demanded in the complaint."

We have heretofore said that the summons gave full notice to plaintiff—we copy same:

"State of North Carolina, Macon County—*In re* A. W. Horn, Trustee: State of North Carolina: To the sheriff or other lawful officer of Macon County, greetings: You are hereby commanded to summon Rebecca C. Nall to be and appear before the undersigned clerk Superior Court of Macon County, at his office in the courthouse in Franklin, N. C., on Monday, 17 November, 1930, then and there answer the petition of G. R. McConnell and show cause why a trustee should not be appointed in the place and stead of A. W. Horn, trustee, deceased, in a certain deed of trust dated 1 October, 1925, and referred to in the petition filed.

This 10 November, 1930. Frank I. Murray, C. S. C.—A. W. Horn, Trustee. Rec'd 11 Nov., 1930. Served by delivering copy and reading notice, 11 November, 1930. C. I. Ingram, Sheriff—C. C. Potts, D.S."

N. C. Code, *supra,* sec. 476, in part, is as follows: "And must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint within the time specified the plaintiff will apply to the court for the relief demanded in the complaint; and must be dated on the date of its issue."

We think the summons substantially complied with the statute. The plaintiff could readily understand what the summons meant; if she needed more information, she could have examined the "petition filed." *Id certum est quod certum reddi potest.* That is certain which can be made certain. 2 Bl. Comm., 143; 1 Bl. Comm., 78; 4 Kent Comm., 462; Broom Max., 624.

This notice was served on 11 November, 1930. This action was not brought until years afterwards—the date of the summons does not appear; in the record the stipulation of counsel is as follows: "That the summons and organization of the court be not copied in this record." The complaint is "verified 10 August, 1934."

(3) That said judgment was void for the reason that the personal representative of the deceased trustee was not made a party to the action brought for the purpose of appointing a substitute trustee." We are not unmindful of N. C. Code, *supra,* secs. 2578 and 2583. We think the contention of plaintiff sets forth a "speaking demurrer." The question of real party in interest may only be made by affirmative allegations. *Morrow v. Cline, ante,* 254. The plaintiff was *sui juris* and had full notice and opportunity to be heard. It is unfortunate for her, but she lost by her laches.

For the reasons given, the judgment must be

Affirmed.

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J. W. COUNCIL, MARTHA A. COUNCIL, AND HELEN A. COUNCIL ANDREWS, v. GREENSBORO JOINT STOCK LAND BANK, C. E. FLEMING, J. H. BLOUNT, J. K. BLOUNT, AND F. L. BLOUNT.

(Filed 24 February, 1937.)

**1. Pleadings § 20—**

Upon demurrer the complaint must be liberally construed with a view to substantial justice between the parties, C. S., 535, and the demurrer should be overruled unless the complaint is wholly insufficient to state a cause of action, taking its allegations to be true and adopting every intendment in behalf of the pleader.

**2. Mortgages § 39g—Complaint held sufficient to allege cause against purchasers to set aside their deed from purchaser at foreclosure sale.**

The complaint, as amended, alleged in substance that the property was bought at the foreclosure sale by the secretary and treasurer of the corporate mortgagee acting in such capacity as an agent of the mortgagee, that he shortly thereafter conveyed to the mortgagee, constituting in effect a purchase of the property by the corporate mortgagee at its own sale, and that defendant purchasers took deed directly from the corporate mortgagee with a recited consideration of ten dollars and other valuable considerations, and that defendant purchasers took with express or implied knowledge of the facts, since the facts were matters of public record. *Held:* Defendant purchasers' demurrer to the complaint should have been overruled, since the complaint is not wholly insufficient to allege a cause of action against them to set aside their deed, leaving the question of whether plaintiffs can establish the allegations with competent proof to be determined on the trial.

APPEAL by plaintiffs from *Barnhill, J.*, at October Term, 1936, of EDGECOMBE. Reversed.

Action by mortgagors to recover land alleged to have been wrongfully sold under foreclosure.

Demurrer by defendants Blount was sustained by *Harris, J.*, with leave to amend. Amendment filed, and demurrer to amended complaint sustained by *Barnhill, J.*

Plaintiffs appealed.

*Bennett & McDonald for plaintiffs.*
*No brief filed for defendants.*

DEVIN, J. The defendants Blount demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action against them. The other defendants answered.

The effect of a demurrer is to admit the truth of all the material facts alleged, and every intendment is adopted in behalf of the pleader. The statute (C. S., 535) requires that the complaint be liberally construed with a view to substantial justice between the parties. *Ramsey v. Furniture Co.*, 209 N. C., 165.

To determine the correctness of the ruling of the court below, it is necessary to examine the complaint and amendment in the light of this rule.

The pertinent allegations are as follows:

"That on 14 July, 1924, the plaintiffs executed a mortgage to the defendant, the Greensboro Joint Stock Land Bank, securing a note of even date in the sum of $5,500, payable semiannually, the same to be due and payable on the first day of August, 1957.

"That thereafter, on 31 August, 1931, the defendant, the Greensboro Joint Stock Land Bank, attempted to foreclose said mortgage, and on

29 April, 1932, the said Greensboro Joint Stock Land Bank attempted to execute a deed by reason of said attempted foreclosure to C. E. Fleming, of Guilford County, North Carolina, upon a purported consideration of $4,000; that immediately thereafter, on 6 May, 1932, Book 268, page 450, the said C. E. Fleming attempted to transfer said property described in the mortgage above referred to to the Greensboro Joint Stock Land Bank.

"That on 8 January, 1934, the said defendant, the Greensboro Joint Stock Land Bank, attempted to transfer said property as described in the mortgage heretofore referred to to the defendants J. H. Blount, J. K. Blount, and F. L. Blount, of Pitt County, North Carolina.

"That the defendant C. E. Fleming, as the plaintiff is informed, believes, and so alleges, was and is connected with the defendant, the Greensboro Joint Stock Land Bank, and was at the time an official of said bank, to wit, secretary and treasurer, and acting in said capacity at the time he purchased said land at the foreclosure sale, and was acting as the agent of said bank. And the defendant, the Greensboro Joint Stock Land Bank, and the said C. E. Fleming conspired together to wrongfully obtain the lands and property of the plaintiffs, and that by reason of same said sale was fraudulent and voidable.

"That the sale by the Greensboro Joint Stock Land Bank to the defendants J. H. Blount, J. K. Blount, and F. L. Blount, for a consideration of $10.00 and other valuable consideration, is void, and that the said grantees knew or could have known by due diligence the defects in the mortgage and sale of said property and the circumstances under which the plaintiffs sold the property. That the said C. E. Fleming was an agent of the mortgagees in said mortgage, rendering said sale, as plaintiffs are informed, believe, and so allege, illegal, fraudulent, and voidable.

"That plaintiffs further allege that in the sale and transfer of the property herein referred to that the defect in the title was a matter of record, in that the records disclosed that the mortgage under which the land was sold did not specify the place of the sale, and that the purchaser at the sale, C. E. Fleming, was an officer of the defendant Greensboro Joint Stock Land Bank, and purchased said property at the mortgage sale and immediately thereafter transferred it to the mortgagee, the Greensboro Joint Stock Land Bank, which made the sale of property voidable at the option of the mortgagor, and that the defendants Blount purchased said property at a private sale direct from the mortgagee in the mortgage under which the property was sold. That said matters were of record in the office of the clerk of the Superior Court and the register of deeds of Edgecombe County, and the defendants Blount knew of the defects in said deed, or could have known by due diligence in

investigating the records, and took said property subject to the equity of the plaintiffs."

It will be noted that the material allegations of the complaint are that at the foreclosure sale the land was bought by the secretary and treasurer of the corporate mortgagee, and that this official was "acting in said capacity at the time he purchased said land at the foreclosure sale, and was acting as the agent of said bank," and that this official shortly thereafter conveyed the land to the mortgagee, which thus indirectly purchased at its own sale.

In the amendment to the complaint it is further alleged that the demurring defendants took their deed for the land direct from the mortgagee with knowledge of these facts, which were all matters of public record, and that their deed recited a consideration of ten dollars and other valuable considerations.

We conclude that the complaint is not so wholly insufficient that it can be overthrown by a demurrer. *Gibson v. Barbour,* 100 N. C., 192; *Hayes v. Pace,* 162 N. C., 288; *Owens v. Mfg. Co.,* 168 N. C., 397; *Morris v. Carroll,* 171 N. C., 761; *Roberson v. Matthews,* 200 N. C., 241; *Lockridge v. Smith,* 206 N. C., 174; *Shuford v. Bank,* 207 N. C., 428.

Whether the plaintiffs can sustain their allegations with competent proof is another matter.

The demurrer should be overruled, with leave to the defendants to answer.

Reversed.

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JAMES P. TOMBERLIN v. O. O. BACHTEL.

(Filed 24 February, 1937.)

**1. Contracts § 7d—Evidence on issue of illegality of slot machines held conflicting and directed verdict that contract relating thereto was void held error.**

Plaintiff instituted this action to recover for breach of contract by defendant under which plaintiff was entitled to have a certain percentage of the receipts collected by him from defendant's slot machines applied to the purchase of an interest in the business by plaintiff, plaintiff alleging that defendant disposed of the machines without accounting to plaintiff for the percentage of the receipts turned in by plaintiff on the purchase of the interest in the business. Plaintiff alone testified as to the method of operation of the machines, and stated that the machines were called marble game tables and explained the method of operation and testified that the machines did not pay off in money, but only in checks to be put back in the machine, and that if the ball went in certain holes in the table the player would be entitled to free shots. *Held:* The testimony is

susceptible of the inference that the machines were unlawful in the light of chs. 37 and 282, Public Laws of 1935, as interpreted by the Court, and a peremptory instruction that if the jury believed the witness to find that the contract sued on was not void as a contract relating to illegal slot machines, *is held* for error.

**2. Trial § 19—**

Where portions of the testimony of a material witness are inconsistent or contradictory, and permit more than one inference to be drawn therefrom, it is a matter for the jury to decide which view of the evidence should be accepted.

**3. Appeal and Error § 46—**

Where a new trial is awarded on one exception, other exceptions relating to matters which may not arise on a subsequent hearing need not be determined.

APPEAL by defendant from *Phillips, J.*, at December Term, 1936, of BUNCOMBE. Modified and affirmed.

This was an action to recover damages for breach of contract relative to the ownership and operation of certain slot machines or amusement devices, instituted in the general county court of Buncombe County.

From judgment on the verdict in the general county court the defendant appealed to the Superior Court, assigning errors.

In the Superior Court all of defendant's assignments of error were sustained and the cause was remanded to the general county court for judgment dismissing the action.

From the judgment of the Superior Court the plaintiff appealed to the Supreme Court.

*DuBose & Orr for plaintiff, appellant.*
*Jones & Ward for defendant, appellee.*

DEVIN, J. The determinative question involved in this appeal is presented by defendant's contention that the machines, about the operation and ownership of which the parties contracted, were gambling devices, and illegal, and that an action to recover profits therefrom could not be maintained.

The issue on this phase of the case, submitted to the jury in the general county court, was as follows: "Was the contract sued on illegal in that it constituted a gambling transaction, as condemned by law?" Upon this issue the judge of the county court charged as follows: "If you believe the testimony of the witness and find the facts to be as all the evidence tends to show, you would answer the issue 'No.'"

Exception to this charge was sustained by the judge of the Superior Court.

The only witness as to the character and method of operation of the slot machines was the plaintiff. The pertinent portions of this testimony on this point were as follows: That he worked with defendant first as employee and then as partner, receiving a percentage of the gross collections from the machines in Asheville and Western North Carolina; that he looked after the machines, checked them up and kept them running; that defendant owned the machines and had charge of buying and selling them; that by the terms of the contract plaintiff retained ten per cent of his collections from the machines, and fifteen per cent thereof was put back in the business until defendant received sufficient amount to entitle plaintiff to one-half interest in the machines and the business; that this contract for a share in the business was made 5 October, 1935, and continued until August, 1936, when defendant breached the contract, disposed of the machines, and failed to account to plaintiff; that the gross collections taken in by plaintiff during the period was about fourteen thousand dollars, which was turned over to defendant, less ten per cent, fifteen per cent of the collections being the amount contributed to the purchase of an interest in the business. The plaintiff further testified:

"Those are machines where you pull a spring and a ball shoots around and falls in a hole; it is called a marble game table; by placing a nickel in the slot you were entitled to shoot a different number of balls; they would shoot these one at a time by pulling a plunger; the plunger was attached to a spring, you pulled the plunger and the ball rolled around and rolled down and fell in one hole or another. They didn't pay off any money, it was a skill game, but no machine ever paid any money. You got free shoots if it fell in certain holes. It was skill. That is the right principle. Couldn't say which hole it would fall in. If it fell in certain holes it paid off checks, pay-off checks to be put back in the machines.

"He told me a decision of the Supreme Court was handed down—he didn't say he wasn't going to operate until he told me that day he quit. He didn't come to me and tell me it was a violation of law—he said when the Supreme Court ruled; I quit along with him. When the Supreme Court ruled that decision the police department quit it. Mr. Bachtel didn't tell me about the Supreme Court (interrupted). I brought the machines in under Mr. Bachtel's orders; that is when the Supreme Court decision came down; me, Mr. Bachtel, and nobody else wasn't going to run any machines after that. I wouldn't run the machines after the decision came down. I am not blaming Mr. Bachtel for quitting when I wouldn't run the machines myself after the Supreme Court decision. Under the law I am not denying that Mr. Bachtel had to quit. I don't know that he had to quit. They are running machines

here in Asheville now that are lawful. We quit running the machines when the Supreme Court decision came down but they are running them lawfully. I quit. I didn't say we were going to quit running and not run them any longer. We stopped on account of the police department and the Supreme Court decision. There wasn't anything said about running the machines longer, and the reason we stopped running these machines was on account of the decision of the law about it."

By chapters 37 and 282, Public Laws of 1935, it was made unlawful to own, possess, permit the operation of, or to make, any agreement with reference to slot machines as therein defined. And an unlawful slot machine was defined as one adapted to use in such a way that, by the insertion of a coin, the device could be operated so that, by reason of chance, the outcome of the operation was unpredictable, and the user or operator might receive or become entitled to receive money, thing of value, or any check, token, or memorandum which could be exchanged for thing of value, or the user might secure additional chances or rights to use such machine. *S. v. Humphries,* 210 N. C., 406.

In the light of these statutes as interpreted by this Court it is apparent that the testimony of the plaintiff is susceptible of the inference that the machines, about the operation of which he contracted, were unlawful and his contract unenforceable. *King v. Winants,* 71 N. C., 469; *Pfeifer v. Israel,* 161 N. C., 409; *Basnight v. Manufacturing Co.,* 174 N. C., 206; *Marshall v. Dicks,* 175 N. C., 38.

Therefore, the exception to the peremptory instruction to the jury by the judge of the county court was properly sustained. On the other hand, we hold that the testimony presents some evidence that the machines were not unlawful.

Where portions of the testimony of a material witness are inconsistent or contradictory, and permit more than one inference to be drawn therefrom, it becomes a matter for the jury to decide which view of the evidence should be accepted. *Dail v. Taylor,* 151 N. C., 284; *Hamilton v. Lumber Co.,* 156 N. C., 519; *Poe v. Telegraph Co.,* 160 N. C., 315; *Hadley v. Tinnin,* 170 N. C., 84; *Smith v. Coach Co.,* 191 N. C., 589.

As there must be another trial upon the whole case, we deem it unnecessary to consider or to decide the other assignments of error, as they may not arise on another trial.

The plaintiff's assignment of error for failure to dismiss the appeal from the general county court cannot be sustained. The findings of the judge of the Superior Court on this point sustain his ruling.

The judgment of the Superior Court should remand the case to the general county court for a new trial in accord with this opinion.

Modified and affirmed.

SWEETHEART LAKE, INC., ARANSAS DEVELOPMENT COMPANY, AND EDWARD D. DUNLOP v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 24 February, 1937.)

**1. Electricity § 3—Power company may not require customer to repair transmission line as condition precedent to restoration of service.**

The facts disclosed by the admissions in the pleadings and at the trial were that defendant power company furnished plaintiff electricity over a four-mile transmission line extending from defendant's main transmission lines to the property of plaintiff, defendant making necessary repairs to the four-mile transmission line at its own expense; that after the suspension of service for good cause, defendant refused to restore service unless plaintiff repaired the four-mile transmission line at plaintiff's expense. *Held:* Upon the facts appearing of record, defendant's refusal to restore service upon the payment of all charges for service, unless plaintiff also repaired the four-mile transmission line, was wrongful.

**2. Same—Customer is entitled to restoration of electric service after suspension without first obtaining an order from Utilities Commission.**

Where a power company furnishes electricity to a customer for years, and then the service is discontinued for nonpayment of charges, the customer, upon payment of all charges for service, is entitled to have the service restored without first obtaining an order to that effect from the Utilities Commission, the power company not having obtained an order from the Commission to discontinue the service under the provisions of N. C. Code, 1112 (32).

APPEAL by plaintiffs from *Pless, J.*, at May Term, 1936, of MOORE. Reversed.

This is an action to recover damages which were sustained by the plaintiffs and which resulted from the wrongful refusal of the defendant, a public service corporation, organized under the laws of this State, and engaged in the business of generating, distributing, and selling electricity for commercial and domestic use, as a public utility, to furnish to the plaintiffs on their property in Moore County, North Carolina, electricity for commercial and domestic use, in accordance with the request of the plaintiffs.

The action was begun in the Superior Court of Moore County on 30 October, 1935, and was heard at May Term, 1936, of said court.

After a jury had been impaneled and the pleadings read, the defendant demurred "to the jurisdiction of the court for that as a prerequisite to its cause of action, the plaintiffs were required to establish their right to service from the defendant before the State Utilities Commission, and that not having done so, this Court is without original jurisdiction in the matter."

The facts, as shown by admissions in the pleadings and at the trial, are as follows:

1. The plaintiffs own certain properties, real and personal, located in Moore County, North Carolina, about four miles from the main transmission lines of the defendant. The said properties were designed for use and were used by the plaintiffs, prior to 1 May, 1931, as a resort for the public. Such use required electricity, for both power and lighting.

2. From about 10 July, 1924, to about 1 May, 1931, the defendant furnished to the plaintiffs on their said property electricity for both power and lights, using for this purpose a line which extended from its main transmission lines to said property, a distance of about four miles. Meters were installed by the defendant at the end of said line on the properties of the plaintiffs and from time to time the defendant made necessary repairs to said line at its own expense.

4. On or about 1 May, 1931, the defendant suspended its service to the plaintiffs because of the failure of the plaintiffs to pay service charges due to the defendant at that date. While such service was suspended, the defendant notified the plaintiffs that it would not renew such service to the plaintiffs unless and until the plaintiffs, at their own expense, made certain repairs to the line extending from its main transmission lines to the properties of the plaintiffs. Thereafter, on or about 1 November, 1931, the plaintiffs paid to the defendant all sums due the defendant for service rendered to the plaintiffs by the defendant prior to 1 May, 1931, and requested the defendant to renew said service over said line. The defendant refused to renew such service unless and until the plaintiffs, at their own expense, made necessary repairs to the line extending from its main transmission lines to the property of the plaintiffs.

5. The plaintiffs, by petition, instituted a proceeding before the North Carolina Corporation Commission for an order requiring the defendant to renew its service to the plaintiffs. The defendant filed an answer to the said petition. The proceeding pended before the commission until some time in December, 1932, when it was dismissed by the Commission because of the failure of the petitioners or the respondent to prosecute the same. No further proceeding has been instituted before the Corporation Commission or before its successor, the Utilities Commission, to determine the rights of the plaintiffs and the defendant with respect to the matters in controversy between them.

On these facts, the court was of opinion that the Superior Court of Moore County is without jurisdiction to hear and determine the action, and accordingly sustained the demurrer of the defendant.

From judgment that plaintiffs recover nothing of the defendant by this action, and that defendant recover of the plaintiffs its costs, the plaintiffs appealed to the Supreme Court, assigning error in the judgment.

*H. F. Seawell, Jr., for plaintiffs.*
*U. L. Spence, W. D. Sabiston, and A. Y. Arledge for defendant.*

CONNOR, J. If on the facts admitted in the pleadings and at the trial of this action, the plaintiffs had a legal right to the service which they requested of the defendant, the Superior Court of Moore County had original jurisdiction of the cause of action alleged in the complaint, and there is error in the judgment, in effect, dismissing the action; on the other hand, if the plaintiffs had no legal right to such service, in the absence of an order of the Utilities Commission requiring the defendant to furnish such service to the plaintiffs, upon such terms as the said Commission shall have determined, there is no error in the judgment, and the same should be affirmed.

We are of opinion that on the facts appearing in the record the plaintiffs had a legal right to the service which they requested of the defendant, and that the refusal of the defendant to furnish such service at the request of the plaintiffs was wrongful, because such refusal was a breach of a duty which the defendant owed to the plaintiffs, whether contractual or statutory. For that reason, the judgment in this action must be reversed.

When a public service corporation, engaged in business as a public utility, has furnished service to a customer through a period of years, the customer is entitled to a continuance of such service, or in the event of a temporary suspension of such service, for good cause, to its restoration, without having first obtained an order to that effect from the State Utilities Commission. In such case, the public service corporation has no legal right to refuse to continue or to restore such service without having first obtained an order to that effect from the State Utilities Commission. It is provided by statute that "upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a utility realizing sufficient revenue from the service to meet its expenses, the Commission shall have power, after petition, notice, and hearing, to authorize by order any utility to abandon or reduce its service or facilities." Sec. 32, ch. 307, Public Laws of N. C., 1933; N. C. Code of 1935, sec. 1112 (32).

The judgment in this action is

Reversed.

ORCHARD SCENIC DEVELOPMENT COMPANY v. BON MARCHE.

(Filed 24 February, 1937.)

**1. Mortgages § 42—Lessee of mortgagor held entitled to unfixed chattel as against purchaser at foreclosure sale.**

The owners of a building executed a deed of trust on same, "together with all engines, boilers, . . . all heating apparatus, . . . and all fixtures of every description belonging to the mortgagors." Thereafter a lessee of the *cestuis* bought and installed an Iron Fireman Stoker for use in connection with the heating plant. The deed of trust was foreclosed, the property being described in the identical terms used in the deed of trust. It was found as a fact that the stoker was complete in itself and could be removed without injury to the freehold, and plaintiff purchaser abandoned any contention that it was a fixture. *Held:* Since the stoker was not covered by the deed of trust and was not affixed to the realty, the lessee is entitled to remove same as against the grantee of the purchaser at the sale, nor is the lessee estopped to assert its claim by failing to assert title at the sale and give notice of its claim, since only property "belonging to said mortgagors" was sold under the foreclosure, and since it was found as a fact that no officer or agent of the lessee made any representation in regard to the ownership of the stoker.

**2. Estoppel § 6c—**

A lessee, owning an unfixed chattel in the building, is not estopped from asserting ownership as against the purchaser at the sale under foreclosure by failing to assert title at the sale when the description of the property at the sale covers only property "belonging to the mortgagors" and does not include the lessee's chattel.

APPEAL by plaintiff from *Phillips, J.*, at November Term, 1936, of BUNCOMBE.

Civil action to restrain removal of Iron Fireman Stoker from Bon Marche building in Asheville.

The essential facts as found by the general county court follow:

1. On 14 February, 1929, Morris Lipinsky and wife executed deed of trust in favor of Northwestern Mutual Life Insurance Company on the Bon Marche building in Asheville, "together with all engines, boilers, . . . all heating apparatus, . . . and all fixtures of every description belonging to said mortgagors," etc.

2. The Iron Fireman Stoker was purchased and installed in August, 1929, by the Bon Marche, Inc., a tenant under lease from Morris Lipinsky and wife. This stoker is a mechanical device, used for heating the boiler in said building, complete within itself, and can be removed without injury to the freehold. It was never the property of the owners of said building.

3. In 1935, the deed of trust above mentioned was foreclosed in equity, the property sold being described in the exact terms used in the deed of

trust. The tenant, Bon Marche, Inc., filed an answer in said action, but raised no issue as to the title to the Iron Fireman Stoker. The Northwestern Mutual Life Insurance Company became the purchaser at said sale, and in 1936 sold the property, so acquired, to the Orchard Scenic Development Company, plaintiff herein.

4. In purchasing said property, "the plaintiff relied upon the judgment of the Superior Court and the title acquired from the commissioner, reasonably believing and did believe that it was purchasing and obtaining thereunder the Iron Fireman as a part of the heating apparatus connected with the aforesaid Bon Marche building. However, no officer or agent of the Bon Marche, Inc., ever at any time made any representation regarding the ownership of said Iron Fireman, or discussed the same in any way with the plaintiff or any officer or agent of the plaintiff."

5. On the hearing, the plaintiff abandoned any contention that the Iron Fireman was a fixture or had become a part of the realty.

Upon these, the facts chiefly pertinent, there was judgment for the plaintiff in the general county court, which was reversed on appeal to the Superior Court.

From this latter judgment the plaintiff appeals, assigning error.

*J. W. Pless for plaintiff, appellant.*
*Adams & Adams for defendant, appellee.*

STACY, C. J. With the finding that the Iron Fireman in question was not covered by the deed of trust and the further concession that it never became a fixture, or a part of the realty, *Springs v. Refining Co.*, 205 N. C., 444, 171 S. E., 635, it follows that the tenant's right to remove the same can only be denied, if at all, on the principle of estoppel, *Bank v. Winder*, 198 N. C., 18, 150 S. E., 489, which is here negatived by the finding that "no officer or agent of the Bon Marche, Inc., ever at any time made any representation regarding the ownership of said Iron Fireman, or discussed the same in any way with the plaintiff or any officer or agent of the plaintiff."

It is true that where one stands by and without protest suffers his property to be sold to an innocent purchaser, it is but meet that thereafter he should be estopped from denying the title acquired at said sale. *McNeely v. Walters, ante*, 112; *Sugg v. Credit Corp.*, 196 N. C., 97, 144 S. E., 554; *Trust Co. v. Wyatt*, 191 N. C., 133, 131 S. E., 311; *Upton v. Ferebee*, 178 N. C., 194, 100 S. E., 310; *LeRoy v. Steamboat Co.*, 165 N. C., 109, 80 S. E., 984; *Holmes v. Crowell*, 73 N. C., 613; *Armfield v. Moore*, 44 N. C., 158. "What I knowingly induce my neighbor to regard as true is the truth as between us, if he has been misled to his injury by my asseveration or conduct"—*Walker, J.*, in *Boddie v.*

*Bond,* 154 N. C., 359, 70 S. E., 824. In the instant case, however, there is no contention that the Iron Fireman was covered by the deed of trust, or that it was offered for sale by the commissioner. Only the property "belonging to said mortgagors" was sold under the foreclosure. Hence, the doctrine of estoppel would seem to be inapplicable.

The case of *Bank v. Planting and Refining Co.,* 107 La., 650, quite similar in many respects to the one at bar, is distinguishable by reason of the fact that there "the opponent stood by and without protest suffered these movables to be thus sold."

On the record, the judgment of the Superior Court appears to be correct.

Affirmed.

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RUTH BROOKS v. WASHINGTON NATIONAL INSURANCE COMPANY.

(Filed 24 February, 1937.)

**1. Insurance § 34a—Evidence held for jury on issue of whether disease causing disability was chronic within terms of policy limiting liability.**

The policy in suit provided monthly disability benefits of $30.00, but stipulated that if the disease causing disability were chronic, insurer's liability should be limited to two monthly payments per year. The evidence tended to show that insured was disabled for a period of five months, which disability was caused by pulmonary tuberculosis, and there was evidence that the disease causing the disability was and is chronic. *Held:* Under the terms of the policy insurer could recover only two months disability benefits if the jury should find from the evidence that the disease causing the disability was and is chronic, and it was error for the trial court to peremptorily instruct the jury that insurer was entitled to recover disability benefits for the five months sued for.

**2. Appeal and Error § 46—**

Where a new trial is awarded on one exception, exceptions relating to matters not likely to arise on a subsequent hearing need not be considered.

APPEAL by defendant from *Phillips, J.,* at August Term, 1936, of BUNCOMBE. New trial.

This is an action to recover on a policy of insurance. The action was begun in a court of a justice of the peace of Buncombe County. From an adverse judgment of said court the plaintiff appealed to the Superior Court of said county.

At the trial in the Superior Court the defendant admitted the issuance of the policy sued on to the plaintiff, and its liability to her under its provisions. The controversy between the parties involved only the amount which the plaintiff is entitled to recover of the defendant in this action.

The policy provides that subject to its provisions the defendant shall pay to the plaintiff a monthly indemnity of $30.00, for such time as the plaintiff shall be totally and continuously disabled because of disease from performing duties pertaining to her occupation. It further provides that "if such disability or other loss is due, directly or indirectly, wholly or in part, to hernia or such disease or illness which has become chronic, the company's liability in any one policy year shall be limited to two months indemnity at the rate of monthly indemnity hereinbefore specified."

There was evidence tending to show that plaintiff became ill on 28 July, 1935, and that she has been ill continuously since that date; that her illness was pulmonary tuberculosis, and that by reason of said disease she was totally disabled to perform the duties pertaining to her occupation from 28 July, 1935, to 28 December, 1935—a period of five months.

The plaintiff contended that under the provisions of the policy she is entitled to recover of the defendant a monthly indemnity of $30.00 from 28 July, 1935, to 28 December, 1935, to wit: $150.00, less the premiums due on said policy for 5 months, to wit: $9.50.

There was evidence offered by the defendant tending to show the disease from which plaintiff suffered, and which resulted in her disability, was and is chronic.

The defendant contended that under the provisions of the policy the plaintiff is entitled to recover of the defendant a monthly indemnity for only two months, to wit: $60.00, less the premiums due for said two months, to wit: $3.80.

The issues submitted to the jury were answered as follows:

"1. Was the policy of health and accident insurance, No. 979,438, issued to the plaintiff by the defendant, in force from 28 July, 1935? Answer: 'Yes.'

"2. Was the plaintiff Ruth Brooks totally disabled from illness and confined to her bed, and daily attended by a physician from 28 July, 1935, to 28 December, 1935? Answer: 'Yes.'

"3. If so, in what amount, if any, is the defendant indebted to the plaintiff under and by reason of the policy No. 979,438, for the period from 28 July, 1935, to 28 December, 1935? Answer: '$140.50.'"

From judgment that plaintiff recover of the defendant the sum of $140.50, and the costs of the action, the defendant appealed to the Supreme Court, assigning numerous errors in the trial.

*W. F. Toms for plaintiff.*

*J. Laurence Jones and James S. Howell for defendant.*

CONNOR, J. At the trial of this action the court instructed the jury with respect to the third issue as follows:

"The court charges you that if you find the facts to be as the evidence tends to show—that is, the evidence of the plaintiff and of the defendant—you will answer the third issue '$140.50.'"

The defendant excepted to this instruction and on its appeal to this Court assigns same as error. The assignment of error is sustained. The defendant is entitled to a new trial.

There was evidence tending to show that the disease from which the plaintiff suffered from 28 July, 1935, to 28 December, 1935, and which resulted in her disability, was and is chronic. If the jury shall so find, under the provisions of the policy and under proper instructions by the court, plaintiff is entitled to recover of the defendant a monthly indemnity of $30.00 for only two months, less the amount due the defendant as premiums on the policy.

It is needless to discuss other assignments of error on this appeal, or to decide the questions presented by said assignments. It is not likely that these questions will arise upon another trial.

The contentions of the parties arising on the evidence will doubtless be presented to the jury at the new trial, either by appropriate issues or by full instructions by the court on the issue involving the amount which plaintiff is entitled to recover of the defendant.

The defendant is entitled to a new trial. It is so ordered.

New trial.

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T. S. MUNDAY v. BANK OF FRANKLIN.

(Filed 24 February, 1937.)

**1. Banks and Banking § 9—**

The relationship of debtor and creditor exists between a bank and a guarantor of payment on a note payable to the bank, and the bank may apply the guarantor's deposit in a checking account to the note upon nonpayment at maturity by the maker.

**2. Limitation of Actions § 12a—**

The application by the payee bank of the checking deposit of the guarantor of payment of the note is a part payment repelling the bar of the statute of limitations.

**3. Appeal and Error § 39—**

A judgment will not be disturbed on appeal, even if partly erroneous, when the judgment is in conformity with the ultimate rights of the parties, since the litigants are interested in practical errors which result in harm and not in theoretical ones which produce no injury.

MUNDAY *v.* BANK.

APPEAL by plaintiff from *Harding, J.,* at August Term, 1936, of MACON.

Civil action to recover on contract.

The facts are these: Prior to 15 December, 1930, the defendant became indebted to the plaintiff in the principal sum of $1,452.38, represented by time certificate of $1,256.67 (reissued 30 October, 1931), and checking account of $195.71. On said date the defendant, being financially embarrassed, was allowed to operate only under restrictions, and continued under such restrictions until 14 February, 1934, when it again resumed its full status as a solvent banking institution. On 12 February, 1934, having in its possession a past-due note of $1,000, executed by C. L. Ingram and endorsed and "payment guaranteed at any time after maturity" by plaintiff, the same was set off and charged against plaintiff's account. Defendant admits its liability to plaintiff for the balance of said account.

The court, being of opinion that the defendant had the right to charge plaintiff's account with said note, upon which he was endorser and guarantor, before it was barred by the statute of limitations, so instructed the jury and gave judgment accordingly, from which the plaintiff appeals, assigning errors.

*J. N. Moody and George B. Patton for plaintiff, appellant.*
*Jones & Jones and G. L. Houck for defendant, appellee.*

STACY, C. J. It will be observed that the plaintiff was not only an endorser of the Ingram note, but also a guarantor. As such, the relation of debtor and creditor existed between him and the defendant, and under the decision in *Trust Co. v. Trust Co.,* 188 N. C., 766, 125 S. E., 536, the charge or credit was properly entered in respect of the checking account, if not the certificate of deposit, which would repel the bar of the statute of limitations, the only point in dispute, and ultimately end in the same result as the judgment entered below. Hence, the trial will not be disturbed. It is not after the manner of appellate courts to upset judgments when the action of the trial court, even if partly erroneous, could by no possibility injure the appellant. *Bechtel v. Weaver,* 202 N. C., 856, 164 S. E., 338; *Bank v. McCullers,* 201 N. C., 440, 160 S. E., 494; *Daniel v. Power Co., ibid.,* 680, 161 S. E., 210; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32; *Butts v. Screws,* 95 N. C., 215. Litigants are interested in practical errors which result in harm, not in theoretical ones which produce no injury. *White v. McCabe,* 208 N. C., 301, 180 S. E., 704; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *Brewer v. Ring and Valk,* 177 N. C., 476, 99 S. E., 358.

The pertinent decisions are to the effect that "a bank has the right to apply the debt due by it for deposits to any indebtedness by the de-

positor, in the same right, to the bank, provided such indebtedness to the bank has matured." *Hodgin v. Bank,* 124 N. C., 540, 32 S. E., 887, and cases there cited. See, also, *In re Bank of Sampson,* 205 N. C., 333, 171 S. E., 436; *Lumberton v. Hood, Comr.,* 204 N. C., 171, 167 S. E., 641; *Coburn v. Carstarphen,* 194 N. C., 368, 139 S. E., 596; *Moore v. Bank,* 173 N. C., 180, 91 S. E., 793; *Davis v. Mfg. Co.,* 114 N. C., 321, 19 S. E., 371; *Adams v. Bank,* 113 N. C., 332, 18 S. E., 513.

Had the plaintiff been simply an endorser, and not a guarantor of the Ingram note, a different question might have arisen. *Harrison v. Harrison,* 118 Ind., 179, 20 N. E., 746, 4 L. R. A., 111; 3 R. C. L., 591. However, we make no present ruling on this question as it is unnecessary to do so.

The verdict and judgment will be upheld.

No error.

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STATE v. CLARSIA STIWINTER AND LEONARD WOOD.

(Filed 24 February, 1937.)

**1. Fornication and Adultery § 4—**

In this prosecution for fornication and adultery, the evidence, though largely circumstantial, *is held* sufficient to be submitted to the jury.

**2. Criminal Law § 77d—**

The record duly certified imports verity, and the Supreme Court is bound thereby. C. S., 643.

**3. Criminal Law § 32a—**

Although circumstantial evidence is a recognized instrumentality for the ascertainment of truth, where it is relied on for a conviction it must establish defendant's guilt to a moral certainty, and exclude every other reasonable hypothesis, and the instruction in this case on the question *is held* for error.

APPEAL by defendants from *Harding, J.,* at August Term, 1936, of MACON.

Criminal prosecution tried upon indictment charging the defendants with fornication and adultery.

Verdict: Guilty.

Judgment: Imprisonment for one year as to each defendant.

The defendants appeal, assigning errors.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*George B. Patton and J. N. Moody for defendants.*

STACY, C. J. Without undertaking to state the facts, which are largely circumstantial in character, it is enough to say the evidence offered by the prosecution is of sufficient probative value or force to sustain a conviction. The defendants did not testify.

Speaking to the effect of circumstantial evidence, the court instructed the jury that "the law does not require the State to offer evidence of facts which if established beyond a reasonable doubt will allow the jury to infer the act of intercourse." We are constrained to believe that this instruction has been erroneously reported, but it is here in a record duly certified, C. S., 643, which imports verity, and we are bound by it. *S. v. Brown,* 207 N. C., 156, 176 S. E., 260; *S. v. Lumber Co., ibid.,* 47, 175 S. E., 713; *S. v. Wheeler,* 185 N. C., 670, 116 S. E., 413.

Even though a *lapsus linguæ,* it constitutes one of the casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388; *S. v. Griggs,* 197 N. C., 352, 148 S. E., 547; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417.

Again, speaking to the value of circumstantial evidence, the court instructed the jury: "I have heard gentlemen of high character say they would not convict anybody on circumstantial evidence. . . . I reckon they are honest about it, but that sort of man is not a competent juror, . . . and if there is any one on the jury in this case who thinks that way, let me know and I will withdraw a juror and order a mistrial." The Attorney-General concedes that this expression is somewhat graphic and that the learned judge was perhaps warmer in his appreciation of circumstantial evidence than the case warranted at that stage of the trial. *S. v. Horne,* 171 N. C., 787, 88 S. E., 433. It is true that circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but also in many instances, quite essential to its establishment. *S. v. Coffey,* 210 N. C., 561, 187 S. E., 754; *S. v. McLeod,* 198 N. C., 649, 152 S. E., 895; *S. v. Plyler,* 153 N. C., 630, 69 S. E., 269. However, the rule is, that when the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the minds of the jurors a moral certainty of the defendant's guilt, and exclude any other reasonable hypothesis. *S. v. Newton,* 207 N. C., 323, 177 S. E., 184; *S. v. McLeod, supra; S. v. Melton,* 187 N. C., 481, 122 S. E., 17; *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625; *S. v. Goodson,* 107 N. C., 798, 12 S. E., 329; *S. v. Brackville,* 106 N. C., 701, 11 S. E., 284; *Rippey v. Miller,* 46 N. C., 479; 23 C. J., 49; 8 R. C. L., 225. See *S. v. Matthews,* 66 N. C., 106.

For the error as indicated, a new trial must be awarded. It is so ordered.

New trial.

MELLIE GAHAGAN v. A. W. WHITEHURST.

(Filed 24 February, 1937.)

**Mortgages § 37—Cestui may maintain action against trustee for accounting without introducing the note and deed of trust in evidence.**

Plaintiff, the *cestui que trust*, instituted this action against the trustee, contending that the trustee had foreclosed the deed of trust and had failed to apply the proceeds of the sale to the satisfaction of the note secured by the instrument. *Held:* Plaintiff's action is for an accounting of the proceeds of sale, and not an action on the note, and defendant's contention that plaintiff could not maintain the action without introducing the note and deed of trust in evidence is untenable.

APPEAL by plaintiff from *Phillips, J.*, at September Term, 1936, of MADISON. Reversed.

This was an action for an accounting, the complaint alleging that the defendant as the trustee in a deed of trust had sold land under foreclosure and had failed to account to the plaintiff, the *cestui que trust*, for the proceeds.

A compulsory reference was ordered, and, upon the coming in of the report of the referee, the plaintiff filed exceptions and asked for jury trial upon certain issues. When the action was heard in the Superior Court, at the conclusion of the evidence offered by plaintiff, defendant's motion for judgment of nonsuit was allowed.

From judgment dismissing the action plaintiff appealed.

*Calvin R. Edney and James E. Rector for plaintiff.*
*Jones & Ward, J. C. Ramsey, and J. H. McElroy for defendant.*

DEVIN, J. The plaintiff offered, without objection, evidence tending to show that she held a note in the sum of $12,600, given in 1925, for the purchase of 1,300 acres of land, and that this note was secured by a deed of trust on the land to the defendant Whitehurst as trustee. The plaintiff testified that she assigned, by endorsement on the note, certain proportionate interests in said note to two other persons; that thereafter, in 1932, following a conference between her and the defendant, it was decided that the land be sold to the United States Government for $3.50 per acre, or $4,550, the defendant agreeing to see that this amount was realized from the sale, and the defendant was requested to foreclose the deed of trust. Thereupon the Citizens Bank, of which defendant was cashier, bid in the land at the sale and conveyed title to the United States in accordance with the agreement. Since then, the plaintiff testified, the defendant trustee has failed, after demand, to account to her for

her proportionate part of the amount realized from the sale of the land. She says this would be $3,198.76.

Plaintiff further testified that she delivered the note to the defendant, and that it had been in the Citizens Bank and she had never gotten the paper back. She did not offer in evidence the note and deed of trust, though available.

The court below was of opinion that it was incumbent upon the plaintiff, in order to make out her case, to offer the note and deed of trust in support of her claim, and based his ruling in sustaining the motion for nonsuit upon that ground. However, in the view we take of the case, it was not necessary that this be done. The plaintiff was not suing on the note, but instituted this action against the trustee who foreclosed the deed of trust for an accounting of the proceeds of the sale. *Carden v. McConnell,* 116 N. C., 875; *Belding v. Archer,* 131 N. C., 287; *Ledford v. Emerson,* 138 N. C., 502; *Miles v. Walker,* 179 N. C., 479; *Hall v. Giessell,* 179 N. C., 657. Her evidence, therefore, was sufficient to have entitled her to go to the jury upon the issues raised, and there was error in sustaining the motion to nonsuit.

Reversed.

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R. S. JONES, ADMINISTRATOR, v. ELOISE G. FRANKS, MARGARET FRANKS, KATHERINE HENRY, AND FRANK L. HENRY.

(Filed 24 February, 1937.)

**Wills § 33c—Remainder to "heirs" held to vest at time of testator's death and not death of life tenant.**

Testator left certain realty to his wife for life, "the same to revert to and become the property of my heirs in equal proportion under the rules of descent at the death of my said wife." *Held:* The words "my heirs" have a definite legal significance, and the remainder vested in the heirs as of the time of the death of the testator, and upon the death of a son of the testator prior to the death of testator's widow, the lands so devised to the son belong to his estate as against his children him surviving.

APPEAL by plaintiff from *Harding, J.,* at November Term, 1936, of MACON. Reversed.

Petition by plaintiff as administrator of estate of Sam F. Franks, deceased, to sell land to create assets to pay debts of the decedent, heard upon agreed statement of facts as to the right to the proceeds from the sale of certain lots.

From judgment that plaintiff as administrator was not entitled to the proceeds from sale of said lots, plaintiff appealed.

*Gilmer A. Jones for plaintiff.*
*G. L. Houck for defendants.*

DEVIN, J. The decision of this appeal turns upon the construction of the will of E. H. Franks, the father of plaintiff's intestate. This will contained the following provision: "I give, devise, and bequeath to my beloved wife, Ellen Franks, my two storehouses and lots on Main Street, in the town of Franklin, and my dwelling house and lot, also on Main Street in the town of Franklin, for and during the term of her natural life, and no longer. The same to revert to and become the property of my heirs in equal proportion under the rules of descent at the death of my said wife."

E. H. Franks died in 1929, and was survived by his widow, Ellen Franks, and by several children, one of whom was Sam L. Franks. Sam L. Franks died in 1933, leaving surviving him his widow, the defendant Eloise G. Franks, and two daughters, the defendants Margaret Franks and Katherine Henry. Ellen Franks, the widow of E. H. Franks and the life tenant under the quoted clause of the will, died in 1934.

The question presented is whether the ultimate takers under the will of E. H. Franks, designated as "my heirs," are to be ascertained at the death of the testator or at the death of the life tenant.

The appellees contend that the latter view should be adopted, and that Sam L. Franks being dead at the time of the death of Ellen Franks, his children took as heirs of E. H. Franks under the provisions of the will, and they contend that the language of the devise "the same to revert to and become the property of my heirs . . . at the death of my wife" indicates a testamentary intention to that effect.

But we conclude that this interpretation should not be held to prevail against the controlling effect to be given the use of the words "my heirs." These words have a definite legal significance, and their meaning here must be interpreted to designate those who answered to that description at the time of the death of the testator. This case falls within the rule laid down in *Witty v. Witty*, 184 N. C., 375, and the authorities there cited. *Westfeldt v. Reynolds*, 191 N. C., 802; *Trust Co. v. Stevenson*, 196 N. C., 29; *Stephens v. Clark, ante*, 84.

Upon the facts agreed, the administrator of Sam L. Franks is entitled to the proceeds of the sale of the land in the hands of the clerk as assets for the payment of the debts of said estate.

Reversed.

CLIFTON R. DAIL v. M. S. HAWKINS ET AL.

(Filed 24 February, 1937.)

**1. Judgments § 22—**

An order of abatement is improperly set aside upon motion in the cause even if the order is erroneous if it were entered in accord with the course and practice of the court, the sole remedy against an erroneous judgment being by appeal or *certiorari*.

**2. Judgments § 25—**

An irregular judgment is one entered contrary to the course and practice of the court.

**3. Judgments § 27—**

An erroneous judgment is one entered contrary to law.

**4. Courts § 3—**

A judge of the Superior Court may not vacate a prior order of another judge on the Superior Court for error of law, since no appeal lies from one Superior Court to another.

**5. Judgments § 23—**

Presence of counsel for a party when a plea is heard precludes such party from asserting excusable neglect upon his motion to set aside the court's order entered upon the plea. C. S., 600.

APPEAL by defendants from *Barnhill, J.*, at October Term, 1936, of WASHINGTON.

Motion to vacate order of abatement.

At the January Term, 1936, *Harris, J.*, presiding, an order of abatement was entered in the instant cause, it appearing that in another action brought by George W. Harrison against the defendants herein for damages arising out of the same crossing collision, the present plaintiff had been made a party defendant to said action, by order of court, and had duly filed answer therein.

Upon motion duly heard at the October Term, 1936, the order of abatement entered at the January Term was vacated upon the dual ground of (1) irregularity and (2) excusable neglect.

Defendants appeal, assigning error.

*E. L. Owens and H. S. Ward for plaintiff, appellee.*

*Z. V. Norman and McLean & Rodman for defendants, appellants.*

STACY, C. J. Conceding, without deciding, that the order of abatement rendered at the January Term may have been erroneous, and therefore correctable by appeal, *Moore v. Packer*, 174 N. C., 665, 94 S. E., 449, still it is not perceived wherein it was irregularly entered. *Fowler v. Fowler*, 190 N. C., 536, 130 S. E., 315; *Roberts v. Allman*,

106 N. C., 391, 11 S. E., 424. An irregular judgment is one entered contrary to the course and practice of the court, *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283; *Finger v. Smith,* 191 N. C., 818, 133 S. E., 186; *Duffer v. Brunson,* 188 N. C., 789, 125 S. E., 619; *Carter v. Rountree,* 109 N. C., 29, 13 S. E., 716; McIntosh N. C. P. & P., 736, while an erroneous judgment is one entered contrary to law. *Harrell v. Welstead, supra; Finger v. Smith, supra; Bank v. Broom Co.,* 188 N. C., 508, 125 S. E., 12; McIntosh N. C. P. & P., 735. Relief from the former may be had by motion in the cause, upon proper showing of irregularity and merit, *Groves v. Ware,* 182 N. C., 553, 109 S. E., 568, while the latter is subject to review only by appeal or *certiorari, S. v. Moore,* 210 N. C., 686; *Hood, Comr., v. Stewart,* 209 N. C., 424, 184 S. E., 36; *S. v. Hollingsworth,* 206 N. C., 739, 175 S. E., 99; *Newton v. Mfg. Co.,* 206 N. C., 533, 174 S. E., 449. No appeal lies from one Superior Court to another. *S. v. Lea,* 203 N. C., 316, 166 S. E., 292; *Wellons v. Lassiter,* 200 N. C., 474, 157 S. E., 434.

Nor is it perceived upon what ground the finding of excusable neglect can be sustained. It appears from the judgment that Edward L. Owens, counsel for plaintiff, "was present when the said plea in abatement was heard." This precludes any idea of excusable neglect. C. S., 600; *Carter v. Anderson,* 208 N. C., 529, 181 S. E., 750; *Kerr v. Bank,* 205 N. C., 410, 171 S. E., 367; *Land Co. v. Wooten,* 177 N. C., 248, 98 S. E., 706; *Roberts v. Allman, supra.*

The rights of the plaintiff were not destroyed by the order of abatement. He is yet to be heard in the *Harrison case,* if so advised. He was made a party to said action upon defendants' allegation that the collision in question was due to his negligence, and he has been allowed to plead therein.

Error.

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STATE v. FRED HOLLAND AND HOWARD MOSES.

(Filed 24 February, 1937.)

**1. Criminal Law § 8—**

When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty.

**2. Criminal Law §§ 71, 80—Failure of affidavit to aver that it is in good faith is fatal defect not curable by amendment after statutory time.**

Where an affidavit for appeal *in forma pauperis* fails to aver that it is in good faith, it is fatally defective and is insufficient to support an order granting the appeal or to confer jurisdiction on the Supreme Court, the requirements of the statute, C. S., 4651, being mandatory and jurisdictional, and not directory, nor may the defect be cured by amendment after expiration of the ten-day period.

STATE *v.* HOLLAND.

APPEAL by defendant Howard Moses from *Harding, J.,* at October Term, 1936, of JACKSON.

Criminal prosecution, tried upon indictment charging the defendant, and another, with the murder of one Alvin Middleton.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in State's Prison for a term of ten years.

Defendant appeals.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*M. V. Higdon for defendant.*

STACY, C. J. The record discloses that on 5 August, 1936, the deceased was shot and killed by Fred Holland with a gun which belonged to the defendant Moses. The evidence as against the defendant Moses, who alone appeals, is sufficient to convict him as an aider and abettor in the commission of the crime. There was also a count in the bill charging him with being an accessory before the fact. C. S., 4175. Holland admitted the killing, was sentenced to fifteen years in the State's Prison, and has not appealed.

It is well established that when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Triplett, ante,* 105; *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323; *S. v. Jarrell,* 141 N. C., 722, 53 S. E., 127.

While we have examined the record and find no error appearing thereon, the defective affidavit upon which the defendant was allowed to appeal *in forma pauperis* necessitates its dismissal. *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734. The defendant does not aver in his affidavit, as required by C. S., 4651, that "the application is in good faith." *S. v. Smith,* 152 N. C., 842, 67 S. E., 965. The requirements of the statute are mandatory, *S. v. Marion,* 200 N. C., 715, 158 S. E., 406, and jurisdictional, *S. v. Parish,* 151 N. C., 659, 65 S. E., 762, "and unless the statute is complied with, the appeal is not in this Court, and we can take no cognizance of the case, except to dismiss it from our docket." *Honeycutt v. Watkins,* 151 N. C., 652, 65 S. E., 762.

We have held that there is no authority for granting an appeal *in forma pauperis,* without proper supporting affidavit, in either a criminal prosecution, *S. v. Moore,* 93 N. C., 500, or a civil action. *Lupton v. Hawkins,* 210 N. C., 658; *Powell v. Moore,* 204 N. C., 654, 169 S. E., 281; *S. v. Keebler,* 145 N. C., 560, 59 S. E., 872.

It appears that the defendant undertook to cure the defect by amending his affidavit on 8 January, 1937. This was too late, *Berwer v. Ins. Co.,* 210 N. C., 814, and the amendment was of no avail. *S. v. Parish,*

*supra; Powell v. Moore, supra.* One is permitted to appeal *in forma pauperis* only by complying with the mandatory and jurisdictional requirements of the statute, which are not subject to indulgences or waiver. *S. v. Moore, supra; S. v. Parish, supra; Berwer v. Ins. Co., supra.* Nor is this a harsh rule. It simply means that one who would avail himself of the benefits of the statute must comply with its terms. That is all. See *Pruitt v. Wood,* 199 N. C., 788, 156 S. E., 126.

Appeal dismissed.

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STATE v. JAMES McNEILL.

(Filed 24 February, 1937.)

**1. Criminal Law §§ 80, 83—**

Where defendant, convicted of a capital crime, fails to make out and serve his statement of case on appeal, the appeal will be dismissed on motion of the Attorney-General in the absence of error on the face of the record, but where the record discloses only error in the judgment, the case will be remanded for proper judgment.

**2. Criminal Law § 61—**

The punishment for a capital crime committed prior to 1 July, 1935, is death by electrocution, the statute substituting lethal gas being applicable only to crimes committed on and subsequent to that date. Ch. 294. Public Laws of 1935.

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

APPEAL by defendant from *Devin, J.,* at First September Term, 1935, of HARNETT. Remanded.

The defendant was tried on a bill of indictment for murder. There was a verdict against defendant of murder in the first degree and the judgment in the court below was that defendant should suffer death by the administration of lethal gas.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*No counsel for defendant.*

CLARKSON, J. This was a motion made by the Attorney-General and Assistant Attorney-General to docket and dismiss the appeal made by defendant on the ground that "the defendant has failed to serve any case on appeal within the time provided by law, and has failed to perfect the said appeal in the manner required by law." *S. v. Moore,* 210 N. C., 459, and *S. c.,* 686.

In *S. v. Laurence,* 210 N. C., 741 (741-2), is the following: "The prisoner, having failed to make out and serve statement of case on appeal, has lost his right to prosecute his appeal, and the motion of the State to docket and dismiss must be allowed. However, this being a case in which the life of the prisoner is involved, we have examined the record to see if any error appears on the face of the record. The examination reveals no error. *S. v. Williams,* 208 N. C., 352; *S. v. Kinyon, ante,* 294."

The defendant was convicted of murder in the first degree and the judgment of the court below, in part, was as follows: "It is therefore ordered and adjudged that the said prisoner, James McNeill, suffer for his crime the penalty of death as provided by law, and to that end—it is further ordered and adjudged that the sheriff of Harnett County, in whose custody the prisoner now is, forthwith convey to the State's Prison at Raleigh said prisoner, James McNeill, and deliver him to the warden of the said State's Prison, and said James McNeill shall there be safely held until 25 October, 1935, when and where, between the hours of 6 a.m. and 5:00 p.m., he, the said James McNeill, shall suffer death by the administration of lethal gas, in the manner now provided by statute, until said prisoner, James McNeill, is dead."

No error appears on the record except in the judgment. In the record it appears that the defendant killed and murdered Sudie Eason on 12 June, A.D. 1935. The statute that death by administration of lethal gas went into effect "from and after 1 July, 1935." Public Laws 1935, ch. 294. The case is remanded to the lower court in order that proper judgment may be imposed. *S. v. Hester,* 209 N. C., 99. *S. v. Dingle,* 209 N. C., 293, is on "all fours" with the present case.

For the reasons given, the case is

Remanded.

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

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F. B. INGLE v. LUCRETIA CASSADY.

(Filed 24 February, 1937.)

**Judgments § 33—**

Where the record supports the findings of the court that the allegations and evidence are substantially identical with those of a prior action nonsuited, and that the merits of the two causes are identical, judgment that the prior action constituted *res adjudicata* and dismissing the second action is proper. C. S., 415.

APPEAL by plaintiff from *Phillips, J.,* at November Term, 1936, of BUNCOMBE.

Civil action to recover damages for an alleged negligent injury.

After hearing the evidence, the trial court found as a fact "that the instant suit between the parties hereto is based substantially on identical allegations and substantially identical evidence as in the former case between the same parties hereto . . . that the merits of this cause of action are in substance and identically the same as in the former action," and thereupon held that the plaintiff was estopped to prosecute the present action by the judgment in the former suit, and dismissed the same.

Plaintiff appeals, assigning error.

*Ford, Coxe & Carter for plaintiff, appellant.*
*Harkins, Van Winkle & Walton for defendant, appellee.*

PER CURIAM. This is the "same candle blown out in the original action," *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562, "and lighted again in the present action." C. S., 415; *Loan Co. v. Warren,* 204 N. C., 50, 167 S. E., 494; *Motsinger v. Hauser,* 195 N. C., 483, 142 S. E., 589.

As the facts found by the trial court are supported by the record, *Batson v. Laundry Co.,* 209 N. C., 223, 183 S. E., 413, the judgment will be affirmed on authority of *Hampton v. Spinning Co.,* 198 N. C., 235, 151 S. E., 266, where it was said that "if upon the trial of the new action, upon its merits, . . . it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res adjudicata,* and thus end that particular litigation." The same rule was restated and followed in *Batson v. Laundry Co.,* 206 N. C., 371, 174 S. E., 90.

Affirmed.

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J. P. MERCER AND WILEY W. UPTON, INDIVIDUALLY AND PARTNERS, TRADING AS FARMERS SUPPLY COMPANY, v. NEW AMSTERDAM CASUALTY COMPANY.

(Filed 24 February, 1937.)

**Insurance § 48—Lienholder on truck damaged by third person held not entitled to enforce payment against third person's insurer.**

Plaintiffs held a lien on a truck damaged by the negligence of the driver of a truck belonging to a third person who carried indemnity insurance on his truck. Although insurer had notice of plaintiffs' lien and the owner of the negligently damaged truck had agreed that check be made payable

to him and plaintiffs jointly, insurer paid the owner of the truck, who failed to pay plaintiffs' lien from the proceeds. *Held:* Insurer was not a tort-feasor, nor obligated by its contract with the owner of the truck negligently causing the damage to pay lienholders on the truck negligently damaged, and plaintiffs are not entitled to enforce payment against insurer either in contract or in tort in the absence of fraud or collusion.

APPEAL by plaintiffs from *Small, J.*, at November Term, 1936, of PASQUOTANK. Affirmed.

At the conclusion of plaintiffs' evidence motion for judgment of nonsuit was allowed, and plaintiffs appealed.

*John H. Hall for plaintiffs.*

*S. Burnell Bragg and Thompson & Wilson for defendant.*

PER CURIAM. The evidence offered by plaintiffs tended to show a fact situation substantially as follows:

A motor truck owned by one M. C. Love was damaged as the result of a collision with a truck belonging to one J. S. Wiggins. The plaintiffs held a lien, by virtue of a registered conditional sales contract, on the Love truck. At the time of the injury Wiggins held a policy of insurance issued by defendant casualty company, indemnifying him against liability arising out of the operation of the Wiggins truck. A representative of the defendant, who was investigating the matter of the casualty company's liability under its policy and negotiating a compromise settlement thereof on behalf of Wiggins, in accordance with defendant's insurance contract with Wiggins, had a conversation with one of plaintiffs and was advised that plaintiffs held a lien on the Love truck, and with the consent of Love request was made that check for settlement of damages to the Love truck be sent to plaintiffs and Love jointly, the amount of damages being in excess of amount of plaintiffs' lien. To this request the representative of defendant made no reply.

Subsequently, defendant paid the amount of the damages for injury to the Love truck to Love, who executed release therefor. This amount Love used for his own purposes without repaying plaintiffs' debt.

Thereupon plaintiffs instituted their action to recover of defendant casualty company the amount of their debt against Love, which was secured by the conditional sales contract covering said truck.

Under the evidence presented in this case, can the plaintiffs maintain their action against the casualty company? The answer is "No."

The defendant's contract was with Wiggins. It was one of indemnity only. *Clark v. Bonsal,* 157 N. C., 270; *Scott v. Bryan,* 210 N. C., 478.

The evidence negatives the suggestion of a contract by the defendant to pay the amount of the damage to the plaintiffs, nor does it appear that

defendant's representative had authority to make such a contract. The defendant was not a tort-feasor. The defendant was under no legal duty to protect the plaintiffs, and assumed no obligation to do so. There was no evidence of fraud or collusion.

So that neither in contract nor in tort are plaintiffs entitled to maintain their action against the casualty company.

The release executed by Love, the mortgagor, to Wiggins, the tort-feasor, and his insurer, would ordinarily bar the mortgagees, the plaintiffs (*Harris v. R. R.*, 190 N. C., 480), and there is nothing in the record here to take this case out of the rule there laid down.

The cases cited by appellants in support of their position (*Miller v. Hortman-Salem Co.*, 145 Sou., 786 [La.], and *Commercial Securities Co. v. Mast*, 28 P. [2d], 635), were actions by mortgagees against tort-feasors.

Judgment affirmed.

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J. H. BLANKENSHIP v. JULIA S. V. DECASCO.

(Filed 24 February, 1937.)

**Judgments § 23—**

A judgment by default final rendered upon service of summons by publication may be set aside upon proper affidavit of defendant filed within the prescribed time, showing "good cause" and a meritorious defense. C. S., 492.

APPEAL by plaintiff from *Phillips, J.*, at December Term, 1936, of BUNCOMBE. Affirmed.

This is an appeal from an order of his Honor, F. Donald Phillips, entered in the December Term of the Superior Court of Buncombe County, North Carolina, setting aside the judgment theretofore entered in the above entitled action. Process obtained by publication, defendant was a nonresident.

Plaintiff excepted to the signing of the judgment, assigned error, and appealed to the Supreme Court.

*C. E. Blackstock for plaintiff.*
*Cathey & Fisher for defendant.*

PER CURIAM. The judgment of the court below, in part, is as follows: "Upon affidavit, through the defendant's counsel, it appearing to his Honor that the defendant in the above entitled action has a right, under section 492 of the Consolidated Statutes of North Carolina, to have the judgment default final formerly entered in this cause by the clerk of the

Superior Court of Buncombe County and docketed 9 March, 1936, to be set aside. And that the same be placed upon the regular docket for trial of civil cases upon the issues raised thereby. Wherefore, it is ordered, adjudged and decreed: (1) That the judgment default final entered in this cause be set aside. (2) That the defendant be allowed twenty days in which to answer or demur to the affidavit and complaint filed by the plaintiff in this action. (3) When answer is filed and issued joined, let this cause of action be placed on the regular civil issue docket for final determination of the rights of the parties. (4) That the temporary restraining order heretofore entered upon affidavit of the defendant be continued until final determination of this cause of action. (5) That the defendant make a cash bond in the sum of $200.00 to indemnify plaintiff by reason of this permanent restraining order until such time as the issue joined therein be determined."

C. S., 492, in part, is as follows: "The defendant against whom publication is ordered, or who is served under the provisions of the preceding section, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition thereof, on such terms as are just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected," etc. The record discloses "good cause shown" and a meritorious defense.

The case of *Vann v. Coleman,* 206 N. C., 451, is in many respects similar to the present one. We see no sufficient evidence of estoppel.

The judgment of the court below is

Affirmed.

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THE J. & E. STEVENS COMPANY v. A. O. MOONEYHAM, TRADING AS MOONEYHAM'S DRUG STORE.

(Filed 24 February, 1937.)

**1. Sales § 20—**

Where the uncontradicted evidence shows that goods described in the complaint were delivered to defendant purchaser in accordance with the contract, and that the purchase price was due in the amount claimed, a directed verdict for plaintiff seller on the issue is proper.

**2. Sales § 25—**

A directed verdict against the purchaser on his counterclaim for alleged defect in the goods sold and delivered is proper when there is no evidence in the record tending to support the counterclaim.

**3. Appeal and Error § 42—**

Where the record does not disclose what the testimony of witnesses would have been, an exception to the exclusion of the testimony cannot be sustained on appeal, since it cannot be determined whether its exclusion was prejudicial, the burden being on appellant to show prejudicial error.

APPEAL by defendant from *Phillips, J.,* at September Term, 1936, of BUNCOMBE. No error.

This is an action to recover the amount of the purchase price of goods, wares, and merchandise sold and delivered by the plaintiff to the defendant.

In his answer the defendant admits the sale and delivery to him by the plaintiff of goods, wares, and merchandise, as alleged in the complaint. He alleges that said goods, wares, and merchandise were defective at the time of their delivery to him, and prays judgment that he recover of the plaintiff, by way of counterclaim, the sum of $200.00.

The issues submitted to the jury were answered as follows:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: 'Yes, $278.98, with interest from 10 January, 1936.'

"2. Is the plaintiff indebted to the defendant, as alleged in the answer and counterclaim? Answer: 'No.'"

From judgment that plaintiff recover of the defendant the sum of $278.98, with interest from 10 January, 1936, and the costs of the action, the defendant appealed to the Supreme Court, assigning errors in the trial.

*Chas. G. Lee, Jr., and Ford, Coxe & Carter for plaintiff.*
*Oscar J. Mooneyham for defendant.*

PER CURIAM. The uncontradicted evidence at the trial of this action showed that the goods, wares, and merchandise described in the complaint were delivered to the defendant at his place of business in the city of Asheville, N. C., on or about 15 September, 1935, and that the purchase price of said goods, wares, and merchandise was $278.98. This amount was due on 10 January, 1936. No payment has been made by the defendant on this amount. The court instructed the jury that if they should find the facts to be as the evidence tended to show, they would answer the first issue "Yes; $278.98, with interest from 10 January, 1936." There was no error in this instruction.

The evidence for the defendant tended to show that when the goods, wares, and merchandise which he had purchased from the plaintiff were delivered to him, they were in packages, and that these packages were not opened by the defendant until some time in December, 1935. Plaintiff's objctions to questions addressed to witnesses for the defendant with respect to the condition of the goods, wares, and merchandise, when the packages were opened, were sustained by the court. It does not appear in the record what the answers of the witnesses would have been had the objections of the plaintiff not been sustained. In *Newbern v. Hinton*, 190 N. C., 108, 129 S. E., 181, it is said: "We are precluded from passing upon the merits of defendant's objections to the evidence, since the record does not disclose what the witnesses would have said if the question had been allowed. The burden is on the appellant to show error, and therefore the record must show the competency and materiality of the proposed evidence. This Court will not do the vain thing to send a case back for a new trial when it does not appear what the excluded evidence is, or even that the witnesses would respond to the question in any way material to the issues. This is the established practice in this Court, in both civil and criminal cases."

In the absence of any evidence tending to support the counterclaim of the defendant, there was no error in the instruction of the court with respect to the second issue.

The judgment is affirmed.

No error.

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STAMEY'S, INC., v. THE TRAVELERS INDEMNITY COMPANY OF HARTFORD, CONNECTICUT.

(Filed 24 February, 1937.)

**Insurance § 55—**

Findings that persons entered insured's store by the rear door with a master key but that they first prized the screen doors apart with some instrument leaving visible marks of force and violence on the doors, *is held* to sustain judgment that the store was burglariously entered within the terms of the burglary insurance policy sued on.

APPEAL by defendant from *Sink, J.*, at September-October Term, 1936, of RUTHERFORD. Affirmed.

This was a suit to recover upon a policy of burglary insurance, instituted in the court of a justice of the peace and heard upon appeal in the Superior Court, where a jury trial was waived. It was agreed that the judge should hear the evidence, find the facts, and render judgment thereon.

The pertinent provision of the insurance policy, Sec. VI, was as follows: "To indemnify the assured for loss not exceeding two hundred fifty dollars ($250.00), of merchandise, furniture, fixtures, and equipment, occasioned by BURGLARY, which shall mean the felonious abstraction of such property from within such premises, by any person or persons making felonious entry therein by actual force and violence when the premises are not open for business, of which force and violence there shall be visible marks made upon the exterior of the premises at the place of such entry, by tools, explosives, electricity, or chemicals."

The court found the following facts:

"1. That the defendant issued and delivered to the plaintiff its policy of insurance No. 2255912, the original of which was introduced upon the trial of this cause.

"2. That the said policy was in full force and effect on 11 September, 1935.

"3. That on the said 11 September, 1935, two boys, to wit, Leo Nodine and George Hall, entered Stamey's store in Spindale, N. C., and stole certain merchandise of the value of $76.39.

"4. That there are two screen doors at the back door of said store, where same was entered, the said screen doors opening outward, and when closed fit very tightly together, there being no lock or hinge or latch of any sort on said screen doors, and that before inserting the master key into the door, by which entry was effected, the said screen doors were opened by inserting a screwdriver or some other instrument between the edges thereof, and that by means of said screwdriver or other instrument said screen doors were opened, so that the thieves were able to insert the pass-key into the main door, and that in opening said screen doors an indenture was made upon the same about half the size of a five-cent piece.

"5. That after opening said screen door as recited above, the said Leo Nodine and George Hall, by the use of a master key, entered the back door of said store, and that neither the back doors to the store nor the windows were injured, scarred, or broken in any manner whatsoever, and that there were no visible marks of entry upon the exterior of the premises except upon the screen door as stated.

"6. That the said Leo Nodine and George Hall were subsequently indicted in the Superior Court of Rutherford County for breaking and entering said Stamey's store, and pleaded guilty of said offense, and stated to the court that they prized the screen door open, entered the store by means of a pass-key.

"Upon the foregoing findings of fact, which are not excepted to by either the plaintiff or the defendant, the court is of the opinion that the

defendant is liable to the plaintiff for the value of the merchandise which was stolen from the plaintiff's store."

It was thereupon adjudged that the plaintiff recover of the defendant $76.39, and defendant excepted to the judgment and appealed.

*Paul Boucher for plaintiff, appellee.*
*Johnson & Uzzell for defendant, appellant.*

PER CURIAM. The findings of fact by the court below are supported by evidence, and upon these findings it was correctly held that the breaking and entry, by means of which plaintiff's goods were stolen, came within the terms of the burglary insurance contract.

This is the first case presented to this Court relative to burglary insurance, but numerous cases from other jurisdictions, bearing on the subject, will be found annotated in 41 A. L. R., 853; 44 A. L. R., 468; and 54 A. L. R., 467.

The finding that the screen doors of plaintiff's store were opened by means of a screwdriver or other instrument, leaving visible marks on the doors of force and violence by tools, brings this case within the terms of the policy.

Judgment affirmed.

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R. F. WOLFE, JR., BY HIS NEXT FRIEND, R. F. WOLFE, SR., *v.* MONTGOMERY WARD & COMPANY AND E. L. JONES.

(Filed 24 February, 1937.)

**Libel and Slander § 13: Appeal and Error § 39—Verdict that plaintiff was slandered but suffered no substantial damage entitles plaintiff to costs.**

Where the jury finds that plaintiff was slandered but does not award damages, the failure of the court to instruct the jury that an affirmative answer to the issue entitles plaintiff to nominal damages at least does not entitle plaintiff to a new trial, but the judgment must be modified to adjudge nominal costs, C. S., 1241 (4), and affirmed, since the item of costs is too small to justify a new trial.

APPEAL by plaintiff from *Spears, J.*, at October Term, 1936, of NASH. Modified and affirmed.

Action for damages for slander and assault.

The verdict of the jury upon issues submitted was as follows:

"1. Did the defendant E. L. Jones speak of and concerning the plaintiff the words in substance alleged in the complaint? Answer: 'Yes.'

"2. If the defendant E. L. Jones used said language as alleged in the complaint, was he, at the time, acting within the scope of his employment and in the line of his duty? Answer: 'Yes.'

"3. Did the defendants wrongfully assault the plaintiff, as alleged in the complaint? Answer: 'No.'

"4. What damages, if any, is the plaintiff entitled to recover of the defendants? Answer: 'None.'"

From judgment on the verdict that plaintiff recover nothing of defendants, plaintiff appealed.

*O. M. Marshburn for plaintiff.*
*Thorp & Thorp for Montgomery Ward & Company.*
*S. L. Arrington for E. L. Jones.*

PER CURIAM. The jury, evidently taking the Biblical view that "a good name is rather to be chosen than great riches," have decided that the plaintiff was slandered but that he was entitled to recover no damages.

The appellant's only complaint is that upon an affirmative finding on the first issue nominal damages, at least, should have been awarded and that he should have been adjudged entitled to recover nominal costs.

There is no other exception. The trial was free from error.

It is provided by statute (C. S., 1241 [4]), that in actions for slander, "if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs than damages."

The trial judge inadvertently omitted to instruct the jury that, if they answered the first issue in the affirmative, the plaintiff was entitled, at least, to nominal damages. What is meant by nominal damages is a small, trivial sum awarded in recognition of a technical injury which has caused no substantial damage. *Davis v. Wallace,* 190 N. C., 543; *Hutton v. Cook,* 173 N. C., 496; *Chaffin v. Mfg. Co.,* 135 N. C., 95.

However, since the jury have established the fact that the plaintiff suffered no damage, the judgment could only have awarded nominal costs. Hence, the form of the judgment has occasioned no injury to the plaintiff of which he can justly complain. No substantial rights are involved, and the trifling item of cost is too small to justify a new trial or further consume the time of the Court. *Cohoon v. Cooper,* 186 N. C., 26.

The judgment should be modified to adjudge nominal costs, and be in other respects affirmed.

Modified and affirmed.

MATILDA HOWELL, ADMINISTRATRIX OF EDDIE HOWELL, DECEASED, *v.* ATLANTIC COAST LINE RAILROAD COMPANY AND M. A. PEACOCK.

(Filed 24 February, 1937.)

**Master and Servant § 27—**

Evidence that an experienced fireman left the engine to perform his duties in interstate commerce while the engine was standing on a trestle over a creek, and fell and was drowned, *is held* not to disclose negligence on the part of the railroad company or the engineer, and their motions to nonsuit were properly granted.

APPEAL by plaintiff from *Daniels, Emergency Judge,* at September Term, 1936, of NASH. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, who fell from an engine owned by the defendant Atlantic Coast Line Railroad Company and operated by its engineer, the defendant M. A. Peacock, while the said intestate was engaged in the performance of his duties as a fireman on said engine.

At the time plaintiff's intestate fell from said engine it was standing on a trestle over Contentnea Creek. He fell into said creek when he left the engine to perform his duties as a fireman, and was drowned.

At the time of his death, the plaintiff's intestate and both the defendants were engaged in interstate commerce.

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

From judgment dismissing the action the plaintiff appealed to the Supreme Court, assigning as error the judgment dismissing the action.

*James W. Keel and I. T. Valentine for plaintiff.*
*Spruill & Spruill and Thomas W. Davis for defendants.*

PER CURIAM. An examination of the evidence appearing in the record in this appeal fails to disclose any evidence tending to show that the death of plaintiff's intestate was caused by the negligence of the defendants, or of either of them, as alleged in the complaint. For that reason there is no error in the judgment dismissing the action. The judgment is affirmed on the authority of *Baltimore & Ohio Railroad Company v. Berry,* 286 U. S., 272, 76 L. Ed., 1098.

Both *Cobia v. R. R.,* 188 N. C., 487, 125 S. E., 18, and *Puget Sound Electric Railway v. Harrigan,* 176 Fed., 488, which are relied upon by the plaintiff to support her contention that there is error in the judgment, are easily distinguishable from the instant case.

In *Cobia v. R. R., supra,* it was not seriously disputed that there was evidence tending to show that defendant was negligent as contended by the plaintiff. It was held that upon the facts shown by the evidence, the question of assumption of risk, relied upon by the defendant to defeat plaintiff's recovery, was properly left to the jury. For that reason the judgment was affirmed.

In *Puget Sound Electric Railway v. Harrigan, supra,* there was evidence tending to show that appellant had failed to exercise reasonable care with respect to the condition of the platform from which the appellee fell, while engaged in the performance of his duties as a brakeman. In the instant case, plaintiff's intestate was an experienced fireman, and knew the conditions which confronted him when he left his place in the cab of the engine. His fall into the creek, and subsequent death by drowning, were the result of his own negligence, or at least were accidental. In neither event are the defendants liable in this action to the plaintiff. The judgment is

Affirmed.

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J. C. STALLINGS, LLOYD PARKER, GEORGE PARKER, NANNIE WHITLEY AND HER HUSBAND, BUD WHITLEY, AND MRS. GEORGIA WHITLEY, v. H. C. KEETER.

(Filed 17 March, 1937.)

**1. Adverse Possession § 4a—Where heir, as tenant in common, takes possession under agreement with coheirs his possession is not adverse.**

The owner of land died intestate leaving a widow and four children as his sole heirs at law. One of the children went into possession and remained in possession for more than twenty years, until his death. Plaintiffs, a son and representatives of deceased children of the original owner, introduced evidence that the heir taking possession did so under an agreement that he should remain in possession during his lifetime and that he should care for and support his mother. *Held:* The heirs at law were tenants in common in the land, and, if the jury should find from the evidence that the one taking possession did so under the agreement, his possession would not be adverse to his cotenants or their legal representatives. C. S., 430.

**2. Deeds § 2a—**

Where there is competent evidence that at the time of the execution of the deed in question the grantor was without mental capacity to execute the deed, the granting of defendant grantee's motion to nonsuit is error, since, if the jury should find the issue in the affirmative, the deed is void and conveys no title or interest in the land.

APPEAL by plaintiffs from *Harris, J.,* at November Term, 1936, of HALIFAX. New trial.

STALLINGS *v.* KEETER.

This is an action to recover possession of a tract of land situate in Halifax County, North Carolina, and containing one hundred acres, more or less.

The facts shown by uncontradicted evidence at the trial are as follows:

Eldridge Stallings died intestate in Halifax County, North Carolina, during the year 1890. At his death he was seized in fee and in possession of the land described in the complaint. He left surviving him his widow, who died during the year 1900, and four children, as follows: (1) D. S. Stallings; (2) J. H. Stallings; (3) Mary Parker; and (4) J. C. Stallings.

D. S. Stallings is dead. He died intestate. The plaintiff Nannie Whitley is his only child and heir at law, and the plaintiff Georgia Whitley, who remarried after his death, is his widow.

J. H. Stallings is dead. He died intestate during the year 1935. He was never married.

Mary Parker is dead. She died intestate. The plaintiffs Lloyd Parker and George Parker are her only children and heirs at law.

J. C. Stallings is living. He is one of the plaintiffs in this action.

Shortly after the death of Eldridge Stallings, his son, J. H. Stallings, took possession of the land described in the complaint, and remained in possession of said land continuously until his death in 1935.

On 16 March, 1912, B. D. Mann, executor of W. F. Parker, conveyed the said land to J. H. Stallings by a deed which is duly recorded in the office of the register of deeds of Halifax County. At the date of the said deed, J. H. Stallings was in possession of said land and had been in possession of the same since shortly after the death of his father, Eldridge Stallings, in 1890.

Some time during the year 1921, J. H. Stallings conveyed the said land to the defendant H. C. Keeter by a deed which is duly recorded in the office of the register of deeds of Halifax County. In said deed, J. H. Stallings reserved an estate in said land to himself for his life. He remained in possession of said land until his death in 1935, when the defendant took possession of the same. The defendant is now in possession of the said land. This action was begun on 28 February, 1936.

The plaintiffs offered evidence tending to show that soon after the death of Eldridge Stallings, it was agreed by and between his three sons, D. S. Stallings, J. H. Stallings, and J. C. Stallings, and his daughter, Mary Parker, that J. H. Stallings should take possession of the land which had descended to them as heirs at law of Eldridge Stallings, deceased, and should remain in possession of the same during his lifetime, and that he should care for and support their mother, the widow of Eldridge Stallings, so long as she should live, and that pursuant to this agreement, the said J. H. Stallings took possession of said land and re-

mained in possession of the same until his death in 1935. No evidence was offered by the defendant tending to contradict this evidence.

The plaintiffs offered evidence tending to show further that at the date of the execution of the deed from J. H. Stallings to the defendant H. C. Keeter, during the year 1921, the said J. H. Stallings was without sufficient mental capacity to execute a deed, because of injuries to his head which he had suffered when he fell from a wagon. The defendant offered evidence to the contrary.

At the close of all the evidence, on motion of the defendant, aptly made under C. S., 567, the action was dismissed by judgment as of nonsuit. The plaintiffs appealed, assigning errors in the trial and in the judgment.

*E. L. Travis and J. B. Meyer for plaintiffs.*
*No counsel for defendant.*

CONNOR, J. There is error in the judgment dismissing this action.

At the death of Eldridge Stallings, intestate in 1890, the land described in the complaint descended to his three sons and his daughter, who, as his heirs at law, thus became the owners of said land as tenants in common.

At the date of the commencement of this action, the plaintiffs were heirs at law of Eldridge Stallings, deceased, then living, or representatives of such of his heirs at law as had died since his death. The plaintiffs are therefore the owners of the land described in the complaint as tenants in common, unless the defendant has acquired title to same by possession under the statute, C. S., 430, or unless the defendant has acquired title to the interest in said land of J. H. Stallings, under the deed of the said J. H. Stallings to the defendant.

The evidence for the plaintiffs tended to show that the possession of J. H. Stallings from 1890 to 1935 was not adverse to his cotenants, but was by virtue of an agreement between him and said cotenants.

If the jury shall so find, the possession of the defendant and those under whom he claims has not been sufficient to ripen title in him to said land, although such possession has been for more than twenty years. *Bradford v. Bank,* 182 N. C., 225, 108 S. E., 750; *Tharpe v. Holcombe.* 126 N. C., 365, 35 S. E., 608; *Conkey v. Lumber Co.,* 126 N. C., 499, 36 S. E., 42. "An adverse possession for twenty years by one tenant in common is necessary to bar his cotenants." *Hicks v. Bullock,* 96 N. C., 164.

The evidence for the plaintiffs further tended to show that at the date of the execution of his deed to the defendant, J. H. Stallings was without mental capacity to execute a deed.

If the jury shall so find, the deed from J. H. Stallings to the defendant is void, and defendant acquired no title to said land or to any interest therein by virtue of said deed.

The judgment is reversed. The plaintiffs are entitled to a new trial. It is so ordered.

New trial.

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J. F. NASH ET AL. V. BOARD OF COMMISSIONERS OF ST. PAULS.

(Filed 17 March, 1937.)

**1. Constitutional Law § 20—Laws in force at time of issuance of bonds become part of contractual obligation which may not be adversely affected by statute under constitutional change.**

Defendant town proposed to issue refunding bonds under an ordinance providing that the holders of the refunding bonds should be subrogated to all the rights and powers of the holders of the indebtedness so refunded, such provision being also in accord with N. C. Code, 2492 (50) b. Plaintiff contended that the refunding bonds would be subject to the power of the Legislature to exempt residences up to the value of $1,000 from taxation under the Constitutional Amendment of Art. V, sec. 5. *Held:* Even conceding that the refunding bonds would be evidenced by a new contract, the provision of the ordinance and statute that the holders should be subrogated to the rights of the holders of the original indebtedness, became a part of such new contract or obligation, which may not be adversely affected by legislative act even under constitutional change, Federal Const., Art. I, sec. 10, and no exemption having been made by the Legislature under the permissive power of the amendment to Art. V, sec. 5, at the time of the issuance of the refunding bonds, the power to provide for the payment of the refunding bonds could not be adversely affected by the constitutional amendment.

**2. Taxation § 23—**

The constitutional amendment to Art. V, sec. 5, is not self-executing, but merely gives the General Assembly permissive power to grant the exemption from taxation to the extent therein mentioned, which power the General Assembly may exercise in whole or in part, or not at all, as it may in its wisdom determine.

**3. Same—**

An exemption of real property from taxation under the provisions of the constitutional amendment of Art. V, sec. 5, would not affect the validity of bonds already issued by a municipality.

**4. Taxation § 37—Home owner held not entitled to restrain issuance of refunding bonds on ground that they would be subject to tax exemption.**

A home owner in a municipality is not entitled to restrain the issuance of refunding bonds by it on the ground that the refunding bonds would be subject to any exemption from taxation that might be allowed the General Assembly under the amendment to Art. V, sec. 5, since he would be bene-

fited rather than injured by any exemption which may be allowed, and since the validity of the proposed bonds would not be affected by such exemption.

APPEAL by plaintiff from *Barnhill, J.,* in Chambers in Lumberton, 4 February, 1937. From ROBESON.

Controversy without action submitted on an agreed statement of facts.

The gist of the statement follows:

1. Plaintiff is a resident and taxpayer of the town of St. Pauls, owning real property situate therein, which is used by him as his place of residence, and he sues for himself and all other taxpayers of the town who may desire to join with him.

2. The defendants constitute the board of commissioners of the town of St. Pauls.

3. The said town of St. Pauls has outstanding public improvement bonds in the principal sum of $102,400, bearing interest at the rate of 6%, which are now in default, some having been issued in 1920 and the others in 1923.

4. It is proposed by the defendants, by ordinance duly adopted 29 December, 1936, to retire these outstanding bonds with refunding bonds in like amount, said refunding bonds to bear lower rates of interest ranging from 2% to 4½%, depending on the length of term; and the ordinance specifically provides: "The holders of said refunding bonds shall be subrogated to all the rights and powers of the holders of the indebtedness so refunded."

A similar ordinance was adopted providing for the funding of the accrued interest due and unpaid on the bonds outstanding.

5. Sec. 5 of Art. V of the State Constitution was amended at the general election in 1936, by adding at the end of said section the following: "The General Assembly may exempt from taxation not exceeding one thousand dollars ($1,000) in value of property held and used as the place of residence of the owner."

The plaintiff contends that the provision of the ordinance, "the holders of said refunding bonds shall be subrogated to all the rights and powers of the holders of the indebtedness so refunded," is in violation of the constitutional amendment adopted in 1936, for the reason that said refunding bonds, when issued, will be subject to the continuing power of the General Assembly to exempt from taxation "homesteads" not exceeding $1,000 in value. Wherefore, plaintiff asks that the issuance of said refunding bonds be restrained or enjoined.

The defendants, on the other hand, contend that all property originally subject to taxation for the payment of the outstanding indebtedness of the town of St. Pauls will remain liable for such indebtedness, as no State is permitted to pass any law "impairing the obligation of con-

tracts" (U. S. Const., Art. I, sec. 10), and that the General Assembly may not exempt "homesteads" from taxation for the payment of an indebtedness subsisting at the time of the adoption of the above amendment.

The plaintiff's prayer for injunction was denied, the court being of opinion that no new debt or obligation would be created by the proposed refunding bonds and that the power to provide for the payment of the indebtedness, existing at the time of its original creation, would remain unchanged and unaffected by the recent constitutional amendment.

From this ruling the plaintiff appeals, assigning error.

*W. C. Watts for plaintiff, appellant.*
*David H. Fuller for defendants, appellees.*

STACY, C. J. Even if it be conceded that the proposed refunding bonds would be subject to the discretionary power of the General Assembly hereafter to exempt certain residential property from taxation, because issued after the adoption of the 1936 constitutional amendment on the subject, which is not so conceded in view of the provisions of the Local Government Act and the ordinance authorizing the issuance of said bonds, still it is not perceived wherein this would in any wise affect the validity of said bonds; only their marketability, perhaps.

It is recognized that the bonds now outstanding, which defendants seek to refund, could not be adversely affected by any act of assembly under the constitutional change, "for a State, no more by constitutional amendment than by statute, can impair the vested rights held by the creditor in assurance of his debt." *Hammond v. McRae,* 182 N. C., 747, 110 S. E., 102; *Smith v. Comrs., ibid,* 149, 108 S. E., 443; *Burney v. Comrs.,* 184 N. C., 274, 114 S. E., 298; *Board of Ed. v. Bray, ibid,* 484, 115 S. E., 47.

It is likewise well established that the laws in force at the time and place of the making of contracts enter into and become integral parts thereof as much so as if they had been expressly incorporated therein. *Eckard v. Ins. Co.,* 210 N. C., 130, 185 S. E., 671; *Headen v. Ins. Co.,* 206 N. C., 270, 172 S. E., 349; *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14; *Trust Co. v. Hudson,* 200 N. C., 688, 158 S. E., 244; *House v. Parker,* 181 N. C., 40, 106 S. E., 136; *Mfg. Co. v. Holladay,* 178 N. C., 417, 100 S. E., 567; *Hill v. Kessler,* 63 N. C., 437.

It is provided by the Local Government Act, chap. 60, Public Laws, 1931, as amended by chap. 258, Public Laws, 1933, and chap. 356, Public Laws, 1935, that in refunding, funding, or renewing indebtedness incurred prior to 1 July, 1933, the ordinance or resolution adopted by any local unit, authorizing the issuance of bonds for such purpose, may con-

tain provision whereby the holders or purchasers of said bonds "shall be subrogated to all the rights and powers of the holders of such indebtedness," which said provision "shall have the force of contract between the unit and the holders of said bonds." Michie's N. C. Code of 1935, sec. 2492 (50) b. Such a provision was incorporated in the ordinance authorizing issuance of the bonds here sought to be enjoined; hence the provision, having the sanction of law, will enter into and become an integral part of the bonds when issued, with contractual force and effect, which may not be impaired by subsequent legislation, as was held by the court below. *Hammond v. McRae, supra; Eckard v. Ins. Co., supra; Headen v. Ins. Co., supra; Long v. St. John,* 170 So. (Fla.), 317.

It is the contention of the plaintiff, however, that while the refunding of a subsisting indebtedness may not create any new or additional debt or extinguish the original obligation (*Blanton v. Comrs.,* 101 N. C., 532, 8 S. E., 162), still the refunding bonds would represent a different contract evidencing the indebtedness. *Fleming v. Turner,* 122 Fla., 200, 165 So., 353; *S. v. Milam,* 113 Fla., 491, 153 So., 100. In other words, he says that while the retirement of the 6% bonds with refunding bonds bearing lower rates of interest would not extinguish the original indebtedness, nevertheless the indebtedness would then be evidenced by a new and different contract or obligation, entered into after the adoption of the 1936 constitutional amendment and therefore subject to its provisions, nothing else appearing. *Klein v. Kinkead,* 16 Nev., 194; *Hicks v. Greene County,* 200 N. C., 73, 156 S. E., 164. Plaintiff further points out that the proposition is not to exchange the old bonds for new ones. *Folks v. County of Marion,* 121 Fla., 17, 163 So., 298.

Conceding, for the sake of argument, that plaintiff's contention apparently has the merit of soundness, it is not perceived, upon the record facts, wherein the judgment entered below runs counter to the position stated. The General Assembly as yet has taken no action under authority of the amendment in question, which is only permissive in terms and not self-executing. The power of exemption, to the extent therein mentioned, is exercisable, in whole or in part, or not at all, as the General Assembly, in its wisdom, shall determine. *Hospital v. Rowan County,* 205 N. C., 8, 169 S. E., 805; *Latta v. Jenkins,* 200 N. C., 255, 156 S. E., 857. Further, the laws in force at the time of the issuance of the proposed refunding bonds provide that the holders thereof, when so assured by ordinance or resolution, as they are here, shall be subrogated to all the rights and powers of the holders of the indebtedness so refunded, which assurance has the force of a contract provision. Michie's Code, *supra.*

Moreover, it is observed that the plaintiff, being the owner of a residence in St. Pauls, without more, would be benefited, rather than in-

jured, by any action of the General Assembly, even under his own interpretation of the laws applicable. His prayer for injunction was properly denied on the facts presently appearing of record. *Newman v. Comrs. of Vance,* 208 N. C., 675, 182 S. E., 453.

Affirmed.

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W. H. BEST, JR., ADMINISTRATOR OF T. H. GARRIS, DECEASED, v. RALPH GARRIS, WINSTON GARRIS, CHARLOTTE JONAS GARRIS, HARRY WORTHAM GARRIS, JOSEPHINE GARRIS HEAD AND HUSBAND, J. N. HEAD; GERTRUDE GARRIS MOYE AND HUSBAND, RAYMOND MOYE; CHARLOTTE GARRIS, RALPH GARRIS, AND WINSTON GARRIS, BEING MINORS WITHOUT GENERAL OR TESTAMENTARY GUARDIAN.

(Filed 17 March, 1937.)

**1. Appeal and Error § 6d—**

An exception to a judgment rendered in a trial by the court under agreement of the parties, C. S., 568, without exception to the evidence or the court's findings of fact, presents the sole question of whether the facts found support the judgment.

**2. Same—Conclusions of law by court held correct on facts found.**

In this trial by the court under agreement of the parties, C. S., 568, the court found that the deeds to the person under whom defendants claim were insufficient to ripen title in him under color, and that plaintiff's intestate owned an undivided interest in the land at the time of his death, and entered judgment that intestate owned an undivided interest in the land and that plaintiff was entitled to sell intestate's interest to make assets, the personalty being insufficient. Defendants excepted to the judgment on the ground that the court erred in holding that the deeds were not such as to ripen title under color, but made no exception to the evidence or to the court's findings of fact. *Held:* The facts found support the conclusions of law by the court, and the judgment must be affirmed on appeal.

APPEAL by defendants from *Williams, J.,* at 24 August Term, 1936, of WAYNE. Affirmed.

This is a petition to sell certain lands for assets to pay indebtedness amounting to some $480.00, brought by plaintiff against defendants.

There are five tracts sought to be sold. The value of the land is about $2,000. The defendants set up the plea practically of sole seizin and ask that the prayer of petitioner be denied. In the record is the following: "Both parties, plaintiff and defendants, having expressly waived trial by jury in open court, and agreed that the court may hear the evidence, find the facts, and render judgment thereon in or out of term, in or out of the district."

The court below found the facts and based its conclusions of law thereon, and rendered the following judgment: "It is considered, ordered, and adjudged that T. H. Garris, deceased, at the time of his death was the owner of an undivided one-fifth interest in and to the lands described in the first four tracts set out in the petition filed herein; that the said T. H. Garris, at the time of his death, did not own or have any interest in the fifth tract (two parcels) described in said petition filed, the life estate held by him terminating at his death, that said T. H. Garris at the time of his death did not own any personal property which could be subjected to the payment of his debts admitted to be owing by him, that the respondents are the owners of an undivided four-fifths interest in and to the lands described as first four tracts, and of a fee simple interest in the lands described as fifth tract (two parcels) in the petition filed, and that the plaintiff herein is entitled to have the aforesaid one-fifth interest in and to the lands described in the first four tracts in said petition sold to make assets with which to pay the indebtedness due by the estate of T. H. Garris, deceased, and that this cause be remanded to the clerk for further proceedings as provided by law. This the 24th day of August, 1936. Clawson L. Williams, Judge of the Superior Court."

The defendants made the following exception and assignment of error and appealed to the Supreme Court: "Exception No. 1 is to the rendering, signing, and entry of the judgment for that it is contrary to the law in the case insofar as it holds that: (a) Title to the first four tracts described in plaintiff's petition remained in Ransom Garris at the date of his death in 1922, and passed by descent to his heirs, and that T. H. Garris took an undivided interest therein and was owner of said interest at his death in fee, and that (b) Possession of said T. H. Garris, under the deeds, Exhibits A and B, was not such as to ripen title under color, or perfect title in said T. H. Garris, and that the petitioner is entitled to have the said undivided interest of T. H. Garris in the said lands sold and proceeds applied to the discharge of the indebtedness due by his estate."

*J. Faison Thomson for plaintiff.*
*E. A. and Ambrose Humphrey for defendants.*

CLARKSON, J. N. C. Code, 1935 (Michie), sec. 568, is as follows: "Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions, in the manner following: (1) By failing to appear at the trial; (2) By written consent, in person or by attorney, filed with the clerk; (3) By oral consent, entered in the minutes."

Sec. 569: "Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the fact found, and the conclusions of law separately. Upon trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision must be filed with the clerk during the court at which the trial takes place, and judgment upon it shall be entered accordingly."

Sec. 570 relates to exceptions to decisions of court.

Nowhere in this record are there any exceptions to any of the evidence upon which the court below made its conclusions of law. It may be noted that the plaintiff did not appeal.

In *Buchanan v. Clark,* 164 N. C., 56 (60-1), is the following: "We are of opinion that the defendants in this case are completely foreclosed by the judge's findings of fact. 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. Revisal, sec. 540 (C. S., 568). His findings of fact are conclusive, unless proper exception is made in apt time that there is no evidence to support his findings or any one or more of them. The present Chief Justice, in *Matthews v. Fry,* 143 N. C., 384, thus states the procedure in such cases: 'The parties waived a jury trial and agreed in writing that the judge should find the facts and enter judgment thereon as upon the facts so found he might decide the law to be. The judge found the facts and entered judgment therein in favor of the defendant. When the certificate of opinion was presented in the court below, the plaintiff moved for judgment in accordance therewith. The defendant resisted this judgment and asked for trial *de novo,* and insisted that some of the findings of fact had been made by the judge without any evidence to support them. The findings of fact by the judge, when authorized by law or the consent of parties, are as conclusive as when found by a jury, if there is any evidence,' " citing numerous authorities. *Odom v. Palmer,* 209 N. C., 93 (98); *Baushar v. Willis,* 210 N. C., 52 (55).

The court below found "Exhibits A and B were not such as to ripen title under color, or perfect title in said T. H. Garris, and that the petitioner is entitled to have the said undivided one-sixth interest of T. H. Garris, deceased, in and to the lands described as first four tracts set out in the petition filed, sold, and the proceeds applied to the discharge of the indebtedness due by his estate." Defendants excepted to the judgment as rendered and stated the reasons.

In *Mfg. Co. v. Lumber Co.,* 178 N. C., 571 (574), we find: "If treated as an exception to the judgment, it presents the single question whether the facts found or admitted are sufficient to support the judgment

(*Ullery v. Guthrie,* 148 N. C., 419)." *Wilson v. Charlotte,* 206 N. C., 856; *Orange Co. v. Atkinson,* 207 N. C., 593 (596); *Shuford v. Building and Loan Assn.,* 210 N. C., 237 (238).

In *Dixon v. Osborne,* 201 N. C., 489 (493), it is said: "Plaintiffs contend that there is error in the judgment in this action rendered at May Term, 1931. This contention is presented by their appeal from the judgment. It has been uniformly held by this Court that an appeal is itself an exception to the judgment and to any other matter appearing on the face of the record," citing numerous authorities.

There are no exceptions by defendants to the finding of facts. The facts having been found, we think the conclusions of law made by the court below correct under the facts and circumstances of this cause.

We have examined the carefully prepared brief of the defendants, which is persuasive but not convincing on the subject.

The judgment must be

Affirmed.

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LEONARD MITCHELL AND WIFE, ALMA MITCHELL; VIRGINIA SMITH AND HUSBAND, NICKSON SMITH; ETHEL RHOADS AND HUSBAND, SAM RHOADS; JOHN LEVIE MITCHELL, WAVERLY MITCHELL, AND THE FOLLOWING MINORS, VIZ.: FLORENCE MITCHELL AND OSCAR MITCHELL, WHO APPEAR BY THEIR NEXT FRIEND, M. M. PIERCE, HEIRS AT LAW OF MINNIE M. MITCHELL, DECEASED, v. ANDREW MITCHELL AND WIFE, WINNIEFRED EVELYN MITCHELL, AND J. H. MITCHELL, HUSBAND OF MINNIE MITCHELL, DECEASED.

(Filed 17 March, 1937.)

**1. Judgments § 25—**

Where the court hears a cause by consent and renders judgment upon the pleadings, all material facts being admitted therein, a motion to set aside on the ground of irregularity is properly denied, an irregular judgment being one rendered contrary to the course and practice of the court.

**2. Judgments § 1—**

Where the pleadings admit all material facts, a judgment thereon rendered by the court in a hearing by consent is not a consent judgment, since the judgment adjudicates the legal rights of the parties upon the facts.

**3. Homestead § 6—**

Where land of a deceased judgment debtor is sold, and the purchaser pays taxes and a mortgage on the land executed by the judgment debtor, and thereafter the sale is set aside by the heirs because no homestead was allotted, the purchaser at the sale is entitled to a lien for the taxes and mortgage superior to the homestead or any other rights of the heirs.

**4. Judgments § 29: Descent and Distribution § 13—Only heirs who were parties are concluded by judgment for sale of land to pay superior liens.**

The execution sale of land of a deceased judgment debtor was set aside for failure to allot homestead, but judgment was entered that the purchaser, who had paid taxes and a mortgage executed by the judgment debtor, was entitled to a lien therefor superior to all rights of the heirs of the judgment debtor, all material facts being admitted in the pleadings, and the land was sold to satisfy the lien created by the judgment. *Held:* All the heirs at law who were parties to the action, including minors who filed answer through a guardian *ad litem*, are concluded by the judgment, but heirs who were not parties are not estopped by the judgment or their interests in the land divested thereby, although such interests are liable proportionately for the lien of the purchaser for taxes and the mortgage executed by their ancestor, and, in a proper proceeding, for the judgment paid out of the proceeds of the execution sale, there being no personalty of the estate available for that purpose.

APPEAL from *Harris, J.*, at January Term, 1937, of WAYNE. New trial.

This was a petition for sale of land for partition. Plaintiffs allege that Leonard Mitchell, Virginia Smith, Ethel Rhoads, John Mitchell, Waverly Mitchell, Florence Mitchell, and Oscar Mitchell, and the defendant Andrew Mitchell are tenants in common, each owning an undivided one-eighth interest in a described tract of land containing 31 acres, which descended to them as heirs at law of Minnie Mitchell, deceased; and they further allege that their undivided interests are subject to the life estate therein of J. H. Mitchell, tenant by the curtesy. The defendants Andrew Mitchell and his wife, Winniefred Mitchell, plead sole seizin in Winniefred Mitchell by virtue of a deed to her for the land pursuant to a sale under a judgment of the Superior Court, rendered by Cowper, Judge.

Upon the trial in the Superior Court of the issue raised by defendant's plea of sole seizin, there was verdict for defendant Winniefred Mitchell, following a peremptory instruction by the court. And from judgment declaring her sole seized of the land, plaintiffs appealed.

*Parker & Lee for plaintiffs, appellants.*
*D. H. Bland for defendants, appellees.*

DEVIN, J. A concise summary of the facts in chronological order as they appear from the pleadings and record before us, may be stated as follows:

Minnie Mitchell, wife of J. H. Mitchell, was the original owner of the land. In 1929, A. T. Griffin Manufacturing Company secured a judgment against Minnie Mitchell and her husband for a debt for materials for a building on the land, pursuant to notice and claim of material-

man's lien, and the judgment declared the lien and authorized sale according to the statute.

In March, 1930, Minnie Mitchell died without having paid the judgment. No administrator was appointed for her estate until December, 1931, when J. H. Mitchell, the husband, qualified. In December, 1930, execution was issued by the clerk of the Superior Court, and the sheriff, pursuant thereto, sold the land without, however, laying off the homestead, and the defendant Winniefred Mitchell purchased the land for $680.00, and the sheriff executed and delivered deed therefor to her 24 April, 1931. The $680.00 purchase money was applied to the payment of the judgment, interest and costs, and delinquent taxes. J. H. Mitchell refused to surrender possession of the land, and on 4 September, 1931, Winniefred Mitchell instituted suit against him and his second wife, Lizzie Mitchell, for possession of the land, claiming title under the sheriff's deed. No answer was filed to the complaint at the time, but in January, 1932, J. H. Mitchell was given leave to file answer, which he did, setting up failure to allot homestead, and alleging that the execution sale and deed were for that reason void. Thereupon, at said January Term, 1932, the court directed that additional parties defendant be made, granting leave to plaintiffs and defendants to file amended pleadings.

Pursuant to the order in the case entitled "Winniefred Mitchell *v.* J. H. Mitchell *et al.*," summons was served on the following additional parties made defendants therein: J. H. Mitchell, administrator of Minnie Mitchell, deceased, A. T. Griffin Manufacturing Company, Paul Garrison, sheriff; Oscar Mitchell, Florence Mitchell, and Waverly Mitchell, infants; and Scott Berkeley, their duly appointed guardian *ad litem*. Amended complaint was thereupon filed, and the guardian *ad litem* answered.

At March Term, 1932, Cowper, J., presiding, the cause was heard by consent and, upon the pleadings, all material facts being admitted, Judge Cowper rendered judgment declaring that the sheriff's deed to Winniefred Mitchell, made pursuant to sale under execution, was void, but held that the money she had paid therefor in good faith had been used for the payment of the past due taxes on the land, and that she had also paid off a prior outstanding mortgage on the land executed by Minnie Mitchell, and that thereby Winniefred Mitchell was subrogated to these liens, and appointed a commissioner to sell the land to satisfy said liens which were adjudged superior to the homestead rights.

Defendants J. H. Mitchell and wife, J. H. Mitchell, administrator, and the three infant defendants, through their guardian *ad litem*, gave notice of appeal from the Cowper judgment, but did not perfect their appeal.

The commissioner named in the Cowper judgment sold the land according to direction 31 May, 1932, and Winniefred Mitchell became the last and highest bidder for same at the price of $450.00, and upon confirmation of sale at August Term, 1932, deed was made conveying to her the land. It was reported by the commissioner and confirmed by the court that the price bid was fair and reasonable.

January 19, 1937, in the case entitled "Winniefred Mitchell *v.* J. W. Mitchell *et al.*," the same counsel who now represent the plaintiffs in this partition proceeding, purporting to act as counsel for the infant defendants Oscar Mitchell, Florence Mitchell, and Waverly Mitchell, gave notice of motion to set aside the Cowper judgment of March, 1932, and to vacate the sale and deed made pursuant thereto by the commissioner on the ground that the judgment was irregular by reason of new parties and pleadings, that same was not supported by the pleadings, and that consent by the guardian *ad litem* was not sufficient to bar the infants.

The motion to set aside the judgment in "Winniefred Mitchell *v.* J. H. Mitchell and others" and vacate the subsequent proceedings thereunder on the ground of irregularity was properly denied. An irregular judgment is one rendered contrary to the course and practice of the court. McIntosh Prac. and Proc., sec. 653; *Harnett Co. v. Reardon,* 203 N. C., 267. The movants were properly before the court and the pleadings set out all the facts and support the judgment.

Nor can the judgment be set aside as one involving the rights of infants as to which consent was improperly given. It was not a consent judgment. No property rights of the infants were surrendered. All the material facts were admitted in the pleadings. There were no controverted issues of fact. The liens for unpaid taxes on the property and for the mortgage executed by their ancestor in title were properly declared by the judgment to be superior to any rights they might have as heirs, or for allotment of homestead. The facts here render inapplicable the authorities cited by appellant on this point.

It follows, therefore, that there was no error in denying the motion, and the exception thereto cannot be sustained.

However, it appears there was error in the peremptory instructions of the court to the jury in the partition proceeding that they should answer the issue that Winniefred Mitchell was sole seized of the land. Four of the plaintiffs in this proceeding, admittedly heirs of Minnie Mitchell, were entitled each to an undivided one-eighth interest in the land. They were never made parties to the case of "Winniefred Mitchell *v.* J. H. Mitchell *et al.*," and were not estopped by the judgment therein. Their title was not thereby divested. Nevertheless, it appears that their undivided interests in the land are likewise subject to the lien in favor

of the defendant Winniefred Mitchell for their proportionate part of the unpaid taxes and prior mortgage and interest, and that their interests in the land may be liable, in proper proceeding, to be charged proportionately with the payment of the debt represented by the Griffin judgment, there being no personal property in the hands of the administrator available for that purpose.

We conclude there was no error in denying the motion to set aside the judgment of Judge Cowper, but that there was error in the instruction of the court upon the issue addressed to the defendant's plea of sole seizin, for which there must be a

New trial.

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M. M. REDDEN AND HIS WIFE, MARY BELL REDDEN, v. CHARLES FRENCH TOMS, SR., AND HIS WIFE, META TOMS, AND OTHERS.

(Filed 17 March, 1937.)

**1. Appeal annd Error § 3b—**

Where a party dies pending his appeal his personal representative will be substituted as a party, upon motion. Rule of Practice in the Supreme Court, No. 37.

**2. Wills § 33c—**

Testator and his son each owned an undivided one-half interest in the lands in controversy. Testator devised his one-half interest to his wife for life, "and upon her death to revert to my son, . . . if he be alive, or to his heirs, if he be dead." *Held:* The son took a remainder in the interest devised contingent upon his surviving testator's widow, and upon his prior death, his children then living became the owners of the remainder.

**3. Wills § 46—Deed of life tenant and contingent remainderman held to convey all their right, title, and interest in the lands.**

The owner of a one-half interest in lands devised his interest to his wife for life with contingent limitation over to T., the owner of the other one-half interest, if he should survive testator's wife. Testator's widow and T. jointly executed a deed in fee to the lands. *Held:* The deed conveyed the widow's life estate and T.'s fee in one-half the land and his contingent remainder in the other half, and upon T.'s death neither his widow nor his estate has any interest in the land.

**4. Abatement and Revival § 14: Estates § 11—**

An action against a contingent remainderman to sell the lands under C. S., 1744, abates upon the death of the remainderman prior to the termination of the life estate when his limitation over is made to depend upon his surviving the life tenant.

APPEAL by defendants Charles French Toms and his wife, Meta Toms, from *Clement, J.*, at Chambers, in Columbus, N. C., on 26 January, 1937. Dismissed.

This is a proceeding for the sale of land described in the petition under the provisions of C. S., 1744, and for other relief.

The proceeding was begun before the clerk of the Superior Court of Henderson County on 17 December, 1936, and was heard on demurrer to the petition duly filed by the defendants Charles French Toms, Sr., and his wife, Meta Toms.

The demurrer was overruled. It was ordered by the judge that defendants be allowed thirty days to file answer to the petition.

The defendants appealed to the Supreme Court, assigning error in the order of the judge overruling their demurrer.

*J. E. Shipman for plaintiffs.*
*R. L. Whitmire for defendants.*

CONNOR, J. This appeal was duly docketed in this Court on 3 February, 1937. The appellant, Charles French Toms, Sr., died on 5 February, 1937. On 10 February, 1937, Meta Toms, who had qualified as executrix of the said Charles French Toms, suggested his death to this Court and moved that she be made a party defendant in the proceeding, as his executrix. This motion was allowed on 11 February, 1937, under rule 37 of the Rules of Practice of this Court. See 200 N. C., 835. The appeal was heard on 24 February, 1937.

It appears from the petition set out in record that Marion C. Toms died in Henderson County during the year 1917. At his death he was seized in fee and in possession of an undivided one-half interest in the land described in the petition. The other undivided one-half interest in said land was owned by his son, Charles F. Toms. By his last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Henderson County, the said Marion C. Toms devised the undivided one-half interest in said land owned by him at his death, to his wife, Katie B. Toms, "to be held by her during the term of her natural life, and upon her death to revert to my son, Charles French Toms, if he be alive, or to his heirs, if he be dead."

The plaintiffs are now the owners of the land described in the petition, claiming title thereto, through mesne conveyances, under a deed executed on 24 June, 1918, by Katie B. Toms and Charles French Toms.

The defendants other than Charles French Toms, Sr., and his wife, Meta Toms, are Katie B. Toms and the children and grandchildren of Charles French Toms, and the husbands and wives of those who are married. Katie B. Toms, widow of Marion C. Toms, is now living.

By virtue of the deed executed on 24 June, 1918, by Katie B. Toms and Charles French Toms, to the grantees named therein, and of mesne conveyances since said deed, at the commencement of this proceeding,

the plaintiffs were and are now the owners of the undivided one-half interest in the land described in the petition, which was owned in fee by Charles F. Toms, at the date of said deed and were and are now also the owners of the life estate of Katie B. Toms in the undivided one-half interest in said land which was devised to her by the last will and testament of Marion C. Toms. The plaintiffs were also the owners of all the right, title, interest, and estate of Charles French Toms, Sr., in and to the said undivided one-half interest in said land, under the will of his father, the said Marion C. Toms. The said interest was a contingent remainder. See *Brown v. Guthery,* 190 N. C., 822, 130 S. E., 836. Upon his death on 5 February, 1937, after this appeal was docketed in this Court, the children of the said Charles French Toms, then living, became the owners of a vested remainder in said undivided one-half interest in said land. See *Brown v. Guthery, supra.* Neither Charles French Toms, Sr., nor Meta Toms, as his widow or as his executrix, now have any right, title, interest, or estate in said land. Conceding without deciding, that a cause of action is alleged in the petition in this proceeding against the defendant Charles French Toms, under the provisions of C. S., 1744, such cause of action did not survive his death. For this reason the proceeding abates as to Charles French Toms, and his appeal must be dismissed. On the facts alleged in the petition, the defendant Meta Toms has no interest in this proceeding, either as widow or as executrix of Charles French Toms.

No pleadings have been filed in this proceeding by or on behalf of any of the defendants other than Charles French Toms and his wife, Meta Toms. The rights of these defendants in and to the subject matter of this proceeding are not involved in this appeal.

The proceeding is remanded to the Superior Court of Henderson County, that judgment may be entered in said court, that the proceeding abate as to the defendant Charles French Toms and his wife, Meta Toms. The appeal is

Dismissed.

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COBURN DEHART, W. M. DEHART, S. A. DEHART, JOHN DEHART, AND FRANK DEHART v. W. T. JENKINS.

(Filed 17 March, 1937.)

**1. Ejectment § 15—Where title is made to depend upon true boundary, plaintiffs have burden of establishing corners as contended for by them.**

In this action for the possession of land title was made to depend upon the location of corners as contended for by plaintiffs. Defendant introduced evidence seeking to establish different corners. Issues were submitted as to each of the two corners in dispute phrased so that the jury

should determine whether each corner was as contended for by plaintiff or defendant. *Held:* Defendant was not attempting to set up an affirmative defense, but introduced evidence of different corners merely to attack plaintiffs' claim, and an instruction that the jury should find the corners as contended for by plaintiffs if plaintiffs had so satisfied them by the greater weight of the evidence, and that they should find the corners contended for by defendant if defendant had so satisfied them by the greater weight of the evidence, *is held* erroneous as placing the burden of proof on both parties at the same time, the burden being upon plaintiffs throughout to prove title by establishing the corners as contended for by them.

**2. Trial § 29c: Appeal and Error § 43—**

An erroneous instruction on the burden of proof entitles the prejudiced party to a new trial, the burden of proof being a substantial right, and a later portion of the charge correctly placing the burden of proof will not cure the error, since inconsistent instructions upon a material point cannot be held harmless.

APPEAL by defendant from *Harding, J.*, at July-August Term, 1936, of SWAIN. New trial.

*Black & Whitaker and Edwards & Leatherwood for plaintiffs.*
*Moody & Moody for defendant.*

DEVIN, J. This was an action to recover the possession of certain lands, upon allegations of title and wrongful possession. The title to two parcels of land was involved.

Among the material issues submitted to the jury were the following:

"1. Is the black oak corner of sec. No. 66 located at the point on the Court Map at figure 4, as testified to by witness Bill Grant, or at the figure 9, as testified to by the defendant William Jenkins?

"2. Is the M. L. Dills white oak corner, described in plaintiffs' second boundary, located at the white oak stump indicated at figure 12 on the Court Map, as testified to by the witness Epp Jenkins, or at the point marked dogwood on the Court Map as testified to by defendant's witness Texas Wiggins, and the defendant?"

The jury answered the first issue, "Yes, No. 4," and the second, "Yes, No. 12."

Appellant's principal assignments of error are addressed to the form of these issues as being in the alternative and contrary to the rule stated in *Emry v. R. R.*, 102 N. C., 209, and *Carey v. Carey*, 108 N. C., 267, and to the judge's charge upon these issues in respect to the burden of proof.

The court charged the jury on the first issue as follows:

"If the plaintiffs have satisfied you, gentlemen, by the evidence in this case and by its greater weight that the corner is at No. 4, then you will

answer the issue, 'Yes, No. 4'; if he has failed to so satisfy you, and the defendant has satisfied you it is at No. 9, that is by the greater weight of the evidence for the purpose of establishing the defendant's claim to the property, you would answer the issue, 'Yes, No. 9.'"

And on the second issue: "The burden is on the plaintiff to satisfy you by the greater weight of the evidence that it is at No. 12, and if he has so satisfied you, then you will answer the issue, 'Yes, No. 12'; if the plaintiff has failed to satisfy you it is at 12, and the defendant has satisfied you by the greater weight of the evidence that it is at the dogwood, then you would answer it, 'dogwood.'"

The court further charged the jury that if they answered the first and second issues locating the corners at No. 4 and No. 12, they should thereupon answer the issues of title in favor of the plaintiffs.

The instructions given by the learned judge who presided over the trial below seem in conflict with the rule laid down in *Boone v. Collins,* 202 N. C., 12. In that case it was said, Chief Justice STACY speaking for the Court: "The burden of establishing the true location of the boundary line was on the plaintiff. *Hill v. Dalton,* 140 N. C., 9, 52 S. E., 273. But this was inadvertently placed on both parties at the same time. *Power Co. v. Taylor,* 194 N. C., 231, 139 S. E., 381. Similar instructions were held for error in *Garris v. Harrington,* 167 N. C., 86, 83 S. E., 253, and *Tillotson v. Fulp,* 172 N. C., 499, 90 S. E., 500. The burden of proving the affirmative of a single issue cannot rest on both sides at the same time. *Carr v. Bizzell,* 192 N. C., 212, 134 S. E., 462; *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. The rule as to the burden of proof constitutes a substantial right, and its erroneous placing is reversible error. *Hosiery Co. v. Express Co.,* 184 N. C., 478, 114 S. E., 823."

While *Boone v. Collins, supra,* was instituted as a special proceeding to establish a dividing line, the instant case was made to turn upon the question of boundary and the location of lines, and the same rule applies.

It is true, in another portion of his charge, the court below used this language: "I don't mean to say the burden is on the defendant anywhere in this case. The defendant is attempting here to establish his corner, and in order to get his corner established he must show it; it doesn't make any difference whether the defendant establishes any of his corners or not, so far as the plaintiffs' and defendant's rights are concerned. The defendant has the right to offer no evidence at all and attack the plaintiffs' evidence, and to contend that the evidence has not established his corner, but the defendant desires to have established here whether or not No. 9 is a corner and whether or not the dogwood is a corner. Of course, when he attempts to establish affirmatively a fact

for his own benefit and use, the burden is on him for that purpose, but so far as the rights of the plaintiffs are concerned the burden is on the plaintiffs all the way through."

But even if this portion of the charge be understood as laying down a different rule as to the burden of proof from that contained in the portion previously quoted, it would fall within the category of inconsistent instructions and invoke the rule laid down in *Young v. Commissioners,* 190 N. C., 845, and cases there cited.

Besides, the defendant cannot properly be said to have been attempting to set up an affirmative defense, in the sense referred to in *Hayes v. Cotton,* 201 N. C., 369, but was seeking by evidence to prevent the establishment of plaintiffs' title consequent upon locating the corners as claimed by them.

We conclude that appellant's assignments of error in the particulars herein pointed out must be sustained, necessitating a new trial. For this reason we do not discuss or decide the other questions presented by the appeal.

New trial.

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THE FEDERAL LAND BANK OF COLUMBIA v. MAUDE E. JONES, ADMINISTRATRIX, ET AL.

(Filed 17 March, 1937.)

**1. Mortgages § 17—After default mortgagee is entitled to possession and may maintain suits to protect his interest in the land.**

Legal title to mortgaged lands, for the purposes of security, is vested in the mortgagee, and in the absence of an agreement to the contrary, certainly after default, the mortgagee is entitled to enter and hold the land until redeemed in order to protect his security, and to this end he may maintain an action in ejectment, even against the mortgagor, or an action in trespass *quare clausum fregit* against anyone tortiously injuring the land, or file suit in equity to restrain waste, such rights of action being based upon the mortgagee's interest in the land.

**2. Same: Pleadings § 2—After default, mortgagee may join suit for foreclosure with action to recover for tortious injury to land.**

After the execution of the mortgage in question, the mortgagor conveyed an easement over the land giving defendant corporations the right to pond water thereon. After default, mortgagee instituted this suit to foreclose the mortgage and to recover from defendant corporations damages resulting to the land from the ponding of water thereon. *Held:* The actions against defendant corporations for tortious injury to the land could be maintained by plaintiff after default but prior to foreclosure, and the cause of action against them was properly joined with the suit against mortgagor for foreclosure.

BANK *v.* JONES.

APPEAL by plaintiff from *Harding, J.*, at August-September Term, 1936, of MACON.

Civil action to foreclose mortgage and to recover damages for injury to mortgaged premises.

The plaintiff holds a mortgage on 35¼ acres of land in Macon County, the same having been taken in 1921 as security for a loan of $1000.

In 1928, during the existence and continuance of plaintiff's lien, the mortgagor, Nannie E. Jacobs, conveyed to the town of Franklin an easement in said tract of land to flood and pond water thereon to the extent necessary for the construction of a dam and municipal electric light plant, which said easement was conveyed to Nantahala Power and Light Company in 1933. The power company is now in possession under said easement, and has greatly lessened plaintiff's security by ponding water on a portion of the mortgaged premises.

Two causes of action are set out in the complaint: One to foreclose said mortgage, and the other to recover damages for injury to the mortgaged premises.

There was judgment by default and order of foreclosure on the first cause of action, from which no appeal has been taken.

During the trial, upon intimation from the court that the cause of action for damages against the town of Franklin and the Nantahala Power and Light Company had not accrued and would not accrue prior to foreclosure with resultant deficiency, plaintiff suffered a nonsuit as to its second cause of action, and appeals.

*Gray & Christopher for plaintiff, appellant.*
*J. Frank Ray for defendant town of Franklin, appellee.*
*Black & Whitaker for defendant Power and Light Co., appellee.*

STACY, C. J. Can a mortgagee, after default and before foreclosure, maintain an action for trespass against one who has tortiously injured the mortgaged estate? The answer is, "Yes."

At the time of ponding water on the mortgaged premises, the plaintiff, as mortgagee after default, was entitled to possession. *Weathersbee v. Goodwin,* 175 N. C., 234, 95 S. E., 491; *Kiser v. Combs,* 114 N. C., 640, 19 S. E., 664; *Coor v. Smith,* 101 N. C., 261, 7 S. E., 669; *Capehart v. Dettrick,* 91 N. C., 344; *Bruner v. Threadgill,* 88 N. C., 361; *Wittkowski v. Watkins,* 84 N. C., 457; *Cunningham v. Davis,* 42 N. C., 5; *Linscott v. Weeks,* 72 Me., 506; 2 Jones on Mortgages, sec. 684, *et seq.* It is the holding in this jurisdiction that the legal title to mortgaged premises, for purposes of security, is vested in the mortgagee. *Gorrell v. Alspaugh,* 120 N. C., 362, 27 S. E., 85; *Weil v. Davis,* 168 N. C., 298, 84 S. E., 395; *Duplin County v. Harrell,* 195 N. C., 445, 142 S. E., 481; *Mitchell v. Shuford,* 200 N. C., 321, 156 S. E., 513.

And where there is no agreement to the contrary, certainly after default, the mortgagee, in order to protect his security, is entitled to enter and to hold the land until redeemed. *Stevens v. Turlington,* 186 N. C., 191, 119 S. E., 210. To this end he may maintain an action in ejectment, even against the mortgagor himself (*Weathersbee v. Goodwin, supra*); file a suit in equity to restrain waste (*Linscott v. Weeks, supra;* 41 C. J., 649); institute an action in trespass *quare clausum fregit* against anyone tortiously injuring the estate. *Stevens v. Smathers,* 124 N. C., 571, 32 S. E., 959; *Beck v. Zimmerman,* 75 N. C., 60; *Edwards v. Meadows,* 195 N. C., 255, 141 S. E., 595; *Walker v. Fawcett,* 29 N. C., 44; *Levitt v. Eastman,* 77 Me., 117; 1 Perry on Trusts (6th ed.), sec. 328. Such rights of action are grounded on the mortgagee's interest in the land. *Stewart v. Munger,* 174 N. C., 402, 93 S. E., 927; *Byrom v. Chapin,* 113 Mass., 308; 2 Jones on Mortgages, sec. 695a; 41 C. J., 648.

Nothing was said in *Watkins v. Mfg. Co.,* 131 N. C., 536, 42 S. E., 983, or in *Liverman v. R. R.,* 109 N. C., 52, 13 S. E., 734, which militates against our present position. On the other hand, the cases of *Wilson v. Motor Lines,* 207 N. C., 263, 176 S. E., 750, and *Harris v. R. R.,* 190 N. C., 480, 130 S. E., 319, dealing with mortgaged chattels, are adminicular herewith. See, also, *Trust Co. v. Asheville,* 207 N. C., 162, 176 S. E., 257, which was bottomed on the same principle, but decided on a procedural question.

The joinder of the two causes of action in the same complaint is sustained by what was said in *Carswell v. Talley,* 192 N. C., 37, 133 S. E., 181, and the procedure in *Stevens v. Smathers, supra,* and *Wilson v. Motor Lines, supra.*

We are not now concerned with whether the plaintiff can make out its case or with the extent of its right of recovery. These are matters which will arise on the hearing. It is observed that both the mortgagee and mortgagor, as was the case in *Stevens v. Smathers, supra,* are parties to the action.

Reversed.

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THOMAS B. DOE v. WACHOVIA BANK AND TRUST COMPANY, ADMINISTRATOR C. T. A. OF DORA W. DOE, DECEASED.

(Filed 17 March, 1937.)

**1. Executors and Administrators § 15d—**

In an action by a son against the estate of his mother to recover for sums advanced by him for her care and necessary medical attention prior to her death, evidence tending to show that said sums were not gifts, and tending to rebut the presumption to that effect arising from the relation, is competent.

**2. Same: Limitation of Actions § 1—Sums for which creditor must account should be applied to items barred by statute of limitations.**

A son advanced certain sums for the care and necessary medical attention of his mother, defendant's intestate, prior to her death, and by agreement with his sisters, received certain sums from a trust fund payable to intestate's children after her death. In his suit against his mother's estate to recover for advancements made by him, *it was held* that advancements made prior to three years from the institution of the action were barred by the statute of limitations, and it appeared that the advancements barred by the statute were in excess of sums received by him from the trust estate. *Held:* Conceding that sums received by him from the trust estate should be applied to advancements made by him, such sums should be applied to advancements barred by the statute, and the exclusion of evidence of the agreement under which he received the sums from the trust estate could not be prejudicial to defendant administrator.

APPEAL by defendant from *Phillips, J.*, at September Term, 1936, of BUNCOMBE. No error.

This is an action to recover the sum of $7,375.30, this being the aggregate of sums of money advanced by the plaintiff, from time to time, for the care and support of defendant's intestate during the last four years of her life.

In its answer the defendant denied liability to the plaintiff for advancements made by him for the care and support of its intestate, if any, on the ground that such advancements, if made by the plaintiff, as alleged in his complaint, were gifts from the plaintiff to defendant's intestate, who was his mother, and also pleaded in bar of plaintiff's recovery in this action the three year statute of limitations.

The evidence at the trial showed that during the year 1930, defendant's intestate, who was then a resident of Buncombe County, North Carolina, became ill; that because of her illness, which was both physical and mental, she required the constant care of physicians and nurses until her death on 23 June, 1931, at which time she was 74 years of age; and that because of her mental condition, due to her illness, defendant's intestate was unable to provide for her care and support out of her own funds, which would otherwise have been available for that purpose.

The evidence for the plaintiff tended to show that beginning on or about 25 August, 1930, and continuing until her death on 23 June, 1931, the plaintiff, who was a son of defendant's intestate, residing in the city of New York, from time to time made advancements for her care and support; that these advancements were made by checks, which were sent by mail to relatives of defendant's intestate with whom she resided; and that the proceeds of these checks were used to defray expenses incurred for her care and support.

The advancements thus made by the plaintiff during the three years immediately preceding the death of defendant's intestate, amounted to the sum of $2,619.

The court was of opinion that plaintiff was not entitled to recover in this action any sums advanced by him more than three years prior to the death of defendant's intestate, and so instructed the jury.

The issue submitted to the jury was answered as follows:

"Is the defendant indebted to the plaintiff, and if so, in what amount?

"Answer: 'Yes; $2,619, with interest.'"

From judgment in accordance with the verdict, the defendant appealed to the Supreme Court, assigning errors in the trial.

*Jones & Ward for plaintiff.*

*Parker, Bernard & Parker for defendant.*

CONNOR, J. Defendant's objections to evidence offered by plaintiff at the trial of this action were properly overruled. The evidence was competent as tending to show that the advancements made by the plaintiff through his sister for the care and support of his mother, were not gifts from him to her, and as tending to rebut any presumption to that effect, arising from her relation to him.

Defendant's objections to the exclusion of evidence tending to show that when their mother became ill in 1930, the plaintiff and his sisters entered into an agreement in writing relative to the distribution of a trust fund which was payable to the children of defendant's intestate at her death, were properly sustained. Sums received by the plaintiff from said trust after the death of his mother, pursuant to said agreement were not paid out of her estate. Conceding that plaintiff should account for said sums as payments on advancements made by him for the care and support of his mother, it does not appear that said sums should be applied as payments on such advancements made within three years preceding the death of his mother. All the evidence showed that plaintiff made advancements which under the ruling of the court are barred by the statute of limitations, and that the sums received by him out of the trust fund did not exceed the amount of these advancements. For this reason, if it should be held that the exclusion of such evidence was error, such error was not prejudicial to the defendant.

The instructions of the court in its charge to the jury, which the defendant assigns as error, are in accord with the law applicable to the facts shown by the evidence, as declared in *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540. The judgment in the instant case is affirmed on the authority of that case.

No error.

ELIZABETH B. DAVIS v. WILLIAM MONTGOMERY ET AL.

(Filed 17 March, 1937.)

**1. Payment § 8—Where creditor renders account showing application of payment debtor must protest such application within reasonable time.**

Where the creditor of a debtor owing two accounts collects the rents from the separate properties securing the debts, and renders statement to the debtor showing application of part of the rents from one property to the payment of the amount delinquent upon the debt secured by the other property, the debtor must protest such application within a reasonable time from receipt of the statement, even if such application is contrary to the agreement between them for the application of rents, and where the debtor fails to make such protest she is estopped from thereafter asserting that the application was wrongful in her effort to save one of the properties after both loans had become delinquent.

**2. Estoppel § 5—**

The foundation of estoppel *in pais* is error or inadvertence on the one side, and fault or dereliction on the other, and the doctrine has no application when both parties are in the right.

APPEAL by defendants from *Barnhill, J.*, at September Term, 1936, of WILSON.

Civil action to restrain foreclosure of deed of trust.

The essential facts follow:

1. In 1927, the plaintiff procured a large sum of money from the Acacia Mutual Life Insurance Company, divided into two loans, one for $75,000 secured by deed of trust on office building in Wilson known as the Davis Building; the other for $15,000, secured by deed of trust on an adjacent building known as the Cafe Building.

2. From April, 1930, up to the date of the institution of the present action, 6 August, 1934, all net rents collected from both buildings were paid to the defendant Insurance Company to apply on said loans.

3. Originally, the net rent received from each building was applied to the curtailment of the indebtedness against said building, but later, on 1 April, 1932, and again on 12 December, 1932, the Insurance Company rendered plaintiff statement of account in which it appeared that a portion of the net rents received from the Cafe Building had been applied against the accrued interest on the Davis Building loan, and in the latter statement special attention was called to this fact.

4. On 10 July, 1934, after the institution of the present action, plaintiff's agent by letter complained at the above application, and asserted: "Mrs. Davis understood that the rents from each building were to be applied to the loan on that building in sufficient amount to keep it in good standing, and agreed that in the event there was a surplus from

either building it was to be applied to the other if necessary to help with the payments."

5. There was a reference under the Code, the referee finding that the credit in dispute, amounting to $6,070.37, should have been applied to the loan against the Cafe Building and not to the loan against the Davis Building, which conclusion was affirmed by the Superior Court upon exceptions duly filed.

6. It is agreed that the application of the above credit is the determinative question in the case. If the plaintiff's contention be correct, then the loan upon the Cafe Building was not in default at the time of the institution of the present action. On the other hand, if the contention of the defendant be correct, then the loans on both buildings were in default, and the injunction should be dissolved.

*No counsel appearing for plaintiff, appellee.*
*Connor & Connor for defendants, appellants.*

STACY, C. J. There is really no dispute in respect of the facts. The evidence is not in conflict. Plaintiff admits that in the event of a surplus from either building it was to be applied to the other. And even if it be conceded that, through error or misunderstanding of the conferences had between the parties, the Acacia applied rents from the Cafe Building against the accrued interest on the Davis Building, when plaintiff understood a different application would be made, which is the strongest permissible inference on the record, still it was her duty to protest at the time of receiving statement, or within a reasonable time thereafter, unless she were content with the application as made by the defendant. *Sweeney v. Pratt,* 70 Conn., 274, 39 Atl., 182. Failing in this, she is now estopped. *McNeely v. Walters, ante,* 112. Compare *Development Co. v. Bon Marche, ante,* 272. The pertinent rule is stated in 48 C. J., 654, with citations in support of the statement, as follows: "The debtor is estopped from questioning the application made by the creditor where he receives an account or receipt applying payments in a certain way and fails to object, even though the application was made by the creditor in violation of an alleged agreement between the parties." The following will also be found as supporting the rule, either directly or in tendency: *McLear v. Hunsucker,* 30 La. Ann., 1225; *Flowers v. O'Brannon,* 43 La. Ann., 1042, 10 So., 376; *Baker v. Smith,* 44 La. Ann., 925, 11 So., 585; *DeBusk v. Perkins,* 207 Ky., 556, 267 S. W., 716; *Felin v. Trust Co.,* 248 Pa., 195, 93 Atl., 956; *Sawyer v. Howard,* 86 Vt., 63, 83 Atl., 535; *Turner v. Osborn,* 106 Miss., 737, 64 So., 721.

The foundation of estoppel *in pais* is error or inadvertence on the one side, and fault or dereliction on the other. *Morgan v. R. R.,* 96 U. S.,

716; *Sweeney v. Pratt, supra; LeRoy v. Steamboat Co.,* 165 N. C., 109, 80 S. E., 984. There is no occasion for the doctrine when both parties are in the right. *Estis v. Jackson,* 111 N. C., 145, 16 S. E., 7. The referee and the court below seem to have overlooked this principle.

In all probability the plaintiff was not concerned at the time with how the rents should be applied, for no doubt she then expected to repay both loans. However, when it later appeared that she would not be able to care for either, as an afterthought, she foregoes any effort to redeem the Davis Building and seeks to forestall foreclosure of the Cafe Building, hoping thereby to save it in the end.

The decision in *Bonner v. Styron,* 113 N. C., 30, 18 S. E., 83, is not at war with our present position.

The cause will be remanded for judgment accordant herewith.

Error.

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LESLIE ADAMS, BY HIS NEXT FRIEND, MRS. MARY ADAMS, v. BLUE BIRD TAXIS, INC., AND D. W. BLANKENSHIP.

(Filed 17 March, 1937.)

**Automobiles § 18g—Evidence held insufficient to discharge plaintiff's burden of identifying defendant's car as the one causing the injury.**

Evidence that many automobiles were passing on the street at the time of the accident, and that the automobile owned by one defendant and operated by the other was on the street near the place of the accident after the accident occurred, without further evidence identifying the automobile as the one which struck the bicycle which plaintiff was riding, *is held* insufficient to resist defendants' motions to nonsuit, the burden being upon plaintiff to affirmatively establish the truth of his allegations.

APPEAL by defendants from *Phillips, J.,* at November Term, 1936, of BUNCOMBE. Reversed.

This is an action to recover damages for personal injuries suffered by the plaintiff, and caused, as alleged in the complaint, by the negligence of the defendants.

The action was begun and tried in the general county court of Buncombe County.

At the trial, issues arising upon the pleadings were submitted to the jury and answered as follows:

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

"2. Did the plaintiff by his own negligence contribute to his injuries as alleged in the answer? Answer: 'No.'

"3. What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: '$1,450.'"

From judgment that plaintiff recover of the defendants the sum of $1,450 and the costs of the action, the defendants appealed to the judge of the Superior Court of Buncombe County, assigning numerous errors in the trial.

At the hearing of defendants' appeal, their assignments of error were not sustained. The judgment of the general county court was affirmed by the judge of the Superior Court. The defendants appealed to the Supreme Court, assigning as errors the rulings of the judge of the Superior Court and his judgment affirming the judgment of the general county court.

*Carl W. Greene and Zeb V. Nettles for plaintiff.*
*Weaver & Miller and J. C. Cheesborough for defendants.*

CONNOR, J. A careful reading of the record in this appeal fails to disclose any evidence at the trial in the general county court of Buncombe County, tending to show the injuries which the plaintiff suffered when he was struck by an automobile, while riding on a bicycle on a public street in the city of Asheville, were caused by the defendants or by either of them. Neither the plaintiff, who testified as a witness in his own behalf, nor James Lowe, who testified that he was riding on the bicycle with the plaintiff when he was struck by an automobile and thrown from the bicycle to the street, identified the automobile owned by the defendant Blue Bird Taxis, Inc., and driven by the defendant D. W. Blankenship, as the automobile which struck the plaintiff. The accident occurred about 10 o'clock at night, and at that time many automobiles were passing on the street where the accident occurred. The presence of defendants' automobile on the street near the place of the accident, after the accident occurred, did not alone support an inference that said automobile had struck the plaintiff and caused him to be thrown to the street. All the evidence tended to show that defendants' automobile arrived on the scene after the accident.

The plaintiff failed to sustain the burden which the law imposed upon him to establish by evidence at the trial—the truth of his allegations.

There was error in the ruling of the judge on defendants' assignment of error based upon their exception to the refusal of the trial court to dismiss the action by judgment of nonsuit. This assignment of error should have been sustained. The judgment is reversed and the action remanded to the Superior Court of Buncombe County, that judgment may be entered in said court in accordance with this opinion.

Reversed.

STATE v. MONROE LEE.

(Filed 17 March, 1937.)

**1. Criminal Law § 32a—**

Circumstantial evidence in this case, including testimony as to the action of bloodhounds, admitted for the purpose of corroboration, *is held* to constitute more than a scintilla, and sufficient to take the case to the jury.

**2. Criminal Law § 40—Testimony tending to impeach and discredit defendant about collateral matter held incompetent.**

Defendant, on trial for maliciously burning a barn, did not testify in his own behalf. A witness, who was not the owner of the barn, was allowed to testify as to difficulties with defendant after the witness had testified against defendant upon an indictment for larceny, a year or two before the indictment for arson, resulting in the witness' indictment of defendant for assault with a deadly weapon. *Held:* The testimony tended to discredit and impeach defendant about a collateral matter when he had not gone upon the stand, and was erroneously admitted.

APPEAL by defendant from *Harris, J.*, at January Term, 1937, of HARNETT. New trial.

Defendant was charged with maliciously burning a barn, the property of State's witness Lucas.

From judgment pronounced on verdict of guilty, the defendant appealed.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*J. R. Young for defendant.*

DEVIN, J. While the evidence was entirely circumstantial and included testimony as to the action of bloodhounds, admitted for the purpose of corroboration, we are unable to say that this did not constitute more than a scintilla of evidence, and so sufficient to take the case to the jury. *S. v. Thompson,* 192 N. C., 704.

However, we think there was error in the admission of testimony, warranting a new trial. The witness Ralph Vann was questioned by the State relative to a difficulty he had had with the defendant a year or two before. It appears from the record that defendant in apt time objected to the evidence, and "to anything that happened a year or two ago; overruled; defendant excepts." The witness thereupon described the difficulty with defendant as follows: "Monroe (the defendant) tried to get me to go off with him that night to steal some meat at his brother's and I would not go, and that night the meat got gone and the next morn-

ing his brother was around there, and I told him about it, and they had him up in Dunn and summoned me, and I told it on the stand, and Mr. Lee got mad with me. So, a long time after that, a year or two, I don't remember when it was, one Saturday morning I was going to my grandfather's, and I went down the road and he come out in his yard with his gun and shot me sideways kind of, and turned around and run back to his house, and I indicted him."

Doubtless the able presiding judge was not advertent to the fact that the exception covered all this testimony, as now appears from the record before us.

This evidence tended to discredit and impeach the defendant about a collateral matter, when he had not gone upon the stand, and was manifestly prejudicial. Nor was the error cured by subsequent proceedings. *S. v. Barrett,* 151 N. C., 665; *S. v. Holly,* 155 N. C., 485; *S. v. Adams,* 193 N. C., 581.

New trial.

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THE FARMERS BANK OF CLAYTON v. NELLIE HORNE McCULLERS ET AL.

(Filed 17 March, 1937.)

**Appeal and Error §§ 19, 31f—**

The pleadings are a necessary part of the record and may not be omitted by consent of the parties, and where the record is inadequate to establish the jurisdiction of the Supreme Court and put it in efficient relation and connection with the court below, the appeal will be dismissed. Rule of Practice in the Supreme Court, No. 19, sec. 1.

APPEAL by L. T. Rose, agent of plaintiff, from *Cranmer, J.,* at September Term, 1936, of JOHNSTON.

Motion by L. T. Rose for allowance out of funds in hands of receiver for services rendered in "receivership had in proceedings supplemental to execution."

From order directing the receiver to pay out all funds in his hands, and "to complete his liquidation of said estate as early as practicable and file his final report herein," the movant, "L. T. Rose, agent of the plaintiff bank," excepts and appeals.

*Parker & Lee for L. T. Rose, appellant.*
*Abell & Shepard for J. L. George and A. A. Corbett, appellees.*

STACY, C. J. It is stipulated by counsel "that the original records in the cases are not necessary on the appeal, and are therefore omitted by consent." This is fatal to the appeal. *Ins. Co. v. Bullard,* 207 N. C.,

652, 178 S. E., 113. Compare *Corp. Com. v. Trust Co.*, 194 N. C., 239, 139 S. E., 244. It is provided by Rule 19, sec. 1, of the Rules of Practice that "the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases." The pleadings are essential in order that we may be advised as to the nature of the action or proceeding. *Waters v. Waters*, 199 N. C., 667, 155 S. E., 564.

The record consists of certain judgments, orders, and reports. No written motion or application of appellant appears in the transcript. Indeed, the judgment from which the appeal is taken contains no reference to such motion. The record is too meager "to establish the jurisdiction of this Court and put it in efficient relation and connection with the court below." *Walton v. McKesson*, 101 N. C., 428, 7 S. E., 566; *Payne v. Brown*, 205 N. C., 785, 172 S. E., 348. Failure to send up adequate record has uniformly resulted in dismissal of the appeal. *S. v. Lbr. Co.*, 207 N. C., 47, 175 S. E., 713. Judicial knowledge arises only from what properly appears on the record. *Goodman v. Goodman*, 208 N. C., 416, 181 S. E., 328; *Ins. Co. v. Bullard, supra.*

On the authorities cited, and others of similar import, the attempted appeal must be dismissed. *Riggan v. Harrison*, 203 N. C., 191, 165 S. E., 358; *Waters v. Waters, supra; Pruitt v. Wood*, 199 N. C., 788, 156 S. E., 126.

Appeal dismissed.

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THE CLAYTON BANKING COMPANY ET AL. v. THE FARMERS BANK ET AL.

(Filed 17 March, 1937.)

**Appeal and Error § 6d—**

Where the correctness of the court's ruling upon a motion is dependent upon facts *aliunde* or *dehors* the record, appellant must request the court to find the facts, otherwise it will be presumed that the court found facts in support of the judgment, and the judgment will be affirmed.

APPEAL by defendant L. T. Rose from *Cranmer, J.*, at September Term, 1936, of JOHNSTON.

Motion to vacate order of confirmation.

At the April Term, 1936, Johnston Superior Court, there was verdict and judgment for plaintiffs in the above entitled cause, and order appointing commissioner and directing sale of collateral to be applied on judgment. The commissioner made sale of collateral and recommended confirmation 19 June, 1936. Order of confirmation was entered at "Smithfield, this 24th day of June, 1936. N. A. Sinclair, Judge," etc.

Motion was made at the September Term, 1936, to vacate said order of confirmation on the ground of irregularity. The motion was denied, "it appearing to the court that the sale was in all respects regular and in accordance with the judgment of the court entered at the April Term."

Movant appeals, assigning errors.

*Parker & Lee for L. T. Rose, appellant.*
*Abell & Shepard for appellees.*

STACY, C. J. Even if it be conceded that the original order of confirmation was irregularly entered, still no harm seems to have come to movant, as later decreed by the judgment at the September Term, which also apparently amounts to an order of confirmation. But, however this may be, the record is barren of any factual determination upon which a reversal of the judgment could be predicated. *Hospital v. Rockingham County, ante,* 205.

In a motion of this kind, where the correctness of the court's ruling is dependent upon facts *aliunde* or *dehors* the record, a request should be made that the facts be found, otherwise it will be presumed that they were determined in support of the judgment. *Dunn v. Wilson,* 210 N. C., 493, 187 S. E., 802; *Powell v. Bladen County,* 206 N. C., 46, 173 S. E., 50; *S. v. Dalton, ibid.,* 507, 174 S. E., 422; *Comr. of Revenue v. Realty Co.,* 204 N. C., 123, 167 S. E., 563; *S. v. Harris, ibid.,* 422, 168 S. E., 498; *Rutledge v. Fitzgerald,* 197 N. C., 163, 147 S. E., 816; *Holcomb v. Holcomb,* 192 N. C., 504, 135 S. E., 287; *Mfg. Co. v. Foy-Seawell Lbr. Co.,* 177 N. C., 404, 99 S. E., 104; *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955; *Lumber Co. v. Buhmann,* 160 N. C., 385, 75 S. E., 1008.

On the record as presented, no error is apparent.

Affirmed.

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A. W. HOWARD v. QUEEN CITY COACH COMPANY.

(Filed 17 March, 1937.)

**1. Judges § 2a: Venue § 8a—**

The resident judge of a district, when not holding court in the county in his district in which the cause is pending, has no jurisdiction to hear an appeal from the clerk refusing defendant's motion for change of venue on the ground of the residence of the parties, and where the record does not show that the judge was holding court in the county the cause will be remanded for determination by a judge holding court.

**2. Appearance § 2b—**

A party cannot, by consent or appearance, confer jurisdiction on the court when there is none in law, and appearance of counsel upon a hearing of a motion for change of venue does not waive such party's objection that the judge hearing the motion was without jurisdiction.

APPEAL by defendant from an order of *Pless, Resident Judge* of the Eighteenth Judicial District, entered in MCDOWELL County, 1 January, 1937. Error and remanded.

Plaintiff instituted suit against the defendant in the Superior Court of McDowell County on 27 July, 1936, and filed complaint alleging a cause of action growing out of the negligence of the defendant. Within the time for answering, defendant filed with the clerk petition and motion for removal of the cause to the Superior Court of Buncombe County, on the ground that plaintiff was a resident of Buncombe County at the time of instituting the action. On 1 October, 1936, the clerk of the Superior Court of McDowell County made an order denying the motion for removal, and the defendant excepted and appealed. On 19 December, 1936, plaintiff caused notice to be served on counsel for defendant that he would move for hearing on said appeal at the courthouse in Marion, North Carolina, on 1 January, 1937.

At said time and place the parties appeared and the motion was heard by J. Will Pless, Jr., Resident Judge of the Eighteenth Judicial District, who made certain findings and upon such findings entered an order denying defendant's motion for removal. The order recited that the cause "came on to be heard before J. Will Pless, Jr., Resident Judge of the Eighteenth Judicial District," and the order was signed "J. Will Pless, Jr., Resident Judge."

There was nothing in the record to show that there was or was not a session of the Superior Court of McDowell County being held on 1 January, 1937, or that Judge Pless was presiding therein by exchange or otherwise. The regular rotation of Superior Court judges indicated that Judge Clement was assigned to hold the term of McDowell court beginning 28 December, 1936.

From the order of Judge Pless affirming the order of the clerk, defendant appealed.

*Morgan & Story for plaintiff.*
*R. R. Williams for defendant.*

DEVIN, J., after stating the case: The principal question presented by this appeal is whether the resident judge of a judicial district, when acting in that capacity alone, has jurisdiction to hear and determine an appeal from an order of the clerk denying a motion to remove a cause to another county.

This question seems to have been decided by this Court in *Ward v. Agrillo,* 194 N. C., 321. From the well considered opinion by *Connor, J.,* in that case we quote the following: "In the absence of statutory provision to that effect, the resident judge of a judicial district has no jurisdiction to hear and determine an appeal from a judgment of the clerk of the Superior Court of any county in his district, rendered pursuant to the provisions of 3 C. S., 593, except when such judge is holding the courts of the district by assignment under the statute, or is holding a term of court by exchange, or under a special commission from the Governor. No jurisdiction is conferred upon the resident judge by the requirement of the Constitution that every judge of the Superior Court shall reside in the district for which he is elected."

It follows that, upon the record before us, the resident judge was without jurisdiction to make the order appealed from.

Nor may the fact that counsel for defendant appeared at the hearing be held to constitute a waiver. While a party may waive his right to have a cause removed, he cannot by consent or by appearance confer jurisdiction when there is none in law. *Dees v. Apple,* 207 N. C., 763; *Realty Co. v. Corpening,* 147 N. C., 613.

It is necessary, therefore, that this case be remanded to the Superior Court of McDowell County in order that the judge holding the courts of said county may hear and determine the appeal from the order of the clerk.

Error and remanded.

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ST. LOUIS UNION TRUST COMPANY AND JAMES H. GROVER, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF E. W. GROVE, DECEASED, v. HARDIN FOSTER.

(Filed 17 March, 1937.)

**1. Deeds § 16—Restrictive agreements applicable to part of tract held not enlarged by subsequent deed to entire tract subject to agreement.**

The owner of a five-hundred-acre tract of land executed an agreement imposing building and residential restrictions on a thirteen-acre tract included in the larger tract. Thereafter he conveyed the entire five-hundred-acre tract subject to all the restrictions, conditions, and stipulations contained in the agreement, and also certain general restrictions set out in the conveyance. Part of the five-hundred-acre tract could not be developed for residential purposes, the land being mountainous and the cost of installing water and sewer being prohibitive. *Held:* The conveyance did not enlarge the restrictions to cover the entire five-hundred-acre tract, but conveyed the land subject only to the residential restrictions on the thirteen-acre tract and the general restrictions set out in the conveyance, it being obvious that the owner did not intend the residential restrictions to apply to the entire tract.

**2. Same: Mortgages § 42—Purchaser at foreclosure takes title free from restrictions placed on property subsequent to mortgage.**

A large tract of land was mortgaged subject to restrictive covenants applicable only to a small part of the entire tract. Thereafter the mortgagor conveyed the entire tract subject to the mortgage. The purchaser and subsequent owners attempted to further develop the tract for residential purposes, plotted part of the tract, and sold certain lots by deeds containing restrictive covenants in accordance with a general plan of development, some of the lots so sold being released from the mortgage on the entire tract. Thereafter the mortgage was foreclosed and title under the sale conveyed to plaintiffs, trustees for the deceased original owner. *Held:* The title of the purchaser at a foreclosure sale relates back to the date of the mortgage, and plaintiffs acquired the land free from the restrictions imposed by intervening owners subsequent to the execution of the mortgage.

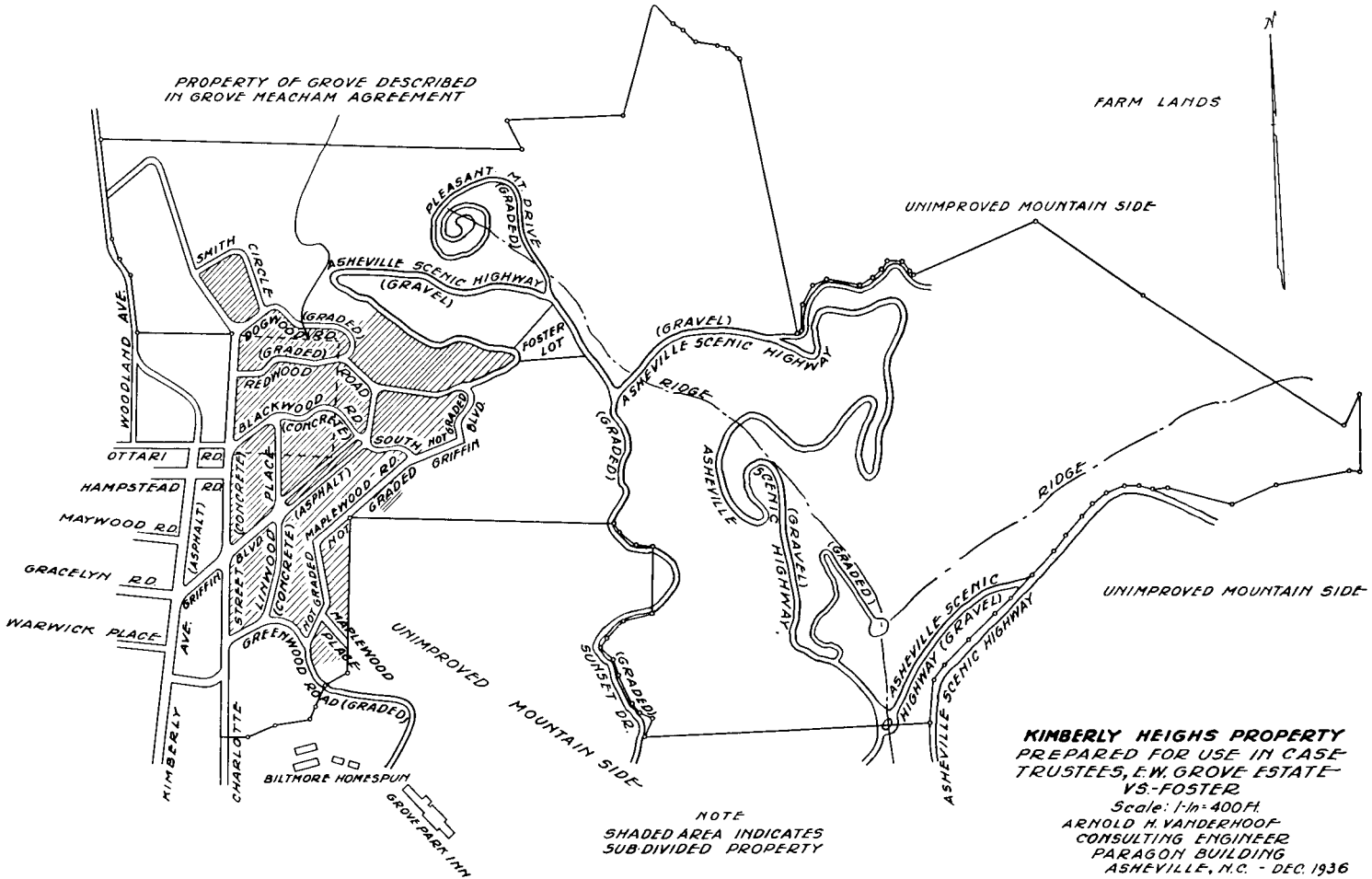
APPEAL by defendant from *Phillips, J.*, at December Term, 1936, of BUNCOMBE. Affirmed.

The plaintiffs and defendant entered into an agreement, on 30 November, 1936, by which plaintiffs agreed to sell to defendant a certain piece of land (shown on map as "Foster lot"). The defendant was willing to carry out his contract, but alleged that plaintiffs could not convey to him a marketable title. This is a submission of controversy without action. N. C. Code, 1935 (Michie), sec. 626.

The facts in regard to same are as follows: Paragraph 1. "In 1918 E. W. Grove and one W. B. Meacham were the owners of adjoining areas of land located in Buncombe County, a short distance north of the city of Asheville, the land of Grove lying on the east side of what was and is known as Charlotte Street Extension (which land appears upon the annexed plat designated as 'Property of Grove described in Grove-Meacham Agreement'), and the land of Meacham lying on the west side of said Charlotte Street Extension. On 8 October, 1918, Grove and Meacham, with the joinder of their respective wives, entered into the following agreement, which is duly recorded in the office of the register of deeds for said county, in Deed Book 224, at page 147."

The agreement set forth contains certain restrictions imposed upon a thirteen-acre tract of land belonging to Grove:

Paragraph 2. "Thereafter, on 1 April, 1926, by deed recorded in the office of the register of deeds, in Deed Book 345, at page 366, the said Grove conveyed to Floralina Realty Corporation a tract of approximately five hundred (500) acres of unimproved land, hereinafter referred to as 'Kimberly Heights,' the boundaries of which appear upon the plat annexed hereto. The said Floralina Realty Corporation was organized by its principal stockholder, one Arthur M. Griffing, for the purposes of developing the said 'Kimberly Heights,' or portions thereof, from time to time, as a residential subdivision. The tract conveyed to




RESIDENTIAL PROPERTY PARTLY RESTRICTED

NOTE
SHADED AREA INDICATES SUB-DIVIDED PROPERTY

**KIMBERLY HEIGHTS PROPERTY**
PREPARED FOR USE IN CASE
TRUSTEES, E.W. GROVE ESTATE
VS.-FOSTER
Scale: 1-In = 400 Ft.
ARNOLD H. VANDERHOOF
CONSULTING ENGINEER
PARAGON BUILDING
ASHEVILLE, N.C. - DEC. 1936

said Floralina Realty Corporation by Grove included the area belonging to said Grove described in the aforementioned agreement between Grove and Meacham. The deed to Floralina Realty Corporation contains in its *habendum* clause the following language:

" 'To have and to hold the above described land and premises, together with all the privileges and appurtenances thereunto belonging, or in anywise appertaining, unto the party of the second part, its successors and assigns, forever; subject, however, to the following restrictions, conditions, and stipulations, that is to say:

" 'All the restrictions, conditions, and stipulations contained in a certain agreement between E. W. Grove and W. B. Meacham and wife, recorded in the office of the register of deeds for Buncombe County, North Carolina, in Book No. 224, page 147; and also subject to the following restrictions:

" 'And the said party of the second part, for itself, its successors, and assigns, doth covenant to and with the said parties of the first part, their heirs, executors, administrators, and assigns, as follows:

" '(1) That they will not erect, license, or suffer to be erected or maintained on the above described land, or any part thereof, any house or building to be used as a sanitarium or hospital, or at any time permit or suffer to be used any house or building erected thereon for any such purpose, and will not, during the term of twenty-one (21) years from the date hereof, lease, sell, or convey said land, or any part thereof, or any building thereon, to a Negro or person of any degree of Negro blood, or any person of bad character;

" '(2) That the foregoing covenants shall be covenants running with the land, and shall be kept by the said party of the second part, its successors and assigns.

" '(3) To secure the unpaid balance of the purchase price of said property, Floralina Realty Corporation executed to Commerce Union Trust Company, as trustee, a first lien purchase money deed of trust embracing said property, which deed of trust, dated 1 April, 1926, is recorded in the office of the aforesaid register of deeds, in Deed of Trust Book 239, at page 283. It contains the following language with reference to restrictions on the property described: "This deed in trust is made and accepted subject to all the conditions and restrictions referred to and contained in deed of E. W. Grove and wife, A. G. Grove, to the party hereto, of the first part, bearing even date with these presents, reference to which deed is hereby made for a full recitation of said conditions and restrictions."

" '(4) By deed dated 1 July, 1926, the Floralina Realty Corporation conveyed the entire Kimberly Heights property, subject to the deed of trust referred to in paragraph 3 hereof, to the said Arthur M. Griffing,

individually, which deed is recorded in the office of said register of deeds, in Deed Book 355, at page 470. With reference to restrictions, the deed provides: "Subject, however, to the restrictions, conditions, and stipulations as contained in deed from E. W. Grove and wife to Floralina Realty Corporation hereinbefore referred to" (which deed is that described in paragraph 2 hereof).

"'(5) At the time of the conveyance to Floralina Realty Corporation by Grove, and at the time of conveyance to Griffing by Floralina Realty Corporation, the said Kimberly Heights property was unimproved, heavily wooded, and inaccessible to vehicular traffic except over what are known as Scenic Highway, Sunset Drive, and Grovewood Road; as appear on the plat annexed. The first two were and are public roads, used primarily for recreational automobile drives and horseback rides; Grovewood Road was, and is, also a public road, used as a rear or secondary entrance to Grove Park Inn, which lies near the southwest corner of the property. As it is shown by said plat, the property extends from Charlotte Street Extension east for a distance of approximately 8,000 feet, horizontal measurement. Across the center of the property, running north and south, lies a ridge of mountains, the two most prominent peaks of which are known as Patton Mountain, near the south boundary, and Mount Pleasant, near the north boundary. Patton Mountain lies almost directly behind the above Grove Park Inn. The Mount Pleasant-Patton Mountain ridge is joined by a second ridge, unnamed, running east to the extreme eastern boundary. The top of Patton Mountain lies about 800 feet, and the top of Mount Pleasant about 600 feet above Charlotte Street Extension, on the west boundary. Intermediate points along the ridge vary slightly from these elevations. The ridge running east is of approximately the same elevation as the Patton Mountain-Mount Pleasant ridge. From Charlotte Street Extension eastwardly there is a gentle rise for about 2,000 feet, then a sharp rise to the top of the ridge. East of the Patton Mountain-Mount Pleasant ridge, and on either side of the joining ridge, is a sharp drop to the north and south boundaries.

"'(6) Shortly after its conveyance to him, the said Griffing caused a portion of said Kimberly Heights, extending from Charlotte Street approximately 2,400 feet eastwardly and containing about sixty-five acres, to be platted into 162 lots, and said lots offered for sale to the public. The lines of the platted area are indicated on the annexed plat. Three maps were platted of this area, were made and placed on record by said Griffing: (a) "First Unit"—recorded in Book of Plats 12, at page 56; (b) "Part of Second Unit"—recorded in Book of Plats 13, at page 71; (c) "First Unit and Part of Second Unit," recorded in Book of Plats 14, at page 5. "First Unit and Part of Second Unit" (c), is merely the

combination of (a) and (b). In addition to the lots as subdivided, streets and alleys, each plat showed a building line for all lots, the same varying from twenty to fifty feet. The said Griffing also installed sewer and water lines available to all but a small number of lots within said platted area, and laid out and constructed streets as appears on the annexed plat. During his term of ownership, Griffing sold and deeded to purchasers a total of fourteen (14) lots within the platted area; of this number twelve (12) were duly released by the said Commerce Union Trust Company, trustee, from the lien of the deed of trust described in paragraph 3 hereof. Each of the deeds from Griffing contained the following language with reference to restrictions:

"'"To have and to hold the above described land and premises, with all the appurtenances thereunto belonging or in anywise appertaining; unto the said party of the second part, her heirs, successors, and assigns forever, subject to the restrictions, conditions, and stipulations hereinafter set forth, to wit:

"'"Whereas, the lot or parcel of land hereinbefore described, a part of a block of land, as shown on the plat hereinabove specifically referred to, the property of the party of the first part and its successors and assigns, which said land within said block has been divided into parcels or lots, and laid off and designed to be used exclusively for residential purposes; and whereas, the parties hereunto desire, for the benefit of their own property and for the benefit of future purchasers and owners of the land shown within the lines of said block, that the same shall be developed, and for a time hereafter used exclusively for private residential purposes:

"'"Now, therefore, the said party of the second part, for herself and her heirs, successors, and assigns, as follows:" (Setting forth certain restrictions.)

"'(7) In 1927, there having been a default under the terms of the deed in trust from Floralina Realty Corporation to Commerce Union Trust Company, trustee, the said trustee foreclosed the same, and deeded the property, excepting those portions previously released by it to lot purchasers from the said Griffing, to Griffing's Kimberly Heights, Incorporated, a corporation which was caused to be organized by the said Arthur M. Griffing for the purpose of developing the property further under the plans and designs theretofore conceived by the said Griffing. The said Griffing was at the time of the organization and thereafter the principal stockholder of the said Griffing's Kimberly Heights, Incorporated. The deed to the said Griffing's Kimberly Heights, Incorporated, was dated 21 May, 1927, and recorded in the office of the aforesaid register of deeds, in Deed Book 374, at page 135. The said deed contains the following provisions with reference to restrictions:

"'"Subject to all conditions and restrictions referred to and contained in deed of E. W. Grove and wife, A. G. Grove, to Floralina Realty Corporation, bearing date 1 April, 1926, and recorded in the office of the register of deeds for Buncombe County, North Carolina, in Book of Deeds ....., at page ....., reference to which deed is hereby made for a full recitation of said restrictions and conditions."

"'(8) By virtue of a refinancing agreement with the plaintiffs herein, who were the holders of the unpaid notes of the said Floralina Realty Corporation, the payment of the bid of Griffing's Kimberly Heights, Incorporated, made in the aforesaid foreclosure sale, was deferred, evidenced by promissory notes and secured by a first lien purchase money deed of trust embracing the property conveyed by said Commerce Union Trust Company, trustee, executed by Griffing's Kimberly Heights, Incorporated, to Commerce Union Trust Company, as trustee, dated 21 May, 1927, and recorded in the office of said register of deeds, in Book of Deeds and Trust 266, at page 1. This deed of trust contains the following provision with reference to restrictions:

"'"Subject to all conditions and restrictions referred to and contained in deed of E. W. Grove and wife, A. G. Grove, to Floralina Realty Corporation bearing date 1 April, 1926, and recorded in the office of the register of deeds for Buncombe County, N. C., in Book of Deeds ....., at page ....., reference to which deed is hereby made for a full recitation of said restrictions and conditions."

"'(9) Between 21 May, 1927, and 31 October, 1931, Griffing's Kimberly Heights, Incorporated, conveyed to purchasers ninety-three (93) lots in the aforementioned platted area, of which number sixty-four (64) were released by the trustee from the lien of the deed of trust described in paragraph 8 hereof. Except as hereinafter otherwise stated, deeds from Griffing's Kimberly Heights, Incorporated, for all of the lots which it conveyed contained the same restrictions as those of the deeds from Griffing, as set out in paragraph 6 hereof. The blanks pertaining to street frontage and minimum building cost of residence were filled in according to the location and size of the lot conveyed. The minimum building cost requirement in Griffing's Kimberly Heights, Incorporated, deeds varied from $5,000 to $24,000, the average being $7,886. Deeds for twenty (20) of the ninety-three (93) lots, located at the extreme northeast corner of the platted area in what was designated as Block "L," contained no minimum building cost requirements, although providing all of the remaining restrictions. Deeds for five (5) lots in scattered portions of the platted area contained no restrictions of any nature. In addition to the platted lots, Griffing's Kimberly Heights, Incorporated, also, in four instances, conveyed land outside the platted area totaling approximately nineteen (19) acres. In one of the conveyances, under this

classification, all of the standard restrictions except the minimum building cost requirement were included; in the second only paragraphs 1, 2, 3, 8, and 9 of the standard restrictions were included; the third conveyance was made subject only to the restrictions contained in the deed of trust from Griffing's Kimberly Heights, Incorporated, to Commerce Union Trust Company, trustee (described in paragraph 8 hereof); and the fourth conveyance was made subject to no restrictions of any nature. Of these four conveyances in the unplatted area, two, aggregating two acres, were released by the trustees from the lien of Griffing's Kimberly Heights, Incorporated, deed of trust.

"'(10) In October, 1931, default having been made under the terms of deed of trust from Griffing's Kimberly Heights, Incorporated, to Commerce Union Trust Company, trustee, foreclosure was had and the property described in the same, excepting such portions as had theretofore been released by the trustee, was duly conveyed by the trustee to the plaintiffs herein, by deed dated 31 October, 1931, and recorded in the office of the said register of deeds, in Book of Deeds 444, at page 421. The said deed provides, with respect to restrictions, the following: "Subject to all conditions and restrictions referred to and contained in deed of E. W. Grove and wife, A. G. Grove, to Floralina Realty Corporation, bearing date 1 April, 1926, and recorded in the office of the register of deeds for Buncombe County, North Carolina, in Book of Deeds 345, at page 366, reference to which deed is hereby made for a full recitation of said restrictions and conditions."

"'(11) By virtue of the foreclosure and deed mentioned in preceding paragraph hereof, the plaintiffs became the owners of the entire unplatted area of said Kimberly Heights (including the "Foster lot" hereinafter referred to), with the exception of the aforementioned two tracts previously released by the trustee; plaintiffs thereby also became the owners of eighty-six (86) lots within the platted area, the release of which had not been had or provided for.

"'(12) Since the conveyance to the plaintiffs, neither Floralina Realty Corporation, Arthur M. Griffing, nor Griffing's Kimberly Heights, Incorporated, has had any interest in or claim to any part of the Kimberly Heights property. Floralina Realty Corporation was duly dissolved on 23 July, 1931, and the charter of Griffing's Kimberly Heights, Incorporated, forfeited by the Commissioner of Revenue of North Carolina on 1 March, 1930, and neither of said corporations has since said dates maintained any organization or undertaken to transact any business. Other than in that portion of the property which has been referred to as the "Platted Area," neither Floralina Realty Corporation, Griffing, nor Griffing's Kimberly Heights, Incorporated, made improvements, although the latter made, or caused to be made, preliminary

designs for further subdivision of portions of the unplatted area, but which designs were never recorded or carried out. At the present time two tracts of 1 acre each, outside the platted area, are owned by purchasers under the title of Griffing's Kimberly Heights, Incorporated. Seventy-six (76) lots within the platted area are now owned by purchasers under the title of Griffing and Griffing's Kimberly Heights, Incorporated; of these lots, twenty-six (26) have been improved by residences erected at various times since April, 1926, under the design of the Griffing and Griffing's Kimberly Heights, Incorporated, restrictions. Fifteen (15) residences front on Griffing Boulevard, six (6) on Lynwood Road; four (4) on Blackwood Road; and one on Charlotte Street Extension. Since the foreclosure sale and conveyance to the plaintiffs, referred to in paragraph 10 hereof, the plaintiffs have made no improvements of either the unplatted area or of the lots conveyed to them by the trustee; nor have they formed or devised any common or general scheme of development for the same or any part thereof.

"'(13) On 30 November, 1936, the plaintiffs and the defendant entered into a certain written contract, by the terms of which the plaintiffs agreed to sell, and the defendant agreed to buy, a certain parcel or lot of land within the unplatted area of said Kimberly Heights shown on the attached plat as the "Foster lot"; that by the terms of such contract, copy of which is attached hereto, marked "Exhibit A," and made a part of this agreed statement of facts, the plaintiffs contracted and agreed to convey said property free and clear of all liens, encumbrances, and restrictions, except certain taxes and rights of way, and the following restrictive covenants: "And, the said purchaser, for himself, his heirs and assigns, does covenant to, and with the said vendors, their successors and assigns, as follows: First, that he will not erect, license, or suffer to be erected or maintained on the above described land, or any part thereof, any house or building to be used as a sanitarium or hospital, or at any time permit or suffer to be used any house or building erected thereon for any such purpose, and will not, during the term of twenty-one years (from 1 April, 1926), lease, sell, or convey said land, or any part thereof, or any building thereon, to a Negro, or person of any degree of Negro blood, or any person of bad character; second, that the foregoing covenants shall be covenants running with the land, and shall be kept by the said purchaser, his heirs and assigns."

"'(14) That, on or about 5 December, 1936, in accordance with the terms of the contract hereinbefore referred to, the plaintiffs tendered to the defendant a good and sufficient deed for said property, said deed purporting to convey the property free and clear from all restrictive covenants, excepting those referred to and set out in said contract and in paragraph 13 hereof.

"'(15) It is agreed that the plaintiffs are the duly designated, qualified, and acting trustees under the will of E. W. Grove, who died testate on or about 27 January, 1927, and that plaintiffs, as trustees, have full power to convey and sell real estate. It is further agreed that the deed as tendered to defendant is a sufficient deed for the property described in said contract, and that plaintiffs, as such trustees, are vested with a clear and marketable title to said property within the contemplation of said contract, except as to the restrictions hereafter specified, but the said defendant has refused to accept said deed and to pay the purchase price for said lot or parcel of land, contending that the plaintiffs' title to the said lot is not free and clear of all liens, encumbrances, and restrictions by reason of the fact that it is burdened with (a) the restrictions contained in the agreement between E. W. Grove and W. B. Meacham, as set forth in paragraph 1 hereof, and (b) the restrictions contained in the deeds from Arthur M. Griffing and Griffing's Kimberly Heights, Incorporated, to purchasers of lots within what has been hereinbefore designated as the "platted area" of Kimberly Heights.

"'(16) It is further agreed that if the court shall be of opinion with the plaintiffs upon the foregoing facts, then judgment shall be entered for the plaintiffs; and if the court shall be of opinion for the defendant, then judgment shall be entered for the defendant.

ADAMS & ADAMS,
*Attorneys for Plaintiffs.*
T. CARLISLE SMITH, JR.,
*Attorney for Defendant.*'"

The property in controversy is set forth in annexed plat, designated as "Property of Grove described in Grove-Meacham Agreement," made by Arnold H. Vanderhoof, consulting engineer.

The judgment in the court below was as follows:

"This cause coming on to be heard and being heard before the undersigned judge of the Superior Court at the regular December, 1936, Term of said court, at Asheville, Buncombe County, upon the agreed statement of facts of the parties, submitted under the terms of section 626 of the Consolidated Statutes of North Carolina, and from said agreed statement of facts it appearing to the court, and the court hereby so finding and holding:

"1. That the provisions of the deed from E. W. Grove to Floralina Realty Corporation, set forth in paragraph 2 of said statement of facts, do not operate in anywise to extend or enlarge the restrictions, conditions, and stipulations contained in the agreement between the said Grove and W. B. Meacham, set forth in paragraph 1, or to impose the same upon any part of the land described in said deed save that portion which

is particularly described in said agreement; that the restrictions contained in said agreement, accordingly, do not affect or encumber the *locus in quo,* and the same is free and clear thereof.

"2. That the restrictions set out and imposed in the various deeds from Arthur W. Griffing and Griffing's Kimberly Heights, Inc., to purchasers of lots in the 'platted area' of Kimberly Heights, which restrictions are set forth in paragraph 6 of the statement of facts, in nowise bind, affect, or encumber any of the land within said Kimberly Heights now owned by the plaintiffs under the trustee's deed referred to in paragraph 10; that, accordingly, none of said restrictions affect or encumber the *locus in quo,* the same being a portion of said land conveyed under said trustee's deed.

"It is therefore ordered, decreed, and adjudged that the plaintiffs are vested with a good and marketable title, within the terms and contemplation of the contract between the parties, free and clear of all liens, encumbrances, and restrictions, to the land and premises described in said contract and referred to in the statement of facts herein as the 'Foster lot'; and it is further ordered and adjudged that the defendant be and is hereby required specifically to perform said contract and to accept the deed to said land heretofore tendered by the plaintiffs, for the consideration and upon the terms of the contract.

"It is further ordered that the costs hereof be taxed against the defendant.

"This 18 December, 1936.

F. DONALD PHILLIPS,
*Judge Presiding.*"

The defendant excepted, assigned error, and appealed to the Supreme Court, on the ground that the court below erred in signing the judgment appearing in the record.

*Adams & Adams for plaintiffs.*
*T. Carlisle Smith, Jr., for defendant.*

CLARKSON, J. The defendant's *first* question involved is as follows: "Is the whole of a boundary of land, containing five hundred acres, subject to restrictions previously imposed upon a small portion thereof, containing approximately thirteen acres, by reason of the fact that the five-hundred-acre boundary is conveyed 'subject to all the conditions, restrictions, and stipulations' contained in the agreement creating the restrictions upon the thirteen-acre tract?" We think not.

The language in the agreed statement of facts as to certain of the restrictions in the deed is as follows: "Subject, however, to the following

restrictions, conditions, and stipulations, that is to say: All the restrictions, conditions, and stipulations contained in a certain agreement between E. W. Grove and W. B. Meacham and wife, recorded in the office of the register of deeds for Buncombe County, North Carolina, in Book No. 224, page 147; and also subject to the following restrictions: And the said party of the second part, for itself, its successors and assigns, doth covenant to and with the said parties of the first part, their heirs, executors, administrators, and assigns, as follows: (1) That they will not erect, license, or suffer to be erected or maintained on the above described land, or any part thereof, any house or building to be used as a sanitarium or hospital, or at any time permit or suffer to be used any house or building erected thereon for any such purpose, and will not, during the term of twenty-one (21) years from the date hereof (1 April, 1926) lease, sell, or convey said land, or any part thereof, or any building thereon, to a Negro or person of any degree of Negro blood, or any person of bad character; (2) that the foregoing covenants shall be covenants running with the land, and shall be kept by the said party of the second part, its successors and assigns."

This language is clear. When the entire 500-acre tract was sold there was a restricted agreement on the 13 acres between Grove and Meacham. This restriction in no way applied to the land sold, and could not be extended or enlarged beyond the particular area described in the Grove-Meacham agreement. The land sold was subject to this restriction in the 13 acres, in the same manner as if a deed were made subject to an existing lien, deed of trust, or mortgage on a portion of the property that was conveyed.

The Grove-Meacham agreement is in no way operative on the Foster lot—the *locus in quo* which is in controversy. The Grove-Meacham restriction is separate and distinct. It will be noted that in defendant's contract for the purchase of the *"locus in quo"* from the plaintiffs, the above restrictions as to sanitarium or hospital and sale to Negroes, etc., are agreed to be restrictions in the conveyance to him. See *Pepper v. Development Co., ante,* 166.

The defendant's *second* question involved is as follows: "Where approximately one-eighth of a five-hundred-acre boundary is subdivided and developed into residential lots, and about one-half of such lots are sold under uniform restrictions adopted pursuant to a general plan or scheme of development for the subdivided area, and thereafter the unsold lots and the undeveloped portion of the boundary is foreclosed under a preëxisting deed of trust and reconveyed to the estate of the owner of the original boundary, what effect, if any, do such restrictions have upon the land so reconveyed?" We cannot see, under the facts and circumstances of the case, that the restrictions have any effect on the land reconveyed on foreclosure.

1. On 1 April, 1926, Grove conveyed to Floralina Realty Corporation, deed duly recorded, the tract of 500 acres with the restrictions above set forth to certain unimproved land, afterwards known as "Kimberly Heights." Included in the deed was the area belonging to Grove described in the agreement between Grove and Meacham and the deed made subject to same.

2. On 1 April, 1926, the Floralina Realty Corporation made a deed in trust to Commerce Union Trust Company to secure the purchase money, which was duly recorded.

3. On 1 July, 1926, the Floralina Realty Corporation made a deed to Arthur M. Griffing, which was duly recorded, subject to the deed of trust before mentioned. Griffing, shortly after the conveyance to him, caused a portion of Kimberly Heights to be platted into 162 lots and offered them for sale with certain restrictions.

In 1927, there having been a default under the terms of the deed in trust from Floralina Realty Corporation to Commerce Union Trust Company, trustee, the said trustee foreclosed the same, and deeded the property, excepting those portions previously released by it to lot purchasers from the said Griffing, and Griffing's Kimberly Heights, Inc.

By virtue of a refinancing agreement with the plaintiffs herein, who were the holders of the unpaid notes of the said Floralina Realty Corporation, the payment of the bid of Griffing's Kimberly Heights, Incorporated, made in the aforesaid foreclosure sale, was deferred, evidenced by promissory notes and secured by a first lien purchase money deed of trust embracing the property conveyed by said Commerce Union Trust Company, trustee, executed by Griffing's Kimberly Heights, Incorporated, to Commerce Union Trust Company, as trustee, dated 21 May, 1927, and duly recorded.

Between 21 May, 1927, and 31 October, 1931, Griffing's Kimberly Heights, Incorporated, conveyed to purchasers ninety-three (93) lots in the platted area, of which number sixty-four (64) were released by the trustee from the lien of the deed of trust above set forth.

In October, 1931, default having been made under the terms of deed of trust from Griffing's Kimberly Heights, Incorporated, to Commerce Union Trust Company, trustee, foreclosure was had and the property described in the same, excepting such portions as had theretofore been released by the trustee, was duly conveyed by the trustee to the plaintiffs herein, by deed dated 31 October, 1931, and duly recorded.

The said deed provides, with respect to restrictions, the following: Subject to all conditions and restrictions referred to and contained in deed of E. W. Grove and wife, A. G. Grove, to Floralina Realty Corporation, bearing date 1 April, 1926.

By virtue of the foreclosure and deed before mentioned, the plaintiffs became the owners of the entire unplatted area of said "Kimberly

Heights" (including the "Foster lot"), with the exception of the before mentioned two tracts previously released by the trustees; plaintiffs thereby also became the owners of eighty-six (86) lots within the platted area, the release of which had not been had or provided for.

At the present time two tracts of 1 acre each, outside the platted area, are owned by purchasers under the title of Griffing's Kimberly Heights, Incorporated. Seventy-six (76) lots within the platted area are now owned by purchasers under the title of Griffing and Griffing's Kimberly Heights, Incorporated; of these lots, twenty-six (26) have been improved by residences erected at various times since April, 1926, under the design of the Griffing and Griffing's Kimberly Heights, Incorporated, restrictions. Fifteen (15) residences front on Griffing Boulevard, six (6) on Lynwood Road; four (4) on Blackwood Road; and one on Charlotte Street Extension. Since the foreclosure sale and conveyance to the plaintiffs, referred to, the plaintiffs have made no improvements of either the unplatted area or of the lots conveyed to them by the trustee; nor have they formed or devised any common or general scheme of development for the same, or any part thereof.

All the conveyances are subject to the restrictions set forth in the Grove-Meacham agreement, and also in the restrictions heretofore mentioned in deed from Grove to Floralina Realty Corporation.

We do not see how the restrictions imposed by Griffing or Griffing's Kimberly Heights, Inc., in deeds to their purchasers can bind or affect the title of the plaintiffs acquired under foreclosure of the purchase money deeds of trust made prior thereto.

In Jones on Mortgages, Vol. 3 (8th Ed.), p. 623, it is said: "Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights."

In Wiltsie on Mortgage Foreclosure, Vol. 2 (4th Ed.), pp. 1030-31, we find: "The title of the purchaser at a sale under a decree of foreclosure relates back to the date of the delivery of the mortgage, as against all intervening purchasers and encumbrancers who were made parties to the action, or who became interested in the premises *pendente lite.* All encumbrances and liens, and all conditions, reservations, and restrictions which the mortgagor may have imposed upon the property subsequently to the execution of the mortgage will be extinguished."

In *Leak v. Armfield,* 187 N. C., 625 (628), it is said: "If subsequent judgment creditors or litigants over the equity of redemption could 'tie up' a first mortgage and affect its terms, it would seriously impair a legal contract."

The 500 acres owned by Grove and which he sold did not provide a general scheme or plan of development. It would have been folly for Grove to have had a general scheme or plan, as only a small portion of

the land was fit for residential development. In the 500-acre tract there was a small area that could be used for residential purposes on which modern conveniences, sewer, water, etc., could be put, and on the balance of the land to have such conveniences, it would be at a prohibitive cost. The 500 acres deeded were unimproved, heavily wooded, and almost all inaccessible to vehicular traffic, mountainous, and very little of the area fitted for residential purposes.

It is a matter of common knowledge that large tracts of land are purchased and the development is gradual in blocks and otherwise. We think it was never the intention of Grove that the restrictions and conditions in the Grove-Meacham agreement block would extend to the balance of the land.

The defendant in his brief says: "The questions raised by this appeal are largely ones of fact, the law applicable to such facts being well settled."

On the agreed facts, we think the court below was correct in its holding.

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

Affirmed.

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J. L. SMATHERS v. THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

(Filed 17 March, 1937.)

**1. Judgments § 29—**

Parties who are *sui juris* and file answer admitting that plaintiff is entitled to the relief sought are concluded by a consent judgment entered in the cause against them in favor of plaintiff.

**2. Same—**

Parties *sui juris* who file answer denying plaintiff's right to recover are concluded by a judgment on the issue entered in the cause adverse to their contentions from which they do not appeal.

**3. Same—**

Infants represented by a guardian *ad litem* who files answer raising the issue of plaintiff's right to the relief sought are concluded by a valid judgment entered in the cause adverse to them, even though the judgment is erroneous, in the absence of an appeal.

**4. Judgments § 22—Judgment entered in accordance with decision of court on issue raised by pleadings may be erroneous, but is not void.**

A judgment rendered in accordance with the decision of the court on the issue of law raised by the pleadings in an action in which all persons having an interest in the subject matter of the suit are made parties and

all infant defendants are represented by a guardian *ad litem*, who files answer denying plaintiff's right to the relief sought, may be erroneous, but is not void and may not be collaterally attacked by the infant defendants.

**5. Trusts § 9—Trustee and beneficiaries held concluded by judgment revoking trust from which no appeal was taken.**

Trustor assigned certain policies of insurance on his life and certain other property to a trustee under an agreement stipulating that after his death the remainder of his estate, including the policies, should be distributed in accordance with the terms of his will, which provided that a share should be distributed to his wife, three of his children, respectively, and a share, including part of the proceeds of the policies, should be held in trust for R., and after R.'s death should be distributed to the surviving wife and children of R. After the death of insured's wife, insured instituted an action to revoke the trust, and his children, R. and R.'s children who had reached their majorities, filed answer admitting his right to revoke the trust, and the trustee and guardian of the minor and unborn children of R. filed answers contending that the remainder over to R.'s children was vested and could not be revoked. The court entered judgment, from which no appeal was taken, that the interests of the minor children were contingent, and entered judgment revoking the trust. C. S., 996. *Held:* The judgment, being rendered in accordance with the court's opinion on the issue raised by the pleadings, that the interests of the minor children were contingent, is binding on the trustee and minor children, even if erroneous, since the judgment is not void, and the parties *sui juris* who consented to the judgment are concluded thereby, and the effect of the judgment was to revoke the trust as to the trustee and all the beneficiaries and reinvest title in the trust property in trustor.

**6. Insurance § 36a—**

Where insurance policies are assigned by insured under a trust agreement, and thereafter the trust is revoked by judgment conclusive on the trustee and all the beneficiaries of the trust, the right to the policies reverts to insured and he is entitled to have the trustee beneficiary named therein changed by insurer in accordance with his directions.

APPEAL by defendant from *Phillips, J.*, at August Term, 1936, of BUNCOMBE. Affirmed.

This is an action for judgment that the defendant be ordered and directed by the court to change the beneficiary in each of two policies of insurance on the life of the plaintiff issued by the defendant, by striking from said policies as the beneficiary therein the name of the Wachovia Bank and Trust Company, trustee, and inserting in lieu thereof the names of Marguerite Smathers Jones, Claudie Smathers, and James L. Smathers, Jr., the children of the plaintiff.

When the action was called for trial, both plaintiff and defendant waived a trial by jury and submitted to the court a statement of facts agreed, which are substantially as follows:

On 14 June, 1904, the defendant issued to the plaintiff two policies of insurance on the life of the plaintiff, each for the sum of $2,000, the said policies being numbered 585,693 and 585,694, respectively. All premiums required to keep said policies in force have been paid. Both policies are now fully paid. The beneficiary named in each policy is the Wachovia Bank and Trust Company, trustee.

On 30 October, 1925, the plaintiff executed his last will and testament. The second item of said last will and testament is in words as follows:

"Second. I bequeath and devise to Wachovia Bank and Trust Company, a North Carolina corporation with an office at Asheville, N. C., all the balance of my property, of every kind, and wherever situate, to have and to hold in trust and for the period of time and for the objects herein declared, as follows:

"(a) To set aside the sum of five thousand ($5,000) dollars, one-half of it from the proceeds of my life insurance policies, and the other half out of the other assets of my estate, as soon as the money is available without hampering my estate, and to handle this fund as follows:

"To invest it in a small farm or tract of land for the use of Charlie Revis, of Murphy, N. C., so long as he may live; the said land to be purchased with the consent and approval of the said Charlie Revis.

"In case the said Revis should prefer to have the said fund invested in securities, then my said trustee shall so invest it and pay over the proceeds to the said Charlie Revis so long as he may live. Upon the death of the said Charlie Revis, said sum shall be invested in income producing securities and the proceeds paid in equal shares to or for the wife and children of the said Charlie Revis for a period of twenty-five (25) years after my death. At the conclusion of the period of twenty-five years after my death, the principal of this trust fund shall be divided equally among his children and his wife, counting his wife as a child. The share of each child shall at that time be paid to him or to her, but my said trustee shall hold in trust his wife's share, paying to her the income therefrom so long as she may live and at her death divide said share in equal parts among the children of the said Charlie Revis then living.

"(b) To divide the remainder of my estate as soon as practicable after my death into four equal shares for my wife and three children, the income and principal of each share to be disposed of when and as hereinafter provided.

"(c) To pay to my wife during her life or widowhood for her comfort and support the net income from one share, and so much of the principal thereof as may, in the discretion of my trustee, be necessary, and at her death or remarriage divide the remainder of her said share equally for my said three children, and pay to them the income and principal, when and as hereinafter provided, for their respective shares.

"(d) To pay to my daughter, Marguerite Smathers Jones, as soon as practicable after my death, one-fourth (¼) of her share and pay to her the income and balance of principal in such amounts and at such times as my trustee, in its wise discretion, may deem advisable, over a period of ten years next following my death.

"(e) To pay to my daughter, Claudie Smathers, who is now in a sanatorium, during her lifetime the income and principal of her share in such amounts and at such times as my trustee may, in its wise discretion, deem advisable and best.

"In the event, however, that in the discretion of my trustee my said daughter should sufficiently recover from her illness to so receive her share of my estate, then my trustee is authorized to pay her one-fourth (¼) of the principal and accrued interest, and pay to her the income and balance of principal in such amounts and at such times as the said trustee may, in its discretion, deem best, covering a period of five years following such recovery.

"(f) To pay to or for my son, J. L. Smathers, Jr., the net income from his share until he arrives at the age of twenty-one (21) years, and then pay to him one-fourth (¼) of the principal of his share, if, in the discretion of my trustee, he is sober and industrious, and well qualified to receive and invest the same, and pay to him the income and balance of principal in such amounts and at such times as my trustee may, in its discretion, deem wise and advisable, covering a period of ten (10) years.

"In the event that my said son, on arriving at the age of thirty-one (31) years, has not received all his share of principal and income, then my trustee is authorized and directed to pay to him all of such balances.

"I am making the above provisions in connection with this bequest to my son, in order to help him in every way possible to wisely save and invest his share of my estate.

"(g) Inasmuch as my estate, not including life insurance, is principally invested in the stock of the J. O. Platt Company, at Canton, N. C., it is my desire and wish that such investment be retained by my trustee during the life of this trust so long as in its sound judgment the investment is safe and the business of the company is conducted along safe and profitable lines.

"My trustee is also authorized to retain any other stocks and bonds that I may own at my death so long during the life of this trust as, in its discretion, such investments are good and profitable. My trustee, however, shall not be liable for any losses that may be sustained by reason of such investments.

"(i) To invest and keep invested all the principal of my estate in such income producing or interest bearing securities as may be approved by the trust committee of my said trustee, until said estate has been discharged of the trust as herein provided."

After the execution by the plaintiff of the said last will and testament, to wit: On 17 March, 1926, the plaintiff and the Wachovia Bank and Trust Company entered into an agreement in writing, by which the plaintiff transferred, assigned, and set over to the Wachovia Bank and Trust Company certain policies of insurance on the life of the plaintiff, including the two policies which had been issued by the defendant to the plaintiff on 14 June, 1904. It is provided in said agreement that the Wachovia Bank and Trust Company shall hold the said policies of insurance on the life of the plaintiff in trust for certain purposes set out in said agreement, among others, the following:

"Fourth. At my death the said trustee is to collect the proceeds of the said policies and hold the same, as well as any sums paid in thereon before my death, and to use, invest, and distribute the said funds as directed in my last will and testament, dated 30 October, 1925, in paragraph second, and subsections (a), (b), (c), (d), (e), (f), (g), and (i) thereof, and close this trust as and when directed in said paragraph of said will."

After the execution of said agreement by the plaintiff and the Wachovia Bank and Trust Company, and pursuant to its provisions, the plaintiff requested the defendant to change the beneficiary in each of the policies which had been issued to the plaintiff by the defendant on 14 June, 1904, by striking out of said policies the name of the original beneficiary and inserting in lieu thereof the name of the Wachovia Bank and Trust Company, trustee. This request was complied with by the defendant. The Wachovia Bank and Trust Company, trustee, is now the beneficiary named in each of said policies.

Mrs. Lillie M. Smathers, wife of the plaintiff, died some time prior to 12 March, 1935. Prior to that date plaintiff had suffered financial losses, as the result of which his estate had greatly diminished in value. For this reason the plaintiff desired to revoke both the last will and testament which he had executed on 30 October, 1925, and the trust which he had created by his agreement with the Wachovia Bank and Trust Company on 17 March, 1926. He was of the opinion that because of the greatly diminished value of his estate, the provisions of the last will and testament which he had executed and of the trust which he had created by his agreement with the Wachovia Bank and Trust Company were unjust and inequitable.

On 12 March, 1935, each of the following named beneficiaries of the trust which the plaintiff had created by his agreement with the Wachovia Bank and Trust Company, on 17 March, 1926, was over the age of twenty-one (21) years, to wit: Charlie Revis, Ella Revis, wife of Charlie Revis, Aubrey Revis, child of Charlie Revis, Marguerite Smathers Jones, Claudie Smathers, and James L. Smathers, Jr., children of the plaintiff.

At said date, the following named children of Charlie Revis, then living, were, each, under the age of twenty-one (21) years, to wit: Minnie, Charles, Jr., Elizabeth, Meta, Lush, Rosa Lee, Utie, and Eugene Revis.

On 12 March, 1935, J. L. Smathers, the plaintiff in this action, instituted an action in the Superior Court of Buncombe County against Wachovia Bank and Trust Company, Charlie Revis and his wife, Ella Revis, Aubrey Revis, Minnie Revis, Charles Revis, Jr., Elizabeth Revis, Meta Revis, Lush Revis, Rosa Lee Revis, Utie Revis, and Eugene Revis, the last eight being infant children of Charlie Revis, now living, and such other children of the said Charlie Revis as may be born hereafter, Marguerite Smathers Jones and her husband, Perry Jones, Claudie Smathers, and James L. Smathers, Jr.

After the institution of said action, by an order duly made therein, Carl W. Greene was duly appointed by the court as guardian *ad litem* for the eight infant defendants, children of Charlie Revis, now living, and also for such child or children of the said Charlie Revis as may be born hereafter. The said Carl W. Greene, guardian *ad litem,* was authorized by the court to employ, and did employ, counsel to represent him in the action.

On the facts alleged in the complaint in said action, J. L. Smathers, the plaintiff in this action, prayed judgment that both the last will and testament which he had executed on 30 October, 1925, and the trust which he had created by his agreement with Wachovia Bank and Trust Company on 17 March, 1926, be declared revoked and canceled.

Answers were duly filed by all the defendants in said action. No issue of fact was raised by the said answers. All the defendants, except Wachovia Bank and Trust Company and Carl W. Greene, guardian *ad litem,* in their several answers admitted that the plaintiff was entitled to the relief prayed for in his complaint, and consented that judgment should be rendered by the court in accordance with his prayer.

The tenth paragraph of the complaint is as follows:

"10. Plaintiff avers that he is advised, informed, and believes that the interests purporting to be devised in said last will and testament and trust agreement is not vested in the wards of the defendant Carl W. Greene, guardian *ad litem* for Minnie Revis, Charles Revis, Jr., Elizabeth Revis, Meta Revis, Lush Revis, Rosa Lee Revis, Utie Revis, and Eugene Revis, children of Charlie Revis and his wife, Ella Revis, now living, and for such as may be hereafter born of said marriage, but that said interests are contingent upon the happening of the events in the future designated and arising by reason of the terms of said last will and testament, or that at all events it cannot now be determined who would take under the terms of said last will and testament upon the

happening of the contingencies and future events named in said last will and testament."

Both the defendants Wachovia Bank and Trust Company and Carl W. Greene, guardian *ad litem,* in their separate answers, denied the allegations and averments made by the plaintiff in the 10th paragraph of his complaint; each alleged that the interests of the children of Charlie Revis, both those now living and those who may be born hereafter, in the subject matter of the trust created by the plaintiff, are vested and not contingent.

The action was heard at March Term, 1935, of the Superior Court of Buncombe County.

The court was of opinion that upon the admissions in the pleadings, the interests of the children of Charlie Revis in the subject matter of the trust created by the agreement between the plaintiff and the defendant Wachovia Bank and Trust Company, by virtue of the provisions of the last will and testament executed by the plaintiff, were contingent and not vested, and that for that reason the plaintiff was entitled to judgment in said action revoking and canceling both the trust created by the agreement and the last will and testament.

It was accordingly ordered and adjudged by the court "that the defendant Wachovia Bank and Trust Company enter a cancellation on its records of said trust agreement, and surrender to the plaintiff the property embraced by said agreement."

It was further ordered and judged by the court that "the defendant Wachovia Bank and Trust Company be and it is hereby fully acquitted and relieved by this judgment of any and all liability to any of the parties to this action, and stands discharged from any and all liability whatsoever on account of its relation as trustee to the matters involved in the trust agreement and will."

Neither of the defendants excepted to or appealed from said judgment.

After the said judgment was rendered, and in accordance with its provisions, the Wachovia Bank and Trust Company delivered the two policies of insurance on the life of the plaintiff in this action which were issued by the defendant to the plaintiff on 14 June, 1904, to the plaintiff, and thereupon the plaintiff requested the defendant to change the beneficiary in each of said policies by striking therefrom the name of Wachovia Bank and Trust Company, trustee, and inserting in lieu thereof the names of Marguerite Smathers Jones, Claudie Smathers, and James L. Smathers, Jr., children of the plaintiff. This request was refused by the defendant.

This action was begun in the Superior Court of Buncombe County on 3 April, 1936, and was heard at August Term, 1936, of said court.

On the facts agreed, the court was of opinion that the minor children of Charlie Revis and his wife, Ella Revis, now living, and their unborn

children, having been made parties to the action entitled "J. L. Smathers *v.* Wachovia Bank and Trust Company and others," and having been duly represented in said action by their guardian *ad litem,* Carl W. Greene, are bound by the judgment rendered in said action, and that the issue of law raised by the pleadings in this action, involving the question as to whether the interests of said children in the subject matter of the trust created by the plaintiff, and revoked by the judgment in that action, are vested or contingent, having been decided adversely to the contentions of the defendant in this action, the judgment in that action in accordance with said decision is conclusive upon the court in this action.

It was accordingly ordered and adjudged by the court "that the defendant, the Northwestern Mutual Life Insurance Company, forthwith endorse a change of beneficiaries in the said insurance policies sued on in this action, Nos. 585693 and 585694, from the Wachovia Bank and Trust Company, trustee, to Marguerite Smathers Jones, Claudie Smathers, and James L. Smathers, Jr., children of the plaintiff, and that the defendant pay the costs of this action, to be taxed by the clerk."

From the said judgment, the defendant appealed to the Supreme Court, assigning error in the judgment.

*Smathers, Martin & McCoy for plaintiff.*
*Harkins, Van Winkle & Walton for defendant.*

CONNOR, J. At the date of the institution in the Superior Court of Buncombe County of the action entitled, "J. L. Smathers *v.* Wachovia Bank and Trust Company and others," the defendants therein, to wit: Wachovia Bank and Trust Company, Charlie Revis, Ella Revis, Aubrey Revis, Marguerite Smathers Jones, Claudie Smathers, and James L. Smathers, Jr., were each *sui juris.* Each of said defendants filed an answer to the complaint in said action, and was represented by counsel. Neither of said defendants excepted to or appealed from the judgment in said action.

The defendants Charlie Revis, Ella Revis, Aubrey Revis, Marguerite Smathers Jones, Claudie Smathers, and James L. Smathers, Jr., each of whom was over twenty-one years of age, admitted that on the facts alleged in his complaint the plaintiff J. L. Smathers was entitled to judgment in said action declaring that the trust which he had created by his agreement with Wachovia Bank and Trust Company on 17 March, 1926, was revoked and ordering that said agreement be canceled by the defendant Wachovia Bank and Trust Company. The said defendants having consented to the judgment rendered by the court in said action are bound by its provisions. They are forever concluded by said judgment from asserting any right or rights, legal or equitable, in or to the

subject matter of said trust. They have no interest, present or future, under and by virtue of said trust agreement, in or to the policies of insurance which were issued by the defendant in this action to the plaintiff on 14 June, 1904, and which are now in force according to their terms and provisions.

The defendant Wachovia Bank and Trust Company by its answer to the complaint in said action, raised the identical issue of law which the defendant has raised by its answer to the complaint in this action, to wit: Whether the interests of the children of Charlie Revis, under and by virtue of the provisions of the trust which was created by the plaintiff by his agreement with the Wachovia Bank and Trust Company on 17 March, 1926, are vested or contingent. That issue was decided by the court adversely to the contention of the Wachovia Bank and Trust Company in the action instituted by the plaintiff in the Superior Court of Buncombe County, to which the Wachovia Bank and Trust Company was a party. The judgment in accordance with said decision is binding on the Wachovia Bank and Trust Company. By reason of said judgment, revoking the said trust, and ordering the cancellation of said agreement by the Wachovia Bank and Trust Company, the Wachovia Bank and Trust Company now has no right, title, or interest in the subject matter of said trust, which includes the policies which the defendant in this action issued to the plaintiff on 14 June, 1904, and which are now in force according to their terms and provisions.

The infant children of Charlie Revis, who were living at the date of the institution in the Superior Court of Buncombe County of the action entitled "J. L. Smathers *v.* Wachovia Bank and Trust Company and others," and such children of the said Charlie Revis as may be born to him hereafter, were parties to said action. They were represented in said action by their duly appointed guardian *ad litem*, who filed an answer in their behalf to the complaint in said action. The said guardian *ad litem*, by his answer, raised the identical issue of law which the defendant in this action has raised by his answer to the complaint herein, to wit: Whether the interest of the children of Charlie Revis, under and by virtue of the provisions of the trust which was created by the plaintiff by his agreement with Wachovia Bank and Trust Company on 17 March, 1926, are vested or contingent. That issue was decided by the court adversely to the contention of the guardian *ad litem* in the action instituted by the plaintiff in the Superior Court of Buncombe County, to which the said children of Charlie Revis, both those now living and those who may be born to him hereafter, were parties. The judgment in accordance with said decision is binding on the said children of Charlie Revis, and concludes them from hereafter asserting any right, title, or interest, legal or equitable, to the subject matter of said

trust, which includes the policies of insurance which the defendant issued to the plaintiff on 14 June, 1904, and which are now in force according to their terms and provisions, unless as contended by the defendant, the judgment is void for the reason that the court had no jurisdiction of the subject matter of the action in which the judgment was rendered.

The contentions of the defendant that said judgment is void, and therefore subject to collateral attack, now or hereafter, cannot be sustained. Conceding without deciding, for the reason that that question is not presented by this appeal, that the judgment is erroneous, we must hold that the judgment is not void. *Starnes v. Thompson,* 173 N. C., 466, 92 S. E., 259; McIntosh, N. C. Prac. and Proc., p. 734. The court was of opinion and so decided that the interests of the children of Charlie Revis, in the subject matter of the trust created by the plaintiff by his agreement with the Wachovia Bank and Trust Company on 17 March, 1926, were contingent and not vested, and that for this reason under the provisions of C. S., 996, the trust was revocable. The judgment was rendered in accordance with the decision of the court of the issue of law raised by the pleadings. Although the judgment may be erroneous, it is not void.

By virtue of the judgment rendered in the action entitled "J. L. Smathers *v.* Wachovia Bank and Trust Company and others," the trust created by the plaintiff by his agreement with the Wachovia Bank and Trust Company on 17 March, 1926, has been revoked both as to the trustee and as to all the beneficiaries of the said trust. All the property which was the subject matter of the trust has reverted to the plaintiff in this action. He is entitled to the policies of insurance on his life which were issued to him by the defendant on 14 June, 1904, and there is no error in the judgment ordering and directing the defendant to change the beneficiary in said policies in accordance with the request of the plaintiff.

The judgment is

Affirmed.

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ROSS L. VAUGHAN v. MRS. ELIZABETH S. VAUGHAN.

(Filed 17 March, 1937.)

**1. Divorce § 1—**

Only the injured party, husband or wife, is entitled to divorce *a mensa et thoro* on the ground of abandonment. N. C. Code, 1660 (1).

**2. Divorce § 11—Order for alimony pendente lite held to sufficiently set forth fact of abandonment and financial necessity of wife.**

In the husband's suit for divorce *a mensa et thoro,* defendant wife set up a cross action asking divorce *a mensa et thoro* and alimony *pendente*

*lite*. Upon the hearing of the wife's motion for alimony *pendente lite*, the court found "from the affidavits . . . and oral testimony . . . that plaintiff willfully abandoned defendant . . . and that since said date he has not provided the defendant with a home and necessary subsistence." *Held:* In the absence of a request for specific findings of fact in regard to the abandonment of the wife and her lack of financial means, the court's findings are sufficient to support its order granting the wife alimony *pendente lite*, and the order will not be held for error on an exception to the "entire findings of fact." C. S., 1666.

**3. Same—**

The right to alimony *pendente lite* is a question of law, while the amount of alimony and counsel fees is a matter of judicial discretion.

**4. Divorce § 14: Appeal and Error § 13—Upon appeal from order for alimony, case is no longer in Superior Court for motion to enforce payment.**

The court, upon the hearing, entered an order granting a wife alimony *pendente lite* with provision that if the sum provided were not paid as stipulated in the order the amount due should be a lien on the husband's lands. The husband appealed from the order. Pending the appeal the wife moved, after notice, that the husband having failed to make the payments as required, a commissioner be appointed to sell his lands. The court appointed a commissioner to sell so much of the husband's lands as might be necessary, but provided that the husband might file a stay bond under the provisions of C. S., 650. *Held:* The appeal took the case out of the jurisdiction of the Superior Court and it was *functus officio* to render the order appointing the commissioner, but by the provision of the judgment the husband became indebted to the wife, and she might issue the ordinary execution against his property to collect the judgment, the husband having given no stay bond as required by the court.

APPEAL by plaintiff from orders of *Barnhill, J.*, 10 October, 1936, and 19 December, 1936, of NASH. Affirmed on first appeal; error as to second appeal.

This was an action brought by plaintiff against defendant, his wife, for a divorce *a mensa et thoro*. The defendant denied the allegations of the complaint and set up a cross action alleging, among other things: "That on 9 December, 1935, the plaintiff, without any just cause or excuse, willfully abandoned the defendant and the infant child born of the marriage, and since that time has willfully failed, neglected, and refused to provide any home for his wife and child, and also has willfully failed, neglected, and refused to make adequate provision for the maintenance and support of his said wife and child. That the defendant and the said child of the marriage are without property, income, or means of support. That the plaintiff is able bodied, highly educated, and is the owner of and in possession and control of real and personal property of the approximate value of $20,000, a part of which is valuable farm land upon which he carries on extensive farming operations and from which

he receives a substantial income, the exact amount of which is unknown to this defendant. That the defendant has not sufficient means whereon to subsist during the prosecution of this cross action and to defray the necessary and proper expenses thereof."

Defendant's prayer was as follows: "(1) That the plaintiff take nothing by his action; (2) That the defendant be granted a decree of divorce *a mensa et thoro;* (3) That an order be made compelling the plaintiff to pay to the defendant such alimony as the court may think reasonable, just, and proper, having due regard to the circumstances of the parties; (4) That the court make an order requiring and compelling the plaintiff to make provision for the maintenance and support of the defendant and the child of the marriage *pendente lite,* and requiring and compelling that he pay the necessary expenses of the prosecution of the defendant's cross action, including a reasonable allowance for counsel fees." The plaintiff replied, denying the material allegations of the defendant in her cross action, and set up his financial status.

The court below rendered the following judgment: "(In Chambers, 10 Oct., 1936.) The plaintiff herein instituted an action for divorce *a mensa et thoro* in the Superior Court of Nash County. The defendant filed answer denying the allegations of the plaintiff and setting up a cross action for divorce on the grounds of abandonment and for alimony *pendente lite* and for counsel fees. The cause now comes on to be heard before the undersigned judge on the motion for alimony *pendente lite* and counsel fees, both plaintiff and defendant being present and each being represented by counsel. From the affidavits filed and read in evidence and the oral testimony offered, the court finds as a fact that the plaintiff willfully abandoned the defendant on or about 9 December, 1935, and that since said date he has not provided the defendant with a home or necessary subsistence. The court further finds that he has contributed $15.00 per month for the support of his infant child, but that said contribution is insufficient for the reason that said child is a bottle baby and the cost of the milk makes $15.00 per month inadequate. The court further finds that the plaintiff has not been profitably employed, except as hereinafter set out, since about 1 November, 1935, at which time he voluntarily surrendered or declined to accept a lucrative position; that he is well educated and is capable of earning a substantial salary, and that his present unemployment is due to his own act. Since about 1 November, 1935, the plaintiff has engaged in the supervision of a four-horse farm, but his lack of attention to said farm is such that he was unable to tell approximately the amount of crops he has made this year, what he owes thereon, or what the prospects of profits are. The court finds that while $60.00 per month is inadequate support for the defendant and her child, said amount is all that the defendant can

reasonably be expected to pay at this time. It is therefore ordered and adjudged that the defendant Elizabeth S. Vaughan be and she is hereby allowed the sum of $60.00 per month alimony *pendente lite* for the support of herself and infant child; and she is allowed the additional sum of $150.00 to be credited on such counsel fees as the court may allow at the final determination of this action. The said Ross L. Vaughan is ordered and directed to pay said alimony on the first day of each and every month, the first payment for the month of October to be made on or before the 17th day of October, and each payment thereafter to be made on or before the 5th day of each month, beginning with the month of November, 1936, and the said Ross L. Vaughan is ordered and directed to pay said counsel fees in monthly installments of $50.00 each not later than the 5th day of November and December, 1936, and January, 1937. It is further ordered and adjudged that the monthly installments for alimony herein allowed, together with the counsel fees, shall constitute a specific lien upon all the real estate of the plaintiff until the same is paid, and the cause is retained to the end that the defendant may, upon default in payment of said alimony, move the court for the appointment of a commissioner to sell said lands to satisfy said lien, and for such other motions as may be proper. This the 10th day of October, 1936. M. V. Barnhill, Resident Judge, Second Judicial District."

To the foregoing order the plaintiff excepted, assigned error, and appealed to the Supreme Court. The court below fixed the case on appeal to this Court. During the pendency of the appeal, a motion in the cause was made by defendant before Barnhill, J., on 19 December, 1936, to sell the lands of plaintiff to enforce the alimony payments and attorney fees. It was found that plaintiff had not paid the amounts stipulated in the former order.

In the order of 19 December, 1936, is the following: "The court is of the opinion and holds that said order allowing alimony and counsel fees in a judgment for the payment of money within the meaning of section 650 of the Consolidated Statutes of North Carolina, and that the defendant has the right to move for the enforcement of said order pending said appeal unless the plaintiff shall give a stay bond, as provided by said section."

The court appointed a commissioner to sell so much of plaintiff's land as was necessary "to satisfy said lien." The court further ordered: "As provided by section 650, the plaintiff is allowed to execute and file a good and sufficient stay bond in the sum of $400.00, to be approved by the clerk of the Superior Court of Nash County, which bond shall be conditioned upon the plaintiff promptly paying to the defendant all installments of alimony due at the time the Supreme Court's opinion is certified down, and said attorneys' fees, etc. . . . That the motion

of the defendant that the plaintiff be attached as for contempt is for the present denied and suspended until after the certification of the Supreme Court opinion. Heard and signed out of term, by consent, parties reserving their right to appeal from conclusions of law and finding of facts contained herein. This the 19th day of December, 1936. M. V. Barnhill, Judge Presiding." To the foregoing order plaintiff excepted, assigned error, and appealed to the Supreme Court.

*Simms & Simms and T. T. Thorne for plaintiff.*
*Clyde A. Douglass and I. T. Valentine for defendant.*

CLARKSON, J. This is an action brought by the plaintiff against the defendant to secure a divorce *a mensa et thoro,* N. C. Code, 1935 (Michie), section 1660, par. 1. The defendant in her answer set up a cross action asking that she be granted a divorce *a mensa et thoro* and alimony *pendente lite,* all of which is shown by the pleadings filed in the action.

N. C. Code, *supra,* is as follows: "Grounds for divorce from bed and board. The Superior Court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases: (1) If either party abandons his or her family," etc. The grounds for divorce *a mensa* given by this section are available to the husband as well as the wife, or as stated by the express language of the statute to the "injured party." *Brewer v. Brewer,* 198 N. C., 669. Only the party injured is entitled to a divorce from bed and board under this section. *Carnes v. Carnes,* 204 N. C., 636 (637); *Albritton v. Albritton,* 210 N. C., 111 (116).

N. C. Code, *supra,* section 1666, is as follows: "If any married woman applies to a court for divorce from the bonds of matrimony, or from bed and board, with her husband, and sets forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as appears to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of anyone interested: Provided, that no order allowing alimony *pendente lite* shall be made unless the husband shall have had five days notice thereof, and in all cases of application for alimony *pendente lite* under this or the succeeding section, whether in or

out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint: Provided further, that if the husband has abandoned his wife and left the State or is in parts unknown, or is about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice is necessary."

Upon motion for alimony it is sufficient for the court to find that the facts are as alleged in the answer and the affidavits filed in support of the motion. *Barker v. Barker,* 136 N. C., 316.

Where the wife's action is for a divorce *a mensa* on the ground of abandonment, stating that she was compelled to leave home by the conduct of her husband, the judge, in allowing alimony *pendente lite,* must find such facts that would justify her in law for so doing, at the time she left her husband, and those that occurred thereafter are insufficient. *Horton v. Horton,* 186 N. C., 332. In an application for alimony *pendente lite* under this section, it is required that the court find the facts in determining whether the wife is entitled to alimony, her right thereto being a question of law, and it is error for the court to refuse applicant's request for a finding of facts upon which the court denies the application. *Caudle v. Caudle,* 206 N. C., 484. The plaintiff in the *Caudle case, supra,* in apt time moved the court to find the facts, which were overruled. In the present case we think the facts were sufficiently found and plaintiff's only exception is "to the entire finding of facts as set out in the order of the judge."

While the right of alimony involves a question of law, the amount of alimony and counsel fees is a matter of judicial discretion. *Davidson v. Davidson,* 189 N. C., 625.

As this is a family controversy, we think it unnecessary to set forth the facts in detail, but we are of the opinion that they are sufficiently set forth in the order of 10 October, 1936, to sustain the judgment rendered.

As to the second exception and assignment of error: "The defendant served notice through her attorney on the plaintiff on 21 September, 1936, that the defendant would appear before the Honorable M. V. Barnhill, Resident Judge of the Second Judicial District of North Carolina, at his office in the city of Rocky Mount, Nash County, North Carolina, on 26 September, 1936, at the hour of 11 o'clock a.m., and make motion that the plaintiff be required and compelled to pay to the defendant alimony *pendente lite* and also for necessary and proper expenses of the prosecution of defendant's cross action, including a reasonable allowance for counsel fees." The hearing was had on this motion and an order rendered, as appears in the record. When this order was rendered, plaintiff had appealed to the Supreme Court, but the stay bond had not been given.

N. C. Code, *supra*, section 650, is as follows: "Undertaking to stay execution on money judgment. If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file, and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested to abide the judgment of the appellate court."

In *Bledsoe v. Nixon*, 69 N. C., 82 (84-5), it is said: "The fact that final judgment was entered in this Court makes a material difference. By the appeal *the cause* was brought up to this Court, and as a matter of course a 'motion in the cause' can only be entertained by the Court where the cause is. This was admitted by the counsel of plaintiff, but they took the position that inasmuch as C. C. P., title XIII, requires two undertakings, one to cover costs, the other to perform the final judgment, and the latter undertaking had not been perfected. This failure on the part of the client left 'the cause' in the Superior Court. This is not the meaning of C. C. P. in regard to appeals. If the undertaking to perform the final judgment is not perfected, or a money deposit made, the purpose was to raise this money deposit by means of an execution,

after 'the cause' has been carried up to the Supreme Court by the appeal; but 'the cause' is by the appeal taken out of the Superior Court and carried up to the Supreme Court, no matter in which of the three ways provision be made for the performance of the final judgment."

In *S. v. Edwards,* 205 N. C., 661 (662), we find: "In the first place, the case was supposed to be pending in the Supreme Court on appeal. If so, during its pendency here, the Superior Court was without power to entertain the motion. *S. v. Casey,* 201 N. C., 185; *Bledsoe v. Nixon,* 69 N. C., 82; *S. v. Lea,* 203 N. C., 316."

The appeal was from a judgment which, among other things, directed the payment of money by plaintiff to defendant. By this judgment plaintiff became indebted to defendant, and she could issue the ordinary execution against the property of plaintiff to collect the judgment, as no stay bond was given as required by the court below. *Hagedorn v. Hagedorn, ante,* 175 (179).

We think after the first appeal was taken, although no stay bond was given, the court below was *funtus officio* to render the second order.

For the reasons given, the judgment is

Affirmed as to first appeal.

As to second appeal there is error.

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MRS. JACKSIE WOLFE AND HUSBAND, J. H. WOLFE, v. M. W. GALLOWAY, ADMINISTRATOR OF THE ESTATE OF J. M. THRASH, DECEASED; MRS. CARRIE DORSETT, P. H. THRASH AND WIFE, OLIVE THRASH; T. O. THRASH AND WIFE, LULA C. THRASH; WACHOVIA BANK AND TRUST CO., TRUSTEE, C. C. LONG AND FRANCES McIVER HEDEMAN.

(Filed 17 March, 1937.)

**1. Descent and Distribution § 12—Grandchild held answerable for advancements under facts of this case.**

Intestate's grandchild, a daughter of intestate's deceased daughter, was charged with advancements for sums paid by intestate for her schooling and expenses incurred after she was eighteen or twenty years old, but no charge was made for expenses of rearing the grandchild. *Held:* Upon the facts found by the referee the charge of advancements was correct. N. C. Code, 139.

**2. Reference § 8—**

Where the parties agree that the findings of fact of the referee and his conclusions in regard to advancements found due by the various heirs at law should be conclusive and that exceptions might be filed only to his conclusions of law, an heir is estopped to contend that the advancements charged against her by the referee were not correct.

**3. Appeal and Error §§ 26, 31d—**

Plaintiff appellant's brief was filed six days after the time required, and plaintiff's appeal is dismissed upon appellees' motion under Rule of Practice in the Supreme Court, No. 28.

**4. Actions § 5—**

The distinction between actions at law and suits in equity is abolished. Art. IV, sec. 1.

**5. Equity § 3—Equity may order sale of property for partition where necessary to complete determination of equitable cause.**

Where a court of equity acquires jurisdiction for any purpose it will proceed, as a general rule, to determine the whole cause, and where an accounting is demanded, which is an equitable matter, the court may proceed to order the sale of the property for partition between the parties in accordance with their rights as determined by the accounting, where such procedure is necessary to determine the cause, equity having jurisdiction to order a sale for partition independent of statute, although it will follow the analogous statutory provisions.

**6. Partition § 5—Necessity of sale for partition must be shown by party demanding the remedy.**

Property may be sold for partition where actual partition cannot be had with justice to all the parties, but the burden is on the party seeking sale for partition to show necessity therefor, N. C. Code, 3233, and where sale for partition is decreed by the court without hearing evidence or finding facts to show the right to sell, the cause will be remanded.

APPEAL from *Sink, J.*, at October Term, 1936, of TRANSYLVANIA. Error and remanded.

J. M. Thrash died intestate on 23 August, 1930, a resident of Transylvania County, N. C. M. W. Galloway is the duly qualified and acting administrator of his estate (succeeding J. H. Pickelsimer, who resigned). At the time of his death, the said J. M. Thrash left surviving him the following children: Mrs. Carrie Dorsett, P. H. Thrash, and T. O. Thrash, and one grandchild, Mrs. Jacksie Wolfe (plaintiff in this action), who is the only surviving child of Rosa Thrash McGaha, a daughter of the said J. M. Thrash, and said children and grandchild constitute all of the heirs at law of the said J. M. Thrash. At the time of his death, the said J. M. Thrash left a large and extensive estate, comprised both of personalty and realty. Prior to his death, J. M. Thrash, deceased, had made advancements to his children. As heirs at law of the said J. M. Thrash, Mrs. Jacksie Wolfe, Mrs. Carrie Dorsett, P. H. Thrash, and T. O. Thrash are owners of the property as tenants in common, subject to his debts and to such advancements as each has received from the said J. M. Thrash.

Plaintiffs pray: "(1) That an accounting be had by and between all of the parties hereto, to determine what, if any, advancements the heirs of J. M. Thrash have received; (2) That judgment be rendered in

accordance with the result of such an accounting; (3) That commissioners be appointed to divide and allot to each of the heirs of J. M. Thrash, deceased, their respective shares of the real estate, such allotment to take into consideration the advancements found to have been made to each of the said heirs; (4) For the costs of this action, to be taxed by the clerk, and such other and further relief as to the court may seem just and proper."

M. W. Galloway, administrator, answers, and, after setting forth certain facts, prays "that the action be dismissed as to him."

Mrs. Carrie Dorsett answers and, after setting forth certain facts, prays "that an accounting be had under the terms and provisions of the arbitration agreement herein set forth to determine what, if any, advancements the heirs of J. M. Thrash, deceased, have received."

The defendants set up a certain arbitration agreement, which was afterwards nullified by the parties and a reference agreed upon.

P. H. Thrash answers and, after setting forth certain facts, prays: "(1) That the lands described in the petition herein be divided between the plaintiff and P. H. Thrash and the other heirs in accordance with said contract and agreement referred to in the 8th paragraph of the answer of these defendants; (2) That under said contract mentioned in paragraph seven of these defendants' further answer that the advancements be ascertained thereunder; (3) That by consent, under said contract or under order of court that the said lands be divided and partitioned between the heirs at law as their interest may appear; (4) That under a proper order of court that M. W. Galloway, as administrator, be required to account to the court and the heirs at law of J. M. Thrash, deceased, for any amount which should be rightfully charged against him as such administrator upon issues to be submitted by the court or under a reference ordered by the court; (5) That M. W. Galloway be required forthwith to make his final settlement as such administrator as provided by law; (6) For such other and further relief as in the opinion of the court is just, right, and proper."

T. O. Thrash answers and, after setting forth certain facts, prays: "(1) That plaintiffs recover nothing against these defendants; (2) That an accounting be had between the parties according to the intention of the said J. M. Thrash and the agreement between his heirs; (3) That the administrator be required to file his final accounting and make distribution of such funds as he may have; (4) That the estate be partitioned according to the respective rights of the parties; (5) For such other and further relief as may be deemed meet and proper."

C. C. Long and Frances McIver Hedeman filed separate answers and, after setting forth certain facts, they allege that they have a deed of trust to secure certain notes of T. O. Thrash on his interest in the land.

"That the said lands of J. M. Thrash should be partitioned and divided among the heirs, subject to the liens and encumbrances of record, and that the administrator should be required to file his final accounting." They pray the court "(1) That they recover nothing against this defendant; (2) That the administrator be required to file his final accounting and be discharged; (3) That the estate be partitioned according to the respective rights of the parties; (4) For such other and further relief as may be meet and proper."

At April Term, 1935, the matter was referred to G. Lyle Jones.

The following agreement appears in the record: "It is agreed by and between all the parties to this action, except M. W. Galloway, administrator, that the findings and conclusions of the referee heretofore appointed in the above cause as to advances made to the various heirs at law of J. M. Thrash, deceased, shall be final and binding on all parties hereto with respect to any and all advances. Either party may except only to conclusions of law made with respect to his findings of facts in the above. Mrs. Jacksie Wolfe and J. H. Wolfe, by J. H. Horner, Jr., attorney; P. H. Thrash, by J. F. Ford and R. M. Wells; Carrie Dorsett, by Ford & Wells; John DuBose, attorney for T. O. Thrash, Lula Thrash, C. C. Long, Frances McIver Hedeman, and Wachovia Bank and Trust Co., trustee."

The referee made careful and detailed findings of fact and conclusions of law. The plaintiffs and defendants excepted to certain conclusions of law. The court below rendered the following judgment: "Now, therefore, it is ordered, adjudged, and considered that the findings of fact contained in the referee's report be and the same hereby are confirmed, and all exceptions thereto are hereby overruled; and it is further ordered, adjudged, and considered that the conclusions of law contained in the referee's report numbered 1, 2, and 3, are hereby confirmed, and all exceptions to said conclusions of law are hereby overruled; and it is further ordered, adjudged, and considered that conclusion of law No. 4 be and the same hereby is amended to read as follows;" and ordered the land to be sold by a commissioner, and how the proceeds should be distributed. All the parties, plaintiffs and defendants, heirs at law of J. M. Thrash, excepted, assigned error and appealed to the Supreme Court.

*Johnston & Horner for plaintiffs.*
*R. M. Wells and Ford, Coxe & Carter for P. H. Thrash et al.*
*DuBose & Orr for T. O. Thrash et al.*
*Ralph H. Ramsey, Jr., for Mrs. Carrie Dorsett.*

CLARKSON, J. N. C. Code, 1935 (Michie), sec. 139, is as follows: "Where any parent dies intestate, who has in his or her lifetime given

to or put in the actual possession of any of his or her children any personal property of what nature or kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime. In case any child who had, in the lifetime of the intestate, received a part of the estate, refuses to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share." *Thompson v. Smith,* 160 N. C., 256; *Paschal v. Paschal,* 197 N. C., 40.

From the facts found by the referee, we think the plaintiff Mrs. Jacksie Wolfe was liable to account for advancements. The referee found that "The mother was dead and the plaintiff, the granddaughter, stood in the place of her mother and was entitled to such funds as the mother might receive, that it was his intention to charge as advancements such items enumerated above. The major part of these charges were made against Mrs. Wolfe for expenses incurred after she was eighteen or twenty years of age, and the others were principally for advantages in the way of schooling. No charges were made for expenses of rearing the plaintiff."

Then again, it was agreed that the advancements found due by the various heirs at law of J. M. Thrash, deceased, "shall be final and binding on all parties hereto, with respect to any and all advances."

The plaintiff Mrs. Jacksie Wolfe is estopped to make the contention she now makes. In her brief she says: "Plaintiffs were perfectly willing to abide by the judgment of the court and did not want to appeal, but inasmuch as the defendant appellants insisted on bringing the case to the Supreme Court, Mrs. Wolfe desires to present her contentions to the court in regard to this."

The defendants made a motion to dismiss plaintiffs' appeal "That under Rule 28 of Practice in the Supreme Court, plaintiff appellants were required to file their brief by noon 13 February, 1937, and they failed to do so until 19 February, 1937." The plaintiffs' appeal is dismissed under the rule.

As to defendants' appeal: They contend "that the jurisdiction in this action was limited to an accounting for the advancements to the various heirs, and a determination of the respective shares of said heirs in the estate left." It will be noted that the action was brought in the Superior Court (1) For accounting for advancements; (2) "That commissioners be appointed to divide and allot to each of the heirs of J. M. Thrash, deceased, their respective shares of the real estate heretofore described, such allotment to take into consideration the advancements found to have been made to each of the said heirs."

The action for an accounting is an equitable matter and was instituted in the Superior Court. Art. IV, sec. 1, Const. of N. C., reads: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action," etc. See *In re Estate of Wright,* 200 N. C., 620 (628); *Reynolds v. Reynolds,* 208 N. C., 578 (624).

In *Sumner v. Staton,* 151 N. C., 198 (201-2), it is said: "There is another principle of equity jurisprudence equally well founded, and that is that equity will not suffer a right to be without a remedy. 'And it may be further observed,' says Mr. Bispham, 'that equity will not only not support a right to be unaccompanied by a remedy, but it will make the remedy, when applied, a complete one.' This learned and accurate writer states another rule of equity courts which fits exactly such a condition as this case presents: 'When a court of chancery acquires jurisdiction for any purpose, it will, as a general rule, proceed to determine the whole cause, although in so doing it may decide questions which, standing alone, would furnish no basis of equitable jurisdiction.' Bispham (6th ed.), sec. 37. To the same effect are our own decisions. *Oliver v. Wiley,* 75 N. C., 320; *Devereux v. Devereux,* 81 N. C., 18."

In 20 R. C. L., pp. 773-774, is the following: "In this country, also, the manifest hardship arising from the division of property of an impartible nature has been almost universally avoided by statutory provisions to the effect that any person entitled to a partition shall be entitled to have the premises sold, if they are so situated that partition cannot be made, or that it would be manifestly to the prejudice of the parties if the property were not sold rather than partitioned, and some of the American courts have held that equity has such power, independently of statute. Partition by sale is a matter of absolute right when the conditions prescribed by the statute to authorize a sale are found to exist, but the burden of proof to establish the necessary requisites to a sale of land rather than a partition is on the party alleging the necessity and advisability of such sale; and it has been held that a finding that a sale is necessary, not based on the consent of the parties or the report of commissioners or on evidence heard by the chancellor, will not support the order of sale."

N. C. Code, 1935 (Michie), sec. 3233, is as follows: "Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof."

The defendants contend "In the absence of any allegation, proof, or finding that an actual partition cannot be had without such injury, the court has no jurisdiction to order a sale."

We think by analogy to the statute and the fact that no evidence was heard by the chancellor or facts found to show a right to sell for partition, the cause must be remanded. We see no other prejudicial error in the record.

The intelligent and careful referee, in his report, says: "That because of the involved nature of the estate and the innumerable complicated questions of fact such as the proper application of various funds paid by the decedent, J. M. Thrash, to the various heirs and various other questions of like kind, your referee, when the evidence had proceeded practically to its completion, clearly saw that an amicable settlement would be to the best interest of all concerned, and with that thought in mind, used his best efforts (perhaps went too far) to get the parties to agree upon a settlement. Your referee felt that this was particularly desirable since this was a family matter and hence involved more than the actual value of the property in question," etc. No agreement could be had and one of the parties "insisted that the referee render a decision on the evidence."

The defendants, in their brief, say: "By agreeing that the referee should act as arbitrator the parties enormously restricted what would otherwise have been almost endless litigation, but of course in so doing they placed very great powers in the hands of the arbitrator. Taking the testimony consumed weeks. The record was more than 700 pages. Over a thousand exhibits were offered," etc. We might say that the printed record is hard to read and is not in accordance with our rules, and is a jumbled record.

In the record we find error, but on the whole record we think the learned judge in the court below "dispensed with law and administered justice." We must follow the law. For the reasons given,

Error and remanded.

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MRS. VERNON B. CASHATT, ADMINISTRATRIX OF JAMES WILLIAM CAMPBELL, DECEASED, v. TOM BROWN AND THE NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 17 March, 1937.)

**1. Railroads § 2—**

A road in use from two houses to the highway prior to the construction of railroad tracks by defendant across the road, and thereafter used by the public and others desiring to go to the houses, is a crossing which the railroad is under duty to keep in a reasonably safe condition. C. S., 3449.

**2. Railroads § 9—Evidence held for jury on issue of railroad's negligent failure to keep crossing in reasonably safe condition.**

Evidence tending to show that plaintiff's intestate drove his car upon a crossing, that ballast was not kept between the rails, but that the crossties or spikes holding the rails were visible, so that when the car was driven over the rail the wheels dropped several inches, causing the car to stop, and that defendant's rapidly approaching train, which gave no signal or warning for the crossing, struck the car and killed plaintiff's intestate, *is held* sufficient to be submitted to the jury on the issues of negligence and proximate cause, and the question of whether defendant was guilty of contributory negligence in driving upon the crossing, and whether such contributory negligence was a proximate cause of the injury is for the jury under the evidence.

CONNOR, J., dissents.

APPEAL by plaintiff from *Hill, J.*, at September Civil Term, 1936, of DAVIDSON. Reversed.

This is an action for actionable negligence brought by plaintiff against defendants for killing her intestate on 25 September, 1935, at a railroad crossing near Price Station, known as Baughn's Crossing.

In the complaint it is alleged in part: "That at a point on said railroad and right of way of the defendant company, at a place about one-half mile in the direction of Winston-Salem, North Carolina, from Price Station on said railroad, there is a crossing which leads from a county or State maintained road across the main line track of the defendant company's sidetrack, which said crossing leads into a place where two houses are situated, and said crossing is known as Baughn's Crossing, and said road ran over the place where said crossing now exists prior to the construction of said railroad, and that by reason of the construction of said railroad, a crossing at said place was made necessary, and the public and other persons who desired to visit the place and persons who occupied said two houses, constantly and habitually used said crossing, and said usage was acquiesced in and approved by said defendant company. . . . That a short while before plaintiff's intestate was killed he went across said crossing, and while returning and going in an eastern direction, and while operating his car in a careful and prudent and very slow manner, he came up an incline to come back into the road which leads across said crossing, and at a point about 40 feet from the western rail of the main line track, he made a slight left turn to cross said tracks, and at said place the road was very rough, and plaintiff's intestate was driving very slowly, and immediately to the right of plaintiff's intestate was a bank about 6 feet in height, undergrowth, bushes, and numerous small pines, which obstructed his view of the crossing; that when plaintiff's intestate straightened out in said road to cross said crossing, and while traveling in an eastern direction at a point about 30 feet from said western rail of said main line track, there is a bank extending up about

6 feet in height from said road, and undergrowth, trees, and bushes with leaves and foliage on them, all of which obstructed the view on plaintiff's intestate's right, and to the left of plaintiff's intestate, at said time and place, there were bushes, undergrowth, and trees, all of which said bushes, undergrowth, trees, and bank as aforesaid were on the right of way of the defendant company; that at said point, behind said bank, trees, and undergrowth, plaintiff's intestate could not see down the track in the direction of Winston-Salem, North Carolina, but that plaintiff's intestate listened and heard no approach of said train or the ringing of bell or the blowing of said whistle of said locomotive or engine; that plaintiff's intestate continued to travel in an eastern direction, and after looking in both directions and listening at a place where plaintiff's intestate could see up and down the tracks of the defendant, the plaintiff's intestate drove his said car very slowly across the sidetrack and after crossing the said track immediately drove his car onto the main track, and as his car crossed the western rail of the main track, the said car dropped down between said rails of the main track and stopped, and without any warning or signals, a locomotive or engine of the defendant company and operated by the defendant's engineer negligently struck said car, demolishing the same and killing plaintiff's intestate; that it was about 5 feet from the front of plaintiff's intestate's car to the place where he was sitting, and that as plaintiff is advised, informed, and believes, the locomotive or engine overhangs the rail about 2½ or 3 feet, and by reason thereof the distance between the western rail of the defendant's main line track and the undergrowth and trees was greatly shortened; that at said crossing, between the rails of the main line track in the direction plaintiff's intestate was traveling, there is a sharp incline, and the ballast between the rails on said main line track was several inches below the top of the rails, and by reason thereof, when plaintiff's intestate slowly drove the front wheels of his said car over the western rail of said main line track, his said car dropped down between the rails, and, without any fault on his part, stalled; that the ballast on said crossing between the rails of said main line track was just barely above the top of the crossties and plaintiff's intestate's front wheels dropped several inches when they crossed said western rail; that at said crossing there is a very sharp curve on said railroad and right of way, and said crossing is practically at the apex of said curve, and that at said crossing and curve the tracks of the defendant company are very materially sloped, and that in traveling in the direction in which the plaintiff's intestate was traveling, at the time he was killed, there is a sharp incline both on said crossing and between said rails; that, as plaintiff is advised, informed, and believes, the right of way of the defendant company has been burned off since 25 September, 1935, and the bushes, undergrowth, and pine trees have been cut down; that at said crossing

there is a cut and on the eastern side of said main line track the said cut is about 2 to 4 feet in height, and on the western side of said crossing the said cut is from 8 to 12 feet in height; that at said time and place the said crossing was rough and needed filling in between the rails of the main line track and said crossing is between a double curve in said track, and, as aforesaid, is located about the apex of said curve; that the engine or locomotive of the defendant company, and operated by the defendant Tom Brown, struck the car in which the plaintiff's intestate was riding, knocked the same about 60 feet, throwing plaintiff's intestate out of said car with his head against the crossties about 60 feet away from said crossing in the direction in which the train was traveling, and throwing said car upon and over him; that, as the plaintiff is advised, informed, and believes, the defendants failed to bring their said train to a quick stop, and that said train, owned and operated by the defendants, left the scene of said collision with plaintiff's intestate still under said car; that at the time of said collision the train, owned and operated by the defendants, was operated at a speed of approximately 60 miles per hour around said curve, and across said crossing at a high and dangerous rate of speed and in complete disregard of the rights of plaintiff's intestate, and without the blowing of any whistle, the ringing of any bell, and without keeping a proper lookout, and without having said train under control, and said train was so operated over and upon said crossing, which was defective and not properly maintained or kept up, and which was obstructed as aforesaid, all of which said conditions were known to the engineer, Tom Brown, and to the defendant company."

Plaintiff prayed for damages, setting same forth.

The defendants denied negligence and set up the plea of contributory negligence.

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 sustained the motion, plaintiff excepted, assigned error, and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

*Spruill & Olive and Don A. Walser for plaintiff.*

*Kerr Craige Ramsay for defendant Brown.*

*Whitwell W. Coxe, Burton Craige, and Phillips & Bower for defendant Norfolk and Western Railroad Company.*

CLARKSON, J. We do not think the nonsuit can be sustained.

The allegations of the complaint and the evidence were to the effect that the Baughn's Crossing was used prior to the construction of defendant's road and since its construction, "the public and other persons who desired to visit the place and persons who occupied said two houses con-

stantly and habitually used said crossing, and said usage was acquiesced in and approved by said defendant company."

In *Stone v. R. R.*, 197 N. C., 429 (431), it is said: "The duty of a railroad company with respect to the maintenance of a crossing over its track, where its track has been constructed over an established road or highway, whether public or private, is well settled. The duty is prescribed by statute, C. S., 3449, and has been recognized and enforced by this Court in numerous decisions. In *Goforth v. R. R.*, 144 N. C., 569, 57 S. E., 209, it is said: 'It is just that crossings necessitated by the construction and operation of a railroad should be kept in a safe condition by it.' As the crossing is on the railroad company's right of way, no one except the company has the right to enter upon the crossing for the purpose of repairing the same. . . . So long, however, as it permits the public to use the crossing, it must respond in damages caused by its negligence in failing to exercise due care to maintain the crossing in a reasonably safe condition." *Moore v. R. R.*, 201 N. C., 26.

The testimony of R. M. Hundley, a witness for the plaintiff, was, in part, as follows: "I have known Baughn's Crossing in Rockingham County, about a half mile from Price, for 15 or 18 years. At the times I have known it, I think the public travels it and I have been over it myself, and have seen other people crossing it. . . . Q. Now, describe the condition of the ballast between the rails of the main line track as you saw it there after the train hit the car? A. Well, there was scarcely any in there. It was beat down or washed down to the top of the crossties—you could see the rail pins, spikes, I believe they call them. The ballast was about 4 inches below the top of the rail. With reference to the ballast between the rails on the main line track, there was practically not any in there above the crossties, and you could see the top of the crossties and also the spikes. The time I am telling about was about an hour after the wreck, the same day, same afternoon. I have been back there since that time, and I was back there in about 2 or 3 weeks after that and it was in the same condition then as it was the day of the wreck."

The allegations in the complaint: "The plaintiff's intestate drove his said car very slowly across the sidetrack and after crossing the said track immediately drove his car onto the main track, and as his car crossed the western rail of the main track the said car dropped down between said rails of the main track and stopped, and without any warning or signals, a locomotive or engine of the defendant company, and operated by the defendant's engineer, negligently struck said car, demolishing the same and killing plaintiff's intestate."

The testimony of Rev. T. G. Williams, in part: "Now, as we came down there, Mr. Campbell was driving about five miles an hour through the cut, and as we approached the track, driving, I would say, five miles

an hour, we drove up across the sidetrack onto the main line track, to the best of my knowledge, the front wheels must have been 12 inches over the west rail and the car stopped, and in the moment the car stopped I looked toward Winston-Salem, which is south, and I noticed the train approaching. I said, 'Yonder is the train.' Mr. Campbell dropped his hand on the shift gear lever and he didn't say anything. I opened the door and jumped. It was the right-hand door next to the train—the moment I hit the ground the train hit the car and knocked it 60 feet."

There was other evidence corroborating the above evidence set forth. There was also evidence that the defendant railroad's engineer gave no warning or signals for the crossing. No blow or bell ringing for the crossing was heard. The train was running about 40 miles an hour.

The case of *Stone v. R. R., supra,* is in many respects similar: This was an "action to recover damages resulting from injuries to plaintiff's automobile, caused by the negligence of defendant in failing to exercise due care (1) to maintain a public crossing which passes over its track, in a reasonably safe condition, and (2) to stop its train before it struck and injured the automobile, which, by reason of the defective condition of said crossing, plaintiff was unable to drive off or move from said track in time to avoid the injury."

There was a judgment for plaintiff and this Court, in sustaining the judgment, said: ". . . All the evidence tended to show that the crossing was defective, in that there was a hole on the right of way, just beyond the crossties, and that this hole was not discovered by plaintiff before the wheel of his automobile dropped into it, causing the running board of his automobile to rest upon the ground. Plaintiff was unable to drive his automobile off the track, or to move it therefrom before it was struck and injured by defendant's train, which appeared after plaintiff had driven upon the crossing."

We think the evidence is sufficient to be submitted to the jury to determine whether the plaintiff's intestate was guilty of contributory negligence, and, if so, whether his negligence was the proximate cause of the injury.

In *Elder v. R. R.,* 194 N. C., 617 (619), speaking to the subject of contributory negligence, we find: "Contributory negligence, such as will defeat a recovery in a case like the one at bar, is the negligent act of the plaintiff, which, concurring and coöperating with the negligent act of the defendant, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which the injury would not have occurred. *Moore v. Iron Works,* 183 N. C., 438."

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

Reversed.

CONNOR, J., dissents.

THE LIFE INSURANCE COMPANY OF VIRGINIA v. FRED I. SMATHERS AND ROSAMOND L. SMATHERS, AND WACHOVIA BANK AND TRUST COMPANY, TRUSTEE.

(Filed 17 March, 1937.)

**1. Pleadings § 29—**

Ordinarily, irrelevant or redundant matter inserted in a pleading may be stricken out on motion of any party aggrieved thereby, but the question is largely in the sound discretion of the trial court. N. C. Code, 537.

**2. Same: Mortgages § 30a—Allegations of answer that mortgage was executed to avoid foreclosure of another mortgage held property stricken out.**

Plaintiff *cestui que trust* instituted this action to foreclose two deeds of trust on two separate tracts of land executed by defendants. Defendants filed separate answers. Plaintiff moved to strike out the allegations of the answers that the second deed of trust on the home place was executed because of threats of plaintiff to foreclose the first deed of trust on the male defendant's business property, that at the time the male defendant was sick and disabled, and that defendants would not have executed the second deed of trust except for the threats, coercion, and duress of plaintiff, and the allegations in the male defendant's answer that since the institution of the action the male defendant had received an offer for the business property greatly in excess of any sums of money due plaintiff upon a proper accounting. *Held:* The motion to strike out was properly granted.

**3. Pleadings § 10: Mortgages § 30h—Cross action for damages for wrongful appointment of receiver may not be set up in action to foreclose.**

In this action to foreclose a deed of trust a receiver was appointed to hold the rents and profits from the property pending the sale in accordance with plaintiff's prayer. Defendant set up a cross action in his answer alleging that the appointment of the receiver was illegal and void, and resulted in damage to defendant in injuring him in his character, reputation, and financial standing. *Held:* The cross action was in tort for abuse of process and could not be set up in plaintiff's action to foreclose, and judgment sustaining plaintiff's demurrer to the cross action is without error.

APPEAL by defendants Fred I. Smathers and Rosamond L. Smathers from *Phillips, J.*, at Regular September Term, 1936, of BUNCOMBE. Affirmed.

The prayer of plaintiff indicates the action:

"(1) That judgment be rendered in this action adjudicating and determining the amount of the indebtedness now due and owing from the defendants Fred I. Smathers and Rosamond L. Smathers to the plaintiff in this action, and on account of the promissory notes and deeds of trust referred to in said complaint, and that said indebtedness be adjudicated and determined in the amount of $15,450, together with interest on all of said amount from 17 July, 1935, until paid.

"(2) That some discreet and proper person be appointed as receiver of this court, with full power and authority to take over, manage, handle, control, and rent said premises described in that deed of trust, dated 17 January, 1931, and to collect the rents and profits from said property and hold the same subject to the orders of this court.

"(3) That the two deeds of trust hereinbefore set forth be foreclosed by order of this court and that a sale be had of said properties for the purpose of barring and foreclosing all right, title, and interest of the defendants herein.

"(4) That some discreet and proper person be appointed as commissioner of this court, with full power and authority to advertise the land described in the two deeds of trust set forth in the complaint, together with the improvements located thereon for sale, and to sell the same to the last and highest bidder for cash, subject to the confirmation of this court; and out of the proceeds derived therefrom to pay the said indebtedness evidenced by the above referred to promissory notes and deeds of trust.

"(5) And for such and further relief as to the court may seem just and proper."

The defendants filed separate answers setting up certain defenses and counterclaim by Fred I. Smathers.

The judgment of the court below was as follows:

"This cause coming on to be heard upon motion of counsel for plaintiff to strike certain parts of the answer of Fred I. Smathers and to strike certain parts of the answer of Rosamond L. Smathers, and also being heard upon the demurrer of the plaintiff to the counterclaim of the defendant Fred I. Smathers, and as set up in the further answer, counterclaim, and defense as filed by the said Fred I. Smathers in answer to the complaint herein; and the court, after hearing argument of counsel on all of the above motions, and being of the opinion that certain portions of the answers, as above set forth, should be stricken out:

"Now therefore it is ordered, adjudged, and decreed that the following portion of said answer of Rosamond L. Smathers be stricken out: Paragraph 6, beginning on the third line of the second paragraph, on pages 22-23, as follows: 'That said agreement and deed of trust were obtained from her by threats and coercion of the plaintiff, for that at the time of the execution of said instrument, her husband and codefendant was sick and disabled. That he was conducting in the building located on the property mentioned and described in paragraph 4 of the plaintiff's complaint, a furniture business and the plaintiff was threatening to foreclose said deed of trust and to close up said business, which was the principal means of support of herself, her husband, and her family. Believing that the plaintiff would carry out said threats, thereby destroying said business, the defendant was induced to and did execute a deed

of trust on her home, which she would not have executed but for the threats, coercion, and duress of the plaintiff.'

"And it is further ordered that the following portions of the answer of Fred I. Smathers be stricken out: Paragraph 4, beginning with the second paragraph, two lines from the bottom of the first page of said answer, quoting as follows: 'Further answering said paragraph, defendant says that at the time of the execution of said agreement and deed of trust this defendant was sick and disabled, and by reason of the financial depression existing at that time and the consequent falling off in defendant's business, defendant was unable to pay the note mentioned and described in the plaintiff's complaint, and because of the persistent threats made by the plaintiff to foreclose the deed of trust securing said note, and thereby close and destroy defendant's business, which was and still is the main support of the defendant and his family.' Also, paragraph 4, on page 16, as follows: 'That since the institution of this action, the defendant has received from a thoroughly reliable and financially responsible business man in the city of Asheville an offer of purchase for said property at a price and in an amount greatly in excess of any and all sums of money which, upon a proper accounting, will be found to be due to the plaintiff, and defendant duly admitted said offer to the plaintiff, but plaintiff has declined and refused to accept said offer.'

"It is further ordered that the plaintiff have twenty days from this date in which to file reply to the further answer and defense of the defendants. The court, after hearing argument of counsel for both plaintiff and defendants on the demurrer, and after said argument the court being of the opinion that said demurrer should be sustained:

"Now therefore it is ordered, adjudged, and decreed that the demurrer of the plaintiff filed herein to the counterclaim of Fred I. Smathers and as set forth in his further answer, defense, and counterclaim, is hereby sustained and said cause of action, predicated upon said counterclaim, is hereby dismissed. This the ..... day of September, 1936.

F. DONALD PHILLIPS, *Judge Presiding.*"

The defendants excepted, assigned errors, and appealed to the Supreme Court.

The assignments of error are as follows: "(1) For that the court erred in striking from the answer of the defendant Rosamond L. Smathers that part of paragraph 6 thereof beginning on the third line of the second paragraph on pages 22-3, as quoted in the judgment of the court. (2) For that the court erred in striking from the answer of Fred I. Smathers those portions of paragraph 4 thereof, as are quoted in the judgment of the court. (3) For that the court erred in sustaining the demurrer of the plaintiff to the counterclaim set out in the answer of the defendant Fred I. Smathers."

*Harkins, Van Winkle & Walton for plaintiff.*
*Alfred S. Barnard for defendants.*

CLARKSON, J. The defendants contend: "(1) Did the court err in striking as irrelevant and immaterial the allegations in the answers of the defendants, as shown by the court's order?" We think not.

N. C. Code, 1935 (Michie), section 537, is as follows: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

In *Revis v. Asheville,* 207 N. C., 237 (240), speaking to the subject, it is written: " 'If irrevelant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby . . .' C. S., sec. 537. Under this statute the Superior Court is authorized in the exercise of its discretion to strike from a pleading any allegations of purely evidential and probative facts. *Commissioners v. Piercy,* 72 N. C., 181. In McIntosh N. C. Prac. and Proc., we find the following: 'Allegations which set forth evidential . . . matters . . . would be considered irrelevant, . . . and excessive fullness of detail . . . would be redundant.' Sec. 371, p. 378; and further: 'The material, essential, or ultimate facts upon which the right of action is based should be stated, and not collateral or evidential facts, which are only to be used to establish the ultimate facts. The plaintiff is to obtain relief only according to the allegations in his complaint, and therefore he should allege all of the material facts, and not the evidence to prove them. . . .' Sec. 379, p. 388." *Pemberton v. Greensboro,* 205 N. C., 599 (600); *Woodley v. Combs,* 210 N. C., 482 (485); *Poovey v. Hickory,* 210 N. C., 630.

Under section 537, *supra,* ordinarily irrelevant or redundant matter inserted in the pleading may be stricken out on motion of any person aggrieved thereby, but this is largely in the sound discretion of the court below.

In the present cause the defendants, no doubt aggrieved at the fact that unfortunately they have been unable to meet their obligations to plaintiff—the plaintiff pressing them for payment—the defendants in their allegations "threw a little mud" at their antagonists, as noted from the language used. The court below ordered them stricken from the pleadings, and in this we can see no prejudicial error to defendants.

The defendants contend: "(2) Did the court err in sustaining plaintiff's demurrer to the counterclaim set up by the defendant Fred I. Smathers?" We think not.

The defendant Fred I. Smathers, by way of counterclaim, alleged "That the appointment of said receiver was illegal and void, and was a gross abuse of the civil process of the court, all of which the plaintiff and its attorney well knew, or should have known. That the appointment of said receiver caused the plaintiff great embarrassment and distress, and otherwise injured him in his character, reputation, and financial standing, all to his damages in the sum of $25,000." This and prior allegations, no doubt, means an abuse of process.

Black's Law Dictionary (3rd ed.), p. 18, defines "Abuse of Process"—"There is said to be an abuse of process when an adversary, through the malicious and unfounded use of some regular legal proceeding, obtains some advantage over his opponent. Wharton. A malicious abuse of legal process occurs where the party employs it for some unlawful object not the purpose which it is intended by the law to effect; in other words, a perversion of it."

This counterclaim is a tort action. We do not think, under our most liberal and elastic code practice, it can be set up in the present action. If defendant has a cause of action in tort for abuse of process, he must bring a separate action. *Weiner v. Style Shop,* 210 N. C., 705, and cases cited.

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

Affirmed.

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PAUL BOUCHER, ADMINISTRATOR C. T. A., D. B. N., OF JAMES MILLARD, DECEASED, V. UNION TRUST COMPANY AND MARY BEASON, ADMINISTRATRIX OF J. W. BEASON, DECEASED.

(Filed 17 March, 1937.)

**1. Judgments § 4—**

A judgment entered upon solemn consent of the parties cannot be changed or altered without the consent of the parties to it, or set aside except upon proper allegation and proof and a finding of the court that it was obtained by fraud or mutual mistake, or that consent was not in fact given, the burden being on the party attacking the judgment.

**2. Same—**

The proper procedure to set aside a consent judgment as to a stipulated item on the ground that such item was not included in the settlement, and was not, therefore, consented to by the parties, is by motion in the cause.

**3. Judgments § 32—Consent judgment held to bar all matters properly within scope of its terms.**

Suit was instituted against a widow as administratrix of her husband to recover sums alleged to be due by the husband on account of matters transpiring while the husband was acting as administrator *c. t. a.* of plaintiff's testate, plaintiff having been appointed administrator *c. t. a., d. b. n.*, after the death of the husband. A compromise judgment was entered by the provisions of which plaintiff recovered a stipulated sum for the estate of his testate in full satisfaction and settlement of all claims which then existed or might thereafter arise on account of the husband's administration of the estate of plaintiff's testate, and released the surety on the husband's bond. Thereafter, plaintiff learned of a deposit in a bank to the credit of the estate of his testate, and instructed the bank to credit the deposit to him as administrator, which an official of the bank promised to do. On the next day the widow withdrew the deposit, informing the bank that it was necessary to complete a settlement had with plaintiff in regard to the estate. Plaintiff instituted this action against the bank and the widow, contending that at the time of the settlement he did not know of the deposit, and that the widow wrongfully withdrew the deposit and that the bank had unlawfully paid same to her. *Held:* By the terms of the consent judgment the item was included in the settlement, and the consent judgment bars plaintiff from maintaining this action, plaintiff's remedy to set aside the consent judgment as to the deposit on the ground that he did not consent thereto, being by motion in the cause.

APPEAL by defendants from *Sink, J.*, at September Term, 1936, of RUTHERFORD. Reversed.

The following facts were agreed upon between the plaintiff and the defendants in the court below:

"(1) That J. W. Beason (now deceased) qualified as administrator *c. t. a.* of the estate of James Millard, deceased, in Rutherford County on 8 January, 1930, and immediately assumed his duties as such administrator and continued to serve until the said J. W. Beason died on 4 May, 1934; that upon the death of J. W. Beason his widow, Mrs. Mary Beason, qualified as administratrix of his estate and immediately assumed the duties thereof.

"(2) That after the death of the said J. W. Beason, J. H. Burwell qualified as administrator *c. t. a., d. b. n.*, of the estate of James Millard, deceased, and that Mrs. Mary Beason, administratrix of J. W. Beason, deceased, filed a final settlement of the administration of the James Millard estate by J. W. Beason, deceased, said report showing a balance due to the estate of James Millard of $655.55, of which amount $628.88 was paid to J. H. Burwell as administrator *c. t. a., d. b. n.*, of James Millard, deceased; that thereafter on 22 November, 1934, J. H. Burwell as administrator *c. t. a., d. b. n.*, of James Millard, filed a suit against Mrs. Mary Beason, administratrix of J. W. Beason, deceased, on account of the administration of the James Millard estate by

the said J. W. Beason, alleging various matters concerning said administration and demanding judgment for the sum of $3,108.95.

"(3) That thereafter on 21 January, 1935, J. H. Burwell died and Paul Boucher was appointed by the court as administrator *c. t. a., d. b. n.*, of the James Millard estate and was substituted as party plaintiff to the action formerly instituted by the former administrator against the estate of J. W. Beason, deceased, and prosecuted said action.

"(4) That the said Paul Boucher, administrator *c. t. a., d. b. n.*, of the James Millard estate, and the defendant Mrs. Mary Beason, administratrix of J. W. Beason, deceased, and Fidelity and Casualty Company of New York compromised and settled all differences set forth in the complaint and answer as shown by the judgment entered in said cause.

"(5) That at the time of said compromise judgment there was on deposit in Union Trust Company, a banking institution in Rutherfordton, N. C., a deposit in the amount of $109.72 to the credit of 'J. W. Beason, administrator of James Millard, deceased,' which amount was withdrawn by Mrs. Mary Beason, administratrix of J. W. Beason, deceased, by check drawn on said account, reading as follows:

" 'Rutherfordton, N. C., July 27, 1935.

Union Trust Company, Rutherfordton Branch

Pay to the order of CASH ..... $109.72
One Hundred and Nine Dollars and seventy-two/100.
J. W. Beason, Admr. of James Millard Estate,
By Mrs. J. W. Beason, Admrx. of J. W. Beason Estate.'

"(6) That the said Paul Boucher, administrator of James Millard, deceased, did not know of said deposit at the time of the settlement in the suit pending in the Superior Court; that upon being informed by W. W. Nanney, manager of Union Trust Company, that said amount was deposited as above set out, he immediately informed the said W. W. Nanney that the money belonged to him as administrator of the James Millard estate and instructed him to transfer the said amount to his account as administrator in said bank, and not to pay same out to any other person; that the said W. W. Nanney, manager of Union Trust Company, consented to transfer said money to the account of Paul Boucher as such administrator and agreed not to pay same out to any other person, but that the said W. W. Nanney did not know of any compromise settlement having been effected between the parties at that time. That the above said notice and information was given to the bank by the said Paul Boucher, administrator, a day before the bank paid out said money to Mrs. Mary Beason, administratrix.

"(7) That J. P. Stockton, teller in said bank who cashed the check presented by Mrs. Mary Beason, administratrix of J. W. Beason, deceased, was informed that she desired to withdraw said fund in order to complete the settlement which she had just made with the said Paul Boucher as administrator of the said James Millard estate, and that the fund in question belonged to her as administratrix of J. W. Beason, deceased.

"(8) Upon the foregoing facts found by the court, the court is of the opinion that the said deposit of $109.72 on deposit in said Union Trust Company to the credit of J. W. Beason, administrator of James Millard, deceased, is sufficiently ear-marked to be adjudged the property of James Millard, deceased, and that Paul Boucher, the plaintiff in this action, is entitled to said fund; and that the defendant Union Trust Company, having unlawfully and erroneously paid out said sum to the defendant Mrs. Mary Beason, administratrix of J. W. Beason, deceased, the plaintiff is entitled to recover the amount of said deposit.

"It is thereupon ordered, adjudged, and decreed that the plaintiff have and recover of and from the defendants Union Trust Company, a banking corporation, and Mrs. Mary Beason, administratrix of J. W. Beason, deceased, the sum of $109.72, together with the costs of this action, and interest on the said sum of $109.72 from 27 July, 1935, until paid.

H. HOYLE SINK, *Judge Presiding.*"

The defendants excepted and assigned error and appealed to the Supreme Court on the ground that "the lower court erred in signing the judgment as appears in the record for that the same is not supported either by the evidence offered by plaintiff or by the findings of fact by the court."

*Wade B. Matheny for plaintiff.*
*C. B. McRorie for Union Trust Company, defendant.*
*Stover P. Dunagan for Mrs. Mary Beason, Admrx., defendant.*

CLARKSON, J. The question involved in this appeal is as follows: "Does the former judgment entered into between plaintiff and the defendant Mary Beason, administratrix of J. W. Beason, operate as a bar or estoppel to this action?" We think so under the facts and circumstances of this case.

In *Gardiner v. May,* 172 N. C., 192 (194-5), it is said, citing numerous authorities: "Where parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed or altered, or set aside without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court, that it was ob-

tained by fraud or mutual mistake, or that consent was not in fact given, which is practically the same thing, the burden being on the party attacking the judgment to show facts which will entitle him to relief."

In *Distributing Company v. Carraway,* 196 N. C., 58 (60), citing authorities, we find: "It is well established by a long line of decisions that when a court of competent jurisdiction renders judgment in a cause properly before it, such judgment estops the parties and their privies as to all issuable matters contained in the pleadings, including all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence, could and should have brought forward."

The proper procedure to set aside the judgment is by motion in the cause. *Cason v. Shute, ante,* 195 (196).

The plaintiff contends that it does not appear of record that the item $109.72 embraced in this action was in controversy in the first action, but the judgment which is a part of the record was agreed to by the parties and it says: "And the defendants have agreed to pay to the plaintiff the sum of $350.00, together with the court costs, said payment to be in full satisfaction and settlement of all claims against the defendants set out in the complaint, and in full satisfaction and settlement of all claims which now exist or hereafter arise against the estate of J. W. Beason on account of his acting as administrator *c. t. a.* of the James Millard estate."

Then again, in finding of fact 7 is the following: "That J. P. Stockton, teller in said bank who cashed the check presented by Mrs. Mary Beason, administratrix of J. W. Beason, deceased, was informed that she desired to withdraw said fund in order to complete the settlement which she had just made with the said Paul Boucher as administrator of the said James Millard estate, and that the fund in question belonged to her as administratrix of J. W. Beason, deceased."

On this record it is found that defendant Mary Beason, administratrix of J. W. Beason, was withdrawing the fund "in order to complete the settlement" and the judgment is explicit that it covers all claims which "now exist or hereafter arise against the estate of J. W. Beason on account of his acting as administrator *c. t. a.* of the James Millard estate." The parties to the judgment were *sui juris* and the judgment is binding unless set aside as above indicated. The judgment even goes so far as to release the surety upon the bond of J. W. Beason, deceased, as administrator *c. t. a.* of James Millard.

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

Reversed.

MAY F. JONES v. MRS. ROBERT J. CRADDOCK.

(Filed 17 March, 1937.)

**Appeal and Error § 55—**

A decision of the Supreme Court in reviewing a judgment as of nonsuit that plaintiff was not guilty of contributory negligence on her own statement, has reference only to the judgment as of nonsuit, and does not preclude the submission of the issue of contributory negligence upon the subsequent trial.

APPEAL by plaintiff from *Sink, J.*, at January Term, 1937, of BUNCOMBE.

Civil action for death of plaintiff's dog, alleged to have been caused by negligence of defendant in operation of automobile.

The issues of negligence and contributory negligence were both answered in the affirmative by the jury. From judgment thereon plaintiff appeals, assigning error in the submission of the second issue.

*J. Y. Jordan, Jr., for plaintiff, appellant.*
*Harkins, Van Winkle & Walton for defendant, appellee.*

PER CURIAM. As the verdict is supported by the evidence, there was no error in submitting the issue of contributory negligence to the jury.

The statement on the former appeal, "The contention that the plaintiff was guilty of contributory negligence on her own statement is untenable on this record" (210 N. C., 429, 187 S. E., 558), was not intended to preclude the submission of the issue to the jury, but had reference to the motion to nonsuit, the only matter then being considered. *Hayes v. Tel. Co., ante,* 192.

The verdict and judgment will be upheld.

No error.

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LELAND HOOKS, EARL HOOKS, AND JULIUS HOOKS, BY THEIR NEXT FRIEND, S. H. HOOKS, v. E. V. NEIGHBORS, INDIVIDUALLY, E. V. NEIGHBORS, EXECUTOR OF THE ESTATE OF E. G. TALTON, AND MRS. JANE TALTON AND MRS. MAUDE EVANS.

(Filed 17 March, 1937.)

**Judgments § 23—**

A party moving to set aside a judgment for surprise, excusable neglect, etc., C. S., 600, must allege facts in her affidavit showing a meritorious defense, and a mere allegation of nonliability and that she has a meritorious defense is insufficient.

HOOKS *v.* NEIGHBORS.

APPEAL by defendant Maude Evans from *Cranmer, J.*, at September Term, 1936, of JOHNSTON. Affirmed.

The judgment of the court below is as follows: "The above cause coming on to be heard before the undersigned judge presiding at the September Term, 1936, of the Superior Court of Johnston County, upon the motion of the defendant Maude Evans to set aside the judgment herein entered at the January Term, 1934, of the Superior Court of Johnston County. And it appearing to the court that summons in said cause was duly issued and served upon the said Maude Evans, together with a copy of the petition on 8 January, 1929, and that she duly appeared and answered in said cause. And it further appearing to the court that the matters in controversy were heard before the clerk of the Superior Court and judgment entered in favor of the petitioners on 11 February, 1929, and that the notice of appeal entered from said judgment pended until the January Term, 1934, at which time counsel for all parties appeared in open court and stated to the court that the defendants did not intend to pursue the appeal but abandoned the same, and interposed no objection to the confirmation of the clerk's judgment. And it appearing to the court further that there has been no excusable neglect and that the defendant Maude Evans had her day in court, and that the judgment of the clerk of the Superior Court has become final and binding on all parties. It is now therefore ordered, adjudged, and decreed that the motion to set aside the judgment be and the same is hereby denied.

E. H. CRANMER, *Judge Presiding.*"

To the above judgment the defendant Maude Evans made numerous exceptions and assignments of error, mainly on the ground that the court below had no evidence on which to base the findings of fact in the judgment: "(1) That there has been no excusable neglect on the part of Maude Evans; (2) That Maude Evans had her day in court; (3) That at January Term, 1934, through counsel, Maude Evans abandoned her appeal; (4) That the judgment of the clerk of the Superior Court has become final and binding on all parties; (5) That the court refused to set aside the judgment signed by Judge Clayton Moore, on account of her attorney representing adverse parties and interests; (6) That the court refused to find facts upon the evidence as requested; (7) That the court deprived the appellant of her right to prepare statement of case on appeal."

*Abell & Shepard for plaintiffs.*
*A. M. Noble for defendant Maude Evans.*

PER CURIAM. We do not think any of the exceptions and assignments of error made by Maude Evans can be sustained.

This was a civil action brought by plaintiffs against defendants. Maude Evans was served with summons on 8 January, 1929. Petition was duly filed. The prayer was: "That some suitable, competent, and fit person be appointed trustee to fill the vacancy created by the death of the said E. G. Talton, and that upon said appointment, judgment be rendered requiring E. V. Neighbors, executor of the estate of the said E. G. Talton, to pay over to such trustee the sum of $3,000 in cash, to be held by such trustee for the purposes and benefits of the said trust."

The defendants, including Maude Evans, answered, practically admitting the allegations of the petition, and pray: "(1) That the prayer of the petitioners be denied or postponed until the estate of E. G. Talton shall have been settled; (2) That the question of the interest on these funds which must first be separated from the assets of the estate of E. G. Talton and then disposed of or invested under the orders of this court shall be postponed until the estate of E. G. Talton is settled."

On 11 February, 1929, the clerk of the Superior Court rendered the following judgment: "The above entitled cause coming on to be heard before the undersigned clerk of the Superior Court of Johnston County, upon the petition herein for the appointment of a trustee to take over a trust fund of $3,000 created by the late Rhoda Pittman under the last will and testament; and it appearing to the court upon the hearing that E. G. Talton, deceased, was trustee for said fund under the will of Rhoda Pittman, deceased, and that the will of the said Rhoda Pittman contained no provision for the appointment of a successor to the said E. G. Talton, and the court finding as a fact that upon the death of said E. G. Talton said office of trustee became and is vacant; it is now therefore ordered, adjudged, and decreed that S. H. Hooks, father and general guardian of the infant petitioners named herein be and he is hereby appointed trustee to fill the vacancy created by the death of the said E. G. Talton, the court finding that said S. H. Hooks to be a suitable, competent, and fit person to act as trustee herein. It is the further judgment of the court that the said S. H. Hooks, as trustee, give bond in the sum of $6,000, with such surety as may be acceptable to the court before any funds shall come into his hands; and it is further ordered, adjudged, and decreed that E. V. Neighbors, executor of the estate of E. G. Talton, deceased, out of the first monies coming into his hands, pay over to the said S. H. Hooks, trustee, the sum of $3,000 to be held by such trustee for the purposes and benefits of the trust created by the last will and testament of Rhoda Pittman, deceased. This 11 February, 1929. H. V. Rose, clerk Superior Court." The defendants appealed to the Superior Court.

On 16 January, 1934 (January Term), the judgment of Judge Clayton Moore was as follows: "The above cause coming on to be heard

before the undersigned judge of the Superior Court presiding at the January Term, 1934, upon the appeal entered by the defendant to the judgment of the clerk of the Superior Court in February, 1929; and it appearing to the court that the defendant has abandoned the appeal, it is now therefore ordered, adjudged, and decreed that the judgment of the clerk of the Superior Court in this cause as of .... February, 1929, be and the same is hereby, in all respects, approved and confirmed. This 16 January, 1934.

CLAYTON MOORE, *Special Judge Presiding.*"

On 6 September, 1936, Maude Evans filed an affidavit setting forth certain facts and prayed that the judgment be set aside, and also "That this affiant specifically says that the estate of E. G. Talton is not indebted to anyone, making necessary the sale of this affiant's land, and this affiant has a meritorious defense to this cause of action."

We take it that the motion to set aside the judgment is made under N. C. Code, 1935 (Michie), sec. 600, which is, in part, as follows: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding," etc.

In order to set aside a judgment for mistake, surprise, or excusable neglect, there must be a showing of a meritorious defense so that the courts can reasonably pass upon the question whether another trial, if granted, would result advantageously for the defendant. *Farmers, etc., Bank v. Duke,* 187 N. C., 386; *Hill v. Huffines Hotel Co.,* 188 N. C., 586; *Fellos v. Allen,* 202 N. C., 375.

A judgment may be set aside under this section if the moving party can show excusable neglect and that he has a meritorious defense. *Dunn v. Jones,* 195 N. C., 354, 356; *Henderson Chevrolet Co. v. Ingle,* 202 N. C., 158; *Bowie v. Tucker,* 206 N. C., 56, 59.

In the affidavit of Maude Evans there are no facts set forth showing a meritorious defense. To say the estate is not indebted and she has a meritorious defense is not sufficient. She must give the facts so that the court may see what her defense is. The court below, in the judgment, did not find that she had a meritorious defense. The findings of facts by the court below were supported by the evidence appearing in the record. The statement of the case on appeal presents clearly the controversy. Maude Evans was served with summons on 8 January, 1929, and made affidavit to set aside the judgment of January Term, 1934, on 6 September, 1936, years afterwards.

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

Affirmed.

WILTON STANLEY, BY HIS NEXT FRIEND, ARTHUR STANLEY, v. THE TOWN OF SMITHFIELD.

(Filed 17 March, 1937.)

**Electricity § 5—Injury from uninsulated wire 23 feet above ground held not foreseeable.**

A complaint alleging that plaintiff, an eleven-year-old boy, was injured when he accidentally threw a small wire attached to an improvised spool across a heavily charged, uninsulated electric wire suspended approximately 23 feet above the ground on a main public highway, *is held* not to state a cause of action.

APPEAL by plaintiff from *Cranmer, J.*, at September Term, 1936, of JOHNSTON. Affirmed.

This is an action for actionable negligence, brought by plaintiff against defendant, alleging damage. The defendant demurred to the complaint.

The court below rendered the following judgment: "This cause coming on regularly to be heard before his Honor, E. H. Cranmer, Judge presiding, and the defendant having filed a demurrer herein contending that the complaint upon its face does not state facts sufficient to constitute a cause of action, and the same being heard upon said demurrer, and the court being of the opinion that the complaint does not state a cause of action against the defendant, and so holding: It is therefore ordered and adjudged by the court that said demurrer be and the same is hereby sustained, and that this cause be and the same is hereby dismissed.

E. H. CRANMER, *Judge Presiding.*"

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

*John A. Narron and Leon G. Stevens for plaintiff.*
*Ward, Stancil & Ward for defendant.*

PER CURIAM. The question involved: "Does the complaint state a cause of action wherein it is alleged that a minor boy eleven years old suffered serious bodily injury from an electric current coursing through his body, while at play, on a main well-traveled public highway, when he accidentally threw a small wire attached to an improvised spool across the uninsulated electric wires of the defendant whereon 2300 volts of electricity were being transmitted and approximately twenty-three feet above the surface of the ground?" We think not.

The plaintiff cites many decisions in this State sustaining liability, but none go so far as the facts in the present cause. We think the court below correct in sustaining the demurrer of defendant. *Parker v. R. R.*, 169 N. C., 68.

The judgment of the court below is

Affirmed.

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CAROLINA MINERAL COMPANY v. W. W. YOUNG, ELLIS YOUNG, LANDON YOUNG, AND JOHN MILLER.

(Filed 17 March, 1937.)

**Reference § 9—Where additional findings of court are supported by evidence, the court's judgment in accordance therewith will be affirmed.**

Upon appeal from the referee in a consent reference, the court amended the report of the referee by making additional findings of fact, confirming the findings of the referee not inconsistent with the court's findings and by striking out a portion of the referee's conclusions of law and substituting other conclusions of law therefor. Appellant excepted to the judgment approving the referee's judgment, and to the court's failure to sustain appellant's exceptions, and to the court's additional findings and to the striking out of part of the referee's conclusions of law, and in refusing the motion to remand to the referee. *Held:* Under the court's power to affirm, disaffirm, or modify the referee's report, the court had the authority to make the modifications complained of, and the court's additional findings of fact being supported by evidence, the judgment in accord with the findings is affirmed.

APPEAL by plaintiff from *Clement, J.*, at July Term, 1936, of MITCHELL. Affirmed.

This is an action brought by plaintiff against defendants to recover a certain specified amount of money and penalty. The prayer is: "Plaintiff prays judgment against the defendants in the sum of $104.00 as double the market value of feldspar wrongfully and willfully taken and carried away, as alleged; and for judgment in the further sum of $500.00 as punitive damages for the wrongful and willful acts of said defendants, as alleged; and as provided by C. S., 6927, together with the costs of this action."

Plaintiff obtained a restraining order and, by consent, this was continued to the hearing. At July Term, 1932, by consent, the matter was referred to W. C. Berry, Esq., "and he is hereby appointed referee in this cause and is directed to hear the evidence of the parties, find the facts thereupon, state his conclusions of law, and report his findings of fact and conclusions of law to this court before its next term for further order, etc., according to the course and practice of the courts."

The referee, at July Term, 1935, filed his report and set forth his findings of fact and conclusions of law. The plaintiff and defendants excepted to the referee's report. The court below rendered the following judgment: "This cause coming on to be heard before the undersigned judge of the Superior Court at the July Term, 1936, of Mitchell County Superior Court, on the exceptions filed to the report of the referee in the above entitled matter, the court, after hearing the matter, counsel for plaintiff and defendants being present, amends the report of the referee as follows: '*Findings of fact.* The court finds as a fact that G. E. Young is the same person as Ellis Young; that on 12 September, 1916, G. E. Young and wife, E. M. Young, conveyed one-half interest of the mineral interests in the land described in the pleadings in this cause to W. W. Young, which deed is recorded in Book 71, page 150, and filed 8 April, 1918, and that at a later date, to wit, 19 September, 1928, W. W. Young and wife conveyed by deed mineral interests, mining and dumping rights to the plaintiff, the Carolina Mineral Company, which deed is filed 8 October, 1928, in Deed Book 86, page 219; that the said Ellis Young (the same person as G. E. Young) owns at this time a one-half interest in the mineral rights in the said land; that the other findings of fact as found by the referee in his report not inconsistent with the above findings are affirmed and approved.' That paragraph one of the conclusions of law in said referee's report is amended as follows: By striking out the portion of said referee's report as to conclusions of law as shown on page 2, beginning with: 'That the plaintiff is entitled to judgment against the defendants W. W. Young and John Miller for the costs of this action, to be taxed by the clerk,' and inserting the following: 'That the plaintiff is entitled to judgment against John Miller for the sum of $9.00 and for the costs of this action, to be taxed by the clerk.' The court is unable to find from the evidence that W. W. Young has taken from the land any feldspar of value, the evidence showing that some feldspar was taken, but no evidence as to the amount. The court allows the referee, W. C. Berry, the sum of $100.00, said amount to be paid one-half by the plaintiff and one-half by John Miller. That Miss Margaret Ragland is allowed the sum of $25.00 for stenographic work, to be taxed one-half against the plaintiff and one-half against John Miller.

J. H. CLEMENT, *Judge Presiding.*"

The plaintiff excepted and assigned error to the judgment of the court and to the facts found therein, excepted to the judgment of the court approving the referee's judgment, and appealed to the Supreme Court. Also, "To the ruling of his Honor in failing to sustain plaintiff's exceptions to the referee's report and motion to remand for causes set forth in said exceptions; and to his Honor's findings of fact (or conclusions

of law) wherein he finds that Ellis (or G. E.) Young owns at this time one-half interest in the mineral rights to said land. And in striking from the referee's conclusions of law the following: 'That plaintiff is entitled to judgment against the defendants W. W. Young and John Miller for costs of this action, to be taxed by the clerk.' And in finding that the feldspar admitted to have been taken from the premises by W. W. Young was without value; and in failing to adjudge or tax W. W. Young with the costs; and in failing to find (or to remand the cause for the referee to find) the amount actually paid to the referee, stenographer, and other costs."

*J. W. Ragland for plaintiff.*
*Charles Hutchins for defendants.*

PER CURIAM. A Superior Court judge may affirm, disaffirm, or modify report of referee in compulsory reference as well as in consent reference. *First Sec. Trust Co. v. Lentz,* 196 N. C., 398, 145 S. E., 776; *Anderson v. McRae, ante,* 197.

"Speaking to the subject in *Dumas v. Morrison,* 175 N. C., 431, 95 S. E., 775, *Walker, J.,* delivering the opinion of the Court and pointing out the difference between the duties of the trial court and the appellate court in dealing with exceptions to reports of referees, said: 'It must be remembered that a judge of the Superior Court in reviewing a referee's report is not confined to the question whether there is any evidence to support his findings of fact, but he may also decide that while there is some such evidence, it does not preponderate in favor of the plaintiff, and thus find the facts contrary to those reported by the referee. The rule is otherwise in this court when a referee's report is under consideration. We do not review the judge's findings, if there is any evidence to support them, and do not pass upon the weight of the evidence.'" *Anderson v. McRae, supra,* pp. 198-9.

In *Mills v. Realty Co.,* 196 N. C., 223 (225), we find: "C. S., 578, empowers a trial judge to 'review the report and set aside, modify, or confirm it in whole or in part,' etc. Thus supervisory power is broad and comprehensive. *Dumas v. Morrison,* 175 N. C., 431, 95 S. E., 775. In the exercise of the power the trial judge may recommit the report for the correction of errors and irregularities, or for more definite statement of facts or conclusions of law, and such order recommitting the report for such purpose is not appealable. *Commissioners v. Magnin,* 85 N. C., 115; *Lutz v. Cline,* 89 N. C., 186; *S. v. Jackson,* 183 N. C., 695, 110 S. E., 593; *Coleman v. McCullough,* 190 N. C., 590, 130 S. E., 508."

We think that there was evidence to support the findings of fact by the court below; therefore the judgment in the court below is

Affirmed.

EDDIE HORTON (WIDOWER); J. L. HORTON AND WIFE, ELDRIE HORTON; RAY HORTON; P. S. HORTON AND WIFE, CARRIE JANE HORTON; THEODORE R. HORTON AND WIFE, VERA HORTON; EDDIE HORTON, GUARDIAN OF MARY LEE HORTON; JESSE W. HORTON, AND MAY BELL HORTON, v. W. W. HORTON.

(Filed 17 March, 1937.)

**Jury § 5—**

Where the record does not show what admissions, if any, were made on the hearing, the decision of the court on a controverted issue raised by the pleadings, without the introduction of evidence, in the absence of waiver of jury trial or agreement as to facts, will be held for error.

APPEAL by defendant from *Cranmer, J.*, at September Term, 1936, of HARNETT. Error and remanded.

Plaintiffs alleged that defendant had agreed, in consideration of the conveyance to him by the plaintiffs of their equity of redemption in described lands, to pay off the mortgage debt thereon and hold the lands subject to their option to repurchase upon repayment to him of the debt, interest, and taxes, within three years; and plaintiffs further alleged that within the time limited, plaintiffs had tendered the amount to the defendant who refused to convey. Defendant in his answer admitted that he made an agreement substantially as alleged, but specifically denied that any tender of repayment of the debt and interest was made to him within the time limited or at any time.

The court, upon consideration of the pleadings and "upon the admissions of the parties," found as a fact that within two years the money advanced by defendant to pay off the mortgage, interest, and taxes, was tendered to the defendant, and thereupon adjudged that equity raised a constructive trust, and that defendant held the land as trustee for the plaintiffs, and directed that he reconvey said lands to them upon the payment of the amounts advanced by him.

Defendant appealed.

*Wm. B. Oliver and J. Elsie Webb for plaintiffs.*
*J. C. Sedberry for defendant.*

PER CURIAM. The record does not disclose what admissions, if any, were made at the hearing in the court below, and there being no waiver of jury trial or agreement as to facts nor evidence offered, the court was without power to decide a controverted issue of fact raised by the plead-

ings. Doubtless the effort to end an unseemly controversy between members of the same family led the learned judge into error.

The case must be remanded for the proper determination of the material issues.

Error and remanded.

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MRS. R. A. HALL v. WILLIE G. BOYKIN ET AL.

(Filed 17 March, 1937.)

**Bills and Notes § 27—Plaintiff must show ownership of note sued on, and directed verdict for her without introduction of evidence by her is error.**

In an action on a note and to foreclose mortgage security plaintiff alleged that she was the owner of the note executed by one defendant to the other. The payee named in the note denied the allegation of ownership, and, upon the court's erroneous ruling that the burden was on him, proffered evidence, which was excluded, that he was the owner of the note. The court thereupon directed a verdict for plaintiff without the introduction of evidence by her. *Held:* Defendant's exception to the directed verdict is well taken.

APPEAL by defendant J. W. Boyett from *Cranmer, J.*, at September Term, 1936, of JOHNSTON.

Civil action to recover on promissory note and to foreclose mortgage security.

Plaintiff alleges that she is the owner and holder of a note for $552.50, executed by Willie G. Boykin to J. W. Boyette on 1 December, 1929, payable 1 January, 1931, and secured by mortgage, which allegation is denied in the answer of J. W. Boyette.

When the pleadings were read, the court ruled that the burden of proof was on the defendant; whereupon, the defendant Boyette proffered testimony to the effect that he was the owner of the "Boykin note and mortgage described in the pleadings," which was excluded. Exception.

From a directed verdict and judgment for plaintiff, the defendant Boyette appeals, assigning errors.

*Abell & Shepard for plaintiff, appellee.*
*Parker & Lee for defendant Boyette, appellant.*

PER CURIAM. The exception to the directed verdict is well taken. Plaintiff offered no evidence under the court's ruling, which was erroneous, and the verdict is unsupported by the record. *Hayes v. Green,* 187 N. C., 776, 123 S. E., 7; *Bank v. School Committee,* 121 N. C., 107, 28 S. E., 134.

New trial.

ANNIE H. BOSEMAN v. OHIO STATE LIFE INSURANCE COMPANY.

(Filed 17 March, 1937.)

**Insurance § 30c—Where nonpayment of premium to insurer's agent in accordance with agreement is caused by termination of agent's employment without notice to insured, insurer may not declare forfeiture.**

Evidence that insured made an agreement with insurer's agent that the agent would collect the monthly premium from insured's employer on the due date, and that the employer was ready, able, and willing to make the payment, but that the agent did not call as agreed because of the termination of his employment with insurer prior thereto, and that insurer gave no notice to insured or his employer that it would require payment direct to it or to its successor agent, *is held* sufficient to be submitted to the jury on the question of payment of the premium in the beneficiary's action on the policy after the death of insured during the month for which such payment would have kept the policy in force.

APPEAL by defendant from *Harris, J.*, at November Term, 1936, of HALIFAX. No error.

This is an action to recover on a policy of insurance issued by the defendant on the life of Aubrey H. Boseman, who died on 21 October, 1935.

The policy was issued on 26 March, 1935. The premiums were payable on the first day of each month and on the payment of each monthly premium the policy was continued in force for the succeeding month.

It was admitted by the defendant that the plaintiff as beneficiary of the policy is entitled to recover of the defendant the sum of $600.00 if the policy was in force at the death of the insured on 21 October, 1935.

The issue submitted to the jury was answered as follows:

"Was policy No. 67113 in force at the time of the death of Aubrey H. Boseman? Answer: 'Yes.'"

From judgment that plaintiff recover of defendant the sum of $600.00 with interest from 23 October, 1935, and the costs of the action, the defendant appealed to the Supreme Court, assigning as error the refusal of the trial court to allow its motion for judgment as of nonsuit at the close of all the evidence, and the peremptory instruction of the court to the jury.

*No counsel for plaintiff.*
*Battle & Winslow for defendant.*

PER CURIAM. It is admitted by the defendant that all the evidence at the trial of this action showed that the policy sued on was in force from the date of its issuance to 1 October, 1935. The defendant contends that

there was no evidence tending to show that the premium due on the policy on 1 October, 1935, was paid by the insured, and for that reason, under its terms, the policy was not in force at the death of the insured on 21 October, 1935. This contention cannot be sustained.

All the evidence showed that in accordance with the instructions of a general agent of the defendant, approved by the defendant, the insured had made arrangements with his employer for the payment of the premium due on 1 October, 1935, and that on that day the employer was ready, willing, and able to pay the premium. The agent of the defendant who had theretofore collected the monthly premiums due on the policy, failed to call on the employer on 1 October, 1935. This agent left the employment of the defendant during the month of September, 1935. Neither the agent nor the defendant notified the insured or his employer that the said agent had left the employment of the defendant, or that the insured would be required to pay the premium due on 1 October, 1935, direct to the defendant or to the successor of the agent who had theretofore collected the monthly premiums. The employer of the insured testified that he had in hand on 1 October, 1935, the money to pay the premium due on that day, and would have paid the premium if the agent of the defendant had called for the money, in accordance with the arrangement made with him by the insured and the agent of the defendant.

In *Lindley v. Ins. Co.*, 209 N. C., 116, 182 S. E., 716, the renewal premium required to keep the policy in force was not paid or tendered to the defendant until after the death of the insured. It was held that the plaintiff could not recover on the policy for the reason that it was not in force at the death of the insured. In the instant case, all the evidence showed that the premium due on 1 October, 1935, was paid by the insured in accordance with the instructions of the defendant. The cases are distinguishable.

The judgment in the instant case is affirmed.

No error.

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H. M. BEASLEY v. HENRY EDWARDS.

(Filed 17 March, 1937.)

**Animals § 2—**

Where a party lawfully impounds a sow, sells same under provisions of a recorder's judgment, and pays himself his lawful fees for impounding the sow and his damages caused by the sow, and pays to the owner the amount due him out of the purchase price, C. S., 1850, 1851, the owner may not complain.

APPEAL by plaintiff from *Cranmer, J.*, at September Term, 1936, of JOHNSTON. Affirmed.

This is an action to recover possession of a red sow, described in the complaint.

From judgment on the pleadings and on admissions at the trial, dismissing the action, the plaintiff appealed to the Supreme Court, assigning error in the judgment.

*Otis L. Duncan, Parker & Lee for plaintiff.*
*A. M. Noble for defendant.*

PER CURIAM. It appears from allegations in the complaint which are admitted in the answer that on or about 1 November, 1935, the defendant lawfully impounded one red sow, which was owned by the plaintiff, and held the said sow in his possession until his lawful fees and damages caused by the sow were paid by the plaintiff. C. S., 1850.

It was admitted at the trial that since the commencement of the action, the defendant has sold the sow, as authorized by a judgment of the recorder's court of Johnston County, and out of the proceeds of said sale has paid to himself his lawful fees for impounding the said sow, and his damages caused by the sow. Plaintiff now has the sow in his possession, and defendant has paid to plaintiff the amount due him out of the purchase price at the sale. C. S., 1851.

There is no error in the judgment dismissing the action. It is

Affirmed.

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MARY HESSIE BYRD AND OTHERS v. J. M. MYERS.

(Filed 17 March, 1937.)

**Deeds § 12—Deed held to have made valid exception to conveyance of part of the land described therein by metes and bounds.**

Deed to defendant described the land conveyed by metes and bounds less ¼ acre that H. "holds her life time rite in." Thereafter the deed of a life estate to H. in the ¼ acre, describing same by metes and bounds, was recorded. *Held:* The ¼ acre was excepted from the land conveyed to defendant, and upon the death of H. the land reverts to the heirs of the grantor, subject to the dower rights of his widow.

APPEAL by defendant from *Clement, J.*, at December Term, 1936, of YADKIN. Affirmed.

This is an action to recover possession of a lot or parcel of land containing one-fourth of an acre, more or less, and described in the complaint by metes and bounds.

At the trial the plaintiffs and the defendant filed with the court a statement of facts agreed. The action was heard upon this statement.

On the facts agreed the court was of opinion that the plaintiffs are the owners and are entitled to the immediate possession of the land described in the complaint, and so adjudged. The defendant appealed to the Supreme Court, assigning error in the judgment.

*Avalon E. Hall for plaintiffs.*
*W. M. Allen for defendant.*

PER CURIAM. The plaintiffs are the widow and heirs at law of W. D. Adams, deceased.

On 20 March, 1918, W. D. Adams and his wife executed and delivered to the defendant J. M. Myers a deed by which they conveyed to the defendant a tract of land described in said deed by metes and bounds, containing 46 acres, "less ¼ acre that Clara Holleman holds her life time rite in." This deed was duly recorded in the office of the register of deeds of Yadkin County.

On 20 August, 1914, W. D. Adams and his wife executed and delivered to Clara Holleman a deed by which they conveyed to her a lot or parcel of land, containing one-fourth of an acre, and described in said deed by metes and bounds. This lot or parcel of land is included within the description of the 46-acre tract contained in the deed from W. D. Adams and wife to the defendant. Clara Holleman is dead. The deed to her was not recorded until after the execution of the deed from W. D. Adams and wife to the defendant.

The court was of opinion that the lot or parcel of land described in the deed from W. D. Adams and wife to Clara Holleman was not conveyed to the defendant by the deed to him executed by W. D. Adams and wife, but that the title to said lot or parcel of land remained in the grantor, W. D. Adams, subject to the life estate of Clara Holleman, and that at her death the said lot or parcel of land descended to the plaintiffs as his heirs at law, subject to the dower right of the plaintiff, his widow.

The judgment in accordance with this opinion is affirmed. See *Fisher v. Mining Co.*, 97 N. C., 95. In the opinion in that case it is said: "Where a grantor makes a valid exception in a deed, the thing excepted remains the property of the grantor or his heirs."

Affirmed.

ROBERT S. BURLESON v. J. F. SNIPES, TRADING AS J. F. SNIPES MOTOR COMPANY, AND C. I. T. CORPORATION.

(Filed 17 March, 1937.)

**Removal of Causes § 4a—Complaint held to show separable controversy, and nonresident's petition for removal was properly granted.**

A complaint alleging that plaintiff purchaser gave the seller a title retaining contract, to which the certificate of title was attached, for balance due on the purchase price of the truck, that the contract was sold and assigned to a nonresident, who failed and refused to surrender the certificate of title upon the completion of the payment of the purchase price, *is held* to show a separable controversy, and the nonresident's petition to remove was properly granted.

APPEAL by plaintiff from judgment rendered by *Rousseau, J.*, 15 January, 1937, AVERY County. Affirmed.

Petition by defendant C. I. T. Corporation, a West Virginia corporation, for removal of the cause of action as to it to the District Court of the United States for the Western District of North Carolina, on the ground of separable controversy involving more than three thousand dollars, heard upon appeal from the clerk, who had denied removal. Proper bond was filed.

The judge below reversed the ruling of the clerk, adjudging that petitioner was entitled to remove.

Plaintiff appealed.

*J. V. Bowers and Charles Hughes for plaintiff.*
*Harkins, Van Winkle & Walton for defendant.*

PER CURIAM. It has been uniformly held by this court that the right of removal of a cause from a state court to the United States Court on the ground of separable controversy must be determined by the facts set forth in the complaint. *Timber Co. v. Ins. Co.*, 190 N. C., 801; *Hughes v. R. R.*, 210 N. C., 730; *Rucker v. Snider Bros.*, 210 N. C., 777. In the instant case the complaint alleges a cause of action against the resident defendant Snipes and the petitioner for damages for failure to surrender an automobile title certificate. The plaintiff alleges that this certificate had been attached to a title retention contract given by him to defendant Snipes to secure the balance due upon the purchase of a motor truck, and that the defendant Snipes sold and assigned said title retention contract, with the certificate attached, to the defendant C. I. T. Corporation; and that upon payment of the balance due on his debt to

the C. I. T. Corporation the latter wrongfully failed and refused to surrender to the plaintiff the title certificate, causing substantial damage to him.

It is manifest that plaintiff has alleged as to the petitioner a cause of action independent and distinct from the resident defendant, and that the petitioner is entitled to have same removed to the United States Court. *Brown v. R. R.*, 204 N. C., 25; *Crisp v. Fibre Co.*, 193 N. C., 77; *Timber Co. v. Ins. Co., supra.*

The judgment below is

Affirmed.

MORGAN P. BODIE v. B. C. HORN.

(Filed 17 March, 1937.)

**Contracts § 7d—**

A contract for "cotton futures" in which no actual delivery is intended or contemplated is void and no action may be maintained thereon.

APPEAL by plaintiff from *Sink, J.*, at September Term, 1936, of RUTHERFORD.

Civil action to recover balance alleged to be due on certain "cotton contracts" purchased by plaintiff from defendant "on call" and "closed out" when plaintiff failed to "put up sufficient margin to protect said contracts."

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

*B. T. Jones, Jr., for plaintiff, appellant.*

*T. J. Moss for defendant, appellee.*

PER CURIAM. The basis of the judgment is that the transactions alleged in the complaint are denominated "futures," no actual delivery of the articles sold being intended or contemplated, and therefore declared illegal by C. S., 2144. *Orvis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C., 231, 91 S. E., 948. It is also observed that the complaint contains no allegation of a promise to pay on the part of the defendant, which, perhaps, the plaintiff assumed the law would imply. However, in all events, the judgment sustaining the demurrer would seem to be correct.

Affirmed.

ZACK HARPER, ADMINISTRATOR OF EMMETT C. HARPER, DECEASED, v. SEABOARD AIR LINE RAILWAY CO., INC., AND L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS FOR SEABOARD AIR LINE RAILWAY CO., INC., AND HAYWOOD SMITH.

(Filed 7 April, 1937.)

**1. Process § 4b—Service on agent of receivers of insolvent corporation held not service on the corporation.**

The court found, upon defendant corporation's motion to dismiss for want of service, that the corporation was in receivership at the time the action was instituted, that personal service was had on the agent of the receivers, but that the agent had at no time been an agent of the corporation since its receivership, although he had been an agent of the corporation prior thereto. *Held:* The facts found support the judgment dismissing the action as to the corporation on the ground that no service had been had upon it.

**2. Trial § 22—**

Upon motion to nonsuit, the evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

**3. Automobiles § 20b—Evidence held for jury on contention that intestate and driver were not engaged in joint enterprise.**

Evidence that the owner of a truck engaged in hauling merchandise for hire permitted customers hauling tobacco to ride on the truck to market without extra charge, and that plaintiff's intestate was so riding on the truck on the way to market and that at the time the truck was driven by the owner's employee, who was authorized to collect the transportation charges from the owners of the tobacco, *is held* plenary to be submitted to the jury on plaintiff's contention that his intestate was not engaged in a joint enterprise with the driver of the truck, and that therefore the negligence of the driver would not be imputed to him.

**4. Automobiles § 21: Negligence § 6—Passenger on truck may hold all parties liable whose negligence was concurring proximate cause of injury.**

In an action against the driver of a truck and the receivers of a railroad company by the administrator of a passenger on the truck to recover for intestate's death in a collision, plaintiff may not recover of the receivers if the driver's negligence was the sole proximate cause of the injury, but where the driver's negligence is not imputed to intestate, plaintiff may recover of the receivers, if their agents operating the train were guilty of negligence which, in any degree, was a concurring proximate cause of the injury, since the negligence of one tort-feasor will not exonerate other tort-feasors.

**5. Railroads § 9—Evidence held competent on question of whether crossing was so dangerous that railroad should have maintained safety devices.**

Evidence that a railroad company maintained no gates or electric warning signals or watchman at a crossing within the limits of an incor-

porated town, together with evidence that the crossing was partially obstructed by houses and buildings and tall weeds, and that the crossing was much used by pedestrians and vehicles, is competent on the question of whether the crossing was so dangerous that the railroad company should have provided such safety devices in the exercise of due care.

**6. Same—Evidence that railroad's negligence concurred in proximately causing accident at crossing held sufficient in guest's action.**

The evidence tended to show that a railroad company's motor train approached a much used crossing in an incorporated town at an excessive speed without giving any warning signal, that the driver of a truck approaching the crossing at twenty miles per hour, with his vision of the crossing partially obstructed, did not see the motor train until within about ten feet of the track, at which time the whistle blew, that the driver put on brakes but was unable to stop the truck before it ran into the side of the front part of the train, with evidence that no watchman or warning devices were maintained at the crossing, and that the horn or whistle on the motor train was similar to that on large trucks or automobiles and unlike the whistle on a steam locomotive, *is held* sufficient to be submitted to the jury, in an action against the receivers of the railroad company by the administrator of a passenger on the truck who was killed in the collision, on the issue of whether the receivers' agents were guilty of negligence which was a concurring proximate cause of the accident, the negligence of the driver of the truck not being imputed to plaintiff's intestate.

APPEAL by plaintiff from *Spears, J.*, at September Term, 1936, of LENOIR. Affirmed on plaintiff's appeal as to railway company; reversed on plaintiff's appeal as to receivers.

This is an action for actionable negligence, brought by Zack Harper, administrator of Emmett C. Harper, deceased, against defendants for killing his intestate at a railroad crossing, alleging damage. The complaint alleges in detail a cause of action against the defendants. The defendants (except Haywood Smith, who filed no answer) denied the material allegations of the complaint in regard to negligence, and set up the plea of contributory negligence. The defendants also entered a special appearance and moved that action against Seaboard Air Line Railway Co., Inc., be dismissed on account of lack of service. The facts and law applicable will be set forth in the opinion.

*J. S. Manning, Wallace & White, and J. A. Jones for plaintiff.*
*Rouse & Rouse and Varser, McIntyre & Henry for defendants.*

CLARKSON, J. In regard to the action against the defendant Seaboard Air Line Railway Co., Inc., the record discloses: "Upon the call of the case and before the jury was impaneled, the Seaboard Air Line Railway Company, through counsel, entered a special appearance and moved to dismiss the action as to it, for that said Seaboard Air Line Railway

Company, a corporation, was in receivership, and no service of summons had been made upon it. Evidence was taken on said motion as appears in the record. The motion was allowed and judgment entered, to which said judgment plaintiff excepted, assigned error, and appealed to the Supreme Court."

The judgment in the court below was as follows: "This cause coming on to be heard before his Honor, Marshall T. Spears, Judge presiding, and at the reading of the pleadings the Seaboard Air Line Railway Company, a corporation, through counsel entered special appearance and moved to strike out the return of service herein in so far as it purported to relate to it, on the ground that H. D. Wood, upon whom service appeared to have been made, was not in fact at the time of said service the agent of the Seaboard Air Line Railway Company, a corporation. The court heard the testimony offered on behalf of said motion (none being offered *contra*) and therefrom finds facts as follows: (1) That the Seaboard Air Line Railway Company, a corporation, was on 23 December, 1930, placed in a receivership by decree of the District Court of the United States for the Eastern District of Virginia, Norfolk Division, in a certain equity cause therein pending, entitled 'Bethlehem Steel Company *v.* Seaboard Air Line Railway Company,' and that all of the property of the said Seaboard Air Line Railway Company has been operated since said date by the receivers thereof, who had employed all the agents that had been in charge of any of the operations thereof since said date. (2) That H. D. Wood was on 23 December, 1930, employed by said receivers as agent for said receivers at Raleigh, N. C., and was prior to said date agent of the Seaboard Air Line Railway Company, and that the said H. D. Wood has since said date continuously been in the employment of the said receivers, and has not at any time since 23 December, 1930, been in the employ of the Seaboard Air Line Railway Company, a corporation, in any capacity whatsoever. (3) That service of summons herein has not been made on the Seaboard Air Line Railway Company, a corporation. Now, therefore, it is ordered that service of summons appearing herein, in so far as it relates to the Seaboard Air Line Railway Company, a corporation, is stricken out, and this action is dismissed as to the said Seaboard Air Line Railway Company, a corporation, and to this ruling the plaintiff excepts. Marshall T. Spears, Judge presiding."

The exception and assignment of error made by plaintiff is to the judgment. The question: Are the facts found sufficient to support the judgment? We think so. In fact, there is no evidence that H. D. Wood, at the time he was served with summons, was the agent of the Seaboard Air Line Railway Company, Inc. He was agent alone of the defendant

receivers. The cases cited by plaintiff are not applicable to the factual situation here presented.

At the close of plaintiff's evidence, the defendant receivers made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below sustained the motion, and in this we think there was error. The evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The evidence on the part of plaintiff was to the effect that J. R. Davenport lived in Deep Run section of Lenoir County, N. C., and owned a Chevrolet truck (doors with glass in them—closed cab), which he used for hauling, and had a license to use it for hauling for hire. Part of the time since 1933 he hauled tobacco from the community to the various markets. He charged each party whose tobacco he hauled 75c per hundred pounds, and the arrangement was that the person who had tobacco hauled could ride on the truck to the market. The truck had a body 12½ feet long and 5 to 5½ feet wide, spread out over the wheels, and those who could not get in the cab would ride behind. No charge was made for riding. On the morning of 22 August, 1933, Haywood Smith, who was the employee of J. R. Davenport, had the truck turned over to him by Davenport to drive. He was at the wheel and in the cab with him were Lewis and Furney Davenport. There were 5,474 pounds of tobacco covered up on the truck belonging to different parties. Haywood Smith had the right to collect 75c per hundred pounds, which was charged for transporting the tobacco. Smith went to the different parties to get the respective loads. Those who did not go to the market had checks brought back and delivered to them. The truck was in good condition and had only been run 10 months—it was new when purchased. The tires were practically new, the brakes and mechanical condition were good. The truck had a double-wheel equipment on the rear. Haywood Smith was related by blood and marriage to some of the parties who went along with their tobacco. On the rear of the truck, where some of the parties who were riding on a bench sat, the pile of tobacco was 6 feet high between them and the cab. From the rear end of the pile of tobacco to the end of the truck was about 3½ feet. Zeb Brown was standing off to the end of the bench—left-hand corner. On the bench were Emmett C. Harper, plaintiff's intestate, and seven others. The parties were facing the direction which the truck was leaving. Of the twelve riding on the truck, nine were killed and the other three seriously injured.

The truck, with Haywood Smith driving, left Deep Run about 4:30 in the morning, reaching Lumberton (112 miles away), about 8:30 o'clock. He drove through Lumberton, crossed the River Bridge and turned at a filling station to the left, going toward Fairmont (about 10 miles south), and was driving the truck when the collision took place. The horn or whistle on the two-motor car, driven by defendant railroad, was similar to that on large trucks or automobiles and not like a whistle or bell on a steam engine.

The evidence is plenary to be submitted to the jury that Haywood Smith, the employee of J. R. Davenport, owner of the truck for hire, was not engaged in a joint enterprise or joint venture with the plaintiff's intestate and others riding on the truck.

It is well settled in this jurisdiction that negligence on the part of a driver of a car will not ordinarily be imputed to another occupant unless such other occupant is the owner of the car or has some kind of control over the driver. They must be engaged in a joint enterprise or joint venture. Automobile driver's negligence is not, as a general rule, imputable to a passenger or guest. *Earwood v. R. R.*, 192 N. C., 27 (30); *Albritton v. Hill*, 190 N. C., 429 (431); *Campbell v. R. R.*, 201 N. C., 102 (107); *Sanders v. R. R.*, 201 N. C., 672 (676); *Newman v. Coach Co.*, 205 N. C., 26 (28); *Johnson v. R. R.*, 205 N. C., 127 (133); *Keller v. R. R.*, 205 N. C., 269 (278-9); *Jernigan v. Jernigan*, 207 N. C., 831 (836-7).

It is the rule, also, that if the negligence of the driver is the sole proximate cause of the injury, the injured passenger or guest cannot recover. *Moss v. Brown*, 199 N. C., 189 (192). As to concurrent negligence, the rule is stated in *White v. Realty Co.*, 182 N. C., 536 (537-8), thus: "Conceding that McQuay, the owner and driver of the Ford machine, was negligent, as it is quite apparent from the evidence he was, yet this would not shield the defendant from suit if its negligence was also one of the proximate causes of the plaintiff's injury. *Crampton v. Ivie*, 126 N. C., 894. There may be two or more proximate causes of an injury; and where this condition exists, and the party injured is free from fault, those responsible for the causes must answer in damages, each being liable for the whole damage instead of permitting the negligence of the one to exonerate the others. This would be so though the negligence of all concurred and contributed to the injury, because, with us, there is no contribution among joint tort-feasors. *Wood v. Public Service Corp.*, 174 N. C., 697. In *Harton v. Tel. Co.*, 141 N. C., 455, the following statement of the law is quoted with approval: '"To show that other causes concurred in producing or contributing to the result complained of is no defense to an action for negligence. There is, indeed, no rule better settled in this present connection than that the

defendant's negligence, in order to render him liable, need not be the sole cause of the plaintiff's injuries. . . . When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes he is liable." ' See, also, 21 A. & E. (2 Ed.), 495, and note." *Hinnant v. Power Co.*, 187 N. C., 288.

The above principle has been recognized so long that it is not necessary to cite further authorities. It was recognized recently in *Trust Co. v. R. R.*, 209 N. C., 304 (308), and *Smith v. Sink*, 210 N. C., 815 (817).

The highway to Fairmont, about 175 yards from the point of the collision, forks and leaves No. 20 and goes on No. 70 to Fairmont. The surface of the road is asphalt. The highway runs practically north and south and the railroad east and west. In going to the point of the collision, the road is not level, but is slightly elevated, going up to the railroad and then down. The first building on the right of the highway is a church, and then on up to the railroad are some stores built close together—some three. Back of the church are a pine thicket and a few houses. Across the railroad is a store, and there is a road between the store and the railroad running parallel with it and five or six houses face on it. On the left side is a colored school building, about 150 feet from the railroad track. The grade crossing where the collision occurred is in the corporate limits of the town of Lumberton. The Fairmont road was the main traveled road which led from Lumberton to Fairmont. The tobacco market was open at the time and had been for a few weeks, and was a tobacco market for years. At this time of the year there was a lot of traffic, cars practically all the time on the road, especially early in the morning before the sales and late in the evening as people returned. Persons used the road as a street to walk over. A good many colored people used it—the section is inhabited mostly by colored people and the school was a colored school. Many trucks went through hauling tobacco towards Fairmont. Ran Evans' store was about 100 feet from the railroad track on the right-hand side, the way the truck was being driven. As you approached the railroad on the right-hand side was a sign "R.R." There were telegraph poles up and down the railroad. There were regular crossing signs with "Railroad Crossing" written on them, east and west. There are no North Carolina stop signs on either side, nor were there any gate, electric gongs, or lights.

On the morning in question, when the wreck occurred, the train was going east towards Lumberton, the truck was going south towards Fairmont, which put the engineer on the opposite side from that which the truck was approaching. Until the collision no whistle was blown or bell rung. The train had two cars and was not a steam engine; it was a motor car. The sound made by it was not as loud as that made by a

steam engine. It was running about 45 to 50 miles an hour. Haywood Smith, the driver of the truck, testified, in part: "I put the truck in second gear and made my turn and kept on up the road in second gear, and I saw a colored man waving at me, I was almost on him, I thought he was wanting to catch a ride to Fairmont, during the time I was beginning to pass or passing this colored man waving, I changed my gears from second to high and had not been but just a little ways before I happened to see the train coming right in front of me, saw it right through the windshield when I first saw the train, and the whistle began to blow as I saw it. Up to that moment no whistle had blown or a bell rung. The train was almost on the road when I saw it. It was approaching from my right, going east. I could not say whether I saw the train before I heard the whistle, but as I saw the train through the windshield I heard the whistle blowing. At that time I was within 8 or 10 feet of the track over which the train was passing. I put on all the brakes I had and tried to prevent going into it but I didn't have brakes enough to stop it. The truck and train came in contact with each other somewhere about the front of the front car (about the No. 2002 on the train and 20 feet from the front), I struck the front car. I don't know how close to the front of it. I did not see the train afterwards. I saw the train about 250 yards down the railroad track, but didn't see it at close-up view. The train was traveling at a fast rate of speed, 45 to 50 miles per hour, I would say. I was traveling about 20 miles per hour just before I saw it. I was knocked unconscious for a while. When I regained consciousness I was still in the truck. The truck was knocked off the road, just off the pavement, the hind wheels were still on the edge of the road and the front end was off of it. The rear wheels were on the shoulder part of the road. Emmett C. Harper was lying on the paved road, close to the side of the railroad. He was dead. He was lying pretty close to the railroad on the hard surfaced paved portion of the highway. Up to the moment when I saw the train and heard the whistle, I didn't know there was a railroad track there. I don't remember seeing any. I had driven over that road once before in the nighttime in 1931, two years before this. I lived in the Deep Run section. I was not familiar with conditions existing there, and knew nothing about the general conditions there around Lumberton where this wreck happened. On one side of the cab the glass was rolled up and the other side lacked about 8 or 10 inches being rolled up to the top. That was on the left-hand side that the window was down about 8 or 10 inches, on the side that I was sitting on as I was driving. . . . Going from the filling station where I turned to my left off of No. 20 and on to the Fairmont road, before you could see the T-iron that crosses the paved road, you have to be close to it to see it on the paved road. There was

not any gate or other similar structure at this crossing that let up and down when the train passed. There was not any watchman there either. There were no electric gongs or lights." Sitting in the truck, Haywood Smith's vision was about the same as that of a person standing on the ground.

Emmett C. Taylor testified, in part: "From the last building up to the railroad (Ran Evans' store) there was a growth of weeds, I would say that they came kinder around the embankment of the highway and would extend about half the distance from the store to the railroad. They were small weeds that went clean on close to the railroad, but those were not so tall. Those extending from near the store to about half the distance to the railroad would be something near my height, I would say; I would say something about like 5 feet is the best of my impression. The county road is on a fill and the railroad is likewise on a fill. I made an observation of where the railroad crossed the pavement at this point. The pavement was right up to the rail of the track, about the same height as the rail. . . . You would have to be near by, maybe within 10 feet of the railroad, before you could see the T-iron. . . . The fill as it goes up to the railroad and the fill as it goes up to the highway, I would say, is some 6 or 8 feet. They are both on a grade. The highway slopes slightly up to the railroad."

In *Blum v. R. R.*, 187 N. C., 640 (647-8), it is stated: "There was error against the plaintiff in giving this instruction that the jury should not consider it negligence that the defendants did not maintain automatic gong or other safety device at the crossing in question, and instructing them not to consider the absence of such a gong or other safety device in passing upon the first issue. This was a matter for the jury upon the evidence. In *Dudley v. R. R.*, 180 N. C., 34, this Court said: 'It was not error for the court to permit the plaintiffs to offer evidence that there was no automatic alarm or gates at the crossing, and the court properly left to the jury to say, upon all the attendant circumstances, whether the railroad company was negligent in not erecting gates. It was incumbent upon the defendant to take such reasonable precautions as were necessary to the safety of travelers at public crossings. 22 R. C. L., 988. This was a question of fact for the jury.'"

In *Moseley v. R. R.*, 197 N. C., 628 (638), it is written: "'Where the evidence shows that a railroad crossing is for any reason peculiarly dangerous, it is a question for the jury whether the degree of care which a railroad company is required to exercise to avoid accidents at crossings imposes on the company the duty to provide safety devices at that crossing.'" In the *Moseley case, supra,* the matter is thoroughly discussed at pp. 638-9.

In *Keller v. R. R.*, 205 N. C., 269 (278), we find: "The evidence on the part of plaintiff was to the effect that plaintiff, Philip Keller, and

his witness, heard no whistle blow or bell ring. In *Harris v. R. R.*, 199 N. C., 798 (799), is the following: 'The law in this State does not impose upon the driver of a motor vehicle, on his approach to a public crossing, the duty, under all circumstances, to stop his vehicle before driving on the crossing. Whether, under all the circumstances, as the evidence tends to show and as the jury may find from the evidence, the failure of the driver to stop, as well as to look and listen for an approaching train at a railroad crossing, was negligence on his part, is ordinarily a question involving matters of fact as well as of law, and must be determined by the jury under proper instructions from the court,'" citing numerous authorities.

In *Earwood v. R. R.*, 192 N. C., 27 (29), is the following: "The crossing in controversy was a grade crossing, and, according to the evidence, one that was much used by the public. It was therefore the duty of the defendant to use due care in giving a timely warning of the approach of its train either by sounding the whistle or ringing the bell at the usual and proper place in order that those approaching or using the crossing could be apprised that the train was at hand. It is established law that failure to perform this duty constitutes negligence," citing many authorities. The *Earwood case, supra,* is in many respects similar to the present case. Also *Smith v. R. R.*, 200 N. C., 177; *Miller, Admr., v. Union Pac. R. R. Co.*, 290 U. S., 227, 78 Law Ed., 283.

In the judgment of the court below is the following: "The court heard the argument of counsel for plaintiff and said defendants, and, after considering the evidence and such argument, and *Herman v. R. R.*, 197 N. C., 718, and *Hinnant v. R. R.*, 202 N. C., 489, the court allows said motion, and the plaintiff excepts."

The learned and careful judge in the court below, we think, was in error in the ruling. We think the cases are distinguishable from the case at bar, and the facts in the present case are sufficient for the jury to determine under proper instructions, and not for the court. There was more than a scintilla of evidence. This is an action for actionable negligence by a passenger or guest, for concurrent negligence, which arises where the injury is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently.

Affirmed on plaintiff's appeal as to railway company.

Reversed on plaintiff's appeal as to receivers.

STATE v. CLIFTON BOYKIN.

(Filed 7 April, 1937.)

**1. Criminal Law § 29a—Testimony sought to be elicited on cross-examination of State's witness held properly excluded as irrelevant.**

Where an officer testifies on cross-examination that he did not swear out a warrant for defendant until twelve days after the commission of the offense because he did not know defendant's name, and that a confederate of defendant suggested that defendant was the person, and that he then found defendant, identified him, and swore out the warrant, and that defendant was the offender, the exclusion of testimony as to the name and residence of the confederate is not prejudicial, the excluded testimony being irrelevant.

**2. Criminal Law § 56—Motion in arrest for want of jurisdiction for defect in organization of the court may not be made in trial court.**

A motion in arrest of judgment on the ground that the court was without jurisdiction for defect in its organization for that due advertisement of the special term at which defendant was tried upon appeal from a recorder's court, was not had as required by N. C. Code, 1452, cannot be made in the trial court because such motion assumes that the court is validly created, nor can the question be presented by appeal from the trial court's denial of the motion, the defect complained of going to the organization of the court and not to the capacity of the jury, and the provisions of the statute being directory and not mandatory.

**3. Constitutional Law § 26—Indictment in Superior Court is not necessary upon appeal from conviction in recorder's court.**

The necessity of an indictment, N. C. Constitution, Art. I, sec. 12, does not apply to "petty misdemeanors," Art. I, sec. 13, and all crimes below the degree of felonies are "petty misdemeanors" within the meaning of the exception provided in the Constitution, C. S., 1541 (3), and upon appeal from a conviction in a recorder's court upon a warrant fully charging the offense, an indictment in the Superior Court is not necessary, the jurisdiction of the Superior Court being derivative.

**4. Courts § 4—Proper authorities should make due advertisement of special term of court in compliance with N. C. Code, 1452.**

It is required by N. C. Code, 1452, that a special term of court, duly called, shall be advertised in some newspaper published in the county, and news items regarding the court are not sufficient to comply with the terms of the statute, but the provision for advertisement is for the benefit of the public and not the jurors, and failure of due advertisement does not affect the jury, but goes only to the organization of the court and is merely an irregularity, the provision of the statute in regard to advertisement being directory and not mandatory.

APPEAL by defendant from *Williams, J.*, and a jury, at Special January Term, 1937, of PITT. No error.

The following warrant, duly sworn to, was issued by the recorder's court of Pitt County: "That at and in said county, on or about the

11th day of June, 1936, Clifton Boykin did unlawfully and willfully operate a motor vehicle on the public highway of this State in a careless and reckless manner against the form of the statute in such case made and provided, and contrary to the law and against the peace and dignity of the State."

On the trial in the recorder's court the defendant was found guilty and judgment pronounced. The defendant appealed to the Superior Court. The defendant again pleaded not guilty and was tried before a jury. The jury returned a verdict of guilty. Defendant made a motion for a new trial on newly discovered evidence and filed affidavits in support of same. The court denied the motion.

In the record is the following: "Thereupon, defendant moved for a new trial and for arrest of judgment as a matter of law, for that this special term of court was not authorized or created as provided by statute, and is without jurisdiction to function, and therefore all of its acts are void, for that the requisites of the statute with respect to special terms have not been complied with in that the provisions of C. S., 1452, have not been complied with, for that this term of court was not advertised at the courthouse door and one public place in each township in Pitt County, or, in lieu thereof, in any newspaper published in Pitt County once a week for two weeks; and requested the court to find the facts with respect to the advertisement for said court; and thereupon the court found the facts as follows:

"1. That the board of county commissioners of the county of Pitt, State of North Carolina, at its regular session duly called and held on 5 November, 1936, duly adopted and passed a resolution requesting the Governor to call a special term of Superior Court for Pitt County, North Carolina, for the trial of criminal cases, beginning Monday, 25 January, 1937, as it appears from the resolution offered in evidence and from the minutes of said board.

"2. That his Excellency, Honorable J. C. B. Ehringhaus, Governor of North Carolina, duly called and issued a commission for said court, as appears from the letter and commission to the undersigned judge holding the same, bearing date of 10 November, 1936, which is recorded in the minutes of the proceedings of this court.

"3. That at the meeting of the board of county commissioners held on 5 November, 1936, said board ordered that a jury be drawn for said special term of court for the trial of criminal cases, and thereafter, at the regular meeting of said board, duly organized and held on 7 December, 1936, the jury was duly drawn and summoned and appeared for service at said special term on Monday, 25 January, 1937.

"4. That a reference to the *Daily Reflector* shows that it contained in its news items, said *Reflector* being a newspaper published and having

general circulation throughout Pitt County, North Carolina, under date of 5 and 11 January, 1937, reference to the term of court beginning 25 January, 1937; likewise, in its editions of 15 and 18 January, and that in the issue appearing under date of 15 January, a calendar of the cases set for trial at said term was published; that, subsequently, the same notice appeared in the *Daily News Letter,* said reference being news items.

"5. That the county attorney, clerk of the Superior Court, and clerk of the board of county commissioners of Pitt County did not publish any special notice of the convening of said special term of court in any newspaper published in the county for two weeks, nor at the courthouse door and one other public place in each township in the county, and knew of no such notice having been published; that in the issue of 11 November, 1936, of the *Daily Reflector,* a newspaper hereinbefore referred to, appears a notice of a special term for the trial of criminal cases, beginning 25 January, as a news item.

"6. That said court was convened and organized on Monday, 25 January, for the transaction of business, and on Monday, 25 January, this case was duly reached in regular order and called for trial; counsel for defendant pleaded not guilty; a jury was duly sworn and impaneled, evidence heard, and a verdict duly returned finding the defendant guilty, as appears in the record; that thereupon motion for judgment upon the verdict was continued to be heard at the convenience of the court later in the term and came on for hearing Saturday at noon, whereupon the above motions were made.

"The court being of the opinion that the records show that the term was duly called and held, as provided by the statute, sections 1450-52-56, regulating the holding of a special term of court, and that the provisions as set out in section 1452 are not mandatory, and that the failure to make such advertisement as set out in Finding No. 5 above does not invalidate the authority of the court, and it is considered, ordered, and adjudged that said motions be denied and dismissed."

To the refusal and denial of said motion in arrest of judgment for the causes assigned, the defendant in apt time excepted and assigned error. The court pronounced judgment on the verdict: "That defendant be confined in the common jail of Pitt County for ninety days and assigned to work the public roads under the supervision of the State Highway and Public Works Commission, and that he pay a fine of two hundred and fifty dollars. And further ordered that defendant's license to operate a motor car be revoked for one year, to run from the trial had in the county court."

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

The evidence on the part of the State, in part: H. E. Smith testified as follows: "I am a patrolman. I saw the defendant on 11 June, 1936, on the date of that warrant, out here in front of the college. I had just started out on the Washington highway, and at that time they were working on the streets and right along there there was a one-way drive. I saw this car cut through there in a careless manner. He overtook two cars and went right on through, and there were several men working there on the side of the street and the street was blocked. I turned around to overtake him and he cut across to Fourth from Fifth and I pulled up by him at Flannigan's corner. I pulled up beside him and asked him for his operator's license and warned him about his driving. At that moment I saw sacks spread over something. He threw his car in second gear and I followed him and motioned him to pull over, but he went down through several red lights across Evans Street on out to Fourth, and cut back to the highway. I was following him. At the end of Fourth Street—they had just finished paving that street—and I could smell whiskey. I chased him to the Pinetops crossroads and there he hit a dirt road. I called Wilson and told him it was a dark Oldsmobile, one man driving. I came back to Greenville. I later swore out a warrant and went over to identify him, and I saw Robert Boykin. The second time I went I saw another Boykin. A *capias* was sent over there and he came over here to the patrol office and I told him what he was wanted for. I identified the man. The defendant is the man. As to his speed, witness replied, 'He left me and I was making between 80 and 85 miles an hour, he outran me.' That was on Fourth Street; his speed was in excess of 30 miles an hour, I would say between 50 and 55 miles an hour. I drove up by him at Cotanch and Fourth streets in Greenville. I had an opportunity to observe him. I don't remember whether I asked anything or not before he drove off. But after he stepped on the gas I pulled up beside him. He looked me in the face and seemed not to understand me. I could not say how fast he came over to the road under construction. That is what attracted my attention to him. I reported to the officers that he was driving an Oldsmobile—the same class as an Oldsmobile. Those cars—a new Buick and new Oldsmobile—are very similar."

There was evidence corroborating the above witness. The defendant denied his guilt and set up an alibi.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*A. O. Dickens and Albion Dunn for defendant.*

CLARKSON, J. H. B. Smith, on cross-examination by defendant, was asked: "Why did you not swear out that warrant until the 23d, if it

happened on the 11th?" He replied: "I did not know the man's name. I did not know he lived in Wilson until I went to Wilson." Question: "Who suggested Clifton Boykin was the man?" Answer: "One of his confederates." Question: "What was his name? Where did the man live that told you that?"

To the above questions the State objected. The objection was sustained and defendant excepted and assigned error. The exception and assignment of error cannot be sustained. The witness had theretofore testified: "I identified the man. The defendant is the man." The witness did not know his name, one of defendant's confederates told him. This the defendant elicited on cross-examination. The evidence was irrelevant and its exclusion not prejudicial.

The next question set forth by defendant: "Did the court commit error in refusing to set aside the verdict and to arrest judgment as a matter of law for defects appearing in the record?" We think not. It nowhere appears in the record that the defendant raised any objection to the organization of the court until judgment had been rendered. It has long been held in this State that the organization of the court may not be attacked by a plea to the jurisdiction of the court for the reason that such a plea assumes that the court is validly created. *Beard v. Cameron,* 7 N. C., 181; *S. v. Hall,* 142 N. C., 710; *S. v. Wood,* 175 N. C., 809; *S. v. Montague,* 190 N. C., 841; *S. v. Lea,* 203 N. C., 13 (26).

*S. v. Baxter,* 208 N. C., 90, is not applicable to the facts in this case. In that case it was held, at p. 94: "We must hold that in the absence of any order of the Governor that a grand jury be drawn at said term, the indictment returned at said time is void, and for that reason the motion of the defendant, first made in this Court, that the judgment in this action be arrested, must be allowed. If we should hold otherwise, the defendant would be deprived of a right guaranteed by the Constitution of this State. Const. of N. C., Art. I, sec. 12."

In the present cause the facts are different from the *Baxter case, supra.* The defendant was tried on appeal from the recorder's court on a warrant. There was no objection by defendant to this procedure. The warrant set forth the charge in clear language.

Article I, sec. 12, of the Constitution provides: "No person shall be put to answer any criminal charge *except as hereinafter allowed* but by indictment, presentment, or impeachment."

It has been held in *S. v. Crook,* 91 N. C., 536 (540), that the words "except as hereinafter allowed" have reference to the succeeding section 13 of the Constitution, and particularly the last sentence therein: "The Legislature may, however, provide other means of trial for *petty misdemeanors* with the right of appeal."

In *S. v. Lytle,* 138 N. C., 738, it is said that under this section indictment by grand jury is dispensed with. In the trial of petty misdemeanors, a large class of inferior courts known commonly as "recorder's courts" has been established between the court of the justice of the peace and the Superior Court. The general laws for the establishment of such courts may be found in Consolidated Statutes, sections 1536-1608.

In order that these courts might be permitted to take cognizance of crime and try criminals without indictment, all crimes below the degree of felony have been declared to be "petty misdemeanors." C. S., 1541, subsection 3.

Under the proceedings established in such courts, the complaint and warrant—which, if necessary, must be construed together (*S. v. Gupton,* 166 N. C., 257)—have been established as the proper proceeding, just as has come down to us from the common law as to crimes the punishment of which is within the jurisdiction of a justice of the peace. C. S., 1549, 1575, 4647, 4648.

Under C. S., 1574, appeals are made from the recorder's court to the Superior Court in the same manner as always made from the court of a justice of the peace to the Superior Court. *McNeeley v. Anderson,* 206 N. C., 481. When the Superior Court sits upon an appeal from a judgment of a justice of the peace in a criminal action, or a judgment of a recorder's court, it is sometimes said to be acting under the derivative jurisdiction of the court from which appeal is taken; the trial is had upon the warrant issued by the court which had jurisdiction and which is required to be transmitted to the court with the return to the appeal. Upon such an appeal from an inferior court for a conviction of a petty misdemeanor—and, as will be seen under the section above referred to, all offenses below felonies are petty misdemeanors—the necessity of a bill of indictment in the latter court, that is, the Superior Court, is dispensed with. *S. v. Jones,* 181 N. C., 543; *S. v. Quick,* 72 N. C., 241 (242). Of course, where the case is beyond the jurisdiction of the inferior court, it does not reach the Superior Court by appeal, but only by the process of "binding over," and in such case only is an indictment necessary. *S. v. McAden,* 162 N. C., 575.

In cases determinable before a justice of the peace, and so by reference in a recorder's court, the action is tried on the warrant and must set out sufficiently the offense charged. *S. v. Jones,* 88 N. C., 671. It may be amended in Superior Court. *S. v. Cauble,* 70 N. C., 62; *S. v. Koonce,* 108 N. C., 752; *S. v. Norman,* 110 N. C., 484.

N. C. Code, 1935 (Michie), sec. 1452, is as follows: "Whenever the Governor shall call a special term of the Superior Court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause com-

petent persons to be drawn and summoned as jurors for said term; and also to advertise the term at the courthouse and at one public place in every township of his county, or by publication of at least two weeks in some newspaper published in his county in lieu of such township advertisement."

The notice which is required to be published is designed not for the purpose of warning the jury of the coming term. These persons receive separate notices or summons. Rather, it serves the purpose of notifying the public. Since the origin of our court system, it has been the uniform custom to publish our court proceedings. Except in special instances, the doors are always open for public hearings. C. S., 1452, requiring that notice be given, is designed for the purpose of insuring the continuance of this long established policy. It follows, then, that the failure to comply with the statute goes to the set-up or organization of the court itself rather than of the jury. Under the doctrine of the *Hall case, supra,* an objection to the organization of the court may not be raised by appeal. We think the notice is directory and not mandatory.

The point in question seems not to have been specifically ruled upon by our Court; however, it has been the subject of consideration elsewhere. While there is some conflict in the decisions, we think the better rule is that statutes requiring notice of special terms are merely directory. *S. v. Shanley,* 38 W. Va., 516; *Northwestern Fuel Co. v. Kofod,* 74 Minn., 448; *S. v. Claude,* 35 La. Ann., 71; *Blimm v. Com.,* 7 Bush (Ky.), 320.

We do not think that defendant was prejudiced by the irregularity. We think, although no notice was given in accordance with the statute, that these directory matters ordinarily should be complied with by the proper authorities.

For the reasons given, we find

No error.

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STATE v. BRANTLEY THORNTON.

(Filed 7 April, 1937.)

**Homicide §§ 11, 27f—Person upon whom unprovoked murderous assault is made may stand ground and kill adversary if necessary in self-defense.**

The evidence tended to show that defendant, an employee of a filling station, was engaged in his duties at the station at the time of the killing, that after some argument with deceased, who came to the filling station in a drunken condition, and wanted defendant to go with him some distance to start his car, he told deceased, who had been using loud and

profane language, to go home in accordance with previous requests of the owner of the station, that deceased thereupon got up and advanced toward defendant in a threatening manner, and that defendant struck him with a lightwood knot, that deceased went off, but started back, that defendant then went into the store of the station and got his gun, came outside and started to sit down when deceased rose from the bench upon which he was sitting and started toward defendant with an open knife, that defendant ran around the corner but was blocked by a standing car, and that he then turned and warned deceased not to approach further, and shot and killed deceased as he continued to advance. *Held:* An instruction upon the law applicable when defendant provokes the fight in which he kills his adversary, though correct on this aspect, is erroneous as failing to instruct the jury as to the law applicable to the facts shown by the evidence, C. S., 564, but the court should have instructed the jury that where a person, without fault, is made the subject of a murderous assault, he need not retreat, but may stand his ground and kill his adversary if necessary to save his life or protect himself from great bodily harm, the necessity to be determined by the jury on the facts as they appeared to defendant.

APPEAL by defendant from *Cranmer, J.*, at December Term, 1936, of JOHNSTON. New trial.

The defendant was tried on an indictment in which he was charged with the murder of John Brascus Webb. C. S., 4614, and C. S., 4642.

When the action was called for trial, the solicitor for the State announced to the court that he would not contend that on the evidence which he would offer for the State the defendant is guilty of murder in the first degree, but would contend that the defendant is guilty of murder in the second degree or of manslaughter, as the jury should find the facts to be from all the evidence. The defendant entered a plea of not guilty; he relied upon his plea of self-defense.

The evidence at the trial tended to show that about 10 o'clock on a Saturday night in August, 1936, at a filling station in Johnston County, which was owned and operated by Willie Parker, the defendant Brantley Thornton shot and killed the deceased, John Brascus Webb; that at the time he shot and killed the deceased the defendant was at the filling station, engaged in the performance of his duties as an employee of the owner and proprietor, Willie Parker; and that the deceased, after he had been repeatedly requested by both Willie Parker and the defendant to leave the filling station, because of his intoxicated condition, did so, but within a short time returned to the filling station, and remained there until he was shot and killed by the defendant.

The defendant Brantley Thornton, as a witness in his own behalf, testified as follow:

"I knew John Brascus Webb. I knew his reputation as a dangerous and violent man. It was bad.

"I am 24 years of age, and am a married man. I have a wife and two children. During the year 1936 I was employed by Willie Parker

to work at his filling station in Johnston County. I was at work at the filling station on the Saturday night in August, 1936, when John Brascus Webb was shot and killed. I had been to Benson. I got back to the filling station about 9 o'clock that night. As I drove up, I saw John Brascus Webb leaving in his automobile. I did not speak to him, nor did he speak to me. We had had no trouble that night, or at any previous time. After he had driven away from the filling station, in a short time he came back and said that his automobile had 'knocked off' on him. He wanted someone at the filling station to go with him to his automobile and help him crank it. There were eight or ten men standing about the filling station. Some of them went with him to his automobile and tried to start it. After they had been gone about ten or fifteen minutes, John Brascus Webb came back to the filling station and asked me to go with him to his automobile. He had been drinking, was intoxicated, and was staggering around. I told him that I could not leave the filling station. He said: 'God damn you, you don't want to go.' He turned from me and called Willie Parker. Willie Parker told him that he could not help him with his automobile—that he did not have a bumper. He said to Willie Parker: 'You do not want to help me.' Willie then told him to go home—that he was in no condition to drive his automobile, if he could get it started. He kept hanging around, cursing and worrying everybody at the filling station. Willie Parker left the filling station, and went home. After Willie Parker left, Webb also left. He went toward his automobile, which was a short distance from the filling station, on the highway. After he had been gone about ten minutes, he came back to the filling station and asked me where Willie Parker was. I told him that Willie Parker had gone home. He then went off towards Willie Parker's home. He soon came back to the filling station. There was no one with me then except John Blackman, who had come to the filling station after Willie Parker left. He and I were standing under the shed, talking, when Webb came back from Willie Parker's home. He again asked me to go with him to his automobile and help him start it. I told him that I had nothing to pull the automobile with, and that I could not leave the filling station. While Webb and I were talking, Willie Parker came back to the filling station. Webb asked Parker again to help him with his automobile. Willie Parker told him that he was fixing to leave the filling station, and could not help him with his automobile. We had closed the store at the filling station for the night but had not locked the front door. Willie Parker soon left the filling station, and Webb again went to his automobile. At this time Luther Lee drove up in his automobile. Willie Parker got into Lee's automobile and called me. I went to Lee's automobile and stood there for a few moments talking with Parker and Lee. John

Brascus Webb came back from his automobile while we were talking. He was then cursing everybody and everything in sight. He was drunk.

"When I left Luther Lee's automobile, I went toward the store. I squatted down on the cement near the oil drum. Webb came up and sat down between John Blackman and Melvin Hudson, who were sitting on a bench at the filling station. He continued to curse. I said to him: 'You had better leave here and go where your automobile is. Willie Parker has told you to leave three times. I want you to leave and stay away from here. We don't want you here. Leave and stay away.' As I said this to him, he reached his hand into his hip pocket, and started toward me. I stepped back, reached down and picked up from the ground a lightwood knot, which we used about the filling station. When I rose up, Webb came toward me again. I struck him on the left shoulder with the lightwood knot. He then turned and went off across the road from the filling station. Melvin Hudson got up from the bench on which he had been sitting and started after Webb. I called to him: 'Come back here. We are not going to have any trouble here tonight.' He came back and I went toward the store. When I got to the store, John Brascus Webb was coming back to the filling station. He was cursing and saying: 'Somebody is going to meet his doom tonight.' I went into the store and got a gun, which I put in my pocket. I did this for my protection. I knew John Brascus Webb's reputation. I was afraid of him when he was drinking.

"When I came out of the store I went to my right and started to sit down. When I got half-way down, Webb got off the bench on which he was sitting, and struck at me with a knife. Laster Smith was sitting on the bench. When Webb brushed by him, he got up and ran to his left. I turned to my right and Webb was right after me. I ran around the corner into a jam made by an automobile which was standing there. I turned to Webb and said: 'Don't come any closer to me; if you do, I will shoot you.' He made another step and I shot. At that time he had his arm up and was coming toward me. The first bullet hit him in his left side, but did not stop him. He kept coming toward me. He threw up his left arm and I shot him a second time. He was then about three feet from me.

"When I ran around the corner, I did not know I was going to get into a jam. I went around there to get out of Webb's reach. John Blackman made a lunge at Webb as he was going around the corner after me. When I shot the second time, Blackman said: 'Brantley, you have done enough.' Webb had his knife in his right hand when I shot the second time. After I shot, he shut his knife, and walked back, saying: 'I'll see you in the morning.' He walked around a post, began to stagger, and soon fell on his face. After Webb died, I told Willie Parker to go

after the sheriff. I remained at the filling station until the sheriff came and took me into custody."

Evidence offered by the defendant tended to show that the defendant is a man of good character, and that the reputation of the deceased, as a dangerous and violent man when he was intoxicated, was bad.

The testimony of the defendant as a witness in his own behalf was corroborated by witnesses for both the State and the defendant.

In its charge the court instructed the jury as follows:

"A man is permitted to kill in self-defense. He may do so whenever it is necessary for him to do so in order to prevent his own death or his great bodily harm. He may do so when it is not actually necessary if he believes it to be necessary, and he has reasonable grounds for that belief, but the jury and not the defendant are the judges of whether or not his grounds are reasonable.

"I further instruct you, gentlemen of the jury, that a man cannot invoke the right of self-defense if there be reasonable opportunity to retreat and avoid the difficulty.

"The State contends in this case that the defendant had all the county to retreat in; that he could have gone into the store; that instead of getting the pistol and arming himself, and coming out to meet this drunken man he could have locked the front door from the inside, gone out the back way, and thus avoided the shooting of the deceased.

"The State contends that the deceased was drunk, that his reason was dethroned by the use of alcohol, and that when the defendant struck him with the lightwood knot, he immediately went off, did not resist the defendant, or offer to fight him. The State contends that the defendant started the fight, and that you ought to so find.

"This is the law, gentlemen of the jury, and I instruct you that when a man provokes a fight by unlawfully striking another and in the progress of the fight kills his adversary, he will be guilty of manslaughter, at least, though he thought at the precise time of the killing that it was necessary for him to kill in order to save his own life. In other words, if a man starts a fight, and then afterwards it is necessary to kill in order to save his own life, he would be guilty of manslaughter, at least, because he started the fight.

"I instruct you, gentlemen of the jury, that the following is the law: When a man enters a fight willingly, that is to say, voluntarily, aggressively, without legal excuse, he cannot invoke the doctrine of self-defense until he has quit the fight and given his adversary notice that he has quit."

The defendant in apt time excepted to these instructions.

There was a verdict that defendant is guilty of manslaughter. The jury recommended the defendant to the mercy of the court.

It was ordered and adjudged by the court that the defendant be confined in the State's Prison for a term of not less than ten or more than twelve years.

The defendant appealed to the Supreme Court, assigning numerous errors in the trial.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*L. L. Levinson, P. G. Lee, and Larry F. Wood for the defendant.*

CONNOR, J. The evidence for the defendant at the trial of this action, if believed by the jury, showed that the defendant did not enter into a fight with the deceased willingly and unlawfully, either at the time the defendant struck the deceased with the lightwood knot which he had picked up from the ground as the deceased was advancing upon him, in a threatening attitude, or, subsequently, when the defendant shot and killed the deceased, who was again advancing upon the defendant, with an open knife in his right hand. On each occasion the deceased, and not the defendant, was the aggressor. The defendant had not provoked the assault upon him by the deceased, and was free from fault. All the evidence showed that at the time of the homicide the defendant was at a place where he had a right and where it was his duty as an employee to be. The deceased, after he had left the filling station, in compliance with the repeated requests of the owner and of the defendant, returned and, as the defendant was about to sit down on a bench at the filling station, assaulted him, with a knife. The defendant did not shoot the deceased until he had warned him that he would do so if he continued to advance upon him with the knife in his hand.

An examination of the charge of the court to the jury fails to disclose any instruction as to the law applicable to the facts as shown by the evidence for the defendant. The instructions as to the law of self-defense, while correct as general propositions, were not in compliance with the mandatory provisions of the statute. C. S., 564.

In *S. v. Blevins,* 138 N. C., 668, 50 S. E., 763, it is said: "It has been established in this State by several well considered decisions that where a man is without fault, and a murderous assault is made upon him—an assault with intent to kill—he is not required to retreat, but may stand his ground, and if he kill his assailant and it is necessary to do so in order to save his own life or protect his person from great bodily harm, it is excusable homicide, and will be so held (*S. v. Harris,* 46 N. C., 190; *S. v. Dixon,* 75 N. C., 275; *S. v. Hough,* 138 N. C., 663); this necessity, real or apparent, to be determined by the jury on the facts as they reasonably appeared to him."

The failure of the court to instruct the jury in accordance with this well settled principle (*S. v. Bost,* 192 N. C., 1, 133 S. E., 176) was error, for which the defendant is entitled to a new trial. It is so ordered.

New trial.

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STATE v. SINA POPE GODWIN.

(Filed 7 April, 1937.)

**Homicide §§ 11, 27f—Person upon whom unprovoked murderous assault is made may stand ground and kill adversary if necessary in self-defense.**

Defendant, on trial for homicide, introduced evidence that she was on the screened porch of her home when deceased, her husband, came to her home, that as he opened the screen door of the porch he got a pistol from his pocket and started shooting, that defendant then got a pistol and returned his fire, and that both of them were wounded in the fight, and that deceased died as the result of his wounds in a few minutes thereafter. *Held:* It was error for the court to fail to charge the law upon the facts as shown by defendant's evidence, that a person upon whom a murderous assault is made and who is without fault, is not required to retreat, but may stand his ground and kill his adversary if it appears to him to be necessary to save his own life or protect himself from great bodily harm, the necessity to be determined by the jury on the facts as they appeared to defendant. C. S., 564.

APPEAL by defendant from *Cranmer, J.,* at November Term, 1936, of HARNETT. New trial.

The defendant was tried on an indictment in which she was charged with the murder of Furman E. Godwin. C. S., 4614, and C. S., 4642.

When the action was called for trial, the solicitor for the State announced to the court that he would not contend that on the evidence which he would offer for the State the defendant is guilty of murder in the first degree, but would contend that she is guilty of murder in the second degree or of manslaughter, as the jury should find the facts to be from all the evidence. The defendant entered a plea of not guilty; she relied on her plea of self-defense.

The evidence for the State tended to show that between 4 and 5 o'clock p.m., on 7 July, 1936, at her home in or near the town of Dunn in Harnett County, North Carolina, the defendant shot and killed the deceased, Furman E. Godwin; that the deceased was the husband of the defendant, and that she shot him with a pistol, when he came on the back porch of her home, within ten or fifteen minutes after she had returned to her home from a visit to the home of her parents; that on

several occasions shortly prior to the homicide the defendant had threatened to kill the deceased; and that the defendant as she was returning to her home on the day of the homicide had a pistol in her possession, which she exhibited to several persons, saying that she had the pistol for her protection.

After he was shot, the deceased went out of the porch into the yard of defendant's home, where he soon died of his wounds. There were at least three wounds on the body of the deceased, each caused by a pistol shot. The chief of police of the town of Dunn testified that when he went to the home of the defendant, immediately after the homicide, he found the body of the deceased lying on the ground in the back yard, with a pistol beside him, between his thumb and his elbow. The defendant was then in the house, lying on her bed. There were wounds on her body caused by pistol shots. She was under the care of a physician and on his advice was taken immediately to a hospital, where she remained for several weeks. An examination at the hospital disclosed that her wounds were superficial.

Mrs. J. C. Pope, a witness for the defendant, testified as follows: "I am the mother of Sina Pope Godwin. She came to my home the night before the homicide, and spent the night there. She frequently spent the night at my home. She left my home the next morning between 9 and 10 o'clock, and went to her home; she returned to my home, bringing with her a small suitcase, and some of her clothes. She remained at my home until after dinner. She and I left my home in her automobile about 3 o'clock p.m. We first drove to a filling station, where we got some gas. We then drove to the home of my son, Albert Pope. When we got there, his wife said to me that she was just fixing to go to my home. We told her that we would take her and her baby there in defendant's automobile. She got into the automobile with her baby, and we drove to the home of the defendant. When we drove into the yard there, the defendant got out of the automobile, saying: 'I believe I will feed my biddies.' She went to the barn, and got a bucket of chicken feed; she fed her chickens; she caught a chicken and gave it to me; she then spoke to some boys who were plowing near her house; she did not have a pistol in her hand at this time; she did not have a pistol while we were together in the automobile.

"After she spoke to the boys, she went into the house. I could see her on the screened porch from the automobile in which I was sitting. She first went to the refrigerator on the porch and took the pan which was under the refrigerator to the sink and emptied it. While doing this, she spilled water from the pan on the floor of the porch. She got a broom and was sweeping up the water. While she was doing this, Furman Godwin drove up into the yard in his automobile. He got out

of the automobile and passed us as he went toward the house. He said to us, 'Howdy.' We replied, 'Howdy.' He looked like he was mad as fire. He went toward the steps leading to the back porch. When he was on the second step, he opened the screen door with his left hand, and put his right hand into his hip pocket. I cried out: 'God save my child.' As soon as he got his pistol from his hind pocket, he began to fire at the defendant, who was then on the porch, which was enclosed by a screen. When he had fired at her two or three times, the defendant said: 'Oh, Furman, please don't kill me.' They then ran together on the porch. He knocked her back against the pump. She reached over and got a pistol which was lying on the pump shelf. After that, they were both shooting. She ran out of the porch and as she came down the steps she dropped her pistol and cried out to me, 'Oh, Ma, I'm killed; I'm killed.' The blood was flying from her hand. Furman then came out of the porch with a pistol in his hand. He went around the corner of the house, staggered, and fell to the ground—dead."

There was other evidence on behalf of the defendant tending to support her contention that she shot and killed the deceased in defense of her own life. This evidence was contradicted by evidence for the State, which tended to support the contention of the State that defendant is guilty of murder in the second degree, or, at least, of manslaughter.

In its charge, the court instructed the jury as follows:

"The law of North Carolina is that a person has a right to kill in self-defense. He may do so whenever it is necessary for him to do so to defend his own life or to protect himself from great bodily harm. He may do so when it is not actually necessary, if he believes it to be necessary and has a good ground for his belief. But the jury and not the defendant are the judges of whether the ground is reasonable.

"I further instruct you, gentlemen of the jury, that a prisoner cannot invoke the right of self-defense if there be opportunity to retreat and avoid the difficulty.

"Furthermore, a person claiming the right of self-defense, and exercising it, must do so in good faith and with reasonable firmness, and if more force is used than is necessary in the circumstances, the defendant would be guilty, at least, of manslaughter.

"I instruct you in this case, that if you find that the defendant was acting in self-defense, she must have done so in good faith and with reasonable firmness. If she used more force than was necessary under the circumstances, you, the jury, and not the defendant, being the judges of whether or not she used more force than was necessary, she would be guilty, at least, of manslaughter.

"There is another phase of this case to which I invite your attention. The defendant contends that they were fighting, and that she was

fighting to save herself; that her husband began the assault on her and that she replied. I further instruct you, gentlemen of the jury, that a person cannot invoke the claim or right of self-defense if he enters the fight willingly. That means voluntarily, aggressively, and without legal excuse, unless and until he abandons the combat and his adversary has notice that he has abandoned the conflict; and hence, in this case, if you find from the evidence that the prisoner, Sina Pope Godwin, entered the fight with her husband willingly, that is to say, aggressively and without legal excuse, she cannot claim or make the right of self-defense, or invoke the right of self-defense unless and until she abandoned the fight or combat, and that her husband, Furman Godwin, had notice that she had abandoned the fight or combat."

The defendant in apt time excepted to these instructions, and to the failure of the court to instruct the jury as required by C. S., 564. There was a verdict that defendant is guilty of murder in the second degree. The jury recommended the defendant to the mercy of the court.

It was ordered and adjudged by the court that the defendant be confined in the State's Prison for a term of not more than fifteen or less than ten years. The defendant appealed to the Supreme Court, assigning numerous errors in the trial.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Ross & Ross, J. R. Young, and J. A. Jones for defendant.*

CONNOR, J. Conceding without deciding that the instructions of the court to the jury at the trial of this action, which the defendant assigns as error on her appeal to this Court, are correct as general propositions of law, and are applicable to the facts as shown by the evidence for the State, we must hold that there was error in the failure of the court to instruct the jury as to the law applicable to the facts as shown by the evidence for the defendant. C. S., 564. If the facts with respect to the homicide are as shown by the evidence for the defendant, and the jury shall so find, the defendant was not required to retreat before she could invoke her right to kill her assailant in defense of her own life, or in protection of her own body from great harm. See *S. v. Thornton, ante,* 413. When an attack is made with a murderous intent, the person attacked is under no obligation to fly, but may stand his ground and kill his adversary, if need be. *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663. This principle is so well settled in the law of homicide in this State that no citation of authority in its support is necessary. See *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Dills,* 196 N. C., 457, 146 S. E., 1; *S. v. Gaddy,* 166 N. C., 341, 81 S. E., 608; *S. v. Blevins,* 138 N. C., 668, 50 S. E., 763.

As the defendant is entitled to a new trial for error in the failure of the court to instruct the jury as required by the statute (C. S., 564), we shall not discuss other assignments of error on this appeal. These assignments of error tend to sustain the contention of the defendant that her conviction of murder in the second degree in this action was the result of the failure of the court to give her the protection of well settled principles of law at her trial.

The defendant is entitled to a new trial. It is so ordered.

New trial.

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L. C. FERRELL AND WIFE, OPHELIA MAY FERRELL, AND R. J. DAWSON AND WIFE, KATIE IVEY DAWSON, v. METROPOLITAN LIFE INSURANCE COMPANY, AND J. GRANBERY TUCKER AND LEON S. BRASSFIELD, SUBSTITUTED TRUSTEES.

(Filed 7 April, 1937.)

**Trusts § 8b: Wills § 33f—Devise for benefit of devisees with full power of disposition held to empower devisees to mortgage the land.**

Testator devised the lands in question to certain of his children with limitation over to certain other children if devisees died without surviving children, and by codicil provided that devisees should have the right to dispose of their respective shares by deed or will in fee, with limitation over in the event they should die without surviving children and without having disposed of the property. *Held:* The devise was for the benefit of the devisees, and the unrestricted power of disposition included the power to mortgage, and a deed of trust executed by one of the devisees is a valid encumbrance on his allotted share of the land.

APPEAL by plaintiffs from *Spears, J.*, at November Term, 1936, of LENOIR. Affirmed.

This is an action brought by plaintiffs against defendants to cancel a certain note, secured by deed of trust, which had been duly recorded, held by defendants as a cloud upon the title of plaintiffs to the certain land in controversy. The property was advertised and plaintiffs applied for and were granted a restraining order.

Jerry Sutton made and executed a certain will and codicil to same, which was duly witnessed and probated in the record of wills in Lenoir County, N. C. The material part of the will to be considered is as follows:

"Item 7. I give and devise to my sons, Charles Sutton, John I. Sutton, and Clarence Sutton, all my lands wherever situated of which I may die seized and not otherwise herein devised. To have and to hold to them and their heirs, but if either of my said sons shall die without

lawful children, then I devise the interest of such son or sons so dying to my surviving children born of my second wife, whose maiden name was Sallie Ivey. And in that event, the word children shall be construed to mean that they shall take *per stirpes* and not *per capita.* The lands devised to my said three sons in this item is given and devised to them upon this express condition: That my said three sons, Charles, John I., and Clarence, and each of them, shall, within a reasonable time, pay over and deliver to my daughters, Octavia B. Herring, Ella Moore, Hepsy Sutton, and Sarah Sutton, and Ava Sutton, such sums of me (money) as they, my said sons, shall be entitled to and receive from the Mutual Benefit Life Insurance Company, the same being Policy No. 188894, now in force on my life and dated February 24, 1893. Such amounts shall be held by my said daughters as their property when so paid over. And if either or any of my said sons shall be a minor or minors at the time of my death, it shall be the duty of their guardian to pay the said insurance money to my said daughters within a reasonable time. And if my said sons shall fail and decline to pay over their interest in said insurance money, or if their guardian shall fail to pay the same, or if for any cause the said policy of insurance shall not be paid to the beneficiary named in the policy, then, in either event, I devise the said lands to all of my children born of my said second wife, except my son Jeremiah Sutton, who has already been provided for. To have and to hold the same to them and their heirs."

The material part of the codicil to be considered is as follows: "Item 4th: At the end of Item 7 of my said will, add the following: It is my will that my said sons, having paid over the insurance money as directed in this item, shall have the right to dispose of their respective shares by deed or will in fee, but if either or all of them shall die without issue seized and possessed of their share, then I devise the shares of such as shall die without issue and without having disposed of the same to my other children born to me by my said Ivey wife, except my son, Jerry Sutton, who has already had his share of my estate. It is further my desire in the division of my said lands mentioned in this item among my said three sons, that the residue and premises surrounding same now occupied by me shall be on the share allotted in the said division to my son, Clarence Sutton, all my said three sons to have an equal share in value of said lands. In testimony whereof, I, the said Jeremiah Sutton, in all things and respects ratifying and confirmin my said will, except as modified in this codicil, have hereunto set my hand and seal, this 9th day of March, 1898. Jerry Sutton (Seal)." The codicil was duly witnessed.

On 30 August, 1926, A. Clarence Sutton made and executed a note for $3,500 to the Metropolitan Life Insurance Company, secured by deed

of trust on the land in controversy to the Raleigh Banking and Trust Company, trustee. J. Granbery Tucker and Leon S. Brassfield, defendants, were duly substituted as trustees. A. Clarence Sutton and wife, Mollie Bell Sutton, on 28 December, 1935, deeded the land in controversy in fee to plaintiffs in this action.

The parties waived a jury trial. The court below found certain facts and rendered judgment in favor of defendants: "The court considers, adjudges, and holds as a matter of law, that the said will and codicil of Jeremiah Sutton fully authorized A. Clarence Sutton to execute a valid and binding mortgage or deed of trust in fee simple on the lands devised to him by said will and codicil. Wherefore, the court is of the opinion and holds as a matter of law, that the power given A. Clarence Sutton by the codicil is a power given for the benefit of the *owner himself,* and should be more broadly construed than a mere power given to a donee having no estate or interest in the subject matter; and that a liberal and broad construction of the power necessarily leads to the conclusion that A. Clarence Sutton had the legal right to execute a valid and binding deed of trust on the land in question, and that the substituted trustees have the right to proceed to exercise the power of sale conferred by the terms of the deed of trust, and that their deed will convey to the purchaser a fee simple title to the land described in said deed of trust," etc.

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

*R. F. Hoke Pollock and John G. Dawson for plaintiffs.*
*Winston & Tucker for defendants.*

CLARKSON, J. The only question presented by this appeal: Did A. Clarence Sutton, under Item 7 of the will of his father, Jeremiah Sutton, and the codicil thereto, have the right to borrow from defendant Metropolitan Life Insurance Company the sum of $3,500, and secure same by deed of trust? We think so.

The authorities are not harmonious. The codicil, in part, is as follows: "It is my will that my said sons . . . shall have the right to dispose of their respective shares by deed or will in fee, but if either or all of them shall die without issue seized and possessed of their shares, then I devise the share of such as shall die without issue and without having disposed of the same to my other children," etc. The sons paid the insurance money as directed.

In *Shannonhouse v. Wolfe,* 191 N. C., 769 (774), is the following: "A clear expression of the proper construction of power to mortgage occurs in the case of *Hamilton v. Hamilton,* 149 Iowa, 329, and is as follows: 'Question is further raised whether, under the power given in

the will, the plaintiff may mortgage the property. That a mere naked power to sell given to an agent or attorney, or to the trustee of any ordinary trust, does not include the power to mortgage is well settled by the weight of authority. In such case the power is to be strictly construed, and will not be extended to cover an act not clearly within the terms of the instrument by which it was created; but a different rule has often been applied where a testamentary power has been given, not for the benefit or profit of the donor, but in the furtherance of some benefit which the donor confers upon the donee. The language creating such a power is to be liberally construed to promote the purpose or intent of its creation, and, if the power to sell is amplified by other words of broader or more general meaning, and the circumstances under which the gift is made be not such as to forbid that construction, the authority to mortgage for the purpose expressed in the writing may be inferred.'" See *Troy v. Troy,* 60 N. C., 624; *Hicks v. Ward,* 107 N. C., 392; *Parks v. Robinson,* 138 N. C., 269; *Mabry v. Brown,* 162 N. C., 217; *Roane v. Robinson,* 189 N. C., 628.

In 21 R. C. L., p. 780, is the following: "And it would seem to be unquestioned that the donee of a power of sale which is unlimited and is to be exercised for his own benefit may execute a mortgage under the power."

In 92 A. L. R., Anno., p. 882, under "Power of Sale as including power to mortgage," at p. 889, we find: "It has been held, or at least stated, in a few cases, that a power of sale in an instrument conferring such power, particularly where the power of sale is unrestricted by other language in the instrument, impliedly confers authority on the donee of the power to mortgage the property (citing numerous authorities). Some of the cases adhering to this rule have proceeded on the theory that a mortgage is a conditional sale," citing authorities. At p. 899: "Where an estate is devised to one for life with power to 'sell and convey the same by deed (part or all of it), the proceeds to be used for devisee's comfort and otherwise as he may think proper,' the power may be exercised by the execution of a mortgage. *Kent v. Morrison* (1891), 153 Mass., 137, 26 N. E., 427, 10 L. R. A., 756, 25 Am. St. Rep., 616. In other words, an absolute and unrestricted power to sell for the benefit and in the discretion of the devisee of the power includes a power to mortgage. *Ibid.*"

We have examined the case of *Head v. Temple,* 51 Tenn. Reports, 34, cited by plaintiffs. That case was construing a marriage settlement. The other cases cited we do not think necessary to distinguish, from the view we take of the language in the will in this case. The able brief of the plaintiffs is persuasive, but not controlling.

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

Affirmed.

SAMUEL B. WELLS v. JEFFERSON STANDARD LIFE INSURANCE COMPANY,

and

SAMUEL B. WELLS, ADMINISTRATOR OF THE ESTATE OF MARY NICHOLSON WELLS, DECEASED, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY,

and

MARTHA J. NICHOLSON v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 7 April, 1937.)

**1. Insurance § 13—**

Laws in force at the time of the issuance of a policy of insurance become a part of the contract, and stipulations in the policy contrary to statutory provisions are of no effect. C. S., 6287, 6288.

**2. Insurance § 31b—Material misrepresentation for which policy may be avoided is one which would influence insurer in making contract.**

It is provided by C. S., 6289, that misrepresentations in an application for insurance will not prevent recovery on the policy unless the misrepresentations are fraudulent or material, and under this section all representations which would naturally influence the judgment of insurer in making the contract are material, and it is not necessary that they be fraudulent in order to bar a recovery, but a stipulation in the policy that all representations in the application should be deemed material is contrary to the statutory provision, and is of no effect.

**3. Same—Whether misrepresentation was material, entitling insurer to avoid policy, held question for jury on evidence in this case.**

The evidence, considered in the light most favorable to plaintiff, tended to show that insured stated in her application for insurance that she had not consulted a doctor for any cause other than as disclosed in the application, while insured had consulted a physician who determined that she had a mild form of malaria causing one-half degree of fever, that at the time of signing the application insured had completely recovered and that the malaria was in no way a cause or contributing cause of her death. *Held:* Whether the misrepresentation in the policy was material is a question for the jury under the evidence in the beneficiary's action on the policy, and the granting of insurer's motion to nonsuit is error.

**4. Same—Evidence held insufficient to establish falsity of representation as a matter of law.**

The evidence disclosed that insured stated in her application that she was not pregnant and that her menstruation was regular and normal, and that she died in childbirth nineteen days less than nine months thereafter. It also appeared that insured was thirty-three years old and married, and paid an additional premium to insurer to cover the risk of childbirth, and that a physician whom insured consulted more than a month after signing the application was unable to determine at that time that she was pregnant. *Held:* The evidence does not affirmatively show that the childbirth

was not premature, and is insufficient to establish as a matter of law that insured's representations in regard thereto in her application were false, and the granting of insurer's motion to nonsuit in the beneficiary's action on the policy is error.

**5. Insurance § 37—Burden is on insurer to establish misrepresentations relied upon by it to avoid policy.**

Where plaintiff beneficiary offers the policy in evidence, and insurer admits its execution and delivery and the death of insured, plaintiff establishes a *prima facie* case, and the burden is on insurer to establish misrepresentations relied on by it to avoid the policy, and the burden of proof is not affected by anticipation of such defense and the offering of evidence upon the issue of misrepresentation by plaintiff, and in passing upon insurer's motion to nonsuit on the ground of such misrepresentations, all the evidence must be considered in the light most favorable to plaintiff.

APPEAL by plaintiffs from *Spears, J.*, at December Term, 1936, of DUPLIN. Reversed.

Three actions upon policies of insurance issued by defendant insurance company upon the life of Mary Nicholson Wells were resisted by the defendant upon the ground of falsity of material representations by the insured in the application for the insurance. The application was dated 28 June, 1935.

Plaintiffs offered, in addition to the defendant's admission of the issuance of the policy and of the death of insured, the testimony of three physicians as to the physical condition and health of insured.

At the close of plaintiffs' evidence motion for nonsuit was sustained, and from judgment dismissing the action, plaintiffs appealed.

*Oscar B. Turner and Norwood B. Boney for plaintiffs.*
*Smith, Wharton & Hudgins and Beasley & Stevens for defendant.*

DEVIN, J. The decision of this appeal turns upon the question whether the representations made by the insured in the application for the policies of insurance sued on were material.

The defense set up in the answer was that the replies to the following three questions in the application were false and material:

(1) Have you consulted a doctor for any cause not included in above answer? No.

(2) Is menstruation regular and normal? Yes.

(3) Are you pregnant? No.

I. Relating to the first of these questions, it was testified by the family physician that on 7 May, 1935, the insured came to him and he found she had one-half degree of fever due to malaria, that he saw her on 14 May and she was feeling better, that he saw her again on 20 May and she had no fever, that he saw her next 23 May and her condition

was good, that she came back 25 June and an examination showed no malaria. "I never heard of anybody dying from this type (of malaria)."

The examining physician, who wrote down the answers to the interrogatories on 28 June, 1935, testified: "I never made any special examination for malaria. I wasn't looking for malaria. . . . I wouldn't have asked her a specific question like that (whether she had had malaria), because it is not included as a specific question. I did not find any trace of malaria."

Another physician testified that malaria had nothing to do with her death.

It is provided by statute that all insurance contracts shall be deemed to have been made subject to the laws of the State. C. S., 6287, 6288. Among these laws is the following: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy." C. S., 6289. Construing these provisions, it is held by this Court "that every fact untruly asserted or wrongfully suppressed must be regarded as material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of premium." *Ins. Co. v. Box Co.*, 185 N. C., 543; *Bryant v. Ins. Co.*, 147 N. C., 181; *Fishblate v. Fidelity Co.*, 140 N. C., 589.

Fraud is not essential and as a general rule recovery will not be allowed if the statements made and accepted as inducements to the contract of insurance are false and material. *Ins. Co. v. Woolen Mills*, 172 N. C., 534; *Ins. Co. v. Box Co.*, 185 N. C., 543.

Whether the representation was material depends upon whether it was such as would naturally and reasonably influence the insurance company with respect to the contract or risk. *Schas v. Ins. Co.*, 166 N. C., 55.

The defendant contends that the testimony of the physician shows that the negative answer to the question, whether the insured had consulted a doctor for any cause not included in the other interrogatories, was false, and that her statement was a representation and deemed material under the rule in *Ins. Co. v. Woolen Mills, supra;* and further, that in the application it was distinctly agreed that every statement therein made was material.

But the evidence offered, considering it in the light most favorable for the plaintiff (as we are required to do on a motion to nonsuit) permits the reasonable inference therefrom that the indisposition of the insured in May, 1935, was slight and temporary, and that it had entirely passed away before the application for insurance was made, and that it had no connection whatever with her death the following March. *Hines v. Casualty Co.*, 172 N. C., 225.

We are unable to hold that the failure to disclose the fact that insured had had some time previous to her application one-half degree of fever due to a mild form of malaria and from which she had entirely recovered, taken in connection with the further fact that she was at the time of the application in sound health and otherwise insurable, was such a withholding of information as would necessarily have been calculated to influence the action or judgment of the insurance company. The evidence in its most favorable light tends to support the view that the representation, or withholding of information, was neither fraudulent nor material.

It was held in *Anthony v. Protective Union,* 206 N. C., 7, *Adams, J.,* speaking for the Court, that the failure of the insured to inform the defendant's representative that in the previous spring a physician had treated her for a temporary indisposition was of negligible significance and in no event an adequate cause for canceling the policy.

II. Referring to the representations of the insured contained in the application for insurance and hereinbefore quoted as numbered (2), the evidence does not disclose the falsity of the statement that the menstruation of the insured was normal.

The defendant, however, contends that the insured represented, on 28 June, 1935, that she was not pregnant, and that this statement was false and material, as she died in childbirth 9 March, 1936.

On the other hand, it does not affirmatively appear that the childbirth was not premature, and hence it would seem the falsity of the representation as to pregnancy would not be a necessary deduction. The plaintiffs further take the position that if she was pregnant on 28 June, 1935, she did not know it, and that her statement was not fraudulent, and that the risk from this cause entered into the contract and was provided against by the defendant by the requirement of an additional premium for that reason which was paid to the defendant, as shown by the rider attached to the policy.

In this connection it appears from the record that the physician testified the insured consulted him 2 August, 1935, presumably about her possible pregnancy, and that he was unable to decide with certainty, and that he told her to come back in a month, when he could tell her definitely.

In view of the evidence that defendant issued its policies on the life of the insured when it knew she was 33 years of age, had been married about a year, and that ordinarily pregnancy might be expected, and the fact that it required an additional premium on that account, we are unable to hold on this record that the plaintiffs are precluded by the statement complained of, or by the failure of the insured thereafter to

disclose to the insurance company her condition, when she had paid an extra premium to compensate the defendant for the additional risk.

By offering in evidence the policy of insurance and the defendant's admission of its execution and delivery and of the death of the insured, the plaintiffs made out a *prima facie* case, and the burden was then upon the defendant to rebut it by proof of the matters alleged in the affirmative defense in the answer. Though the plaintiffs, in anticipation of the defense, elected to offer the testimony of the witnesses, this did not change this rule as to the burden of proof. Nevertheless, the motion for judgment of nonsuit requires the consideration of all the evidence in the light, however, most favorable to the plaintiffs.

We have examined the authorities cited by counsel for the defendant in their well prepared brief, but conclude that the evidence here presented does not necessarily require the holding as a matter of law that the quoted representations, contained in the application of the insured, were both false and material, as contended by the defendant.

We are of opinion, and so decide, that the learned judge was in error in sustaining the motion for judgment of nonsuit.

Reversed.

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LILLIAN B. LITTLE, ADMINISTRATRIX OF THE ESTATE OF E. E. LITTLE, DECEASED, v. C. L. RHYNE AND WIFE, MRS. C. L. RHYNE (BERTHA RHODES RHYNE).

(Filed 7 April, 1937.)

**Executors and Administrators § 10: Pleadings § 8a—Plaintiff need not introduce proof of allegations which are admitted to be true in answer.**

Plaintiff alleged that she was duly appointed administratrix of her intestate, and that she was then in the active discharge of her duties as such administratrix, which allegations were admitted to be true in defendants' answers. *Held:* The admission of the allegations establishes them, N. C. Code, 543, and makes it unnecessary for plaintiff to introduce evidence in support thereof, and the allegations are sufficiently broad to establish plaintiff's right to maintain the action as administratrix, and a contention that the allegations were insufficient in that it was not alleged that plaintiff had duly qualified, is untenable, the allegation that plaintiff was actively engaged in the discharge of her duties as administratrix, liberally construed, being sufficient to imply qualification.

APPEAL by plaintiff from *Sink, J.*, at January Term, 1937, of IREDELL. Reversed.

This is a civil action brought by the plaintiff to recover judgment on two certain notes alleged to have been executed and delivered by the defendants to one D. P. Rhodes, and transferred and assigned and nego-

tiated by the said D. P. Rhodes, by blank endorsement, to the plaintiff's intestate before maturity, which allegation is denied by the defendant's answer.

It was admitted of record at the May, 1936, Term of Superior Court for Iredell County that the defendants executed said note, and that the endorsement of D. P. Rhodes was genuine. Counsel for the defendants, upon request, admitted in writing that the signatures of the defendants to said notes were genuine on 29 January, 1936. Both of these admissions were introduced in evidence at the time of the trial, as were the two notes upon which the suit was brought.

It was alleged in the complaint that the plaintiff's intestate died intestate on 25 January, 1933, and that she was duly appointed as administratrix of the estate of E. E. Little on 21 January, 1933, and was, at the time the suit was instituted, actively engaged in the discharge of her duties as such administratrix. It is admitted in the defendants' answer and in the amended answer of the defendant Mrs. C. L. Rhyne that this allegation is true.

At the conclusion of the plaintiff's evidence, the defendants moved for a judgment of nonsuit on the ground that the plaintiff had failed to make out her case in that no proof has been offered that she was, in fact, the administratrix of the estate of E. E. Little. The defendants' motion was allowed by the court, and judgment of nonsuit entered accordingly, whereupon the plaintiff excepted, assigned error, and appealed to the Supreme Court.

The plaintiff's exceptions and assignments of error are as follows:

"1. That the court erred in allowing the motion for judgment of nonsuit at the conclusion of the plaintiff's evidence.

"2. That the court erred in holding that, upon the evidence presented, the plaintiff had failed to make out her case for the reason that she had not offered proof that she was in fact administratrix of the estate of E. E. Little, although this fact was alleged in the complaint and admitted in both answers of the defendants."

*Raymer & Raymer for plaintiff.*
*Lewis & Lewis for defendants.*

CLARKSON, J. At the close of plaintiff's evidence, on motion of defendants, the court below allowed defendants' motion for judgment as in case of nonsuit. C. S., 567. In this we think there was error.

The plaintiff alleged in her complaint: "That E. E. Little, late of Iredell County, North Carolina, died intestate on or about 25 January, 1933, and that the plaintiff Lillian B. Little, administratrix of the estate of E. E. Little, was duly appointed as such by the clerk of Superior

Court of Iredell County, North Carolina, on 31 January, 1933, and is now in the active discharge of her duties as such administratrix."

The defendants in their answer say: "That the allegations contained in the first paragraph of the complaint are true."

The amended answer of Mrs. C. L. Rhyne states: "That paragraph 1 of the complaint is true and admitted."

N. C. Code, 1935 (Michie), section 543, is as follows: "Allegations not denied, deemed true.—Every material allegation of the complaint not controverted by an answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply is, for the purposes of the action, taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires."

N. C. Practice and Procedure in Civil Cases (McIntosh), pp. 366-7, is as follows: "The material facts are those alleged in the complaint, and which the plaintiff must prove in order to establish his cause of action, and, when one of these facts is not denied in the answer, it is as effectual as if found by a jury; and it is not necessary to introduce the pleadings in evidence to show that there was no denial. Where the complaint alleges a material fact upon information and belief, and the answer admits such allegation, it is an admission of the facts alleged, and not simply of the information and belief. . . . For determining the cause of action or defense, and the material facts which are controverted, each party is bound by his pleading, as a conclusive or judicial admission, and it is not a question of evidence." *West v. A. F. Messick Gro. Co.*, 138 N. C., 166; *Leathers v. Blackwell Durham Tob. Co.*, 144 N. C., 330; *Page v. Life Ins. Co. of Va.*, 131 N. C., 115; *Adams v. Beasley*, 174 N. C., 118.

The defendants contend: "That the plaintiff should have introduced evidence to the jury and to the court showing that she was the duly appointed and *qualified* administratrix of the estate of E. E. Little, deceased, and having failed to do so, the court was entirely right in granting the motion of nonsuit at the close of plaintiff's evidence. However, if the court should be of the opinion that when the allegations of the complaint are admitted, or are not denied, that no proof need be offered as contended by the plaintiff in this action, then we call the court's attention to the fact that the plaintiff did not allege in the complaint that the plaintiff was the duly appointed and *qualified* administratrix of the estate of E. E. Little; and, of course, was not admitted in the answer."

It goes without saying that plaintiff must be the duly appointed and qualified administratrix of the estate of E. E. Little. We think the

allegations in the complaint admitted in the answers show this. The plaintiff alleges that she was "duly appointed," and goes further and alleges, "And is now in the active discharge of her duties as such administratrix." Liberally construed, as our pleadings are, we think this language implies that she "qualified." The contention of defendants is too technical, and cannot be sustained.

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

Reversed.

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S. GLENN WILSON v. N. C. LEE AND E. C. NEWMAN, TRADING AS LEE & NEWMAN.

(Filed 7 April, 1937.)

**1. Money Received § 1—**

An action for money had and received may be maintained whenever defendant has money in his hands which belongs to plaintiff, and which in equity and good conscience he ought to pay plaintiff, the money belonging to plaintiff having been secured by defendant without plaintiff's consent, or, if with his consent, without consideration.

**2. Same—Allegations and evidence held sufficient to constitute cause of action for money had and received, and nonsuit was improperly granted.**

Plaintiff alleged and offered supporting evidence that he had paid defendants a certain sum upon a modified agreement between plaintiff and defendants that defendants would recall an execution issued against plaintiff's father, that unknown to plaintiff the land had been sold under the execution at the time the money was paid, and the land bought in by defendants, that plaintiff paid the money in reliance on the prior agreement for the recall of the execution, and that the return of the money had been demanded and had been refused. *Held:* The action was for money had and received, plaintiff having received no consideration for the money paid over, and plaintiff having waived all other causes of action, and plaintiff's evidence, if believed by the jury, would entitle plaintiff to recover, and the granting of defendants' motion to nonsuit was error.

APPEAL by plaintiff from *Spears, J.*, at September Term, 1936, of SAMPSON. Reversed.

This is an action to recover of the defendants the sum of $246.00.

In his complaint, the plaintiff alleges that on 14 October, 1931, he paid to the defendants the sum of $246.00, upon their representation that in accordance with their agreement with the plaintiff they had recalled an execution which they had caused to be issued on a judgment which they had recovered against George W. Wilson, the father of the plaintiff, and under which the lands of the said George W. Wilson had been adver-

tised for sale on 5 October, 1931; that at the time the plaintiff paid to the defendants the said sum of $246.00 the lands of George W. Wilson had been sold under said execution, and that the defendants had bought said lands at said sale; and that upon his discovery that defendants had not recalled said execution, but in violation of their agreement with the plaintiff, had caused the said lands to be sold under said execution, the plaintiff demanded that the defendants return to him the said sum of $246.00, which demand the defendants had refused.

In their answer, the defendants admit the receipt by them from the plaintiff, on 14 October, 1931, of the sum of $246.00, but deny that they received said sum of $246.00 under and pursuant to the agreement as alleged in the complaint. They allege that plaintiff paid them the sum of $246.00 for an option to purchase the lands which the defendants had purchased at the sale under the execution, and that plaintiff had failed to exercise said option, in accordance with its terms.

At the trial the evidence for the plaintiff tended to show that at August Term, 1929, of the Superior Court of Sampson County, the defendants had recovered a judgment against George W. Wilson for the sum of $878.67, with interest and costs; that said judgment was duly docketed in the office of the clerk of the Superior Court of Sampson County; that some time prior to 5 October, 1931, the defendants had caused an execution to be issued on said judgment to the sheriff of Sampson County; and that after the said execution was issued to him, the sheriff of Sampson County had levied upon and advertised for sale under said execution, on 5 October, 1931, certain lands in Sampson County, which were owned by George W. Wilson, the judgment debtor.

The evidence for the plaintiff further tended to show that on 5 October, 1931, about 10:30 a.m., the plaintiff, accompanied by a friend, went to the office of the attorney for the defendants and there agreed with said attorney that he would pay, or cause to be paid, within a few days, the sum of $500.00 on said judgment, and that he would pay the balance due on said judgment after the payment of the sum of $500.00, in monthly installments; and that in consideration of said agreement the said attorney agreed with the plaintiff that he would recall said execution; that on 14 October, 1931, the plaintiff notified the defendants that he was unable to pay the sum of $500.00 in cash on said judgment, but then and there offered to pay to defendants the sum of $246.00, in accordance with the agreement by and between the plaintiff and the defendants on 5 October, 1931; and that this offer was accepted by the defendants. The plaintiff accordingly paid to the defendants the sum of $246.00.

The evidence for the plaintiff further tended to show that the attorney for the defendants did not recall said execution in accordance with his

agreement with the plaintiff on 5 October, 1931, but caused the lands of George W. Wilson to be sold by the sheriff under said execution at 12 m., on 5 October, 1931; and that at said sale the defendants were the purchasers of said land, and now have a deed for said land from the sheriff of Sampson County.

The evidence for the plaintiff further tended to show that on 14 October, 1931, when the plaintiff paid to the defendants the said sum of $246.00, the plaintiff did not know that defendants had failed to recall the execution on 5 October, 1931, in accordance with their agreement with the plaintiff, but had caused the lands of George W. Wilson to be sold under said execution, in accordance with the advertisement of the sheriff of Sampson County.

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

From judgment dismissing the action, in accordance with defendants' motion, the plaintiff appealed to the Supreme Court, assigning error in the judgment.

*J. D. Johnson, Jr., for plaintiff.*
*P. D. Herring and Richard L. Herring for defendants.*

CONNOR, J. This is an action for money had and received. Although an action at law, it is governed by equitable principles. The plaintiff in the action waives all torts, trespasses, and damages. The action may, in general, be maintained whenever the defendant has money in his hands which belongs to the plaintiff, and which in equity and good conscience he ought to pay to the plaintiff. 41 C. J., 28. The plaintiff is entitled to recover when it appears that the money in question belonged to the plaintiff and was secured by the defendant without the consent of the plaintiff, or if with his consent, without consideration. 41 C. J., 42.

The evidence for the plaintiff in the instant case tended to show that on 14 October, 1931, the plaintiff paid to the defendants the sum of $246.00, in performance of his agreement with the defendants on 5 October, 1931, which was subsequently modified only with respect to the amount which should be paid by the plaintiff to the defendants, in cash, and that the defendants, without the knowledge of the plaintiff, had failed to perform their agreement with the plaintiff, and that for this reason the plaintiff received no consideration for the sum of $246.00, which he paid to the defendants. If the jury had found the facts to be as the evidence for the plaintiff tended to show, the plaintiff is entitled to recover of the defendants the sum of $246.00, with interest from 14 October, 1931. There is error in the judgment dismissing the action as of nonsuit.

In *Tomlinson v. Bennett,* 145 N. C., 279, 59 S. E., 37, it is said: "The only cause of action stated in the complaint is for money had and received to plaintiff's use. If the plaintiff, in part performance of an executory contract, paid the money and delivered the horse, and, for any reason, for which he was not responsible, the contract was not executed, he would be entitled to recover the money upon an implied promise to repay it, and the value of the horse as for a conversion. The law will imply a promise to repay money received, when there is a total failure of the consideration upon which it was paid. It would be against good conscience and equity to retain it. This is the principle upon which the action is based."

Applying this principle to the facts which the evidence for the plaintiff tends to show, we reverse the judgment in this action and remand the action to the Superior Court of Sampson County for a new trial.

Reversed.

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STATE v. ARTHUR ORMOND.

(Filed 7 April, 1937.)

**1. Criminal Law § 78c—**

Where defendant does not move for judgment as of nonsuit as required by C. S., 4643, and fails to request a directed verdict for insufficiency of the evidence, he waives his right to contend on appeal that the evidence was insufficient to sustain a conviction.

**2. Automobiles § 33—**

In a prosecution for manslaughter for reckless driving, it is competent for a witness to testify from his observation as to the skid marks on the concrete leading to defendant's car and as to its position after the accident as tending to show the speed at which the car was traveling at the time.

**3. Criminal Law § 81c—**

An exception to the admission of evidence cannot be sustained when the evidence objected to corroborates the testimony of another witness and its admission is not prejudicial to defendant.

**4. Criminal Law § 53c—**

The instruction in this case that the burden was on the State to prove defendant guilty beyond a reasonable doubt, and that the jury should ascertain the facts from the evidence *is held* sufficiently full in the absence of prayers for special instructions.

**5. Criminal Law § 56—**

A motion in arrest of judgment for that the special term at which defendant was tried was not advertised as required by law goes to the organization of the court and not to the competency of the jury, and is improperly made in the trial court.

STATE *v.* ORMOND.

APPEAL by defendant from *Williams, J.,* and a jury, at January Special Term, 1937, of PITT. No error.

The defendant was indicted on the following bill of indictment: "The grand jurors for the State upon their oath present: That Arthur Ormond, late of the county of Pitt, on 19 April, A.D. 1936, with force and arms, at and in the county aforesaid, unlawfully, willfully, and feloniously did operate an automobile on the public highway in a reckless and careless manner, and while so doing unlawfully, willfully, and feloniously did in and upon one Bernice Haddock with a certain deadly weapon, to wit: an automobile, kill and slay, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State. D. M. Clark, Solicitor."

The defendant entered a plea of not guilty. After hearing the evidence and charge of the court, the jury returned into open court and said for their verdict, "Defendant is guilty." Defendant moved for a new trial and for arrest of judgment. The motion was denied and the defendant excepted and assigned error. Thereupon the court, on 30 January, 1937, entered judgment as follows: That the defendant be confined in the State's Prison for a term of not less than seven years nor more than ten years. It was in evidence that the general reputation of defendant was bad and he had theretofore served a sentence on a whiskey charge, and had committed other offenses.

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

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*A. B. Corey and Albion Dunn for defendant.*

CLARKSON, J. In the record it appears that defendant did not make in the court below a motion as in case of nonsuit or to dismiss. N. C. Code, 1935 (Michie), sec. 4643.

In *Jones v. Ins. Co.,* 210 N. C., 559 (561), is the following: "The record discloses that no motion for judgment as in case of nonsuit was lodged 'when the plaintiff introduced his evidence and rested his case,' but was lodged for the first time 'after all the evidence on both sides is (was) in.' The defendant thereby lost his right under C. S., 567, to demur to the evidence. 'The motion (for judgment as in case of nonsuit) cannot primarily come at the close of all the evidence. It must be made initially at the close of plaintiffs' evidence, and, if the motion is refused, there may be an exception and appeal. But if evidence is offered by defendant, the exception is waived. At the end of all the evidence the exception may be renewed, but not then made for the first

time.' *Nowell v. Basnight,* 185 N. C., 142 (147), and cases there cited."

This section serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by section 567, in civil actions. *S. v. Fulcher,* 184 N. C., 663 (665). A motion for judgment of nonsuit, under this section, must be made at the close of the State's evidence in order for a motion thereunder made at the close of all the evidence to be considered. *S. v. Norris,* 206 N. C., 191.

Defendant requested no prayer for instruction to the effect that the evidence was not sufficient to be submitted to the jury. From the well settled law in this jurisdiction, the defendant has now waived his right to contend that there was no evidence sufficient to be submitted to the jury on the indictment. The defendant contends that on the trial errors were committed:

(1) The defendant excepted and assigned error (which cannot be sustained) to the following evidence of the witness C. R. Williams: "I made an examination of this homicide. I found a Chevrolet coach on the right-hand side of the road going toward Vanceboro. The car was facing back toward Greenville at an angle. The fence was torn down. The bank is two and a half or three feet high. Q. What marks, if any, did you find on the pavement? Ans.: The brake marks leading to the car started approximately in the middle of the highway." Asked by the court what he meant by brake marks, the witness replied, "Tire marks." It was a concrete pavement.

In 9 Blashfield Automobile Law, at p. 531, we read: "Since the test of control of a motor vehicle is the ability to stop it quickly and easily, scars or marks on the pavement caused by skidding are admissible on the question of speed, when connected up with the defendant's automobile. If such marks show an inability to stop quickly and easily, on an occasion for so doing, the inference is obvious either that the car was running too fast or that a proper effort to control it was not made. Therefore, on the question of speed at the time of the collision, it is proper to consider the skid marks to show the distance an automobile traveled after the accident and before it came to a stop." *Goss v. Williams,* 196 N. C., 213 (219).

(2) The exception and assignment of error made by defendant to Sheriff Whitehurst's evidence cannot be sustained; it was corroborative of Williams' testimony and not prejudicial.

(3) The court below charged the jury: "The case has been argued to you by counsel for the State and defendant. The court will not undertake to repeat all the evidence given by either the State or the defendant, but it is your duty to take into consideration the contentions of both the State and the defendant, whether referred to by the court or not, and which will enable you to reach a verdict which expresses the

truth of this matter, realizing its importance to the State and to the defendant, applying to the facts as you find them to be from the evidence beyond a reasonable doubt the law as laid down to you by the court." To the foregoing portion of his Honor's charge the defendant excepted and assigned error, which cannot be sustained. It is too attenuated and technical.

The court had theretofore charged the jury: "The term, 'beyond a reasonable doubt,' does not mean a vain, imaginary, or fanciful doubt, but is a sane doubt arising from the testimony and supported by common sense and reason. It means the jury must be fully satisfied, or satisfied to a moral certainty, but if after carefully considering, weighing, and comparing all the evidence in the case the jury cannot say it has an abiding conviction of the defendant's guilt, then it has a reasonable doubt, otherwise not. A reasonable doubt is an honest, substantial misgiving, an insufficiency which fails to convince your reason and judgment. It is not a doubt aroused by the ingenuity of counsel. It is a sane doubt arising from the testimony and supported by common sense and reason." Taking the charge as a whole, the jury could readily understand that they were the triers of the facts. If defendant wanted a more specific or detailed charge, he should have requested same by prayer for instruction.

(4) The last and final question submitted by the defendant: "Did the court commit error in refusing to arrest judgment?" This exception and assignment of error cannot be sustained. The matter has been decided to the contrary in *S. v. Boykin, ante,* 407.

For the reasons given, in the trial of the court below we find

No error.

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IN RE ESTATE OF ALICE J. BOST, DECEASED.

(Filed 7 April, 1937.)

**1. Executors and Administrators § 30b—Under facts of this case executors held not personally liable for gravestone purchased without order of court.**

The will provided that not less than $4,500 be spent on testatrix' burial and gravestone, etc. The executors, at a time when it appeared the estate was solvent, spent more than $100 for a gravestone and other burial expenses without an order of court, C. S., 108. *Held:* Upon later insolvency of the estate, creditors may not hold the executors personally liable as for a breach of trust for the expenditure of funds of the estate for this purpose in good faith.

**2. Same—Creditors filing claims more than twelve months after publication of notice may assert their demands only against undistributed assets.**

Creditors filing their claims more than twelve months after the publication of the first notice by the executors may assert their demands only against the undistributed assets of the estate, C. S., 101, and may not hold the executors personally liable for distributing household and kitchen furniture to the legatees shortly after the death of testatrix in accordance with specific bequests in the will, at a time when it appeared the estate was amply solvent.

**3. Same: Attorney and Client § 10—**

Executors paid part of a judgment against the estate to the judgment creditor without notice that his attorneys were entitled to a part of the recovery under a contingent fee agreement. *Held:* The executors cannot be held personally liable by the attorneys.

APPEAL by executors as such, and individually, from *Alley, J.*, 24 December, 1936. From CABARRUS.

Exceptions to report of executors, heard under C. S., 124, and on appeal under C. S., 125, resulting in judgment against the executors individually and in their representative capacity.

The questions presented turn upon the following facts:

1. On 6 August, 1929, Alice J. Bost, of Cabarrus County, died testate, naming the Citizens Bank and Trust Company and Sam Suber her lawful executors, and directing in her will that at least $4,500 should be spent on her burial, gravestone, improvement of family plot, etc., in accordance with directions given in her lifetime. She left an estate valued at the time at approximately $16,000. (See *Lipe v. Trust Co.*, 207 N. C., 794, 178 S. E., 665.)

2. The executors duly qualified 9 August, 1929, filed will for probate, and immediately entered upon the administration of said estate.

3. In Item 8 of the will, the testatrix leaves her household and kitchen furniture, worth about $200, to Mrs. Artie Suber and her children. This was turned over to the legatees soon after the death of the testatrix.

4. The executors rented a house belonging to the testatrix to Mrs. C. H. Lipe for $22.50 per month, her husband agreeing to secure payment of said rent by any interest which he had in the estate. C. H. Lipe is a nephew of the testatrix and was given a legacy of $3,000 under her will. No cash rent has been collected since 1 June, 1930, and the renting was done without order of court. *Hardy v. Turnage*, 204 N. C., 538, 168 S. E., 823.

5. On 5 August, 1932, C. H. Lipe brought suit against the estate for services rendered the testatrix during her lifetime and recovered judgment in the sum of $3,875, agreeing with his counsel, however, that they should have 40 per cent of whatever amount was collected on said judg-

ment. *Lipe v. Trust Co., supra.* The first notice the executors had of Lipe's claim was when he filed suit; and the first notice they had of his agreement with counsel was received 2 August, 1935.

6. The executors have realized only $10,211.62 from properties belonging to the estate, and the estate now appears to be insolvent.

7. In the final report of the executors, the C. H. Lipe judgment is credited with payment of $1,240 on 30 July, 1935, "by house rent."

In the court below, the executors were held personally liable:

First, for $1,298, excessive monument and grave expenses made without order of court;

Second, $200 value of household and kitchen furniture;

Third, 40 per cent of credit on Lipe judgment, plus certain expenses advanced by counsel.

The executors, individually and in their representative capacity, appeal, assigning errors.

*Z. A. Morris, H. S. Williams, and John Hugh Williams for appellants.*
*Crowell & Crowell and Hartsell & Hartsell for appellees.*

STACY, C. J. This is another case in which executors who are required to act in the searchlight of prevision have been judged in the noonday of hindsight. The latter is usually the brighter light, affording a clearer vision. "Hindsight is usually better than foresight." *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562.

First, in respect of the burial expenses, purchase of gravestone, improvement of family plot, etc., it should be remembered that these were made in obedience to testamentary instructions and at a time when the estate appeared to be solvent. *Hicks v. Purvis,* 208 N. C., 657, 182 S. E., 151; *Fancher v. Fancher,* 156 Cal., 13, 23 L. R. A. (N. S.), 944, 19 Ann. Cas., 1157. Hence, the provisions of C. S., 108, requiring an order of court to spend more than $100 for a gravestone is not necessarily controlling. 24 C. J., 92, *et seq.* It is not suggested that the executors acted in bad faith—only that they omitted to secure an order of court before proceeding as directed by the will. *Hardy v. Turnage, supra.* The record, we apprehend, is insufficient to hold them as for a breach of trust. *Stroud v. Stroud,* 206 N. C., 668, 175 S. E., 131; *Thigpen v. Trust Co.,* 203 N. C., 291, 165 S. E., 720; *Deberry v. Ivey,* 55 N. C., 370.

Secondly, as to the household and kitchen furniture, specifically bequeathed by the will (*Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356) and turned over to the legatees soon after the death of the testator: It is true that a testator, or testatrix, has nothing to give away until his debts are paid. Equity, which delighteth in equality, as well as the law,

which commands the right, requires that one shall be just before he is generous, for generosity ceases to be a virtue when indulged in at the expense of creditors. *Trust Co. v. Lentz,* 196 N. C., 398, 145 S. E., 776. It is, also, the rule that executors are not chargeable with the value of specific bequests, turned over in good faith in the due administration of the estate prior to notice of claims of creditors, for under C. S., 101, a claimant who has not presented his claim within twelve months from the first publication of the general notice to creditors, is allowed to assert his demand only as against undistributed assets of the estate and without cost against the executor. *Morrisey v. Hill,* 142 N. C., 355, 55 S. E., 193; *Rigsbee v. Brogden,* 209 N. C., 510, 184 S. E., 24; *Mallard v. Patterson,* 108 N. C., 255, 13 S. E., 93. The respondents, who fall in this latter class, are in no position to complain at the disposition made of the household and kitchen furniture. Of course, if their claims had been filed prior to the expiration of the time mentioned in the statute, C. S., 101, a different situation would have arisen. *Woodward v. Fisher,* 19 Miss., 303; 24 C. J., 713. But we have no occasion presently to consider such a case. It is not now before us.

Thirdly, in regard to 40 per cent of the credit made on the Lipe judgment: This adjustment of the house rent, it will be observed, was made by the executors prior to notice of any interest which counsel held in said judgment. The judgment was in Lipe's name, and it is not perceived upon what principle the executors could be held liable for dealing with him as the owner thereof. *Ricaud v. Alderman,* 132 N. C., 62, 43 S. E., 543. Nothing was said in *Casket Co. v. Wheeler,* 182 N. C., 459, 109 S. E., 378, which militates against this position.

The liability of C. H. Lipe for the 40 per cent in question, which, perhaps, would be conceded, is not presented by the record.

The exceptions will be remanded for rulings accordant herewith.

Error and remanded.

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DAVID LUPTON v. J. J. DAY, ADELAIDE DAY, ELBRIDGE DANIELS, WILBUR HUDNELL, MACK LEWIS, AND DAWSON DELEMAR.

(Filed 7 April, 1937.)

**1. Evidence § 42f—Allegations of the complaint admitted in the answer may be introduced in evidence.**

Where the answer admits the allegations of a paragraph of the complaint, plaintiff may introduce in evidence the admission in the answer and also the paragraph of the complaint admitted, and where the answer contains a qualified admission, that portion of the corresponding allegation of the complaint may be admitted to explain the relevancy of the admission.

**2. Same—Allegations of complaint may be admitted in evidence only against defendants admitting the truth of the allegations.**

In their answer, one defendant admitted the allegations of fact in a paragraph of the complaint and testified on the trial in accordance therewith, but another defendant did not admit the allegations or introduce evidence in regard thereto. *Held:* The introduction of the paragraph of the complaint was harmless as to the defendant admitting its allegations, but constitutes prejudicial error as to the other defendant, since as against such other defendant the paragraph was a self-serving declaration on the part of plaintiff.

APPEAL by defendants J. J. Day and Adelaide Day from *Sinclair, J.*, at December Term, 1936, of CARTERET. Partial new trial.

This was an action for wrongful and malicious injury to plaintiff's boat by removing same from its moorings and causing it to sink.

Upon issues submitted, the jury returned verdict that the defendants J. J. Day and his wife, Adelaide Day, were liable for the injury to the boat, and awarded the plaintiff both compensatory and punitive damages. The other named defendants were eliminated from the case during the trial.

From judgment on the verdict, defendants J. J. Day and Adelaide Day appealed.

*Luther H. Hamilton and R. E. Whitehurst for plaintiff.*
*F. C. Harding, C. R. Wheatly, and J. F. Duncan for defendants.*

DEVIN, J. The appellants assign as error the ruling of the court below in permitting, over their objection, the introduction in evidence by the plaintiff of paragraph 8 of his complaint.

Paragraph 8 of the complaint is as follows: "That the defendants, jointly and severally, acting one with another, willfully, maliciously, and unlawfully, without the knowledge or consent, and in violation of the plaintiff's desires and rights, on or about 6 February, 1936, pulled said boat away from its moorings and towed it between one-half and one mile in the deep water up Smith's Creek, a tributary of Neuse River, which said creek at the point said boat was carried is salt water, and there caused and permitted the boat to sink."

To this paragraph of the complaint the defendants answered as follows: "The defendants, answering the 8th paragraph of the complaint, deny that they jointly or severally acted one with another, willfully, maliciously, and unlawfully, without the knowledge or consent and in violation of the plaintiff's rights, or did anything whatsoever to injure or damage said boat. Further answering said 8th paragraph of the complaint, these defendants say that the said J. J. Day, acting in good faith on this information received from Captain Whitford, requested

the defendants Elbridge Daniels and Wilbur Hudnell and Mack Lewis and Dawson Delemar to aid and assist him in moving the said 'Mildred B' from its position, which partly blocked the ingress and egress of the Day dock. Further answering said 8th paragraph of the complaint, these defendants say that the defendant Adelaide Day took no part nor did she in any way advise with or encourage the moving of said boat, and that the said Adelaide Day had no knowledge that said boat was being moved."

The plaintiff was properly permitted to offer in evidence the admission in the answer that defendant J. J. Day requested certain of the defendants (other than Adelaide Day) to assist him in moving the boat. This was competent, certainly against J. J. Day. But the introduction of a paragraph of the complaint which was denied in the answer violated the rule against permitting one to make evidence for himself by the production of self-serving declarations. Lockhart on Ev., par. 159, 1 A. L. R., 42, *et seq.* (note).

The denial in the answer of the fact alleged in the complaint puts the controverted fact in issue, and neither is the denial evidence against nor the plaintiff's allegation evidence for the truth of the disputed fact to be determined by the jury. *Jackson v. Love,* 82 N. C., 405.

It has been uniformly held by this Court that a party may offer in evidence a portion of his adversary's pleading containing the admission of a distinct and separate fact, relevant to the inquiry, without being required to introduce accompanying qualifying or explanatory matter. *Sears Roebuck & Co. v. Banking Co.,* 191 N. C., 500, and cases there cited.

And when the answer contains a categorical admission of an allegation, the same rule permits the introduction of the allegation in the complaint for the purpose of showing what was admitted; and further, when the answer contains a qualified admission, that portion of the corresponding allegation of the complaint which tends to explain the relevancy of the admission may become competent. *Lewis v. R. R.,* 132 N. C., 382; *Modlin v. Ins. Co.,* 151 N. C., 35.

But this wholesome rule does not go to the extent of permitting the plaintiff to introduce as competent evidence his own allegation of a material fact which is denied in the answer.

In the instant case the defendant J. J. Day admitted in the answer and testified on the trial that he authorized the removal of the boat, and based his defense on his right to move it and the absence of consequent injury to the plaintiff. These questions were determined against him by the jury, and hence the introduction in evidence of the paragraph of the complaint was, as to him, immaterial and harmless, and the assignment of error therefor, on his part, cannot be sustained.

But in the case of defendant Adelaide Day, there was neither admission in the answer nor testimony on the trial that she performed any act in respect to moving the boat, or was present at the time, or counseled or procured its removal. So that the introduction in evidence of the material allegation that "the defendants (including Adelaide Day) jointly and severally, acting one with another, willfully, maliciously, and unlawfully and in violation of the rights of the plaintiff" moved said boat and caused it to sink, constituted prejudicial error, for which she is entitled to a new trial.

For the reasons stated, we conclude that there was in the trial, as to defendant J. J. Day, no error; and that as to defendant Adelaide Day there must be a new trial upon the issue as to her liability for the alleged injury to plaintiff's boat.

Partial new trial.

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S. S. M. REALTY COMPANY v. ORTON BOREN ET AL.

(Filed 7 April, 1937.)

**1. Partition § 11—Center of partition wall erected by tenants in common constitutes dividing line as against calls in their deeds.**

Where tenants in common go upon the land and effect a partition by building a dividing wall with a staircase in the middle which both thereafter use in getting to their respective properties, and exchange deeds for the property as thus divided, the center of the partition wall as thus established is the dividing line of the properties binding upon the tenants and their privies, and will govern as against calls in the deeds giving one tenant the wall and stairway.

**2. Boundaries § 1—Boundary will be established in accordance with intent of parties at time of execution of the instrument.**

In construing a deed the courts will endeavor to ascertain the intent of the parties at the time of the conveyance, and calls and courses will be established as of that time, and where the parties at the time go upon the land and locate a line, such line will prevail as against a contrary call in the deed, evidence of the line as established by them being competent to show that the description of the line in the deed was a mistake.

APPEAL by defendants from *Clement, J.*, at October Term, 1936, of WILKES.

Civil action in ejectment.

The controversy involves space occupied by partition wall and stairway.

In 1904, D. W. Mayberry and J. I. Myers dissolved their partnership business, and, as tenants in common, divided the mercantile establishment between them. Mayberry testifies: "When we decided to divide

the business we put the partition wall in there and then divided the building. We built the partition for the purpose of marking the line between us. The partition went from the basement to the roof. I took one side of the partition and he took the other. We did this before Mr. Myers or I either conveyed our interest to anyone. That was when I made him a deed to the lot on the west side of the partition and he made me a deed to the lot on the east side. I saw the building about a couple of years ago and the partition wall is at the same place that it was when Mr. Myers and I built it. When we built the partition marking the line between us we used the stairway jointly to go up to our property."

Plaintiff derives title by *mesne* conveyances from D. W. Mayberry. Defendants claim under J. I. Myers.

In apt time, the defendants requested the following special instruction: "That if the jury shall find from the testimony and by the greater weight thereof that Mayberry & Myers ran the partition in the building for the purpose of marking the line between their property and thereby actually marked their line between them upon the land, then the court charges you that this would constitute the line as marked, and that defendants' title would cover the land to the center of the partition." Refused; exception.

From verdict and judgment for plaintiff, the defendants appeal, assigning errors.

*W. M. Allen and J. H. Whicker for plaintiff, appellee.*
*A. C. Davis and C. G. Gilreath for defendants, appellants.*

STACY, C. J. The plaintiff prevailed in the court below on the contention that the calls in its deed, as shown by an actual survey, cover the wall and stairway in question. *Reed v. Schenck,* 13 N. C., 415. The law is, however, that when tenants in common, with a view to executing divisional deeds, go upon the premises and establish a dividing line, and deeds are thereupon made, intending to divide the land according to the division agreed upon, and they thereafter deal with the land with reference to said line, the boundary thus established will estop them and their privies from claiming a different line as being in accordance with the calls in their deeds. *Dudley v. Jeffress,* 178 N. C., 111, 100 S. E., 253; *Clarke v. Aldridge,* 162 N. C., 326, 78 S. E., 216. "It is settled beyond controversy in this State that a line surveyed and marked out and agreed upon by the parties at the time of the execution of the deed will control the course and distance set out in the instrument." *Millikin v. Sessoms,* 173 N. C., 723, 92 S. E., 359.

Speaking to the subject in *Cox v. McGowan,* 116 N. C., 131, 21 S. E., 108, *Avery, J.,* delivering the opinion of the Court, said:

"All rules adopted for the construction of deeds tend towards one objective point. They embody what the law, founded on reason and experience, declares to be the best means of arriving at the intention of the parties. 3 Washburn, 428 and 429. The intention, of course, relates to the time when the deed is delivered, hence course and distance, or even what is considered in law a more certain or controlling call, must yield to evidence, if believed, that the parties at the time of the execution of a deed actually ran and located a different line from that called for, such evidence being admissible to show the description of the line to be a mistake. *Buckner v. Anderson,* 111 N. C., 572; *Cherry v. Slade,* 7 N. C., 82; *Baxter v. Wilson,* 95 N. C., 137; *Stanly v. Green,* 12 Cal., 148; 3 Washburn, 435.

"In support of the position stated, we find that Tiedman, in his exhaustive work on Real Property, sec. 828, lays down the rule as follows: *'Contemporanea expositio est optima et fortissima in lege.* In construing deeds, courts endeavor to place themselves in the position of the parties at the time of the conveyance, in order to ascertain what is intended to be conveyed. For in *describing* the property parties are *presumed to refer to its condition at that time,* and the meaning of their terms of expression can only be properly understood by a knowledge of their position and that of the property conveyed.' The familiar rule that the course of a stream called for as a boundary is to be determined by showing the location at the date of the conveyance is referred to as one illustration of the practical operation of the rule."

Under the principle stated, which is well established in this jurisdiction, it would seem that the defendants were entitled to the special instruction, duly requested in apt time.

New trial.

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J. W. SUTTON v. NORTH CAROLINA JOINT STOCK LAND BANK ET AL.

(Filed 7 April, 1937.)

**Mortgages § 30a—Party liable for debt held bound by agreement in consent judgment that he would not again restrain foreclosure.**

Where a party liable for a debt secured by a deed of trust enters into a consent judgment with the *cestui* by which he is given a certain length of time to put the loan in good standing and in consideration of indulgences, agrees not to again restrain foreclosure if he should fail to make the payments called for in the agreement, he is bound by his agreement, and judgment denying him any further restraining order after the expiration of the time agreed without performance on his part is without error.

APPEAL by plaintiff from *Sinclair, J.*, at October Term, 1936, of PITT.

Civil action to restrain foreclosure and to adjust equities.

Plaintiff alleges that on 18 January, 1924, he and the defendant Joe Sutton purchased a tract of land in Pitt County, subject to deed of trust in favor of the North Carolina Joint Stock Land Bank, given as security for a loan of $5,000; that Joe Sutton agreed to assume payment of the secured indebtedness as a part of his half of the purchase price; that thereafter the land was divided and plaintiff and defendant Joe Sutton now hold their respective shares in severalty; wherefore plaintiff seeks to have the share allotted to Joe Sutton first sold, and his own share reserved and sold only in the event of a deficiency.

The allegations upon which plaintiff predicates his right to an injunction are denied by the defendant Joe Sutton.

It further appears that in 1934, and again in 1935, the plaintiff brought actions identical with the present one, which resulted in consent judgments, neither of which has been carried out by the plaintiff. In the last suit, plaintiff was allowed ninety days to "place said loan in good standing," failing in which, it was ordered that foreclosure should proceed, "and the plaintiff agreed that he would bring no proceeding to restrain said sale."

From judgment denying any further restraining order, but adjudging "that said sale shall be made without prejudice to the rights of either J. W. Sutton or Joe Sutton, as to any claim they may have against said surplus or excess fund that may be derived from the sale of the said property," plaintiff appeals, assigning error.

*J. H. Harrell for plaintiff, appellant.*

*J. B. James for defendants, Bank and substituted trustee, appellees.*

STACY, C. J. Conceding that under the principles announced in *McLamb v. McLamb,* 208 N. C., 72, 178 S. E., 847, and *Ins. Co. v. Cates,* 193 N. C., 456, 137 S. E., 324, and the kindred doctrines promulgated in *Bank v. Page,* 206 N. C., 18, 173 S. E., 312, and *Porter v. Ins. Co.,* 207 N. C., 646, 178 S. E., 223, the plaintiff originally had some rights, cognizable in equity, it would appear that his agreement, made in exchange for indulgences, not to bring any further proceeding "to restrain said sale," ought to be respected in this, the third suit instituted for the purpose. The *cestui* also has some rights. *Dennis v. Redmond,* 210 N. C., 780; *Leak v. Armfield,* 187 N. C., 625, 122 S. E., 393; *Everhart v. Adderton,* 175 N. C., 403, 95 S. E., 614.

The showing made by appellant is not sufficient to overturn the judgment entered below.

Affirmed.

A. D. ABERNETHY ET AL. v. FIRST SECURITY TRUST COMPANY ET AL.

(Filed 7 April, 1937.)

**1. Judgments § 23—**

Where it appears that a party was in the courtroom at the time the court announced that motions in his case would be heard the following day, his motion to set aside the order made on the day stipulated on the ground of excusable neglect is properly denied. C. S., 600.

**2. Appeal and Error §§ 19, 31f—**

The Supreme Court can judicially know only what appears of record, and where the transcript fails to contain the record proper the appeal will be dismissed, since the record is insufficient to establish the jurisdiction of the Supreme Court or put it in efficient connection with the court below.

APPEAL by movant, R. O. Abernethy, from *Alley, J.*, at November Term, 1936, of CATAWBA.

Motion made at September Term, 1936, to vacate order entered at July Term, 1936, on ground of excusable neglect. Motion denied. Movant appeals.

*R. O. Abernethy in propria persona, movant, appellant.*
*E. B. Cline and Charles W. Bagby for defendants, appellees.*

STACY, C. J. The matter was on the motion docket for hearing at the July Term, 1936. On Wednesday of the term, it was announced in open court that motions would be heard the following day. His honor finds that "the plaintiff R. O. Abernethy was actually present in court on Thursday morning." Upon this fact being made to appear, the court intimated that he would not be justified in setting aside the order on the ground of excusable neglect, *Dail v. Hawkins, ante,* 283, but that he would grant the plaintiff until the next term of court to make further showing, if he could, "why the order should be set aside for alleged excusable neglect." At the November Term, "the plaintiff R. O. Abernethy argued the matter at length, but presented no further or other reason for setting aside the former order"; whereupon the motion was dismissed and the matter "ordered to be dropped from the docket." The judgment accords with the decisions on the subject. C. S., 600; *Carter v. Anderson,* 208 N. C., 529, 181 S. E., 750; *Kerr v. Bank,* 205 N. C., 410, 171 S. E., 367; *Land Co. v. Wooten,* 177 N. C., 248, 98 S. E., 706; *Roberts v. Allman,* 106 N. C., 391, 11 S. E., 424.

But for another reason the appeal must be dismissed. The record proper has been omitted from the transcript on appeal. *Bank v. Mc-*

*Cullers, ante,* 327. The necessity of an adequate record "to establish the jurisdiction of this Court and put it in efficient relation and connection with the court below" (*Walton v. McKesson,* 101 N. C., 428, 7 S. E., 566), is well illustrated by the instant case, for, in one of the briefs, reference is made to the transcript in *Hoke v. Trust Co.,* reported in 207 N. C., 604, 178 S. E., 109, as containing a full recital of the facts, but it nowhere appears of record that the order, which movant seeks to vacate, was entered in the cited case, or that the cited case and the instant case are one and the same. We can know judicially only what appears of record. *Bank v. McCullers, supra; Tucker v. Bank,* 204 N. C., 120, 167 S. E., 495.

On the authorities cited, and others of similar import, the attempted appeal must be dismissed. *Riggan v. Harrison,* 203 N. C., 191, 165 S. E., 358; *Waters v. Waters,* 199 N. C., 667, 155 S. E., 564; *Pruitt v. Wood, ibid.,* 788, 156 S. E., 126.

Appeal dismissed.

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IN RE WILL OF LOVINA L. PLOTT, DECEASED.

(Filed 7 April, 1937.)

**1. Evidence § 32: Wills § 23c—Held: Testimony related to communication with decedent by interested party and was incompetent.**

In this caveat proceeding issues as to undue influence and mental capacity were submitted to the jury. A caveator interested in the result was permitted to testify to the effect that testarix had stated to him that propounders had forced her to leave the witness out of her will. The court stated that the evidence would be competent only to show mental capacity and the execution of the will. *Held:* The testimony related solely to the issue of undue influence, and testatrix' statement having been made more than a year after the execution of the will, did not constitute *pars res gestæ,* and the testimony was of a transaction or communication with a decedent prohibited by C. S., 1795, and the jury having answered the issue of undue influence in favor of caveators, its admission constitutes reversible error.

**2. Appeal and Error § 46—**

Where a new trial is awarded on one exception, other exceptions relating to matters not likely to arise upon a subsequent hearing need not be decided.

APPEAL by propounders from *McElroy, J.,* at August Term, 1936, of CABARRUS. New trial.

IN RE WILL OF PLOTT.

This was a proceeding to determine the issues raised by the caveat to the will of Lovina L. Plott. The caveat alleged mental incapacity and undue influence on the part of Henry Plott, a son of the testatrix.

The issues submitted to the jury and responses thereto were as follows:

"1. Was the execution of the paper writing purporting to be the last will and testament of Mrs. L. L. Plott procured by the fraud or undue influence of Henry Plott and family, as alleged in the caveat? A. 'Yes.'

"2. Did Mrs. L. L. Plott, at the time of the execution of the said paper writing, to wit, 12 August, 1933, have sufficient mental capacity to execute the same? A. .....

"3. Is the paper writing propounded, and every part thereof, the last will and testament of Mrs. L. L. Plott? A. 'No.'"

From judgment on the verdict setting aside the purported will, the propounders appealed.

*Hartsell & Hartsell and Crowell & Crowell for appellants.*

*Hiram P. Whitacre and Armfield, Sherrin & Barnhardt for appellees.*

DEVIN, J. The propounders assign as error the ruling of the court below in admitting, over their objection, the following evidence from the witness Zeb Plott, who was one of the caveators and interested in the result: "Q. What, if anything, did she (testatrix) tell you then with respect to making a will? The court: It would only be competent as it may tend to show the execution of the will and her ability to make a will. A. She asked us to move back to the old home place, said, 'Cause Henry and his family had made her will us out and she wanted us to go back to the old home place, she wanted to live with us and see that we got our part.'"

While the presiding judge stated this evidence would only be competent on the question of the capacity of the deceased to make a will, it is apparent that it related solely and directly to the question of undue influence, and was incompetent. The decisions of this Court are to the effect that it is not competent for a witness who is a party, or interested in the result, to testify to declarations of the deceased, whose will is under attack, when the issue is as to undue influence. *Linebarger v. Linebarger,* 143 N. C., 229; *In re Fowler,* 159 N. C., 203; *In re Chisman,* 175 N. C., 420; *Bissett v. Bailey,* 176 N. C., 43; *In re Hinton,* 180 N. C., 211; *Honeycutt v. Burleson,* 198 N. C., 37; *In re Yelverton,* 198 N. C., 749; C. S., 1795.

It further appears that the declaration of the testatrix testified to was not a part of the *res gestæ* but was made a year after the will was executed.

The evidence objected to was material to the issue upon which the case was decided, was prejudicial to the propounders, and its admission constitutes reversible error necessitating a new trial.

This disposition of the case renders unnecessary a consideration of the other questions presented by the appeal, as they may not arise on another trial.

New trial.

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J. B. DAWSON v. ADA DAWSON.

(Filed 7 April, 1937.)

**1. Divorce § 11—**

Upon application for alimony *pendente lite* the trial court is required to find the facts in order that the correctness of its ruling may be determined on appeal, and the granting of the application solely upon a finding that defendant was the owner of certain properties is error. C. S., 1666.

**2. Divorce § 13—**

Alimony without divorce, C. S., 1667, may be had only by independent suit, and application for alimony *pendente lite* may not be treated as application for alimony under this section.

APPEAL by plaintiff from *Spears, J.*, at November Term, 1936, of ONSLOW.

Civil action for divorce on ground of abandonment and two years separation.

The complaint alleges that plaintiff and defendant were married 22 October, 1921, and lived together as man and wife until July, 1934, when defendant abandoned the plaintiff without just cause, since which date they have not lived together; that the plaintiff is the injured party and has been a resident of North Carolina for more than twelve months next preceding the institution of this action.

Defendant filed answer, denied the material allegations of the complaint, except the fact of marriage, and set up, by way of further defense that on 2 November, 1935, "plaintiff demanded that the defendant leave his home and never to return," since which time plaintiff has failed and refused to contribute anything to her support; that defendant is without means to defend this action, whereas plaintiff owns considerable property; wherefore, defendant prays that the action be dismissed, and that she be awarded alimony *pendente lite* and counsel fees.

Upon motion for alimony *pendente lite* and allowance for counsel fees, the court found that the plaintiff was the owner of certain properties and ordered that he pay alimony in the sum of $15.00 per month and $50.00 counsel fees. From this order the plaintiff appeals, assigning error.

*D. E. Henderson and G. W. Phillips for plaintiff, appellant.*
*No counsel appearing for defendant.*

STACY, C. J. The defendant's motion for alimony *pendente lite* and counsel fees is not supported under C. S., 1666, either by sufficient allegations or adequate factual findings. *Vaughan v. Vaughan, ante,* 354; *Horton v. Horton,* 186 N. C., 332, 119 S. E., 490; *White v. White,* 179 N. C., 592, 103 S. E., 216; *Webber v. Webber,* 79 N. C., 572; *Miller v. Miller,* 75 N. C., 70. It was said in *Moore v. Moore,* 130 N. C., 333, 41 S. E., 943, that upon application for alimony *pendente lite* under C. S., 1666, "whether the wife is entitled to alimony is a question of law upon the facts found," reviewable on appeal by either party, and "the court below must find the facts." *Caudle v. Caudle,* 206 N. C., 484, 174 S. E., 304. Not until the facts are found can we determine the correctness of the ruling as a matter of law. *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9.

Nor can the order be upheld as upon an application for alimony without divorce under C. S., 1667. This section "only applies to independent suits for alimony." *Skittletharpe v. Skittletharpe,* 130 N. C., 72, 40 S. E., 851; *Reeves v. Reeves,* 82 N. C., 348.

Error.

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SADIE B. BRANTLEY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 April, 1937.)

**1. Carriers § 21—Evidence of carrier's negligent injury to passenger held sufficient to be submitted to the jury.**

Evidence that plaintiff, when a child of twelve years, was put on a train by her uncle and placed in charge of the conductor, who seated her by a window, which he opened for her himself, that thereafter, upon a sudden slowing of the train, the window fell on plaintiff's arm and injured it, *is held* sufficient to be submitted to the jury in the plaintiff's action against the railroad upon reaching her majority.

**2. Appeal and Error § 52—Motion for new trial for newly discovered evidence is granted in this case in the Supreme Court.**

Defendant's motion in the Supreme Court for a new trial for newly discovered evidence, based upon verified statements of a number of prospective witnesses whose testimony it alleges it did not discover until after the trial and was unable to make use of at the trial, is granted in this case, without intimation as to the sufficiency of evidence or discussion of the facts in accordance with the rule of the Court in such instances.

APPEAL by defendant from *Barnhill, J.,* at November Term, 1936, of EDGECOMBE. New trial.

This was an action for damages for an injury to plaintiff's hand and arm, alleged to have been occasioned by the falling of the window sash in defendant's passenger coach, due to the negligence of the defendant.

Plaintiff alleged and offered evidence tending to show that 7 July, 1926, she became a passenger on defendant's train from Rocky Mount, North Carolina, to Tarboro, North Carolina, and that being then 12 years of age, she was put in charge of the conductor, who seated her in the coach and raised the window beside the seat; that as the train approached Tarboro, the train slackened speed suddenly, and the window fell, striking her wrist and injuring it; that thereafter the pain in her wrist continued and the injury progressed until her hand and arm became withered, deformed, and useless; that this action was instituted upon the plaintiff's coming of age.

The defendant denied that plaintiff was a passenger on its train as alleged, or that she was injured, and denied all allegations of negligence. Defendant offered evidence tending to show that plaintiff's hand and wrist suffered from some disease, injury, or deformity prior to 1926, and that the injury complained of was not due to any act or omission of the defendant.

Upon issues submitted, the jury for their verdict found that plaintiff was injured by the negligence of the defendant and awarded damages in the sum of $12,000.

From judgment on the verdict, defendant appealed.

*Fountain & Fountain and H. H. Philips for plaintiff.*
*Thos. W. Davis, V. E. Phelps, and Spruill & Spruill for defendant.*

DEVIN, J. The appellant assigns as error the denial of its motion for judgment of nonsuit, interposed at the conclusion of plaintiff's evidence and renewed at the close of all the evidence.

The ruling of the trial court on this motion must be sustained. The evidence offered would seem to entitle the plaintiff to have her case submitted to the jury. This is in accord with the decision of this Court in *Saunders v. R. R.*, 185 N. C., 289. While in the *Saunders case, supra,* recovery for a similar injury was denied, the evidence here presented brings the instant case within the principle there set forth and sustains the ruling of the court on the motion of nonsuit. Here the plaintiff, a child of twelve years, was placed under the care of the train conductor by her uncle. The conductor ushered her into the coach and gave her a seat by a window and himself raised the sash. The fact that, under these circumstances, shortly thereafter, following a sudden slackening of the train, the window sash fell and injured the plaintiff, would seem to permit the inference of negligence for the reasons stated in *Saunders*

*v. R. R., supra,* and the authorities there cited. The charge of the court to the jury was free from error.

Since the argument of the case, the defendant has filed motion for a new trial on the ground of newly discovered evidence, based upon verified statements from a number of prospective witnesses whose testimony it alleges it did not discover until after the trial, and of which it was unable to make use in its defense. *Hilton v. Ins. Co.,* 195 N. C., 874; *Johnson v. R. R.,* 163 N. C., 453; *Mottu v. Davis,* 153 N. C., 160.

After due consideration of the motion and affidavits, in connection with the evidence adduced at the trial, and without any intimation as to the sufficiency or the probative effect of the testimony, we are of the opinion that a new trial should be awarded by reason of newly discovered evidence.

In accord with the rule of this Court stated in *Herndon v. R. R.,* 121 N. C., 498, and *Crenshaw v. Street Railway Co.,* 140 N. C., 192, the facts on the motion are not discussed.

New trial.

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MATTIE L. ROWLAND v. HOME BUILDING & LOAN ASSOCIATION.

(Filed 7 April, 1937.)

**Deeds § 13b—Grantee held to take fee simple under rule in Shelley's case.**

A deed to L., "the said party of the second part, for and during the term of his natural life," and at his death "said lands shall descend to his heirs at law or to such collateral relations as may be entitled to same upon failure of issue," *is held* to convey the fee simple title to L. under the rule in *Shelley's case,* the controlling principle for the operation of the rule being the nature of the second estate and not the estate conveyed to the first taker, and the *habendum* in this case not altering the course of descent, but casting the estate on those who would take in the character and quality of heirs of the first taker.

APPEAL by defendant from *Williams, J.,* at February Term, 1937, of BEAUFORT.

Controversy without action, submitted on an agreed statement of facts.

The defendant, being under contract to lend plaintiff $2,200, to be secured by deed of trust on real estate, has declined to make said loan on the ground that title to the security offered is defective.

The court, being of opinion that plaintiff holds fee simple title to security offered, rendered judgment accordingly, from which the defendant appeals, assigning error.

*H. C. Carter for plaintiff, appellee.*
*MacLean & Rodman for defendant, appellant.*

STACY, C. J. On the hearing, the sufficiency of the title offered was properly made to depend upon whether deed from Mary A. Laughinghouse to T. L. Laughinghouse for the *locus in quo* conveys a fee simple or only a life estate.

The *habendum* is "to him, the said party of the second part, for and during the term of his natural life," and at his death "said lands shall descend to his heirs at law or to such collateral relations as may be entitled to same upon failure of issue." We agree with the trial court that by virtue of the operation of the rule in *Shelley's case,* which obtains in this jurisdiction, not only as a rule of law, but also as a rule of property, the grantee in said deed took a fee simple title to the property thereby conveyed. *Whitehurst v. Bowers,* 205 N. C., 541, 172 S. E., 180; *Morehead v. Montague,* 200 N. C., 497, 157 S. E., 793; *Doggett v. Vaughan,* 199 N. C., 424, 154 S. E., 660; *Bank v. Dortch,* 186 N. C., 510, 120 S. E., 60; *Martin v. Knowles,* 195 N. C., 427, 142 S. E., 313; *Parrish v. Hodge,* 178 N. C., 133, 100 S. E., 256; *Nobles v. Nobles,* 177 N. C., 243, 98 S. E., 715. "It (The Rule) applies when the same persons will take the same estate, whether they take by descent or purchase; in which case they are made to take by descent"—*Brown, J.,* in *Tyson v. Sinclair,* 138 N. C., 23, 50 S. E., 450. "In determining whether the rule in *Shelley's case* shall apply, it is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. The material inquiry is, What is taken under the second devise? If those who take under the second devise take the same estate, they would take as heirs or heirs of his body, the rule applies"—*Perley, C. J.,* in *Crockett v. Robinson,* 46 N. H., 454. *Welch v. Gibson,* 193 N. C., 684, 138 S. E., 25.

It will be observed that the limitation after the death of the grantee does not change the course of descent. "The law will not treat that as an estate for life which is essentially an estate of inheritance, nor permit anyone to take in the character of heir unless he takes also in the quality of heir." *Steacy v. Rice,* 27 Pa. St., 95, 65 Am. Dec., 447. In other words, as an *heir* is one upon whom the *law* casts an estate at the death of the ancestor (II Blackstone, ch. 14), and as it is necessary to consult the law to find out who the heir of the ancestor is, the law, speaking through the rule in *Shelley's case,* in substance, says: "He who would thus take in the character of heir must take also in the quality of heir; that is, as *heir* by descent under the law and not by purchase under the instrument." *Yelverton v. Yelverton,* 192 N. C., 614, 135 S. E., 632.

Affirmed.

STATE v. DON EVANS.

(Filed 7 April, 1937.)

**Abortion § 7—Held: There was no prejudicial error in the admission or exclusion of evidence in this prosecution for abortion.**

In a prosecution for violating C. S., 4226 and 4227, the admission of evidence offered by the State relative to the taking of an anæsthetic by deceased at the time of taking the medicine which the evidence tended to show defendant had procured for her with unlawful intent, is immaterial and not prejudicial to defendant, and the exclusion of his evidence that at the time deceased was suffering with a disease which facilitated the abortion is not error, such evidence being irrelevant to the issue.

APPEAL by defendant from *Sinclair, J.*, at August Term, 1936, of PITT. No error.

This is a criminal action in which defendant was tried on an indictment in which he was charged in the first count with a violation of C. S., 4226, in the second count with the violation of C. S., 4227, and in the third count with manslaughter.

When the action was called for trial, the solicitor for the State announced to the court that he would not prosecute the defendant on the third count in the indictment.

There was a verdict that the defendant is guilty on both the first and second counts in the indictment.

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 errors in the trial.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Albion Dunn for defendant.*

CONNOR, J. The evidence at the trial of this action was sufficient to support the verdict that the defendant is guilty on both the first and second counts in the indictment. The evidence was properly submitted to the jury as sufficient to show that on or about 7 August, 1936, in Pitt County, North Carolina, the defendant willfully, unlawfully, and feloniously advised or procured the young woman named in the indictment, who was then pregnant or quick with child, to take medicine with intent thereby to destroy the child, and also with intent thereby to procure a miscarriage. C. S., 4226, and C. S., 4227. The defendant did not contend to the contrary at the trial. Nor does he so contend on this appeal to this Court. He did not move at the close of all the evidence at the trial that the action be dismissed. C. S., 4643.

The defendant's contentions on his appeal to this Court that there was error in the admission by the court of evidence offered by the State at the trial, and in the exclusion of evidence offered by him, cannot be sustained.

The admission of evidence offered by the State, over the objection of the defendant and subject to his exception had little, if any, probative value with respect to the issue involved in the trial. It was immaterial whether or not the deceased took an anæsthetic at the time the abortion was committed. All the evidence showed that she took medicine with intent to produce an abortion, and that the defendant was with her both before and after she took the medicine, and knew her purpose in taking the medicine. The evidence was sufficient to support an inference by the jury that the defendant advised or procured the deceased to take the medicine with an unlawful intent.

Evidence offered by the defendant tending to show that the deceased was suffering from a disease which facilitated the abortion was not relevant to the issue involving the defendant's guilt as charged in the indictment. There was no error in the exclusion of such evidence, upon objection by the State.

The defendant's contentions that there were errors in the charge of the court to the jury cannot be sustained. The charge appears in the record. The judge fully complied with the mandatory provisions of the statute. C. S., 564. *S. v. Graham,* 194 N. C., 459, 140 S. E., 26.

The judgment is affirmed.

No error.

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NORTH CAROLINA JOINT STOCK LAND BANK OF DURHAM v. H. V. HARDY AND A. G. PHELPS,

and

H. V. HARDY AND WIFE, EUNICE V. HARDY, v. NORTH CAROLINA JOINT STOCK LAND BANK AND W. G. BRAMHAM AND T. L. BLAND, RECEIVERS OF THE FIRST NATIONAL TRUST COMPANY OF DURHAM, INC.

(Filed 7 April, 1937.)

**1. Mortgages § 39c—Lease by trustor after foreclosure and judgment in ejectment against him held to estop him from attacking validity of sale.**

Where, after the foreclosure of a deed of trust, the trustor leases the land from the *cestui,* who purchased same at the sale, and thereafter judgment is entered, unappealed from, ordering the trustor to surrender

possession, the trustor is estopped from attacking the validity of the sale on the ground that it was conducted by an agent of the *cestui*, both by the lease and the judgment.

**2. Pleadings § 22—**

Where plaintiff moves to amend his complaint almost a year after the filing of the complaint, and after defendant had moved for judgment on the pleading, an order of the trial court denying the motion to amend is without error.

APPEAL by H. V. Hardy and wife from *Sinclair, J.*, at December Term, 1936, of GREENE. Affirmed.

The two cases were by consent consolidated for the purpose of motion. From judgment in favor of the North Carolina Joint Stock Land Bank, H. V. Hardy and wife appealed.

*J. B. James and J. S. Patterson for plaintiff, appellee.*
*Walter G. Sheppard and Robt. H. Rouse for defendants, appellants.*

PER CURIAM. Judgment was rendered on the pleadings. The undisputed material facts appearing therefrom may be concisely stated as follows:

On 21 October, 1924, H. V. Hardy and wife executed a deed of trust on described lands, of which H. V. Hardy was then the owner, to the First National Trust Company, trustee, to secure an indebtedness of $20,000 due the North Carolina Joint Stock Land Bank. Thereafter, the name of the trustee was changed by charter amendment to the First National Company, and later by judgment of the United States District Court for the Eastern District of North Carolina receivers were appointed for said First National Company. On 21 February, 1931, default having been made in the payment of the debt secured, the lands were sold under foreclosure, one J. C. Exum, as agent of the receivers, conducting the sale, and said land bank became the purchaser at the bid price of $12,000, and deed to said bank was executed and delivered. H. V. Hardy remained on the land under oral agreement for the payment of rent to the land bank for the remainder of the year 1931, and on 8 February, 1932, executed a written lease for said lands for the year 1932 from the land bank as landlord, and continued in possession as tenant, paying rent therefor, the lease involving expenditures on part of the bank for farm machinery. In February, 1933, the said land bank declined to renew the lease, and upon refusal of H. V. Hardy to vacate, instituted summary ejectment proceedings, which resulted, on appeal, in judgment by Frizzelle, Judge, at December Term, 1933, of Greene Superior Court, that H. V. Hardy was estopped by reason of the lease to dispute the title of the land bank, and that he vacate the lands. No

appeal was taken from the Frizzelle judgment. In 1934 the land bank leased the lands to A. G. Phelps, who permitted Hardy to remain on the land.

On 11 February, 1935, H. V. Hardy still refusing to vacate, action was instituted by the land bank against Hardy and Phelps to recover possession of said lands.

On 8 February, 1936, H. V. Hardy and wife instituted suit against the land bank and the receivers of the First National Company to set aside the sale and deed to the land bank, alleging that the foreclosure was conducted by an agent for the land bank, and that by reason of the purchase by the land bank at such sale the relation of mortgagor and mortgagee still subsisted, and asked for an accounting for rents and damages.

At December Term, 1936, of the Superior Court of Greene County, the two actions were consolidated for the purpose of motion for judgment on the pleadings. After said motion was made and pending the hearing, H. V. Hardy and wife moved to amend their complaint to allege fraud and collusion on the part of the land bank and the receivers. The motion for judgment on the pleadings was allowed and it was adjudged that the land bank was owner of the land and H. V. Hardy and A. G. Phelps were required to surrender possession.

It was further adjudged that the motion to amend the complaint be denied, the court finding that the complaint had been on file since February, 1936, and that the motion to amend was made after the motion for judgment on the pleadings.

It is apparent that judgment was properly rendered on the facts shown by the pleadings, and that under the rule laid down in *Bunn v. Holliday,* 209 N. C., 351, and *Hill v. Fertilizer Co.,* 210 N. C., 417, H. V. Hardy was precluded by his lease of the land under the written agreement, and the payment of rent to the land bank therefor for the years 1931 and 1932, as well as by the Frizzelle judgment that he vacate the lands, from contesting the title of the land bank under the foreclosure sale and deed.

The facts here presented are not such as to invoke the principle referred to in *Eubanks v. Becton,* 158 N. C., 230.

As was said in *Bunn v. Holliday, supra:* "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; *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."

We find no error in the order denying the motion to amend the complaint.

Judgment affirmed.

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NOLAND COMPANY, INC., v. J. W. JONES, W. P. JONES, VERA JONES, AND L. O. WELCH.

(Filed 7 April, 1937.)

**1. Frauds, Statute of, § 5—Evidence held for jury on question of financial interest of person promising to answer for debt.**

The evidence disclosed that defendant was engaged in business and during a number of years plaintiff sold goods to him, that thereafter defendant told plaintiff's agent he wished plaintiff to continue to ship merchandise upon order of his son, that the agent replied that his company would ship on open account to defendant and son, and that they would look to defendant for goods sold on open account, that thereafter a receipt for payment on account was made out in the name of defendant and son company, and that defendant's name appeared over the door of the store throughout the transactions, and that the first notice plaintiff had that defendant was not in business was a telephone call, after the goods in question had been shipped, notifying plaintiff not to ship any more goods on open account. *Held:* The evidence was sufficient to be submitted to the jury on the question of whether defendant had an interest in the purchase of the goods so as to take the case out of the operation of the statute of frauds, C. S., 987.

**2. Trial § 33—**

A misstatement of the contentions of a party will not be held for error when the injured party fails to bring the matter to the attention of the trial court in apt time.

APPEAL by defendant J. W. Jones from *Finley, Emergency Judge,* and a jury, at September Term, 1936, of CLEVELAND. No error.

This is an action brought by plaintiff against defendants to recover $251.97, for goods shipped by plaintiff to J. W. Jones & Son—twelve shipments from 11 October, 1934, to 14 November, 1934, inclusive.

The issues submitted to the jury were as follows:

"1. What amount, if any, is J. W. Jones indebted to the plaintiff?

"2. What amount, if any, is W. P. Jones indebted to the plaintiff?"

The jury answered both issues in favor of plaintiff, "$251.97, with interest from 13 January, 1935." Judgment was rendered on the verdict for plaintiff.

It is not denied by W. P. Jones that he is liable to plaintiff, but the controversy was as to the liability of J. W. Jones. The defendant J. W. Jones made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

*Quinn, Hamrick & Hamrick for plaintiff.*
*E. A. Harrill for defendant J. W. Jones.*

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence, the defendant J. W. Jones made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we see no error.

The evidence on the part of plaintiff succinctly was as follows: For several years prior to the time the transaction in question took place, J. W. Jones had been operating a plumbing business in Kings Mountain. His name was on the front of the store and remained there throughout the transactions in question. Plaintiff had sold J. W. Jones merchandise prior to this time. A shipment to J. W. Jones had been returned in June, 1934, and plaintiff's manager, C. J. Lauer, went to see him about same, J. W. Jones being ill at the time. In August, plaintiff's manager, C. J. Lauer, went to see the defendant J. W. Jones again with reference to shipping him merchandise. When C. J. Lauer saw the defendant J. W. Jones in August, 1934, the following facts existed: W. P. Jones was running the business; C. J. Lauer was only slightly acquainted with W. P. Jones; plaintiff was shipping to J. W. Jones C.O.D.; J. W. Jones made the remark indicating that he desired plaintiff to continue to ship goods on the order of W. P. Jones; plaintiff's manager, C. J. Lauer, then said, "I will ship on open account to J. W. Jones & Son." J. W. Jones made no reply to this, other than the statement, "You won't lose anything by it." Pursuant to this conversation, goods were ordered by W. P. Jones and shipped by plaintiff to "J. W. Jones & Son." These goods were shipped C.O.D., from 21 August, 1934, to 11 September, 1934; goods were then shipped to "J. W. Jones & Son," on open account; the first shipment on open account was 11 October, 1934, the last on 14 November, 1934; an invoice was received in Kings Mountain within a day or two after each shipment, and each invoice was made out to "J. W. Jones & Son"; these invoices were received and noted by J. W. Jones' son and daughter. After 17 November, 1934, J. W. Jones called plaintiff over telephone and notified plaintiff not to ship any more goods on open account to J. W. Jones & Son; after this no more goods were shipped. Plaintiff never received any notice from

anybody other than the telephone call. No notice was therefore given plaintiff that J. W. Jones had ceased to do business.

A receipt in the record is as follows: "Receipt—Branch, Spartanburg, S. C., Date 11/17/1934. Received of J. W. Jones & Son $60.00—Sixty and No/100 Dollars. For: On account. Noland Company, Inc., By: J. R. Turpin, Cashier."

The goods in controversy were sold from 11 October, 1934, to 14 November, 1934, inclusive. The payment of $60.00 was made on 17 November, 1934. After this payment, defendant W. P. Jones testified, in part: "He told them if they sold anything else on open account they would look to me for it." The defendant J. W. Jones contends that the statute of frauds (N. C. Code, 1935 [Michie], section 987) is applicable to this case. Under all the facts and circumstances we cannot so hold. We think the case of *Taylor v. Lee,* 187 N. C., 393-4, in many respects similar.

Taking the language of J. W. Jones, before the goods were sold and delivered to J. W. Jones & Son, the telephone message after they were sold, and all the surrounding circumstances and setting of the parties, the evidence was sufficient to be submitted to the jury to determine.

The court below charged the jury: "Now, the plaintiff contends, on account of the situation existing there prior to this conversation, that J. W. Jones having been in the business and having a storehouse and having his name up there and holding himself out to the public in the mercantile business that he and everybody else had a right to assume that he was still in the mercantile business until he had gone out of business by publishing notice to that effect, and that when he went to him and had this conversation with him that he was justified in assuming from the past history and surrounding circumstances that he was still in the business, and when he told him he was going to charge it to J. W. Jones & Son; that when he said nothing that he meant yes, that silence gives consent, and that that is the only logical conclusion you could come to from what took place on that occasion. Therefore, plaintiff contends you ought to answer the first issue '$251.97, with interest from 13 January, 1935.'"

The defendant J. W. Jones excepted and assigned error to the above excerpt from the charge—that it impinged C. S., 564. It will be noted that this was a contention, and it is too well settled that this is waived by not calling it to the attention of the court at the time. *S. v. Sinodis,* 189 N. C., 565 (571).

For the reasons given, we find

No error.

IDA M. GILBERT, BY HER NEXT FRIEND, BERTHA GILBERT SMITH, v. D. W. WEST.

(Filed 7 April, 1937.)

**1. Cancellation of Instruments § 14—Where deed is set aside consideration therefore should be credited to rent for which grantee is liable.**

Where a deed is set aside upon the verdict of the jury establishing mental incapacity of the grantor of which the grantee had knowledge and undue influence of the grantee, the grantee is entitled to have the consideration paid for the deed credited to the rental value of the property during his occupancy, since the object of the law is to put the parties *in statu quo*, and not to punish the grantee for his wrongdoing.

**2. Same: Betterments § 4—Where deed is set aside for undue influence, grantee is not entitled to recover for improvements.**

Where a deed is set aside upon the verdict of the jury establishing mental incapacity of the grantor of which the grantee had knowledge and for undue influence exerted by the grantee, the grantee is not entitled to credit for the amount expended by him in making permanent improvements on the land while he was in possession under the deed.

APPEAL by defendant from *Sinclair, J.*, at October Term, 1936, of CRAVEN. Modified and affirmed.

This is an action for the cancellation of a deed executed by the plaintiff purporting to convey to the defendant the life estate of the plaintiff in the land described in the complaint, for possession of said land, and for damages.

On 28 June, 1935, the plaintiff was the owner of an estate for her life in the land described in the complaint. The defendant was the owner of said land in fee, subject to the life estate of the plaintiff. On said day, the plaintiff executed a deed purporting to convey to the defendant her life estate in said land.

The defendant entered into possession of the land described in the complaint under and by virtue of the deed executed by the plaintiff, and was in such possession at the date of the commencement of this action. While in such possession, the defendant made permanent improvements on said land.

The issues arising upon the pleadings and submitted to the jury were answered as follows:

"1. Did the plaintiff have sufficient mental capacity to execute the paper writing in controversy? Answer: 'No.'

"2. If not, did the defendant D. W. West have knowledge of such mental incapacity? Answer: 'Yes.'

"3. Was the execution procured by undue influence of the defendant? Answer: 'Yes.'

"4. What was the rental value of the land described in the paper writing for the year 1935? Answer: '$100.00.'

"5. What consideration did the defendant D. W. West, pay for the execution of said deed? Answer: '$25.00.'

"6. What is the value, if any, of permanent improvements made on said land by the defendant? Answer: '$500.00.'

"7. What would be the rental value of the land for the year 1936 if it had remained in the same condition it was in before the improvements were placed upon it by the defendant? Answer: '$100.00.'"

On the verdict it was ordered, adjudged, and decreed by the court that the deed executed by the plaintiff to the defendant on 28 June, 1935, be and the same was canceled.

It was further considered, ordered, and adjudged by the court that the plaintiff recover of the defendant possession of the land described in the complaint as of 1 January, 1937.

It was further considered, ordered, and adjudged by the court that the plaintiff recover of the defendant as damages the sum of $200.00, and the costs of the action.

The defendant excepted to the judgment and appealed to the Supreme Court, assigning error in the judgment.

*H. P. Whitehurst and Ward & Ward for plaintiff.*

*R. A. Nunn for defendant.*

PER CURIAM. We are of opinion that on the verdict at the trial of this action, the defendant is entitled to have the sum paid by him to the plaintiff as the consideration for her deed to him, to wit, $25.00, applied as a credit on the amount found by the jury as the rental value of the land described in the complaint for the years during which the defendant was in possession of said land, to wit: 1935 and 1936.

When a court, in the exercise of its equitable jurisdiction, cancels a contract or deed, it should seek to place the parties *in statu quo,* as nearly as this can be done, for while one party to the contract or deed may have been wronged by the other, the court does not undertake by its judgment to punish the wrongdoer. The wrong is ordinarily adequately avenged when the *status quo* is restored. This principle is recognized by *Walker, J.,* in *Hodges v. Wilson,* 165 N. C., 323, 81 S. E., 340. It is applicable in the instant case.

There is no error in the judgment denying the defendant credit for the amount expended by him in making permanent improvements on the

land while he was in possession under a deed from the plaintiff which he had procured from the plaintiff by undue influence, when he knew that she was without sufficient mental capacity to execute a deed. The instant case is distinguishable from *Hinton v. West,* 210 N. C., 712, 188 S. E., 410.

The judgment as modified in accordance with this opinion is affirmed.

Modified and affirmed.

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MRS. GAYNELL HAWKINS, BY HER NEXT FRIEND, MRS. NEAL CAMP, v. J. A. MAUNEY.

(Filed 7 April, 1937.)

**Damages § 12—**

Where plaintiff, a married minor, introduces evidence that she nevertheless became liable on a note given for money borrowed and used to pay for medical attention for her after the injury, the evidence is sufficient to support the recovery of such item by her as an element of her damages.

APPEAL by defendant from *Alley, J.,* at October Term, 1936, of LINCOLN. No error.

This is an action to recover damages for personal injuries which the plaintiff suffered as the result of a collision during the nighttime, on a highway in Lincoln County, North Carolina, between an automobile driven by her husband in which she was riding and an automobile driven by the defendant.

At the date of the commencement of the action, the plaintiff was under the age of twenty-one. The action was begun and prosecuted in her behalf by her duly appointed next friend.

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

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

"2. What damages, if any, is the plaintiff entitled to recover? Answer: '$3,800.'"

From judgment that plaintiff recover of the defendant the sum of $3,800, with interest and cost, the defendant appealed to the Supreme Court.

*Jonas & Jonas and H. A. Jonas for plaintiff.*

*W. H. Childs and J. Laurence Jones for defendant.*

PER CURIAM. Only one exception appears in the record in this appeal. The defendant excepted to an instruction by the court to the jury with respect to the second issue. With respect to this issue, the court instructed the jury in effect that they should include in their answer to the second issue any sum which they should find from the evidence was expended by the plaintiff for medical care and nursing which she received because of her injuries.

There was evidence at the trial tending to show that the plaintiff borrowed from the uncle of her husband the sum of $142.50, which she paid to the physician who attended her while she was in the hospital because of her injuries, and that she, as principal, and her husband and mother, as sureties, executed a note for that sum payable to her husband's uncle. This note has not been paid. There was no evidence tending to show that the sum of $142.50 was an unreasonable or excessive charge for the services rendered to the plaintiff by her physician.

The plaintiff, although a minor and a married woman, assumed personal liability for the expenses incurred by her for medical care and nursing. For this reason she was entitled to recover of the defendant the sum expended by her for that purpose. There was no error in the instruction. See *Bitting v. Goss,* 203 N. C., 424, 166 S. E., 302; *Cole v. Wagner,* 197 N. C., 692, 150 S. E., 339; and *Bowen v. Daugherty,* 168 N. C., 242, 84 S. E., 265. The judgment is affirmed.

No error.

FRANK ROGERS, BY HIS NEXT FRIEND, H. W. ROGERS, v. DR. J. D. FREEMAN.

(Filed 7 April, 1937.)

**Appeal and Error § 39—**

A new trial will not be granted for error that is not prejudicial and material, amounting to a denial of some substantial right, and *held* in this case no prejudicial or material error was made to appear.

STACY, C. J., dissents.

APPEAL by plaintiff from *Alley, J.,* and a jury, at January Special Term, 1937, of SAMPSON. No error.

This is an action for actionable negligence (malpractice) brought by plaintiff against defendant to recover damages. The action is brought by Frank Rogers, a minor, by his next friend, H. W. Rogers, his father. Frank Rogers was injured while playing in the yard with

children—in some way a baby two years of age got hold of a pair of scissors and stuck them in his left eye. This was on 8 July, 1929. The boy, who was five years old at the time, was immediately taken to the defendant in Wilmington, N. C., who was an eye, ear, nose, and throat specialist. From that time until 1 October, 1929, Frank Rogers was a patient of defendant. It is alleged in the complaint that defendant was guilty of malpractice, in that he negligently treated Frank Rogers' left eye, which became blind, and further that he negligently failed to remove the left eye, and in consequence Frank Rogers lost the sight of his right eye and is now totally and permanently blind in both eyes. That on account of the negligent acts and omissions of the defendant and the failure of the defendant to exercise and use due and reasonable care and skill in the treatment of Frank Rogers, he became totally and permanently blind, and demands damages.

The defendant in his answer denied the material allegations of the complaint, and alleged that he used every precaution and care that was possible in the treatment of Frank Rogers. That he did not in any way or manner neglect his patient in administering said treatment, and that further, H. W. Rogers, the father of Frank Rogers, was negligent and careless in not carrying out his instructions and in not informing him of the condition of the child's eye; that he did everything possible in the science of medicine for the proper treatment of the patient. That an action was heretofore instituted and at the August Term, 1932, of Duplin County Superior Court, at the close of plaintiff's evidence the court rendered judgment as of nonsuit. That this action was identical with the present action, which was brought some time afterwards. In the trial of this action the above judgment was not considered.

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

"1. Was the injury to the plaintiff Frank Rogers caused by the negligence of the defendant, as alleged in the complaint? Answer: 'No.'

"2. What damages, if any, is the plaintiff Frank Rogers entitled to recover of the defendant? Unanswered."

Judgment was rendered on the verdict, plaintiff made numerous exceptions and assignments of error, and appealed to the Supreme Court.

*Sutton & Greene, Jesse A. Jones, and Butler & Butler for plaintiff.*

*Carr, James & LeGrand and Stevens & Burgwin for defendant.*

PER CURIAM. We have read with care the record and assignments of error made by plaintiff. We do not think that they can be sustained. Taking the record as a whole, we think there is no prejudicial or reversible error. The court below in the charge recited the evidence, gave the

contentions fairly for both sides, and charged the law applicable to the facts. The court fully set forth and defined burden of proof, negligence, and proximate cause. In fact, the charge, with additional instructions to the jury, comprises some 35 pages. We think the exceptions and assignments of error to the charge and to the admission and exclusion of evidence were not so material, if error, that would amount to prejudicial or reversible error.

It is well settled in this jurisdiction that verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right.

It would be hard to find a more pathetic case—a boy going through life blind in both eyes, when once he could see. The brief and argument of plaintiff were clearly and forcefully set forth, but we cannot on the entire record hold that there was prejudicial or reversible error. The jury were the triers of the facts, and decided with defendant that the injury was not caused by the negligence of defendant.

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

No error.

STACY, C. J., dissents.

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## STATE v. J. C. HOUSE.

(Filed 7 April, 1937.)

**1. Criminal Law § 81c—**

Where defendant is tried upon two counts and judgment is pronounced on a general verdict of guilty, the refusal of defendant's motion for judgment as of nonsuit on one count, there being no motion to nonsuit as to the other count, cannot be held for prejudicial error.

**2. Intoxicating Liquor § 9e—**

The instruction of the court upon the presumption from the possession of more than one gallon of whiskey *held* without error.

**3. Criminal Law § 53f—**

An exception to the statement of the contentions of the parfies will not be considered when no objection is noted at the time.

**4. Criminal Law § 56—**

Exception to the denial of a motion in arrest of judgment on the ground that the special term of court at which defendant was tried was not properly advertised held untenable on this record.

STATE *v.* HOUSE.

APPEAL by defendant from *Williams, J.*, at January Special Term, 1937, of PITT. No error.

The defendant was charged with maintaining a common nuisance, and also with the possession of whiskey for the purpose of sale.

From judgment pronounced on a general verdict of guilty, the defendant appealed.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Albion Dunn for defendant, appellant.*

PER CURIAM. Appellant assigns as error the denial of his motion for nonsuit on the charge of maintaining a nuisance, but this cannot be sustained, as there was evidence of possession of whiskey for the purpose of sale as charged in the second count, and the jury returned a general verdict of guilty. *S. v. Pace,* 210 N. C., 255; *S. v. Norris,* 206 N. C., 191; *S. v. McAllister,* 187 N. C., 400; *S. v. Switzer,* 187 N. C., 88. There was no motion for nonsuit on the second count.

The charge of the court as to the *prima facie* effect of possession of more than one gallon of whiskey was in substantial accord with the rule laid down in *S. v. Wilkerson,* 164 N. C., 431, and other cases. The charge was free from error.

The exception to the recital of certain testimony in the judge's charge is without merit, as the judge was stating the contentions of the parties and no objection was noted at the time. *S. v. Baldwin,* 184 N. C., 791. Furthermore, it appears the statement of the court to which exception was noted was substantially as testified, without objection, by witness Whitehurst.

The motion in arrest of judgment on the ground that the special term of court was not properly advertised is untenable on this record. The defendant appeared at a properly authorized special term of court, and when his case was called, entered his plea of not guilty, made no motion to quash, nor objection to the jury. The ruling in *S. v. Baxter,* 208 N. C., 90, is inapplicable here. *S. v. Boykin, ante,* 407.

There were no other assignments of error brought forward in defendant's brief or presented on the argument. In the trial we find

No error.

J. W. SUTTON v. GUY SUTTON, JOE SUTTON, MRS. NORA PATRICK, AND FRANK WOOTEN, TRUSTEE.

(Filed 7 April, 1937.)

**Tenants in Common § 6—**

One tenant in common, under obligation to discharge an encumbrance on the land, may not procure a foreclosure sale thereunder and acquire, directly or indirectly, the title to the entire interest to the exclusion of his cotenant.

APPEAL by defendant Guy Sutton from *Sinclair, J.*, at September Term, 1936, of PITT. Affirmed.

Action to set aside foreclosure sale and deed, and also to have defendant Guy Sutton declared to hold one-half interest in the described land in trust for the plaintiff.

The defendants demurred (1) on the ground of misjoinder of parties and causes of action, and (2) that the complaint did not state facts sufficient to constitute a cause of action. Pending the hearing and before judgment, plaintiff took a voluntary nonsuit as to all defendants except Guy Sutton.

From judgment overruling demurrer as to him, defendant Guy Sutton appealed.

*H. C. Carter and J. H. Harrell for plaintiff, appellee.*
*Albion Dunn for Guy Sutton, defendant.*

PER CURIAM. The material allegations in the complaint setting forth a cause of action against the defendant Guy Sutton may be stated concisely as follows: That in 1926 the plaintiff J. W. Sutton, the father, and defendant Guy Sutton, the son, purchased as tenants in common certain land at the price of $16,300, the plaintiff paying one-half therefor in cash, and he and defendant Guy Sutton executed deed of trust on the land for the remaining one-half of the purchase price, which deed of trust the defendant Guy Sutton agreed to pay off and discharge; that defendant failed to pay off the deed of trust which represented his one-half of the purchase price; that plaintiff was adjudged *non compos mentis* in 1927, and remained in that condition until 1934, when he was adjudged sane; that while plaintiff was insane, defendant Guy Sutton instigated and procured the sale of the land under foreclosure for the purpose of depriving plaintiff of his interest in the land and acquiring the title to the entire interest therein in himself, and that defendant Guy Sutton thereupon took title from the purchaser at the foreclosure sale, upon the execution of a deed of trust on the land for the

purported sale price of $5,778, and now holds the said land to the exclusion of the plaintiff.

It is apparent that the facts alleged are sufficient to constitute a cause of action against the appellant and that the demurrer was properly overruled. One tenant in common, under obligation to discharge an encumbrance on the land, may not procure a foreclosure sale thereunder and acquire, either directly or indirectly, the title to the entire interest in the land to the exclusion of his cotenant. Equity will declare him to have purchased for the benefit of the other. *Bailey v. Howell,* 209 N. C., 712; *Gentry v. Gentry,* 187 N. C., 29; *Smith v. Smith,* 150 N. C., 81.

Affirmed.

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T. L. COX v. OAKDALE COTTON MILLS, INC.

(Filed 7 April, 1937.)

**Venue § 3—**

An action to recover damages to land caused by alleged wrongful obstruction of a river causing ponding of water on plaintiff's land, does not involve title to or any interest in land, and is transitory for the purposes of venue, and defendant's motion to remove to the county of its residence, where its land is situate upon which the obstruction was built, is properly refused.

APPEAL by defendant from *Alley, J.,* at February Term, 1937, of RANDOLPH. Affirmed.

This action was heard on the motion of the defendant made in apt time, for the removal of the action, as a matter of right, from the Superior Court of Randolph to the Superior Court of Guilford County, for trial.

The motion was denied and the defendant appealed to the Supreme Court, assigning error in the order denying its motion.

*J. Allen Austin and J. G. Prevette for plaintiff.*
*Roberson, Haworth & Reese for defendant.*

PER CURIAM. This is an action to recover damages for injuries suffered by the plaintiff, as the owner of land situate in Randolph County. The plaintiff is a resident of said county. The action was begun in the Superior Court of Randolph County.

The defendant is a resident of Guilford County. It owns land situate in said county. In apt time, C. S., 470, the defendant moved that the

action be removed from the Superior Court of Randolph County to the Superior Court of Guilford County, for trial, as a matter of right. C. S., 463.

It is alleged in the complaint that the injuries which the plaintiff has suffered were caused by the artificial obstruction by the defendant, on its land in Guilford County, of the water in a river which flows through the land of the defendant, and thence to and through the land of the plaintiff.

For purposes of venue, the action is transitory and not local. *Clay Co. v. Clay Co.*, 203 N. C., 12, 164 S. E., 341; *Causey v. Morris*, 195 N. C., 532, 142 S. E., 783. The action does not involve title to or any interest in land. There is, therefore, no error in the order denying the motion of the defendant. The order is

Affirmed.

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BERT L. BENNETT, JOE H. GLENN, JR., AND A. B. GLENN, TRADING AS QUALITY TRANSPORT COMPANY, v. SOUTHERN RAILWAY COMPANY; WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY; ATLANTIC AND YADKIN RAILWAY COMPANY; ATLANTIC COAST LINE RAILROAD COMPANY; ABERDEEN AND ROCKFISH RAILROAD COMPANY; HIGH POINT, RANDLEMAN, ASHEBORO, AND SOUTHERN RAILROAD COMPANY; YADKIN RAILROAD COMPANY; AND PIEDMONT AND NORTHERN RAILWAY COMPANY.

(Filed 28 April, 1937.)

**1. Pleadings § 15—**

A demurrer on the ground that the complaint fails to state a cause of action will not be sustained unless the complaint is wholly insufficient.

**2. Monopolies § 3—Individual may maintain action for damages caused by defendants' violation of statute against monopolies.**

Plaintiffs, carriers by truck, instituted this action alleging that defendant railroad companies, pursuant to an agreement and conspiracy between them, had reduced rates for transporting gasoline and kerosene, between certain points in the State, intending later to restore them after competition had been removed, and charged lower rates to certain points in the State, where there was competition, than to other points, without sufficient reason, with intent to injure plaintiffs. Defendants demurred on the ground that the alleged acts were criminal offenses which could be inquired into only by prosecution by the Attorney-General. *Held:* The right of action for damages is expressly conferred by C. S., 2574, and defendants demurrer was properly overruled.

**3. Same: Actions § 3—Damage sustained as result of defendants' violation of monopoly statute is not damnum absque injuria.**

An individual suing for damages caused by alleged monopolistic acts of defendants, C. S., 2563, 2574, must show a casual relation between the

alleged violation of the monopoly statute and the injury, but where plaintiffs alleged unlawful acts in violation of the monopoly statute and injury resulting to them as a proximate cause of such acts, defendants' contention that the injury is *damnum absque injuria* is untenable. *Motor Service v. R. R.*, 210 N. C., 36, distinguished in that that action was for an injunction and based upon the Public Utilities Act, while this is an action for damages resulting from a violation of the statute against monopolies and trusts. C. S., 2574.

**4. Carriers § 4—Carriers may not reduce rates when such reduction is made pursuant to agreement in violation of monopoly statute.**

The provisions of the monopoly statutes apply to railroads in the same manner as they apply to individuals and other corporations, and while C. S., 1112 (o), allows railroad companies to reduce rates at will and deprives the Utilities Commissioner of jurisdiction over reductions in rates, the statute applies to reductions in rates by railroad companies acting separately and with lawful intent, and does not permit railroad companies to violate the monopoly statutes by reducing rates in accordance with an agreement and conspiracy between them with intent to injure a competitor and thereafter to restore the rates, or to reduce rates to certain points where there is competition while maintaining higher rates to other points in the State without sufficient reason, with intent to injure a competitor, N. C. Code, 1112 (o), not being in conflict with the monopoly statutes.

CONNOR, J., concurring.

APPEAL by defendants from *Warlick, J.*, at June Term, 1936, of FORSYTH. Affirmed.

This is an action instituted by a certain contract truck carrier engaged in the transportation of gasoline and kerosene in intrastate commerce from the terminal port at Wilmington, N. C., to certain points in North Carolina, against the defendant railroad companies, in which judgment is prayed as follows:

"(1) That they recover damages of the defendants on account of the injury done to them by reason of the acts and things herein set out; that the jury assess such damages in favor of the plaintiffs, and that judgment be entered against the defendants in treble the amount fixed by the verdict of the jury; (2) That the court issue an order restraining the defendants from further reducing their rates for the transportation of gasoline and kerosene between said shipping points and any points in the State of North Carolina in intrastate commerce, and that they be ordered and directed by the court to cease and desist from carrying out in the future the illegal rates at present charged and maintained by them pursuant to such unlawful agreement and purpose, and that they be directed and ordered by the court to cease and desist from transporting gasoline and kerosene from said shipping points to any points in the State of North Carolina in intrastate commerce at rates less than were lawfully in force and effect prior to the unlawful conspiracy and acts herein com-

plained of; (3) And that the court grant to the plaintiffs such other relief as may be deemed just and proper."

Among other things, it is alleged in the complaint: "That the defendants illegally conspired and agreed among themselves to fix rates for the transportation of gasoline and kerosene in intrastate commerce in the State of North Carolina, and that all of the defendants should charge substantially the same rate for the transportation of such commodities, taking into consideration the distances and routes over which the commodities were to be hauled, and that the rates actually charged and collected by the defendants, pursuant to such agreement, have been uniform and had for one of their purposes the elimination of competition between themselves, and were also for the purpose of eliminating competition by motor truck haulers of such commodities, including the plaintiffs. That the defendants have unlawfully conspired, contracted, and agreed by express contract and agreement, or by contract and agreement knowingly implied, to do the following acts and things:

"(a) To willfully destroy and injure and to undertake to destroy and injure the business of the plaintiffs and other haulers of gasoline by motor trucks in the State of North Carolina with the purpose and intention of attempting to fix a price for the transportation of gasoline and kerosene within the State of North Carolina when the competition of the plaintiffs and other motor truck haulers of gasoline and kerosene is removed; that the service of transporting gasoline and kerosene is a thing of value; that the plaintiffs and defendants were and are business rivals in the transportation of gasoline in the State of North Carolina; that the defendants have unlawfully entered into an agreement and common purpose to reduce the rates for transporting gasoline and kerosene, as set out herein, for the purpose of destroying the business of the plaintiffs and other persons and corporations engaged in the business of transporting gasoline and kerosene by motor truck in intrastate commerce in the State of North Carolina, and with the further purpose of raising and fixing at a higher scale their rates for such transportation of said commodities after the removal of competition by the plaintiffs and other motor truck haulers of gasoline and kerosene.

"(b) That pursuant to the common purpose, agreement, and conspiracy referred to in the complaint, the defendants adopted the rates for the transportation of such commodities in intrastate commerce from Wilmington and River Terminal to designated points in the State of North Carolina, as set out in Exhibits, and have actually transported such commodities in intrastate commerce between said points at the reduced rates, thereby carrying out their plan and purpose of injuring the plaintiffs and other persons engaged in the business of transporting gasoline and kerosene in intrastate commerce in the State of North Carolina

in competition with the defendants, and they have damaged and injured these plaintiffs in the amounts hereinafter set out.

"(c) That the defendants who are engaged in transporting gasoline and kerosene for hire from River Terminal and Wilmington to various points through the entire territory of the State of North Carolina, which transportation is a thing of value, have, to the points designated in Exhibits, furnished such thing of value, to wit, the transportation of gasoline and kerosene between River Terminal and Wilmington to the points designated in said Exhibits, at a price lower than is charged by them to other places in the State of North Carolina, to wit, Asheville, Hendersonville, Murphy, and other points greater than a distance of approximately two hundred miles from Wilmington and Fayetteville respectively, and that there is not good and sufficient reason on account of transportation or the expense of doing business for charging less to the said places, to which the reduced rates have been put into effect, than to the other places in the State of North Carolina, and that such discrimination and charges, as herein set out, have been made with the view and purpose of injuring the business of the plaintiffs and of others engaged in the transportation by motor truck of gasoline and kerosene in intrastate commerce within the State of North Carolina.

"(d) That the plaintiffs are now engaged and were at all times referred to in this complaint engaged in the transportation by motor truck of gasoline and kerosene from Wilmington, North Carolina, to various points in the State of North Carolina, namely, Winston-Salem, Elkin, Mt. Airy, and Greenville, in competition with the defendants, and that the unlawful and illegal reduction of rates, as set out in the complaint, have greatly injured the plaintiffs.

"That in order to obtain any customers whatever who would employ the plaintiffs to transport gasoline and kerosene from Wilmington to any points in the State of North Carolina to which the reduced rates above specified were put into effect by the defendants, and in order for the plaintiffs to remain in business at all, and in order to avoid a total loss of all of plaintiffs' investment in motor trucks, tanks, and other equipment, it was made necessary by reason of the conduct of the defendants herein set out that the plaintiffs transport gasoline and kerosene from said shipping points to various termini in the State of North Carolina at substantially the same rates as were charged by the defendants; that the plaintiffs have, therefore, since the effective dates of the respective rate reductions, above set out, transported gasoline and kerosene at substantially the reduced rates over the routes, in the quantities and to the places set out in the attached Exhibit. That the loss in revenue resulting to the plaintiffs by reason of the enforced reduction of remuneration for transporting said commodities amounts to $14,854.91, and that

the plaintiffs have, therefore, by reason of the unlawful agreement, conspiracy, and acts of the defendants, herein set out, been actually damaged by reason of reduced revenues in the sum of $14,854.91."

Defendants filed demurrer to the complaint, as follows: "The defendants demur to the amendment to the complaint and to the complaint as amended, and state as grounds for their written demurrer:

"1. That the amendment and complaint as amended do not contain facts sufficient to constitute a cause of action in that:

"(1) The plaintiffs cannot recover damages based upon a violation of chapter 53 of the Code, sections 2559 to 2574, inclusive, entitled 'Monopolies and Trusts,' and upon an unlawful combination and conspiracy in violation of said chapter, where the act alleged to have been committed in furtherance of the conspiracy is a lawful act, the damage in such case, if any, being *damnum absque injuria.*

"(2) The act alleged in the complaint as having been committed in furtherance of the alleged conspiracy is a lawful act and has been declared by the Supreme Court of North Carolina in the case of *Carolina Motor Service, Inc., et al., v. Atlantic Coast Line Railroad Company, et al.,* 210 N. C., 36, to be a lawful act.

"(3) Plaintiffs allege that it is the purpose of defendants to increase the rates after the accomplishment of the purpose alleged in the complaint, and that the defendants can and will increase such rates, when as a matter of law, under the statutes of North Carolina, defendants cannot increase such rates or any freight rate without the approval of the Utilities Commissioner.

"(4) That the rates of which plaintiffs complain have been approved by the Utilities Commissioner as proper rates by formal order entered in the matter of Application of Southern Freight Association, Atlanta, Georgia, through Chairman J. E. Tilford, for Authority to Establish Truck Competitive Rates on Gasoline, including Blended Gasoline and Kerosene, from Wilmington, N. C., to North Carolina Points, Docket No. 446, which order is now in effect, and plaintiffs cannot complain of any damage resulting from the transportation of property at a proper rate by the defendants or any of them.

"(5) Chapter 53 of the Code, entitled 'Monopolies and Trusts,' has no application to a conspiracy or combination among carriers of freight by railroad to reduce freight rates.

"(6) It is not alleged in the complaint that any property or legal rights vested in the plaintiffs have been invaded or illegally interfered with by the promulgation and putting into effect of the rates referred to in the complaint.

"(7) Any alleged monopolistic acts on the part of the defendants, alleged in the complaint, of which the defendants may be guilty, are

criminal offenses and can only be inquired into in a proper action instituted under Chapter 53 of the Code, entitled 'Monopolies and Trusts,' by the Attorney-General of the State of North Carolina.

"2. That the court is without jurisdiction to hear and determine the cause of action, if any, set out in the complaint, for that:

"(1) An action under the provisions of Chapter 53 of the North Carolina Code, entitled 'Monopolies and Trusts,' with respect to the facts alleged in the complaint, can only be brought and maintained by the Attorney-General of the State of North Carolina.

"(2) Upon the facts alleged in the complaint, the court has no jurisdiction to determine the right of the plaintiffs to complain of the alleged acts of the defendants.

"Wherefore, these defendants pray that their demurrer be sustained."

The judgment of the court below is as follows: "This cause coming on to be heard and being heard in due course at the 22 June, 1936, Term of the Superior Court of Forsyth County before Wilson Warlick, Judge presiding, upon the demurrer filed by Southern Railway Company and others for misjoinder of parties and causes of action, and the plaintiffs, having prayed that the court allow an amendment to the complaint so as to make more clear the allegations of the complaint with reference to the matters referred to in the demurrer, the plaintiffs were allowed to file an amendment to the complaint, which amendment appears of record. All the defendants thereupon filed a written demurrer to the complaint as amended, said demurrer being based upon the ground that the complaint with the amendment does not state a cause of action. The court having heard arguments of counsel for plaintiffs and of counsel for defendants, and the court being of the opinion that the complaint is sufficient in law and does state a cause of action and that the said demurrer should be overruled; It is, therefore, ordered, adjudged, and decreed by the court that the demurrer of the defendants to the complaint on the ground that the same does not state a cause of action be and the same is hereby overruled. It is further ordered that said written demurrer be marked filed as of the date of the filing of the amended complaint. The judgment entered on Minute Docket 63, page 287, will be stricken out and this judgment entered in lieu thereof. Wilson Warlick, *Judge Presiding.*"

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

*Parrish & Deal for plaintiffs.*

*Manly, Hendren & Womble for Southern Railway Co.*

*Craige & Craige for Winston-Salem Southbound Ry. Co.*

*Frank P. Hobgood for Atlantic & Yadkin Ry. Co.*

*Richard B. Gwathmey and Murray Allen for Atlantic Coast Line Railroad Co.*

*Dye & Clark for Aberdeen & Rockfish Railroad Co.*

*Manly, Hendren & Womble for High Point, Randleman, Asheboro, and Southern Railroad Co.*

*Manly, Hendren & Womble for Yadkin Railroad Co.*

*W. S. O'B. Robinson, Jr., and Manly, Hendren & Womble for Piedmont & Northern Ry. Co.*

CLARKSON, J. On this record we are considering a demurrer. It is well settled that the complaint must be wholly insufficient before it can be overthrown by a demurrer. *Council v. Bank, ante,* 262 (265). In the present case we cannot so hold. Whether on the trial plaintiffs can sustain their allegations with competent proof is another matter.

The question involved: Was the court below correct in overruling defendants' general demurrer to the complaint, which alleged defendants, rail carriers, had unlawfully conspired to injure plaintiffs in violation of monopolies and trust statute, by (1) reducing rates for transporting gasoline and kerosene, intending later to restore them (C. S., 2563, par. 3), and (2) by charging lower rates to certain points in the State where there was competition, than to other points, without sufficient reason, with intent to injure plaintiffs (C. S., 2563, par. 5)? We think so.

N. C. Code, sec. 2559, is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars." This section defines the offence and provides that indictment is one of the remedies.

The statute applicable in the present action is C. S., sec. 2563: "In addition to the matters and things hereinbefore declared to be illegal (sec. 2559), the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or to have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section: . . . (3) To willfully destroy or injure, or undertake to destroy or injure, the business of any opponent or business rival in the State of North Carolina with the purpose or intention of attempting to fix the price of any-

thing of value when the competition is removed. . . . (5) Who deals in any thing of value within the State of North Carolina, to give away or sell, at a place where there is competition, such thing of value at a price lower than is charged by such person, firm, corporation, or association for the same thing at another place, where there is not good and sufficient reason, on account of transportation or the expense of doing business, for charging less at the one place than at the other, with the view of injuring the business of another."

In *State v. Coal Co.*, 210 N. C., 742, the criminal attitude of the above section (2563 [3]) has been fully considered, and a jury verdict and judgment thereon sustained.

1. It is contended by the demurrer of defendants that the amendment and complaint as amended do not contain facts sufficient to constitute a cause of action (C. S., section 511 [6]), in that any alleged monopolist acts on the part of the defendants, alleged in the complaint, of which the defendants may be guilty, are criminal offenses and can only be inquired into in a proper action instituted under Chap. 53 of the Code, entitled "Monopolies and Trusts," by the Attorney-General of the State of North Carolina.

2. That the court is without jurisdiction to hear and determine the cause of action, if any, set out in the complaint, for that: (1) An action under the provisions of Chapter 53 of the North Carolina Code, entitled "Monopolies and Trusts," with respect to the facts alleged in the complaint, can only be brought and maintained by the Attorney-General of the State of North Carolina. (2) Upon the facts alleged in the complaint, the court has no jurisdiction to determine the right of the plaintiffs to complain of the alleged acts of the defendants.

The statute is contrary to defendants' contentions. Section 2574 is as follows: "If the business of any person, firm, or corporation shall be broken up, destroyed, or injured by reason of any act or thing done by any other person, firm, or corporation in violation of the provisions of this chapter, such person, firm, or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed by a jury in such case judgment shall be rendered in favor of plaintiff and against the defendant for treble the amount fixed by the verdict."

A casual relation between violation and injury must be shown. *Lewis v. Archbell,* 199 N. C., 205. See *Lewis v. Frye,* 207 N. C., 852; *Brown v. R. R.,* 208 N. C., 423; *Rice v. Ice Co.,* 204 N. C., 768.

Defendants contend (2) "The plaintiffs cannot recover damages based upon a violation of chapter 53 of the Code, sections 2559 to 2574, inclusive, entitled 'Monopolies and Trusts,' and upon an unlawful combination and conspiracy in violation of said chapter, where the act alleged

to have been committed in furtherance of the conspiracy is a lawful act, the damage in such case, if any, being *damnum absque injuria*. The act alleged in the complaint as having been committed in furtherance of the alleged conspiracy is a lawful act and has been declared by the Supreme Court of North Carolina in the case of *Carolina Motor Service, Inc., et al., v. Atlantic Coast Line Railroad Company, et al.*, 210 N. C., 36, to be a lawful act."

We think the present cast distinguishable from the *Carolina Motor Service, Inc., v. A. C. L. Ry. Co., supra*. That was an action (bill in equity) against certain railroads and the Utilities Commissioner of North Carolina, alleging (1) discrimination under the Public Utilities Act, and (2) incidentally a conspiracy to monopolize the transportation of gasoline, and the only relief prayed for was an injunction against the railroads and the Utilities Commissioner. The court held (1) that plaintiff failed to show any interest to be protected under the Public Utilities Act, and (2) that the alleged monopolistic acts of the defendants are criminal, and that equity will not enjoin the commission of a crime. The present case is not based on the Public Utilities Act to any extent whatever. It is an action at law for damages under the above statute, C. S., 2574. It is true the complaint also asks for a restraining order, but the record does not show that this phase of the case has been pressed. At the present time plaintiffs are relying on the damages phase of the case only. The first part of the opinion relates to the Public Utilities Act only and has no application to the present case. The remainder of the opinion relates to plaintiffs' prayer for an injunction, and the holding is that since the threatened wrong is a criminal act, equity does not restrain criminal acts, but leaves them to the criminal courts. The opinion, to some extent, supports the plaintiffs' contention that the alleged acts of the defendant carriers are unlawful and in violation of sec. 2563, quoting from the opinion: "While C. S., 2563, declares that all of the above-mentioned acts are unlawful, the following section, C. S., 2564," provides they are criminal. The same acts which sec. 2564 and the above opinion of the court declare criminal are by the express terms of sec. 2574 made the basis of a cause of action for treble damages by any person injured thereby, the defendants' demurrer admits that plaintiffs have been so damaged.

The provisions of the monopoly statutes apply to railroads just as they do to individuals and other corporations. Both at common law and under our monopoly statutes a conspiracy to reduce rates with intent to injure a competitor and thereafter to restore prices is actionable. Likewise a conspiracy to charge lower rates where there is competition, while maintaining higher rates to other points in the State for the same thing of value without sufficient reason, with intent to injure a competitor, is actionable. *State v. Atlantic Ice & Coal Co.*, 210 N. C., 742.

The rates fixed by defendants as the result of the alleged conspiracy are not legal rates, that is, they do not have the sanction of any administrative or judicial tribunal, either of the Utilities Commissioner or the courts, because the proviso to C. S., section 1112 (o), deprives the Utilities Commissioner of jurisdiction over reductions in rates. The proviso reads as follows: "Provided, however, that nothing herein shall be construed to prevent any public-service corporation from reducing its rates either directly or by change in classification." This means that any railroad acting lawfully, that is, individually and with proper intent, may reduce its own rates free of the control of the Utilities Commissioner, but it does not mean that it can, acting unlawfully or as a result of a conspiracy with other railroads, use this uncontrolled power to injure a competitor. It is conceded in defendants' brief that "Under the law of this State railroads may reduce their rates at will."

Further, Public Laws of 1933, N. C. Code, 1935 (Michie), sec. 1112(1) to (36) are not germane. The plaintiffs' complaint is bottomed on the provisions set forth in the Monopolies and Trusts Statutes, *supra*. The ending clause of the 1933 act, *supra*, sec. 27, is as follows: "No present provision of law shall be deemed to be repealed by this article except such as are directly in conflict therewith." In fact, sec. 1112(2) reads: "Every rate made, demanded, or received by any public utility or by any two or more public utilities jointly, shall be just and reasonable."

The plaintiffs' action for damages is under Chapter 53—Monopolies and Trusts. The rights of plaintiffs and the wrongs set forth in plaintiffs' complaint are founded on the statutory provisions therein set forth and are not in conflict with Chapter 307, Public Laws of 1933, *supra*. We think there is no conflict in the acts. *Horton v. Tel. Co.*, 202 N. C., 610.

This is a civil action alleging damage under the Monopolies and Trusts Statutes, *supra*. In the case of *State v. Atlantic Ice & Coal Co., supra* (748), which was a criminal action, speaking to the subject, this Court said: "In Fletcher's Cyc. Corporations (Permanent Ed.) Vol. 10, ch. 56, part of sec. 5016, p. 850, it is said: 'Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors,' citing many authorities. *Porto Rican Amer. Tobacco Co. v. Amer. Tobacco Co.*, 30 Fed. Reporter, 234 (236); *Standard Oil Co. v. U. S.*, 221 U. S., 1; *U. S. v. Amer. Tobacco Co.*, 211 U. S., 106. Wharton's Criminal Law, Vol. 3, 12th Ed. (1932), sec. 2330, is as follows: 'In the closing years of the 19th Century and early part of the 20th, statutes were enacted in nearly all states and by Congress with a design to restrain the evils of complete monopoly. This class of laws has been sustained in principle as to both civil and criminal features. They

were leveled at contracts, combinations, and conspiracies in restraint of trade that had been declared to be against public policy and void under the common law before the passage of such new statutes. The language of the statutes need be supplemented by allegations as to the facts. Conspiracy to combine as well as the actual coöperation to monopolize is forbidden. The exaction of excessive prices upon the sale of necessaries was forbidden in the United States as in various countries during the World War. The criminal part of the act failed for indefiniteness.'" Constitution of N. C., Art. I, secs. 7 and 31; *S. v. Craft,* 168 N. C., 208; *Mar-Hof Co. v. Rosenbacker,* 176 N. C., 330; *Addyston Pipe and Steel Co. v. United States,* 175 U. S., 211, 85 Fed., 271, 44 L. Ed., 136, affirming the lower court. In the *Addyston case, supra, Judge Taft* said: "Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation." *U. S. v. Trans-Missouri Freight Association,* 166 U. S., 290, 41 L. Ed., 1007; *U. S. v. Joint Traffic Association,* 171 U. S., 505; *Northern Securities Co. v. U. S.,* 193 U. S., 197, 48 L. Ed., 679; *Tift v. Southern Railroad Co.,* 123 Fed., 789; *Keogh v. Chicago Northwestern Railroad Company,* 260 U. S., 156, 67 L. Ed., 183.

The defendants contend: (3) "Plaintiffs allege that it is the purpose of defendants to increase the rates after the accomplishment of the purpose alleged in the complaint, and that the defendants can and will increase such rates, when as a matter of law, under the statutes of North Carolina, defendants cannot increase such rates or any freight rate without the approval of the Utilities Commissioner. That the rates of which plaintiffs complain have been approved by the Utilities Commissioner as proper rates by formal order entered in the matter of Application of Southern Freight Association, Atlanta, Georgia, through Chairman J. E. Tilford, for Authority to Establish Truck Competitive Rates on Gasoline, including Blended Gasoline and Kerosene, from Wilmington, N. C., to North Carolina Points, Docket No. 446, which order is now in effect, and plaintiffs cannot complain of any damage resulting from the transportation of property at a proper rate by the defendants or any of them."

Section 1112 (o), is as follows: "The said Utilities Commissioner shall at all times be required to keep himself informed as to the public-service corporations hereinbefore specified and enumerated, their rates and

charges for service, and the service supplied to the citizens of the State and purposes therefor; and he shall at all times be empowered and required to inquire into such service and rates charged therefor, and to fix and determine as herein provided the reasonableness thereof, and upon petition or otherwise to make full inquiry into such rates and charges in behalf of the citizens of the State, and compel and require compliance with the regulations and charges, and final determination fixed therefor under the provisions of this article, and no corporation, association, partnership, or individual doing business in the State of North Carolina as a public-service corporation, or any corporation herein designated, shall be allowed to increase its rate and charge for service or change its classification in any manner whatsoever except upon petition duly filed with the Utilities Commission and inquiry held thereon and final determination of the reasonableness and necessity of any such increase change in classification or service: Provided, however, that nothing herein shall be construed to prevent any public-service corporation from reducing its rate either directly or by change in classification."

The complaint has an exhibit, in part, as follows: "Southern Freight Association, Atlanta, Georgia. 19 June, 1935. To the Utilities Commission of the State of North Carolina, Raleigh, N. C. J. E. Tilford, for and on behalf of all rail carriers operating in the State of North Carolina, hereby respectfully request authority to establish truck competitive rates on: 'Gasoline, including blended gasoline and kerosene, in tank cars, carloads, estimated weight 6.6 pounds per gallon, subject to Rule 35 of Southern Classification,' and routing shown in connection therewith, from Wilmington, N. C., to destinations in North Carolina, applicable on North Carolina intrastate traffic, and, for cause, states: *During the past several months the rail carriers have lost a very substantial proportion of this traffic to tank trucks.* After a series of conferences with the oil interests, these carriers *have determined* to establish reduced rates on both interstate and intrastate traffic in an effort to regain for future handling a part of the lost traffic and to prevent additional losses. Since the proposed rates are made to meet tank truck competition, they are not based strictly upon any mileage scale or any percentage relationship to first-class rates. *The new rates, of course, are lower in every case than the present rates; generally, they represent very substantial reductions,"* etc. (Italics ours.)

Under the proviso above set forth, this was unnecessary to be done, as the railroad carriers could reduce their rates at will. They have voluntarily put their heads into the "lion's jaw," it is no fault of plaintiffs. "These carriers have determined to establish reduced rates." No doubt by this unnecessary method, they thought that they could take advantage

of truck-carrier competitors. The Utilities Commissioners do not have the power to prevent any reduction proposed by the railways. The rates proposed by the railways go into effect whether the Utilities Commissioner approves them or not. Therefore, it cannot be said that the Commissioner has any jurisdiction whatever over reductions proposed by the railways, either to approve or disapprove. The defendant railways take the position in their brief that the Utilities Commissioner has no power to prevent them reducing rates as they please, and neither have the courts—that where rate reductions are concerned, they are answerable to no one, and that they can do whatever they please to destroy motor truck competition, conspire to reduce rates temporarily, conspire to charge unreasonably low rates where there is competition, then after they have injured or destroyed the business of plaintiffs and others, now contend that this is a lawful act, and to plaintiffs this is *damnum absque injuria*. We cannot so hold.

Under the proviso to sec. 1112 (o), the defendants can reduce their rates, but it does not follow that conspiracies in violation of the Monopolies and Trusts Statute are made legal by this proviso. The defendants say that a situation has been reached that they cannot raise their rates without the approval of the Commissioner, but whatever the situation in which the defendants find themselves, they created it, and created it by wrongfully taking advantage of the proviso to sec. 1112 (o) and conspiring to reduce rates to the injury of plaintiffs. The demurrer admits this. They admit that on their own responsibility they conspired to reduce the rates with the intent to injure plaintiffs, but they now say they are not responsible for having done so. The vice is the method—conspiracy—and the intent—injury of competitors. As was well said by *Judge Peckham* in the *Trans-Missouri Assn. case, supra*, what one company may do by way of charging reasonable rates is radically different from entering into a conspiracy with others to fix rates.

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

Affirmed.

CONNOR, J., concurring. This action was heard in the Superior Court on defendants' demurrer to the complaint. The demurrer was overruled, and defendants appeal to this Court.

The only question presented by this appeal is whether the facts alleged in the complaint are sufficient to constitute a cause of action in which the plaintiffs are entitled to recover of the defendants. These facts are admitted by the demurrer. This Court is of opinion that the question presented should be answered in the affirmative. The judgment is accordingly affirmed. I concur in the judgment.

STATE v. TOMMIE WALLS.

(Filed 28 April, 1937.)

**1. Criminal Law § 79—**

Those exceptions and assignments of error which are not set forth in defendant's brief are deemed abandoned. Rule of Practice No. 28.

**2. Constitutional Law § 33—Denial of petition for removal from State to Federal Court held without error.**

The defendant filed a petition for removal from the State Superior Court to the United States Court for the district to be certified as to the place of trial. Act of Congress, 3 March, 1863, Title 28, secs. 74 and 75. The court denied the petition for that the petition did not allege any denial of any rights by reason of State law. *Held:* The denial of the petition was without error, defendant's remedy for alleged denial of equal protection of the laws on account of prejudice or in the exclusion of colored persons from the grand jury, being in the State Court and ultimately by writ of error to the Supreme Court of the United States.

**3. Same—Evidence held to support finding that grand jury was legally organized and that colored persons were not illegally barred therefrom.**

The trial court found, upon supporting evidence, that the grand jury which returned the bill of indictment was selected from a jury list of taxpayers of the county eligible to serve, the names of colored persons on the list being in red ink and the names of white persons being in black ink, but that there was no discrimination as to color, the different ink being used merely for identification, and that the names of all those eligible, both white and colored, were placed in the box and drawn therefrom by a four-year-old child, and that one colored person served on the grand jury which returned the indictment. *Held:* The findings support the court's denial of defendant's motion to quash the indictment on the ground that the grand jury was illegally organized and that defendant was denied the equal protection of the laws for that persons of the Negro race were excluded therefrom solely because of race, it appearing that the grand jury was selected according to law. C. S., 2312, 2313, 2314.

**4. Criminal Law § 81a—**

The findings of the trial court that the jurors were drawn, sworn, and impaneled in accordance with law are conclusive on appeal when supported by evidence, in the absence of gross abuse.

**5. Burglary § 10—**

Where there is no evidence that the burglary was committed under circumstances which would make it burglary in the second degree, it is not error for the court to refuse to submit to the jury the question of defendant's guilt of that degree of the crime.

**6. Criminal Law § 43c—**

The charge of the court in this case, correctly construed, *is held* to have correctly instructed the jury that the burden was on the State to

satisfy the jury beyond a reasonable doubt as to each aspect on which defendant could be convicted under the bill of indictment, and to have correctly defined reasonable doubt.

**7. Criminal Law § 53a—**

The court need not instruct the jury what the punishment would be upon a conviction upon a count in the indictment, the rendition of judgment upon the verdict being a responsibility of the court alone.

**8. Criminal Law § 53d—**

An inquiry by the court as to whether the jury's verdict of guilty referred to the count of first degree burglary *is held* not error as an expression of opinion by the court, it appearing from the record that such was the freely returned verdict of the jury, and that defendant was not prejudiced thereby since the jury was polled.

APPEAL by defendant from *Rousseau, J.*, and a jury, February Regular Criminal Term, 1937, of MECKLENBURG. No error.

The defendant was indicted for burglary, under C. S., 4232.

Peter S. Gilchrist, Jr., a witness for the State, testified, in part: "I know the defendant, Tommie Walls, when I see him; on or about the early morning of 2nd of September, I saw him on the second floor of my father's home, at 320 E. Park Avenue, Charlotte. It was between the hours of 3:30 and 4:00 a.m., in the nighttime. I was awakened about 3:30 by hearing a noise on the second floor of my father's home, and I looked out of my bedroom door and I could see a figure moving in a room that was joined to my room by a small back hall. I listened and heard a figure in there moving and opening and closing bureau drawers, and I looked in the door and saw a figure standing at a bureau, and I ran in and got him from behind at the same time calling to my father, who was asleep on the same floor, to come to my assistance. I threw the man I had caught from behind, to the floor, and he was armed with a knife, and he cut me with it on the hand and scratched me across the stomach and then he stabbed me in the right leg. We fought on the floor for several minutes, and I obtained possession of the knife, and threw the man from me, and I had a chance at that time to see his face in the bright moonlight that was streaming through the window. About that time my father came in and asked me what was wrong and I said there was a man there, and he had an opportunity to see his face, too, in the bright moonlight. I asked my father to go to the telephone on the landing between the first and second floors and phone for the police. He went down to telephone and turned on the light half way between the first and second floors, while I stood upstairs and held this man at bay, which amounted to nothing more than him standing there beside me. When my father turned on the light I had an opportunity to see his face again. My father returned to the second floor because he had forgotten his glasses and was unable to telephone. Just as he reached the top of

the stairs this man pushed me to one side and ran down the stairs to the first floor and to the rear of the house where he left the house by means of an opened back window. I followed him through the back door and out through the back gate, down the alley to the next corner; we live two houses from the corner and I saw him under the street light again, but was unable to get him because of loss of blood. I returned home and dialed the police for an ambulance and the police arrived within five minutes. I would say approximately five minutes after I had dialed police arrived, before the ambulance. They asked me which way this man had gone and what his general description was, which I gave them, and then the ambulance arrived and carried me to the Presbyterian Hospital. Later, I would say 15 to 25 minutes later, the police brought a man over to the hospital where I identified him from his face and also from the fact that he had blood on his right hand and his trousers were spattered with blood. My father at this time identified him also, in my presence; this defendant, Tommie Walls, is the man who was in my father's house. The house had been closed up before we went to bed that night, windows down and doors locked; when the man ran out of the house the rear kitchen window was up, open. The defendant went out that window; I went out the door. I was sleeping in the house that night and was asleep when awakened by the noise of someone in the house; my father was also asleep in the house and my mother and nurse were also on the same floor; that is the home of my father, Peter S. Gilchrist, Sr., and I live with him, and my name is Peter S. Gilchrist, Jr. (The State offered in evidence the knife.) . . . He was standing facing me on the second floor while the light was on at the landing; while my father was going down he turned the light on and I had a chance to see his face on the second floor from the light at the landing half way between the two floors. . . . I found the knife you hand me in the possession of the man I caught in the house that morning. I did not pick it up in the room but obtained it from the man himself in the dark; I did not see the knife until I returned to the house. There was blood on the knife. . . . I was in the hospital about two or three days, and then in bed at home for another week. When father came to my rescue he got within two or three feet of the man in the room, close enough to have laid hands on him; at that time I had already gotten the knife away from him. I do not know whether my father put his hands on the man or not; I turned in the knife to the police that morning."

Peter S. Gilchrist, Sr., corroborated the testimony of Peter S. Gilchrist, Jr.

Mr. Bridges testified, in part: "I saw the defendant Tommie Walls on the morning of second, just a little after four o'clock, eight or ten

blocks from the Gilchrist home and he was going north away from the Gilchrist home; he had on a brown shirt, brown mixed pants, and was bareheaded and his hair sorter slicked back, but I could not say what with; it was not in the same condition it is now but was flat on his head. I stopped him and we asked him where he had been and he said to the fertilizer plant to see his father. He told us that he had been to the fertilizer plant to see his father and we took him in custody and took him back to Mr. Gilchrist's home. Chief Joyner was there and I took him to Chief Joyner and we took him to Mr. Gilchrist, the old gentleman, and he looked at him, and I do not know what he said and Chief Joyner told me to take him to the station, and I started to the station with him and got a message on the radio to take him to Presbyterian Hospital, and I had him handcuffed to my arm and took him to the hospital and let young Mr. Gilchrist and his father both see him. When we picked up Tommie Walls I noticed there was blood on the front of his pants and in his right hand; it was fresh blood. The only fertilizer plant I know about is in the other end of the city; the way he was going would be towards the fertilizer plant in the eastern part of the city. Mr. Gilchrist, Sr., identified him as being the one that was in his home. . . . At the time we arrested Tommie Walls there was a bright moon shining, just as light as could be; we did our driving with the lights off, moonlight so bright we did not need the lights on the automobile."

C. L. Sykes testified, in part: "I was with Mr. Bridges when we arrested Tommie Walls on the morning of 2 September, 1936. I first saw him at the corner of E. Morehead and S. McDowell; he was going north and away from the Gilchrist home; it was a very light night; the moon was shining very bright; we did not have the lights on our car. . . . When arrested there was blood on defendant's pants and on his right hand; there was a cut place on his right hand but at that particular time it was not bleeding and I could not say it looked like a fresh cut; there was blood on some parts of his right hand, the one that was cut; I do not recall as to any cut between the middle fingers."

The defendant denied his guilt, and testified, in part: "It was not me that young Mr. Gilchrist attacked in the room of his home; I did not cut him with any knife and the first time I ever saw this knife was when they had it in the fingerprint room and tried to make me take it. I had some blood on my finger when arrested but did not have any on my pants. The blood on my hand came from a cut on my finger right here, my middle finger; I cut it on a beer can when I laid it on the table at the beer garden on the corner or between Davis and Caldwell. When I was there that boy right there, Partee, was there too, and his brother-in-law and cousin, Lawrence Maley. At that time Maley worked at a cafe but I do not know where he is now. I left Brevard Street to get

me a drink of liquor. I drank some liquor at the beer garden, a full pint and a half pint; I drank the pint at the cafe and the half pint at the beer garden; then I went down on S. Brevard to Littlejohn's house on the other side of Hill Street; Littlejohn is a colored man and his place is almost right across from a laundry, and there is a church on the right-hand side from it across the street from the laundry. I do not know what church that is. When I left the beer garden it was between 12 and 1 o'clock and I was drunk, and when I came to myself I was sitting in front of the church on the steps. I do not know what time I went there but I spent the night there sitting right on those steps; when I left there I went on the other side of Brevard and turned left and came out on East Morehead; I had started home; I turned left down McDowell and went north and when the officers got me I was going north on McDowell Street, and I went that way until the officers got me; from where I woke up I went up S. Brevard to East Morehead and down East Morehead until I hit McDowell. I had not been to the Gilchrist's, and I did have a hat and the one you have in your hand is the hat I had when the officers arrested me, and that I had on when they carried me before Mr. Gilchrist on his porch. I have had it ever since, while in jail and down at the State Prison. . . . I have been in trouble before. The picture you show me is a picture of me made here in Charlotte and my hair was cut when it was made, and it was like that picture when they accused me of going in the Gilchrist home. . . . The picture was made 2 September, 1936, at City Hall, and is a picture of me made the morning after I was accused of going into Mr. Gilchrist's home, and it looks like me on that morning. My hair at that time was not as long as it is now and it was laying like it is in the picture, but there was nothing on it. The trouble I was in was for housebreaking, storebreaking, and for murder; I was tried for murder in 1932 and they sent me to Raleigh for killing Howard Moore; I went for 4 to 7 years. I was up for first degree burglary in 1926; I do not know whose home I went in then; they sent me to a training school as I was under 16; the next time I was up for storebreaking and larceny was in '31, and I got 12 months. I went into the house before midnight on the one I was sent up for and I went in through the kitchen door; I broke into the store through the door. In 1932 I was sentenced to 4 to 7 years and got out June 16, 1936. When sent to training school they had me charged with going into a number of houses and taking things; and I stayed at the training school 5 years; then I served one year on the roads. I got off the roads in July and got in trouble in September, 1932."

There was other evidence corroborating the State's evidence and contradicting that of the defendant. The defendant also introduced evidence contradicting that of the State and corroborating his own. There

was a verdict of guilty of burglary in the first degree. Judgment of death, in accordance with law, was pronounced by the court below on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*A. A. Tarlton for defendant.*

CLARKSON, J. At the close of the State's evidence, and at the close of all the evidence, the defendant in the court below made motions to dismiss the action or for judgment of nonsuit. C. S., 4643. The court below overruled these motions, and in this we see no error.

These exceptions and assignments of error were not set forth in defendant appellant's brief. Rule of Practice in the Supreme Court, part of Rule 28 (200 N. C., 831) is as follows: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." This is tantamount to the admission that the evidence was sufficient to be submitted to the jury. *Nowell v. Basnight,* 185 N. C., 142 (148); *Jones v. Ins. Co.,* 210 N. C., 559.

The defendant sets forth the questions involved on the appeal:

(1) Did the court err in refusing defendant's motion to transfer this cause from the Superior Court of Mecklenburg County, North Carolina, to the United States District Court for the Western District of North Carolina, to be certified by said United States District Court as to the place of trial? We cannot so hold.

To sustain this motion defendant filed an affidavit and cited for his position Act of Congress, 3 March, 1863, Title 28, secs. 74 and 75, Judicial Code 31 and 32. On the petition the court below ruled: "Petition and motion is denied for the reason that the petition does not allege any denial of any rights by reason of any state law, statute, ordinance, regulation, or custom hostile to the rights of the petitioner."

In *Fitzgerald v. Allman,* 82 N. C., 492 (494), speaking to the subject, it is said: "In *State v. Dunlap,* 65 N. C., 491, decided at June Term, 1871, the statute is construed to extend to, and 'include cases where, *by reason of prejudice in the community,* a fair trial cannot be had in the State courts'; and this construction, followed in the court below, embraces that before us. Since this decision, the clause in the constitution which this act is intended to enforce has been interpreted and explained by the Supreme Court of the United States, more in consonance with its language and purposes, and it has been confined to trials in states whose

laws discriminate adversely against a class of citizens to which the persons asking for the removal belong. . . . (p. 495). It is not pretended that the laws and judicial practices in this State recognize any distinctions among its citizens 'on account of race, color, or previous condition,' or that every right and privilege possessed by the white is not equally shared by the colored man. For local prejudice, the basis of the proposed removal, the law provides for a transfer of the cause, whoever may be the parties, to a county where such prejudice does not exist and a fair trial may be had." *Slaughter House cases,* 16 Wall., 36; *Gibson v. Miss.,* 162 U. S., 565; *Kentucky v. Powers,* 201 U. S., 1; *Norris v. Alabama,* 294 U. S., 587.

The remedy for any wrong, as complained of by defendant, is in the State Court and ultimately in the Supreme Court of the United States by writ of error to protect any right secured or granted to the accused by the Constitution or laws of the United States which has been denied to him in the highest court of the State in which the decision in respect to that right can be had. *Powers case, supra.*

(2) Did the court err in refusing to quash the bill of indictment because the grand jury which found the bill of indictment was improperly and illegally drawn, organized, and constituted? We think not, as the grand jury was legally organized.

The court below found: "Motion to quash the bill of indictment is denied and the court finds as a fact there are approximately 10,000 names of the white race in the jury box and something over 600 names of the colored race in the jury box, and at this term of court there is one colored man on the grand jury that returned a true bill in this case, and that there has been no discrimination against the defendant."

The clerk of the board of county commissioners testified: "The scrolls containing the colored race, approximately 650 in number, are still in red ink and the scrolls containing the names of the white race are in black ink. That condition existed at the time it was done in red and black ink so as to distinguish them, so they would know whether to look for a white man or a colored man. There is no discrimination in the selection of names; when a child draws a name out we put the name on the jury list, have a colored man on the grand jury now. There is no discrimination in the selection of the grand jury or petit jury. When the names are called out I put them on the list to give the sheriff to be summoned for jury service. We have been using a four-year-old child and if the name comes out red or black it is put on the list. The purpose in two different colors of ink is to see who to look for. It makes it easier to look for them. . . . There are about 650 names of the colored race and approximately 10,000 whites. There is one colored man on the grand jury now who found this bill. Q. In drawing the

jurors at former terms was a colored man on the petit jury? Ans.: Yes, sir, ever since last year we have had colored men drawn and on the civil jury frequently. I do not know how many. Q. Regardless of how many were drawn there was not but one colored man drawn this last time? Ans.: Yes, there were two. That is all that came out of the box; it should average about two out of thirty if the average is kept up."

The exclusion of all persons of the negro race from a grand jury, which finds an indictment against a negro, where they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of the Constitution of N. C. and of the United States. *S. v. Peoples,* 131 N. C., 784.

The jury list and method of drawing the jury is set forth in C. S., 2312, 2313, and 2314. The names on the list are put in a box with two divisions, marked "one" and "two," and two locks. One is kept by the sheriff and one by the chairman of the board of county commissioners. The manner of drawing the jury is by a child not more than ten years of age, who draws the names of the jury out of partition marked "one." (In the present case the child was four years of age.) The scrolls so drawn to make up the jury are put in the partition marked "two."

The findings of the trial court, after hearing evidence, that the jurors were drawn, sworn, and impaneled in accordance with these sections, and that there was no discrimination against persons of the negro race in making up the jury lists, are conclusive on appeal when supported by sufficient evidence, in the absence of gross abuse. *S. v. Cooper,* 205 N. C., 657. His Honor found that there had been no discrimination against persons of the defendant's race in the selection of the grand jury. This finding, when supported by evidence, is conclusive on appeal in the absence of gross abuse. *S. v. Daniels,* 134 U. S., 641; *Texas v. Thomas,* 212 U. S., 278; *S. v. Cooper, supra.*

The reason for having a child not more than ten years of age to draw the jurors is to prevent fraud in the selection of the jury, so that the law can be administered impartially and without discrimination. The child draws from the jury box the names of all sorts and conditions of men, white and negro persons, Jew and Gentile, who are qualified to serve under the law. A more perfect system could hardly be devised to insure impartiality. It is the duty of those charged with this important arm of the government to see to it that these provisions of the statute are carried out as provided in C. S., 2312, *supra,* which is as follows: "The board of county commissioners for the several counties at their regular meeting on the first Monday in June, in the year nineteen hundred and five, and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, *from which they shall proceed to select the names of all such persons as have paid*

*all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence.* (Italics ours.) A list of the names thus selected shall be made out by the clerk of the board of commissioners and shall constitute the jury list, and shall be preserved as such."

The child drawing the jury list, by custom, is often blindfolded to insure impartiality. If as many negroes are not drawn as defendant desired, he cannot complain—the chance in selecting same are applicable to both the white and negro race alike. The selection is fair and impartial.

(3) Did the court err in failing to charge the jury as to second degree burglary? We think not. All the evidence on the part of the State showed it was burglary in the first degree, if the State's evidence was to be believed by the jury. There can be no question that there was sufficient evidence to be submitted to the jury. *S. v. Smith,* 201 N. C., 494 (496) is contrary to the position taken by defendant. It is there said: "This Court has repeatedly disapproved the theory that the degree of guilt may arbitrarily be determined in the discretion of the jury without regard to the facts in evidence. The jury, having 'no discretion against the obligation of their oath,' should never award a verdict independent of all proof. *S. v. Fleming,* 107 N. C., 905. The primary object of a verdict is to inform the court as to how far the facts established by the evidence conform to those which are alleged or charged and put in issue. If neither the specific act charged nor a lesser degree thereof nor an attempt to commit either of them is supported by proof, neither the principal nor the subordinate act can properly be made the basis of an affirmative verdict. In *S. v. Johnston,* 119 N. C., 883, the prisoner requested an instruction 'that when the crime charged in the bill of indictment is burglary in the first degree the jury may render a verdict in the second degree if they deem it proper to do so.' The prayer was denied and on appeal the Court said: 'Shields, a witness for the State, testified that at the time of the burglary he and his wife and daughter were occupying rooms in the house; that he was sleeping in a room on the first floor and his wife and daughter were sleeping in a room upstairs. Upon this testimony, if the jury believed it, the defendant was guilty of burglary in the first degree. There was no proof tending to show that the burglary might have been committed under circumstances which would make it burglary in the second degree under the statute. If his Honor had charged as he was requested it would have been error.' So, likewise, in *S. v. Allen,* 186 N. C., 302. A verdict for a lesser degree of the crime charged is logically permissible only when 'there is evidence tending to support a milder verdict,' although there are decisions to the effect that if without such supporting evidence a verdict is returned for

the lesser offense it will not be disturbed because it is favorable to the prisoner. *S. v. Ratcliff,* 199 N. C., 9; *S. v. Allen, supra.*"

(4) Did the court err in failing and refusing to charge the jury that if they were not satisfied beyond a reasonable doubt as to the guilt of the defendant on each and every count or any of said counts it would be their duty to acquit the defendant and return a verdict of not guilty of anything? As we construe the charge as a whole, we think there is no merit in this contention.

Before the commencement of the arguments, upon inquiry by Mr. Tarlton and in the presence of the jury, the court announced it would charge the jury that it may return one of the five following verdicts: Guilty of burglary in the first degree; Guilty of attempt to commit burglary in the first degree; Guilty of breaking and entering a dwelling house other than burglariously; Guilty of an attempt to break with intent to commit a felony; Not guilty. (*S. v. Allen,* 186 N. C., 302.) "If the State has satisfied you beyond a reasonable doubt as to the burglary in the first degree then you would not consider the other counts, but if the State has failed to satisfy you beyond a reasonable doubt and your verdict is not guilty of first degree burglary then you will proceed to the second count, that is an attempt to commit the crime of burglary in the first degree. An attempt to commit burglary in the first degree is composed of two elements," etc. The court then charged the other elements of the crime, with clearness and accuracy, on which defendant could be convicted or acquitted. "Find out what the truth is and speak that in your verdict. Your verdict can be one of five: Guilty of burglary in the first degree; guilty of an attempt to commit burglary in the first degree; if not guilty of that then guilty of breaking or entering other than burglary, with intent to commit a felony or the crime of larceny. If not guilty of them, an attempt to break or enter the home or dwelling of another with the intent to commit a felony therein; or not guilty."

(5) Did the court err in refusing to tell the jury of the punishment attempt to commit second degree burglary would carry? We think not.

In *S. v. Matthews,* 191 N. C., 378 (381), this Court has decided contrary to defendant's contentions: "The jury has fully discharged its duty, and performed its functions, under the law of this State, when its members have sat together, heard the evidence, and rendered their verdict accordingly. As the judge must not invade the true office and province of the jury by giving an opinion in his charge, either in a civil or criminal action, as to whether a fact is fully or sufficiently proven (C. S., 564), so the jury must be content to leave with the judge the grave responsibility imposed upon him to render a judgment, upon their verdict, according to law."

(6) Did the court err when the jury returned a verdict of guilty by saying: "You say that Tommie Walls is guilty of burglary in the first degree of the felony whereof he stands charged?" Was that not an expression of opinion? We think not; it was an inquiry.

The jury announced it was ready to render verdict and the clerk said, "Gentlemen of the Jury, answer to your names," and called each name separately and each juror answered "Present." (By the clerk) Q. "Have you agreed on your verdict?" A. "We have." (By the clerk) "Stand up Tommie Walls; hold up your right hand. Gentlemen of the Jury, look upon the prisoner; what say you as to his guilt of the felony burglary in which he stands indicted in the bill of indictment, Guilty or Not guilty?" A. "Guilty." (By the court) Q. "So say you all?" A. "Yes." (By the court) "By your verdict you say that Tommie Walls is guilty of burglary in the first degree of the felony whereof he stands charged?" A. "Yes, sir." (By the clerk of court) Q. "So say you all?" A. "Yes, sir, we find him guilty of first degree burglary with recommendation of the mercy of the court."

"Counsel for the defendant requested that the jury be polled, whereupon the clerk, under the directions of the court, called each juror by name, requesting that the said juror stand; that the clerk asked each juror two questions: (1) 'Mr. Juror, did you assent to the verdict rendered by your foreman?' and (2) 'Do you still assent thereto?' Each juror answered in the affirmative to each of the two questions propounded, each question being asked and answered separately." If there was error in the inquiry of the court, it was not prejudicial, as defendant had the jury polled.

The court below in the charge summarized the evidence, set forth the contentions on both sides fairly and impartially, charged that the burden was on the State to satisfy the jury beyond a reasonable doubt as to each aspect on which the defendant could be convicted or acquitted under the bill of indictment or found not guilty, and defined reasonable doubt. The charge was a long one, carefully prepared and gave the law applicable to the facts. In fact, it was so accurate and fair that defendant made no exceptions or assignments of error except those heretofore considered.

The evidence of Peter S. Gilchrist, Jr., was corroborated by other witnesses. He made a brave endeavor to stop the burglar, who attempted to and almost succeeded in killing him. "He left the house by means of an opened back window. I followed him through the back door and out through the back gate, down the alley to the next corner; we live two doors from the corner and I saw him under the street light again but was unable to get him because of loss of blood. . . . I

identified him from his face and also from the fact that he had blood on his right hand and his trousers were spattered with blood. . . . I found the knife you hand me in the possession of the man I caught in the house that morning. I did not pick it up in the room but obtained it from the man himself, in the dark; I did not see the knife until I returned to the house. There was blood on the knife. . . . I was in the hospital about two or three days and then in bed at home for another week."

The defendant, from his own evidence, showed himself to be a lawless, desperate man. The night of the burglary he was drinking at a beer garden and drank liquor—a half pint and a pint—"sat down on the steps of a church on Railroad Street, . . . came to myself there around 4 o'clock and they arrested me." Defendant admitted that he had theretofore been convicted (1) of housebreaking; (2) storebreaking; (3) murder, etc. He was tried for burglary in the first degree in 1926 and sent to the training school, as he was under 16 years of age. In 1931 he was tried for storebreaking and larceny and imprisoned 12 months. In 1932 he was tried for the murder of Howard Moore and imprisoned for 4 to 7 years.

The fight between Peter S. Gilchrist, Jr., and defendant (by his own admissions an ex-convict and desperado) was a desperate and dangerous one, after midnight, in the Gilchrist home. Few men under such trying circumstances have shown more courage and bravery than the younger Gilchrist did in the encounter with this desperate and dangerous man. The testimony of both Peter S. Gilchrist, Jr., and his father, Peter S. Gilchrist, Sr., was corroborated by facts that were pregnant as to identity—fresh blood on defendant's pants and right hand.

The defense is founded mostly on technicalities and refinements. A bill of indictment is never quashed "by reason of any informality or refinement." C. S., 4623. "The appellant is required to show error, and he must make it appear plainly, as the presumption is against him." *In re Ross,* 182 N. C., 477 (478). The whole purpose of the law is to administer justice and that law and order and orderly government may at all times be maintained. In the present case the defendant has been given every right and privilege known to the law. He has had a fair trial and been defended by an able counsel.

On the whole record, we find no reversible or prejudicial error.

No error.

BELLE LEMINGS, ADMINISTRATRIX OF JOE LEMINGS, DECEASED, v. SOUTHERN RAILWAY COMPANY, C. BURT, AND D. H. CALL.

(Filed 28 April, 1937.)

**1. Appeal and Error § 46—**

Where it is determined on appeal that defendants' motions to nonsuit should have been sustained, other exceptions of defendants need not be considered.

**2. Railroads § 10—Doctrine of last clear chance held inapplicable to evidence showing contributory negligence continuing to moment of accident, and that defendants could not have avoided the injury.**

The evidence tended to show that plaintiff's intestate, a man of sixty years, in good health physically and mentally, sat down upon a crosstie on the corporate defendant's tracks, where the tracks were straight and unobstructed for at least 3,000 feet, that he was warned by several passers-by of his dangerous position, that he responded to the warnings, but continued to sit on the crosstie with his elbows on his knees and his head between his hands, that defendant's train, pulled by two engines, approached at a speed of 40 to 50 miles an hour in violation of an ordinance of the town in which the accident occurred limiting the speed of trains to six miles per hour, that the whistles of the engines were blown repeatedly in warning, and that when the train was about 160 feet from intestate and the engineers realized he was not going to heed their warning, they put on brakes and exerted themselves to the utmost of their ability to stop the train and avoid hitting intestate, but were unable to do so. *Held:* The evidence was insufficient to support the submission of an issue of last clear chance, since the evidence shows contributory negligence of intestate continuing up to the moment of impact, and does not show that intestate was in a helpless or even an apparently helpless condition on the track, and that therefore the engineers had a right to assume up to the last moment that he would get off the track and avoid injury, and that when they realized he would not, it was too late to avoid the accident, although they exerted themselves to do so.

CLARKSON, J., dissenting.

APPEAL by defendants from *Alley, J.*, at September Term, 1936, of HAYWOOD. Reversed.

This is an action to recover damages for the death of plaintiff's intestate. C. S., 160.

The facts shown by all the evidence at the trial with respect to the liability of the defendants to the plaintiff for damages resulting from the death of her intestate are as follows:

About 5:30 o'clock p.m., on 9 March, 1936, while he was sitting on the end of a crosstie in the track of the defendant Southern Railway Company, within the corporate limits of the town of Waynesville, in Haywood County, North Carolina, plaintiff's intestate was struck and killed by a train owned by the defendant Southern Railway Company and

drawn by two of its engines, one operated by the defendant C. Burt, and the other by the defendant D. H. Call, both of whom were employees of their codefendant.

The train was a "doubleheader." As it approached the crosstie on which plaintiff's intestate was sitting, from a westerly direction, the train was traveling at a speed of 40 to 50 miles per hour, in violation of an ordinance of the town of Waynesville, which prescribed a maximum speed for trains operated within the corporate limits of said town, of six miles per hour. As it approached the point on the track where plaintiff's intestate was sitting, the whistles on the engines drawing said train were blown repeatedly by the engineers. No effort was made by them to lower the speed of the train until it was about 160 feet from the point where plaintiff's intestate was sitting and where he was struck and killed by the train. He died almost immediately after he was struck and injured by the train. His death was the result of his injuries.

Plaintiff's intestate was about 60 years of age at the date of his death. He was in good health, both physically and mentally. He was a carpenter by trade, and had worked at his trade during the week preceding his death. He left the station in Waynesville about 4 o'clock p.m., on 9 March, 1936, and after walking on defendants' track in a westerly direction for a distance of about 300 yards, he sat down on the end of a crosstie in said track. He continued to sit on the crosstie for about an hour, until he was struck and killed by defendant's train about 5:30 o'clock p.m. During this time he was warned by passers-by that he was sitting in a place of danger; that it was about time for a train. He was advised by at least two persons, who passed him, to get up from the crosstie and leave. He responded to these warnings and to this advice, but continued to sit on the crosstie. The track from the point where plaintiff's intestate was sitting, in a westerly direction, for a distance of about 3,000 feet, was straight. There was nothing on the track which would have prevented plaintiff's intestate from seeing a train approaching from the west in ample time for him to have gotten up from the crosstie and left the track. There was no evidence tending to show that the sight or hearing of plaintiff's intestate was defective, or that at any time while he was sitting on the crosstie he was not conscious of his peril.

Shortly before he sat down on the crosstie, while he was walking on the track plaintiff's intestate staggered between the rails of the track. After he sat down, he leaned over, with his elbows on his knees, and with his head between his hands. He remained in that position until he was struck and killed by the train. There was no evidence tending to show that any of the persons who saw him as he sat on the crosstie—some of whom knew him—offered him any assistance because of apprehension

that he was sick, or for any reason unable to care for himself. All the evidence showed that the persons who warned him of his peril and advised him to get up from the crosstie and leave, left him sitting on the crosstie, fully conscious of his perilous situation.

W. L. Hardin, Jr., the only witness who testified that he saw plaintiff's intestate immediately before he was struck and killed by the train, testified as follows:

"I live in Waynesville. I am sales agent of the Standard Oil Company. My office is near the track of the Southern Railway Company. I am familiar with the track from the station in Waynesville to the station in Hazelwood. It is used constantly by the public as a walkway. It is straight from the station in Waynesville in a westerly direction for a distance of over 3,000 feet. There are no obstructions on or near the track which prevent a person on the track from seeing a train approaching the station in Waynesville from the west for a distance of more than 3,000 feet.

"I knew Joe Lemings. I saw him from my office sitting on a crosstie in the track of the Southern Railway Company on the afternoon of 9 March, 1936. When I came out of my office and first saw him, he was at an angle from me—a distance of about 150 feet. He was sitting on the crosstie in a leaning position, with his elbows on his knees, and his hands between his knees. His left side was turned toward me. I did not pay any particular attention to his arms. I did not have time to do so. I saw the train coming from the west. It was coming at a speed of 40 to 45 miles per hour. It was about 160 feet from where Joe Lemings was sitting on the crosstie. The engineer was trying to stop the train. He had put on his brakes. I saw sparks of fire on the track, under the wheels of the engine. I did not see the train strike Joe Lemings. After it struck him I went to the place where I had seen him before he was struck. His body was beside the track. He was dead. The train stopped after it struck him at a distance of 160 to 180 feet.

"When I saw Joe Lemings sitting on the crosstie, before he was struck by the train, there was nothing about him to indicate that there was anything the matter with him. He was just sitting on the crosstie, leaning over, with his feet on the ground, his elbows on his knees, and his hands between his knees. The engineer on defendant's train could have seen him in that position for a distance of at least 3,000 feet."

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff's intestate injured and killed by the negligence of the Southern Railway Company, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff's intestate injured and killed by the negligence of the defendant C. Burt, as alleged in the complaint? Answer: 'Yes.'

"3. Was the plaintiff's intestate injured and killed by the negligence of the defendant D. H. Call, as alleged in the complaint? Answer: 'Yes.'

"4. Did the plaintiff's intestate, by his own negligence, contribute to his own injury and death, as alleged in the answer? Answer: 'Yes.'

"5. Notwithstanding such negligence on the part of plaintiff's intestate, could the defendants, by the exercise of ordinary care, have avoided the injury and death of plaintiff's intestate? Answer: 'Yes.'

"6. What damage, if any, is plaintiff entitled to recover? Answer: '$2,500.'"

From judgment that plaintiff recover of the defendants and each of them the sum of $2,500 and the costs of the action, the defendants appealed to the Supreme Court, assigning errors in the trial.

*J. Hayes Alley and F. E. Alley, Jr., for plaintiff.*
*Jones & Ward and R. C. Kelly for defendants.*

CONNOR, J. As we are of the opinion that there was error in the refusal of the trial court to allow defendants' motion, at the close of all the evidence, for judgment as of nonsuit (C. S., 567), we shall not discuss assignments of error on this appeal, presenting defendants' contentions that there was error in the admission of evidence offered by the plaintiff, in the exclusion of evidence offered by the defendants, and in the charge of the court to the jury. Conceding, without deciding, that neither of these assignments of error can be sustained, we are of opinion that there was error in the refusal of defendants' motion for judgment as of nonsuit, and that for this reason the judgment should be reversed, and that the action should be dismissed.

Conceding, as contended by the plaintiff, that there was no error in the trial of this action with respect to the first, second, third, or fourth issue, we find no evidence in the record tending to support an affirmative answer to the fifth issue. In view of the answer to the fourth issue, the judgment is supported only by the affirmative answer to the fifth issue. There was no evidence tending to show that plaintiff's intestate as he sat on the crosstie, and as the train approached him, was at any time in a helpless or even an apparently helpless condition. For this reason the principle on which the doctrine of the "last clear chance" is founded is not applicable to this case. See *Reep v. R. R.*, 210 N. C., 285, 186 S. E., 318; *Stover v. R. R.*, 208 N. C., 495, 181 S. E., 336; *Rives v. R. R.*, 203 N. C., 227, 165 S. E., 709. In *Reep v. R. R., supra,* it is said: "All that the evidence discloses is that the intestate was sitting on the crosstie, with his head resting upon the extended fingers of his right hand. This was not sufficient to put the engineer upon notice that the

intestate would not get off of the track before the engine reached and struck him. There was no evidence that any disability of the intestate was known or was apparent to the engineer. The engineer therefore had a right to assume up to the last moment that the intestate would get off of the track." In that case, a judgment for the plaintiff was reversed for error in submitting to the jury an issue involving the principle on which the doctrine of the "last clear chance" is founded. The instant case cannot be distinguished from that case.

This case is distinguishable from *Jenkins v. R. R.,* 196 N. C., 466, 146 S. E., 83. In that case it is said: "There was evidence that deceased could not have been seen by a person on the train at a greater distance than about 400 feet, because of a curve in the track; that deceased had gone upon the track as a licensee, and while lawfully walking thereon had become suddenly ill, and for that reason had sat down upon the end of a crosstie; that he was sitting there as the defendant's train approached him in an apparently unconscious and therefore helpless condition, and that the train which was moving at a rate of speed not less than fifteen miles per hour, could not have stopped at that point within less than 600 feet." In that case a judgment dismissing the action as of nonsuit was reversed.

In the instant case, there was no evidence tending to show that the deceased was in a helpless condition at any time after he sat down on the end of the crosstie until he was struck and killed by defendant's train. All the evidence showed that defendant's engineers saw the deceased as he sat on the end of the crosstie, and gave ample warning to him of the approach of the train. When the engineers realized that the deceased continued to sit on the crosstie, and failed to heed their warning, they put on the brakes of their engines, and exerted themselves to the utmost of their ability to stop the train and avoid striking the deceased. It was then too late. The proximate cause of the injuries and death of plaintiff's intestate was his negligence, which continued up to the moment when he was struck by defendant's train. On all the facts shown by the evidence, the doctrine of "the last clear chance" cannot be invoked in this case.

There was error in the refusal of defendants' motion at the close of all the evidence, for judgment as of nonsuit. The judgment is

Reversed.

CLARKSON, J., dissenting: The evidence: The track from the point where plaintiff's intestate was sitting, in a westerly direction, for a distance of about 3,000 feet, was straight. Shortly before he sat down on the crosstie, while he was walking on the track plaintiff's intestate staggered between the rails of the track. After he sat down, he leaned over,

with his elbows on his knees, and with his head between his hands. He remained in that position until this carpenter by trade was struck and killed by the train.

The killing was in daylight, about 5:30 o'clock p.m., and within the corporate limits of the town of Waynesville. The train was traveling between 40 and 50 miles per hour, in violation of an ordinance of the town of Waynesville, which prescribed a maximum speed for trains operated within the corporate limits of said town of six miles per hour. No effort was made to lower the speed of the train until within about 160 feet of where plaintiff's intestate was sitting and where he was struck and killed by the train.

In *McArver v. R. R.*, 129 N. C., 380 (384), we find: "Engineers in charge of moving trains are required by the decisions of this Court to exercise reasonable care in observing the track, keeping a diligent lookout for obstructions of any kind, including cattle, horses, and hogs, and also persons who may be helpless or unconscious, or both. And this lookout is not only for the safety of the passengers on the train, but also for the protection of cattle, etc., and of those persons who may be in the condition and situation as just described. If, therefore, an engineer, in the omission of the requirement to keep a vigilant outlook fails to see such a person on the track, or so near to it as to be in peril from a passing train, and could have, by the use of his appliances, prevented the injury, and failed to do so, then he would be also guilty of negligence," citing authorities.

In *Holman v. R. R.*, 159 N. C., 44 (45), it is said: "A man lying on the track or sitting on the end of a crosstie at the point where the plaintiff's body was found could be seen under the headlight of the engine 125 yards, and the defendant's train that night could have been stopped within that distance from the spot, if running at the rate of not over 8 miles per hour, the speed allowed by the ordinance." At p. 46 we find: "In *Snipes v. Mfg. Co.*, 152 N. C., 42, the Court says: 'It is well established that the employees of a railroad company in operating its trains are required to keep a careful and continuous outlook along the track and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of their duty,'" citing numerous authorities. *Triplett v. R. R.*, 205 N. C., 113.

In *Neal v. R. R.*, 126 N. C., 634 (638), it is written: "These cases hold that it is not negligence on a railroad company where its train runs over a man walking on the railroad track, apparently in possession of his faculties, and in the absence of any reason to suppose that he was not. This is put upon the ground that the engineer may reasonably suppose that the man will step off in time to prevent injury."

Right or wrong, this Court has consistently followed the doctrine in the *Neal case, supra,* but there are many exceptions to this rule. In *Ray v. R. R.,* 141 N. C., 84, *Hoke, J.,* said: "The authorities are to the effect that if the plaintiff is at the time rightfully upon the track or sufficiently near it to threaten his safety, and is negligent, and so brought into a position of peril, if the defendant company by taking a proper precaution and keeping a proper lookout could have discovered the peril in time to have averted the injury by the exercise of proper diligence, and negligently fails to do it, the defendant would still be responsible, though the plaintiff also may have been negligent in the first instance." These exceptions are to the effect that persons on the track asleep, drunk, helpless, or unconscious, or in a position oblivious to danger, recovery can be had for the negligence of the railroad.

The following is said in *Threadwell v. R. R.,* 169 N. C., 694 (701): "If deceased were asleep on the track, or otherwise helpless, he was negligent, but it was the duty of the defendant's engineer, after discovering his dangerous position, to have exercised ordinary care in saving him from harm, and it was further his duty, under our decisions, to keep a reasonably careful lookout so as to discern any person who may be on the track in a helpless condition. *Arrowood v. R. R. Co.,* 126 N. C., 629; *Gray v. R. R.,* 167 N. C., 433; *Cullifer v. R. R. Co.,* 168 N. C., at p. 311."

All the evidence in the present case is to the effect that the plaintiff's intestate was sitting on the crossties, leaning over, with his elbows on his knees and with his head between his hands. It was daylight and the engineer could have seen him for 3,000 feet, and could have stopped his train in plenty of time to have saved the life of plaintiff's intestate by keeping a proper lookout, as it was his duty to do. It may be that plaintiff's intestate was overcome by illness as he sat on the crosstie with his elbows on his knees and his head between his hands.

In *Wilson v. R. R.,* 90 N. C., 69, at pp. 73-4, it is said: "The evidence, including that of the engineer, went to show that the railroad was straight, passing through an open field for a long distance in the neighborhood where the mule was killed. It was about one o'clock in the day, and the engineer could, by reasonable diligence, easily have seen the mule on the road one-half or three-quarters of a mile ahead of the engine; he saw it on the road half a mile ahead and gave the alarm. The evidence is conflicting as to whether or not the speed of the train was slackened; it was moving at about the rate of fifteen miles per hour; the mule ran off, then on the road, and was killed by the engine. Now, if these facts were true, or substantially true, and nothing else appeared, the presumption of negligence was not repelled. Indeed, there was manifest negligence. It was the plain duty of the engineer to slacken the speed, and, if need be, stop the train. In this aspect of the case, the

court instructed the jury that 'if the engineer saw the mule upon the track a quarter or a half mile ahead, or could have seen it running on the track, by proper watchfulness, and could have stopped the train before reaching the point where it was killed, then the defendant was guilty of negligence, and the plaintiff was entitled to recover the value of the mule.' There was evidence tending to prove the case as supposed in this charge, and the plaintiff contended that the evidence proved it. The charge in that view was correct, and is fully sustained by repeated decisions of this Court," citing authorities. At p. 75: "It may be conceded that where cattle are quietly grazing, resting, or moving near the road—not on it—and manifesting no disposition to go on it, the speed of the train need not be checked, but the rule is different where the cow or mule is on the road and runs on, then off, along, near to, and back upon it. In such a case, reasonable diligence and care require that the engineer shall slacken the speed, keep the engine steadily and firmly under his control, and, if need be, stop it until the danger shall be out of the way."

In *Snowden v. R. R.*, 95 N. C., 93, it was held: "Where a horse was feeding within three feet of a railroad track, in plain view of the engineer, who did not slacken the speed of the train, or take other precautions, until the train was within close proximity to the horse, and he had gotten upon the track, it was held negligence."

In *Lewis v. Norfolk Southern R. R. Co.*, 163 N. C., 33, it was held: "A flock of turkeys are not as alert to danger as cattle, horses, or other more intelligent creatures, though more quickly alarmed by a sudden sharp sound, as the whistle of an approaching railroad locomotive. Hence, the failure of the engineer to blow the whistle of the locomotive when he sees turkeys feeding on or across the track, or should have seen them by a proper lookout, is actionable negligence. The jury may consider the known characteristics of a turkey to run or fly at a sudden sound upon the question as to whether the failure to blow the whistle, under these circumstances, was the proximate cause of the damage inflicted by the train running into them."

The engineers in the above quoted cases were required to stop to save the lives of mules, horses, and turkeys when on the track, but under the decision in this case, not a human being. It is the age-old cry, when another son of a carpenter said: "How much then is a man better than a sheep." Matthew, 12th chapter, part verse 12.

MRS. DAISY T. TAFT, ADMINISTRATRIX OF THE ESTATE OF W. M. TAFT, JR., v. MARYLAND CASUALTY COMPANY.

(Filed 28 April, 1937.)

**1. Insurance § 38—Policy providing liability for injury while riding in "passenger automobile" held not to cover injury while riding in truck.**

The policy in suit provided liability for accidental injury or death while insured was driving or riding in a "passenger automobile." At the time the policy was issued, insured owned only trucks to the knowledge of insurer's soliciting agent, and at the time of the accidental injury causing insured's death, he was riding in a truck with trailer attached, both of which carried the licenses as prescribed by law, and at the time the vehicle was being used solely for pleasure and not for business purposes. *Held:* The provisions of the policy are not ambiguous, and the policy does not cover the accidental injury resulting in death while insured was riding in the truck, and the fact that the truck was being used for passenger purposes cannot change the nature of the vehicle or the terms of the policy limiting liability to accidental injury or death while insured is riding in a passenger automobile.

**2. Insurance § 13—**

Where the insurance contract is expressed in clear and unmistakable language, without ambiguity, its construction is for the court.

APPEAL by plaintiff from *Rousseau, J.*, at February Regular Term, 1937, of MECKLENBURG. Affirmed.

The complaint of plaintiff is as follows:

"1. That W. M. Taft, Jr., of late a citizen and resident of Mecklenburg County, North Carolina, died intestate on or about 13 January, 1935, and that Mrs. Daisy T. Taft has been duly appointed by the Superior Court of Mecklenburg County, North Carolina, and has qualified and is now acting as administratrix of the estate of W. M. Taft, Jr., deceased.

"2. That the defendant is a corporation, organized and existing according to law, with its principal offices at Baltimore, Maryland, and, as such, is and was, at the times herein mentioned, engaged in the insurance business.

"3. That on or about 27 April, 1934, for a valuable consideration, the defendant issued and delivered to plaintiff's intestate a certain life and accident insurance policy, under the terms of which the defendant insured plaintiff's intestate in the sum of $1,000 against the loss of life while driving or riding in a passenger automobile.

"4. That on or about 13 January, 1935, plaintiff's intestate lost his life while driving or riding in a passenger automobile.

"5. That said policy of insurance was payable to the estate of plaintiff's intestate and was in full force and effect at the time of his death.

"6. That by reason of said insurance policy and said loss of life, the defendant is indebted to the plaintiff in the sum of $1,000, with interest thereon from 13 January, 1935, until paid.

"7. That demand has been made by the plaintiff upon the defendant for the payment of said sum, and payment thereof has been refused.

"Wherefore, plaintiff prays judgment against the defendant for the sum of $1,000, with interest thereon from 13 January, 1935, and for the costs of the action, to be taxed by the clerk. Carswell & Ervin, Attorneys for Plaintiff."

The defendant denied the material allegations of the complaint, except that it issued the certificate of insurance to plaintiff's intestate, W. M. Taft, Jr.

The material part of the policy to be considered is as follows:

"This Policy Provides Indemnity for Loss of Life, Limb, Sight, or Time by Accidental Means to the Extent Herein Limited and Provided.

"Maryland Casualty Company, Baltimore (Hereinafter called the Company).

"In consideration of the payment of the premium and subject to the terms, conditions, and limitations hereinafter contained.

"Does hereby insure the individual whose name appears below (hereinafter called the Insured), for the term of one year from noon, standard time, at the place where the Insured resides, of the date this policy is dated, against loss resulting from bodily injuries caused directly, solely, and independently of all other causes through accidental means, which bodily injuries or their facts shall not be caused wholly or in part by any disease, and sustained by the Insured in the following manner and subject to all conditions and limitations hereinafter contained:

"(1) While driving or riding in a passenger automobile," etc. "This policy is issued in consideration of an annual premium of One Dollar and Twenty ($1.20) Cents. . . . Insured Name: W. M. Taft, Jr. Expiration Date of Insurance: 4/27/35." The policy provides: "For loss of life $1,000.00."

W. M. Taft, Jr., was killed on the morning of 13 January, 1935, while riding in the truck, with the trailer. Mrs. Daisy T. Taft, the wife of W. M. Taft, Jr., and his administratrix, testified, in part: "I was riding with him that evening, and he was driving when I was with him. We rode to Troy and he left me at his uncle's home at 10:30 o'clock. We rode to Troy in a 1934 Ford V-8 truck. At that time it had a trailer; it was not a covered trailer; it was a flat trailer. We have driven the truck often when the trailer was off. I saw the truck, the one that I rode in, within the next day or two after his funeral. I don't think it was damaged. Something was wrong with it, or at least it couldn't be driven. I know lots of times I have ridden in it with the trailer off.

I don't know what they did with it when it was detached. Q. Did you have any other automobile, other than this automobile, to ride in? A. We did not. At the time the policy was sold to us we didn't own anything but trucks and the man that sold us the policy knew that we didn't have anything but trucks. Q. What I asked you was what other car, if any, did you have to ride in other than this truck? A. None. I live in Charlotte. When the trailer is off, there is nothing there by an enclosed cab. We rode in the enclosed cab. It had an enclosed cab on it. The night of 12 January, when I was riding with my husband, it had the trailer on it. After my husband was killed, we took the trailer off and later we put a dump body on it. That was about a year ago. I was visiting in Troy. . . . Q. From the time this policy was taken out up until your husband's death, did you use any other kind of car to ride in? A. No, we didn't. Q. For what purposes did you use it, to go what places as a passenger car? A. My home is 150 miles from here. We went there several times and carried our babies with us, and we went to Savannah, Georgia, in the same car and took our family with us. Q. And did you go about Charlotte here in that same car? A. Yes, sir. For long trips and in town too. . . . My husband was in different types of trucking business. The trailer was sometimes used for hauling lumber. It was long enough to haul lumber on. I think he hauled steel sometimes on that truck. . . . Neither the cab of the truck nor the frame of the truck has been changed. Those were the same on the 12th when I was riding in this truck as they are now, to the best of my knowledge. When the trailer is off, this and this is all that is left (pointing to exhibit). I guess the wheels on it are the same now as then. I guess it's the same type of wheels and two tires in the rear; I don't remember any change. The springs, so far as I know, are the same. This truck was bought primarily to use in our business. When my husband had work, it was used most of the time in his business, but we were not working for quite a while before he was killed, I imagine it was about six weeks. . . . Q. For six weeks prior to the time your husband was hurt, what was the truck used for? A. We used it for business and sometimes we took trips in it. When he was not working, we used it for our own pleasure. We went to Troy on 12 January to visit relatives at Troy. We went to spend the week-end. My husband's people lived at Troy."

Albert Van Cannon testified in part that he was driving the truck when the accident occurred. "About two and one-half miles the other side of Troy, we were coming up the River Hill and I ran off the road in the ditch, and when I pulled back on the road, the door came open and he (plaintiff's intestate) fell out. I kind of fell asleep, started off just a second, and ran off of the road. He fell out on the ground when the

door came open. When I picked him up, he was unconscious. I took him to Dr. Harris. He lived for about 30 minutes after that. . . . I don't know definitely, but I guess the trailer on this truck I was driving was about twenty feet long. I don't know whether it had a truck license on it or not. . . . It had four wheels in the rear. I couldn't say about the springs that were on it. As far as I can tell, the chassis of the truck I was driving is the same as the one shown in plaintiff's exhibit. . . . The truck the night that Mr. Taft and I had it was not used for any business purpose. It was being used for pleasure. Mr. Taft went to the truck about 12:30 o'clock, I believe. When I came to the truck a little after 3 o'clock, he was asleep."

J. E. Hurley testified: "I live at Troy. I was acquainted with this truck in question. I saw it before the collision. This trailer was detachable. We have trailers at the lumber plant, and this was constructed the same way as mine. I am acquainted with the 1934 automobile trailer type truck. To take the trailer off, we drive the truck under the chain pole and lift up the trailer and then drive the truck from under it. It takes about 10 or 15 minutes to do that. This particular automobile was of that type."

The plaintiff made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

*G. T. Carswell and Joe W. Ervin for plaintiff.*
*Robinson & Jones for defendant.*

CLARKSON, J. 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 language in the policy to be construed is: "While driving or riding in a passenger automobile." The language is clear and not ambiguous. The vehicle in which plaintiff's intestate was riding when killed was a 1934 Ford V-8 truck. It had a trailer about 20 feet long, four wheels in the rear. It was being driven with the trailer the night on which plaintiff's intestate was killed. There is a vast difference between a truck and a passenger automobile. The difference is recognized in this State by statute. As to a truck, C. S., 2621 (46a), is as follows: "No motor vehicle designed, equipped for, or engaged in transporting property shall be operated over the highways of the State at a greater rate of speed than thirty-five miles an hour, and no such motor vehicle to which a trailer is attached shall be operated over such highways at a greater rate of speed than thirty (30) miles an hour." As

to passenger vehicle, C. S., 2621 (46), says: "Speed restrictions—(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. (b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable or prudent, and that it is unlawful. (4) Forty-five miles per hour under other conditions," etc.

The cost of license is different for a passenger automobile and a truck. C. S., 2612, "Rates for automobiles" are set forth, and "Rates for trucks," and "on all trailers $15.00 per ton carrying capacity." Plaintiff administratrix testified: "My husband bought a truck license for it and had said license on it the night he was killed."

In *Lloyd v. Ins. Co.*, 200 N. C., 722, the statement of the case, in part, is as follows: "The policy provided an indemnity of $1,000 for death from accidental bodily injuries if such death resulted from 'the wrecking or disablement of any private horse-drawn vehicle, or private automobile of the pleasure-car type in which the insured is riding or driving,' etc. The evidence tended to show that at the time of his death the deceased was riding in a 1929 Model A, one and a half ton Ford truck. This truck has an enclosed cab with a seat that would accommodate three passengers comfortably. The owner of the truck testified that it was used for hauling passengers and truck. He said: 'There was no place at the back for passengers to ride. That was to carry what we wanted to haul. We had a body on the back. Sometimes I took my family to church on it. . . . We had a car other than this truck. . . . On the back is a truck body which was used for hauling milk from the Lawrence Dairy on the milk route. It was used for most anything that come to hand and done more hauling of milk than anything else. I also had a five-passenger Ford touring car. That was the principal pleasure car of the family. . . . There was a wreck.' Two other men were riding in the truck with the deceased at the time of the wreck. The third issue was as follows: 'Was plaintiff's intestate killed by the wrecking and disablement of a private automobile of the pleasure-car type in which insured was riding, as alleged in the complaint?' At the close of plaintiff's testimony the trial judge intimated that he would give a peremptory instruction directing the jury to answer the third issue 'No.'" The question in this case was: "Is a Ford one and a half ton truck, used principally for hauling milk, 'a private automobile of the pleasure-car type?'" The court concludes its opinion: "Manifestly, the truck in which plaintiff's intestate was riding at the time of his death was by intention, use, and construction a commercial vehicle, and so classified by the North Carolina statute. Consequently, the coverage clause of the policy issued by the defendant did not, upon the evidence, include the

accidental death of plaintiff's intestate, and the ruling of the trial judge is upheld." We are of the opinion that this case is determinative of the present one.

The plaintiff relies on *Conyard v. Ins. Co.*, 204 N. C., 506, and *Fidelity & Casualty Co. v. Martin*, 66 Federal Reporter (2nd series), 438 (9th circuit).

In the *Conyard case, supra*, the deceased "Held an insurance policy with the defendant company which provided an indemnity of $1,000 for death from accidental bodily injuries resulting from the 'collision of or by any accident to any private drawn vehicle or private motor driven car in which the insured is riding or driving.'" It was held: "The term 'motor driven car' is broad enough to include a motor driven truck, and we cannot say a narrower interpretation was intended by the parties. The rule of construction is, that when an insurance policy is reasonably susceptible of two interpretations, the one more favorable to the assured will be adopted. 'The policy having been prepared by the insurers, it should be construed most strongly against them' (citing authorities). There is nothing said in *Lloyd v. Ins. Co.*, 200 N. C., 722; *Anderson v. Ins. Co.*, 197 N. C., 72; or *Gant v. Ins. Co.*, 197 N. C., 122, which militates against the position here taken."

In the *Martin case, supra*, the factual situation was different. "Roy Anderson, a Ford salesman, testified that the car purchased by Mr. Martin was a Ford roadster, a pick-up body, and not a truck." The Court in that case said (at pp. 440-1): "If the car had been a Ford roadster equipped to carry passengers only, *or a heavy truck solely adapted to carry freight, and the necessary attendants and operators*, no doubt the question of the applicability of the policy of insurance to accidents occurring therein would be a question of law, but, where the automobile is of the character disclosed by the evidence, its classification is one of fact to be determined by the court or jury, as the case may be." (Italics ours.)

Neither of the above cases is similar to the present one. The language of the policy here is: "While driving or riding in a passenger automobile." The plaintiff's intestate was riding when killed (1) in a 1934 Ford V-8 truck; (2) it carried a truck license with a trailer (the trailer was an additional license cost), and when plaintiff's intestate was killed it was a truck with the trailer attached; (3) there is no part of the vehicle which is the same as an ordinary passenger car; (4) the wheels (double in the back), the springs, the chassis, and everything is different, and it was designed and built for the sole purpose of hauling—it was a truck; (5) the State license fee was for truck hauling and different from the State license fee for a passenger automobile; (6) the truck was bought primarily to be used in business; (7) under the rule

of the road it was prohibited from being driven as fast as a passenger automobile; (8) the cheapness of the policy ($1.20 per year premium with payment for loss of life $1,000) covered injury while driving or riding in a passenger automobile—not a truck. This would indicate clearly that it was not a passenger automobile in which many might ride compared with a few in a truck. The duty of a court is to *construe* and not *make* contracts—that is for the parties to do. *Gilmore v. Ins. Co.*, 199 N. C., 632. The fact that the truck in question was used for passenger purposes cannot change the nature of the vehicle or the terms of the contract. The intention of the parties is shown by the clear and unmistakable language used, no ambiguity. It is the duty of a court in such cases to construe the contract. The fact that the truck was used for pleasure trips does not make it a passenger automobile so as to nullify the plain language of the contract.

The death of plaintiff's intestate was a sad misfortune, which in no way defendant was responsible or liable for under the policy sued on.

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

Affirmed.

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MRS. ANNIE McLAWHORN v. R. W. SMITH AND HIS WIFE, CORA E. SMITH, AND B. F. STOKES AND HIS WIFE, HATTIE STOKES.

(Filed 28 April, 1937.)

**1. Courts § 2c—Appeal from clerk in dower proceeding in which questions of law and fact are raised by pleadings held governed by C. S., 634.**

In this proceeding for the allotment of dower, issues of law and of fact were raised by the pleadings, and at the hearing before the clerk the parties waived jury trial and filed a statement of facts agreed. Upon rendition of judgment on the facts agreed by the clerk, plaintiff excepted to the judgment adverse to her, appealed to the Superior Court in term time, gave notice of appeal at the time judgment was signed, and further notice was waived by defendants, and the clerk transferred the appeal to the civil issue docket as required by C. S., 634. *Held:* The appeal is governed by C. S., 634, and judgment of the Superior Court dismissing the appeal on the ground that plaintiff was guilty of laches in failing to have the clerk prepare and forward to the judge a transcript of the record as required by C. S., 635, is error, C. S., 635, not being applicable to the appeal.

**2. Dower § 2—Widow is not entitled to dower in land conveyed before marriage by husband in defraud of creditors, even though deed is later set aside.**

The owner of land, prior to his marriage, deeded certain lands to his mother. Thereafter the deed was set aside by his creditors as being fraudulent as to them, the judgment in the action being entered subse-

quent to his marriage, although the action was instituted and notice of *lis pendens* was filed before the marriage. *Held:* The deed conveyed title as between the grantor and grantee, although it was executed to delay, hinder, and defraud creditors, and the judgment setting aside the deed reinvested the grantor with title only for the purposes of subjecting the land to sale for the benefit of his creditors, and did not affect the title as between the grantor and the grantee, and upon the death of the grantor, his widow is not entitled to dower therein, since her husband was never beneficially seized of title during coverture.

APPEAL by plaintiff from *Sinclair, J.*, at September Term, 1936, of PITT. Affirmed.

This is a special proceeding for the allotment to the plaintiff as widow of Ed McLawhorn of a dower in land situate in Pitt County, North Carolina, of which the said Ed McLawhorn was seized and possessed during his marriage to the plaintiff.

The proceeding was begun before the clerk of the Superior Court of Pitt County, and was heard by said clerk on 13 August, 1936, on a statement of facts agreed. The said statement is as follows:

"The plaintiff and the defendants expressly waive a trial by jury and agree that the facts out of which this controversy arose are undisputed and are as follows:

"1. That on and prior to 26 January, 1921, Ed McLawhorn, late of the county of Pitt, owned in fee simple and was in possession of a tract of land lying and being in Pitt County, North Carolina, near the town of Ayden, containing 62½ acres, more or less, and known as the B. A. Jones land, said tract of land being fully described by metes and bounds in a deed from Exum Dail and wife to Ed McLawhorn recorded in the office of the register of deeds of Pitt County on 11 October, 1912, in Book G-10, at page 63.

"2. That thereafter, to wit: On 26 January, 1921, the said Ed McLawhorn, for the purpose of defrauding his creditors, made a voluntary conveyance of said tract of land to his mother, Nancy McLawhorn, by deed duly recorded in the office of the register of deeds of Pitt County on 29 January, 1921, in Book S-13, at page 513.

"3. That on 12 April, 1921, a civil action was instituted in the Superior Court of Pitt County by the Bank of Ayden, a creditor of Ed McLawhorn, against the said Ed McLawhorn and Nancy McLawhorn, his mother, for the purpose of having the deed made by Ed McLawhorn to his mother, Nancy McLawhorn, of record in Book S-13, at page 313, set aside, vacated, and declared null and void, for fraud.

"4. That concurrently with the commencement of the action referred to in paragraph 3 above, the Bank of Ayden, plaintiff in said action, caused to be filed in the office of the clerk of the Superior Court of Pitt County, against Ed McLawhorn and his mother, Nancy McLawhorn, a

notice of *lis pendens* in due form, a copy of which is hereto attached, marked 'Exhibit 1,' and is made a part of this agreed statement of facts.

"5. That thereafter, to wit: At the April Term, 1926, of the Superior Court of Pitt County, said action was heard and verdict rendered and judgment signed and entered, as appears of record in Judgment Docket No. 29, at page 247, a copy of which is hereto attached, marked 'Exhibit 2,' and is made a part of this agreed statement of facts.

"6. That, among other things, said judgment provided as follows: '. . . . And it is further considered, ordered, and adjudged that the plaintiff be and it is hereby declared to have an equitable lien upon the said tract of land on and from 12 April, 1921, the date of the filing of the *lis pendens* in the office of the clerk of the Superior Court of Pitt County, and the date of the commencement of this action, for the full amount of this judgment, which said lien is hereby declared to be prior to any lien which may have been placed against said property or any judgment which may have been secured against the said Ed McLawhorn subsequent to the filing of the said *lis pendens*, which said *lis pendens* is recorded in Lis Pendens Docket No. 1, at page 1, the court being of the opinion that the plaintiff is entitled to have such lien, and that such lien shall have priority over all other liens recorded since the date of the filing of the said *lis pendens*, by reason of the plaintiff's diligence in prosecuting this action to judgment.'

"7. That at the time of the commencement of the action, and at the time of the filing of the notice of *lis pendens*, to wit: 12 April, 1921, the said Ed McLawhorn was unmarried.

"8. That the said Ed McLawhorn and the plaintiff Mrs. Annie M. McLawhorn were lawfully married on 22 December, 1921, and thereafter lived together as husband and wife until 11 July, 1930, when the said Ed McLawhorn died intestate; that of the said marriage there were born to the said Ed McLawhorn and Annie McLawhorn several children, who are now living.

"9. That after judgment was entered as set forth in paragraph 5 above, upon the petition of Ed McLawhorn, his homestead was set apart and allotted to him in said land, and the said tract of land, subject to the homestead, was sold by commissioners of the court to R. W. Smith for the sum of $11,500, as will appear by reference to deed recorded in Book M-16, at page 240, in the office of the register of deeds of Pitt County.

"10. That Mrs. Annie McLawhorn, widow of Ed McLawhorn, was not a party to the action to set aside the fraudulent deed of Ed McLawhorn, the said Ed McLawhorn not having married the said Annie McLawhorn until 22 December, 1921, after the institution of said action and the filing of the said notice to *lis pendens*.

"11. That on 22 December, 1929, R. W. Smith and his wife, Cora E. Smith, for a valuable consideration, conveyed said land to the defendant B. F. Stokes, by deed of record in Book E-17, at page 599, in the office of the register of deeds of Pitt County, and on the same day B. F. Stokes and his wife, Hattie Stokes, executed to the said R. W. Smith a mortgage deed therein for the purpose of securing the purchase price to be paid for said land."

On the foregoing facts, the plaintiff Mrs. Annie McLawhorn contends:

That as the widow of Ed McLawhorn, by reason of the fact that said Ed McLawhorn was seized in fee of said land during her coverture, that no valid encumbrance rested on said land prior to her coverture, and that she did not by her free consent encumber or convey her inchoate dower interest in said land during her coverture, or subsequent thereto, she is entitled to have secured to her her dower in said tract of land under the Constitution and laws of the State of North Carolina.

On the foregoing facts, the defendants contend:

That the revesting of title to said land in the said Ed McLawhorn, as decreed in said judgment, and the attachment of the Bank of Ayden's judgment, occurred and attached concurrently and simultaneously, and dated, existed, and attached as expressly provided in said judgment, on and from 12 April, 1921, and that by reason thereof any dower interest which the plaintiff may have had in said land was subject and subordinate to the lien of the Bank of Ayden's judgment, for that the plaintiff, on 12 April, 1921, had not married the said Ed McLawhorn, the judgment debtor, and that her marriage to the said judgment debtor, after the filing of the notice of *lis pendens,* and the attachment of said lien, did not and could not vest in the plaintiff any rights, interests, or claims superior to said lien, and that by reason of the conduct of the plaintiff as widow of the judgment debtor, in respect to the homestead, she in any event made an election of her remedy, and ratified the sale of the land to R. W. Smith, and is now estopped to claim dower in said land.

At the hearing of the proceeding before the clerk of the Superior Court of Pitt County, the court was of opinion that on the facts agreed, the revesting of the title to the land described in the deed from Ed McLawhorn to his mother, Nancy McLawhorn, pursuant to the judgment in the action instituted by the Bank of Ayden against Ed McLawhorn and Nancy McLawhorn, in the said Ed McLawhorn, and the attachment of said judgment occurred concurrently and simultaneously, as provided by said judgment on 12 April, 1921, and that any dower interest which the plaintiff may have had in said land was subject and subordinate to the lien of said judgment, and that for that reason the defendant R. W. Smith, as purchaser at the sale of said land made by commissioners under said judgment, took title to said land free and discharged from

any dower interest in said land of the plaintiff, by reason of her marriage to Ed McLawhorn on 22 December, 1921.

It was accordingly ordered and adjudged by the court that the plaintiff is not entitled to the allotment to her of a dower in the land described in her petition, but that the defendant R. W. Smith, and those who claim under him, are now the owners of the said land freed and discharged from any claim to dower by the plaintiff.

This judgment was rendered and signed on 13 August, 1936. The plaintiff excepted to the judgment and appealed to the Superior Court of Pitt County, in term time. Further notice was waived by the defendants.

Plaintiff's appeal from the judgment of the clerk of the Superior Court of Pitt County was heard by the judge presiding at the September Term, 1936, of said court. At said hearing, the defendants moved that said appeal be dismissed for that plaintiff had failed to perfect her said appeal by causing a transcript of the record in the proceeding to be prepared by the clerk of the Superior Court of Pitt County and forwarded to the judge of said court, as required by C. S., 635. A ruling on said motion was reserved by the judge, who then heard plaintiff's appeal on its merits.

At said hearing it was ordered, considered, and adjudged by the court that the appeal of the plaintiff be and the same was dismissed, in accordance with the motion of the defendants, because of her failure to comply with the provisions of C. S., 635, with respect to said appeal, and that the judgment of the clerk of the Superior Court of Pitt County be and the same was affirmed in all respects. The plaintiff appealed to the Supreme Court, assigning error in the order dismissing her appeal and in the judgment affirming the judgment of the clerk of the Superior Court of Pitt County.

*Harding & Lee and Roberts & Williford for plaintiff.*
*Albion Dunn for defendants.*

CONNOR, J. At the hearing by the judge presiding at the September Term, 1936, of the Superior Court of Pitt County, of defendants' motion that plaintiff's appeal from the judgment of the clerk of said court be dismissed, it was made to appear to the judge, and the judge found, that plaintiff had failed to cause a transcript of the record in the proceeding to be prepared by the clerk and forwarded to the judge, as required by C. S., 635, and that such failure was due to the laches of the plaintiff. On these findings, it was ordered by the judge that plaintiff's appeal be and the same was dismissed. The plaintiff did not except to the findings by the judge. She did except, however, to the order dismissing her

appeal from the judgment of the clerk, and on her appeal to this Court assigns same as error.

If C. S., 635, is applicable to plaintiff's appeal from the judgment of the clerk of the Superior Court of Pitt County, there was no error in the order dismissing her appeal. *Hicks v. Wooten,* 175 N. C., 597, 96 S. E., 107. In that case it was held by this Court that on the finding by the judge that plaintiff, who had appealed from an order of the clerk denying plaintiff's motion that an execution be issued on a judgment which the plaintiff had recovered against the defendant, had been guilty of laches in failing to have the clerk to prepare and forward to the judge a transcript of the record, as required by C. S., 635, plaintiff's appeal had been properly dismissed by the judge.

In this proceeding, however, issues of law and of fact were raised on the pleadings which had been filed before the clerk. At the hearing of the proceeding by the clerk, the parties waived a trial by jury of the issues of fact, and filed with the clerk a statement on facts agreed. On these facts the clerk rendered a judgment adverse to the plaintiff. The plaintiff excepted to the judgment, and appealed to the Superior Court in term time. Notice of appeal was given by the plaintiff at the time the judgment was signed. The defendants waived further notice. The clerk thereafter transferred the proceeding to the civil issue docket of the Superior Court of Pitt County, as required by C. S., 634. The proceeding was heard on plaintiff's appeal from the judgment of the clerk at the next ensuing term of the court. At this hearing no issues of fact were submitted to a jury. The proceeding was heard on the statement of facts agreed which had been submitted to the clerk.

On the facts disclosed by the record, we are of opinion that C. S., 634, and not 635, was applicable to plaintiff's appeal from the judgment of the clerk of the Superior Court of Pitt County, and that there was error in the order of the judge dismissing plaintiff's appeal on his finding that plaintiff had failed to perfect her appeal, as required by C. S., 635.

Notwithstanding his order dismissing plaintiff's appeal from the judgment of the clerk of the Superior Court in this proceeding, the judge considered the appeal on its merits (see *Hicks v. Wooten, supra*), and being of opinion that on the facts agreed the plaintiff is not entitled to dower in the land described in her petition, rendered judgment accordingly. Plaintiff excepted to the judgment and appealed to the Supreme Court, assigning same as error. Her assignment of error cannot be sustained.

In *Holt v. Lynch,* 201 N. C., 404, 160 S. E., 469, it is said: "Dower is a life estate to which a married woman is entitled upon the death of her husband intestate, or in case of her dissent from his will, being one-third in value of all the lands, tenements, and hereditaments, legal and

equitable, of which her husband was beneficially seized in law or in fact at any time during coverture, and which her issue might by possibility inherit as heir to the husband. *Chemical Co. v. Walston,* 187 N. C., 817, 123 S. E., 196."

In the instant case, plaintiff's husband was not seized of the land described in her petition at the date of her marriage to him, to wit: 22 December, 1921. By his deed dated 26 January, 1921, he had theretofore conveyed the land to his mother. This deed, although made by plaintiff's husband with intent to hinder, delay, and defraud his creditors, was good and effective as a conveyance of the land as between him as grantor and his mother as grantee. It was void only as against creditors. *Saunders v. Lee,* 101 N. C., 3, 7 S. E., 590. When the deed was set aside and declared void by the judgment in the action instituted by the Bank of Ayden against the grantor and the grantee in the deed, the title did not revest in plaintiff's husband except for the purpose of subjecting the land to sale for the payment of his creditors. The title did not revest in plaintiff's husband as against his mother, the grantee in the deed dated 26 January, 1921. Plaintiff's husband was not seized beneficially of the land at any time during her marriage to him, and she is therefore not entitled to dower in the land.

"A conveyance of lands by a husband before marriage in fraud of his creditors effectually bars his widow's dower therein, for the conveyance is binding on him, and she can claim only through his title. This has been held, although such conveyance was subsequently set aside by the husband's creditors." 19 C. J., 515, section 162, and cases cited in notes.

There is no error in the judgment. It is

Affirmed.

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COMMERCIAL NATIONAL BANK OF CHARLOTTE, NORTH CAROLINA, EXECUTOR OF THE LAST WILL AND TESTAMENT OF THOMAS M. MISENHEIMER, DECEASED, v. CHARLES A. MISENHEIMER AND J. J. MISENHEIMER.

(Filed 28 April, 1937.)

**1. Wills § 44—In order for principle of election to apply, testator must show clear intention to dispose of property not his own.**

The principle of election under a will requires that he who takes under the will must conform to all of its provisions, but the *prima facie* presumption is that the testator intended to dispose only of his own property, and in order for this presumption to be overcome and the principle of election to apply, the intention of testator to dispose of property not his own must be clear and unmistakable.

**2. Same—Evidence held to support finding that testator did not intend to dispose of property not his own and put beneficiary to election.**

Testator directed that one-half "of my life insurance" be applied to an indebtedness on property owned by testator in common with his brother, and that the other half of the insurance money be divided equally between his two brothers. In an action to construe the will, jury trial was waived and it was agreed the court should find the facts. The court found from the evidence that there were four policies of insurance on testator's life, two made payable to his estate and two in which his brother, who was tenant in common with him in the lands, was named beneficiary, that one-half the proceeds of the policies in which the estate was named beneficiary was approximately sufficient to discharge one-sixth of the indebtedness against the lands held in common. *Held:* It not appearing that testator intended to discharge the entire indebtedness on his interest in the property owned as tenant in common, but that the devisees of such interest should take *cum onere*, the evidence, together with consideration of the entire will in the light of the surrounding circumstances, supports the conclusion by the court that testator did not intend to dispose of the insurance policies in which his brother was named beneficiary, and judgment that the brother was not put to his election in regard to such policies is without error.

**3. Wills § 48—**

While ordinarily rents collected by the executor from devised realty go to the devisee, an order directing application of rents to repairs, taxes, insurance, and mortgage indebtedness against the property, is not injurious to the devisees, and an exception to such order is without merit.

**4. Appeal and Error § 46—**

Where it is determined on appeal that the judgment that a devisee was not put to his election under the will is without error, exceptions to the admission of testimony by the devisee as to whether he intended to elect to take under the will become immaterial.

**5. Wills § 46—**

Devisees of property take same subject to prior mortgage debt thereon, and judgment that if the debt were not arranged for by the interested parties, the executor should sell the land to satisfy the liens, and disburse the excess in accordance with the terms of the will, is proper.

APPEAL by defendant J. J. Misenheimer from *Cowper, Special Judge,* at October, 1936, Extra Civil Term of MECKLENBURG. Affirmed.

This was an action instituted by the plaintiff, executor of Thomas M. Misenheimer, deceased, for the construction and interpretation of the will of the testator, who died 4 January, 1935. The defendants are the testator's brothers, next of kin, and the sole devisees under his will.

The provisions of the will referred to are as follows:

"Item I. I direct my executor, hereinafter named, to pay all of my just debts out of the first money that comes into its hands.

"Item II. I bequeath one-half of my life insurance to apply to the indebtedness of the estate which my brother Charlie and I, jointly, own.

The other one-half of my life insurance is to be divided equally between my brothers, Charlie and Jay. (Referring to Charles A. Misenheimer and J. J. Misenheimer.)

"Item III. To my brother Jay I devise and bequeath my interest in the property known as the Fifth Street property, at 305 West Fifth Street; and also to my brother Jay I devise and bequeath one-third interest in the property at 206 North Tryon Street.

"Item IV. To my brother Jay I give and bequeath my automobile and my saddle horse.

"Item V. I give, devise, and bequeath to my brother, Charlie A. Misenheimer, the remainder of my estate, absolutely.

"Item VI. I nominate, constitute, and appoint the Commercial National Bank of Charlotte, North Carolina, a corporation chartered under the laws of the United States of America, as executor of this my last will according to the true intent and meaning thereof, with full powers to pledge, mortgage, sell at either public or private sale, dispose of, invest, reinvest, and otherwise deal with all or any part of my property and estate for the purpose of carrying out the terms and provisions of this will."

Pending the action, Harding, J., made an order 25 June, 1935, authorizing the executor, among other things, to collect one-half the rents from devised real estate, to keep separate account, and to pay therefrom the pro rata share of the testator's estate for repairs, taxes, insurance, and interest or principal of mortgage indebtedness. To this order appellant preserved his exception.

When the cause came on to be heard in October, 1936, jury trial was waived, and it was agreed that the court should find the facts and render judgment in accordance with his conclusions therefrom.

A statement of the facts found by the court may be briefly summarized as follows: At the time of the death of the testator there were in force upon his life four policies of life insurance in the sum of $5,000 each, two of said policies payable to defendant Charles A. Misenheimer, as sole beneficiary, and two policies payable to the testator's estate. About four days prior to testator's death, at his request, Charles E. Barnhardt, a relative, brought to him from testator's office certain papers. These included the four insurance policies and a paper in testator's handwriting. The paper writing was a tentative draft of his will (substantially in same form as later executed and hereinbefore quoted), and at the top of the paper appeared the words and figures following: "Stocks 20,000. Life Insurance 20,000. Barnhardt 165 shares." The testator delivered the four policies and the paper to Barnhardt, who placed the policies in his safe and handed the paper to an attorney for drafting the will in legal form. Upon the execution of the will it also was placed in Barnhardt's safe.

After the death of the testator the plaintiff executor collected from the insurance company approximately $10,000, the amount of the two policies payable to the estate, and defendant Charles A. Misenheimer collected the amount due under the two policies which were payable to said Charles A. Misenheimer as beneficiary.

At the time of his death the testator and defendant Charles A. Misenheimer owned as tenants in common of equal shares, subject to encumbrances, four tracts of land described as (1) Crab Orchard Township farm, (2) Charlotte and Sharon Township farm, (3) Fifth Street property, and (4) North Tryon Street property. These parcels of real property were acquired by the testator and Charles A. Misenheimer subject to prior deeds of trust, amounting at testator's death to $10,000 on the Charlotte and Sharon Township farm, $6,000 on Fifth Street property, and $27,500 on North Tryon Street property. By a paper writing, duly executed, the testator and defendant Charles A. Misenheimer agreed to be personally bound for the amounts secured by the said deeds of trust and to release the estates of those from whom the lands were acquired. The testator left personal property sufficient in value to pay all personal debts of the testator exclusive of those secured by deeds of trust on the real property.

From the facts found the court below decided, and so adjudged, that the testator's will did not include or dispose of the two policies of life insurance in which defendant Charles A. Misenheimer was named as sole beneficiary, and that the will included and disposed of only the policies, and proceeds thereof, which were payable to the estate of the testator. And that of the sum received as proceeds of the two last mentioned policies, one-half should be applied towards the payment, proportionately, as credits on the debts secured by the deeds of trust on the lands, and one-half thereof divided equally between the defendants, "provided and to the extent such amount is not required by the executor for paying debts of testator and cost of administration." It was further adjudged that defendant J. J. Misenheimer should take the one-half interest of the testator in the Fifth Street property, and one-third undivided interest in the North Tryon Street property, "subject to the balance due upon the mortgage debts outstanding against same after the application upon such mortgage debt of that portion of the insurance fund properly applicable thereto"; and that defendant Charles A. Misenheimer should, as residuary devisee, take the remaining real estate of the testator subject to the mortgage debts thereon remaining after application of insurance money as aforesaid.

It was further decreed that the plaintiff, as commissioner, be authorized to sell, free of encumbrance, at private sale, subject to confirmation, the lands designated as second, third, and fourth tracts, and apply the

net proceeds, respectively, to the satisfaction of the deeds of trust thereon; one-half of the excess, if any, to be held for the benefit of Charles A. Misenheimer subject to disbursement under further order of the court, and the remaining half of such excess to be paid over to plaintiff as executor to be handled and disbursed by the executor, after payment of debts and costs of administration, in accordance with the will of the testator. It was ordered, however, in the event the liens on the said tracts should be paid or arranged before confirmation, the authority to sell should become inoperative.

From the judgment entered in accordance with the findings of fact, defendant J. J. Misenheimer appealed.

*H. L. Taylor for J. J. Misenheimer, appellant.*

*Tillett, Tillett & Kennedy and Taliaferro & Clarkson for Charles A. Misenheimer, appellee.*

DEVIN, J. The appeal in this case involves the construction of the will of Thomas M. Misenheimer, and the principal question presented is whether the testator's use of the words "my life insurance" manifested the intention to dispose of policies of insurance in which Charles A. Misenheimer was named beneficiary as well as those policies made payable to his estate.

The appellant contends that the language used, considered in connection with the attendant circumstances, indicates the intention to include the policies payable to Charles A. Misenheimer in the bequest contained in the second item of the will, and that thereby the devisee was placed in position where he was required to elect whether he should claim the insurance, or take under the will, and that, having elected to take under the will, a court of equity should not now permit him to claim and retain sole beneficial interest in these insurance policies. This view was strongly pressed in the argument by the able counsel for the appellant.

But the court below has found the facts against this contention. Considering the evidence presented and interpreting the language of the will in the light of the surrounding circumstances, the trial judge has found the facts to be, and so decided, that by the words used in the will the testator included and disposed of only the policies of life insurance which were made payable to his estate. While the testimony offered was susceptible of inferences favorable to the appellant's contention, it did not necessarily compel the conclusion that the testator intended by the use of the words "my life insurance" to dispose of the property of another. The facts found by the court are sufficient to support the judgment.

In order to call for the application of the equitable principle of election the intention of the testator to dispose of property not his own must be clear and unmistakable. 28 R. C. L., 330; *Peel v. Corey,* 196 N. C., 79.

In *Elmore v. Byrd,* 180 N. C., 120, *Walker, J.,* speaking for the Court, discusses learnedly and fully the doctrine of election in equity, and defines it as follows: "An election in equity is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument and the retention of some property already his own which is attempted to be disposed of in favor of a third party by virtue of the same paper." In the application of the principle to wills it simply means that he who takes under a will is required to conform to all its provisions. *McGehee v. McGehee,* 189 N. C., 558.

In the interpretation of a will there is a *prima facie* presumption that the testator intended only to dispose of what is his own, what he has a right to give. To overcome this presumption the intention must clearly appear. 69 C. J., 1089, 1090. "If it be doubtful by the terms of the will whether the testator had in fact a purpose to dispose of property belonging to another, that doubt will govern the courts, so that the owner, even though he derive benefit under the will, will not be put to election." *Isler v. Isler,* 88 N. C., 581; *Elmore v. Byrd,* 180 N. C., 120.

In *In re Estate of Moore,* 62 Cal. App., 265, it was said: "Where the testator has a partial or limited interest in the property devised, the presumption is that he intended to dispose of that which he might properly devise, and nothing more, and this presumption will prevail unless the intention is clearly manifested by demonstration plain, or necessary implication, on the part of the testator to dispose of the whole estate." And where in such case he uses general words in disposing of it, no question of election arises. *Waggoner v. Waggoner,* 68 S. E. (Va.), 990.

The rule seems to be well established that in cases where the testator's language can have full effect when applied only to his own property, he is presumed to have intended to give only the property over which he has power of disposition. *Pratt v. Douglas,* 38 N. J. Eq., 516; 30 L. R. A. (N. S.), 644, note. "Of two possible constructions, that which favors the conclusion that the testator was disposing only of his own moiety of the property will be adopted." *In re Estate of Moore, supra.*

In *Royal v. Moore,* 187 N. C., 379, where the beneficiaries in life insurance policies were put to election, the will used the words "all my insurance," together with designation of the particular policies. To the same effect is the holding in *Weeks v. Weeks,* 77 N. C., 421.

In *Whitten v. Peace,* 188 N. C., 298, the doctrine of election was not involved because there was no specific devise. In *Van Schaack v. Leonard,* 45 N. E. (Ill.), 982, where the legatee was put to election, the

bequest was "The proceeds derived from all insurance policies upon my life." In that case recognition was given to the rule that where a testator has a partial interest in property, it will be understood that he intended to dispose of that interest only, unless an intention to dispose of property not his own clearly appears.

The facts in the case at bar, as they are shown by the record, warrant the holding by the court below that the words "my life insurance" did not include those policies in which he had named Charles A. Misenheimer as sole beneficiary, and that the doctrine of election did not apply.

The specifications of error addressed to the other questions involved do not require elaboration.

While ordinarily rents collected by the executor from devised real property would go to the devisee (*Carr v. Carr,* 208 N. C., 246), the order of Harding, J., authorizing the application of collections of rents to repairs, taxes, insurance, and mortgage indebtedness on the particular tract from which the rents were derived, would not be injurious to the interest of the appellant, and his exception to the order is without substantial merit.

The exception to the ruling of the court below in permitting defendant Charles A. Misenheimer to testify whether he intended to elect between the retention of the proceeds of the policies of insurance and the devise under the will, becomes immaterial in view of the holding that he was not put to election.

The bequest that one-half of the proceeds from life insurance be applied to the liens on the lands owned jointly with defendant Charles A. Misenheimer would seem to justify the reasonable conclusion, gathered from a consideration of the entire will in the light of the surrounding circumstances, that the testator did not intend to provide for the payment of the entire mortgage debts, which had been created prior to his acquisition of the property, but rather that the devisees should take *cum onere,* and that the remainder of the mortgage debt should be carried or arranged by those to whom he devised the lands.

The provision in the judgment which authorizes the plaintiff, as executor and commissioner, to sell certain real estate for the satisfaction of the respective liens thereon (unless other arrangements should be made by the interested parties), and to handle and disburse the excess in accordance with the last will and testament of Thomas M. Misenheimer seems to be proper under the terms of the will as construed, and affords the appellant no ground of complaint.

After consideration of all the assignments of error, we find in the judgment no error, and it is

Affirmed.

FRANK LAWSON, INCOMPETENT, BY HIS GUARDIAN, E. L. STALLINGS, v. F. F. LANGLEY AND E. R. LANGLEY.

(Filed 28 April, 1937.)

**Venue § 1—Guardian for incompetent may maintain action in county of his personal residence.**

This action to recover for alleged negligent injuries inflicted upon a person subsequently adjudged insane was brought by the injured person's guardian in the county of the guardian's personal residence. Defendants made a motion, under C. S., 470 (1), to remove to the county in which the injured person and the defendants resided and in which the cause of action arose and in which the guardian for the injured person was appointed and qualified. *Held:* The guardian was entitled to maintain the action in the county of his personal residence, C. S., 469, 446, 449, 450, 2169, and defendants' motion to remove should have been denied.

APPEAL by plaintiff from *Small, J.,* at Second November Term, 1936, of WAKE. Reversed.

This is an action for actionable negligence, brought by plaintiff against defendants, alleging damage. The action grew out of an automobile collision with defendants, in which Frank Lawson was incapacitated for life.

Before filing answer, defendants made the following motion for change of venue: "To the Honorable Clerk of the Superior Court of Wake County: Now come the defendants, F. F. Langley and E. R. Langley, and move that the court change the place of trial of the above entitled action from Wake County to Johnston County, upon the ground that Wake County is not the proper county for the trial of said cause, for that: (1) The plaintiff, Frank Lawson, incompetent, was at the time of the institution of this action, and still is, a resident of Johnston County, North Carolina. (2) That the defendants, F. F. Langley and E. R. Langley, were at the institution of this action, and still are, residents of Johnston County, North Carolina. (3) That the cause of action arose in Johnston County, as appears in the complaint. And defendants move that the record in the case, or a certified copy thereof, be transmitted to the Superior Court of Johnston County, North Carolina. This 7 July, 1936. Wellons & Wellons, J. M. Broughton, Attorneys for defendants, F. F. Langley and E. R. Langley."

At the Second November Term, 1936, Wake Superior Court, the following order of removal was made: "This cause coming on to be heard and being heard before his Honor, W. L. Small, at the Second November Term, 1936, of Wake Superior Court, and being heard upon a motion heretofore filed herein in apt time by the defendants for a

change of venue, the court, upon consideration of the complaint, motion for change of venue, and affidavits offered by the defendants in support thereof, finds the facts to be as follows:

"1. That the cause of action which is the subject matter of this suit arose in Johnston County, North Carolina.

"2. That the defendants, and each of them, were at the time of the institution of this action, and still are, residents of Johnston County North Carolina.

"3. It was admitted in open court by the plaintiff that at the time the said cause of action arose, and at the time of the institution of this action, the plaintiff Frank Lawson was and still is domiciled in said Johnston County; that at all such times the said Frank Lawson had a home in Johnston County, where his wife resides; that subsequent to the date on which the cause of action arose, the plaintiff Frank Lawson was in a proceeding before the clerk of the Superior Court of said Johnston County, adjudged to be incompetent and committed to the State Hospital for the Insane, located at Raleigh, in Wake County; that up to the time of such adjudication of incompetency as to said plaintiff and his commitment to said State Hospital for the Insane at Raleigh he had made no change of his domicile or residence, which was at said time in said Johnston County.

"4. That in said proceedings before the clerk of the Superior Court of Johnston County, E. L. Stallings was named as guardian of said Frank Lawson, incompetent, and qualified as such before the said clerk of the Superior Court of Johnston County; that said E. L. Stallings was at the time of the institution of this action and is now a resident of Wake County, North Carolina; that subsequent to his appointment as such guardian there was instituted in the Superior Court of Wake County an action as above entitled, the same being in the name of Frank Lawson, incompetent, by his guardian, E. L. Stallings, against the above named defendants.

"5. That the said Frank Lawson, plaintiff, was at the time of the institution of this action, and still is, the real party in interest, as plaintiff, and was at said time and still is domiciled in and a resident of Johnston County, North Carolina.

"From the record herein, and upon the foregoing facts, the court is of the opinion, and so holds, that the plaintiff Frank Lawson was at the time of the institution of this action, and prior thereto, and still is, domiciled in and a legal resident of Johnston County, North Carolina, and was at such time and still is the real party in interest as plaintiff, and as such the party plaintiff of record; that the defendants, and each of them, are residents of said Johnston County, and that the cause of action arose in said Johnston County, and that accordingly Johnston

County is the proper venue for the trial of this action, and that the defendants are entitled to have their motion for change of venue allowed:

"It is therefore ordered and adjudged that the said motion for change of venue be and the same is hereby allowed, and that this action be removed to the Superior Court of Johnston County; that the clerk of this court be and he is hereby authorized and directed forthwith to transmit the record in this case to the said Superior Court of Johnston County. Walter L. Small, Judge presiding."

To the foregoing order E. L. Stallings, as guardian of Frank Lawson, incompetent, in apt time excepted, assigned error, and appealed to the Supreme Court.

*MacLean, Pou & Emanuel and Stanley J. Seligson for plaintiff.*

*J. M. Broughton, William Wellons, and W. H. Yarborough, Jr., for defendants.*

CLARKSON, J. (1) The injury for which the action is instituted took place in Johnston County, N. C. (2) The defendants, who in the complaint it is alleged negligently inflicted the injury, are domiciled in Johnston County. (3) E. L. Stallings was appointed guardian for Frank Lawson in Johnston County. (4) Frank Lawson was domiciled in Johnston County. (5) E. L. Stallings resides in Wake County, N. C. Appellant concedes that the plaintiff Frank Lawson, being a resident of and domiciled in Johnston County prior to becoming a person *non compos mentis,* was incapable of changing his residence to Wake County. 19 C. J., pp. 417-418; *Duke v. Johnston, ante,* 171 (175).

Under the above factual situation, does the plaintiff, guardian of an incompetent, have the right to maintain and try the action in the county of his personal residence? We think so.

C. S., 469, is as follows: "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."

C. S., 470, in part: "If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court. The court may change the place of trial in

the following cases: (1) When the county designated for that purpose is not the proper one," etc. Under this statute defendants seek to remove the action to Johnston County, N. C.

C. S., 446, in part: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided," etc.

C. S., 449: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, includes a person with whom, or in whose name, a contract is made for the benefit of another."

C. S., 450, in part: "In actions and special proceedings, when any of the parties plaintiff are infants, idiots, lunatics, or persons *non compos mentis,* whether residents or nonresidents of this State, they must appear by their general or testamentary guardian, if they have any within the State; but if the action or proceeding is against, or if there is no such guardian, then said persons may appear by their next friend."

C. S., 2169: "Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor."

The defendants cite, as authority for their contention: *George v. High,* 85 N. C., 113 (114), where it is said: "It has been decided by this Court in several cases, and amongst them the cases of *Branch v. Goddin,* 60 N. C., 493; *Falls v. Gamble,* 66 N. C., 455; and *Mason v. McCormick,* 75 N. C., 263, that one who conducts a suit as guardian, or next friend, for infants is not a party of record, but that the infants themselves are the real plaintiffs." *Abbott v. Hancock,* 123 N. C., 99. They also cite *Krachanake v. Mfg. Co.,* 175 N. C., 435 (441), where it is written: "The father is not, however, a party in the legal sense. He is an officer appointed by the court to protect the interest of his son, who is the real plaintiff (*Hockoday v. Lawrence,* 156 N. C., 319)."

The plaintiff, on the other hand, contends that the above cases cited by defendants are distinguishable from the present case, and in his brief analyzes the distinction and cites N. C. Practice & Procedure in Civil Cases (McIntosh), pp. 271-2, secs. 287 and 288, where it is said: "In all other actions except those indicated as local actions, the venue is regulated by statute according to the residence of the parties, and 'parties' means those who appear as such upon the record. The plaintiff is allowed to select the forum, subject to certain restrictions imposed by the statute. Where the plaintiff and the defendant both reside in the same county, the action must be tried there, unless removed for cause; and if there are several plaintiffs or several defendants, the action may be brought in any county in which any of the plaintiffs or any of the defendants reside. The residence at the commencement of the action

determines the venue, and a subsequent change of residence would not affect it. (Sec. 288.) In actions brought by fiduciaries, the personal residence of the fiduciary controls. While an executor or administrator must be sued in the county in which he qualified, he may bring an action in the county in which he resides, or in which the defendant resides, although neither may be the county in which he qualified. Plaintiff's intestate was a resident of H. County and was killed in P. County; plaintiff, a resident of M. County, qualified as administrator in H. County, and brought an action for wrongful death in M. County against a foreign corporation and another defendant resident in P. County. The court held that the action was properly brought, since the residence of the individual holding the office and not his official residence or county where he qualified controlled. An action upon an insurance policy was properly brought by an administrator in the county of his individual residence, though not the county in which he qualified. The same rule applies in case of trustees, receivers, and other fiduciaries. Where an action is brought against an administrator for services rendered for him, this being a personal claim, and not a debt of the estate, the plaintiff may sue in his own county or in that of the administrator." McIntosh cites authorities to sustain the text. *Biggs v. Bowen,* 170 N. C., 34; *Hannon v. Power Co.,* 173 N. C., 520; *Whitford v. Ins. Co.,* 156 N. C., 42; *Mecom v. Fitzsimmons,* 284 U. S., 183.

The court below in the judgment found that Frank Lawson "is the real party in interest." Fiduciaries are not the real parties in interest, yet they can bring an action for the real beneficiaries. It is expressly provided in C. S., 449. *Sheppard v. Jackson,* 198 N. C., 627 (628). McIntosh, *supra,* says the personal residence of the fiduciary controls in actions brought by fiduciaries. We think C. S., 2169, tends to support the view, where it is said: "Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor." The guardian can select the forum, as there is no statute to the contrary.

All compensation for injuries received in course of employment, accruing and maturing during deceased's lifetime, thereafter belongs to his "estate." *Morgannelli's Estate v. City of Derby,* 135 A., 911, 105 Conn., 545.

The statute specifically charges the guardian that he "may bring all necessary actions therefor." The plaintiff, under the statute, has done this, and we think he can do this in the county of his personal residence. In *Wallace v. Wallace,* 210 N. C., 656, the factual situation is different.

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

Reversed.

R. GORDON MESSICK AND HIS WIFE, ERA MESSICK, v. THE CITY OF HICKORY.

(Filed 28 April, 1937.)

**1. Appeal and Error §§ 20, 31f—Where judge settles case on appeal, motion to dismiss for prolix statement is addressed to discretion of court.**

A motion to dismiss an appeal for that the case on appeal is not a concise statement containing only matter reasonably necessary for the consideration of appellant's assignments of error, C. S., 643, Rule of Practice in the Supreme Court No. 19, is addressed to the discretion of the Supreme Court when the case on appeal is settled by the trial judge, C. S., 644, and the motion is denied in this case, since a dismissal would be a denial of justice to appellant.

**2. Eminent Domain § 23—Instruction on issue of permanent damages for flooding of land by municipal drains held not to conform to evidence.**

In this action to recover permanent damages to plaintiffs' land resulting from defendant municipality's inadequate surface drains, plaintiffs introduced evidence of damage from overflow of water during two months of heavy rains, and introduced testimony of the value of the land at the time of the institution of the action some eighteen months after the injury, and the value the land would have had at that time if defendant's drainage system had been adequate. Plaintiffs offered no evidence of the value of the land immediately before and immediately after the injury. *Held:* An instruction to the effect that plaintiffs had introduced evidence of the value of the land immediately before and immediately after the injury, and that the jury should ascertain said values from the evidence and award as damage the difference in values, is erroneous as an inadvertent misstatement of plaintiffs' evidence, which constitutes prejudicial error when taken with the charge on the measure of damage, and it was also prejudicial error for the court to fail to state defendant's contentions, based upon its evidence duly admitted, that the property had not been permanently damaged by the overflow of surface waters during the two months of heavy rains.

**3. Trials § 33—**

Where the trial court states the contention of one of the parties on the evidence, it is error for the court to fail to state the contentions of the adverse party based on its evidence on the same aspect of the case.

**4. Appeal and Error § 52—**

Where error is committed in the lower court in respect to one issue alone, the Supreme Court in its discretion may order a partial new trial when the issue in respect to which error was committed is entirely separable from the other issues and there is no danger of complication.

APPEAL by defendant from *Alley, J.*, at November Term, 1936, of CATAWBA. Partial new trial.

This is an action to recover damages for injuries to plaintiffs' property, situate within the corporate limits of the city of Hickory and occupied by the plaintiffs as their home since August, 1933.

Two causes of action are alleged in the complaint.

On the first cause of action plaintiffs pray judgment that they recover of the defendant permanent damages for injuries to their property which were caused by the negligent construction by the defendant of its drainage system, and which resulted in a partial taking of plaintiffs' property by the defendant.

On the second cause of action the plaintiffs pray judgment that they recover of the defendant permanent damages for injuries to their property which were caused by the construction by the defendant of a sewer line across their property.

The evidence at the trial showed that the injuries to plaintiffs' property described in the complaint caused by the construction by the defendant of its drainage system occurred during the months of July and August, 1934, and that no injuries have occurred since that time.

The evidence at the trial further showed that the injuries to plaintiffs' property described in the complaint caused by the construction of the sewer line across said property by the defendant occurred during the year 1935.

This action was begun on 13 January, 1936. The issues arising on the pleadings and submitted to the jury were answered as follows:

"1. Did the plaintiffs institute this action within three years from the time their first cause of action accrued? Answer: 'Yes.'

"2. Was the plaintiffs' property flooded and damaged by the negligence of the defendant, as alleged in plaintiffs' first cause of action? Answer: 'Yes.'

"3. What damages, if any, are the plaintiffs entitled to recover on their first cause of action? Answer: '$3,800.'

"4. Did the defendant build and construct a sewer line across plaintiffs' property, as alleged in the complaint? Answer: 'Yes.'

"5. Has the defendant acquired the right by prescription to construct and maintain said sewer line, as alleged in the answer? Answer: 'No.'

"6. What compensation, if any, are the plaintiffs entitled to recover on their second cause of action? Answer: '$200.00.' "

It was ordered and adjudged by the court that plaintiffs recover of the defendant the sum of $4,000, and the costs of the action, and that defendant has and shall enjoy a permanent easement or right to maintain its present drainage system and sewer line over and across plaintiffs' property.

The defendant appealed from the judgment to the Supreme Court, assigning errors in the trial chiefly with respect to the third issue.

*Chas. W. Bagby, C. D. Swift, and J. C. Rudisill for plaintiffs.*

*R. H. Shuford, J. L. Murphy, and M. H. Yount for defendant.*

CONNOR, J. The plaintiffs, as appellees, moved in this Court that the appeal of the defendant be dismissed for that the case on appeal was not prepared in accordance with the provisions of C. S., 643, and of Rule 19 of this Court.

An examination of the transcript filed in this Court at the time the appeal was docketed discloses that the case on appeal, upon disagreement of counsel, was settled by the judge. C. S., 644. Plaintiffs' motion that the appeal be dismissed was therefore addressed to the discretion of this Court. Rule 19 (4). Although the case on appeal was not prepared in accordance with the provisions of the statute (C. S., 643), plaintiffs' motion was denied. The appeal was heard and duly considered by this Court.

If in the preparation of the case on appeal the provisions of the statute had been complied with, and the case on appeal had been a concise statement of the case, containing only matter reasonably required for the consideration by this Court of defendant's assignments of error, the defendant would have been spared needless expense for the printing of the record, and the labor of this Court would have been greatly lessened. After examining the transcript filed in this Court, the Court was of opinion that a dismissal of its appeal would be a denial of justice to the defendant. For that reason, plaintiffs' motion was denied by this Court in the exercise of its discretion.

On its appeal to this Court, the defendant relies chiefly on its contention that there were errors in the instructions of the court to the jury with respect to the third issue, for which it is entitled to a new trial. Its assignments of error with respect to the other issues have been duly considered. They cannot be sustained. There was no error in the trial with respect to these issues.

The third issue is as follows: "3. What damages, if any, are the plaintiffs entitled to recover on their first cause of action?"

With respect to this issue, the court instructed the jury as follows:

"Now, gentlemen, I refer you to the evidence in this case. The plaintiff has introduced witnesses whose testimony tends to show that plaintiffs' property was worth $8,000 before the floods of 1934 (assuming that the defendant, the city of Hickory, had had then suitable and proper drainage to take care of and carry off this overflow of water), and that after the floods (assuming that the defendant, the city of Hickory, in this case will acquire a permanent right or easement to continue its present system of drainage) that the plaintiffs' property is not worth more than $1,500 or $2,000.

"Now, ordinarily, in a tort action, that is, an action for a negligent wrong, the measure of damages would be the damages that proximately flow or arise as the direct and proximate result of the wrong, or such as

could have been reasonably foreseen and anticipated by the defendant. (But this case, although it is being tried as an action for damages, partakes to some extent of the nature of a proceeding for condemnation, for the reason that both sides agree that permanent damages shall be assessed in this case, that is, that whatever the plaintiffs shall recover shall represent past damages, present damages, and prospective damages, and when the case is tried on that theory, and the judgment is signed—in the event you allow the plaintiffs' damages—the effect of it will be to grant the defendant, the city of Hickory, a perpetual easement to maintain its drainage system as it now is, without enlarging it, even though it might be necessary to enlarge it, in so far as the plaintiffs' property is concerned, and in that class of cases the law has fixed a rule for the measurement of damages which represents the difference in the market value of the property immediately before the injury was sustained and immediately after it was sustained.)

"(Then, what was the market value of the plaintiffs' property? What was it before the floods of 1934 occurred, assuming that there had been a drainage then sufficient to take care of the rainfall and floods, and then what would be its market value immediately after the floods of 1934, assuming that the defendant, the city of Hickory, has the right to continue its present drainage system, even though it might be ascertained to be insufficient?

"(Now, the amount the plaintiffs are entitled to recover—if you find that they are entitled to recover at all—would be the difference between those two sums. So, I charge you, when you come to answer the third issue, you should answer it in such sum as you may find by the greater weight of the evidence would represent the difference between the market value of the property, as I have defined that to you just before the floods of 1934, assuming that it had drainage sufficient to take care of the overflow and excess water, and what its market value would be after the floods of 1934, assuming that the defendant, the city of Hickory, will acquire at the end of this lawsuit a perpetual right or easement to continue its present drainage system, so far as the plaintiffs' property is concerned, and you are to fix that amount in dollars and cents, as you may find it to be, that is, the difference between those two sums.)"

The defendant duly excepted to the portions of said instructions which are included within parentheses, and assigns same as error.

At the trial, evidence for the plaintiffs showed that their property had been injured by water, resulting from unusual rainfalls, which had overflowed said property during the months of July and August, 1934, because of the inadequate drainage system which the defendant, the city of Hickory, had caused to be constructed within its corporate limits prior to that time. There was no evidence tending to show any subsequent injuries to said property.

Witnesses for the plaintiffs testified that in their opinion plaintiffs' property would have been worth, on 13 January, 1936—the date of the commencement of this action—the sum of $8,000, if the drainage system of the defendant had been adequate to take care of and to carry off the water which overflowed said property during the months of July and August, 1934, but that by reason of the inadequacy of said drainage system, the said property at that date was worth only $1,500 or $2,000. Plaintiffs offered no evidence tending to show the value of their property immediately before or immediately after it was injured by the overflow of water during the months of July and August, 1934.

Witnesses for the defendant testified that in their opinion plaintiffs' property was worth during the months of July and August, 1934, $4,000 to $4,500, both before and after water, resulting from unusual rainfalls, overflowed said property. These witnesses were of the opinion that the injuries to said property, caused by the overflow of water, were temporary and not substantial, and that the value of the property was not affected by such injuries.

The inadvertent statement by the court in its instructions to the jury with respect to the third issue, in effect, that witnesses for the plaintiffs had testified that in their opinion plaintiffs' property before it was injured by the floods of 1934 was worth $8,000, and that after said floods it was worth not to exceed $2,000, when taken in connection with the instruction as to measure of damages which the jury should apply in this case, was not only erroneous in fact, but was manifestly prejudicial to the rights of the defendant. The instructions, moreover, show that the court was inadvertent to the testimony of witnesses for the defendant as to the value of plaintiffs' property both before and after the floods of 1934. The court failed to refer in its instructions to this testimony. This was likewise prejudicial to the defendant. Having instructed the jury in accordance with the contentions of the plaintiffs, it was error for the court to fail to instruct the jury in accordance with the contentions of the defendant as to the damages, if any, which the plaintiffs are entitled to recover on their first cause of action.

For error in the instructions of the court to the jury with respect to the third issue, the defendant is entitled to a new trial of said issue. It is so ordered. See *Lumber Co. v. Branch,* 158 N. C., 251, 73 S. E., 164, where it is said by *Walker, J.:* "It is settled beyond controversy that it is entirely discretionary with the court, Superior or Supreme, whether it will grant a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication."

Partial new trial.

H. M. STOVALL v. C. A. RAGLAND.

(Filed 28 April, 1937.)

**1. Trial § 22—**

Upon motion to nonsuit, the evidence is to be considered in the light most favorable to the contentions of plaintiff. C. S., 567.

**2. Automobiles § 11—**

The driver of a car approaching a vehicle going in the same direction on the highway must keep on the right side of the highway until he determines to pass the vehicle in front of him, and before attempting to pass must give warning of his intention to do so by blowing his horn. N. C. Code, 2621 (51), (54b).

**3. Automobiles § 13—**

Where the driver of a car ascertains that there is no vehicle in sight, either ahead of him or behind him, on the highway, he is under no obligation, by virtue of N. C. Code, 2621 (59), to give any signal of his purpose to turn left across the highway to enter a driveway.

**4. Automobiles § 18g—Evidence held not to show contributory negligence barring recovery as matter of law.**

The evidence favorable to plaintiff tended to show that plaintiff, while driving his automobile on a State highway, at about 25 miles per hour, ascertained that there was no vehicle in sight either in front of him or behind him, slowed his car to about eight miles per hour and turned his car to the left across the highway to enter a driveway to his home, without giving any signal of his purpose to turn, that defendant, driving his car in excess of forty-five miles per hour behind plaintiff and traveling in the same direction, drove on the left side of the highway, without giving any warning of his intention to pass plaintiff's car, and hit plaintiff's car as plaintiff's car, which he could have seen for a distance of about five hundred feet, was entering the driveway with only its rear wheels extending on the highway for a distance of about four feet, leaving fourteen feet of unobstructed highway on defendant's right. *Held:* Defendant's violation of the statute regulating the passing of vehicles on the highway, N. C. Code, 2621 (51), (54b), was negligence *per se*, entitling plaintiff to recover if such violation proximately caused the injury in suit, and defendant's contention that plaintiff's failure to give the signal of his intention to turn to the left across the highway, N. C. Code, 2621 (59), constituted contributory negligence barring recovery as a matter of law is untenable, since the statute does not impose the duty on a driver to give such warning when the driver has ascertained that no vehicle is in sight from the front or rear.

APPEAL by plaintiff from *Harris, J.*, at February Term, 1937, of FRANKLIN. Reversed.

This is an action to recover damages for injuries both to his person and to his property, which the plaintiff suffered when an automobile which he owned and which he was driving was struck as it was entering

the driveway which leads from the highway on which he had been driving to his home on the west side of said highway, by an automobile which the defendant was driving.

It is alleged in the complaint that the injuries which the plaintiff suffered when his automobile was struck by the automobile which the defendant was driving were caused by the negligence of the defendant. This allegation is denied in the answer of the defendant.

In further defense of plaintiff's action, the defendant alleges in his answer that plaintiff by his own negligence contributed to his injuries. Such contributory negligence is pleaded by the defendant in bar of plaintiff's recovery in this action. C. S., 523.

At the close of the evidence for the plaintiff, on motion of the defendant, the action was dismissed by judgment as of nonsuit. C. S., 567.

The plaintiff duly excepted and appealed to the Supreme Court, assigning error in the judgment.

*Charles P. Green and G. M. Beam for plaintiff.*
*J. M. Broughton and W. H. Yarborough for defendant.*

CONNOR, J. The evidence for the plaintiff at the trial of this action, considered in the light most favorable to the contentions of the plaintiff, as required by the well settled rule applicable to the question presented by this appeal (see *Murphy v. Asheville-Knoxville Coach Co.*, 200 N. C., 92, 156 S. E., 550), was sufficient to show the following facts:

On 8 March, 1936, about 2 o'clock in the afternoon, plaintiff left the cafe in the town of Louisburg, N. C., which was operated by his wife, in his automobile and drove in a northerly direction toward his home, which is located about a mile from the corporate limits of Louisburg on the west side of the highway leading from Louisburg to Henderson. Plaintiff's wife was in the automobile, sitting on the front seat beside the plaintiff. On the rear seat were plaintiff's son, about 12 years of age, and another boy of about the same age.

Before reaching the driveway which leads from the highway on which he was driving to his home, which is about 125 feet from the highway, plaintiff was driving at a speed of about 25 miles per hour. The weather was fair, and the highway dry. As he approached the driveway, the plaintiff slowed down to a speed of about 15 miles per hour. After observing the highway in both directions—to the north, through his windshield, and to the south, by means of a mirror attached to his windshield, and seeing no automobile or other vehicle approaching from either direction, plaintiff turned from the right side of the highway and drove across the highway to his left. Before doing so, plaintiff gave no

signal, by holding out his hand or otherwise, of his purpose to turn to his left and to enter the driveway.

After he had turned to his left, and while he was entering the driveway at a speed of about 8 miles per hour, plaintiff's automobile was struck on its left side by an automobile which was driven by the defendant. At the time it was struck its front wheels were just entering the driveway, and its rear wheels were on the highway, about 4 feet from its west side. The highway is 18 feet wide. It was clear for a distance of 14 feet on the right side of the defendant as he approached the driveway from the south. As the result of the collision, plaintiff suffered injuries both of his person and to his automobile, by reason of which he has sustained damages.

The highway on which plaintiff was driving before his automobile was struck by the automobile which the defendant was driving was straight for a distance of about 600 feet to the south of the driveway. The defendant approached the driveway from the south, traveling in the same direction as the plaintiff before he turned to his left and drove across the highway. Defendant could have seen plaintiff's automobile before plaintiff turned to his left and drove across the highway for a distance of at least 500 feet. He was driving at a rapid rate of speed—in excess of 45 miles per hour—on his left side of the highway. As he approached plaintiff's automobile he gave no warning, by sounding his horn or otherwise, of his purpose to pass plaintiff's automobile, nor did he slacken his speed until he was about 50 feet from plaintiff's automobile. He then put on his brakes, which were in good condition, and skidded toward plaintiff's automobile, which at that time was entering the driveway. After he had struck plaintiff's automobile, his automobile ran for a distance of about 80 feet, when it left the highway, and ran into an embankment. Plaintiff's automobile was knocked a distance of about 25 feet to the north of the driveway. It was practically demolished.

The trial court was of opinion that on all the facts shown by the evidence for the plaintiff, the defendant is not liable to the plaintiff in this action, and accordingly allowed defendant's motion that the action be dismissed on the ground that plaintiff by his own negligence had contributed to his injuries. Judgment as of nonsuit was thereupon rendered, dismissing the action. On his appeal to this Court, the plaintiff contends that there is error in the judgment. This contention must be sustained.

It was the duty of the defendant as he drove his automobile on the highway, which is 18 feet wide, following the automobile of the plaintiff, to drive on his right-hand side of the highway, at least until he overtook

and decided to pass plaintiff's automobile. This duty is prescribed by statute, which is as follows:

"Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway, and shall drive a slow-moving vehicle as closely as possible to the right-hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway, and except where overtaking and passing another vehicle, subject to the limitations applicable in overtaking and passing set forth in sections 2621 (54) and 2621 (55)." N. C. Code of 1935, section 2621 (51).

When defendant approached plaintiff's automobile and undertook to pass the same on the highway, it was his duty before passing, or attempting to pass, to give audible warning, by blowing his horn or otherwise, of his purpose to do so. This duty is also prescribed by statute, which is as follows:

"The driver of an overtaking motor vehicle, not within a business or residence district as here defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction." N. C. Code of 1935, section 2621 (54b).

The violation of these statutes, or of either of them, was negligence (see *Grimes v. Carolina Coach Co.*, 203 N. C., 605, 166 S. E., 599), and if such negligence was the proximate cause of plaintiff's injuries, as the evidence for the plaintiff tended to show, the defendant, nothing else appearing, is liable to the plaintiff in this action.

The defendant contends that, conceding that there was evidence tending to show that plaintiff's injuries were caused by his negligence, plaintiff cannot recover in this action, because all the evidence shows that plaintiff by his own negligence contributed to said injuries. This contention cannot be sustained. The statute applicable to this contention is as follows:

"The driver of any vehicle upon a highway, before starting, stopping, or turning from a direct line, shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement shall give a signal as required by this section plainly visible to the driver of such other vehicle of the intention to make such movement." Code of N. C., section 2621 (59).

The plaintiff having first looked in both directions, and having observed no automobile or other vehicle approaching from either direction, was under no obligation, by virtue of the statute, to give any signal of his purpose to turn to his left and enter the driveway to his home. He

was therefore not negligent as a matter of law in failing to give a signal before he turned to his left and crossed the highway for the purpose of entering the driveway to his home.

There was error in the judgment dismissing the action. For that reason, the judgment is

Reversed.

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BROCK BARKLEY, RECEIVER OF McCLUNG REALTY COMPANY, A CORPORATION, J. W. McCLUNG, AND J. W. McCLUNG, JR., v. McCLUNG REALTY COMPANY, A CORPORATION, J. W. McCLUNG AND HIS WIFE, MARY L. McCLUNG, J. W. McCLUNG, JR., MINERVA H. McCLUNG, AND McCLUNG CORPORATION OF MIAMI, FLORIDA.

(Filed 28 April, 1937.)

**1. Pleadings §§ 2, 16—Complaint may join causes of action arising out of same transaction or series of transactions forming one course of dealing.**

If the causes of action united in the same complaint are not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, the complaint is not multifarious, C. S., 507, and a demurrer thereto on the ground of misjoinder of causes should be overruled, C. S., 511 (5).

**2. Same—Actions against joint judgment debtors to set aside their respective deeds as fraudulent as to creditor, held properly joined.**

In a suit against a corporation and its two principal stockholders, plaintiff recovered judgment against defendants jointly. Pending the suit the corporation and the individual defendants executed, respectively, deeds to lands owned by them to a family controlled corporation and to another member of the family. Upon return of execution unsatisfied, a receiver was appointed for defendants in supplemental proceedings, who instituted this action against all three defendants to set aside their respective deeds as being without consideration and fraudulent to the judgment creditor. *Held:* Defendant's demurrer to the complaint on the ground of misjoinder in that the complaint stated three separate causes of action, was properly overruled, for although the complaint does not allege that the separate deeds were executed by the defendants, respectively, pursuant to a conspiracy to hinder, delay, and defraud creditors, an inference to that effect is not only permissible but inescapable from the facts alleged.

APPEAL by defendants from *Cowper, Special Judge,* at December Term, 1936, of MECKLENBURG. Affirmed.

The facts alleged in the complaint are as follows:

1. On 22 February, 1936, in an action pending in the Superior Court of Mecklenburg County, entitled, "Mrs. A. D. N. Hunter, Trustee, *et al.,* *v.* McClung Realty Company, a Corporation, J. W. McClung, and J. W.

McClung, Jr.," a judgment was rendered that the plaintiffs recover of the defendants the sum of $10,000, with interest and costs. The said judgment was duly docketed in the office of the clerk of the Superior Court of Mecklenburg County on 24 February, 1936. Thereafter an execution was duly issued on said judgment to the sheriff of Mecklenburg County. The said execution was returned wholly unsatisfied. In supplementary proceedings in execution which were duly instituted in said action, the plaintiff Brock Barkley was appointed by the court as receiver of the defendants, McClung Realty Company, a corporation, J. W. McClung, and J. W. McClung, Jr. The said receiver was authorized and directed by the court to institute this action. The action was accordingly begun on 3 September, 1936.

2. While the action entitled "Mrs. A. D. N. Hunter, Trustee, *et al., v.* McClung Realty Company, a Corporation, *et al.,*" was pending in the Superior Court of Mecklenburg County, to wit: On 18 February, 1936, the defendant McClung Realty Company executed two certain deeds by which it purported to convey to the defendant McClung Corporation of Miami, Florida, certain lots of land situate in Mecklenburg County, North Carolina, and fully described in said deeds, which were duly recorded in the office of the register of deeds of Mecklenburg County, on 20 February, 1936.

3. While the action entitled "Mrs. A. D. N. Hunter, Trustee, *et al., v.* McClung Realty Company, a Corporation, *et al.,*" was pending in the Superior Court of Mecklenburg County, to wit: On 18 February, 1936, the defendant J. W. McClung, Jr., executed a certain deed by which he purported to convey to the defendant McClung Corporation of Miami, Florida, certain lots of land situate in Mecklenburg County, North Carolina, and fully described in said deed, which was duly recorded in the office of the register of deeds of Mecklenburg County, on 20 February, 1936.

4. While the action entitled "Mrs. A. D. N. Hunter, Trustee, *et al., v.* McClung Realty Company, a Corporation, *et al.,*" was pending in the Superior Court of Mecklenburg County, to wit: On 13 February, 1936, the defendants J. W. McClung and his wife, Mary L. McClung, by their attorney in fact, J. W. McClung, Jr., executed a certain deed, by which they purported to convey to the defendant Minerva H. McClung, who is a daughter of the said J. W. McClung and his wife, Mary L. McClung, and a sister of the said J. W. McClung, Jr., certain lots of land situate in Mecklenburg County, North Carolina, and fully described in said deed, which was duly recorded in the office of the register of deeds of Mecklenburg County, on 20 February, 1936.

5. The defendant J. W. McClung is the president, the defendant J. W. McClung, Jr., is the secretary, and the defendant Minerva H. McClung

is the vice-president of the defendant McClung Realty Company, a corporation organized under the laws of the State of North Carolina, and of the defendant McClung Corporation of Miami, Florida, a corporation organized under the laws of the State of Florida. The capital stock of both said corporations is owned and both said corporations are controlled by the defendants J. W. McClung and J. W. McClung, Jr., and members of their family. The defendants J. W. McClung and J. W. McClung, Jr., are directors of both said corporations.

6. Each of the deeds hereinbefore described was executed by the grantor therein without consideration and for the purpose of hindering, delaying, and defrauding the plaintiffs in the action entitled "Mrs. A. D. N. Hunter, Trustee, *et al., v.* McClung Realty Company, a Corporation, *et al.,*" as creditors of the said grantor.

On the foregoing facts alleged in his complaint, the plaintiff prays judgment that each of said deeds be set aside, and declared null and void, and that plaintiff have such other and further relief as he may be entitled to in the premises.

The defendants in apt time demurred to the complaint on the ground that on the facts alleged therein there is a defect of parties defendant, and a misjoinder of causes of action, in that plaintiff has joined at least three separate and distinct causes of action in his complaint.

At the hearing of the action, the demurrer was overruled, and the defendants and each of them appealed to the Supreme Court, assigning error in the order overruling the demurrer.

*F. A. McCleneghan and Stancill & Davis for plaintiff.*
*E. A. Hilker for defendants.*

CONNOR, J. It is provided by statute in this State that "the plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, when they all arise out of the same transaction, or transaction connected with the subject of the action." C. S., 507.

Construing the provisions of this statute, it has been uniformly held by this Court that if the causes of action united in the same complaint be not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, the objection that there is a misjoinder of causes of action in the same complaint, although aptly made by demurrer to the complaint (C. S., 511 [5]), will not be sustained. In such case, the demurrer will be overruled. *Hood v. Love,* 203 N. C., 583, 166 S. E., 743; *Shaffer v. Bank,* 201 N. C., 415, 160 S. E., 481; *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524; *Cotton Mills v. Maslin,* 195 N. C., 12,

141 S. E., 348. In the last cited case, it is said by *Brogden, J.*: "The rule for determining misjoinder of causes of action is thus stated by *Walker, J.*, in *Hawk v. Lumber Co.*, 145 N. C., p. 48: 'The result of the decisions is that, if the causes of action be not entirely distinct and unconnected, if they arise on one and the same transaction, or a series of transactions forming one course of dealing and all tending to one end, if one connected story can be told of the whole, the objection of multifariousness does not arise.'" The decisions of this Court cited by *Justice Walker* in support of the rule stated by him in *Hawk v. Lumber Co.*, 145 N. C., 48, 58 S. E., 603, are *McGowan v. Ins. Co.*, 141 N. C., 367, 54 S. E., 287; *Oyster v. Mining Co.*, 140 N. C., 135, 52 S. E., 198; *Fisher v. Trust Co.*, 138 N. C., 224, 50 S. E., 659; *Daniels v. Fowler*, 120 N. C., 14, 26 S. E., 635; *Cook v. Smith*, 119 N. C., 350, 25 S. E., 958; *Benton v. Collins*, 118 N. C., 196, 24 S. E., 122; *King v. Farmer*, 88 N. C., 22; and *Young v. Young*, 81 N. C., 91.

In the opinion in the last cited case, it is said by *Ashe, J.*:

"Before this section of the Code (now C. S., 507), was adopted, the doctrine of multifariousness was generally understood by the profession, and as the Code has in the main conformed to the equity practice, it may be well to look to those old landmarks for a guide through the mist that envelopes the subject.

"We find it held that if the grounds be not entirely distinct and unconnected; if they arise out of one and the same transactions or series of transactions, forming one course of dealing, and all tending to one end; if one connected story can be told of the whole, the objection of multifariousness does not arise. Story Eq. Pl., sec. 271; *Bedsole v. Monroe*, 40 N. C., 313. And if the objects of the suit are single, and it happens that different persons have separate interests in distinct questions which arise out of the single object, it necessarily follows that such different persons must be brought before the court in order that the suit may conclude the whole subject. *Salvidge v. Hyde*, 5 Mad. Ch. Rep., 138. The same doctrine was laid down by Chancellor Walworth in the case of *Boyd v. Hoyt*, 5 Paige, 78. And in the case of *Whaley v. Dawson*, 2 Sch. & Lef., 370, it was held that in English cases where demurrers, because the plaintiff demanded in his bill matters of distinct natures against several defendants not connected in interest have been overruled, there has been a general right in the plaintiff covering the whole case, although the rights of the defendants may have been distinct; and so it was held in the case of *Dimmick v. Vixby*, 20 Pick., 368, that where one general right is claimed by the plaintiff, although the defendants may have distinct and separate rights, the bill of complaint is not multifarious. All these cases were decided upon the principle of preventing a multiplicity of suits, which was the object of the 'clause' under consideration.

"Applying the principles enunciated in the cases cited to our case, we are of the opinion the causes of action in the complaint were properly united and the first ground of objection taken by the demurrer cannot be sustained."

It is not specifically alleged in the complaint in this action that the defendants entered into a conspiracy to hinder, delay, and defraud their creditors, and that the deeds which the plaintiff seeks to have set aside and declared null and void for that reason, were executed pursuant to such conspiracy. However, an inference to that effect is permissible. Indeed, such inference from the facts alleged in the complaint is inescapable. In *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524, it is said in the opinion by *Stacy, C. J.:*

"The one circumstance which differentiates this case from those cited by the defendants, especially *Emerson v. Gaither,* 103 Ind., 564, 7 Am. Cas., 1114, most nearly in point and upon which great reliance is put, is the allegation of a general course of dealing and systematic policy of wrongdoings, concealment, and mismanagement, virtually amounting to a conspiracy, in which the defendants are all charged with having participated at different times and in varying degrees. *Cotton v. Laurel Park Estates,* 195 N. C., 848, 141 S. E., 339. A connected story is told and a complete picture is painted of a series of transactions, forming one general scheme, and tending to a single end. This saves the pleading from the challenge of the demurrers."

There is no error in the order overruling the demurrer in this action. It is

Affirmed.

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A. M. MEWBORN AND HIS WIFE, FLORENCE A. MEWBORN, v. RUDISILL GOLD MINE, INC., AND CARSON REALTY COMPANY.

(Filed 28 April, 1937.)

**1. Nuisance § 1—Instruction held to charge that location of mine as well as its manner of operation determines whether it is nuisance.**

The evidence disclosed that defendant operated a gold mine on property inside the corporate limits of a city, and that plaintiffs owned adjacent property, also within the city limits. The court instructed the jury, in effect, that the operation of the mine by defendant would not constitute a nuisance unless its manner of operation occasioned more noise, lights, and vibration than would result from the operation of other mines of like kind and character operated as a reasonably prudent miner would operate them under like circumstances. *Held:* Construing the charge contextually as a whole in the light of the evidence, an objection that it failed to charge that the location of the mine as well as the manner of its operation should be considered in determining whether it was a nuisance, is untenable.

**2. Trial § 36—**

An instruction will be considered contextually as a whole and interpreted in the light of all the evidence.

APPEAL by plaintiffs from *Cowper, Special Judge,* at September Term, 1936, of MECKLENBURG. No error.

This is an action to recover damages for injuries both to the persons and to the property of the plaintiffs which were caused by the operation by the defendant Rudisill Gold Mine, Inc., as lessee of the defendant Carson Realty Company, of a gold mine which is located on property adjoining the property of the plaintiffs within the corporate limits of the city of Charlotte, N. C.

It is alleged in the complaint that by the maintenance and operation of the gold mine described therein, the defendants have created a nuisance which has caused injuries both to the persons and to the property of the plaintiffs. This allegation is denied in the answers of both the defendants.

At the close of all the evidence, the motion of the defendant Carson Realty Company that the action be dismissed as to said defendant by judgment as of nonsuit, was allowed. Judgment was rendered accordingly.

The evidence offered by the plaintiffs and by the defendant Rudisill Gold Mine, Inc., tended to support their conflicting contentions as to the facts.

Issues arising on the pleadings of the plaintiffs and of the defendant Rudisill Gold Mine, Inc., were submitted to the jury. The first and second issues were as follows:

"1. Are the plaintiffs A. M. Mewborn and his wife, Florence A. Mewborn, owners as tenants by the entirety of the property described in the complaint? Answer: .....

"2. Did the defendant Rudisill Gold Mine, Inc., maintain and operate the gold mine referred to in the complaint so as to create a nuisance, as alleged, to the time of the trial? Answer: ....."

The first issue was answered "Yes (by consent)." With respect to the second issue, the court instructed the jury as follows:

"On the second issue, the burden is on the plaintiffs to satisfy the jury by the greater weight of the evidence that the defendant Rudisill Gold Mine, Inc., did maintain and operate the gold mine referred to in the complaint so as to create a nuisance, as alleged, and that it did so up to the time of the trial.

"One who owns, or maintains and operates, a mining plant must take proper precautions to prevent unnecessary or excessive noises, or vibrations, or glaring lights, from becoming a nuisance to those residing in such proximity as to be injuriously affected by such noises, vibrations, or lights, amounting to a nuisance, but this being done, unavoidable

noises, and vibrations, and necessary lights must be considered as inconveniences to which neighbors must submit.

"The court further charges you, gentlemen of the jury, that mere noise, in itself, is not a nuisance, but noise may become a nuisance if it be of such excessive character as to produce actual physical discomfort, and annoyance to a person of ordinary sensibilities.

"The court further charges you, gentlemen of the jury, that as many useful acts are necessarily attended with more or less noise, vibrations, and lights, reasonable noise, vibrations, and lights, which are not excessive and abnormal under the circumstances, do not constitute a nuisance.

"Now, gentlemen of the jury, the court further instructs you on the second issue that the operation of a mine must occasion more noise and vibration than necessarily results from the operation of other plants of like kind and character, operated as a reasonably prudent man or miner would operate them under like circumstances, in order to constitute such operation a nuisance. Although the operation may be to some extent annoying, if not annoying to the extent of amounting to a nuisance—that is, excessive, or unreasonable, greater than other mining plants of like kind and character, operated by reasonably prudent miners, then, gentlemen, it must be submitted to.

"Again, gentlemen, the court instructs you, with the hope of aiding you in understanding the charge, to create a nuisance for which damages may be recovered, the noise and vibration must be either excessive or unreasonable in degree, and of such character as to produce physical discomfort to a person of ordinary sensibilities; the injuries must be real, gentlemen, and not fanciful.

"Now, gentlemen, applying these principles of law to this case, and addressing myself to the second issue, the court instructs the jury that if the jury shall find from the evidence, and by its greater weight, the burden being upon the plaintiffs on the second issue, that the maintenance and operation of the defendant's mine occasioned more noise and vibration than necessarily resulted from the operation of other plants of like kind and character, *i.e.*, other plants of like kind and character, that such noise and vibration were excessive, or unreasonable in degree, and of such character as to produce physical discomfort and annoyance to a person of ordinary sensibilities, or injury to property, which could have been avoided but for such excessive or unreasonable operation, as I have defined them, and as alleged in the complaint, then, gentlemen of the jury, the court instructs you that if you find all of this by the greater weight of the evidence, that would amount to a nuisance, and it would be your duty to answer the second issue 'Yes'; if you fail to so find, by the greater weight of the evidence, it would be equally your duty to answer the second issue 'No.'"

The jury answered the second issue "No."

From judgment that they recover nothing of the defendant Rudisill Gold Mine, Inc., by this action, the plaintiffs appealed to the Supreme Court, assigning errors in the instructions of the court to the jury.

*Leslie J. Huntley, Jr., G. T. Carswell, and Joe W. Ervin for plaintiffs.*
*Whitlock, Dockery & Shaw for defendant.*

CONNOR, J. On their appeal to this Court, the plaintiffs contend that the trial court should have instructed the jury that the question as to whether the gold mine which is operated by the defendant is a nuisance depended not only on the manner in which it was operated by the defendant, but also on its location. They contend that the failure of the court to so instruct the jury was error, for which the plaintiffs are entitled to a new trial.

All the evidence at the trial showed that both the plaintiffs' property, which the plaintiffs occupy as their home, and the gold mine which the defendant operates, are located within the corporate limits of the city of Charlotte, N. C., and that plaintiffs' property adjoins the property on which the gold mine is operated by the defendant.

It is undoubtedly true, as contended by the plaintiffs, that the location of a mine or factory—whether in a city or town or in the country—whether in a residential or business district of a city or town—should be considered by the jury in determining whether the operation of the mine or factory creates a nuisance for which a plaintiff may recover damages, when its operation results in injury to his person or property. 46 C. J., p. 666, sec. 32, and cases cited to support the principle stated in the text. Conceding that in the instant case, the jury should have been instructed to consider the location of the gold mine operated by the defendant in determining whether such operation is a nuisance, we are of opinion that the trial court did, in effect, so instruct the jury.

Taking the charge as a whole, and not disconnectedly (see *Teseneer v. Mills Co.,* 209 N. C., 615, 184 S. E., 535), and interpreting the instructions in the light of all the evidence (see *In re Will of Hardee,* 187 N. C., 381, 121 S. E., 667), we hold that there was no error in the instructions with respect to the second issue for which plaintiffs are entitled to a new trial. The answer to the second issue is determinative of the action. The judgment is affirmed.

No error.

MRS. CLATE WHITE AYDLETT v. MAJOR & LOOMIS COMPANY.

(Filed 28 April, 1937.)

**1. Corporations §§ 14, 20—Purchaser of stock may rely on apparent authority of treasurer and general manager to make repurchase agreement.**

Plaintiff purchased a considerable amount of a new issue of preferred stock of defendant corporation, the sale having been made by a director of the corporation under an agreement, in accordance with a letter in regard to the sale written the director by the treasurer and general manager of the corporation, under which the corporation agreed to repurchase at par a stipulated amount of the stock every three-year period upon demand of the purchaser. Thereafter, upon demand of plaintiff, defendant corporation repurchased part of the stock over a three-year period, but refused to repurchase more of said stock during the subsequent three-year period, and plaintiff instituted this action. *Held:* Plaintiff had a right to rely on the apparent authority of the treasurer and general manager of the corporation to make the repurchase agreement in good faith in the interest of the corporation to induce the purchase of the stock, and defendant's contention that its officer did not have authority to make the agreement is untenable, and the corporation being solvent and the rights of creditors not being involved, and the corporation not being prohibited by statute or its charter from purchasing certain shares of its own preferred stock, and there being no suggestion of collusion or fraud, a directed verdict for plaintiff is without error.

**2. Limitation of Actions § 3—Cause of action does not accrue until injured party is at liberty to sue.**

A cause of action does not accrue until the injured party is at liberty to sue, and where a contract obligates a party to repurchase stock upon demand after a stated period, a cause of action thereon does not accrue until the seller has a right to demand repurchase and the demand made in accordance therewith is refused by the seller.

**3. Evidence § 39—Written instrument does not preclude extrinsic evidence of contemporaneous agreement not in conflict therewith.**

A provision in a stock certificate that the corporation should have the option to repurchase its stock at any interest period at a price five dollars above par does not preclude evidence of an agreement by the corporation at the time of the sale to redeem a part of the stock at par every three-year period, upon demand of the purchaser, the agreement not being inconsistent with the provision in the certificate.

APPEAL by defendant from *Frizzelle, J.*, at September Term, 1936, of PASQUOTANK. No error.

This was an action to enforce a contract for the purchase of certain shares of the preferred stock of defendant corporation.

The plaintiff alleged, and offered evidence tending to show, that in 1926 the defendant duly authorized an increase of its capital stock by the issuance of $250,000 of 7% cumulative preferred stock of the par value

of $100. In order to facilitate the sale of the new stock it was understood that each director of the corporation should sell what stock he could. Pursuant to this arrangement, T. S. White, one of the directors, approached the plaintiff for that purpose, and she proposed to buy 251 shares of the stock, provided the corporation would agree to repurchase or redeem a limited amount of the stock when her necessity required. This proposal was referred to T. J. Nixon, Jr., who was then director, treasurer, and general manager of the corporation, and in general charge of its business, and he thereupon wrote the following letter, under date of 4 April, 1926:

MAJOR & LOOMIS COMPANY,
THOS. J. NIXON, JR., *Treas. & General Manager.*

MR. T. S. WHITE,
Hertford, N. C.

In reference to the proposed sale of Preferred Stock to your sisters, Mrs. Clate W. Aydlett, Mrs. Willie W. Weeks, and Mrs. Cornie W. Abbott, aggregating approximately fifty thousand dollars, we agree, should it become necessary for either of the above to have a portion of the above amount, not to exceed $3,000.00 at any one time, that we will redeem that portion of the stock at $100.00 per share, provided we are given ninety days notice in advance. However, it is understood that the stock cannot be called more than one time every three years.

Yours very truly,
MAJOR & LOOMIS COMPANY,
THOS. J. NIXON, JR., *Treas.*

Shortly afterwards, and pursuant to this agreement, 251 shares of the stock were issued to and paid for by plaintiff. The certificate of stock contained this provision: "This stock is redeemable at the option of Major & Loomis Company at the price of $105 per share at any interest period by giving ninety days notice to the owner hereof."

Thereafter, upon the request of plaintiff, shares of plaintiff's stock were repurchased by defendant on the dates and in the amounts following: 4 March, 1929, 5 shares, $500.00; 31 July, 1929, 10 shares, $1,000; 16 January, 1930, 16 shares, $1,600; 1 November, 1930, 20 shares, $2,000. In 1931 and 1932, 36 shares of the stock belonging to plaintiff's sister were likewise redeemed. 8 August, 1935, the plaintiff requested defendant to repurchase an additional $3,000 of her stock, in accordance with the terms of the agreement, and defendant refused to comply.

Defendant denied in its answer that it was under obligation to redeem or repurchase plaintiff's stock, that if the agreement alleged in the complaint was made by an officer of the company, it was without authority

and void; that the alleged agreement is void for uncertainty, and that plaintiff's cause of action is barred by the statute of limitations; that the provisions in the stock certificate accepted by plaintiff constituted the contract between the parties for the redemption of stock. Defendant offered evidence tending to show that the officers and directors of the corporation, other than T. S. White and T. J. Nixon, Jr., were not advised of the letter of 4 April, 1926, and did not learn of it until 1932, when the board of directors ordered that no more stock be taken over. The defendant also offered the minutes of the board of directors tending to show restriction upon the authority of the treasurer and general manager with respect to the amount of timber he could purchase.

At the close of the evidence defendant renewed its motion for judgment of nonsuit, and this was denied.

Under peremptory instructions from the court, the jury answered the issues in favor of the plaintiff, and from judgment on the verdict defendant appealed.

*J. H. LeRoy, Jr., for plaintiff.*
*Whedbee & Whedbee and Thompson & Wilson for defendant.*

DEVIN, J. The appellant's principal assignments of error are addressed to the denial of its motion for judgment of nonsuit, and to the charge of the court to the jury.

Upon consideration of the facts presented by the record before us, we are of opinion, and so decide, that the motion for nonsuit was properly denied, and that the evidence offered warranted the peremptory instruction given by the court.

The authority of the treasurer and general manager of the corporation to enter into the financial agreement alleged, for the purpose of inducing the purchase of a portion of the corporation's issue of additional shares of stock, on the evidence adduced, cannot be successfully controverted. *Watson, Trustee, v. Proximity Mfg. Co.*, 147 N. C., 469; *Bank v. Dunn Oil Mill Co.*, 157 N. C., 302; *Morris v. Basnight*, 179 N. C., 298; *Lumber Co. v. Elias*, 199 N. C., 103; *Warren v. Bottling Co.*, 204 N. C., 288; *White v. Johnson*, 205 N. C., 773.

A person dealing with the corporation and purchasing a considerable amount of a new issue of stock would have a right to act upon the apparent authority of the treasurer and general manager to make a contract, in good faith, in the interest of the corporation, to induce the purchase. *Watson, Trustee, v. Proximity Mfg. Co., supra; Trollinger v. Fleer*, 157 N. C., 81; *R. R. v. Smitherman*, 178 N. C., 595; *Cardwell v. Garrison*, 179 N. C., 476; *Lumber Co. v. Elias, supra.*

The fact that some of the plaintiff's shares of preferred stock were being redeemed by the corporation was known to the entire board of

directors when the payments were begun in 1929, and no notice of objection thereto was given to the plaintiff until 1935. While this may not have been conclusive evidence of ratification, it negatives the idea of concealment or advantage taken. Neither in the pleadings nor in the evidence is there any suggestion of collusion or fraud. The corporation was not prohibited by statute nor by its charter from purchasing certain shares of its own preferred stock for future disposition by the company. The dividends on the stock were being paid. The corporation was solvent. No rights of creditors were involved. *Blalock v. Mfg. Co.*, 110 N. C., 99; *Hospital v. Nicholson*, 189 N. C., 44; *Thompson v. Shepherd*, 203 N. C., 310; *Byrd v. Power Co.*, 205 N. C., 589; C. S., 1166, 1174.

In no view could the cause of action be held to have been barred by the three-year statute of limitations. The last repurchase of plaintiff's stock by the defendant was 1 November, 1930. Under the contract she could not have requested another purchase until the expiration of three years thereafter. Request was made 8 August, 1935, and refused. Suit was begun 9 December, 1935. The cause of action does not accrue until the injured party is at liberty to sue. The statute of limitations begins to run only when a party becomes liable to an action. *Eller v. Church*, 121 N. C., 269; *City of Washington v. Bonner*, 203 N. C., 250; *Peal v. Martin*, 207 N. C., 106.

The provisions in the certificate of stock giving the corporation the option to call the stock for redemption at $105 do not conflict with the agreement giving the plaintiff the right to require the repurchase of limited amounts of her stock at par. The contract evidenced by the issue and acceptance of the certificate cannot be held to abrogate the previous agreement with the plaintiff, which is not inconsistent therewith. *Byrd v. Power Co.*, 205 N. C., 589.

The exceptions to the ruling of the court below upon the admission of evidence are without substantial merit. In the trial, we find

No error.

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CLARENCE H. DAVIS, BY HIS NEXT FRIEND, B. O. DAVIS, v. ASKIN'S RETAIL STORES, INCORPORATED, AND GEORGE LEFLER.

(Filed 28 April, 1937.)

**1. Libel and Slander § 2—Libelous words are actionable per se if they subject person to disgrace, ridicule, odium, or contempt.**

The rule determining whether words used in a libel are actionable *per se* is different from the rule applicable to actions for slander, and libelous words are actionable *per se* when they subject a person to dis-

grace, ridicule, odium, or contempt in the estimation of friends and acquaintances or the public, and it is not necessary that they impute a crime.

**2. Same—Letter declared on in this case held libelous per se.**

A letter imputing that plaintiff had wrongfully removed merchandise not belonging to him from the State in violation of a criminal statute, and stating that if payment were not immediately made defendants would assume that the violation of the statute was intentional and would turn the matter over to the authorities for action prescribed by law, *is held* libelous and actionable without averment of special damages.

**3. Libel and Slander § 4—Complaint held to allege defendants' responsibility for publication of libelous letter.**

The complaint alleged that defendants mailed to plaintiff, then seventeen years of age, a letter containing language which, on account of plaintiff's inexperience and youth, would cause him to believe he was threatened with criminal prosecution, that plaintiff showed the letter to others and that defendants knew that plaintiff, by reason of his youth, and fear which the letter would engender, would show the letter to others for advice as a natural and probable result of defendants' wrong. *Held:* The complaint sufficiently alleges that defendants were responsible for the publication of the libelous matter complained of.

APPEAL by defendants from *Cowper, Special Judge,* at November Term, 1936, of MECKLENBURG. Affirmed.

Civil action for libel. The complaint alleges that the plaintiff, then 17 years of age, received through the mail from the defendants the following false and libelous communication: "Collection Department, Askin's—Clothing for the Family. Dear Customer: We have just learned through our special investigator that you have left the city and State with merchandise which was leased to you under a signed contract. By removing property which does not belong to you, you have violated the laws of this city and State, and by so doing you have made yourself liable to prosecution. This law was passed for the protection of merchants against people who willfully convert to their own use merchandise sold to them under lease. We do not know whether you intended to evade this obligation by leaving the city, or not, but we will have to arrive at that conclusion unless you settle the account at once. Naturally we would prefer to have you settle this account without any trouble, but unless we hear from you within three days, we will assume that it is not your intention to pay, and we will then have to turn the whole matter over to the proper authorities, for whatever action is prescribed by the law. Very truly yours, Askin's. Geo. Lefler, Mgr."

It was further alleged that the plaintiff, an inexperienced youth, believing he was threatened with prosecution for a criminal offense, naturally consulted others and exhibited the communication to them,

and that the defendants knew that the plaintiff, by reason of his youth and under the emotion of fear, would divulge the contents of the letter to others as a natural and probable result of defendants' wrongful act.

The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, for that the writing quoted was not libelous *per se,* and no special damages were alleged; and also that it appeared in the complaint that the alleged libel was published by the plaintiff himself and not by defendants.

The demurrer was overruled, and defendants excepted and appealed.

*Carswell & Ervin for plaintiff, appellee.*
*Fred B. Helms for defendants, appellants.*

DEVIN, J. The sufficiency of the complaint is challenged by the demurrer on two grounds: (1) That the writing complained of is not libelous *per se* and contains no averment of special damage, and (2) that the complaint shows there was no publication of the alleged libel by the defendants.

1. The distinction between oral and written defamation is well recognized. To determine whether the particular words used are actionable *per se,* it is necessary to apply a different rule in case of libel from that applicable to slander.

In *Simmons v. Morse,* 51 N. C., 7, it was said: "A libel, as applicable to individuals, has been well defined to be a malicious publication, expressed either in printing or writing, or by signs, or pictures, tending either to blacken the memory of one dead or the reputation of one alive, and expose him to public hatred, contempt, or ridicule. . . . Any written slander, though merely tending to render the party liable to disgrace, ridicule, or contempt, is actionable, though it do not impute any definite infamous crime." 36 C. J., 1152; *Brown v. Lumber Co.,* 167 N. C., 9; *Hall v. Hall,* 179 N. C., 571; *Alexander v. Vann,* 180 N. C., 187; *Hedgepeth v. Coleman,* 183 N. C., 309; *Pentuff v. Park,* 194 N. C., 146.

In *Paul v. Auction Co.,* 181 N. C., 1, *Hoke, J.,* uses this language: "It is fully recognized that in order to constitute a libel it is not necessary that the publication should impute the commission of crime, infamous or otherwise, but the charge is established when a false publication is made, holding one up to public hatred, obloquy, contempt, or ridicule."

In *Pentuff v. Park, supra, Clarkson, J.,* quotes with approval from Newell on Slander and Libel, as follows: "Everything printed or written which reflects on the character of another, and is published

without lawful justification or excuse, is a libel, whatever the intention may have been. . . . The words need not necessarily impute disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous."

"Defamatory words, when spoken, are ordinarily not actionable *per se* unless they impute a crime; but written or printed words are actionable when they subject a person to disgrace, ridicule, odium, or contempt in the estimation of friends and acquaintances, or the public." 17 R. C. L., 263; *Foster-Milburn v. Chinn,* 134 Ky., 424.

The written words complained of charged the plaintiff in part as follows: "By removing property which does not belong to you, you have violated the laws of this city and State, and by so doing you have made yourself liable to prosecution. This law was passed for the protection of merchants against people who willfully convert to their own use merchandise sold to them under lease. . . . Unless we hear from you within 3 days we will have to turn the whole matter over to the proper authorities for whatever action is prescribed by the law."

In accord with the pertinent principles of the law of libel as set forth in the adjudicated cases and stated by text-writers, this written language must be held libelous and actionable without averment of special damages.

2. Does the complaint sufficiently allege that the defendants were responsible for the publication of the libelous matter complained of? Under the rule stated by *Adams, J.,* speaking for the Court in *Hedgepeth v. Coleman,* 183 N. C., 309, this question must be answered in the affirmative. In the *Hedgepeth case, supra,* the facts were similar to those in the case at bar. It was there said: "In the letter referred to there is a threat of prosecution. When it was received, the plaintiff was between fourteen and fifteen years of age, and his youth was known to the defendant. With the knowledge of the plaintiff's immaturity, of the character of the accusation and menace contained in the letter, of the probable emotion of fear, and the impelling desire for advice on the part of the plaintiff, the defendant must have foreseen the plaintiff's necessary exposure of the letter as the natural and probable result of the libel."

The facts alleged in the complaint are sufficient to constitute a cause of action, and the demurrer was properly overruled.

Affirmed.

STATE v. RAYMOND EDWARDS.

(Filed 28 April, 1937.)

1. **Criminal Law §§ 33, 41f—Defendant is entitled to have exculpatory as well as incriminating portions of confession considered by jury.**

Exculpatory matter contained in a confession of guilt introduced in evidence by the State should be given the same weight by the jury as incriminating portions of the confession, unless disproved or weakened by other evidence, since a confession must be considered as given, in its entirety, and the exculpatory statements do not constitute evidence by defendant in his own behalf, and an instruction that such statements should be scrutinized because of defendant's interest in the verdict, is error.

2. **Criminal Law § 41f—Credibility of testimony by defendant in his own behalf.**

It is error for the court to charge that defendant's testimony should be scrutinized and received with caution in view of defendant's interest in the verdict, without adding that if they find defendant worthy of belief, they should give as full credit to his testimony as any other witness, notwithstanding his interest.

3. **Homicide §§ 4c, 21—Evidence of drunkenness is competent on question of premeditation and deliberation.**

Evidence of defendant's drunken condition at the time of the homicide is competent on the question of premeditation and deliberation, since if defendant is too intoxicated to be capable of premeditation and deliberation he cannot be convicted of first degree murder, unless the deliberate purpose to kill was formed when sober, though executed when drunk.

APPEAL by defendant from *Finley, Emergency Judge,* at November Term, 1936, of GASTON.

Criminal prosecution, tried upon indictment charging the defendant with the murder of his wife, Fannie Edwards.

The deceased was killed on the night of 5 November, 1936. The evidence tending to connect the defendant with the homicide comes from a written confession in which the defendant says he killed his wife with an axe, but in the same confession he states and reiterates that he was drunk and did not know what he was doing. The defendant offered no evidence.

With respect to the statements in the confession tending to show that the defendant was drunk, the court in its charge said to the jury: "This is evidence offered by the defendant in his own behalf and the law says that you shall 'take it with a grain of salt.'" Exception.

And immediately following: "The State contends that there was no evidence to show that he was drunk that evening outside of the evidence of the defendant—evidence made in his own behalf. The law says that

you must take these statements with care and caution, because he is liable to testify to his own interest, . . . if a man's life is at stake." Exception.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Ernest R. Warren and Charles E. Hamilton, Jr., for defendant.*

STACY, C. J. In telling the jury that they should take the exculpatory part of defendant's confession "with a grain of salt," the learned judge was evidently under the impression that the defendant had testified in his own behalf. In this he was mistaken. The defendant did not go upon the witness stand. The confession was offered in evidence by the State, and upon the confession the prosecution grounded its case. *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91. The defendant was entitled to have the confession considered as given, in its entirety, with whatever views or theories it afforded. *S. v. Jones,* 79 N. C., 630; 1 R. C. L., 585.

In *Burnett v. People,* 204 Ill., 208, 68 A. S. R., 206, 66 L. R. A., 304, the following instruction was held to be a correct statement of the law: "The court instructs the jury that where a confession of the prisoner charged with a crime is offered in evidence, the whole of the confession so offered and testified to must be taken together, as well (as) that part which makes in favor of the accused as that part which makes against him; and if the part of the statement which is in favor of the defendant is not disproved by other testimony in the case, and is not improbable or untrue, considered in connection with all the other testimony of the case, then that part of the statement is entitled to as much consideration from the jury as the parts which make against the defendant."

Again, this original misapprehension seems to have led the court into another error. The jury was instructed to consider the "evidence of the defendant," meaning the exculpatory statements in the confession, "with care and caution because he is liable to testify to his own interest . . . if a man's life is at stake." It is conceded in the State's brief that, had the defendant testified in his own behalf, this instruction could hardly be said to meet the test laid down in *S. v. Ray,* 195 N. C., 619, 143 S. E., 143: ". . . 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," citing in support of the position, *S. v. Graham,* 133 N. C., 645, 45 S. E., 514; *S. v. Lee,* 121 N. C., 544, 28 S. E., 552; *S. v. Collins,* 118 N. C., 1203, 24 S. E., 118; *S. v. Holloway,* 117 N. C., 730, 23 S. E., 168, later quoted with approval in *S. v. Wilcox,* 206 N. C., 694, 175 S. E., 121.

Evidence of the defendant's drunken condition at the time of the homicide was competent to be considered by the jury on the question of premeditation and deliberation. *S. v. Ross,* 193 N. C., 25, 136 S. E., 193; *S. v. English,* 164 N. C., 497, 80 S. E., 72; *S. v. Allen,* 186 N. C., 302, 119 S. E., 504.

Speaking to the question in *S. v. Murphy,* 157 N. C., 614, *Hoke, J.,* delivering the opinion of the Court, said: "It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been held controlling in many causes in this State and on indictments for homicide, as in *S. v. Wilson,* 104 N. C., 868; *S. v. Potts,* 100 N. C., 457. The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be established as an essential feature of the crime. In Clark's Criminal Law, p. 72, this limitation on the more general principle is thus succinctly stated: 'Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence.' Accordingly, since the statute dividing the crime of murder into two degrees and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the 'killing was deliberate and premeditated,' these terms contain, as an essential element of the crime of murder, 'a purpose to kill previously formed after weighing the matter' (*S. v. Banks,* 143 N. C., 658; *S. v. Dowden,* 118 N. C., 1148), a mental process, embodying a specific, definite intent, and if it is shown that an offender, charged with such crime, is so drunk that he is utterly unable to form or entertain this essential purpose he should not be convicted of the higher offense. It is said in some of the cases, and the statement has our unqualified approval, that the doctrine in question should be applied with great caution. It does not exist in reference to murder in the second degree nor as to manslaughter. Wharton on Homicide (3 Ed.), 810. It has been excluded in well considered decisions where the facts show that the purpose to kill was deliberately formed when sober, though it was executed when drunk, a position presented in *S. v. Kale,* 124 N. C., 816, and approved and recognized in *Arzman v. Indiana,* 123 Ind., 346, and it does not avail from the fact that an offender is, at the time, under the influence of intoxicants, unless, as heretofore stated, his mind is so affected that he is unable to form or entertain the specified purpose referred to."

For errors, as indicated, a new trial will be awarded.

New trial.

G. W. DENNY ET AL. v. MECKLENBURG COUNTY ET AL.

(Filed 28 April, 1937.)

**Taxation § 4—N. C. Code, 1334 (8), does not give special authority to counties to erect teacherages in connection with consolidated schools.**

N. C. Code, 1334 (8), giving special authority to counties to issue bonds and notes for the special purposes therein named, including the erection and purchase of schoolhouses, as administrative agencies of the State, does not grant special authority to issue bonds or notes for the erection and maintenance of teacherages in connection with consolidated rural schools, and where a proposed bond issue for this purpose has not been approved by the majority of the qualified voters of the county, an order restraining the issuance of the bonds is proper.

CONNOR, J., dissenting.

APPEAL by defendants from *Ervin, Special Judge,* at March Special Term, 1937, of MECKLENBURG.

Civil action to restrain the defendant Board of Commissioners of Mecklenburg County from issuing bonds in the sum of $96,000 to provide eight teacherages for the rural consolidated schools of the county.

Pursuant to the provisions of the County Finance Act, ch. 81, Public Laws 1927, and subsequent amendments, the question was duly submitted to a vote of the people and carried by a majority of the votes cast, but not by a majority of the qualified voters.

It is found as a fact that in the premises the defendants "are acting as an administrative agency of the State . . . to provide a State system of public schools according to the provisions of the Constitution."

It is the purpose of the county board of education to charge the teachers, occupying said buildings, as rental, a sum sufficient to liquidate the indebtedness during the life of the proposed bonds, which is to be thirty years.

The court being of opinion that no authority has been granted to Mecklenburg County, as an administrative agency of the State, to provide teacherages for the schools in question, granted the injunction prayed for by the plaintiff. Defendants appeal, assigning error.

*H. Haywood Robbins for plaintiff, appellee.*
*J. Clyde Stancill and Henry E. Fisher for defendants, appellants.*

STACY, C. J. The case turns on a single question. It is this: Does the special authorization to the counties of the State, as contained in section 8 of the County Finance Act, Michie's Code, 1334 (8), to issue bonds and notes for the special purposes therein named, including the

"erection and purchase of schoolhouses" and their "necessary equipment," carry with it special authority to erect and maintain teacherages in connection with rural consolidated schools? The trial court answered the question in the negative. We cannot say there is error in this ruling.

To hold as a matter of law that a teacherage is a part of the necessary equipment of a rural consolidated school would be to go farther than the General Assembly has gone, and, perhaps, entail some judicial engraftment. *Greenbanks v. Boutwell,* 43 Vt., 207. The statute is not fraught with any dubiety of meaning. A teacherage, which is to be run for profit and solely for the benefit of the teachers, is not included within its terms. As was said in *Hansen v. Lee,* 119 Wash., 691, 206 Pac., 927, "It is not necessary to cite authorities to support the statement that school districts and their directors have only such powers as are by statute given them. A careful reading of all the provisions of statutes affecting this question . . . shows that they do not, either expressly or by reasonable implication, grant any power or authority to school districts, . . . or to their board of directors, to erect dwellings for the use of school teachers."

The cases cited by the defendants, *Adams v. Miles,* 300 S. W. (Tex. Civ. App.), 211, and *Young v. Linwood,* 97 S. W. (2d) (Ark.), 627, are neither controlling nor directly in point. Indeed, the subsequent reversal of the *Adams case,* 35 S. W. (2d) (Tex.), 123, would seem to make it more nearly an authority for the plaintiff. Nor can the defendants derive any comfort from anything that was said in *Taylor v. Board of Education,* 206 N. C., 263, 173 S. E., 608, or *Frazier v. Comrs.,* 194 N. C., 49, 138 S. E., 433.

On the record as presented, the judgment would seem to be correct.

Affirmed.

CONNOR, J., dissenting: The judgment in this action is in accord with the opinion of the trial court that the Board of Commissioners of Mecklenburg County has not been authorized by the General Assembly of this State to issue bonds of Mecklenburg County for the purpose of providing funds for the erection of teacherages in certain school districts of said county, notwithstanding the finding of the board of education of said county, approved by the said board of commissioners, that said teacherages are necessary for the maintenance and operation of schools in said districts as required by the Constitution of this State.

The General Assembly, by statute, has authorized the board of commissioners of any county in this State, after compliance with all the provisions of the statute, to issue bonds of the county for the purpose of providing funds for the "erection and purchase of schoolhouses." N. C. Code of 1935, section 1334 (8).

There is in this State no statutory definition of the word "schoolhouses." In the absence of such definition, I do not think that it can be held as a matter of law that a teacherage is not a schoolhouse. On the facts found by the trial court in the instant case, I am of opinion that the Board of Commissioners of Mecklenburg County has authority to issue bonds of said county for the purpose of providing teacherages for the school districts of said county named in the resolution of the said board of commissioners. Accordingly, I think the judgment in this action should be reversed.

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GASTON COUNTY UNITED DRY FORCES, INCORPORATED, v. J. A. WILKINS AND R. B. BABINGTON, JR., EXECUTORS OF THE ESTATE OF E. G. McLURD.

(Filed 28 April, 1937.)

**1. Wills § 43—**

A will speaks at the time of the death of testator, and if at that time there is no organization or entity answering the description and capable of taking the bequest, the bequest is void, even though a corporation is thereafter formed conforming to the description.

**2. Wills § 33d—Absolute bequest without restriction or control over the beneficiary constitutes gift and does not create trust.**

A bequest to "any organization which may be organized for the purpose of enforcing the prohibition laws" of the county may not be upheld as a trust so as to enable a corporation formed for the stipulated purpose after the death of the testator to take, since the bequest purports to vest sole ownership in the legatee without restriction, and consitutes an absolute gift rather than a trust.

APPEAL by plaintiff from *Pless, J.*, at September Term, 1936, of GASTON. Affirmed.

Action to recover a legacy under the will of E. G. McLurd, deceased, heard upon agreed statement of facts.

The facts agreed were substantially these: The testator died 24 November, 1933, leaving a will, which contained the following bequest: "$1,000 to any organization which may be organized for the purpose of enforcing the prohibition laws in Gaston County." On 1 January, 1936, the defendants, executors, instituted action in the Superior Court of Gaston County for the purpose of obtaining the advice of the court with respect to the quoted bequest. This action, to which the residuary legatees were made parties, resulted in a judgment by Harding, J., that the legacy of $1,000 was void for uncertainty as to the devisee and as to

the purpose of the bequest, and in the judgment was recited the further finding that at the time of the death of the testator there was no organization in existence capable of receiving such a devise, and no organization at that time fulfilling the description of the beneficiary of the bequest. Thereafter, on 29 February, 1936, a charter was applied for and issued, creating an ordinary corporation in the name of "Gaston County United Dry Forces, Incorporated," with authorized capital stock of 20,000 shares of par value of $1.00 each, showing subscription by the incorporators for four shares of stock. On 6 March, 1936, this action to recover the legacy of $1,000 was instituted. Among the objects and purposes of the plaintiff corporation, set out in the charter, were the following: "To promote and encourage the lawful enforcement, and to lawfully enforce and to aid and assist in enforcing by lawful means and measures the prohibition laws of North Carolina now in force in the State and Gaston County." The corporation was authorized to receive bequests and devises for the purposes of the corporation. The estate of the testator has not yet been fully administered.

The court below held that the plaintiff was not entitled to recover under the facts agreed, and rendered judgment accordingly. Plaintiff appealed.

*A. C. Jones for plaintiff, appellant.*

*J. A. Wilkins and Cherry & Hollowell for defendants, appellees.*

DEVIN, J., after stating the case: The question presented for decision is whether the bequest of "$1,000 to any organization which may be organized for the purpose of enforcing the prohibition laws in Gaston County" is capable of adjudication as a valid testamentary disposition, entitling the plaintiff to recover the legacy.

A will speaks from the death of the testator. At the time of the death of E. G. McLurd there was in existence no organization or entity answering the description in the bequest capable of taking. While the bequest seemed to contemplate an organization to be thereafter formed, it was an absolute bequest and did not purport to create a trust for a charitable purpose. For the validity of the bequest there must be a definite beneficiary. 68 C. J., 505, 528; 28 R. C. L., 332; *Bridges v. Pleasants,* 39 N. C., 26; *St. James v. Bagley,* 138 N. C., 384; *McLeod v. Jones,* 159 N. C., 74; *Thomas v. Clay,* 187 N. C., 778; *Early v. Arnold,* 119 Va., 500.

In *Hester v. Hester,* 37 N. C., 330, a legacy "to some promising young man of good talents, of the Baptist order, to be selected by the executor," was held void for indefiniteness. The Court said: "There is no person

who can claim it." "The gift must be to such person, natural or artificial, as can legally take." *Bridges v. Pleasants, supra.*

In *Keith v. Scales,* 124 N. C., 497, where a charitable trust was upheld, it was said: "If the object of the trust were indefinite, it would be void; otherwise where, as in this case, it is definite and the selection of the individuals to enjoy its benefit is left to trustees."

The bequest to "any organization" was to an indefinite and nonexistent legatee, and was void for uncertainty. If regarded as the creation of a trust for a charitable or benevolent purpose, it is not one over which the court could assume jurisdiction or control, and for that reason must fail. As was said by *Gaston, J.,* in *Holland v. Peck,* 37 N. C., 255, "that can never be a trust which leaves anywhere an uncontrolled power of disposition." In *McAuley v. Wilson,* 16 N. C., 276, *Chief Justice Henderson* uses this language: "The validity of the devise depends on whether the devisees are accountable to anyone for the execution of the trust; for if they are not, it is void."

A bequest to an organization which may be organized to enforce the prohibition laws would seem to infringe upon the duty of the constituted authorities. But if it be understood that the purpose of the attempted bequest was to encourage and assist law enforcement, the bequest was a direct donation to an uncertain and nonexistent donee, and, even if it be held to have referred to the later ascertained and subsequently incorporated plaintiff, it was an unqualified gift without restriction upon or control over the devisee. It would not constitute a trust (*St. James v. Bagley, supra*), but vest ownership, if there had been one designated with sufficient certainty, capable of taking.

The motives of the incorporators of the plaintiff are in no way impugned. They were doubtless actuated by the worthy desire to use the fund designated in the will for the purpose of advancing a cause believed to be for the public good.

While the prior judgment of Judge Harding may not constitute an estoppel so far as the plaintiff is concerned, it is persuasive that, before the plaintiff came into being, the bequest was adjudged in a proper proceeding void for uncertainty and for want of a devisee.

For the reasons stated, we conclude that the bequest contained in the will of E. G. McLurd cannot avail the plaintiff, and that the judgment of the court below must be

Affirmed.

STATE v. JOHN CALLETT.

(Filed 28 April, 1937.)

**1. Buggery § 2—**

In this prosecution for buggery under C. S., 4336, the evidence of defendant's guilt *is held* insufficient to be submitted to the jury.

**2. Indictment § 7—**

A crime punishable by death or imprisonment in the State's Prison is a felony, C. S., 4171, and an indictment therefor must use the word "feloniously" or it is fatally defective, and should be quashed or judgment arrested on motion of defendant.

APPEAL by defendant from *Rousseau, J.*, and a jury, at January Regular Term, 1937, of MECKLENBURG. Reversed.

The defendant was tried on the following bill of indictment: "The jurors for the State upon their oath present, that: John Callett, late of the county of Mecklenburg, on 16 December, 1936, with force and arms, at and in the county aforesaid, did unlawfully and willfully commit the abominable and detestable crime against nature, against the form of the statute and in such case made and provided against the peace and dignity of the State. ....., Solicitor."

The defendant entered a plea of not guilty. The verdict of the jury was as follows: "The jury, after having been duly sworn and impaneled, returned for their verdict, finds the defendant guilty, with recommendation for mercy." Upon the verdict the court below pronounced judgment.

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*A. A. Tarlton for defendant.*

CLARKSON, J. At the close of the State's evidence and at the close of all the evidence the defendant in the court below made motions to dismiss the action, or for judgment of nonsuit. C. S., 4643. The court below overruled these motions, and in this we think there was error.

(1) The defendant was indicted for buggery, under C. S., 4336. After a careful review of the evidence, we do not think it sufficient to have been submitted to the jury. *S. v. Goodson,* 107 N. C., 798; *S. v. Montague,* 195 N. C., 20; *S. v. Carter,* 204 N. C., 304. Under the buggery statute, C. S., 4336, *supra,* the crime is punishable as follows: "He shall be imprisoned in the State's Prison not less than 5 nor more than 50 years."

(2) C. S., 4171, is as follows: "A felony is a crime which is or may be punishable by either death or imprisonment in the State's Prison. Any other crime is a misdemeanor."

Since all criminal offenses punishable with death or imprisonment in a State prison were by this section declared felonies, indictments wherein there has been a failure to use the word "feloniously," as characterizing the charge in the latter class of cases, have been declared fatally defective. *S. v. Jesse,* 19 N. C., 297; *S. v. Roper,* 88 N. C., 656; *S. v. Skidmore,* 109 N. C., 795; *S. v. Bryan,* 112 N. C., 848; *S. v. Caldwell,* 112 N. C., 854; *S. v. Wilson,* 116 N. C., 979; *S. v. Shaw,* 117 N. C., 764; *S. v. Holder,* 153 N. C., 606; *S. v. Goffney,* 157 N. C., 624; *S. v. Brinkley,* 191 N. C., 702. But this principle does not hold good where the Legislature otherwise expressly provides.

The indictment is fatally defective in not alleging "feloniously." As to the sufficiency of the bill in other respects, see *S. v. Ballangee,* 191 N. C., 700. In the record is the following: "The defendant was called upon to plead to the bill of indictment before plea and before a jury was impaneled moved the court to quash the bill of indictment for defects appearing on the face thereof, for that said indictment does not have sufficiently alleged law and facts as required by law. Motion overruled and defendant excepted and assigned error."

The indictment should have been quashed, C. S., 4623, but the prisoner held for a proper bill. *S. v. Skidmore, supra.* A motion could have been made by defendant in arrest of judgment. *S. v. Efird,* 186 N. C., 482.

The latter aspect of the opinion, under (2), is not material, as there was no sufficient evidence to have been submitted to the jury on the charge in the bill of indictment. We have written the well settled law so that it can be followed in bills of indictment.

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

Reversed.

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JOHN LOWE v. CITY OF GASTONIA.

(Filed 28 April, 1937.)

**1. Municipal Corporations § 17—**

A caddy on a municipal golf course, offering his services to the players on the course, is at least an invitee, and the city is liable for injuries resulting from its failure to exercise reasonable care for his safety in maintaining a defective bridge across a creek on the course.

**2. Municipal Corporations § 12—**

A municipality cannot avoid liability for injuries suffered by a caddy on its municipal golf course, as a result of its negligent failure to exercise reasonable care for his safety, on the ground that it owned and operated the golf course in the exercise of a governmental function.

APPEAL by defendant from *Rousseau, J.*, at January Term, 1937, of GASTON. No error.

This is an action to recover damages for personal injuries which the plaintiff suffered when he fell from a small bridge across a creek on the golf course, which is owned and maintained by the defendant.

At the close of the evidence for the plaintiff, the defendant moved for judgment as of nonsuit. The motion was denied and the defendant excepted. The defendant offered no evidence.

The issues arising upon the pleadings were answered by the jury as follows:

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

"2. Did the plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: 'No.'

"3. What amount, if any, is the plaintiff entitled to recover of the defendant as damages? Answer: '$200.00.'"

From judgment that the plaintiff recover of the defendant the sum of $200.00, and the costs of the action, the defendant appealed to the Supreme Court, assigning as error the refusal of the trial court to allow its motion for judgment as of nonsuit at the close of all the evidence.

*J. L. Hamme for plaintiff.*
*Ernest R. Warren for defendant.*

CONNOR, J. The evidence at the trial of this action, considered in the light most favorable to the contentions of the plaintiff, was sufficient to show facts on which the defendant is liable to the plaintiff for the damages which the plaintiff sustained from the injuries which he suffered, when he fell from the small bridge across the creek on the golf course which the defendant owns and maintains in Gaston County.

The plaintiff at the time he was injured was on defendant's golf course as a caddy, offering his services to the players on said golf course. He was at least an invitee. *Brigman v. Fiske-Carter Const. Co.*, 192 N. C., 791, 136 S. E., 125. For this reason the defendant owed the plaintiff the duty to exercise reasonable care for his safety, while the plaintiff was on its premises as a caddy. *Everett v. Goodwin*, 201 N. C., 734, 161 S. E., 317. The evidence was sufficient to show that the small bridge across the creek on defendant's golf course, near the first fairway, was

defective, as alleged in the complaint, and that as plaintiff was in the act of walking across the bridge he fell into the creek. His fall and resulting injuries were caused by the defects on the bridge. These defects were the result of the negligence of the defendant in the construction and maintenance of the bridge.

Defendant's contention on its appeal to this Court that it is not liable to the plaintiff in this action because it owned and maintained the golf course in the exercise of a governmental function, cannot be sustained. See *White v. City of Charlotte, ante,* 186, 189 S. E., 492.

There was no error in the refusal of the trial court to allow defendant's motion at the close of all the evidence, that the action be dismissed. The judgment is affirmed.

No error.

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MRS. A. P. RUCKER v. SNIDER BROTHERS, INC., ET AL.

(Filed 28 April, 1937.)

**1. Appeal and Error § 45b—**

Refusal of motion to strike from complaint allegations of negligence against defendant appellant on the ground that they were conclusions of the pleader and not supported by the facts alleged, is upheld on authority of *Pemberton v. Greensboro,* 203 N. C., 514; *S. c.,* 205 N. C., 599.

**2. Appeal and Error § 55—**

Decision on a former appeal, upon consideration of a motion to remove, that the complaint alleged joint negligence on the part of defendants, disposes of a demurrer entered by one defendant at the subsequent hearing on the ground that the complaint failed to state a cause of action against it.

APPEAL by defendant Maner Motor Transit Company from *Ervin, Special Judge,* at February Special Term, 1937, of MECKLENBURG.

Civil action to recover damages for personal injuries alleged to have been caused by the joint and concurrent negligence of the defendants when a truck owned by Snider Brothers, Inc., and operated at the time by J. W. Kluttz, collided with a truck and trailer owned by Maner Motor Transit Company, and operated at the time by Doyle Campbell, then immediately ran into a third car or vehicle on the highway in which plaintiff was riding as a guest, inflicting serious and permanent injuries.

Motion to strike from the complaint, as amended, allegations of negligence against Maner Motor Transit Company on ground that they are only conclusions of the pleader and not supported by the facts set out in the complaint. Overruled; exception.

The Maner Motor Transit Company appeals, assigning errors.

*Carswell & Ervin for plaintiff, appellee.*

*C. H. Gover, William T. Covington, Jr., and Hugh L. Lobdell for defendant Transit Company, appellant.*

STACY, C. J. This is the same case that was before us, on petition to remove, at the Fall Term, 1936, reported in 210 N. C., 778.

The ruling on the motion to strike will be upheld on authority of *Pemberton v. Greensboro,* 203 N. C., 514, 166 S. E., 396; *S. c.,* 205 N. C., 599, 172 S. E., 196. Nothing was said in *Poovey v. Hickory,* 210 N. C., 630, 188 S. E., 78, or *Jackson v. Bank,* 203 N. C., 357, 166 S. E., 176, which conflicts with this view.

On the argument, appellant interposed a demurrer *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action against the Maner Motor Transit Company. When the cases were here on the former appeal, it was said: "It is obvious that plaintiff has here alleged a cause of action based upon the joint and concurring negligence of both resident and nonresident tort-feasors, at the same time and place, and that the complaint does not show a separable controversy." *Rucker v. Snider Bros,* 210 N. C., 777. True, this was said on consideration of the motion to remove, but it would seem to be sufficient to dispose of the demurrer *ore tenus.*

Affirmed.

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KATE F. ABSHER v. CITY OF RALEIGH.

(Filed 28 April, 1937.)

**1. Municipal Corporations § 14—Evidence held to require submission of issue of contributory negligence in this action for fall on sidewalk.**

In this action against a municipality to recover for injuries sustained by plaintiff in a fall caused by a defective condition in a sidewalk, defendant elicited on cross-examination of plaintiff's witnesses evidence that the defect could be seen from the street while riding in an automobile, and that a person could step over the defective place. Plaintiff introduced evidence that the defect could not have been seen by her in the dark. *Held:* The evidence was sufficiently equivocal and contradictory to require the submission of an issue of contributory negligence to the jury.

**2. Negligence § 19b—**

The issue of contributory negligence must be submitted to the jury if there is more than a scintilla of evidence on the issue.

**3. Negligence § 11—**

Contributory negligence, *ex vi termini,* implies that it need not be the sole proximate cause of the injury, and bars recovery if it concurs with the negligence of defendant in proximately causing the injury.

**4. Appeal and Error § 46—**

Where a new trial is awarded on one exception, other exceptions relating to matters not likely to arise on a subsequent hearing need not be considered.

APPEAL by defendant from *Small, J.,* at November Term, 1936, of WAKE.

Civil action to recover damages for personal injuries sustained by plaintiff when she fell on one of the public streets of the city of Raleigh, due to the defective condition of the sidewalk.

The record discloses that on the night of 22 October, 1935, the plaintiff was walking along the cement sidewalk on the west side of Glenwood Avenue, city of Raleigh, when "one of her feet suddenly caught under a section of the concrete sidewalk that was several inches higher than the other section thereof," by reason of which the plaintiff was thrown to the ground and severely injured, her right arm being broken or fractured.

The defendant denied all allegations of negligence, pleaded contributory negligence, alleging that plaintiff failed to exercise reasonable care for her own safety, and elicited from plaintiff's witnesses the following on cross-examination: (1) C. H. Rogers, "You can see the broken place while riding in an automobile along Glenwood Avenue if a person looked for it." (2) Elizabeth Coppedge, "We skated over it. . . . It was easy to step over if you were sure of your footing." (3) Mrs. Hunter, "I was always careful when I passed it. I didn't stop to look at it."

There was evidence on behalf of the plaintiff tending to show that she could not see the defective condition of the sidewalk in the dark.

The court declined to submit an issue of contributory negligence. Exception by defendant.

The defendant, also, assigns error in that plaintiff's physician was allowed to demonstrate certain testimony upon the person of the plaintiff by manipulating her arm and elbow in the presence of the jury, causing demonstrations of pain and suffering by the plaintiff, and permitting the witness to comment on said demonstrations.

The jury answered the issue of negligence in favor of the plaintiff, and assessed her damages at $7,500. From judgment on the verdict, the defendant appeals, assigning errors.

*Douglass & Douglass for plaintiff, appellee.*
*Clem B. Holding for defendant, appellant.*

STACY, C. J. The evidence on the issue of contributory negligence is not all one way. It is sufficiently equivocal and contradictory to require its submission to the jury. *Doyle v. Charlotte,* 210 N. C., 709; *Williams v. Bus Co., ibid.,* 400, 186 S. E., 482; *Oldham v. R. R., ibid.,* 642. Compare *Gasque v. Asheville,* 207 N. C., 821, 178 S. E., 848. "A serious

and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence and certain conduct of a plaintiff contributory negligence and take away the question of negligence and contributory negligence from the jury. The right of trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the court"—*Clarkson, J.*, in *Moseley v. R. R.*, 197 N. C., 628, 150 S. E., 184.

The plaintiff's negligence, in order to bar a recovery, need not be the sole or exclusive proximate cause of the injury, for this would exclude any idea of negligence on the part of the defendant. *Mangum v. Winstead*, 202 N. C., 252, 162 S. E., 557; *Smith v. R. R.*, 200 N. C., 177, 156 S. E., 508; *Davis v. Jeffreys*, 197 N. C., 712, 150 S. E., 488; *Lunsford v. Mfg. Co.*, 196 N. C., 510, 146 S. E., 129. It is enough if it contribute to the injury. *Wright v. Grocery Co.*, 210 N. C., 462, 187 S. E., 564; *Const. Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672. The very term "contributory negligence" *ex vi termini* implies that it need not be the sole cause of the injury. *Fulcher v. Lbr. Co.*, 191 N. C., 408, 132 S. E., 9. Plaintiff may not recover when his negligence concurs with that of the defendant in proximately producing the injury. *Wright v. Grocery Co., supra*, and cases there cited.

There are other exceptions appearing on the record worthy of consideration, especially those addressed to the demonstrative testimony of plaintiff's physician, which is in excess of the matters considered in *Fleming v. Holleman*, 190 N. C., 449, 130 S. E., 171, and is disapproved elsewhere, 26 R. C. L., 1019; *Peters v. Hockley*, 152 Ore., 434, 53 Pac. (2d), 1059, but as they are not likely to arise on another hearing, present rulings thereon, which could only be anticipatory, and perhaps supererogatory, are pretermitted. *Pemberton v. Greensboro*, 208 N. C., 466, 181 S. E., 258.

New trial.

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STATE v. J. G. WILLIAMS.

(Filed 28 April, 1937.)

**Indictment § 17—Furnishing final account showing credits and alleged shortage and accounts in defendant's hands held sufficient bill of particulars in this prosecution for embezzlement.**

The purpose of a bill of particulars is to afford defendant a fair opportunity to procure his witnesses and to prepare his defense as to the particular transactions in which he is accused, and to limit the evidence to the transactions stated, and in this prosecution of an insurance agent for embezzlement, the furnishing by the State of accounts and records dis-

closing itemized credits and amounts due by defendant to the insurance company *is held* a sufficient compliance with an order theretofore entered requiring the State to furnish a bill of particulars.

APPEAL by defendant from *Small, J.*, at September Term, 1936, of WAKE. No error.

The defendant was charged with embezzlement. From judgment imposing sentence on verdict of guilty, the defendant appealed.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Douglass & Douglass and W. L. Spencer for defendant.*

PER CURIAM. Defendant assigns as error the denial by the court below of his motions for continuance and for mistrial on account of the failure of the State to furnish a bill of particulars. It was charged that defendant had embezzled certain money collected by him as agent for an insurance company. At a prior term of court the presiding judge had directed the State to furnish a bill of particulars setting forth the names of persons from whom money had been collected by the defendant as agent for the insurance company, together with the dates and amounts of such collections which were not remitted. The record shows that the State furnished defendant's counsel copy of the final account of defendant with the insurance company, revealing all credits due defendant and his alleged shortage in money after such credits were deducted, and the State also furnished copy of all of defendant's weekly reports to the insurance company for the entire period of his employment of more than two years, and also "a copy of defendant's collection book showing all the more than five hundred policyholders on defendant's debit, and the premiums due from each."

Defendant's motions were denied on the ground that defendant had been furnished sufficient bill of particulars. The purpose of a bill of particulars is to afford the defendant a fair opportunity to procure his witnesses and to prepare his defense as to the particular transactions in which he is accused, and to limit the evidence to the transactions stated in the particulars. *S. v. R. R.*, 149 N. C., 508; *S. v. Wadford*, 194 N. C., 336; *S. v. Beal*, 199 N. C., 278; *S. v. Everhardt*, 203 N. C., 610.

The particulars furnished to the defendant in the case at bar seem to comply fully with the requirement contained in the order, and the ruling of the court below on this point must be sustained.

The exceptions to the rulings of the trial judge on matters of evidence are without substantial merit.

In the trial we find

No error.

GROVER C. WINSLOW, JR., v. CAROLINA CONFERENCE ASSOCIATION OF THE SEVENTH DAY ADVENTISTS AND LUMBERMEN'S MUTUAL CASUALTY COMPANY.

(Filed 19 May, 1937.)

**1. Master and Servant § 37—Compensation Act should be administered so that employer and employee receive benefits and protection of the act.**

Under the Workmen's Compensation Act the employer, in exchange for exclusive and limited liability under the act, N. C. Code, 8081 (r), consents to pay claims where no liability existed before, and the employee, in return for certainty and celerity in obtaining the compensation provided in the act, consents to give up trial by jury and the possibility of a larger recovery, and the act should be administered by the Industrial Commission to the end that both the employer and employee, in view of their mutual concessions, shall receive the benefits and enjoy the protection of the act.

**2. Master and Servant § 46d—**

The Industrial Commission has power to make rules governing the administration of the Compensation Act, and to construe and apply its rules. Compensation Act, section 54.

**3. Master and Servant § 55d—**

The construction and application of rules of administration of the Compensation Act, duly made and promulgated by the Industrial Commission in proceedings before it, ordinarily are final and conclusive and not subject to review by the courts on appeal.

**4. Same—**

The findings of fact by the Industrial Commission in a proceeding before it are final and conclusive on appeal when supported by evidence, the review by the Superior Court being limited to matters of law appearing in the record as certified by the Commission. Compensation Act, section 60.

**5. Master and Servant § 55c—Notice of appeal may be served on adverse parties within thirty days from award or receipt of notice thereof.**

Either party may appeal from the award of the Industrial Commission within thirty days from the date of the award or within thirty days from the receipt of notice of the award by registered mail, and where appellant causes notice of appeal to be served on the adverse parties within the thirty-day period, the notice and service are sufficient. N. C. Code, 8081 (ppp).

**6. Same—**

An appeal from an award of the Industrial Commission may be docketed in the Superior Court at any time before or during the next ensuing regular term of the Superior Court.

**7. Same—**

Statutory provisions with respect to appeals from judgments of justices of the peace do not control appeals from awards of the Industrial Commission.

**8. Master and Servant § 47—Requirement that claim be filed within one year is condition precedent to the right to compensation.**

The provision of the Compensation Act, N. C. Code, 8081 (ff), that claim for compensation must be filed with the Commission within one year from the accident is a condition precedent to the right of compensation and not a statute of limitation, and where claim has not been filed or the Commission has not acquired jurisdiction within the one-year period, the right to compensation is barred.

**9. Master and Servant § 55d—Superior Court held without authority to modify finding that proceeding was not begun or claim filed in time.**

The evidence tended to show that the employer did not give notice of the accident to the insurance carrier until more than eleven months after its occurrence, that the insurance carrier did not transmit said notice to the Industrial Commission until more than a year after the accident, and that claim for compensation was not filed with the Commission by the employee until some eighteen months after the accident. The Commission found as facts that the proceeding was not begun nor claim for compensation filed within the one-year period prescribed by the act, N. C. Code, 8081 (ff). On appeal, the Superior Court modified the findings and concluded as a matter of law that the filing of notice with the insurance carrier, under the rules of the Commission, constituted filing of the claim with the Commission. *Held:* The Superior Court was without authority to modify or change the findings of fact of the Commission, the construction and application of rules of administration by the Commission being ordinarily conclusive.

APPEAL by defendant Lumbermen's Mutual Casualty Company from *Harris, J.*, at January Term, 1937, of WAYNE. Reversed.

This is a proceeding for compensation, under the provisions of the North Carolina Workmen's Compensation Act, for an injury by accident arising out of and in the course of the employment of the plaintiff by the defendant Carolina Conference Association of the Seventh Day Adventists. The defendant Lumbermen's Mutual Casualty Company was the insurance carrier of its codefendant at the date of the accident. The accident and resulting injury to the plaintiff occurred on 4 June, 1934. The first report of the accident was filed with the North Carolina Industrial Commission by the defendants on 28 June, 1935. No claim for compensation had been filed with the Industrial Commission by the plaintiff prior to that date.

The proceeding was begun before the North Carolina Industrial Commission. Thereafter, on 3 December, 1935, the Industrial Commission received from the plaintiff an application, in writing, for a hearing of the proceeding. Pursuant to said application, and after due notice to all parties, the proceeding was heard by Commissioner Jurney, at Goldsboro, N. C., on 24 March, 1936. On the findings of fact and conclusions of law made by Commissioner Jurney, an award was made in the proceeding on 2 June, 1936. At the request of the defendants, duly made as provided by statute, this award was reviewed by the Full Com-

mission on 3 September, 1936. An award was made by the Full Commission on 16 October, 1936. The findings of fact, conclusions of law, and award of the Full Commission are as follows:

"The Full Commission directs that the findings of fact, conclusions of law, and award of Commissioner Buren Jurney be stricken out and that there be substituted in lieu thereof the following:

"FINDINGS OF FACT.

"1. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act. The Lumbermen's Mutual Casualty Company is the insurance carrier of the defendant employer, Carolina Conference Association of the Seventh Day Adventists.

"2. The plaintiff Grover C. Winslow, Jr., suffered an injury by accident arising out of and in the course of his employment by the defendant employer on 4 June, 1934, resulting in a long period of temporary total disability, and in all likelihood resulting also in some permanent disability.

"3. The defendant employer had notice of the accident and resulting injury suffered by the plaintiff employee immediately after the occurrence of the same. The defendant insurance carrier, however, had no notice of the accident and resulting injury for some eleven months after the occurrence of the same.

"4. No report of the accident and the resulting injury suffered by the plaintiff employee was filed with the Industrial Commission until after the expiration of one year from the date of the accident and resulting injury.

"5. A report of the accident and the resulting injury suffered by the plaintiff was made by the defendant employer to the defendant insurance carrier some seven or eight days before the expiration of one year from the date of the accident and resulting injury.

"6. A claim for compensation for his injury was filed with the Industrial Commission by the plaintiff on 3 December, 1935, more than one year after the date of the accident and his resulting injury.

"7. The defendant insurance carrier received a report of the accident from the defendant employer on Form 19, as approved by the Industrial Commission, on 28 May, 1935. The defendant employer talked with the defendant insurance carrier for the first time on 17 May, 1935.

"CONCLUSIONS OF LAW.

"The provisions of section 24 of the North Carolina Workmen's Compensation Act (N. C. Code of 1935, section 8081 [ff]), are mandatory, and no claim having been filed with the Industrial Commission in this

proceeding within one year from the date of the accident, and the resulting injury suffered by the plaintiff, unless something appears to change the result, the claim of the plaintiff for compensation is forever barred. *Wray v. Woolen Mills,* 205 N. C., 782, 172 S. E., 487.

"Whether the provision of section 24 is a condition annexed to and forming a part of the right to maintain a claim for compensation, or is a statute of limitations, has not, so far as we are aware, been finally determined by the courts of this State, and we will not go into a discussion of that subject at this time.

"If, however, compliance with section 24 be considered as a condition annexed to and forming a part of the right to maintain a claim for compensation, it must be borne in mind that such right did not exist at common law, and exists solely by virtue of the Workmen's Compensation Act, and is analogous to C. S., 160, giving a cause of action for wrongful death. In that case, the effect of section 24 would be determined by decisions of the courts of this State as to the effect of C. S., 160, by virtue of which an action to recover damages for wrongful death may be maintained only if begun within one year from the date of the death. Otherwise, there is no right of action.

"There is a clear distinction between a statute conferring a right, with a condition annexed to and forming a part of the right, and a statute of limitation which affects the remedy only. The former is not subject to disabilities and excuses which are applicable to an ordinary statute of limitation, and is not affected even by fraud. 37 Corpus Juris, sec. 5, page 686; *Taylor v. Iron Co.,* 94 N. C., 525; *Best v. Kinston,* 106 N. C., 205; *Hanie v. Penland,* 193 N. C., 800; *Curlee v. Power Co.,* 205 N. C., 644.

"If the provisions of section 24 of the Workmen's Compensation Act be considered a statute of limitation, nothing else appearing, and no claim having been filed with the Industrial Commission within one year from the date of the accident, the right of the plaintiff to proceed under the provisions of the Workmen's Compensation Act is barred. However, the plaintiff contends that the carrier defendant is by its act and conduct estopped to plead the provisions of section 24, but under the facts as found we do not concur in this contention. There was no express agreement on the part of the carrier defendant not to plead the statute of limitation, nor was there anything in the acts or conduct of the carrier or employer, or any of their agents, which would in our opinion make a plea of the statute of limitation inequitable. *Wilson v. Clement Co.,* 207 N. C., 541.

"For the reasons stated, we are of the opinion that any right which the plaintiff may have had to compensation is forever barred by the provisions of section 24 of the North Carolina Workmen's Compensation

Act, and that an award of compensation cannot be made in this proceeding by the North Carolina Industrial Commission. The claim is therefore denied.

"There seems to be much merit in the claim for compensation in this case, and it is unfortunate that the plaintiff has slept on his rights."

The plaintiff appealed from the award of the Full Commission to the Superior Court of Wayne County.

In apt time, the defendant Lumbermen's Mutual Casualty Company entered a special appearance in the Superior Court of Wayne County and moved that the appeal be dismissed, on grounds set out in its motion, which was in writing. The motion was heard at January Term, 1937, of said court, when an order was made denying the motion, as follows:

"This cause coming on to be heard at January Term, 1937, of the Superior Court of Wayne County, before his Honor, W. C. Harris, Judge, upon the special appearance and motion to dismiss plaintiff's appeal from the award of the North Carolina Industrial Commission, denying compensation in this proceeding, of the defendant Lumbermen's Mutual Casualty Company, through its attorneys, Ruark & Ruark, and being heard, the court finds the following facts:

"1. The award of the North Carolina Industrial Commission from which this appeal was taken was promulgated by the said Industrial Commission on 16 October, 1936.

"2. Said award was forwarded to Messrs. Langston, Allen & Taylor, attorneys for the plaintiff Grover C. Winslow, Jr., by registered mail, and was delivered to the said Langston, Allen & Taylor on 17 October, 1936.

"3. Notice of appeal from said award was first served on defendant Lumbermen's Mutual Casualty Company on 31 October, 1936.

"4. The record of appeal as certified by the Industrial Commission was docketed in the Superior Court of Wayne County on 12 December, 1936.

"5. Service of the notice of appeal was accepted and further notice and all time waived on 9 November, 1936, by the defendant Carolina Conference Association of the Seventh Day Adventists.

"6. The first term of the Superior Court of Wayne County subsequent to the award of the North Carolina Industrial Commission in this proceeding, from which the plaintiff appealed to said court, convened on 30 November, 1936, same being a two weeks term for the trial of both criminal and civil actions.

"7. Before the judgment in this appeal was signed, but after the court had announced at the conclusion of the argument on the motion to dismiss, that it would deny said motion, the appeal was argued before the court on its merits.

"8. No motion to dismiss the appeal from the award of the North Carolina Industrial Commission in this proceeding has been made by the defendant Carolina Conference Association of Seventh Day Adventists.

"9. Special appearance was made and motion to dismiss the appeal entered by the defendant Lumbermen's Mutual Casualty Company on 8 January, 1937, as appears in the record.

"On the foregoing facts, the court being of opinion that the notice of appeal was properly served and that the appeal was duly and properly docketed in this court, in apt time, and that the plaintiff was not guilty of laches in perfecting his appeal, and that said appeal is properly constituted in this court, it is therefore ordered and adjudged that the motion to dismiss the appeal be and the same is denied."

The defendant Lumbermen's Mutual Casualty Company duly excepted to the order denying its motion that the appeal of the plaintiff be dismissed.

Thereafter judgment was rendered as follows:

"This cause coming on to be heard at the January Term, 1937, of the Superior Court of Wayne County, upon the appeal herein of the plaintiff Grover C. Winslow, Jr., from the award of the North Carolina Industrial Commission, before his Honor, W. C. Harris, Judge holding the courts of the Fourth Judicial District, and being heard, the plaintiff being present through and represented by his counsel, Berkeley & Colton, attorneys, and Langston, Allen & Taylor, attorneys, and the defendant Lumbermen's Mutual Casualty Company being present through and represented by its counsel, Ruark & Ruark, attorneys, the court modifies and amends certain findings of fact made by the North Carolina Industrial Commission in this proceeding, and strikes out and substitutes in lieu thereof, certain other findings of fact and conclusions of law, so that the findings of fact and conclusions of law as made by this court are as follows:

"1. The defendant Carolina Conference Association of the Seventh Day Adventists, employer, has not appealed from any finding of fact or conclusion of law, or from the award in this proceeding made by the North Carolina Industrial Commission since the institution of this proceeding before the said Industrial Commission.

"2. The parties to this proceeding are bound by the provisions of the North Carolina Workmen's Compensation Act, and the Lumbermen's Mutual Casualty Company is the insurance carrier of the defendant employer.

"3. The plaintiff suffered an injury by accident arising out of and in the course of his employment by the defendant Carolina Conference Association on 4 June, 1934, resulting in disability for a long period of time.

"4. The defendant employer had notice of the accident and the resulting injury suffered by the plaintiff employee immediately after the occurrence of the same. The defendant insurance carrier, however, had no notice of the accident other than such constructive notice as it may have had through the notice to the defendant employer, for some eleven months after the occurrence of the accident.

"5. No actual physical report or claim was filed with the North Carolina Industrial Commission, other than the report filed with the defendant insurance carrier on behalf of the plaintiff employee, for transmission by the said carrier pursuant to the instructions and rules of said Industrial Commission; but the defendant employer had due and actual notice of the accident and resulting injury to the plaintiff employee on 5 June, 1934, and the defendant insurance carrier had such notice on 22 May, 1935. Form 19 (being Exhibit 5, appearing in the record of this proceeding as certified by the North Carolina Industrial Commission) was received by the defendant insurance carrier from the defendant employer, at Greensboro, N. C., on 28 May, 1935, and was transmitted by said insurance carrier to the North Carolina Industrial Commission on 27 June, 1935.

"6. Prior to the date of the accident and resulting injury to the plaintiff employee, to wit: 4 June, 1934, the North Carolina Industrial Commission had prescribed and promulgated a rule requiring that the report of an accident and injury to an employee on Form 19 must be transmitted by the employer through his insurance carrier to the Industrial Commission. (See Exhibit 5, appearing in the record in this proceeding.)

"On the foregoing facts as found by the court, the court makes the following conclusions of law:

"1. The defendant insurance carrier had constructive notice of the accident and the resulting injury to the plaintiff employee from 5 June, 1934, to 22 May, 1935, the date at which it had actual notice of said accident from the defendant employer.

"2. The court is of the opinion and concludes that the filing of Form 19 with the defendant insurance carrier by the defendant employer on 28 May, 1935, constituted a filing of said Form 19 with the North Carolina Industrial Commission as of that date.

"3. The court is of the opinion and concludes that the filing of said Form 19 with the defendant insurance carrier constituted a filing of the claim of the plaintiff employee for compensation for the injury suffered by him on 4 June, 1934, with the North Carolina Industrial Commission as contemplated by the provisions of the North Carolina Workmen's Compensation Act and the rules prescribed and promulgated by said Industrial Commission; and that said claim was filed with the North

Carolina Industrial Commission within one year from the date of the accident, to wit: 4 June, 1934.

"4. The court is of the opinion that section 24 of the North Carolina Workmen's Compensation Act (N. C. Code of 1935, section 8081 [ff]), is a statute of limitations and is not a statute prescribing a condition annexed to the right to claim compensation, and that for that reason the requirements of said section can be waived.

"5. The court further finds as a fact and as a conclusion of law that the act of the defendant insurance carrier in holding Form 19 in its possession from 28 May, 1935, until after the expiration of one year from the date of the injury, and in failing to transmit the same to the North Carolina Industrial Commission before the expiration of said year was inequitable and constituted a waiver by the said defendant of its right to plead the statute of limitation in bar of plaintiff's recovery in this proceeding.

"It is now therefore, on the foregoing findings of fact and conclusions of law, considered, ordered, and adjudged that the claim of the plaintiff employee for compensation in this proceeding was duly filed with the North Carolina Industrial Commission within one year after the accident resulting in injury to the plaintiff employee, and that if it were not so filed the defendant Lumbermen's Mutual Casualty Company has waived its right to plead the statute of limitations, and is equitably estopped by its conduct to plead said statute. This proceeding is remanded to the North Carolina Industrial Commission for an award in accordance with this judgment.

"It is further adjudged that the defendant insurance carrier pay the costs of this appeal."

The defendant Lumbermen's Mutual Casualty Company excepted to the judgment and appealed to the Supreme Court, assigning as error the order of the court denying its motion that the appeal be dismissed, and the judgment as signed by the court.

*Langston, Allen & Taylor and Scott B. Berkeley for plaintiff.*
*Ruark & Ruark for defendant.*

CONNOR, J. A careful study of the provisions of the North Carolina Workmen's Compensation Act (chapter 120, Public Laws of North Carolina, 1929, as amended, chapter 133-A, N. C. Code of 1935), shows that it was the purpose of the General Assembly of this State, in providing for compensation for an employee who has suffered an injury, or for the dependents of an employee who has suffered death, by accident arising out of and in the course of his employment, without fault on the part of the employer, where both the employee and the employer have

accepted the provisions of the act, and are therefore bound by said provisions, that the North Carolina Industrial Commission, created by the act for that purpose, shall administer its provisions to the end that both employee and employer shall receive the benefits and enjoy the protection of the act. The act contemplates mutual concessions by employee and employer; for that reason, its validity has been upheld, and its policy approved. See *Conrad v. Cook-Lewis Foundry Co.*, 198 N. C., 723, 153 S. E., 266. In the opinion in that case, *Adams, J.*, says:

"In construing the word 'accident' as used in the Compensation Act, we must remember that we are not administering the law of negligence. Under that law an employee can recover damages only when the injury is attributable to the employer's want of due care; but the act under consideration contains elements of mutual concession between the employer and the employee by which the question of negligence is eliminated. Both had suffered under the old system, the employer by heavy judgments, the employee through old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury, but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it. *Stertz v. Industrial Ins. Commission,* 91 Wash., 588, 158 Pac., 256."

It is provided in the act that "the rights and remedies herein granted to an employee when he and his employer have accepted the provisions of this act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representatives, parents, dependents, or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death." Chapter 120, Public Laws of N. C., 1929; section 11, N. C. Code of 1935, section 8081 (r).

To make its purpose that the North Carolina Workmen's Compensation Act shall be administered exclusively by the North Carolina Industrial Commission effective, the General Assembly has empowered the said Industrial Commission "to make rules, not inconsistent with this act, for carrying out the provisions of the act," and has provided that "processes and procedure under this act shall be as summary and simple as reasonably may be." Section 54. The North Carolina Industrial Commission has the power not only to make rules governing its administration of the act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, ordinarily are final and

conclusive and not subject to review by the courts of this State, on an appeal from an award made by said Industrial Commission.

Where a proceeding for compensation under the provisions of the North Carolina Workmen's Compensation Act has been duly instituted before the North Carolina Industrial Commission, and an award has been finally made in the proceeding by the said Industrial Commission, the findings of fact made by the said Commission in support of its award are final and conclusive, where there was evidence sufficient to support the findings. Either party to the proceeding, within thirty days from the date of the award, or within thirty days after receipt of notice of the award, which may be given by registered mail, may appeal from the award to the Superior Court of the county in which the accident occurred. On such appeal, the Superior Court has no power to review the findings of fact by the Industrial Commission. It can consider only errors of law appearing in the record, as certified by the Industrial Commission. Section 60. The statutory provisions to this effect have been consistently and uniformly recognized by this Court. See *Mayze v. Forest City,* 207 N. C., 168, 176 S. E., 270; *Bryson v. Lumber Co.,* 204 N. C., 665, 169 S. E., 276; *Moore v. Drug Co.,* 206 N. C., 711, 175 S. E., 96; *Kenan v. Motor Co.,* 203 N. C., 108, 164 S. E., 729; *Wimbish v. Detective Co.,* 202 N. C., 800, 164 S. E., 344; *Williams v. Thompson,* 200 N. C., 463, 157 S. E., 430. N. C. Code of 1935, section 8081 (ppp).

These statutory provisions are obviously not applicable to a motion by an appellee in the Superior Court, that the appeal be dismissed. In the instant case, however, on the facts found by the judge, there was no error in his refusal to allow the motion.

The award was made on 16 October, 1936. Notice of the award was duly served on attorneys for the plaintiff on 17 October, 1936. Within thirty days thereafter, the plaintiff caused notice of his appeal to be served on each of the defendants. Such notice was in compliance with the provisions of the statute. The contention of the defendant Lumbermen's Mutual Casualty Company, on this appeal, to the contrary is not supported by the decision of this Court in *Higdon v. Light Co.,* 207 N. C., 39, 175 S. E., 710. In that case it was held that "the carbon copy of a letter from the secretary of the Industrial Commission to the attorney for the defendant cannot be construed as a compliance with the applicable statutes." In the instant case, it was found by the judge that notice of plaintiff's appeal was served on the defendant Lumbermen's Mutual Casualty Company on 31 October, 1936. Both the notice and the service were sufficient.

Pursuant to his notice of appeal, and at the request of the plaintiff, the Industrial Commission caused a transcript of the record in this proceeding to be made, and thereafter transmitted the said transcript, duly certified by its secretary, to the Superior Court of Wayne County, where

it was docketed on 12 December, 1936, before the expiration of the next ensuing term of said court. In the absence of any requirement of the statute as to the time within which a transcript of the record in a proceeding before the Industrial Commission must be docketed in the Superior Court, when there has been an appeal from the award of the Commission in such proceeding, as authorized by the statute, such docketing at any time before the convening of the next ensuing regular term of the Superior Court, or before said time has expired, is sufficient to perfect the appeal. Whether in a proper case the Industrial Commission may by an order in the proceeding extend the time for the transmission of the transcript and the docketing of the appeal in the Superior Court, need not be considered on this appeal. Statutory provisions with respect to appeals from judgments of justices of the peace to the Superior Court, where the trial must be *de novo*, are not controlling with respect to appeals from awards of the Industrial Commission to the Superior Court, where only errors of law appearing in the record may be considered.

There is no error in the order of the judge in the instant case refusing to allow defendant's motion that the appeal of the plaintiff from the award of the Industrial Commission to the Superior Court of Wayne County be dismissed. The appeal was duly and properly docketed in the Superior Court of Wayne County, on 12 December, 1936.

The Industrial Commission, in support of its award denying plaintiff compensation in this proceeding on the facts found by the Commission, concluded as a matter of law that by virtue of the provisions of section 24, chapter 120, Public Laws of North Carolina, 1929, N. C. Code of 1935, section 8081 (ff), plaintiff's right to compensation for the injury which he suffered on 4 June, 1934, was barred for the reason that his claim for compensation was not filed with the Industrial Commission within one year after the accident. On plaintiff's appeal from this award to the Superior Court of Wayne County, this conclusion of law was reversed by the judge of said court, for that (1) if the provisions of section 24 shall be construed as annexing a condition precedent to the right of compensation, and not as a statute of limitation, on the facts found by him, the claim of the plaintiff for compensation was filed with the Industrial Commission within one year after the accident, and was therefore not barred; or (2) if the said provision shall be construed as constituting a statute of limitation, on the facts found by him, the defendant insurance carrier, by its conduct in failing to transmit Form 19, after the same had been signed by the defendant employer, and forwarded to said insurance carrier before the expiration of one year from the accident, to the Industrial Commission, until after the expiration of one year from the accident, was estopped to plead the statute in bar of plaintiff's right to compensation in this proceeding.

Section 24, chapter 120, Public Laws of North Carolina, N. C. Code of 1935, section 8081 (ff), is as follows:

"The right to compensation under this act shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commissioner within one year thereafter."

After careful consideration of the question, which has not been heretofore decided by this Court, we are of the opinion and hold that the provisions of section 24 constitute a condition precedent to the right to compensation, and not a statute of limitation. For this reason, where a claim for compensation under the provisions of the North Carolina Workmen's Act has not been filed with the Industrial Commission within one year after the date of the accident which resulted in the injury for which compensation is claimed, or where the Industrial Commission has not acquired jurisdiction of such claim within one year after the date of such accident (see *Hardison v. Hampton,* 203 N. C., 187, 165 S. E., 355), the right to compensation is barred.

In the instant case, the Industrial Commission has found as facts (1) that the proceeding was not begun, and (2) that the claim of the plaintiff for compensation was not filed with the Commission until after the expiration of one year from the date of the accident. These findings of fact are final and conclusive. The judge was without power to modify, change, or strike out these findings. On these findings of fact there is error in the judgment remanding the proceeding to the Industrial Commission for an award in accord with the judgment. The award of the Industrial Commission should have been affirmed.

The judgment of the Superior Court on this proceeding is

Reversed.

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GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, ON RELATION OF UNITED BANK & TRUST COMPANY; GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, ON RELATION OF THE UNITED BANK & TRUST COMPANY; AND W. P. DYER, JR., LIQUIDATING AGENT OF THE UNITED BANK & TRUST COMPANY, v. RICHARDSON REALTY, INCORPORATED, J. C. WATKINS, AND W. F. ROSS.

(Filed 19 May, 1937.)

**1. Appeal and Error § 45f—**

Upon appeal from judgment sustaining a demurrer, the complaint and exhibits attached thereto will be examined to determine the sufficiency of the pleading to constitute a cause of action against demurring defendant.

**2. Pleadings § 20—**

A demurrer admits facts properly alleged aside from deductions of the pleader, and requires that the pleading should be liberally construed.

**3. Banks and Banking § 16—**

The complaint in this action *is held* sufficient, as against demurrer, to allege that defendant was the real or beneficial owner of shares of stock appearing on the books of the bank in the name of another.

**4. Same—Statutory liability is for benefit of creditors of the bank and is not enforcible when all debts of bank have been paid.**

The statutory liability of stockholders of a bank constitutes a trust fund for the benefit of all the creditors of the bank enforcible by the statutory receiver for their benefit upon the insolvency of the bank, and upon payment of all the creditors of an insolvent bank the statutory liability of stockholders is no longer enforcible.

**5. Same—Bank paying creditors and taking over assets of insolvent bank held not creditor of insolvent bank so as to enforce statutory liability.**

A bank, in consideration of paying or discharging all the debts of an insolvent bank, took over all its assets, including the statutory liability of the stockholders of the insolvent bank. *Held:* The transaction amounted to a sale and purchase and all debts of the insolvent bank being discharged, the statutory liability of its stockholders, upon which no assessment had been made nor judgment docketed, could no longer be enforced, and the transferee bank may not complain that some of the assets so bought were worthless, or maintain the position of creditor of the insolvent bank for the purpose of enforcing the statutory liability of its stockholders in the absence of a contract of guaranty, or undertaking to repay, or facts sufficient to raise the equity of subrogation.

**6. Same—Statutory liability of stockholders is for benefit of creditors of the bank and may not be enforced for benefit of others.**

The Commissioner of Banks, as authorized by judgment of the Superior Court, transferred and assigned all assets of an insolvent bank, including judgments on stock assessments docketed and to be docketed, to a new bank in consideration of the new bank's paying or discharging all creditors of the old bank, and filed final account showing payment of all creditors of the old bank. Thereafter the new bank became insolvent and this action was instituted by the Commissioner of Banks for the benefit of creditors of the new bank to enforce the statutory liability against defendant by showing that defendant was the real or beneficial owner of stock in the old bank which appeared on the books of the bank in the name of another against whom assessment had been levied and judgment docketed. *Held:* The statutory liability of stockholders of the old bank is enforcible solely for the benefit of the creditors of the old bank and is not a chose in action ordinarily assignable, and neither the new bank nor the commissioner of banks as its statutory receiver acquired the right to enforce the statutory liability against defendant by showing that he was the beneficial owner of stock in the old bank.

**7. Same: Judgments § 37—**

The assignment of a judgment on an assessment of the statutory liability on bank stock does not entitle the assignee to subject another to

liability thereon on the ground that such other person was the real or beneficial owner of the stock.

**8. Banks and Banking § 16: Constitutional Law § 21—**

As between a stockholder and a creditor or depositor of a bank prior to the passage of ch. 99, Public Laws of 1935, the provisions of the statute relieving the stockholder of his statutory liability would seem to be an impairment of a contractual obligation prohibited by Art. I, sec. 10, of the Federal Constitution.

**9. Same—**

A person not appearing on the books of a bank as a stockholder would seem to be relieved of liability in a suit alleging he was the real or beneficial owner of stock by ch. 99, Public Laws of 1935, since no rights had vested or assessment levied at the time of the passage of the act.

**10. Statutes § 6—**

A statute will not be declared unconstitutional unless clearly so.

**11. Appeal and Error § 45g—**

Appellate courts will not decide the constitutionality of a statute unless it is necessary to protect some constitutional right that has been invaded or threatened.

STACY, C. J., concurs in result.

APPEAL by plaintiffs from *Armstrong, J.*, at February Term, 1937, of GUILFORD. Affirmed.

Action to recover of defendant Richardson Realty, Inc., the stock assessment on one hundred shares of stock in the closed and liquidated United Bank & Trust Company. It was alleged that defendant was the real owner of the shares of stock, certificate for which had been issued in the name of W. F. Ross and against whom assessment had been levied and judgment docketed.

The defendant Richardson Realty, Inc., demurred *ore tenus* to the complaint, on the ground that sufficient facts were not alleged to constitute a cause of action as to it. The demurrer was sustained and from judgment dismissing the action plaintiffs appealed.

*J. S. Duncan and R. M. Robinson for plaintiffs.*
*Frazier & Frazier and Huger S. King for defendant.*

DEVIN, J. The appeal from ruling of the court below in sustaining the demurrer requires an examination of the allegations of the complaint, together with the exhibits attached and connected therewith, in order to determine the sufficiency of the pleading to constitute a cause of action against the demurring defendant.

In the consideration of a demurrer it is the established rule that all the material facts alleged, aside from the deductions of the pleader, are

deemed admitted, and that the pleading shall be liberally construed. *Blackmore v. Winders,* 144 N. C., 212; *Ramsey v. Furniture Co.,* 209 N. C., 165.

The facts, as they appear from the complaint and exhibits, are substantially these: On 30 December, 1931, United Bank & Trust Company (hereinafter called the old bank) closed its doors on account of insolvency, and Gurney P. Hood, Commissioner of Banks, took charge of its affairs, and thereafter levied an assessment of one hundred per cent on all stockholders of record of said bank. On the stock books of the bank appeared the name of W. F. Ross as the holder of one hundred shares of the par value of one hundred dollars per share. The assessment roll was subsequently docketed in the Superior Court of Guilford County, in accordance with the statute, on 28 June, 1932.

About 14 June, 1932, a new banking institution was organized under the laws of North Carolina, under the name of "The United Bank & Trust Company." This last named bank will be hereinafter styled the new bank. Shortly after its organization the new bank submitted to the Commissioner of Banks in charge of the old bank a proposal to pay a sum sufficient to discharge all preferred claims and the claims of all depositors and creditors of the old bank and to release the Commissioner from all further liability on account of unproven claims, in consideration of the conveyance, transfer, and assignment to the new bank by the Commissioner of Banks of all the property and assets of the old bank, including judgments now docketed or to be docketed representing stockholders' liability. This offer the Commissioner of Banks, on the relation of the old bank, petitioned the court for authority to accept, stating that the proposition had been approved by unanimous vote of the directors and the stockholders of the old bank.

Thereupon, on 27 June, 1932, an order of court was signed by H. Hoyle Sink, Judge presiding in the Twelfth Judicial District, authorizing the Commissioner of Banks "to convey, assign, and transfer to The United Bank & Trust Company of Greensboro (new bank) all the property and assets of every kind and nature of United Bank & Trust Company (old bank), including judgments now docketed or to be docketed in the office of the clerk of the Superior Court of Guilford County, representing stockholders' liability." The Commissioner of Banks was also authorized to distribute the proceeds from such sale in accordance with the agreement of the creditors of the old bank, and the Commissioner was further directed, after making such sale and distribution, to file his final report in accordance with C. S., 218 (c), (18), the order declaring that "the filing of such report shall act as a full and complete discharge of the Commissioner of Banks from all further liability by reason of the liquidation of said United Bank & Trust Company."

Thereafter, Gurney P. Hood, Commissioner of Banks, as statutory liquidator and receiver of United Bank & Trust Company, pursuant to the order of Judge Sink and in accordance with the statute, filed his final report. In this report the Commissioner of Banks stated that he took possession of the old bank for the purpose of liquidation under the statute 30 December, 1931, and "that the affairs of said bank remained in the hands of the Commissioner until 30 June, 1932," and, after reciting the offer of the new bank and the order of Judge Sink, he reported compliance with all the terms and requirements of said order, together with detailed statement of the items of account showing payment of all claims in full or discharge in accordance with depositors' agreement. The Commissioner of Banks concluded the report with the following official statement: "That all of the assets of the trust have been collected, compromised, or sold. Such compromises or sales have been either approved or ordered by the resident or presiding judge of the Superior Court. There now remain, in the hands of the said Gurney P. Hood, statutory liquidator as aforesaid, no assets for further disposal, and all of the liabilities have been legally discharged. That the filing of this final report and accounting completes all proceedings required under the laws of North Carolina to be taken by the Commissioner of Banks as statutory liquidator and receiver of United Bank & Trust Company."

The plaintiffs in their complaint further allege that the shares of stock appearing on the books of the old bank in the name of W. F. Ross, and upon which assessment was levied and judgment docketed, were really the shares of stock of defendant Richardson Realty, Inc., and that this defendant was the real or beneficial owner thereof. The complaint sets out in detail the methods and subterfuges by which it is alleged the defendant concealed its ownership and sought to evade liability. Admitting, for the purposes of the demurrer, the material facts set out in the complaint, the allegations in this respect are sufficient to make it appear, in the light most favorable for the pleader, that Richardson Realty, Inc., was the real or beneficial owner of the shares of stock.

That brings us to the consideration of the question whether a stock liability, which originally might have been capable of enforcement against the defendant under the facts alleged in the complaint, may now constitute a cause of action for recovery by the plaintiffs in this suit.

The double or additional liability of a stockholder in a bank imposed by the statute has been uniformly held to constitute a trust fund for the benefit of the depositors and creditors of the bank. The phrase "trust fund" means that this liability in case of insolvency of the bank should constitute a fund to be equitably distributed for the benefit of all creditors. *Hood, Comr., v. Trust Co.*, 209 N. C., 367; *Bank v. Cotton Mills*, 115 N. C., 507. This liability arises by reason of the statute and is con-

tractual in its nature. Admittedly the Commissioner of Banks on the relation of the old bank could have brought suit to enforce this liability for the benefit of the creditors of the old bank. This liability, while not strictly and in all respects an asset of the bank, is regarded as a contingent asset to be collected by the receiver for distribution among all the creditors, and, if more than sufficient for that purpose, to be repaid to the stockholders.

But it appears here that there are now no creditors of the old bank. They have all been paid in full. The statutory receiver has so reported. His final report has been filed and upon such filing he was discharged, as provided by the previous order of the court. If there are no creditors, the additional stock liability is no longer enforcible. The reason for the imposition of the liability by the statute has failed. The statute imposes the liability only for the payment of the debts of the bank in which the stock is held. The relation of the Commissioner of Banks to the institution being liquidated is that of a statutory receiver. Doubtless he could, even after final report, again come into court upon showing additional uncollected assets and unpaid creditors and continue his administration to final conclusion. But here all the creditors have been paid, and thereupon additional assets, if any, would belong to the stockholders.

The appellants contend, however, that there is an unsatisfied creditor of the old bank, to wit, the new bank; for that the new bank acquired, among other things, a judgment against W. F. Ross which has not been paid, and is uncollectible, and that it has sustained a loss rendering collection of the liability sued on necessary for the reimbursement of the new bank; or on the ground that the new bank, having paid the debts of the old bank, is entitled to occupy the position of creditor of the old bank by reason of that fact.

This position cannot be maintained in view of the fact that it is alleged the new bank took over all the assets of the old bank in consideration of paying all its debts. The new bank was compensated for its obligation by the acquisition of the assets of the old bank. It was a sale and purchase. The new bank got what it bought and cannot now be heard to complain if some of the property it bought proved of little value, in the absence of a contract of guaranty, or undertaking to repay, or facts sufficient to raise the equity of subrogation. Here no promise to repay, express or implied, is alleged. The primary purpose of the transaction in June, 1932, between the Commissioner of Banks representing the old bank on the one hand and the new bank on the other, was to pay off and satisfy the depositors and creditors of the old bank. This was done.

It is true the Commissioner of Banks sues in his capacity as statutory receiver of the old bank, as well as on relation of the new bank, which later also became insolvent, but the suit is alleged to be for the use and benefit of the new bank.

The allegation of the complaint is "that these plaintiffs are advised that by the order of court referred to and the transfer of the assets of United Bank & Trust Company (old bank), The United Bank & Trust Company (new bank) became, and is now, the owner of said assessment, the amount due thereupon and all right thereto, and entitled to enforce such right in this proceeding, and if for any reason The United Bank & Trust Company is not entitled to recover of defendant the $10,000 assessment in its own name, its coplaintiff (Commissioner of Banks on relation of new bank) is entitled to make such recovery for and on behalf of and to the use of The United Bank & Trust Company (new bank)."

Since all the debts of the old bank have been discharged and there are no creditors, it is obvious that suit cannot now be maintained to enforce the statutory liability of an alleged stockholder in that bank. This liability cannot be extended to constitute an obligation for the payment of the creditors of another bank.

This brings us to the consideration of the question whether the additional liability of a stockholder in the old bank is an asset which passed to the new bank by virtue of the conveyance authorized by order of Judge Sink.

The order authorizing the conveyance and transfer uses the words "judgments docketed and to be docketed." But the words "to be docketed" apparently had reference to the fact that the order was signed 27 June, 1932, while all the judgments on the stock assessment were docketed in the Superior Court of Guilford County 28 June, 1932.

In the recent work of Braver on Liquidation of Financial Institutions, the author states the rule as to the assignment of the stockholders' double liability as follows (sec. 276): "In the absence of special statutory authority, it has been held that the double liability of stockholders is not subject to assignment as an ordinary chose in action, as it is not an asset of the bank, and that a court's approval of the banking commissioner's assignment thereof is void for want of jurisdiction, and the order of approval is subject to collateral attack. Hence, if the Banking Commissioner sells the assets of the insolvent bank and assigns the statutory liability of the stockholders, it has been held that the assignee, or the Banking Commissioner for the benefit of the assignee, cannot enforce it, but that the Banking Commissioner or receiver only is authorized to collect it for the benefit of creditors."

It seems to be generally held that, as this liability is fixed by statute and is imposed solely for the benefit of the creditors of the bank in which the stock is held, it cannot be regarded as an assignable chose in action, ordinarily entitling the assignee to sue for its enforcement. Nor would it pass under the general designation of assets.

"The statutory liability of the stockholder is created exclusively for the benefit of the 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 Stock & Stockholders, sec. 218." *Hill v. Smathers,* 173 N. C., 642; *Hood, Commissioner of Banks, v. Trust Co.,* 209 N. C., 367. See, also, *Hood, Comr., v. Martin,* 203 N. C., 620.

Even if the transfer of assets by the Commissioner of Banks to the new bank expressly attempted to assign the stockholders' liability, there was no authority conferred upon the new bank to enforce a liability created by law exclusively for the benefit of the creditors of the old bank. As was pointed out in *Woodcock v. Bostic,* 118 N. C., 822, "If the courts would not entertain a suit at the hands of the assignee, because of the uselessness to him of the thing transferred, how can it be said that such a thing is assignable?" If the new bank, at the time it purchased the assets of the old bank, had no power to enforce the statutory stockholders' liability, the subsequent insolvency of the new bank would give the statutory receiver no additional rights.

If the plaintiffs seek by this suit to claim the right to subject defendant to liability on the judgment against W. F. Ross, they are met by the decisions of this Court in the recent cases of *Jones v. Franklin Estate,* 209 N. C., 585, and *Security Co. v. Hight, ante,* 117. In *Jones v. Franklin Estate, supra,* it was held that "the mere assignment of a judgment, unless expressly provided for, does not confer upon the assignee the additional right thereafter to subject to the liability of 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."

The demurrer interposed on the ground that the facts alleged in the complaint are insufficient to constitute a cause of action against the defendant, in the respect pointed out, raises questions relative to the effect of the transfer of the assets of the old bank to the new bank, which have not heretofore been directly determined by this Court, but similar cases have been considered in other jurisdictions, and the weight of authority is in support of the views herein expressed. *Griffin v. Brewer,* 167 Okla., 654; *State ex rel. Mothersead v. Kelly,* 141 Okla., 36; *American Exchange Bank v. Rowsey,* 144 Okla., 172; *Runner v. Dwiggins,* 147 Ind., 238; *Assets Realization Co. v. Howard,* 211 N. Y., 430; *Zang v. Wyant,* 25 Colo., 551; *Williamson v. American Bank,* 109 Fed., 36; *Ames v. American National Bank,* 163 Va., 1, 176 S. E., 204; *Andrew v. Bank,* 214 Iowa, 1339; 82 A. L. R., 1280 (note); *Trust Co. v. Bradbury,* 117 Minn., 83; *Bank v. Aaron,* 271 Mich., 147; *Wilson v. Bank,* 251 Ky., 372; *Farmers' Bank v. Scott,* 144 Ky., 575; *Bank v. Holsen,* 331 Ill., 622; *Poe v. King,* 217 Iowa, 213; *Emery v. Wilkinson,* 72 Fed. (2nd), 10; *Hightower v. Bank,* 263 U. S., 351; *Bank v. Chapman,* 263 S. W. (Tex.), 929; *Schaberg v. McDonald,* 60 Neb., 493; *Cobe v. Hackney,* 83 Kan., 306; 7 American Jurisprudence, secs. 136, 137.

The appellee calls attention to chapter 99, Public Laws of 1935, as additional reason why the demurrer should be sustained. The appellants, on the other hand, contend that this statute does not apply, and, if it does, it violates the constitutional prohibition against a law impairing the obligation of a contract.

The Act of 1935 in question amends the statute (C. S., 219 [a], and amendments thereto) which imposes the additional liability on stockholders of banks, by adding these words: "Such additional liability as is provided in this section shall cease on 1 July, 1935, with respect to any shares which may have been or may hereafter be issued." The effect of this act is to abolish the statutory double liability of stockholders in the banks of this State, and it is made applicable to all shares of stock, issued or to be issued. The stockholders' liability, having been imposed by statute for the benefit of depositors and other creditors, has been uniformly held to be contractual in its nature. The subscriber to or transferee of shares of bank stock acquires his shares subject to this liability, and the depositors and creditors are regarded as having dealt with the bank presumably in consideration of the additional security afforded by this contractual obligation. Therefore, as between the stockholder and one who was a depositor or creditor of the bank prior to the passage of the act, the statute, which prescribes that this liability shall cease with respect to shares which had theretofore been issued, would seem to offend the constitutional provision of Art. I, sec. 10, of the Constitution of the United States prohibiting the passage of an act impairing the obligation of a contract. *Coombes v. Getz,* 285 U. S., 434. As was well said by *Stacy, C. J.,* in delivering the opinion of the Court in *Nash v. Commissioners of St. Pauls, ante,* 301, "For, a state no more by constitutional amendment than by statute can impair the vested rights held by the creditor in assurance of his debt."

"The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State as well as to contracts between individuals." *Smith v. Commissioners,* 182 N. C., 149.

It was held in *Simons v. Groesbeck,* 268 Mich., 495, that the stockholders' liability, based upon statute, "is contractual in its nature, so much so that the Legislature has been regarded as prohibited by the constitutional prohibition against impairing the obligation of contracts from taking away the stockholders' liability after it has once accrued or attached."

But where no rights had vested, and where neither assessment had been levied nor judgment rendered against this defendant prior to the passage of the Act of 1935, it would seem that the act would avail in the present suit.

Besides, it is well settled that a legislative act will not be held to violate any constitutional provision unless the conflict is so clear that no reasonable doubt can arise (*Glenn v. Board of Education,* 210 N. C., 525; *S. v. Brockwell,* 209 N. C., 209), and it is the established rule of appellate courts that they will not consider or attempt to decide whether a legislative act violates the Constitution unless it appears that it is necessary to do so in order to protect some constitutional right which has been invaded or threatened. *Blackmore v. Duplin Co.,* 201 N. C., 243; *S. v. Rooks,* 207 N. C., 275; *Newman v. Commissioners of Vance,* 208 N. C., 675; *S. v. Williams,* 209 N. C., 57; *Sales Co. v. Grosscup,* 298 U. S., 226. "The judicial power does not extend to the determination of abstract questions." *Ashwander v. Tennessee Valley Authority,* 297 U. S., 288.

In the recent case of *Security Co. v. Hight, ante,* 117, where the assignee of a judgment, based on an assessment for the liability of ostensible stockholders, brought suit to reform the judgment so as to hold others liable therefor as the real owners of the stock, it was said by this Court: "Moreover, it is conceded that since the levy of the assessment in the instant case, the holders of bank stock have been relieved of their double liability by chapter 99, Public Laws of 1935. So, unless the defendants were rendered liable by the original assessment, they cannot now be made liable therefor."

For the reasons stated, we conclude that the judgment sustaining the demurrer must be

Affirmed.

STACY, C. J., concurs in result.

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BEULAH COLE v. ATLANTIC COAST LINE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, AND GOLDSBORO UNION STATION COMPANY.

(Filed 19 May, 1937.)

**1. Appeal and Error § 31g—**

Plaintiff's appeal from judgment of nonsuit as to one defendant is dismissed in accordance with stipulation in her brief upon decision on appeals of other defendants sustaining plaintiff's recovery against them.

**2. Master and Servant § 20: Carriers § 22—Master's liability for acts of volunteer workers.**

A company operating a union station under contract with several railroad companies and permitting "red cap" porters to call trains and direct passengers for tips, may not escape liability for acts of the porters in the

scope of their apparent authority on the ground that they are volunteers, since the station company uses such porters to discharge its contractual obligations to the railroad companies and their passengers.

**3. Master and Servant § 23: Carriers § 22—Evidence held for jury on question of whether servant's acts were within apparent scope of authority.**

Evidence that a station company permitted porters to work upon the premises for tips, and that the porters customarily called trains and directed passengers to and from their trains, and that a porter who had called plaintiff's train instructed plaintiff that her train was standing on a certain track, *is held* sufficient to be submitted to the jury on the question of whether the porter was acting within the apparent scope of his authority in giving the instruction.

**4. Master and Servant § 23—**

Doubt as to whether a servant was acting within the scope of his authority will be resolved in favor of the person injured by the servant's act, so as to require submission of the question to the jury, since the master puts the servant in a position to do the act.

**5. Trial § 22—**

On motion to nonsuit, plaintiff is entitled to the benefit of every germane fact and inference of fact reasonably deductible from the evidence, and evidence supporting plaintiff's claim will be taken as true although contradicted by defendants' evidence. C. S., 567.

**6. Master and Servant § 22: Carriers § 22—Evidence held for jury on question of whether porter's misdirection of passenger proximately caused injury.**

The evidence tended to show that two trains were standing in a union station, that the warning of "all aboard" had been given for one of them, that a "red cap" porter standing in the station heard the signals and knew that the train attendants had boarded the train, and that it was expected to start momentarily, that plaintiff, coming into the station after the starting signals had been given with a ticket for the train not then ready to start, was erroneously instructed by the porter that the other train was hers, and that as she attempted to board the other train, it started and threw her, to her injury. *Held:* The evidence permits the inference that the porter, with knowledge of the circumstances, should have foreseen that injury might result to plaintiff, and the question of whether his failure to warn plaintiff of the danger was the proximate cause of plaintiff's injury is for the jury under the evidence.

**7. Negligence § 1—**

Negligence is the failure to exercise that degree of care for others' safety which an ordinarily prudent man in like circumstances would exercise, and is actionable when such failure directly and proximately causes injury, and injury or harm might have been reasonably foreseen under the circumstances.

**8. Appeal and Error § 42—**

An exception to the admission of evidence on the ground that it was incompetent as hearsay will not be sustained when the record fails to show that the testimony was not within the knowledge of the witness, the burden being upon appellant to show error clearly.

**9. Appeal and Error § 37b—**

Whether a verdict is objectionable as excessive usually rests in the discretion of the lower court, and is not ordinarily reviewable upon appeal.

**10. Appeal and Error § 38—**

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.

APPEALS by plaintiff and defendants Atlantic Coast Line and Goldsboro Union Station Company from *Spears, J.*, at December Special Term, 1936, of LENOIR.

Civil action to recover damages for personal injuries alleged to have been caused by the wrongful act, neglect, or default of the defendants.

The evidence on behalf of the plaintiff tends to show that on the night of 21 September, 1935, the plaintiff, a young woman 22 years of age, and Grady L. Wyrick, came from Kinston to Goldsboro, intending to take the Southern train for Greensboro. They arrived at the Union Station in Goldsboro about 9:45 p.m., purchased their tickets, and waited in the waiting room until the Southern train for Greensboro was called by a station porter. This was about 9:55. The Southern train was due to leave at 10:00 p.m. It was standing on the third track from the waiting room, headed south. On the fourth or farthest track from the waiting room was the northbound Coast Line train, running slightly behind schedule that night, which had been called to leave before plaintiff arrived at the station, and which actually started at 9:57.

As the station porter announced the Southern train at the door of the waiting room, he heard the conductor of the Coast Line train call "board," and the porter himself repeated the call. Neither the plaintiff nor her companion heard the call of the Coast Line conductor; and in response to the announcement that the Southern train was ready to leave, they immediately started for their train. As they approached the Southern train standing on the third track—it not being easy to distinguish between the two trains without some assistance or instruction—Wyrick asked the porter, who had called the trains in the station and who was wearing a red cap, whether the train he was approaching was the train for Greensboro. The porter replied, "No, sir; that is your train over there," pointing to the Coast Line train, which was on the track farthest away. This train was in plain view of the porter, with its door and vestibule open, but he gave no warning to plaintiff, or her companion, that the conductor had already called "board" and that the train was ready to start. There was no Coast Line official or employee outside of the train, nor was there a step to get on the train. The door to the day coach was open, and as the plaintiff "took hold of the handle

and started to place her foot on the step," the train started with a jerk, threw her off and under the train, and cut off her right leg just below the knee.

It is further in evidence that the Union Passenger Station at Goldsboro is owned by the Goldsboro Union Station Company, a corporation, and operated by it for the joint accommodation of the railroads entering said station, to wit, the Southern, the Coast Line, and the Norfolk and Southern. C. S., 1042. By written agreement, it is provided that the use of the station, tracks, and facilities "shall be subject to the jurisdiction of the Station Company, its station master, and employees"; with the proviso that the station master of the Station Company is to be appointed only by unanimous consent of the three railway companies, and his dismissal, as well as that of any subordinate official of the Station Company, is to be insured upon the written request of any one of the said railway companies. In the actual operation of the station, the agents and employees of the Station Company sell tickets for the railway companies, announce the arrival and departure of trains, and assist and direct passengers to and from their trains.

There is also evidence to the effect that it was customary for the "red cap porters" to call trains and to assist passengers in and out of the station, to and from their trains.

Upon demurrer to the evidence, at the close of plaintiff's case, judgment of nonsuit was entered as to the Southern Railway Company. Exception by plaintiff.

The Coast Line and the Station Company each offered evidence in support of its denial of liability.

The evidence of the Coast Line is to the effect that when the conductor and flagman gave the starting signals by calling "all aboard" and waving lantern, neither the plaintiff nor her companion, nor anyone else, was in sight, or preparing to board the train. After giving the usual signals, the attendants all boarded the train; the conductor "pulled the train ahead," and it started. Passengers and others testified that the train was in motion when the plaintiff and her companion came running across the third track and attempted to get on it.

The evidence on behalf of the Station Company tends to show that it did not employ anyone called a "porter," but did employ two "transfer men" to handle mail and baggage, and one of them had the duty of calling trains on the night in question, but he did not wear a red cap. He gave no information or instruction to the plaintiff, or her companion, in respect to their train. It is further in evidence that the Station Company allowed two colored boys, called "red caps," to carry baggage for passengers to and from trains solely for the tips they might receive and without any compensation from the Station Company or the rail-

roads. These "red caps" did not have any duty "in respect to calling trains," though they might show passengers which trains to take at times, and sometimes they directed passengers to the station. They were given no authority by the Station Company. Both "red caps" were at the station when the plaintiff was hurt. They both denied having given the plaintiff, or her companion, any directions, or that they were asked by either of them for any information as to their train.

The jury answered the issues of negligence against the Goldsboro Union Station Company and the Atlantic Coast Line Railroad Company, exculpated the plaintiff from any contributory negligence, and awarded damages in the sum of $25,000.

The plaintiff appeals from the judgment of nonsuit in favor of the Southern Railway Company.

The Goldsboro Union Station Company and the Atlantic Coast Line Railroad Company appeal from the judgment rendered on the verdict.

*Ehringhaus, Royall, Gosney & Smith and John G. Dawson for plaintiff.*

*Thomas W. Davis, V. E. Phelps, and W. B. R. Guion for Atlantic Coast Line.*

*Allen & Allen and Richard C. Kelly for Southern Railway Company.*

*Simms & Simms for Union Station Company in Supreme Court only.*

STACY, C. J., after stating the case: It is agreed on all hands that the plaintiff suffered a distressing and unfortunate injury at the Union Station in Goldsboro on the night of 21 September, 1935. The trial resulted in a nonsuit as to the Southern, and verdict and judgment against the other defendants. There are three appeals.

PLAINTIFF'S APPEAL.

It is stated in plaintiff's brief that if the judgment is affirmed as to either of the appealing defendants, "the plaintiff does not desire a new trial against the Southern, and is willing that her appeal be dismissed." In the light of this statement, and the subsequent disposition to be made of defendants' appeals, the plaintiff's appeal will be dismissed without considering the correctness of the judgment of nonsuit in favor of the Southern.

DEFENDANT STATION COMPANY'S APPEAL.

It is earnestly insisted that no liability has been shown against the Station Company, because the misdirection of the "red cap," if indeed he gave any instruction, was unauthorized, and in no event could it have been the proximate cause of plaintiff's injury.

In considering the defendant's demurrer to the evidence, it should be remembered the testimony is in sharp conflict, and the jury has accepted the plaintiff's version of the matter. Assuming that the "red cap" who called the train in the station was the "same man" who misdirected the plaintiff and her companion, as the jury has evidently found, it cannot be said, upon the present record, that his acts were not within the apparent scope of his authority. *Lane v. R. R.*, 192 N. C., 287, 134 S. E., 855; *Leggett v. R. R.*, 168 N. C., 366, 84 S. E., 357; *Parrish v. Mfg. Co., ante,* 10, and cases there cited. And it can profit the defendant nothing in the present action that the "red cap" was only a volunteer worker and not upon its pay roll. *Booker v. Penn. R. Co.*, 82 Pa. Superior Ct., 588. With permission of the defendant, he was allowed to work upon the premises, for what he might receive in tips, it is true, nevertheless his acts were those of the defendant in the discharge of the contractual duties which it owed to the railroads using its station, and to their passengers. Annotations, 59 A. L. R., 126. He was carrying out his customary duties. *Leggett v. R. R., supra; Mangum v. R. R.*, 145 N. C., 152, 58 S. E., 913; *Pineus v. R. R.*, 140 N. C., 450, 53 S. E., 297; *Willis v. R. R.*, 120 N. C., 508, 26 S. E., 784. See, also, *Cooper v. Ry. Co.*, 165 N. C., 578, 81 S. E., 761; *Sutton v. Lyons*, 156 N. C., 3, 72 S. E., 4; and *Snipes v. R. R.*, 144 N. C., 18, 56 S. E., 477. At any rate, there is evidence to support this view, which must be taken as true on motion to nonsuit. C. S., 567; *Moore v. R. R.*, 165 N. C., 439, 81 S. E., 603. The plaintiff must be given the benefit of every fact and inference of fact pertaining to the issues involved, which may reasonably be deduced from the evidence. *Nash v. Royster*, 189 N. C., 408, 127 S. E., 356.

"When one who knowingly and without objection receives the benefits of labor, or holds out to the public one as engaged in his service, he is liable as a master for the negligence of such servant when the act or failure constituting the negligence comes within the apparent scope of the employment, even though he has not employed or paid the servant." *D. & R. G. R. R. Co. v. Gustafson*, 21 Colo., 393.

Further, speaking to the subject in *Booker v. Penn. R. Co., supra, Keller, J.*, delivering the opinion of the Court, said: "The fact that a traveler gives a tip to a porter for courteous service in the carriage of his hand luggage does not make the porter his servant for whose negligence he is responsible any more than a tip given to a bell boy in a hotel, to a waiter in a restaurant, or to a hat check employee, changes the status of their respective employment. Nor does the fact—if such is the case—that the railroad company does not pay its employees while they are 'portering only,' but that their sole source of revenue in such circumstances is the tips which they receive from passengers, negative the continuance of their employment while acting as porters or relieve

the employer of responsibility for their acts within the scope of their employment."

Moreover, it is well settled, as stated in 39 C. J., 1284, and quoted with approval in *Colvin v. Lumber Co.,* 198 N. C., 776, 153 S. E., 394, that "where it is doubtful whether a servant in injuring a third person was acting within the scope of his authority, it has been said that the doubt will be resolved against the master because he set the servant in motion, at least to the extent of requiring the question to be submitted to the jury for determination." See *Gallop v. Clark,* 188 N. C., 186, 124 S. E., 145.

Again, in *Union Depot Co. v. Londoner,* 50 Colo., 22, 114 Pac., 316, it was held: "A corporation organized for the purpose of maintaining a station or depot to be used by railroad companies, owes to the traveling public, as to the conduct of such station or depot, the same duty as is due from the railway company which maintains its own station; and its obligations toward the public are not affected by the agreement between itself and the railway company."

It is also a permissible inference, which the jury obviously drew from the evidence, that the misdirection of the "red cap" was the proximate cause of plaintiff's injury. True, he could not foresee precisely what transpired, nevertheless, with his superior knowledge of the situation, to wit, that the starting signals had been given, that the attendants had all boarded the train, and that it was expected to move momentarily, he should have foreseen that consequences of a serious nature were likely to occur without some warning to plaintiff and her companion. *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Hall v. Rinehart,* 192 N. C., 706, 135 S. E., 790; *Hudson v. R. R.,* 176 N. C., 488, 97 S. E., 388; *Drum v. Miller,* 135 N. C., 204, 47 S. E., 421. This defeats the motion to nonsuit and makes it a case for the jury. *Collins v. Lumber Co.,* 195 N. C., 849, 141 S. E., 580.

Negligence is the breach of some duty imposed by law. It is doing other than, or failing to do, what a reasonably prudent man, similarly situated, would have done. The conduct of the reasonably prudent man is the accepted standard. *Tudor v. Bowen,* 152 N. C., 441, 67 S. E., 1015. "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. See *Trust Co. v. R. R.*, 209 N. C., 304, 183 S. E., 620; *Hamilton v. R. R.*, 200 N. C., 543, 158 S. E., 75.

Speaking to the question in *Ramsbottom v. R. R.*, 138 N. C., 39, 50 S. E., 448, *Hoke, J.*, delivering the opinion of the Court, said: "To establish actionable negligence, the question of contributory negligence being out of the case, the plaintiff is required to show by the greater weight of the testimony, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiffs under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with like duty; and, second, that such negligent breach of duty was the proximate cause of the injury—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 result was probable under all the facts as they existed." This is still the law with the modification contained in *Drum v. Miller, supra,* and many other cases, "that it is not required that the particular injury should be foreseen, and it is sufficient if it could reasonably be contemplated that injury or harm might follow the wrongful act." *Hudson v. R. R.*, 176 N. C., 488, 97 S. E., 388; *Gore v. Wilmington*, 194 N. C., 450, 140 S. E., 71.

In a case somewhat similar to the one at bar, *Union Depot Co. v. Londoner, supra,* it was held by the Supreme Court of Colorado, as stated in 2nd headnote, 33 L. R. A. (N. S.), 433 (which accurately digests the opinion): "A union depot company which relied upon train employees to direct passengers to their trains is liable for injury caused to a passenger's attendant by following the direction of such employee, which takes him into an unsafe place, where the danger is not obvious, although the one giving it was not in its immediate employ."

And in answer to the contention that the men who directed the plaintiff were not employees of the Union Depot Company, the Court said: "These men were the agency through which the appellant chose to perform its service of directing passengers to their trains, and they were the only agency which it employed in this case to perform that service. It availed itself and had the benefit of the service of these men, made them the agents or means for the performance of that particular part of its work which it had undertaken in the operation of its station, and it cannot now be permitted to say that Londoner had no right, so far as it was concerned, to follow the directions of the agency which it adopted and used as the means through which it gave directions."

Of course, to look at the case from the standpoint of the defendant's evidence, quite a different picture is presented. But the jury rejected

this view. They were instructed to find against the plaintiff, if the defendant's version of the matter were accepted, or believed to be true.

At the time of plaintiff's injury, she was employed as a saleslady in a Kinston department store, specializing in the sale of Victrola records, and was engaged in a contest with other salesmen of such records. The contest was being "staged by the manager, Mr. Madalia." Over objection, plaintiff was allowed to testify "from her knowledge of the sales of records in other stores," so far in the contest, "I was in the lead." The basis of the objection is, that plaintiff was here speaking of matters necessarily not of her own knowledge, and perforce violative of the rule against hearsay. *S. v. Kluttz,* 206 N. C., 726, 175 S. E., 81. The conclusion is a *non sequitur.* The question propounded called for an answer within her own knowledge. There was no effort by cross-examination or otherwise to show that she was speaking from hearsay. To prevail on appeal, the party alleging error, not only has the laboring oar, but the tide is also against him. Error must be shown; it will not be presumed. *Kelly v. Tea Co.,* 209 N. C., 839, 183 S. E., 291; *Poindexter v. R. R.,* 201 N. C., 833, 160 S. E., 767.

Touching the alleged excessiveness of the verdict, mentioned on argument and in brief, but apparently not specifically assigned as error below, it is perhaps enough to say that this is usually a matter resting in the sound discretion of the trial court, and is not reviewable on appeal, unless accompanied by some imputed error of law or legal inference in connection therewith. *Hyatt v. McCoy,* 194 N. C., 760, 140 S. E., 807; *Parker v. R. R.,* 181 N. C., 95, 106 S. E., 755; *Boney v. R. R.,* 145 N. C., 248, 58 S. E., 1082; *Norton v. R. R.,* 122 N. C., 910, 29 S. E., 886.

The remaining exceptions, 90 in number, are not of sufficient moment to work a new trial or to call for elaboration. They are not unusual in the trial of damage suits. *Tilghman v. R. R.,* 171 N. C., 652, 89 S. E., 71. To consider them *seriatim* would be to extend the discussion to a "burdensome and intolerable length" (*Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286), and to end only in the application of old principles to the facts in hand. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737.

DEFENDANT COAST LINE'S APPEAL.

One member of the Court, *Schenck, J.,* being absent, and the remaining four being equally divided in opinion as to whether reversible error has been shown, particularly on the refusal to nonsuit as to the Coast Line, the judgment of the Superior Court, accordant with the usual practice in such cases, is affirmed and stands as the decision in the instant case, without becoming a precedent. *Allen v. Ins. Co., post,* 736,

and cases there cited. See *Goodman v. Queen City Lines,* 208 N. C., 323, 180 S. E., 661; *Keiger v. Utilities Co.,* 199 N. C., 786, 155 S. E., 875.

The result, then, is:

On plaintiff's appeal, Appeal dismissed.

On defendant Station Company's appeal, No error.

On defendant Coast Line's appeal, Affirmed.

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CHARLES M. MORGAN v. TOWN OF NORWOOD AND UNITED STATES FIDELITY & GUARANTY COMPANY.

(Filed 19 May, 1937.)

**Master and Servant § 42—Consent award accepted in full settlement of claim held to bar petition for review of award for changed condition.**

Claimant was awarded compensation for total disability for a stated number of weeks and compensation for partial permanent disability for a stated number of weeks, and thereafter, upon reopening of the award for changed condition, claimant was awarded a sum for partial loss of hearing, and upon appeal from the last award the case was remanded to allow defendants to cross-examine a witness. Pending a hearing after remand, the parties reached a compromise, under which defendants paid claimant a lump sum "as full and complete settlement . . . from and on account of the accident in question," which compromise agreement was duly approved by the Industrial Commission. Thereafter claimant filed petition for rehearing, alleging that his hearing had grown worse and his physical condition deteriorated so that he had become permanently and totally disabled, and that he would not have signed the compromise agreement except for the fact that his condition necessitated the receipt of compensation. *Held:* The compromise agreement, approved by the Commission, is conclusive and final, and bars claimant from filing petition to reopen the award for changed condition, there being no allegation or proof that the agreement was procured by fraud or through mutual mistake, or that consent was not in fact given.

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

APPEAL by defendants from *Rousseau, J.,* at October Term, 1936, of STANLY. Reversed.

The record discloses, in part, the following:

"*Opinion of Full Commission* (16 June, 1933):

"This case came on for review before the Full Commission at Raleigh, North Carolina, 29 May, 1933, upon an appeal by the defendant in apt time from the decision of Commissioner Dorsett in which compensation was allowed for specific loss of hearing subsequent to the plaintiff having

been paid compensation for temporary total disability and for a general partial disability under section 30.

"It appears from the record that the plaintiff was paid in a lump sum for his general partial disability, which came within the purview of section 30. The award of 4 March, 1932, by Commissioner Dorsett, provided compensation for total disability for 121 and 3/7 weeks at $18.00 per week and 176 and 4/7 weeks at $6.93 per week for 33⅓ per cent permanent partial disability under section 30. On 2 December, 1932, Commissioner Dorsett conducted another hearing to determine whether the plaintiff had had a change of condition, and, if so, the extent of the change. Commissioner Dorsett held that the plaintiff did not have a greater general partial disability than 33⅓ per cent, but did find that the plaintiff had a 51 per cent loss of hearing in the left ear and 56 per cent loss of hearing in the right ear, for which he had not been paid. Commissioner Dorsett further held that the plaintiff was entitled to additional compensation for specific loss of hearing, and it was upon this point that the defendant appealed, contending that the claimant had been paid in full. Section 30 (underscoring by Commission) reads as follows:

" '*Except as otherwise provided in the next section hereafter,* where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to 60 per centum of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than eighteen dollars a week, and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of injury. In case the partial disability begins after a period of total disability, the latter period shall be deducted from the maximum period herein allowed for partial disability.'

"Section 31 provides for a specific schedule of compensation to be paid in certain permanent injuries, particularly section 31-s, reads as follows: 'For the complete loss of hearing in one ear, sixty per centum of the average weekly wages during seventy weeks; for the complete loss of hearing in both ears, sixty per centum of average weekly wages during one hundred and fifty weeks.'

"The Full Commission is in accord with Commissioner Dorsett that the plaintiff is entitled to the additional compensation under section 31-s. While the Commission has been unable to find a court case, the Virginia Industrial Commission, which has similar sections, has the following to say on the same subject: (Section 31 corresponds to our section 30, and section 32 of the Virginia law corresponds to the North Carolina section 31.) 'The employee sustained injuries resulting in

disability of a general nature such as would entitle him to compensation under section 31. In addition to such injuries, he had also sustained injuries of a specific nature such as to entitle him to compensation under section 32. He is entitled to compensation for the specific injuries under section 32, and then, if still disabled as a result of the other injuries, compensation will be paid under section 31.' *E. L. Baughn v. Richmond Forging Co.,* Claim No. 70-597.

"However, in the case before the North Carolina Industrial Commission the plaintiff had already been paid for his general disability and the evidence does not disclose that the specific disability was shown at any previous hearing. Therefore, the Full Commission affirms the decision of Commissioner Dorsett as shown in the opinion filed 2 March, 1933, and the corrected award of 10 March, 1933. The defendants will pay the costs of this hearing."

As ordered in said opinion, an award was issued on the same date, as follows:

"*Award* (16 June, 1933).

"You, and each of you, are hereby notified that a hearing was had before the Full Commission on 29 May, 1933, in the above entitled case, Raleigh, N. C., and the decision thereupon was rendered by Commissioner T. A. Wilson for the Full Commission, on 16 June, 1933, in which an award was ordered and adjudged, as follows:

" 'That the findings of fact and conclusions of law set out in the opinion of Commissioner J. Dewey Dorsett are proper and justified from all of the evidence, and they are hereby adopted as findings of fact and conclusions of law of the Full Commission, and that the award heretofore issued under date of 10 March, 1933, reading as follows: "Upon the finding that the plaintiff has not had a change of condition as to disability of a general nature, and that he now has only 33⅓ per cent disability of a general nature, the claim for additional compensation for such disability is denied. Upon the finding that plaintiff has 51 per cent loss of hearing in left ear and 56 per cent loss of hearing in right ear, the defendant will pay plaintiff compensation at the rate of $18.00 per week for a period of 74 9/10 weeks, covering 51 per cent loss of hearing of the left ear and 56 per cent loss of hearing of the right ear. The plaintiff has expended $219.25 for medical and hospital treatment. The plaintiff will submit itemized bill to the Commission for approval, such itemized bills to show authorization for drugs and also for glasses, and when approved the defendants will pay plaintiff this amount as approved. Defendants to pay cost of hearing. A fee of $100.00 is approved for attorney representing the plaintiff." The foregoing corrects the award dated 2 March, 1933, which contained an error in that compensation was awarded for total loss of hearing in both ears, whereas,

according to Commissioner Dorsett's findings of fact and according to the award itself the plaintiff has suffered 51 per cent loss of hearing of the left ear and 56 per cent loss of hearing of the right ear, be in all respects affirmed.' "

To this opinion and award of the Full Commission the defendants excepted and appealed to the Superior Court. The case came on for hearing in the Superior Court before Stack, J., at Chambers, on Friday, 24 November, 1933, when and where his Honor, Judge Stack, rendered judgment as follows:

"This cause coming on to be heard and being heard before his Honor, A. M. Stack, at Chambers in the town of Monroe, by consent of parties, on Friday, 24 November, 1933; after hearing the argument of counsel and a careful review of the record on appeal from the North Carolina Industrial Commission, it appearing to the court that the judgment appealed from was based on findings of Dr. Hart with reference to defective hearing of the plaintiff, and the defendants had not had an opportunity to cross-examine Dr. Hart in this connection; and the court being of the opinion that the case should be remanded with a view of allowing the defendants the opportunity of cross-examining Dr. Hart with reference to the defective hearing complained of by the plaintiff. It is therefore ordered and adjudged by the court that this case be and the same is hereby remanded to the North Carolina Industrial Commission; that the defendants be allowed the opportunity to examine Dr. Hart with reference to plaintiff's defective hearing. The other exceptions and objections raised by the defendants in this appeal are not passed upon and the same are in all respects preserved. A. M. Stack, Judge of the 13th Judicial District."

To the foregoing order the plaintiff objects and excepts.

In accordance with the judgment of Judge Stack, on 15 December, 1933, there was sent out to all parties notices of hearing to be conducted in Charlotte on 12 January, 1934, copy of said notice being as follows:

"*Notice of Hearing.* A hearing will be held in the above case at office clerk Superior Court, Charlotte, N. C., at 2 o'clock p.m., on 12 January, 1934. This hearing is part of a schedule. It cannot be postponed without considerable inconvenience and extra expense. The Commission will not consent to postponement except upon strictly legal grounds. Subject of hearing (here state question in dispute): This cause remanded to the N. C. Industrial Commission so that the defendants be allowed the opportunity to examine Dr. Hart with reference to plaintiff's defective hearing. The parties to this hearing should arrange to have all witnesses present to testify promptly at the time and place above given. The right is reserved to take such action as the law permits if either party fail to appear at the time and place set for this hearing."

Prior to the hearing in Charlotte, defendants' counsel received a proposition of settlement from plaintiff's counsel, which is embodied in letter of A. C. Huneycutt, attorney, directed to W. E. Smith, attorney, dated 12 January, 1934. This offer of settlement was accepted by the defendants and confirmed by judgment filed 15 January, 1934, by Commissioner Wilson, the offer of settlement being set out in the judgment, which is as follows:

"*Order of Commissioner Wilson* (15 January, 1934).

"This case was set for Charlotte, N. C., 12 January, 1934, to take the evidence of Dr. Hart pursuant to the order of the judge of the Superior Court of the 13th Judicial District. However, the day before, at Albemarle, the attorneys on both sides had a conference with the hearing Commissioner in which the question was raised as to whether, even if the claimant should win the court decision, that as a matter of law shouldn't the defendant carrier be given credit against the weekly payments for compensation paid for partial disability under section 30 to a previous award of Commissioner Dorsett, which was paid in a lump sum. The hearing Commissioner ruled that the defendants were entitled to this credit, and the defendants agreed to pay, which the claimant accepted. The agreement for settlement of the case is embodied in the letter of the plaintiff's attorney, A. C. Huneycutt, to the defendant carrier, dated 12 January, 1934, which reads as follows:

" 'Further, with regard to the compromise settlement of the C. M. Morgan matter now pending before the North Carolina Industrial Commission, Mr. Morgan has taken the matter under consideration, and has decided that if your clients, town of Norwood and U. S. F. & G. Co., will pay him in a lump sum, at once, he will accept $829.14, net to him, as full and complete settlement against the town of Norwood arising through, from, and on account of the accident in question, your client, of course, to pay the attorney's fees set out in the award of 10 March, 1933, cost of the appeal, and other items named in the said award, or arrange same so as to protect him from being responsible for same. In other words, he will accept $829.14 in a lump sum net to him.'

"The appeal of the defendants is withdrawn, the testimony of Dr. Hart was not taken. An award shall issue approving the agreement above set forth in final settlement and determination of this case."

On 17 January, 1934, the Commission rendered judgment approving the lump sum settlement, as follows:

"*Judgment of Commission* (17 January, 1934):

"The Commission approves the lump sum settlement of $829.14 net to the plaintiff as set out in the letter of Attorney A. C. Huneycutt, 12 January, 1934."

Payment of the amount of this agreed settlement was made on 24 January, 1934. Thereafter the Commission received from the plaintiff

an affidavit, dated 5 January, 1935, requesting that the case be reopened, said affidavit being as follows:

"This matter, affiant C. M. Morgan makes oath that he was injured while in the employ of the town of Norwood, on or about 13 October, 1929; after that certain negotiations were had with the insurance carrier, and affiant was paid the sum of $18.00 a week for 12 weeks, when payment ceased. Thereafter a hearing was had before the Industrial Commission and affiant was awarded the sum of $6.93 per week for a period of 178 weeks. This was treated as a lump sum settlement as of the date thereof. Thereafter there was a subsequent hearing and award in which affiant was awarded approximately $829.10, due to defective hearing. Affiant's hearing has steadily grown worse, his physical condition has gradually deteriorated, and he is now absolutely unable to pursue any gainful occupation. Affiant would not have agreed to the settlement aforesaid had not the existence of his illness been so rapid as to make it necessary as compensation for the injuries received by him and which are fully set forth in the record. Wherefore, affiant prays that the case as to him be reopened; that the insurance carrier be notified; that a hearing be had; and that such proceedings taken and such orders made at such hearing as may be consistent with right and justice. (Signed) C. M. Morgan."

On 2 August, 1935, the hearing Commissioner Dorsett found certain facts and denied plaintiff further compensation. On appeal by plaintiff to the Full Commission, on 7 July, 1936, they found certain facts and made an award as follows: "Upon the findings that plaintiff has had a change of condition since the last payment of compensation, and that plaintiff has been temporarily totally disabled since 21 June, 1935, the defendants will pay plaintiff compensation at the rate of $18.00 per week from 21 June, 1935, during the continuance of temporary total disability, total payments not to exceed $6,000, with proper deduction for any and all payments of compensation heretofore made," etc.

The defendants appealed to the Superior Court, and the court below rendered judgment, as follows: "It is therefore ordered, adjudged, and decreed that the judgment of the Full Commission, handed down on 7 July, 1936, be and is hereby the judgment of this court. J. A. Rousseau, Judge presiding."

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

*T. L. Dysard, Jr., for plaintiff.*
*R. L. Smith & Sons for defendants.*

CLARKSON, J. The material question involved: "Is the compromise settlement of 12 January, 1934, approved by the Industrial Commis-

sion, on 17 January, 1934, binding and final between the parties?" We think so.

It is in the record that the various disability compensations heretofore awarded plaintiff were some $4,000 other than the present award. In the record is also the following: "The agreement for settlement of the case is embodied in the letter of the plaintiff's attorney, A. C. Huneycutt, to the defendant carrier, dated 12 January, 1934, which reads as follows:

" 'Further, with regard to the compromise settlement of the C. M. Morgan matter now pending before the North Carolina Industrial Commission, Mr. Morgan has taken the matter under consideration, and has decided that if your clients, town of Norwood and U. S. F. & G. Co., will pay him in a lump sum, at once, he will accept $829.14, net to him, as full and complete settlement against the town of Norwood arising through, from, and on account of the accident in question, your client, of course, to pay the attorney's fees set out in the award of 10 March, 1933, cost of the appeal, and other items named in the said award, or arrange same so as to protect him from being responsible for same. In other words, he will accept $829.14 in a lump sum net to him.'

" 'The appeal of the defendants is withdrawn, the testimony of Dr. Hart was not taken. An award shall issue approving the agreement above set forth in final settlement and determination of this case.'

"On 17 January, 1934, the Commission rendered judgment approving the lump sum settlement as follows: *Judgment of Commission* (17 January, 1934). 'The Commission approves the lump sum settlement of $829.14 net to the plaintiff as set out in the letter of Attorney A. C. Huneycutt, 12 January, 1934.' Payment of the amount of this agreed settlement was made on 24 January, 1934."

There was a controversy between the plaintiff and defendants as to additional disability compensation more than had been heretofore paid plaintiff. The parties compromised and settled this additional claim of plaintiff. The language of this agreement is clear and not ambiguous: *"Net to him, as full and complete settlement against the town of Norwood arising through, from, and on account of the accident in question."* This was approved by the Industrial Commission and the money paid on the faith of this agreement. The plaintiff in his affidavit to reopen the case says: "Affiant would not have agreed to the settlement aforesaid had not the existence of his illness been so rapid as to make it necessary as compensation for the injuries received by him and which are fully set forth in the record."

To set aside the agreement, it does not appear upon proper allegation and proof that the "full and complete settlement" was obtained by fraud or mutual mistake, or that consent was not given. The plaintiff was

*sui juris* and is now estopped to deny his solemn agreement. *Boucher v. Trust Co., ante,* 377.

In *Mfg. Co. v. Lumber Co.,* 178 N. C., 571 (574), we find: "If treated as an exception to the judgment, it presents the single question whether the facts found or admitted are sufficient to support the judgment. (*Ullery v. Guthrie,* 148 N. C., 419)." *Wilson v. Charlotte,* 206 N. C., 856; *Orange Co. v. Atkinson,* 207 N. C., 593 (596); *Shuford v. Building and Loan Assn.,* 210 N. C., 237 (238); *Best v. Garris, ante,* 305 (307-8). We do not think the facts admitted support the judgment.

We have consistently held, as stated in *Johnson v. Asheville Hosiery Co.,* 199 N. C., 38 (40): "It is generally held by the courts that the various compensation acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation."

We think the facts in the present case and statutes on the subject differ from those in the authorities cited by plaintiff. Be that as it may, we are not inclined to set aside a solemn agreement in full settlement, approved by the Industrial Commission and the money paid and accepted by plaintiff on the faith of his agreement. The agreement is not a "scrap of paper."

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

Reversed.

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

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CITY OF HIGH POINT (A MUNICIPAL CORPORATION) v. S. C. CLARK AND WIFE, DAISY O. CLARK.

(Filed 19 May, 1937.)

**1. Municipal Corporations § 33—Party petitioning for public improvements and accepting benefits held estopped to attack assessments.**

The owners of land, in developing same for residential purposes, plotted streets for the development and dedicated them to the city, filed petition for improvement of the streets with total cost to be assessed against the abutting property, and in proceedings in substantial conformity with C. S., ch. 56, Art. 9, the city levied assessments and made the improvements. The owners listed the land for taxation by the city, did not appeal from confirmation of the assessment role, and both the owners and the city thought the land lay within the city limits, until a survey some years after the confirmation of the assessment role disclosed that one of the streets ran outside of and parallel to the city limit. *Held:* The owners of the land, by petitioning for the improvements and accepting the benefits thereof are estopped to deny the validity of the assessments, the paving of the street outside the city limits not being *ultra vires* the city.

**2. Municipal Corporations § 30—City held to have power to pave street acquired by it by dedication, although street was outside city limits.**

Since C. S., 2791, empowers a city to purchase land for establishing or widening necessary streets either "within or outside the city," and to control and manage same, a city acquiring by dedication a street lying just outside its limits and connected with the streets within its limits, has the power to pave such street so acquired by it, and its paving of the street upon petition of the owners of abutting property is not *ultra vires* the city.

**3. Municipal Corporations § 35—**

The General Assembly has the power by curative act to validate assessments for public improvements levied by a municipal corporation when the levy of the assessments is not void or *ultra vires* the city.

APPEAL by defendants from *Armstrong, J.*, 19 April, 1937. From GUILFORD. Affirmed.

This is a submission of controversy without action, C. S., 626-628. This controversy without action is brought by plaintiff against defendants to determine the validity of certain street assessments levied by the city of High Point against certain property belonging to the defendants. The agreed case is fully set out in the record with the contentions of plaintiff and defendants. The material facts to be considered are as follows:

On or about 16 November, 1925, and for some time prior thereto, the defendants S. C. Clark and wife, Daisy O. Clark, were the owners of a large number of acres of land in the western portion of the city of High Point. Some time prior to 16 November, 1925, they had this acreage platted into an exclusive residential development of said city, known as Emerywood Addition No. 6. While they were the owners of all the lots on each side of Forest Hill Drive, Greenway Drive, and other streets as laid out upon the plat of Emerywood Addition No. 6, they prepared and executed a petition pursuant to chapter 56, Public Laws of 1915, as amended, petitioning the city of High Point to pave Forest Hill Drive between Greenway Drive and Hillcrest Drive, a part of which is just outside of the western boundary line of the city and almost parallel thereto. This petition was dated 16 November, 1925. It appears in the agreed case "That in platting said acreage into residential lots, Forest Hill Drive, Greenway Drive, and other streets, as shown on said map, were laid out and dedicated to the city of High Point."

Pursuant to the filing and consideration of said petition, all the procedure and steps required by said chapter 56, Public Laws of 1915, as amended, were substantially complied with, the street paved, the assessment roll made up and confirmed on 21 September, 1926, by the council of the city of High Point, after due notice as required by chapter 56,

Public Laws of 1915, as amended, and levies of assessment made against each of the lots in said plat of Emerywood Addition No. 6.

The defendants defaulted in the payment of the installments on the assessment levied against the land in question that became due prior to 1 July, 1931. In January, 1931, a careful survey of the western boundary of the city of High Point was made, which disclosed that a small portion of the property platted into streets and lots by the defendants was just outside of the corporate boundary line of the city. Until this survey was made, neither the city nor the defendants knew that the land in question was outside of the city. Not only did the defendants and the city consider that the entire tract of land platted by the defendants as Emerywood Addition No. 6 was inside the corporate limits of the city, but the defendants listed said tract of land and said Lot No. 1 in question as being within the city and subject to general taxation by the city.

After the city discovered that a portion of the real estate development known as Emerywood Addition No. 6, which includes the land in question, was just beyond its boundary, it got the Legislature to pass chapter 131 of Private Laws of 1931, authorizing the city to reassess the assessment in question over a new ten-year period, so that the first installment under the reassessment plan would become due 1 October, 1931. Acting pursuant to the provisions of chapter 131, Private Laws of 1931, the council of the city of High Point reassessed the assessment in question. Chapter 131 of the Private Laws of 1931 likewise validated the assessment in question. At the 1933 session of the Legislature, the city got the Legislature to pass chapter 150, Private Laws 1933, validating the reassessment plan of the assessment in question as made by the council of the city pursuant to the provisions of chapter 131, Private Laws of 1931.

The land in question still belongs to the defendants S. C. Clark and wife, Daisy O. Clark, and the defendants have failed and neglected to pay the installments which became due on the assessment on the reassessment plan.

On the agreed case, the court below rendered judgment for plaintiff. The defendants excepted to the judgment as signed and appealed to the Supreme Court. Other necessary facts will be set forth in the opinion.

*Grover H. Jones for plaintiff.*
*C. R. McIver, Jr., for defendants.*

CLARKSON, J. The main question presented on this appeal: Could the city of High Point levy a benefit assessment against land abutting on the portion of a street owned and dedicated to the city of High Point

as a part of its street system and lying beyond the corporate limits of such city, said street connecting with streets inside the corporate limits, on account of the paving of the portion of such street lying beyond its corporate limits where such abutting property owner signed a petition in which petition he represented to the city that his abutting land was within corporate limits of the city; and where neither the city nor such abutting landowners knew, until some years after the confirmation of the assessment roll, that his land so assessed was beyond the corporate limits of the city, he returning same for taxes; and where such abutting landowner failed to appeal from the confirmation of the assessment roll as required by section 2714, C. S.? We think so, under the facts and circumstances of this case.

In the record is the following part of the agreed case:

"1. The above named city of High Point is a municipal corporation, duly incorporated under the laws of the State of North Carolina, and as such municipal corporation it is authorized by law to pave its streets and to make benefit assessments against the property abutting thereon for the cost of such improvement, and is hereinafter called the plaintiff.

"2. That the above named S. C. Clark and wife, Daisy O. Clark, hereinafter called the defendants, are citizens and residents and taxpayers of the city of High Point, N. C.

"3. The defendant S. C. Clark was the owner of a number of acres of land, most of which was in the western portion of the city of High Point, and the said S. C. Clark platted this acreage into an exclusive residential subdivision known as Emerywood Addition No. 6, map of which is recorded in Plat Book 8, at page 37, register of deeds' office of Guilford County, N. C.; that the map of said subdivision known as Emerywood Addition No. 6 was submitted to and approved by the governing body of the city of High Point, to wit: The council of said city, prior to the time that the said map was filed in the office of the register of deeds of Guilford County; *that in platting said acreage into residential lots, Forest Hill Drive, Greenway Drive, and other streets as shown on said map were laid out* and dedicated to the city of High Point." (Italics ours.)

C. S., 2791, in part, is as follows: "When in the opinion of the governing body of any city, or other board, commission, or department of the government of such city having and exercising or desiring to have and exercise the management and control of the streets, . . . which are or may by law be owned and operated or hereafter acquired by such city . . . on behalf and for the benefit of such city, any land, right of way, . . . privilege, or easement, either within or outside the city, shall be necessary for the purpose of opening, establishing, building, widening, extending, enlarging, maintaining, or operating any such

streets, . . . such governing body, board, commission, or department of government of such city may purchase such land, right of way, . . . privilege, or easement from the owner or owners thereof and pay such compensation therefor as may be agreed upon."

In the present case the streets outside the city were dedicated to the city and there was no necessity to purchase same, though the statute gave the power to acquire same. The plaintiff and defendants were both of the opinion that the *locus in quo* was in the city of High Point, and defendants listed and paid general tax on said property to the city of High Point. The defendants wanted the street paved and, in the manner provided by law, petitioned the mayor and city council of High Point to pave same, viz.: "Do hereby respectfully petition your Honorable Body to improve Hillcrest Drive west from Hillcrest Drive to Emery Street and Forest Hill Drive from Greenway Drive to Hillcrest Drive, a total distance of approximately 3,000 feet, with a permanent pavement of a character, type, and material to be determined by your Honorable Body, including the necessary grading or regrading of said part of said street, and the construction, reconstruction, and altering of curbs, gutters, and drains therein. We further respectfully request that 100 per cent of the total cost of said improvement, including cash for cost of all street intersections in advance, be specially assessed upon the lots and parcels of land abutting directly on the improvement, according to their respective frontage thereon by an equal rate per foot of such frontage. This petition is signed and filed under section 5 of chapter 56 of the Public Laws of 1915 of North Carolina. Witness our respective hands with a statement of our approximate frontages respectively on the portion of such street proposed to be improved. Dated 16 November, 1925. Signatures of Owners—S. C. Clark, S. C. Clark. Approximate frontage 3000-3000."

In accordance with the petition and statutes, the improvement was made and assessment levied. The record discloses: "The defendants did not register any objection to the confirmation by the council of the city of High Point of the assessment roll, and did not take an appeal from the confirmation of the assessment roll."

Under the statute, C. S., 2791, *supra,* the plaintiff had the right to acquire these streets and in the present case they were laid out and dedicated to the plaintiff. The plaintiff had the "management and control" of the streets like any other streets of plaintiff city. The defendants, in no uncertain language, petitioned that they be improved. We think, under the factual situation of this case, that defendants are estopped to repudiate their solemn petition, acted on by plaintiff, and which defendants are now receiving the benefits to enhance the value of their property by having the streets paved.

In *Charlotte v. Alexander,* 173 N. C., 515 (519-20), is the following: "There is no valid reason why citizens who wish to have their property improved by street paving may not expressly waive the charter restriction and contract with the city to pay the actual cost. There is nothing against public policy in such agreement. On the contrary, it conduces to the general improvement of the municipality. When such contracts are entered into with full knowledge by the property owner the law will not permit him to repudiate it after the work is done and he has received the benefits. This principle is approved by numerous authorities. . . . In *McKnight v. Pittsburgh,* 91 Pa. State, 273-6, the Court said: 'The appellant made no objection to the grade or to the work as it progressed. The work was undertaken at her instance, among others, and for the benefit of her property, and her agents aided the contractor in hauling and furnishing material. *Held,* that she was estopped from controverting the acts of the city and its contractor, even though the contract under which the grading was done was void for want of power of a city to execute it.' In our opinion, it is both good morals and sound law to hold that when a person has accepted the benefits of a contract, not *contra bonos mores,* he is estopped to question the validity of it."

*In the Matter of Assessment Against Railroad,* 196 N. C., 756; *Jones v. Durham,* 197 N. C., 127; *Efird v. Winston-Salem,* 199 N. C., 33; *Wake Forest v. Holding,* 206 N. C., 425.

In Elliott on Roads and Streets, Vol. 2, 4th Ed., sec. 733, it is said, in part: "If the party who assails the assessment has induced the officers to enter upon the work, his complaint should meet with no favor from the courts. Thus, it has been held that one who petitions for the improvement is estopped from claiming that there is no authority to make it, and so generally as to acts caused by or naturally and properly following such petition," etc., citing *Wright v. Davidson,* 181 U. S., 371; *Burlington v. Gilbert,* 31 Iowa, 356 (364); *Ballentine v. City of Columbia, S. C.,* 124 S. E., 643.

The streets in question were dedicated to the plaintiff city of High Point. The statute, *supra,* gave the city the right to acquire streets "within or outside the city," and to "exercise the management and control of the streets," etc. The language is broad enough for the streets so dedicated to the plaintiff city that the city had authority to pave same, as was done in the instant case, under the statutes.

Chapter 131, Private Laws 1931, entitled "An act relating to special assessments levied by the city of High Point," validated and confirmed the special assessment referred to in the pleadings in this action and authorized the council of said city to make a reassessment thereof, which reassessment was made as of 1 July, 1931. Chapter 150, Private Laws 1933, entitled "An act to amend chapter 131 of the Private Laws of

1931, relating to special assessments levied by the city of High Point," likewise validated and confirmed the reassessment of the assessment made by resolution of the city council of the city of High Point pursuant to the provisions of chapter 131, Private Laws of 1931, and thus validated and confirmed the reassessment of the particular street assessment referred to in the pleadings in this action. It has been repeatedly held by our Court that such acts have the effect of validating benefit assessments. *Holton v. Mocksville,* 189 N. C., 144; *Gallimore v. Thomasville,* 191 N. C., 648; *Barbour v. Wake County,* 197 N. C., 314; *Crutchfield v. Thomasville,* 205 N. C., 709; *High Point v. Brown,* 206 N. C., 664.

From the view we take of the agreed case, we see nothing in the contentions of defendant that the matter was *ultra vires. Union Indemnity Co. v. Perry,* 198 N. C., 286; *Realty Co. v. Charlotte,* 198 N. C., 564.

The agreed case is lengthy and the able briefs, *pro* and *con,* set forth fully the contentions of the litigants. We do not think that any of the contentions of defendants can be sustained. The defendants were of full age, *sui juris,* signed the petition for the improvement; the streets were dedicated to the city; defendants returned the land for tax to plaintiff; no appeal from the assessment was made by defendants; they saw the plaintiff making improvements on the streets from which they received the benefit of having paved streets; the General Assembly ratified and approved the improvement. The defendants must "keep the whiteness of their souls" and pay for the assessment.

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

Affirmed.

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KERMIT LOWRY v. D. MARVIN BARKER.

(Filed 19 May, 1937.)

**1. Appeal and Error § 39—**

Appellant's exceptions relating to an issue answered in his favor will not be sustained.

**2. False Imprisonment § 2—Good faith of officer making arrest is material on question of actual damages recoverable by plaintiff.**

Under the facts of this case, the good faith of an officer in making an arrest under an invalid warrant *is held* material on the question of the amount of actual damages, if any, plaintiff is entitled to recover for the false arrest, and an instruction to this effect is *not* held prejudicial in view of the jury's finding upon supporting evidence that plaintiff suffered no actual damages.

**3. Escape § 5—Evidence held for jury on contention of defendant officer that assault was result of plaintiff's attempt to escape.**

Plaintiff brought this action for wrongful assault, and offered evidence in support of his contention that after he had been taken to jail he was assaulted and beaten, without provocation, by the officer who had arrested him. Defendant officer introduced evidence to the effect that a highway patrolman had helped him arrest plaintiff, that after plaintiff had been taken to the jail and while a cell was being prepared for him, plaintiff attacked the patrolman in an attempt to escape, and that defendant officer had beaten them both with a small stick in order to stop the fight and separate them. *Held:* The conflicting evidence was properly submitted to the jury, under proper instructions, and the jury's verdict that plaintiff had not been wrongfully assaulted is upheld.

APPEAL by plaintiff from *Parker, J.*, at October Term, 1936, of ROBESON. No error.

This is an action to recover damages, both compensatory and punitive, (1) for the wrongful and unlawful arrest of the plaintiff by the defendant, and (2) for an assault and battery on the plaintiff by the defendant, after the unlawful arrest, and while the plaintiff was wrongfully detained by the defendant.

The issues arising on the pleadings were answered by the jury as follows:

"1. Did the defendant wrongfully and unlawfully arrest the plaintiff and restrain him of his liberty, as alleged in the complaint? Answer: 'Yes.'

"2. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: 'One penny.'

"3. Did the defendant wrongfully and unlawfully assault and beat the plaintiff, as alleged in the complaint? Answer: 'No.'

"4. What compensatory damages, if any, is the plaintiff entitled to recover of the defendant? Answer: .....

"5. What punitive damages, if any, is the plaintiff entitled to recover of the defendant? Answer: ....."

From judgment that plaintiff recover of the defendant one penny and the costs of the action, the plaintiff appealed to the Supreme Court, assigning errors in the trial.

*Varser, McIntyre & Henry for plaintiff.*
*McLean & Stacy for defendant.*

CONNOR, J. On or about 27 September, 1935, between 9:30 and 10:00 o'clock at night, the defendant, a rural policeman and deputy sheriff of Robeson County, arrested the plaintiff, who was at work on the Robeson County Fair Grounds, near the town of Lumberton, N. C. The arrest

was made under and by virtue of a criminal warrant, which had been issued by a justice of the peace of Robeson County, upon the verified complaint, in writing, of Sanford Prevatte. The warrant was addressed to the sheriff or other lawful officer of Robeson County, and commanded the said sheriff or other officer to arrest John Doe, and take him before the recorder of Robeson County to answer the criminal charge made in the complaint. Sanford Prevatte was present when the arrest was made, and had identified the plaintiff as the man who had committed the crime charged in the complaint. The defendant did not know the plaintiff. He had never seen him before the arrest, and relied upon the identification made by Sanford Prevatte, when he arrested him under and by virtue of the warrant, which had been placed in his hands by the sheriff of Robeson County.

The court was of opinion that the warrant was void as a matter of law, and that for that reason the arrest of the plaintiff by the defendant was unlawful and wrongful, and so instructed the jury. See *Hanie v. Rice*, 194 N. C., 234, 139 S. E., 380; *Bryan v. Stewart*, 123 N. C., 93, 31 S. E., 268; *Mead v. Young*, 19 N. C., 521; *Haskins v. Young*, 19 N. C., 528; 16 C. J., 306. In accordance with the instruction of the court, the jury answered the first issue "Yes." This answer was in accordance with the contention of the plaintiff. His assignments of error with respect to the trial of the first issue are not sustained.

With respect to the second issue, which involves the damages, if any, which the plaintiff is entitled to recover of the defendant for his unlawful and wrongful arrest and imprisonment, the court instructed the jury substantially as follows:

"Having answered the first issue 'Yes,' it will be your duty, gentlemen of the jury, to award the plaintiff at least nominal damages.

"Nominal damages are damages awarded for the violation of a right, and are awarded when no actual loss has been sustained by the plaintiff as the result of the violation by the defendant of a right of the plaintiff; to illustrate, a penny and costs would be nominal damages.

"The burden on the second issue of showing damages other than actual damages is on the plaintiff. Before you can award him actual damages, the plaintiff must have satisfied you by a preponderance of the evidence that he is entitled to recover actual damages under the rules of law as the court will instruct you.

"The damages which the plaintiff in an action for false arrest or false imprisonment may recover of the defendant, are usually by the very nature of the wrong, incapable of exact measurement, and must rest largely in the discretion of the jury. Unless the defendant is shown to have acted maliciously, or with wanton and reckless disregard of his duty and of plaintiff's rights, the damages should be compensatory only,

that is, such as will fairly compensate the plaintiff for his loss of time, his expenses incurred in procuring his release from the false imprisonment, and the indignity, humiliation, and suffering which he has undergone as the result of his wrongful and unlawful arrest and imprisonment. Liabilities incurred by the plaintiff for medical treatment of his bodily injuries, if any, may be recovered, although they have not been paid by the plaintiff, and although the plaintiff was permitted after his arrest to go at large, within a short time, either upon his own recognizance or upon bail. There is no precise measure of damages in cases of this kind. It is impossible to ascertain the exact equivalent in money for bodily or mental pain. As the court has instructed you, the damages which the plaintiff in an action for false arrest and imprisonment may recover are usually, by the very nature of the wrong done, incapable of exact measurement, and must rest largely in the discretion of the jury.

"This is an action, with respect to the first and second issues, for false arrest and false imprisonment, and as the court has charged you, the warrant under and by virtue of which the arrest was made was void, and the defendant, although an officer, under the circumstances shown by all the evidence, was not justified in arresting the plaintiff without a warrant. Good faith on his part has nothing to do with the question of his liability to the plaintiff for the unlawful and wrongful arrest and imprisonment. It is presumed that every one knows the law, but the good faith of the defendant in making the arrest is very material on the question of the amount of damages which the plaintiff is entitled to recover of the defendant in this action.

"As I have instructed you, it is your duty, if you answer the first issue 'Yes,' by your answer to the second issue, to award the plaintiff at least nominal damages; but before you can award the plaintiff actual damages, the burden of the second issue being on the plaintiff, he must satisfy you by the preponderance of the evidence that he is entitled to recover of the defendant actual damages. In that case, your answer to the second issue will be the amount in dollars and cents which you shall find from all the evidence will fairly compensate the plaintiff for all the injuries which you shall find from the evidence he has suffered as the result of his unlawful and wrongful arrest and imprisonment by the defendant."

There are no errors in the instructions of the court to the jury with respect to the second issue, as contended by the plaintiff on this appeal. The evidence with respect to this issue was conflicting. The contention of the defendant that plaintiff suffered no loss or injury as the result of his arrest or imprisonment, was supported by evidence, and was sustained by the jury. The contention of the plaintiff to the contrary, while supported by evidence, was rejected by the jury. Under all the

facts and circumstances as shown by the evidence for the defendant, his good faith in making the arrest was very material on the question as to the amount of actual damages, if any, which the plaintiff was entitled to recover of the defendant in this action. There was no error in the instruction to that effect. However, if it should be otherwise, the error would not be prejudicial, as the jury found that plaintiff was entitled to recover only nominal damages. See *Hicks v. Nirens,* 210 N. C., 44, 185 S. E., 469; *Rhodes v. Collins,* 198 N. C., 23, 150 S. E., 492; *Sawyer v. Jarvis,* 35 N. C., 179; 25 C. J., 561; and McCormick on Damages, page 379.

The facts with respect to the third issue, which involves the liability of the defendant for an assault and battery upon the plaintiff, as shown by all the evidence, are as follows:

After the defendant, with the aid of two State Highway Patrolmen, had arrested the plaintiff at the Robeson County Fair Grounds, and had taken him in an automobile to the county jail, and while the plaintiff was in the jail in the custody of the defendant, the defendant struck the plaintiff about his shoulders with a stick, thereby causing injuries from which plaintiff suffered for several weeks.

The evidence for the plaintiff tended to show that the assault and battery which the defendant made upon him in the jail was without provocation or excuse, but was wrongful and malicious on the part of the defendant.

The evidence for the defendant tended to show that after he had taken the plaintiff to the jail, and while he was preparing a cell for the plaintiff, the plaintiff, in an attempt to escape from the jail, assaulted one of the highway patrolmen, who had accompanied the defendant from the fair grounds to the jail, and that the plaintiff and the highway patrolmen thereupon engaged in a fight, in the presence of the defendant; and that while they were fighting, and for the purpose of causing them to desist, the defendant struck both of them with a small stick which he had in his hand. After plaintiff and the patrolman stopped fighting, and were separated, the plaintiff, at his request, was taken to a hospital, where he received medical treatment for his injuries. The defendant's evidence tended to show that the injuries were not serious.

The conflicting contentions of the plaintiff and the defendant with respect to their answer to the third issue were submitted by the court to the jury, under instructions as to the law applicable to the facts as the jury should find the facts to be from the evidence, which are free from error. Plaintiff's assignments of error with respect to the trial of the third issue cannot be sustained.

The jury having answered the third issue "No," under the instructions of the court, did not answer the fourth or the fifth issue. Assign-

ments of error with respect to the trial of these issues are not sustained.

A careful examination of the record in this appeal discloses no error for which the plaintiff is entitled to a new trial. There was evidence tending to support the contentions of the plaintiff. These contentions were fully and fairly submitted by the court to the jury. They were rejected by the jury.

The judgment in accordance with the verdict is affirmed.

No error.

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MRS. BERTHA DEBNAM v. TOWN OF WHITEVILLE.

(Filed 19 May, 1937.)

**1. Trial § 22—**

Upon motion to nonsuit, all the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and she is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

**2. Appeal and Error § 21—**

Where the charge of the lower court is not in the record, it will be presumed that it is without error.

**3. Municipal Corporations § 14—Evidence held for jury on question of constructive notice of city of obstruction on sidewalk.**

In this action against a municipality to recover for injuries sustained by plaintiff in a fall, on a dark night, over timbers obstructing a sidewalk of the town, the evidence that the town had placed the timbers there in working its adjacent street, and that the timbers had been in such dangerous position for a length of time sufficient to give the town implied notice thereof, *is held* sufficient to be submitted to the jury, and defendant town's motion to nonsuit on the ground that the evidence did not show that it had either actual or implied notice of the condition was properly refused.

APPEAL by defendant from *Sink, J.*, at Special September Term, 1936, of COLUMBUS. No error.

This is an action for actionable negligence brought by plaintiff against the defendant, alleging damage.

The plaintiff, Mrs. Bertha Debnam, testified in part: "In the early part of the night of 12 May, 1934, I was coming home from down the street where I had been to the picture show. . . . I took Columbus Street. . . . In order to travel from the main street to my home, I travel Columbus Street a block and then come up northwardly almost a block. . . . I can't remember when I had been on that street before on foot. I had been on it in a car, but not walking. About 8 o'clock,

on 12 May, it was dark, there was not anything but starlight; there was no electric light on Columbus Street along there. There was a light on down the street, but it didn't throw any reflection on Columbus Street. There are some trees right above the side where I was walking but not right at it. There were leaves on the trees, but there were not trees where this lumber was; there were weeds. There is a light at the intersection of Columbus Street and the street I live on, but the trees hid that; they were east of me and obscured the light. Franklin Street runs parallel with the main street. I was walking on what was supposed to be the sidewalk. I didn't know anything about the obstruction until my foot went in it. I was walking awful fast, and I always carried my head up. I was walking on the sidewalk where I was supposed to be, there was not anything but a path, and when I took a step I was in something; naturally, when I stumbled in one thing I caught on the other foot, and went into something else, and it threw me over backwards, and the next thing I knew I was in a pile of lumber, or timbers. I did not see it, but I could only feel it; it seemed like a pile of lumber. The part I caught my foot in was across the portion I was walking on. My left hip was bruised as large as my hand on this side; my right side and neck were twisted. I went backwards; I didn't go forward. I caught with one foot and twisted and fell backwards on those timbers. I was not able to get up by myself right then; when I got out I crawled out. I did not get any assistance until I got on the sidewalk in front of my home, where I met my son-in-law and daughter."

K. W. Taylor, a witness for plaintiff, testified, in part: "Q. With reference to those timbers, did you go there immediately afterwards and see where she fell? A. Yes, sir. Q. Had you seen those timbers there before she fell? A. No, sir; I had not noticed. Immediately after the injury, when I went there, I found the timbers on the street there, between where the vehicles go and where you walk, and scattered along the edge. They were scattered, they were not piled straight. The ends of the timbers were sticking out on the traveled portion where travelers had to walk. There were boards in the path part of the sidewalk. . . . The light was not plain enough to see anything. You had to go down close to examine it and see the timber. She told us where she fell and my wife and I went along slow and examined it, and found the timbers she fell over. You could not see it by riding by. There were no lights to warn travelers that the timbers were there. It was not roped or wired. I don't remember that there were any weeds there. *Yes, I know something about the town working the street along there before this. They were grading the street with shovels, cleaning out this drain and throwing it out in the middle of the street, grading both sides.* I could not say how long this was before 12 May. It would not run

into months. I would not say weeks; it was very shortly before; it was before 12 May. The accident was after the work. The town forces were doing the work. I can't say how long it was before she was hurt, I don't think it was as much as a month. I did not know those boards were there before Mrs. Debnam fell. *I saw them in the ditch before the town went to work there. They were not in the ditch after the town did the work.* Before they worked there they were in the ditch. After they worked there, up until the injury, I did not see them there until she fell over them. *They were not in the ditch when I went there the night after the injury. They were lying on the sidewalk. They were the same pieces that had been in the ditch.*"

Brice Thompson, a witness for plaintiff, testified in part: "I live in the town of Whiteville, and was living here at the time of this alleged accident. I was familiar with Columbus Street. With reference to the condition of that street, they were building a new brick home and right in this special place floored a place across the ditch. The ditch was shallow, about a foot deep. The street owns it, and a bunch of men were shoveling the dirt out of the street, and throwing the lumber on the street. I suppose they worked there probably three or four days. I don't know who had supervision of the men working in the street. I saw the timbers after they were removed from the ditch. They were on the curb line of the sidewalk. With reference to weeds and grass, the sidewalk was pretty well grown up. There was a path that people walked. I don't recollect that I ever saw any light at night or any flag or anything to indicate to people walking along that these timbers were piled there. They were there before the accident, and afterwards. I passed them every day. They stayed there from the time they were put there until the house was built, about 2 or 3 months."

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. What amount, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$1,000.'"

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

*Tucker & Proctor and Varser, McIntyre & Henry for plaintiff.*
*Powell & Lewis and Lyon & Lyon for defendant.*

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence the defendant in the court below made motions for judg-

ment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

The evidence which makes for plaintiff's claim, or tends to support her cause of action, is to be taken in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

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. There is no issue as to contributory negligence and none set up in the answer. The only serious contention made by the defendant is that there was no sufficient evidence to be submitted to the jury that the defendant had either express or implied notice of the defects in the sidewalk.

We think the evidence sufficient to be submitted to the jury: (1) That the defendant town, in grading the street, put the boards on the sidewalk, and the danger was created by the town itself. (2) That the boards had been on the sidewalk such a length of time as to give the town implied notice.

In *Markham v. Improvement Co.*, 201 N. C., 117 (120), citing numerous authorities, it is said: "The law imposes upon the governing authorities of a city or town the duty of exercising ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who may have occasion to use them in a proper manner. Such authorities are liable only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect and the occurrence of an injury; he must show that the officers of the city knew, or by ordinary diligence might have known, of the defect. But actual notice is not required. Notice of a dangerous condition in a street may be implied, and indeed will be imputed to the city or town if its officers should have discovered it in the exercise of due care. This principle has been adhered to in our decisions and is now regarded as firmly established." *Kinsey v. Kinston,* 145 N. C., 106; *Bailey v. Winston,* 157 N. C., 252; *Gasque v. Asheville,* 207 N. C., 821.

For the reasons given, we find no error in the judgment of the court below.

No error.

MRS. RALPH LEACH, JANETTE LEACH, MRS. LOUISE LEACH MARTIN, MRS. MARY LEACH GRAHAM, AND MRS. RALPH LEACH, GUARDIAN OF RALPH LEACH, v. J. R. PAGE, INDIVIDUALLY; J. R. PAGE, ADMINISTRATOR AND TRUSTEE OF THE ESTATE OF RALPH LEACH, DECEASED; MRS. FLORA SHAW PAGE, EXECUTRIX OF ESTATE OF ROBERT N. PAGE, DECEASED; HENRY A. PAGE, MARY F. PAGE, EMMA C. PAGE, FRANCIS PAGE WILDER, J. R. PAGE, WACHOVIA BANK & TRUST COMPANY, EXECUTOR OF ESTATE OF FRANK PAGE, DECEASED; AND PAGE BROTHERS, COPARTNERS, TRADING UNDER THE FIRM NAME OF PAGE & COMPANY; MRS. F. C. PAGE, MRS. ARTHUR W. PAGE, MRS. LEILA T. PAGE AND MRS. CHARLES G. LORING, COPARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF PAGE BROTHERS; PAGE TRUST COMPANY, A NORTH CAROLINA BANKING CORPORATION; S. J. HINSDALE, LIQUIDATING AGENT OF PAGE TRUST COMPANY; AND GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA.

(Filed 19 May, 1937.)

**1. Pleadings § 20—Pleading will be liberally construed upon demurrer.**

Upon examination of a pleading to determine its sufficiency as against a demurrer, its allegations will be liberally construed with a view to substantial justice, C. S., 535, and every reasonable intendment and presumption will be given the pleader, and the demurrer overruled unless the pleading is wholly insufficient.

**2. Pleadings §§ 2, 16—Held: Demurrer for misjoinder of parties and causes should have been overruled in this action.**

The widow and heirs instituted this action against the administrator and trustee of the estate and the corporate surety on his bond and the receivers of the corporate surety, alleging that the administrator had invested funds of the estate in a family partnership of which he was a member; against the members of the partnership, including another family partnership as a member of the larger firm, and the personal representatives of deceased partners, upon written agreement of the partnership to be responsible for the funds; against the receivers of a bank alleging that the family partnerships were subsidiaries of the bank and that the receiver had assets of the partnerships which in equity belonged to plaintiffs; that demand for repayment of the funds had been made on each of defendants, and demand refused. *Held:* The complaint relates a connected series of events and relationships, growing out of the same transaction or connected with the same subject of action, and a demurrer for misjoinder of parties and causes should have been overruled.

**3. Executors and Administrators § 30c—Allegations held insufficient to show waiver of liability of administrator by acceptance of notes of third party for claim.**

In an action against an administrator and trustee for wrongful investment of funds of the estate in a partnership of which he was a member, his demurrer on the ground that his personal liability had been discharged and waived by the beneficiaries of the estate, accepting the obligation and notes of the partnership therefor, should be overruled, where the com-

plaint does not show that the notes of the partnership had been paid or that its notes were accepted with the intention to waive and discharge the liability of the administrator and trustee.

**4. Same—Administrator may be sued for wrongful investment and refusal to pay over or account for funds without demand for settlement of estate.**

An administrator and trustee is subject to suit upon allegations that he had invested funds of the estate in and through his own partnership and had failed and refused to pay over or account for same, C. S., 135, and a demurrer on the ground that the action would lie only to compel the filing of a final account and settlement of the estate is untenable.

**5. Pleadings § 18—**

Positive defenses may not be taken advantage of by demurrer.

**6. Receivers § 9—**

Allegations that defendant receivers held assets belonging to another defendant, and that such assets in equity were held for plaintiffs' benefit and should be subjected to plaintiffs' claim against such other defendant, *is held* to state a cause of action against the receivers.

**7. Pleadings §§ 20, 27—**

Indefiniteness and uncertainty in a complaint, which sufficiently states a cause of action, may not be taken advantage of by demurrer, the remedy being by motion to make the pleading more definite by amendment. C. S., 537.

APPEAL by plaintiffs from *Moore, Special Judge,* at May Term, 1936, of MOORE.

Defendant J. R. Page, administrator, and Gurney P. Hood, Commissioner of Banks, and S. J. Hinsdale, liquidating agent, in charge of Page Trust Company, filed separate demurrers on the ground that the complaint did not state facts sufficient to constitute a cause of action as to them, and that there was a misjoinder of parties and causes of action.

From judgment sustaining the demurrers on both grounds and dismissing the action as to the demurring defendants, plaintiffs appealed.

*Douglass & Douglass and R. L. McMillan for plaintiffs.*
*U. L. Spence and W. D. Sabiston, Jr., for defendants.*

DEVIN, J. The appeal presents for review the ruling of the court below in sustaining the demurrers of certain defendants and dismissing the action as to them.

This requires an examination of the complaint, particularly with reference to the objections pointed out by the demurrers, in order to determine its sufficiency. This must be done in accord with the uniform rule that for the purpose of ascertaining the meaning and determining the effect of a pleading its allegations shall be liberally construed with

a view to substantial justice between the parties (C. S., 535), and that every reasonable intendment and presumption be made in favor of the pleader. *Blackmore v. Winders,* 144 N. C., 212.

The allegations of the complaint may be briefly summarized as follows: That the plaintiffs are the widow and children of Ralph Leach, deceased, and sole distributees of his estate, and the demurring defendant J. R. Page is the duly appointed and qualified administrator and trustee of the estate of Ralph Leach, deceased, and has been acting as such since 1918, and the Page Trust Company (now represented by the demurring defendants, Gurney P. Hood, Commissioner of Banks, and S. J. Hinsdale, liquidating agent) is the surety on the bond of J. R. Page; that in 1926 J. R. Page, administrator and trustee, invested $15,000, the funds of said estate, in or through the partnership styled Page & Co., of which J. R. Page was and is a member, defendant J. R. Page stating the investment would be in bonds, and that plaintiffs could get their money whenever desired; that interest was paid from time to time, and $1,200 on the principal, until 1 December, 1932, when payments ceased; that Page & Company, by letter, advised plaintiffs that the balance of $13,800 was invested in mortgage bonds on real estate, and that "Page & Co. agree that they are responsible for the investment of this amount of money"; that thereafter, when plaintiffs complained to J. R. Page of their failure to receive payments, he told them to see Ralph Page, the secretary and treasurer of the partnership of Page & Co., and get their interest, and that Ralph Page executed for and on behalf of Page & Co. a series of promissory notes to the plaintiffs in the aggregate sum of $13,800, said notes being signed Page & Co., by Ralph Page; that plaintiffs have demanded payment of J. R. Page, administrator, Page & Co., Page Trust Co., Page Brothers, and the other defendants, and each of the defendants has failed and refused to pay or account.

The plaintiffs further allege that J. R. Page, administrator and trustee, reported to the clerk of the Superior Court that the fund was invested in certain bonds, and that J. R. Page now says he does not know anything about the bonds, or whether there were any such bonds.

The plaintiffs further allege, in paragraph 11 of the complaint, that Page & Co. and Page Brothers were and are subsidiaries of Page Trust Co., and "that Page Trust Co., or its liquidating agent, now holds certain assets and securities of Page & Co. and Page Brothers, which assets and securities the plaintiffs say (are) held by Page Trust Co., surety for J. R. Page, administrator and trustee, for the benefit of the plaintiffs, (and) are in equity owing to the plaintiffs, and should be applied to the payment of said investment and indebtedness."

(1) It is apparent that the complaint relates a connected series of events and relationships, growing out of the same transaction or con-

nected with the same subject of action, and that the demurrer for misjoinder of parties and causes of action cannot be sustained. *Lee v. Thornton,* 171 N. C., 209; *Trust Co. v. Peirce,* 195 N. C., 717; *Cotten v. Laurel Park Estates,* 195 N. C., 848; *Shuford v. Yarborough,* 197 N. C., 150; *Shaffer v. Bank,* 201 N. C., 415. "Where a general right is claimed arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter in one suit." *Young v. Young,* 81 N. C., 92.

(2) The defendant J. R. Page, administrator, demurring on the ground that, as to him, the complaint does not state facts sufficient to constitute a cause of action, specifies as the ground of his objection "that it appears on the face of the complaint that if as a matter of fact J. R. Page as administrator was at any time liable to the plaintiffs upon his official bond with respect to notes, bonds, and other evidences of indebtedness declared upon in the complaint, such liability has been discharged and waived as against J. R. Page in his capacity as administrator by the acceptance of the obligation and liability of Page & Co., as evidenced by the letter and promissory notes of Page & Co. set out in the complaint."

The above quoted portion of this defendant's pleading seems to go beyond the true office of a demurrer in that it sets out deductions from the facts alleged in the complaint which do not necessarily follow. The fact that Page & Co. executed and delivered to the plaintiffs promissory notes for the amount of the fund invested by the administrator with the partnership of which he was a member, and which said promissory notes have not been paid, would not, considered in the light most favorable to the pleader, constitute a waiver and discharge of the liability of the administrator and trustee, unless so intended.

The defendant J. R. Page, administrator, further sets up in his demurrer that the complaint does not state sufficient facts to constitute a cause of action as to him in that plaintiffs do not allege that defendant has failed to file his final account, and that the action is for the recovery of certain funds and not for settlement of the estate.

But it is substantially alleged in the complaint that defendant J. R. Page, as administrator and trustee, received the estate in 1918, and invested the funds of the estate in and through his own partnership in 1926, and now fails and refuses to pay over or account for same, and there is, under our system of code pleading, nothing to prevent the beneficiaries from bringing an action in the Superior Court. C. S., 135. The distributees of an estate may bring suit originally in the Superior Court against the administrator for an accounting and for a breach of his bond. *Bratton v. Davidson,* 79 N. C., 423; *Fisher v. Trust Co.,* 138 N. C., 91; *S. v. McCanless,* 193 N. C., 200.

Neither of the defendants has demurred on the ground that the plaintiffs did not have legal capacity to sue (C. S., 511), and on the argument it was admitted that this point was not raised. "The defense of real party in interest may only be made by affirmative allegations." *Nall v. McConnell, ante,* 258; *Morrow v. Cline, ante,* 254.

The good faith of the administrator and the other matters urged as a defense to plaintiffs' allegations may not be presented by a demurrer.

(3) Considering now the separate demurrer of the defendants who represent Page Trust Co., their objection that, as to them, the complaint does not state facts sufficient to constitute a cause of action cannot be sustained, particularly in view of paragraph 11 of the complaint. While this allegation may be open to the criticism that the facts are not set forth with such definiteness and precision as might be desired, viewing this allegation, as against a demurrer, in the light most favorable for the pleader, we think it is susceptible of the construction that the plaintiffs have there alleged, in addition to the fact of the close relationship between the defendants, that the Page Trust Company now holds certain securities of Page & Company, and that these securities are held by Page Trust Company for the benefit of the plaintiffs, and that in equity they belong to them and should be applied toward the payment of the indebtedness declared on.

It is provided by C. S., 537, if a pleading be indefinite or uncertain, the court may, on motion, require the pleading to be made definite and certain. If the facts constituting a cause of action are substantially stated in the complaint, or can be inferred therefrom by reasonable intendment, though the allegations may be imperfect or incomplete, the proper mode of correction is not by demurrer but by motion to make the pleading more definite by amendment. *Blackmore v. Winders,* 144 N. C., 212; *Moore v. Edmiston,* 70 N. C., 510.

In *Blackmore v. Winders, supra, Walker, J.,* speaking for the Court, uses this language: "A complaint cannot be overthrown by a demurrer unless it is wholly insufficient. If 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." *Brewer v. Wynne,* 154 N. C., 467; *Hoke v. Glenn,* 167 N. C., 594; *Lee v. Thornton,* 171 N. C., 209; *Horney v. Mills,* 189 N. C., 728; *S. v. Bank,* 193 N. C., 524; *Seawell v. Cole,* 194 N. C., 546; *Meyer v. Fenner,* 196 N. C., 476; *Ins. Co. v. Dey,* 206 N. C., 368; *Fairbanks, Morse & Co. v. Murdock Co.,* 207 N. C., 348;

*In re Trust Co.*, 207 N. C., 802; *Bowling v. Bank*, 209 N. C., 463. It is the purpose of the code system of pleading that actions be tried upon their merits. *Hoke v. Glenn, supra.*

"If any of the causes of action are good, the demurrer cannot be sustained." *S. v. McCanless, supra.*

For the reasons stated, we conclude that there was error in sustaining the demurrers.

Reversed.

C. E. RUSHING v. H. LEE ASHCRAFT.

(Filed 19 May, 1937.)

**1. Attachment § 18—**

The filing of undertaking by defendant does not preclude him from traversing the ground upon which the attachment was based, and the issue may be determined before trial on the merits or, if demanded, with the trial of the main issue between the parties. C. S., 815.

**2. Pleadings § 22—**

Process may be amended to justify the original service or to validate previous action taken only when rights of third persons have not intervened.

**3. Attachment § 24—**

Where the ground of attachment as originally laid is not supported by evidence at the trial, but the original process is amended to allege another ground supported by evidence, the surety on the undertaking is relieved of liability since his obligation was entered into with reference to the cause as it stood at the time of his signature.

APPEAL by defendant from *Warlick, J.*, at February Term, 1937, of UNION. Modified and affirmed.

Action on a promissory note for $570.00. Plea, failure of consideration.

Summons was personally served on defendant 25 December, 1935, in Union County, and at the same time as ancillary thereto warrant of attachment was issued and served on defendant and attachment levied on an automobile then present. On same day undertaking for release of the automobile from attachment was executed by defendant with one Townley R. Stevens as surety in sum of $1,200 and automobile released. The basis for the warrant of attachment was stated in the affidavit, at the time it was issued, to be "that the defendant conceals and secretes his property from plaintiff with intent to cheat and defraud the plaintiff of his rights." Complaint was filed 7 January, 1936, and answer filed 6 February, 1936, wherein, among other defenses, defendant denied that he concealed or secreted his property from plaintiff with intent to cheat

and defraud the plaintiff of his rights, and demanded a jury trial on that allegation, and asked that the undertaking in attachment be canceled.

At the trial plaintiff moved to amend the original affidavit in the attachment by the averment that "the defendant is a nonresident of the State of North Carolina and resides in the State of South Carolina." This motion, over the objection of defendant, was allowed in the discretion of the court, and defendant excepted. Upon issues submitted to the jury, there was verdict for the plaintiff for the amount of the note and interest. There was no evidence that defendant had concealed or secreted his property with intent to defraud. It was admitted that defendant was at all times and still is a resident of the State of South Carolina.

The court rendered judgment for plaintiff on the verdict, and further found from the admissions and testimony that defendant was at time of issuance of summons and attachment, and still continued to be, a nonresident of the State of North Carolina, and thereupon denied defendant's motion to cancel defendant's undertaking, and adjudged that the attachment proceedings were valid and legal. Defendant appealed.

*Sikes & Richardson for plaintiff, appellee.*
*E. E. Collins and A. M. Stack for defendant, appellant.*

DEVIN, J. Here the plaintiff invoked the aid of the provisional remedy of attachment as ancillary to his action, and the primary question presented by the appeal relates to the validity of the defendant's undertaking therein. C. S., 815.

It was held in a well reasoned opinion by *Clarkson, J.*, in *Bizzell v. Mitchell,* 195 N. C., 484, that by giving a bond or undertaking the defendant in attachment is not estopped to traverse the ground on which the warrant was based. And it was also decided in that case that when defendant has given bond the truth of the facts alleged in the affidavit to procure the warrant may be determined before the trial on the merits, or, if demanded, may be tried with the main issue at the time of the trial, and that separate issues, if supported by evidence, may properly be submitted. McIntosh, sec. 812 (3). In the case at bar the allegation of fraudulent concealment of defendant's property, contained in the original affidavit, was unsupported by any evidence. The basis for issuing the writ, therefore, failed. Upon the trial the alleged ground for attachment was disproved. However, the court below in its discretion permitted the plaintiff to amend the affidavit to allege the nonresidence of defendant, and thus insert as an amendment an admittedly valid basis for attachment of defendant's property. The effect of the amendment allowed, as it relates to the undertaking and the surety, is one of the principal questions here presented for decision.

The power of the court to amend process and pleading, both by statute and under the decisions of this Court, is ample. Indeed, to *Chief Justice Pearson* it seemed that the statute allowed amendments on a scale so liberal that it might well be said "anything may be amended at any time." *Garrett v. Trotter,* 65 N. C., 430; *Hicks v. Nivens,* 210 N. C., 44. This principle has been upheld by this Court in many authoritative cases, in the administration of justice, in order that the right of all the parties might be preserved. *Sheldon v. Kivett,* 110 N. C., 408; *Thornburg v. Burton,* 197 N. C., 193. In order that the defendant might be brought into court to answer the plaintiff's suit, that the defendant's property be held to await the determination of the litigated questions, irregularities have been frequently disregarded and amendments liberally allowed between the parties.

But amendment may not be permitted where the rights of third persons are injuriously affected. And where the surety on defendant's undertaking has executed a bond in a substantial sum, in accordance with the statute, to discharge the lien on property which has been attached by virtue of a warrant based solely on an unfounded allegation in the affidavit, the allowance of an amendment thereafter to set up a new ground of attachment would have the effect of imposing on the surety an obligation which he did not assume. The process may be amended to justify the original service or to validate the previous action taken, only when the intervening rights of innocent persons are not prejudiced. *Clendenin v. Turner,* 96 N. C., 416; *Page v. McDonald,* 159 N. C., 38; McIntosh Prac. & Proc., sec. 801 (3) (c); McIntosh Prac. & Proc., sec. 487.

When the surety signed the bond he entered into the obligation with reference to the cause as it then stood. *Gilna v. Fidelity & Deposit Co.,* 83 Mont., 231.

When a new element of liability is introduced by the amendment, the surety is discharged. 74 A. L. R., 913 (note); *Bryan v. Bradley,* 1 N. C. (Taylor's Reports), 177; *Michelin Tire Co. v. Bentel,* 184 Cal., 315; *Wilson v. Fisk,* 22 R. I., 100; 5 American Jurisprudence, sec. 914.

The ruling of the court below denying the motion to discharge the undertaking was based solely on the finding that the defendant was a nonresident. There was no finding, nor evidence, that the only ground for attachment stated in the original affidavit at the time the undertaking was signed by the surety had any foundation in fact. All the evidence was to the contrary. There was error in denying defendant's motion to release the defendant's undertaking.

There was sufficient evidence of consideration for the execution of the note sued on, and the exception to the instruction of the court on that issue cannot be sustained.

The appellant's exception to the ruling of the court below in the admission of evidence is without merit.

We conclude that the judgment must be modified by striking out the last paragraph thereof, wherein the motion to release the undertaking was denied, and that in all other respects the judgment be affirmed.

Modified and affirmed.

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C. S. DAVIS, EXECUTOR OF THE ESTATE OF S. G. GARNER, AND DR. W. N. McDUFFIE, EXECUTOR OF H. M. SHIELDS, v. W. J. COCKMAN AND DORA COCKMAN, HIS WIFE.

(Filed 19 May, 1937.)

**1. Judgments § 5—Private examination of wife need not be taken in confession of judgment by husband and wife in favor of creditors.**

A judgment by confession in favor of creditors against a husband and wife is valid if taken in conformity with C. S., 623, 624, 625, and the private examination of the wife is not necessary, the statute, C. S., 2515, being applicable only to contracts between husband and wife, and the wife being *sui juris* and having capacity to make the contract sued on, C. S., 2507.

**2. Limitation of Actions § 2a—**

An action on a judgment by confession is not barred until ten years after its rendition. C. S., 437.

APPEAL by defendants from *Finley, Emergency Judge,* at December Term, 1936, of MOORE. No error.

This is an action brought by plaintiffs against defendants to recover $881.19, on a judgment rendered on 29 December, 1925, with interest from 29 December, 1925, and $7.00 cost.

The basis of the action is a confession of judgment rendered in favor of H. M. Shields and S. G. Garner, copartners, doing business under firm name of Shields & Garner, against W. J. Cockman and Dora Cockman. The plaintiffs are the duly appointed and qualified executors of the estates of Shields and Garner.

The present action was instituted 17 December, 1935, and summons and copy of complaint served on defendants 24 December, 1935. In the answer defendants set up as a defense the illegality of the judgment.

The issues submitted to the jury, and their answers thereto, were as follows:

"1. What amount, if anything, are the defendants indebted to the plaintiffs? Ans.: '$881.19, with interest from 29 December, 1925.'

"2. Is plaintiffs' cause of action barred by the statute of limitations? Ans.: 'No.'"

Judgment was rendered on the verdict. The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

*M. G. Boyette and Gavin & Jackson for plaintiffs.*
*W. R. Clegg for defendants.*

CLARKSON, J. The defendants contend that the questions involved are: (1) Should the motion for nonsuit at the close of plaintiffs' evidence have been allowed? (2) Is the demurrer *ore tenus* interposed by the defendants good? We do not think defendants' contentions can be sustained.

We think the confession of judgment was taken in accordance with the statute. C. S., Art. 24, secs. 623, 624, and 625.

C. S., 437, in part, is as follows: "Within ten years an action—(1) Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment," etc. The record discloses that the present action was instituted within 10 years.

The court below gave the following instructions, which we think correct: "Gentlemen, there are two issues submitted, first: 'What amount, if any, are the defendants indebted to the plaintiffs?' I charge you, if you believe the evidence and are satisfied from it by the greater weight, that you will answer that issue 'Eight hundred and eighty-one dollars and nineteen cents, with interest from 29 December, 1925.' The second issue is: 'Is the plaintiffs' cause of action barred by the statute of limitations?' I charge you that, if you believe the evidence and are satisfied from it by the greater weight, that you will answer that issue 'No.' Take the issues, gentlemen, and return your verdict." The jury returned the verdict as above set forth.

Defendants contend that the charge is contrary to C. S., 2515, which is as follows: "No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract is in writing, and is duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may

hereafter be required by law in the probate of deeds of *femes covert,* it shall appear to the satisfaction of such officer that the wife freely executes such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be."

The confession of judgment in the present action, is not between husband and wife, but by creditors against defendants. Therefore the above statute is not applicable.

C. S., 2507, is as follows: "Subject to the provisions of section 2515 of this chapter, regulating contracts of wife with husband affecting *corpus* or income of estate, every married woman is authorized to contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried, but no conveyance of her real estate shall be valid unless made with the written assent of her husband as provided by section six of article ten of the Constitution, and her privy examination as to the execution of the same taken and certified as now required by law."

The defendants made the contract with plaintiffs and the confession of judgment was based on same. By statute the defendant Dora Cockman is *sui juris* and had the capacity to make the contract and is bound by same. *Taft v. Covington,* 199 N. C., 51. See *Bank v. McCullers,* 201 N. C., 412; *S. c.,* 440.

For the reasons given, we see no error in the judgment of the court below.

No error.

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J. W. DIAMOND v. McDONALD SERVICE STORES, ETC.

(Filed 19 May, 1937.)

**1. Negligence § 4b—Evidence held for jury in action by invitee to recover for owner's failure to warn of dangerous substance on premises.**

This action was instituted by a welder to recover for injuries sustained when his acetylene torch heated and exploded a container of alcohol on defendant's premises, where he had been sent by his employer in response to a call by defendant. *Held:* The evidence should have been submitted to the jury on the questions of whether defendant was negligent in failing to warn plaintiff of the presence of inflammable material, and whether plaintiff was guilty of contributory negligence.

**2. Trial § 22—**

On motion to nonsuit, plaintiff is entitled to every germane fact and inference of fact which may be reasonably deduced from the evidence.

**3. Negligence § 1—**

Negligence is the failure to exercise that degree of care for others' safety which a reasonably prudent man, under like circumstances, would exercise, and may consist either of acts of commission or omission.

APPEAL by plaintiff from *Armstrong, J.*, at February Term, 1937, of GUILFORD.

Civil action to recover damages for personal injuries alleged to have been caused by the wrongful act, neglect, or default of the defendant.

The defendant conducts a gasoline and service station in the city of Greensboro. Plaintiff is a welder, employed by Rierson Brothers of the same city. On 21 August, 1936, in response to a call from the defendant, the plaintiff went to defendant's station, with an acetylene torch, for the purpose of cutting a steel runner over a grease pit. The plaintiff examined the pit and its surroundings to make sure that no inflammable material was located within range of fire of the torch. Observing nothing of a dangerous character in or near the pit, the plaintiff began work at the point indicated by defendant's agent. When plaintiff had cut about a half-inch, "with his flame aimed at an angle downward," a barrel or container of alcohol, which had theretofore been stored in the pit by the defendant, exploded and burned plaintiff's face and arms. Plaintiff testified: "I never did see this can of alcohol that exploded. I did not know it was there. . . . Neither the man who took me there, nor anyone else connected with the defendant corporation, pointed out to me or told me of any inflammable material in close proximity of the work I was to do."

Upon denial of liability and plea of contributory negligence, there was a judgment of nonsuit at the close of plaintiff's evidence, from which he appeals, assigning errors.

*Frazier & Frazier and Huger S. King for plaintiff, appellant.*
*Hobgood & Ward for defendant, appellee.*

STACY, C. J. The case turns on two questions: (1) Was it the duty of the defendant to warn the plaintiff of the presence of inflammable material in the pit? (2) Was plaintiff contributorily negligent? Both questions, we apprehend, should be submitted to the jury for answer under proper instructions from the court. *Ellington v. Ricks,* 179 N. C., 686, 102 S. E., 510; *Evans v. Lbr. Co.,* 174 N. C., 31, 93 S. E., 430; *Absher v. Raleigh, ante,* 567; *Cole v. R. R., ante,* 591. See *Cook v. Mfg. Co.,* 183 N. C., 48, 110 S. E., 608. "The rule applicable in cases of this kind is, that if diverse inferences may reasonably be drawn from the evidence, some favorable to the plaintiff and others to the defendant, the cause should be submitted to the jury for final determination"—

*Adams, J.*, in *Hobbs v. Mann*, 199 N. C., 532, 155 S. E., 163. See *Lincoln v. R. R.*, 207 N. C., 787, 178 S. E., 601; *Wadsworth v. Trucking Co.*, 203 N. C., 730, 166 S. E., 898; *Ridge v. High Point*, 176 N. C., 421, 97 S. E., 369.

On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved, which may reasonably be deduced from the evidence. *Cole v. R. R., supra; James v. Coach Co.*, 207 N. C., 742, 178 S. E., 607; *Nash v. Royster*, 189 N. C., 408, 127 S. E., 356.

Negligence is a breach of some duty imposed by law. It is doing other than, or failing to do, what a reasonably prudent man, similarly situated, would have done. *Cole v. R. R., supra.* In short, negligence is a want of due care; and due care means commensurate care under the circumstances. *Small v. Utilities Co.*, 200 N. C., 719, 158 S. E., 385. The lack of diligence, or want of due care, may consist in doing the wrong thing at the time and place in question, or it may arise from inaction or from doing nothing when something should have been done. *Moore v. Iron Works*, 183 N. C., 438, 111 S. E., 776. The standard is always the conduct of the reasonably prudent man, or the care which a reasonably prudent man would have used under the circumstances. *Tudor v. Bowen*, 152 N. C., 441, 67 S. E., 1015. The rule is constant, while the degree of care which a reasonably prudent man exercises varies with the exigencies of the occasion. *Small v. Utilities Co., supra; Fitzgerald v. R. R.*, 141 N. C., 530, 54 S. E., 391; *Hanes v. Shapiro*, 168 N. C., 24, 84 S. E., 33; 9 R. C. L., 1200.

As the principles involved are well settled, and the case is to be tried again, we refrain from discussing the evidence, so that, on the rehearing neither side may be benefited or prejudiced thereby.

Reversed.

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J. W. JACKSON, ADMINISTRATOR, v. D. J. THOMAS, ADMINISTRATOR.

(Filed 19 May, 1937.)

**1. Executors and Administrators § 17: Limitation of Actions § 10—**

An action against an administrator on a subrogated claim for funeral expenses and to recover a legacy is not completely barred by any statute of limitations, even when claim is not filed within twelve months from notice, when plaintiff shows undistributed assets of the estate. C. S., 101.

**2. Trial § 24—**

A demurrer to the evidence goes to plaintiff's entire right to recover, and may not be sustained if, in any aspect or to any extent, a cause of action within the pleadings is made out. C. S., 567.

STATE *v.* WOODELL.

APPEAL by plaintiff from *Rousseau, J.*, at September Term, 1936, of MOORE.

Civil action to recover legacy and funeral expenses advanced by plaintiff's intestate at request of defendant administrator.

Plaintiff proffered evidence tending to show that his intestate paid the funeral expenses of defendant's intestate, at the request of the defendant administrator on the latter's promise to repay the same, which has not been done and that the undistributed assets of the estate are sufficient to care for plaintiff's claims.

There was no plea of *plene administravit*, but defendant "pleads the one-year statute and the three-year statute and every other statute of limitations known to the law in bar of said claim."

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

*K. R. Hoyle and S. R. Hoyle for plaintiff, appellant.*
*W. R. Clegg for defendant, appellee.*

STACY, C. J. Plaintiff's evidence tends to show a subrogated claim for funeral expenses, *Ray v. Honeycutt*, 119 N. C., 510, 26 S. E., 127, 60 C. J., 725, a legacy due plaintiff's intestate, *Redmond v. Burroughs*, 63 N. C., 242, and undistributed assets of the estate. *In re Estate of Bost, ante*, 440; *Caffey v. Osborne*, 210 N. C., 252, 186 S. E., 364. This would seem to defeat the motion for nonsuit, as none of the statutes of limitations is a complete bar upon the facts presently appearing of record. Moreover, the plea of the statutes of limitations would seem to be bad, *Turner v. Shuffler*, 108 N. C., 642, 13 S. E., 243, except, perhaps, as it may relate to C. S., 101, which is not available as against undistributed assets other than costs. *In re Estate of Bost, supra.*

A demurrer to the evidence goes to plaintiff's entire right to recover, and may not be sustained, if, in any aspect or to any extent a cause of action within the pleadings is made out. C. S., 567; *Moseley v. R. R.*, 197 N. C., 628, 150 S. E., 184.

Reversed.

STATE v. BRADLEY WOODELL AND MARY B. CALLAHAN.

(Filed 19 May, 1937.)

**Fornication and Adultery § 4—**

Evidence merely that defendants had an opportunity to commit the crime charged is insufficient to be submitted to the jury in a prosecution for fornication and adultery.

STATE *v.* WOODELL.

APPEAL by defendants from *Barnhill, J.*, at February Term, 1937, of ROBESON. Reversed.

This is a criminal action in which the defendants were tried on a warrant charging them with fornication and adultery.

From judgment on their conviction, both defendants appealed to the Supreme Court, assigning as error the refusal of the trial court to allow their motions for judgment as of nonsuit at the close of the evidence for the State.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*F. D. Hackett, Jr., and McLean & Stacy for defendants.*

PER CURIAM. Where the evidence for the State at the trial of a criminal action in which the defendants are charged with fornication and adultery, shows no more than that the defendants had opportunities to commit the crime, as in the instant case, on motion of the defendants, the action should be dismissed, and a verdict of not guilty entered. C. S., 4643.

The principle applicable to the evidence in this case is stated by *Walker, J.*, in *S. v. Prince,* 182 N. C., 788, 108 S. E., 330, as follows: "We may say generally that evidence should raise more than a mere conjecture as to the existence of the fact to be proved. The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies within the province of the court, the last within that of the jury. Applying the maxim, *de minimis non curat lex,* when we say that there is no evidence to go to the jury, we do not mean that there is literally and absolutely none, for as to this there could be no room for any controversy, but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established, though there is no practical or logical difference between no evidence and evidence without legal weight or probative force. The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances."

The judgment in this case is reversed to the end that a verdict of not guilty may be entered as provided by statute.

Reversed.

## STATE v. HUNTER WINCHESTER.

(Filed 19 May, 1937.)

**Criminal Law § 80—**

Where defendant, convicted of a capital crime, fails to serve his case on appeal within the time allowed by order of the court, and fails to request any extension of time, his appeal will be dismissed on motion of the Attorney-General in the absence of error on the face of the record.

APPEAL by defendant from *Armstrong, J.*, at March Term, 1937, of GUILFORD. Appeal dismissed.

Motion by the State to docket and dismiss the defendant's appeal. Motion allowed.

PER CURIAM. The defendant was charged in the bill of indictment with the murder of Mabel Winchester. The jury returned a verdict of guilty of murder in the first degree, and thereupon sentence of death was pronounced. Defendant gave notice of appeal, but no case on appeal has been served within the time allowed by the order of the court below, and no request has been made for extension of the time.

The Attorney-General moves to docket and dismiss the appeal. This motion must be allowed, but according to the usual rule of this Court in capital cases, we have examined the record to see if any error appears. In the record we find no error.

Appeal dismissed.

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## SUSAN B. ANTHONY, BY HER NEXT FRIEND, JOHN S. MICHAUX, v. HOLT KNIGHT, DR. W. P. KNIGHT, MOTOR FREIGHT CORPORATION, AND A. A. BAREFOOT.

(Filed 19 May, 1937.)

**1. Pleadings § 20—**

Upon demurrer, the complaint will be liberally construed and every reasonable intendment and presumption will be made in favor of the pleader. C. S., 535.

**2. Automobiles § 19—Complaint held to state facts sufficient to constitute cause in guest's favor against driver and owner.**

The complaint alleged that the car in which plaintiff was riding as a guest was driven at seventy miles per hour approaching an intersection in a city without keeping a proper lookout and without warning, and collided with a truck driven into the intersection from the other street without first stopping as required by ordinance of the city. *Held:* The complaint states a cause of action for negligence of the driver of the car in which plaintiff was riding, and does not state facts warranting the deduction of intervening negligence on the part of the truck driver insu-

lating the negligence of the driver of the car, nor that the truck driver's negligence was the sole proximate cause of the injuries, and demurrers of the owner of the car and the driver thereof were properly overruled.

APPEAL by defendants Holt Knight and W. P. Knight from *Armstrong, J.*, at January Term, 1937, of GUILFORD. Affirmed.

Action for damages for personal injury sustained as result of collision of the automobile of defendant W. P. Knight, driven by defendant Holt Knight, with the truck of defendant Motor Freight Corporation, driven by defendant Barefoot. Plaintiff was a passenger in the Knight automobile.

Plaintiff alleged the concurrent negligence of the defendants proximately causing or contributing to her injury. Defendants Knight demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action as to them, and, also, on the ground of misjoinder of parties and causes of action.

From judgment overruling the demurrer, defendants Holt Knight and W. P. Knight appealed.

*Smith, Wharton & Hudgins for plaintiff.*
*Frazier & Frazier for Holt Knight and W. P. Knight.*

PER CURIAM. For the consideration of a demurrer, both the statute and the authoritative decisions of this Court require that the complaint be liberally construed and that every reasonable intendment and presumption be made in favor of the pleader. C. S., 535; *Blackmore v. Winders*, 144 N. C., 212. Applying this rule, it is apparent that the plaintiff has alleged facts sufficient to constitute actionable negligence on the part of the demurring defendants.

The allegation that the defendant Holt Knight recklessly drove the automobile at a speed of seventy miles per hour approaching the intersection of two much traveled streets in the city of Greensboro, without keeping a proper lookout and without warning, and collided at the intersection with the truck of defendant Motor Freight Corporation, which had been negligently driven into the intersection slightly prior to the time the automobile entered the intersection, may not be overthrown by a demurrer.

Nor can the allegation of negligence, as against the defendants Motor Freight Corporation and Barefoot, that they drove the truck into the intersection of said street without stopping, in violation of an ordinance of the city of Greensboro, and without looking for approaching vehicles, be held to support the necessary conclusion that the negligence of the driver of the truck constituted a new and intervening cause, breaking the chain of causation and insulating the negligence of the demurring

defendants. All the facts necessary to render applicable the doctrine of insulated negligence set forth in *Hinnant v. R. R.*, 202 N. C., 489, do not appear on the face of the complaint, nor are they necessarily deducible therefrom. *Vivian v. Transportation Co.*, 196 N. C., 774; *Caddell v. Powell*, 70 Fed. (2nd), 123.

Neither does it affirmatively appear that the negligence of the driver of the truck was the sole proximate cause of the injury.

It follows, therefore, if the complaint states a cause of concurrent negligence against all the defendants, there has been no misjoinder of parties and causes of action.

There was no error in overruling the demurrer.

Affirmed.

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FRANCES HEADEN v. BLUEBIRD TRANSPORTATION CORPORATION AND ELY-BLOODWORTH MOTORS, INC.

(Filed 19 May, 1937.)

1. **Automobiles § 24b—Taxi driver accepting fare for transportation of passenger is presumed to be acting in scope of employment.**

   Admissions and evidence to the effect that plaintiff telephoned defendant taxi company for a taxi, that a taxi with defendant company's name on its side called for plaintiff, and that she paid her fare to the driver for transportation to another part of the city, *is held* sufficient to be submitted to the jury on the question of defendant taxi company's ownership of the taxi and its employment of the driver, and that the driver was acting in the scope of his employment in driving plaintiff to the place designated.

2. **Trial § 22—**

   Upon motion to nonsuit all evidence tending to support plaintiff's claim is to be considered in its light most favorable to plaintiff, and she is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

3. **Automobiles § 12e—**

   Failure of a driver to stop before traversing a through street intersection, in violation of a city ordinance, is negligence *per se*.

4. **Trial § 32—**

   Where the charge of the court meets the requirements of C. S., 564, a party desiring a fuller charge must aptly tender request therefor.

APPEAL by Bluebird Transportation Corporation from *Warlick, J.*, and a jury, November Term, 1936, of GUILFORD. No error.

This is an action for actionable negligence brought by plaintiff against defendants, alleging damage. The defendants denied negligence.

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

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

"2. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: '$750.00.'"

The court below rendered judgment on the verdict. The Bluebird Transportation Corporation made many exceptions and assignments of error and appealed to the Supreme Court.

*Harry Rockwell and W. Henry Hunter for plaintiff.*

*H. R. Stanley for defendant Bluebird Transportation Corporation.*

PER CURIAM. At the close of plaintiff's evidence and at the close of all the evidence the defendant Bluebird Transportation Corporation made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error. The plaintiff, at the conclusion of her evidence, submitted to a judgment of nonsuit as to the defendant Ely-Bloodworth Motors, Inc. This action is a simple one and devoid of complications.

The plaintiff alleged: "That on 30 January, 1936, at approximately 9 o'clock a.m., the plaintiff requested the defendant Taxi Company to transport her by means of one of its taxicabs, in the regular course of its business as a common carrier by taxicab, from her home at 916 High Street to another place in the city of Greensboro, in consideration of the payment by her of the advertised fare of 25 cents; that pursuant to said request the defendant Taxi Company did send one of its taxicabs to the home of the plaintiff for the purpose of transporting her as a paying passenger as aforesaid, and that the plaintiff then and there entered into said taxicab for the purpose aforesaid, and became and was accepted as a passenger by said defendant for the purpose aforesaid; and that at all times hereinbefore and hereinafter referred to the plaintiff was and has been ready, able, and willing to pay the fare charged by said defendant for the said transportation."

The defendant in its answer said: "It is admitted that on or about 30 January, 1936, the plaintiff requested the defendant Taxi Company to transport her from her home to another place in the city of Greensboro; all other allegations contained in article 2 of the complaint are denied."

The plaintiff testified, in part: "My name is Frances Headen. I live at 916 High Street, in the city of Greensboro, N. C. . . . On the morning of 30 January, of this year, I had occasion to call for a taxicab.

I called for a taxi around 9 o'clock to carry me to 1204 Madison Avenue. The taxicab came shortly thereafter. It was the automobile of the Bluebird Motor Company. I paid the fare of 25c."

The complaint, answer, and testimony of plaintiff are clear (1) that plaintiff called a taxicab, (2) that the taxicab came with a driver, (3) that it was the automobile of the Bluebird Transportation Corporation, (4) that the driver collected the fare.

The evidence which makes for plaintiff's claim, or tends to support her cause of action, is to be taken in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

From all the evidence, complaint, answer, and testimony of plaintiff, the taxicab was that of the defendant Bluebird Transportation Corporation, the driver was an employee of the Bluebird Transportation Corporation, and about his master's business—in the scope of his employment. The plaintiff was a passenger and had paid her fare for the contemplated trip. *Sutton v. Lyons,* 156 N. C., 3 (5); *Lilley v. Cooperage Co.,* 194 N. C., 250 (252). While plaintiff was a passenger of defendant Bluebird Transportation Corporation, there was a collision at the intersection of Gorrell and Bennett streets in the city of Greensboro, N. C., between the taxicab and a truck of Ely-Bloodworth Motors, Inc. The taxicab on entering the intersection of Gorrell and Bennett streets was traveling on Bennett Street, about 25 miles an hour, and made no stop on entering Gorrell Street, as required by law. Plaintiff introduced the ordinance of the city of Greensboro, which reads, in part: "A vehicle shall be brought to a complete stop before entering or crossing a through highway. . . . The following streets within the corporate limits of the city of Greensboro are hereby designated as through highways: 'i' Gorrell Street from Asheboro Street to east corporate limits."

Louis French testified, in part: "The taxi did not slow up at all on approach to the intersection, nor as it entered it."

We see no error in the charge as to damages. If a fuller charge were desired, defendant should have asked for same. We think the charge, taken as a whole, in its entirety, fully sets forth the law applicable to the facts. The charge did not impinge C. S., 564. None of the exceptions and assignments of error made by defendant can be sustained.

In *Davis v. Long,* 189 N. C., 129 (137), it is said: "The case is not complicated as to the law or facts. The jurors are presumed to be men of 'good moral character and sufficient intelligence.' They could easily understand the law as applied to the facts."

On the record there is no prejudicial or reversible error. In the judgment there is

No error.

C. M. CASTEVENS v. STANLY COUNTY, T. R. WOLFE, AS CHAIRMAN, AND J. V. BARRINGER AND JOHN L. LITTLE, AS MEMBERS, AND D. L. CROWELL AS CLERK, RESPECTIVELY, OF THE BOARD OF COMMISSIONERS OF STANLY COUNTY.

(Filed 9 June, 1937.)

**1. Constitutional Law § 4—**

The legislative powers of the people of the State are vested in the General Assembly, subject only to limitations contained in the State and Federal Constitutions.

**2. Actions § 2: Taxation § 37—Statute providing for action by taxing unit to have bond issue declared valid is not unconstitutional as imposing on courts nonjudicial function of determining moot question.**

Ch. 186, Public Laws of 1931, secs. 4 to 8, inclusive, as amended (N. C. Code, 2492 [55 to 59]), providing that a taxing unit of the State may institute action against its residents and taxpayers to have the validity of a proposed bond issue and proposed taxes for payment of the indebtedness determined by judgment of the court, provides for an action in the nature of an adversary proceeding *in rem*, and contemplates that the court should determine whether the proposed bond issue is valid or not in accordance with the issues of fact and law which may be raised by the pleadings, and the act is not unconstitutional as attempting to impose upon the courts the nonjudicial function of determining moot or hypothetical questions. N. C. Constitution, Art. I, sec. 8; Art. IV, sec. 12.

**3. Constitutional Law § 16: Process § 5—Persons in well defined class may be served by publication in action in rem without being named in summons.**

A suit by a taxing unit to have declared valid a proposed bond issue and proposed taxes for the payment of the indebtedness, N. C. Code, 2492 (55 to 59), is declared by the act to be in the nature of a proceeding *in rem*, and its provisions that residents and taxpayers of the unit may be served by publication without their names being stated in the complaint or summons is valid, and the contention of a taxpayer of the unit that a judgment under the act deprives him of property without due process of law because he was not personally served with summons is untenable, since a well defined class may be served with summons in this manner in proceedings *in rem*, and since the procedure prescribed by the act affords each taxpayer notice and an opportunity to appear and file such pleadings as he may be advised. N. C. Constitution, Art. I, sec. 17; Fourteenth Amendment to the Federal Constitution.

**4. Taxation § 37: Process § 5—Service by publication is complete the day the last notice is published.**

In this suit by a taxing unit to have a proposed bond issue declared valid, N. C. Code, 2492 (55 to 59), summons was served by publication for three successive weeks as required by the act, and defendants were required by said publication to file answer within twenty-one days from the date of the last publication. *Held:* "Full publication" was complete as

required by the act on the day the last notice was published, and the contention that publication was not complete until a week from the publication of the last notice and that defendants should have been given twenty days from that date to file answer is untenable, publication once a week for three successive weeks being all that is required by the statute.

**5. Taxation § 37—Taxpayer is concluded by final judgment in suit by taxing unit declaring proposed bond issue valid.**

A judgment in a suit by a taxing unit declaring that bonds which the unit proposed to issue were for the purpose of refunding bonds of the unit which had been issued by it as an administrative agency of the State for the purpose of maintaining the constitutional school term, and that other bonds which the unit proposed to issue were for refunding bonds which had been issued by it for necessary expenses, and that therefore taxation to pay principal and interest on the bonds would not be subject to the constitutional limitation on the tax rate, *is held* conclusive on a taxpayer in his subsequent suit challenging the validity of the bonds on the very issues determined by the prior judgment.

APPEAL by plaintiff from *Warlick, J.*, at Chambers in the town of Rockingham, N. C., on 7 April, 1937. Affirmed.

This is an action to enjoin the issuance and sale of bonds of Stanly County, which the defendants, the chairman, members, and clerk of the board of commissioners of said county are about to issue and sell, pursuant to resolutions adopted by said board, in accordance with the provisions of the County Finance Act of North Carolina.

The plaintiff C. M. Castevens is a citizen and resident of Stanly County, and owns property in said county, which is subject to taxation. The allegations of his complaint are as follows:

"3. That the defendants are about to issue bonds of Stanly County in the aggregate principal sum of $41,500, designated as 'School Funding Bonds,' pursuant to the provisions of the County Finance Act of North Carolina, as amended, and as authorized by an order adopted by the board of commissioners of Stanly County on 25 May, 1936. A copy of said order, marked Exhibit A, is attached hereto and is made a part hereof.

"4. That the defendants are about to issue bonds of Stanly County in the aggregate principal sum of $18,500, designated as 'General Funding Bonds,' pursuant to the provisions of the County Finance Act of North Carolina, as amended, and as authorized by an order adopted by the board of commissioners of Stanly County on 25 May, 1936. A copy of said order, marked Exhibit B, is attached hereto and is made a part hereof.

"5. That each of said orders referred to in paragraphs 3 and 4 hereof provides that a tax sufficient to pay the principal of and the interest on the bonds authorized thereby, when due, shall be levied and collected

annually. The defendants are about to levy said tax pursuant to said orders. The rate of said tax about to be levied, together with the rate of the tax to be levied by the defendants this year for the ordinary and current expenses of Stanly County, will exceed fifteen cents on the one hundred dollar valuation of property in said county. Each of said bonds, if issued, will contain a recital as follows:

" 'The full faith and credit of said county are hereby pledged for the punctual payment of the principal of and the interest on this bond, according to its terms.'

"6. That the order referred to in paragraph 3 hereof determined that the indebtedness to be funded by means of said School Funding Bonds was incurred for the construction, reconstruction, or repair of school buildings required to enable Stanly County, as an administrative agent of the State of North Carolina, to maintain schools in said county for a minimum school term of six months, as required by the Constitution of North Carolina. The said School Funding Bonds, if issued, will contain a recital that they were issued 'to fund indebtedness incurred by said county as an administrative unit of the public school system of North Carolina, for the maintenance of schools in said county for the six months term required by the Constitution of North Carolina.'

"7. That the order referred to in paragraph 4 hereof determined that the indebtedness to be funded by means of said General Funding Bonds was incurred for the purpose of repairing, remodeling, and making additions to the courthouse of Stanly County. The said General Funding Bonds, if issued, will contain a recital that they were issued 'to fund indebtedness incurred for purposes which constitute necessary expenses of said county, within the meaning of section 7 of Article VII of the Constitution of North Carolina, and also for special purposes within the meaning of section 6 of Article V of said Constitution.'

"8. That the plaintiff is informed and believes that the indebtedness sought to be funded by means of said School Funding Bonds, and by means of said General Funding Bonds, was not incurred either for school purposes or for courthouse purposes, or for any special purpose within the meaning of section 6 of Article V of the Constitution of North Carolina, but he is informed and believes that all of said indebtedness was incurred in anticipation of taxes to provide funds to meet the ordinary and current expenses of Stanly County, and that no tax can be levied to pay said indebtedness or to pay bonds issued to fund said indebtedness, unless said tax is levied within the fifteen cent limitation prescribed by section 6 of Article V of the Constitution of North Carolina.

"9. That by reason of the recitals to be contained in said School Funding Bonds, and in said General Funding Bonds, as alleged in para-

graphs 6 and 7 of this complaint, Stanly County, if said bonds are issued and sold, would be estopped, as against a *bona fide* purchaser of said bonds, or of any of them, to deny that said bonds were issued for purposes for which a tax may be levied without regard to the limitation prescribed by section 6 of Article V of the Constitution of North Carolina. It is necessary, therefore, that the issuance and sale of said bonds be enjoined and restrained, in order to prevent the levy of taxes for their payment in violation of section 6 of Article V of the Constitution of North Carolina."

In the answer to the complaint filed by the defendants all the foregoing allegations are admitted, except the allegations contained in paragraphs 8 and 9. These allegations are denied.

In his complaint the plaintiff further alleges:

"10. That on 4 February, 1937, a decree was entered in the Superior Court of Stanly County declaring that the 'School Funding Bonds' and the 'General Funding Bonds,' which the defendants are about to issue and sell, and the means of payment provided therefor, including the provisions made for the levy of a sufficient tax, are valid.

"Said decree was entered in an action entitled 'Stanly County, plaintiff, *v.* Each and all the owners of taxable property within the county of Stanly, and each and all the citizens residing in said county, and J. N. Auten, on his own behalf and on behalf of all other taxpayers and citizens of the county of Stanly, defendants.' Said action was begun and was prosecuted in accordance with the provisions of sections 4 to 8, inclusive, of chapter 186, Public Laws of North Carolina, 1931, as amended, and under the provisions of the Uniform Declaratory Judgment Act. No appeal was taken from said decree as authorized by law. See Exhibit H, attached hereto and made a part hereof.

"The plaintiff in this action was not served personally with summons or other process in said action. He is informed and believes that J. N. Auten, a defendant in said action, was served personally with process in said action, but that said J. N. Auten filed no answer or other pleading in said action.

"A summons addressed to the defendants in said action, requiring them to appear and answer or demur to the complaint in said action, not later than 22 December, 1936, was first published on 17 November, 1936, and subsequently on 24 November, 1936, and on 1 December, 1936, in the 'Stanly News & Press,' a newspaper published and circulating in Stanly County. Copies of said decree and of said summons, marked Exhibits F and G, respectively, are attached hereto and made parts hereof.

"11. That the plaintiff in this action is not bound by said decree under the Uniform Declaratory Judgment Act, because the action did not

involve a justiciable controversy, and said act does not confer jurisdiction to determine moot or hypothetical questions, and further because plaintiff was not brought within the jurisdiction of the court by which the decree was rendered by personal service of process.

"12. That said decree is not binding upon the plaintiff in this action under the provisions of sections 4 to 8, inclusive, of chapter 186, Public Laws of North Carolina, 1931, as amended, because said statute is unconstitutional as applied to the plaintiff. Said statute is in violation of section 8 of Article I and section 12 of Article IV of the Constitution of North Carolina, for the reason that said statute imposes upon the courts of this State the nonjudicial function of determining moot or hypothetical questions. Said statute is also in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, for that the statute authorizes the entering of a final decree, purporting to be binding on a citizen and on his taxable property, in an action in which summons or other process has been served on him only by publication.

"13. That in any event jurisdiction was not obtained of the plaintiff in this action by the court in which said decree was rendered, because the order of the court directing publication of summons and the summons as published contained an unlawful limitation upon the time within which the defendants in said action were required to appear and answer or demur to the complaint.

"Said order as made by the court, and said summons as published, required the defendants to appear and answer or demur to the complaint not later than 22 December, 1936. It is provided in section 4 of chapter 186, Public Laws of North Carolina, 1931, as amended, that summons in an action begun in accordance with the provisions of said statute shall be published 'once a week for three successive weeks,' and that an interested person may become a party to said action, and that the defendants and all interested persons may appear at any time before the expiration of twenty days from and after the 'full publication' of such summons. The summons in said action was published on 17 November, 1936, on 24 November, 1936, and on 1 December, 1936. The three weeks publication of the summons in said action as required by the statute was not full and complete until 8 December, 1936. The defendants in said action were entitled under the statute to appear and answer or demur to the complaint at any time not later than 28 December, 1936, whereas they were required by the summons as published to appear and answer or demur not later than 22 December, 1936."

In the answer to the complaint filed by the defendants, all allegations contained in the foregoing paragraphs of the complaint are denied. Further answering the complaint, the defendants allege:

"13. That neither the plaintiff in this action nor any other person requested an extension of time before or after 22 December, 1936, within which to appear in said action and to answer or demur to the complaint therein.

"14. That no appeal was taken from the decree of the Superior Court of Stanly County rendered in the action entitled 'Stanly County, plaintiff, *v.* Each and all the owners of taxable property within the county of Stanly, and each and all citizens residing in said county, and J. N. Auten, on his own behalf and on behalf of all other taxpayers and citizens of the county of Stanly, defendants,' within thirty days from the date of the rendition of said decree, as authorized by statute, and that for this reason the decree that the 'School Funding Bonds' and the 'General Funding Bonds,' described in the complaint in this action, and the orders of the board of commissioners of Stanly, authorizing and directing the issuance and sale of said bonds, are valid, is binding upon the plaintiff in this action, and that plaintiff is now estopped by said decree from contesting the validity of said bonds, or said orders."

The action was heard, on the motion of the defendants for judgment on the pleadings, by consent of plaintiff and defendants, by the judge of the Superior Court holding the courts of the Thirteenth Judicial District, at his Chambers in the town of Rockingham, N. C., on 7 April, 1937.

On the facts alleged in the complaint, and admitted in the answer, the judge was of opinion and held:

"1. That the summons in the action entitled 'Stanly County, plaintiff, *v.* Each and all of the owners of taxable property within the county of Stanly, and each and all the citizens residing in said county, and J. N. Auten, on his own behalf and on behalf of all other taxpayers and citizens of the county of Stanly, defendants,' and the publication of said summons were in compliance with the statute, and were sufficient to give the court jurisdiction of the action and of the parties thereto.

"2. That sections 4 to 8, inclusive, of chapter 186, Public Laws of North Carolina, 1931, as amended, under which the decree dated 4 February, 1937, was rendered by the Superior Court of Stanly County in the action instituted in said court, are not unconstitutional either on the ground that nonjudicial functions are conferred by said sections on the courts of this State, or on the ground that due process of law is denied by said sections, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, or in violation of the provisions of section 17 of Article I of the Constitution of North Carolina.

"3. That said decree, dated 4 February, 1937, is *res judicata,* and the plaintiff is estopped by said decree from attacking the validity of the

bonds described in his complaint, or of the orders of the board of commissioners of Stanly County, authorizing and directing the issuance and sale of said bonds.

"4. That it is not necessary to pass upon the question presented by the pleadings in this action as to whether the plaintiff is bound by said decree by virtue of the provisions of the Uniform Declaratory Judgment Act of North Carolina."

It was accordingly ordered, considered, and adjudged by the court, that plaintiff's application for a restraining order or injunction be and the same was denied, and that the action be and the same was dismissed. It was ordered that plaintiff pay the costs of the action.

The plaintiff excepted to the judgment and appealed to the Supreme Court, assigning error in the judgment as signed by the court.

*H. C. Turner for plaintiff.*

*R. L. Smith & Sons and Reed, Hoyt & Washburn for defendants.*

CONNOR, J. Chapter 186, Public Laws of North Carolina, 1931, is entitled "An act to provide the manner in which the issuance of bonds or notes of a unit, and the indebtedness of a unit, may be validated."

In section 1 of said act, the word "unit," as used therein, is defined as "a county, city, town, township, school district, school taxing district, or other district or political subdivision of government of the State."

Sections 4 to 8, inclusive, of said act, as amended by chapter 290, Public Laws of North Carolina, 1935 (see N. C. Code of 1935, section 2492, subsections 55 to 59, inclusive), now read as follows:

"Sec. 4. At any time after the adoption of an ordinance, resolution, or order for the issuance of refunding or funding bonds of a unit by the board authorized by law to issue the same, and following the approval of the issuance of such bonds by the Local Government Commission, and prior to the issuance of any such bonds, such board may cause to be instituted in the name of the unit an action in the Superior Court of any county in which all or any part of the unit lies, to determine the validity of such bonds and the validity of the means of payment provided therefor.

"Such action shall be in the nature of a proceeding *in rem,* and shall be against each and all the owners of taxable property within the unit, and each and all the citizens residing in the unit, but without any requirement that the name of any such owner or citizen be stated in the complaint or in the summons.

"Jurisdiction of all parties defendant may be had by publication of a summons once a week for three successive weeks in some newspaper of general circulation published in each county in which any part of the

unit lies, and jurisdiction shall be complete within twenty days after the full publication of such summons in the manner herein provided. Any interested person may become a party to such action, and the defendants and all others interested may at any time before the expiration of such twenty days appear and by proper proceedings contest the validity of the indebtedness to be refunded or funded or the validity of such refunding or funding bonds, or the validity of the means of payment provided therefor.

"The complaint shall set forth briefly by allegations, references, or exhibits the proceedings taken by such board in relation to such bonds and the means of payment provided therefor, and, if an election was held to authorize such issuance, a statement of that fact, together with a copy of the election notice and of the official canvass of votes and declaration of the result. There shall similarly be set forth in the complaint a statement of the amount, purpose, and character of the indebtedness to be refunded or funded, and such other allegations as may be relevant. The prayer of the complaint shall be that the court find and determine as against the defendants the validity of such bonds and the validity of the means of payment so provided.

"Sec. 5. The trial of such action shall be in accordance with the Constitution and laws of the State; and the rules of pleading and practice provided by the Consolidated Statutes and court rules for civil actions, including the procedure for appeals, which are not inconsistent with the provisions of this act, are hereby declared applicable to all actions herein provided for: *Provided, however,* that an appeal from a decree in such action must be taken within thirty days from the date of the rendition of such decree.

"The court shall render a decree either validating such bonds and the means of payment provided therefor, or adjudging that such bonds and the means of payment provided therefor are, in whole or in part, invalid and illegal.

"Sec. 6. If (a) the Superior Court shall render a decree validating such bonds and the means of payment provided therefor, and no appeal shall be taken within the time prescribed herein, or (b) if taken, the decree validating such bonds and the means of payment provided therefor shall be affirmed by the Supreme Court, or (c) if the Superior Court shall render a decree adjudging that such bonds and the means of payment provided therefor are, in whole or in part, invalid and illegal, and on appeal the Supreme Court shall reverse such decree and sustain the validity of such bonds and the means of payment provided therefor (in which case the Supreme Court shall issue its mandate to the Superior Court requiring it to render a decree validating such bonds and the means of payment provided therefor), the decree of the Superior Court

validating such bonds and the means of payment provided therefor shall be forever conclusive as to the validity of such bonds and the validity of the means of payment provided therefor as against the unit and as against all taxpayers and citizens thereof, to the extent of the matters and things pleaded, or which might have been pleaded, and to such extent the validity of said bonds and means of payment thereof shall never be called in question in any court in this State.

"Sec. 7. The costs in any action brought under this act may be allowed and apportioned between the parties or taxed to the losing party, in the discretion of the court.

"Sec. 8. If the complaint in any action brought under this act, or an exhibit attached to such complaint, shows that an ordinance or resolution has been adopted by the unit providing that a tax sufficient to pay the principal and interest of the bonds or notes involved in such action is to be levied and collected, such ordinance or resolution shall be construed as meaning that such tax is to be levied without regard to any constitutional or statutory limitation of the rate or amount of taxes, unless such ordinance or resolution declares that such limitation is to be observed in levying such tax."

By the provisions of section 4 to 8, inclusive, of chapter 186, Public Laws of North Carolina, 1931, as amended by chapter 290, Public Laws of North Carolina, 1935, the General Assembly of North Carolina, in which are vested all the legislative powers which reside primarily in the people of this State, subject only to limitations contained in the Constitution of the United States and in the Constitution of North Carolina, has authorized any local governmental unit in this State, as defined in section 1 of the act, whose governing body, in the exercise of its statutory powers, has ordered and directed that bonds of said unit for the purpose of funding or refunding its existing valid indebtedness shall be issued and sold, before the said bonds are issued or offered for sale, to institute in the Superior Court of this State an action in which the said court shall have power to render a decree or judgment that said bonds are or are not valid. The action authorized by the statute is in the nature of a proceeding *in rem*, and is adversary both in form and in substance. The statute contemplates that issues both of law and of fact may be raised by pleadings duly filed, and that such issues shall be determined by the court. The court has no power by virtue of the statute to validate bonds which are for any reason invalid. It has power only to determine whether or not on the facts as found by the court and under the law applicable to these facts, the bonds are valid. This is a judicial power, and in its exercise the court is performing a judicial function. The contention of the plaintiff in this action to the contrary cannot be sustained. This contention is not supported by

either *Tregea v. Modesto Irrigation District*, 164 U. S., 178, 41 L. Ed., 395, or by *Wright v. McGee*, 206 N. C., 52, 173 S. E., 31. See *People v. Linda Vista Irrigation District* (Cal.), 61 Pac., 81; *Fidelity National Bank & Trust Company of Kansas City v. Swope*, 274 U. S., 123, 71 L. Ed., 959; and *O'Neal v. Mann*, 193 N. C., 153, 136 S. E., 379.

The statute provides that "each and all the owners of taxable property within the unit, and each and all the citizens residing in the unit, shall be made parties defendant to the action." It is expressly provided in the statute that it shall not be required that "the name of any such owner or citizen be stated in the complaint or in the summons," and that "jurisdiction of all parties defendant may be had by publication of a summons once a week for three successive weeks in some newspaper of general circulation published in each county in which any part of the unit lies." "Jurisdiction of all parties to the action shall be complete within twenty days after the full publication of such summons in the manner herein provided."

The contention that an owner of taxable property within the unit, or a citizen residing therein, may be deprived of his property, without due process of law, or contrary to the law of the land, by a decree or judgment in the action declaring or adjudging that the bonds and tax to be levied for their payment, are valid, because it is not required by the statute that his name shall appear in the summons or in the complaint, or that the summons shall be served on him personally, cannot be sustained. The action is declared by the statute to be in the nature of a proceeding *in rem*. In such case, all persons included within a well defined class may be made parties defendant, and service of summons by publication is sufficient, although such persons are not named in the summons. See *Bernhardt v. Brown*, 118 N. C., 700, 24 S. E., 527. In the opinion in that case it is said summons may be served by publication, in cases authorized by law, in proceedings *in rem*.

It is further provided in the statute that where a decree or judgment has been rendered in an action instituted and prosecuted in accordance with its provisions, declaring or adjudging that the bonds and the tax to be levied for their payment, are valid, such decree or judgment shall be binding and conclusive as against all taxpayers and citizens of the unit, to the extent of all matters and things which were or which might have been pleaded in the action, and that with respect to such matters and things the validity of the bonds and the tax shall not be called in question in any court of this State.

The contention that by this provision an owner of taxable property within the unit, or a citizen residing therein, is estopped from challenging the validity of the bonds and of the tax, without having had an opportunity to be heard, cannot be sustained. No decree or judgment

adverse to his rights can be rendered in an action instituted and prosecuted in accordance with the provisions of the statute, until every taxpayer and citizen of the unit has been lawfully served with summons, and until he has had ample opportunity to appear and file such pleadings as he may wish. If he has failed to avail himself of his constitutional rights, which are fully protected by the statute, he has no just ground of complaint that the court will not hear him when he invokes its aid after the decree or judgment has been finally rendered, and others have relied upon its protection.

After full and careful consideration, we are of the opinion that there was no error in the holding of the judge of the Superior Court, at the trial of this action, that sections 4 to 8, inclusive, of chapter 186, Public Laws of North Carolina, 1931, as amended by chapter 290, Public Laws of North Carolina, 1935 (see section 2492, subsections 55 to 59, inclusive, Code of N. C., 1935), are not unconstitutional either on the ground that the statute confers nonjudicial functions on the Superior Courts of this State or on the ground that the statute denies due process of law to taxpayers or citizens of a local governmental unit in this State, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, or of the 17th section of Article I of the Constitution of North Carolina.

The plaintiff in this action further contends that conceding that the statute under which the action entitled "Stanly County, plaintiff, *v.* Each and all of the owners of taxable property within the county of Stanly, and each and all of the citizens residing in said county, and J. N. Auten, on his own behalf and on behalf of all other taxpayers and citizens of the county of Stanly, defendants," was instituted, is valid, there was error in the holding of the judge of the Superior Court that the summons and the service of summons by publication in said action were in full compliance with the provisions of the statute, and were sufficient to give the court jurisdiction of said action and of the parties thereto.

This contention cannot be sustained. The summons in said action was in strict compliance as to its form and substance with the provisions of the statute. It was published once a week for three successive weeks as required by the statute. This was sufficient.

The only issues of fact arising on the pleadings in this action involve the validity of the indebtedness of Stanly County which the defendants propose to fund by the issuance and sale of the bonds of said county, designated as "School Funding Bonds" and "General Funding Bonds," and the purposes for which said indebtedness was incurred. These identical issues were submitted to the jury at the trial of the action entitled "Stanly County, plaintiff, *v.* Each and all the owners of taxable

property within the county of Stanly, and each and all the citizens residing in said county, and J. N. Auten on his own behalf and on behalf of all other taxpayers and citizens of the county of Stanly, defendants."

These issues were answered in the affirmative, that is, the jury found that the said indebtedness is valid and was incurred for lawful purposes. The decree or judgment in that action is binding and conclusive on the plaintiff in this action. It is expressly so provided in the statute, which recognizes and applies to the action authorized by the statute the principle stated in *Eaton v. Graded School,* 184 N. C., 471, 114 S. E., 689, as follows:

"Except where some special private interest is shown, it seems to be established by the clear weight of authority that, in the absence of fraud or collusion, a final judgment on the merits rendered in a suit by a taxpayer (usually brought on behalf of himself and others similarly situated) involving a matter of general interest to the public, and instituted against a governmental body or local board, which in its official capacity represents the citizens and taxpayers of the territory affected, is binding on all residents of the district, if adverse to the plaintiff, and all may take advantage of it if the judgment is otherwise." See cases cited.

We find no error in the judgment in this action. It is

Affirmed.

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EAST COAST FERTILIZER COMPANY, INC., v. NORMAN F. HARDEE.

(Filed 9 June, 1937.)

**1. Appeal and Error § 24—**

An assignment of error which is not supported by an exception appearing of record will not be considered on appeal.

**2. Execution § 25—Verdict establishing conversion of plaintiff's property is sufficient to support judgment for execution against the person.**

An affirmative answer to an issue establishing that defendant had retained and converted to his own use, in violation of the terms of the contract of assignment with plaintiff, property belonging to plaintiff, is sufficient to support a judgment that execution against the person of defendant issue upon application of plaintiff upon return of execution against the property unsatisfied, intent of defendant in doing the acts constituting a breach of trust being immaterial, and a specific finding of fraud being unnecessary. C. S., 673.

**3. Trial § 27—Ordinarily verdict may not be directed in favor of party having burden of proof.**

A directed verdict may not be given in favor of plaintiff having the burden of proof on the issue unless there is no evidence from which the

jury could find or which would justify an inference contrary to plaintiff's contention, and evidence in this action *is held* insufficient to support a directed verdict in plaintiff's favor on the issue of defendant's wrongful conversion of plaintiff's property.

DEVIN, J., concurring.

CLARKSON, J., concurs in concurring opinion.

APPEAL by defendant from *Grady, J.*, at February Term, 1937, of NEW HANOVER. New trial.

This is an action to recover the balance due on an accounting for commercial fertilizers which were delivered by plaintiff to the defendant, as its agent, under and pursuant to the terms and provisions of a contract in writing which was entered into by and between plaintiff and defendant prior to the delivery of said fertilizers.

The action was begun in the Superior Court of New Hanover County on 27 September, 1934.

It is alleged in the complaint that during the year 1934 the plaintiff delivered to the defendant, as its agent, under and pursuant to the terms and provisions of a contract in writing which the plaintiff and the defendant entered into on 29 January, 1934, a copy of which is attached to the complaint, as Exhibit A, commercial fertilizers of the value of $9,409.57, and that thereafter the defendant paid to the plaintiff on account of said fertilizers the sum of $8,501.99, which sum has been duly credited to the defendant's account with the plaintiff, leaving a balance due by the defendant to the plaintiff of $907.58.

It is further alleged in the complaint:

"6. That plaintiff has demanded of the defendant an accounting for the fertilizers delivered to him by the plaintiff, and the payment by the defendant to the plaintiff of the balance due on account of said fertilizers, but that the defendant has failed and refused, and still fails and refuses, to account to the plaintiff for the said fertilizers.

"7. That plaintiff is informed, believes, and alleges that the defendant has sold said fertilizers to parties unknown to the plaintiff, and has wrongfully, unlawfully, and fraudulently misappropriated and converted the proceeds arising therefrom to his own use, with the intent and purpose on his part to cheat and defraud the plaintiff of its property."

The allegations of the complaint are denied in the answer.

At February Term, 1935, of the court, with the consent of the plaintiff and defendant, the action was referred by the judge presiding to a referee for trial.

The referee filed his report prior to or at the May Term, 1935, of the court. No exceptions having been filed thereto, the report of the referee was approved by the court. Judgment was accordingly rendered that plaintiff recover of the defendant the sum of $907.58, with interest from

27 September, 1934, and the costs of the action. It was ordered by the court that "the issue of fraud arising on the pleadings be and the same is retained on the civil issue docket to be submitted to a jury at a subsequent term of the Superior Court of New Hanover County."

Pursuant to said order, at February Term, 1937, of the Superior Court of New Hanover County (see *East Coast Fertilizer Company v. Hardee, ante,* 56, 188 S. E., 623), an issue as follows was submitted to a jury:

"Did the defendant retain and convert to his own use, in violation of the terms of his contract of consignment with the plaintiff, any property belonging to the plaintiff; and if so, in what amount?"

At the trial of said issue, the plaintiff offered in evidence the following:

(a) The contract between the plaintiff and the defendant, a copy of which is attached to the original complaint filed in this action.

(b) The report of the referee, containing his findings of fact and conclusions of law, as set out therein.

(c) The judgment entered in the action at May Term, 1935, of the court.

After it had offered the foregoing evidence and had rested its case, and before the defendant had offered evidence, the plaintiff moved the court to instruct the jury peremptorily to answer the issue "Yes; $907.58, with interest from 27 September, 1934." The motion was allowed.

In accordance with the peremptory instruction, the jury answered the issue as directed by the court. In apt time, the defendant excepted to the peremptory instruction of the court to the jury.

It was thereupon considered, ordered, and adjudged by the court "that the plaintiff recover of the defendant the sum of $907.58, with interest thereon from 27 September, 1934, and the costs of the action, to be taxed by the clerk of the court, and that execution therefor shall be issued by the clerk of the court, upon the application of the plaintiff, and that if the said execution shall be returned by the officer to whom it is issued, unsatisfied, then and in that event the plaintiff shall have execution against the person of the defendant for the amount of the judgment, in conformity with law, commanding the sheriff to take the person of the defendant into his possession and control, until the amount of judgment, with interest and costs, is paid, or until the defendant is discharged in conformity with the laws of North Carolina."

The defendant appealed to the Supreme Court, assigning errors in the trial and in the judgment.

*Hackler & Allen and E. K. Bryan for plaintiff.*

*S. H. Newberry for defendant.*

CONNOR, J. At the trial of this action, the defendant did not object to the issue submitted by the court to the jury. His assignment of error on his appeal to this Court, with respect to the issue, is not supported by an exception appearing in the case on appeal, and for that reason cannot be considered on this appeal. See *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299, and cases cited in the opinion in that case by *Stacy, C. J.*

An affirmative answer to the issue was sufficient to support the judgment and the order contained therein that upon the return of an execution on the judgment unsatisfied, an execution against the person of the defendant should be issued upon the application of the plaintiff for such execution. If the defendant retained and converted to his own use property which the plaintiff had delivered to him as its agent, and failed to account for such property in accordance with his contract with the plaintiff, it is immaterial whether or not he did so with intent to cheat and defraud the plaintiff. In such case, the defendant was guilty of a breach of trust, and plaintiff is entitled to an execution against his person on the judgment which plaintiff has recovered of the defendant in this action. C. S., 673.

In *Organ Co. v. Snyder,* 147 N. C., 271, 61 S. E., 51, it is said: "The fact that the defendant detains the property and refuses to deliver it to the plaintiff, who he admits is the true owner, is evidence of a breach of trust and of a wrongful and fraudulent conversion. In a civil action for the wrongful and fraudulent conversion of property by an agent the question of intent is not material. If such conversion took place, the plaintiff is entitled to his remedy. The intent does not enter into it. 'Good intentions,' says *Mr. Justice Burwell,* 'do not at all lessen the wrongfulness of a breach of trust; or, rather, the law will not allow one to say that he violated its plain precepts with good intentions.' *Boykin v. Maddrey,* 114 N. C., 90; *Fertilizer Co. v. Little,* 118 N. C., 808; *Gossler v. Wood,* 120 N. C., 69; *Doyle v. Bush,* 171 N. C., 10." See, also, *Guano Co. v. Southerland,* 175 N. C., 228, 95 S. E., 364.

There is no error in the judgment in the instant case, and the same must be affirmed, unless there was error in the trial.

The burden on the issue submitted to the jury was on the plaintiff. It was therefore error for the court to instruct the jury peremptorily and thereby direct an affirmative answer to the issue. In *Phillips v. Giles,* 175 N. C., 409, 95 S. E., 772, it is said:

"It is a fixed principle in our system of procedure, both by statute and approved precedents, that a judge in charging a jury shall not give an opinion whether a fact is fully or sufficiently proven, 'such matter being the true office and province of the jury,' and it has been held with us in many well considered cases that the inhibition extends not only to the ultimate facts, but to all essential inferences of fact arising from the testimony and upon which the ultimate facts necessarily depend. This

principle, recognized by the Court in *Bank v. Pugh,* 8 N. C., 198, has been again and again approved in our cases. *Forsyth v. Oil Mill,* 167 N. C., 179; *S. v. R. R.,* 149 N. C., 508-512; *S. v. Daniels,* 134 N. C., 671. In the *Forsyth case, supra,* the correct principle is stated by *Brown, J.,* as follows: 'The converse of the rule is true and for a stronger reason a verdict can never be directed in favor of a plaintiff when there is any evidence from which the jury may find contrary to the plaintiff's contention, or when there is evidence that will justify an inference to the contrary of such contention."

For the error of the court in instructing the jury peremptorily to answer the issue in the affirmative, the defendant is entitled to a new trial. It is so ordered.

New trial.

DEVIN, J., concurs in the result, but is of opinion that appellant's assignment of error as to the judgment should have been sustained upon the ground that the portion of the judgment which authorized execution against the person was predicated upon an issue which was not in accord with the language of the previous judgment in the cause requiring that the "issue of fraud arising on the pleadings be submitted to a jury." The complaint alleged a fraudulent misappropriation and conversion of property, and in the decision of this case on a former appeal it was adjudged that the plaintiff was entitled to "trial by jury of the issue of fraud arising on the pleadings."

In *Ledford v. Emerson,* 143 N. C., 527, it was said: "The Constitution provides 'there shall be no imprisonment for debt in this State, except in cases of fraud.' Art. I, sec. 16. This, we think, clearly means that there shall at least be no imprisonment to enforce the payment of a debt under final process, unless it has been adjudged, upon an allegation duly made in the complaint and a corresponding issue found by a jury, that there has been fraud. . . . There should be a separate and distinct issue submitted to the jury as to any fraud alleged. . . . The constitutional right of trial by jury shields the defendant from arrest under an execution against his person, unless in actions of debt an issue of fraud has been found against him and a judgment entered in conformity therewith."

In *Doyle v. Bush,* 171 N. C., 10 (citing *Ledford v. Emerson, supra*), it was held that the refusal to submit the issue of fraudulent conversion was the denial of a substantial right, if the pleadings raised the issue.

In *Organ Co. v. Snyder,* 147 N. C., 271, the issue was: "Did the defendant wrongfully and fraudulently convert to his own use property of plaintiff?" The trial judge instructed the jury to answer the issue "No." This Court, in awarding a new trial, said: "The plaintiff resorted to the ancillary proceedings of arrest and bail, and in order to

entitle him to execution against the person it was incumbent upon it to secure an affirmative answer to the first issue."

In *Guano Co. v. Southerland,* 175 N. C., 228, the issue was: "Did the defendant knowingly and willfully misappropriate and misapply" the property of the plaintiff? In *Boykin v. Maddrey,* 114 N. C., 90, the issue was: "Have the defendants embezzled and fraudulently appropriated to their own use" property of plaintiffs?

While it has been held that in an action for fraudulent conversion the question of intent is not material when a breach of trust is established (*Organ Co. v. Snyder,* 147 N. C., 271; *Gossler v. Wood,* 120 N. C., 69; and *Fertilizer Co. v. Little,* 118 N. C., 808), in the instant case, in the light of the fact that the allegation of fraudulent conversion in the complaint, denied in the answer, raised an issue of fraud which the court had adjudged should be submitted to the jury, in my opinion the judgment improperly authorized the imprisonment of the defendant upon an affirmative answer to the issue submitted, "Did the defendant retain and convert to his own use in violation of the terms of his contract of consignment with the plaintiff" property of plaintiff?

I am authorized to say that MR. JUSTICE CLARKSON joins in this opinion.

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SARAH F. CREECH v. THE SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD.

(Filed 9 June, 1937.)

**1. Insurance § 37—Ordinarily defendant insurer is not entitled to nonsuit on ground of affirmative defenses.**

Where the evidence and admissions establish the issuance and delivery of the policy and the death of the insured, and that plaintiff is named beneficiary in the policy and that demand for payment had been made and refused, plaintiff makes out a *prima facie* case, and the burden is on insurer to establish affirmative defenses relied on by it, and ordinarily its motion to nonsuit, based on such defenses, is properly denied.

**2. Evidence § 14—Whether physician should be compelled to disclose information concerning patient lies in sound discretion of trial court.**

Whether a physician should be compelled to disclose information acquired by him in his treatment of his patient rests in the sound discretion of the trial court upon its determination of whether such testimony is necessary for the administration of justice, C. S., 1798, and in this action to recover on a policy of insurance the trial court's refusal to require a physician to testify as to his treatment of insured within five years prior to the application for the policy upon the court's finding from the evidence that insured died from pneumonia contracted after the

issuance of the policy, *is held* not prejudicial error, especially in view of the fact that the physician's sworn proof of death was admitted in evidence.

**3. Evidence § 22—**

Insurer's witnesses testified that insured was an habitual drunkard, but on cross-examination were permitted to testify that insured's general character was good. *Held:* Under the facts of this case the admission of the character evidence, if error, was not prejudicial.

**4. Appeal and Error § 46—**

Where the rights of the parties are determined by the answers to several of the issues, assignments of error relating to another issue need not be considered on appeal.

CONNOR, J., concurring.

APPEAL by defendant from *Barnhill, J.,* at Special September Term, 1936, of COLUMBUS. No error.

This is an action brought by plaintiff against defendant to recover on a policy of insurance (10-year term insurance certificate), issued in favor of plaintiff beneficiary by defendant on the life of plaintiff's husband, Onzie Creech. The policy of insurance (beneficiary's certificate) was taken out on 6 March, 1935, and delivered 15 April, 1935. Onzie Creech died on 6 December, 1935, of lobar pneumonia. The premium was paid on the policy and defendant attempted a refund of same by sending plaintiff $28.54 after Onzie Creech's death, which was never accepted. The defendant denied liability on the ground of false and fraudulent representations of a material character set out in the application for the policy of insurance, which induced defendant to issue same.

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

"1. Had the deceased, Onzie Creech, prior to 5 March, 1935, used liquors to excess? Ans.: 'No.'

"2. Had the deceased, Onzie Creech, within five years prior to 5 March, 1935, suffered any mental or bodily disease or infirmity? Ans.: 'No.'

"3. Had the deceased, Onzie Creech, within five years prior to 5 March, 1935, consulted or been attended by a physician for any disease or injury or undergone any surgical operation? Ans.: 'No.'

"4. Had the deceased, within ten years prior to 5 March, 1935, had any disease or injury? Ans.: 'No.'

"5. Did the insured, Onzie Creech, procure the issuance of the policy of insurance upon his life sued on in this action by false and fraudulent statements, as alleged in the answer? Ans.: .....

"6. Is the defendant indebted to the plaintiff, and if so, in what amount? Ans.: '$2,500, with interest.' "

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

*Lyon & Lyon for plaintiff.*
*Powell & Lewis for defendant.*

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions, and in this we can see no error.

The plaintiff introduced the policy (beneficiary certificate) on the life of Onzie Creech, dated 6 March, 1935. The admissions of the defendant were that Onzie Creech died 6 December, 1935; that plaintiff was named as beneficiary in the beneficiary certificate; the issuance and delivery of the beneficiary certificate; the filing of proof; and that plaintiff had made demand on the defendant for $2,500, amount of the insurance, and payment refused by defendant. The plaintiff then rested.

In *Lyons v. Knights of Pythias,* 172 N. C., 408 (410), it is said: "On proof of the death of the member, presentation of the policy by the beneficiary and denial of any liability by the company, a *prima facie* right of recovery is established, and defendant, claiming to be relieved by reason of nonpayment of dues or other like default, has the burden of proof in reference to such defenses. *Harris v. Junior Order, etc.,* 168 N. C., 357; *Wilkie v. National Council,* 147 N. C., 637; *Doggett v. Golden Cross,* 126 N. C., pp. 477-480." *Blackman v. W. O. W.,* 184 N. C., 75; *Green v. Casualty Co.,* 203 N. C., 767 (773).

The defendant set up as a defense to the action the following provisions in the policy: "For the purpose of securing the beneficiary certificate herein applied for, I hereby warrant that I have not been sick, except as stated herein; that I am now in sound bodily health; that I have no injury or disease that will tend to shorten my life; that I am not addicted to the use of intoxicating liquors, opium, or other injurious drugs or substances."

The answers by Onzie Creech to the material questions were as follows:

"1. Have you ever used liquors to excess or taken treatment for liquor habit, or have you ever used any form of opium, morphine, cocaine, or other narcotics? Ans.: 'No.'

"2. Have you, within the past five years, suffered any mental or bodily disease or infirmity? Ans.: 'No.'

"3. Have you, within the past five years, consulted or been attended by a physician for any disease or injury, or undergone any surgical operation? Ans.: 'No.'

"4. Have you had, in the last ten years, any disease or injury other than those above mentioned? Ans.: 'No.'"

We need not consider the fifth issue: "Did the insured, Onzie Creech, procure the issuance of the policy of insurance upon his life sued on in this action by false and fraudulent statements, as alleged in the answer?" The jury answered "No" to all the first four issues, and automatically the sixth issue was answered "$2,500, and interest."

Upon a careful review of the charge of the court below, we see no prejudicial error on the four issues answered in favor of plaintiff.

In the application of Onzie Creech for certificate of membership is the following: "And further waive for myself and beneficiaries the privileges and benefits of any and all laws which are now in force or may hereafter be enacted in regard to disqualifying any physician or nurse from testifying concerning any information obtained by him or her in a professional capacity; and I expressly authorize such physician or nurse to make such disclosure."

In the record is the following: Dr. R. C. Sadler, a witness for defendant, was asked: 'Q. Have you treated him for any disease or infirmity within the past five years? Q. Did he have any physical disease? (By the court:) What you knew about him, I take it, you discovered as a physician? Ans.: That is true.' The defendant moved, under section 1798, in order to make the testimony of witness competent. The court, in the exercise of its discretion, refused to grant the motion, after the witness stated that he discovered what he knew about the deceased in the capacity of a physician. (Witness recalled.) 'Q. Do you recall whether you have treated him for any disease within the past five years? Ans.: I treated him, yes.' The defendant moves, under section 1798, C. S., in order to make the testimony of the witness competent. The court, in the exercise of its discretion, refused to grant the motion; it being made to appear to the court from the evidence so far that the deceased died from pneumonia contracted from a cold, and no evidence being offered to the contrary." To all the above questions the plaintiff objected, which was sustained by the court below for the reasons given. In this we can see no error. C. S., 1798, *supra,* is as follows: "No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: *Provided,* that the presiding judge of a Superior Court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice."

Before a physician may testify to matters arising in his confidential relationship with his patient, our statute requires that the trial judge find that in his opinion such testimony is "necessary to a proper admin-

istration of justice," and in the absence of such finding appearing of record on appeal, it is reversible error for the trial judge, upon defendant's exception, to admit testimony of the insured's physician tending to show that the insured in his application for life insurance had made misstatements of material facts that would avoid the insurer's liability in his suit to cancel the policy issued thereon. *Metropolitan Life Ins. Co. v. Boddie,* 194 N. C., 199; *S. v. Wade,* 197 N. C., 571.

In *Smith v. Lumber Co.,* 147 N. C., 62, after citing the statute above set forth, *Hoke, J.,* at p. 64, says: "It is the accepted construction of this statute that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. *Gartside v. Ins. Co.,* 76 Mo., 446; *Dilleber v. Ins. Co.,* 69 N. Y., 256. And it is further held, uniformly, so far as we have examined, that the privilege established is for the benefit of the patient alone, and that same may be insisted on or waived by him in his discretion, subject to the limitations provided by the statute itself: '(1) That the matter is placed entirely in the control of the presiding judge, who may always direct an answer, when in his opinion same is necessary to a proper administration of justice. (2) That the privilege only extends to information acquired while attending as physician in a professional capacity, and which information is necessary to enable him to prescribe for such patient as a physician.' Wigmore, Vol. XIV, sec. 2286c."

It seems that this matter, under the proviso in the statute and the above decision, was subject to the control of the court in its sound discretion. *S. v. Martin,* 182 N. C., 846; see *Fuller v. Knights of Pythias,* 129 N. C., 318. We think the proviso of the statute should not be nullified.

We cannot see how defendant was prejudiced by the exclusion of the evidence of this physician. The same physician furnished the proof of death to defendant, and under oath answered, among other questions, the following:

"1. What was the cause of death? Lobar pneumonia. Duration, 7 days.

"2. Was it complicated with any other disease, acute or chronic? If so, what? Yes, asthma. Duration?

"3. What was the remote cause of death? If from disease, give predisposing cause, date of first appearance of its symptoms, and history of same? Lobar pneumonia.

"4. Was there any special cause, direct or indirect, for his death in the habits, occupation, or residence of the deceased? Exposed himself hunting.

"5. Did the deceased use alcoholic beverages? If so, to what extent did their use cause or contribute to his fatal illness? Yes, probably not.

"6. Have you any knowledge or have you ever heard that deceased suffered from any other disease prior to his last illness? If so, state the time and nature of same? No."

In fact, D. M. Thompson, district organizer for defendant, a witness for defendant, on cross-examination, stated: "As far as I knew at that time, or had reason to know, he was a man of perfectly sound, good health. It was astonishing to me that this claim was not paid when he died. I had seen Onzie Creech off and on for 15 or 20 years before this application was taken. . . . I was surprised when I heard the claim had been turned down, like I would for any other man that I would write."

The first issue was: "Had the deceased, Onzie Creech, prior to 5 March, 1935, used liquors to excess?" The defendant introduced certain witnesses tending to show that Onzie Creech was an habitual drunkard, and on cross-examination they testified that his general character was good. "He was a good, hard-working man." We do not think the question of character, if error, was reversible error, under the facts and circumstances of this case. The answers to the first four issues sustain the verdict, and it is unnecessary to consider the contentions made *pro* and *con* on the fifth issue. The court below told the jury that if the first four issues were decided in favor of plaintiff, they need not consider the fifth.

On the whole record, we find no prejudicial or reversible error.

No error.

CONNOR, J. I concur in the decision of the Court in this appeal that there was no error in the trial of this action in the Superior Court.

Upon objection by the plaintiff to testimony of a physician, who was offered as a witness by the defendant, as to matters within his knowledge which he knew by reason of his relation to the insured as his physician, the defendant moved the court to overrule the objection and admit the testimony as evidence in its behalf, in its discretion, C. S., 1798. The motion was denied, and the testimony excluded by the court, in its discretion. For that reason the ruling of the trial court is not reviewable by this Court.

The defendant did not rely upon the waiver of such objection, contained in the application of the insured for the certificate of insurance, on which the plaintiff has sued in this action. The question as to the effect of the waiver upon the statute is not presented or decided on this appeal. There was no ruling by the trial court upon this question.

R. D. DOUGLAS, GUARDIAN OF LUCY B. SPENCER, v. JOHN A. BUCHANAN, W. C. LOCKHART, INDIVIDUALLY AND AS TRUSTEE, JAMES MASON, JR., DOLIAN HARRIS, TRUSTEE, AND MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

(Filed 9 June, 1937.)

**1. Bill of Discovery § 1—**

C. S., 900, 901, providing a substitute for the old bill of discovery, are remedial statutes and should be liberally construed.

**2. Bill of Discovery § 3—**

Where the pleadings have been filed, an adverse party may be examined under C. S., 900, 901, as a matter of right without leave of court, and in such instance the filing of an affidavit is unnecessary.

**3. Bill of Discovery § 5—**

Where an examination of an adverse party is founded on the pleadings, the pleadings determine the scope of the examination, and it is error to limit the scope of the examination further.

**4. Appeal and Error § 2—**

An appeal from an order for the examination of an adverse party is premature and ordinarily will be dismissed.

APPEAL by plaintiff and defendants Buchanan and Mason from *Parker, J.*, at Spring Term, 1937, of DURHAM. Error on plaintiff's appeal; affirmed on defendants' appeal.

This is an action instituted by plaintiff against defendants to set aside certain conveyances made by plaintiff and alleging fraud. These allegations were denied by defendants, except Dolian Harris, trustee, admits and denies certain allegations, and as to other allegations says "is without sufficient information to form a belief as to the truth."

The following judgment was rendered in the court below:

"This cause coming on to be heard, and being heard before the undersigned judge regularly holding the courts for the Spring Term, 1937, in the Tenth Judicial District, upon the appeal of the defendants John A. Buchanan, W. S. Lockhart, and James Mason, Jr., from the appointment by the clerk of the Superior Court of Durham County of James R. Patton, Jr., as commissioner, before whom the defendants, to be examined, were directed to appear and testify;

"It having been made to appear to the court, the court finds as facts that after the complaint and answers in this cause were filed, the clerk of the Superior Court of Durham County, at the request of plaintiff, on 21 January, 1937, appointed James R. Patton, Jr., Esq., commissioner before whom the plaintiff might examine said defendants, as adverse parties; that on 29 January, 1937, the plaintiff caused to be

duly served upon each of said defendants a written notice that he would examine said defendants at 10:30 a.m., 10 February, 1937, before said James R. Patton, Jr., at the county courthouse in Durham, together with a subpœna for each of said defendants issued by the clerk of the Superior Court of Durham County, requiring them to be present at said time and place for said purpose; that the plaintiff, likewise on 29 January, 1937, caused to be served on C. W. Hall, trustee, and the Massachusetts Mutual Life Insurance Company, the other defendants herein, a notice that their codefendants would be so examined as adverse parties at said time and place; that on 5 February, 1937, the defendants John A. Buchanan, W. S. Lockhart, individually and as trustee, and James Mason, Jr., filed in the office of the clerk of the Superior Court of Durham County their notice of appeal from the appointment of said commissioner.

"It having been made to appear, and the court finding as a fact, that Dolian Harris, trustee, did not appeal from the order of the clerk appointing said commissioner to hold said examination of parties; and that the defendant W. S. Lockhart did in open court before the undersigned judge withdraw his objection to being examined, and consented to such examination in so far as the said W. S. Lockhart is concerned; and it further appearing to the court that no privilege is sought to examine C. W. Hall, trustee, or the Massachusetts Mutual Life Insurance Company.

"And it further appearing to the court that Lucy B. Spencer, who appears in this action through her guardian, R. D. Douglas, has been duly and legally declared to be incompetent by a court of competent jurisdiction, and the court has considered the complaint of the plaintiff and the various answers of the appealing defendants as affidavits, and the court, upon the consideration of the pleadings of the parties, is of the opinion that the plaintiff is entitled to examine the appealing defendants within the scope hereinafter limited, the court is of opinion and finds as a fact that by reason of the incompetency of Lucy B. Spencer the examination of the appealing defendants is necessary under the pleadings considered by the court as affidavits. The court is therefore of the opinion that the plaintiff has a right to examine said defendants as adverse parties; that said commission to James R. Patton, Jr., was properly issued by the clerk, and that the appeal of said defendants is premature.

"It is now therefore ordered, adjudged, and decreed that the appeal of the defendants John A. Buchanan, W. S. Lockhart, individually and as trustee, and James Mason, Jr., from the appointment by the clerk of the Superior Court of Durham County of James R. Patton, Jr., as commissioner, to take the evidence of the defendants, be and the same is

hereby dismissed; and it is further ordered, adjudged, and decreed by the court in its discretion upon the facts found by it upon the pleadings offered by the plaintiff and used as affidavits that the said defendants sought to be examined by the plaintiff, to wit: John A. Buchanan, James Mason, Jr., W. S. Lockhart, and Dolian Harris, shall appear before James R. Patton, Jr., in the city of Durham, on 8 April, 1937, at 10 a.m., in James R. Patton's office in Durham, N. C., there to submit to examination by the plaintiff. It is, however, ordered, adjudged, and decreed that the examination of the defendants John A. Buchanan and James Mason, Jr., shall be limited to those matters and things relevant and material to the inducements and representations made by the said defendants to the plaintiff, her children and her agents, which allegedly induced the execution of the mortgages, notes, deeds of trust, and deeds referred to in the pleadings, and to those matters and things relevant and material to the amounts actually paid to plaintiff by reason of the execution of said mortgages, notes, deeds of trust, and deeds, described in the pleadings, and as to a relevant and material examination of said defendants as to whether or not they were acting solely for themselves, or as agents, servants, and employees of others."

To the foregoing judgment the plaintiff, in apt time, excepted, assigned error, and appealed to the Supreme Court. To the foregoing findings of fact, conclusions of law, and to the signing of the foregoing judgment the defendants John A. Buchanan and James Mason, Jr., excepted, assigned error, and appealed to the Supreme Court.

*Robert Moseley and Hines & Boren for plaintiff.*

*Bryant & Jones, Allston Stubbs, S. C. Brawley, Jr., and W. S. Lockhart for defendants John A. Buchanan and James Mason, Jr.*

CLARKSON, J. 1. Contention of the defendants: "The defendants contend that the plaintiff has no right to examine the appealing defendants without first filing a sufficient affidavit and securing an order therefor."

2. Contention of the plaintiff: "The plaintiff admits that if the purpose of the proposed examination were to secure information in order to enable him to prepare his complaint, the position of the defendants would be correct; but contends that when, as in this case, all the pleadings have been filed and the purpose of the examination is to secure information for the trial, no such affidavit or order is necessary, and that the plaintiff may examine the defendants as a matter of right. The plaintiff contends, therefore, that so much of Judge Parker's judgment is correct as held 'that the plaintiff has a right to examine said defendants as adverse parties'; 'that the appeal of said defendants is premature, . . . and the appeal be and the same is hereby dismissed,' but

that the judge erred in limiting the scope of the examination as set out in the latter part of the last paragraph of the judgment."

N. C. Code, 1935 (Michie), sec. 900, is as follows: "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."

Section 901: "The examination, instead of being had at the trial, as provided in the preceding section, may be had at any time before the trial, at the opinion of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown the judge or court orders otherwise."

These sections are a substitute for a bill of discovery, are remedial, and should be liberally construed. *Abbitt v. Gregory,* 196 N. C., 9.

In *Ward v. Martin,* 175 N. C., 287, the facts, at p. 288, were: "The plaintiff having filed his verified complaint, moved in the cause for an order to examine defendant before the clerk prior to trial under Revisal, secs. 865, 866 (C. S., 900, 901). The clerk made the order and the defendant moved to vacate the same. The motion was denied, and defendant appealed to the Superior Court. His honor, Judge Bond, affirmed the order of the clerk, October Term, 1917, and defendant appealed." In the opinion (same page), it is said: "Where no complaint has been filed and the purpose of the examination is to aid in preparing the complaint, the mover must show by affidavit such facts as will entitle him to the order. In this case the complaint has been filed and sets out a cause of action against defendant. The plaintiff then has a right under the statute to examine the defendant. No leave of court is necessary, as was the case under the old bill of discovery. That requirement is omitted from our statute. *Vann v. Lawrence,* 111 N. C., 34. . . . (p. 289). A motion was made to dismiss this appeal on the ground that it is premature. There are decisions of this Court holding that a party cannot appeal from an order to appear before the clerk to be examined under oath concerning the matters set out in the pleadings. *Pender v. Mallett,* 122 N. C., 163; *Holt v. Warehouse Co.,* 116 N. C., 480; *Vann v. Lawrence,* 111 N. C., 32."

In *Johnson v. Mills Co.,* 196 N. C., 93 (94), speaking to the subject, it is said: "When no pleadings have been filed, the plaintiff, by proper and sufficient affidavit, may apply to the court for an order of examination. *Bailey v. Matthews,* 156 N. C., 78, 72 S. E., 92; *Fields v. Coleman,* 160 N. C., 11, 75 S. E., 1005; *Chesson v. Bank,* 190 N. C., 187,

129 S. E., 403. And when a proper order for such examination has been duly made, an appeal therefrom to the Supreme Court is premature and will be dismissed. *Ward v. Martin,* 175 N. C., 287, 95 S. E., 621; *Monroe v. Holder,* 182 N. C., 79, 108 S. E., 359; *Abbitt v. Gregory, ante,* 9."

In *Bell v. Bank,* 196 N. C., 233, the facts are different and the case distinguishable from the present one. We think there was error in limiting the examination of John A. Buchanan and James Mason, Jr.—the examination is founded on the pleadings, which is broader in scope.

On account of the importance of this case, we consider it on its merits, but the practice is to dismiss as premature.

On the plaintiff's appeal there is error.

On the defendants' appeal, affirmed.

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INDEPENDENT OIL COMPANY, INC., A CORPORATION, v. THE BROADFOOT IRON WORKS, INC.

(Filed 9 June, 1937.)

**1. Trial § 22—**

On motion to nonsuit all the evidence favorable to plaintiff is to be considered in the light most favorable to it, and it is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

**2. Bailment § 3—Proof of delivery of property to bailee for hire and his failure to return same makes out prima facie case.**

Where plaintiff shows delivery of property for repair and defendant's failure to return same as agreed in good condition he makes out a *prima facie* case sufficient to take the case to the jury, although the burden of proving negligence is on him, and the evidence in support of plaintiff's allegations of negligence in that defendant attempted to repair plaintiff's gasoline tank truck without taking proper precautions against an explosion *is held* sufficient to overrule defendant's motion to nonsuit, although defendant's evidence sharply contradicted plaintiff's evidence on the issue.

APPEAL by plaintiff from *Sinclair, J.,* at February Term, 1937, of DURHAM. Reversed.

The complaint of plaintiff is as follows:

"The plaintiff, complaining of the defendant, alleges:

"1. That the Independent Oil Company, a corporation, organized and existing under the laws of the State of North Carolina, with its home office in the city of Durham, N. C., is engaged in the gasoline and oil business.

"2. That the Broadfoot Iron Works, Inc., a corporation organized and existing under the laws of the State of North Carolina, with its home office at the foot of Church Street, in Wilmington, N. C., is engaged in the construction and repair of machinery, and particularly in motor trucks and motor vehicles.

"3. That the plaintiff was on 9 July, 1936, at the times complained of the owner and in possession of a Butler Trailow gasoline tank, and on said date delivered it to defendant for the purpose of having said minor repair done thereon.

"4. That on 9 July, 1936, the defendant corporation accepted the Butler Trailow tank delivered to it by the plaintiff, and agreed to repair the same, which consisted of welding a small leak in the bottom of said tank, for which the defendant would have charged about $25.00, and agreed to redeliver said tank repaired in the manner aforesaid to the plaintiff on the morning of 10 July, 1936, in as good condition as when turned over to it by the plaintiff.

"5. That the defendant held itself out as being prepared to repair tanks in that manner, and as having proper equipment and knowledge for so doing. Plaintiff delivered the tank into the possession and control of the defendant for the purpose of enabling the defendant to perform said work, as it had agreed to do, and it further agreed that it would do the said repair work and return it to the plaintiff at seven o'clock on the morning of 10 July, 1936.

"6. That the said tank was used for the purpose of transporting gasoline, a fact well known to the defendant.

"7. That while the tank was in possession and control of the defendant for the purpose of having repairs made thereon, the defendant, through its agents and employees, negligently and carelessly damaged and destroyed the said tank, and when the plaintiff sent for the tank on the morning of 10 July, 1936, it was found to be destroyed and in a useless and worthless condition.

"8. That the said tank cost the plaintiff $2,315 f.o.b. Kansas City, Missouri, and the freight on same was about $200, or a total cost to plaintiff of $2,515.

"9. That the tank was bought in October, 1935; that it was kept in good condition, and worth practically as much on 9 July, 1936, when delivered to the defendant, as when purchased by the plaintiff in 1935, except for the minor defects which were to be repaired; that the parts that can be salvaged are probably worth about $500.

"10. That plaintiff's damage through the negligence and carelessness of the defendant, and its servants and employees, is $2,015.

"11. That plaintiff has made demand upon defendant that it pay the amount of damages in the sum of $2,015, but defendant declines and refuses to do so.

"12. That the plaintiff, Independent Oil Company, Inc., has been endamaged in the destruction of its Butler Trailow tank through the defendant's negligence in permitting it to be destroyed while in its possession and control for the purpose of repairing same, for which repair work the plaintiff was to pay the defendant; that the defendant is indebted to the plaintiff in a sum equal to the value of the tank and the cost of transportation, or $2,515, less the salvage, or a net amount of $2,015, which plaintiff has demanded of the defendant and the defendant has refused to pay.

"13. That the defendant negligently failed to remove the gasoline and gasoline fumes from the tank prior to undertaking to weld the leak or negligently failed to isolate the spot which was being welded by grounding its current, or both, and by thus negligently failing to prepare the tank for repair, and to negligently perform the work by properly grounding its current, it caused the fumes to ignite and thereby the explosion which destroyed the tank; that the defendant failed to exercise that care for the protection of the plaintiff's property required of it as a bailee, and through its own negligence destroyed plaintiff's property, and failed to return same in good condition as it agreed to do, all to plaintiff's great damage, to wit, in the sum of $2,015.

"Wherefore plaintiff Independent Oil Company, Inc., prays for judgment against defendant, the Broadfoot Iron Works, Inc., in the sum of two thousand fifteen ($2,015) dollars, and the costs of the action, and for such other and further relief as the plaintiff may be entitled to. R. O. Everett, Attorney for plaintiff."

The defendant denied the material allegations of the complaint, and, among other things, alleged: "That upon testing said tank on the morning of 10 July, 1936, for gasoline fumes and finding none present in the middle compartment which was to be welded, and relying upon the assurance and instruction of the plaintiff that the gasoline from said auxiliary tank had been rendered harmless by reason of its isolation, this defendant proceeded to attempt to weld the crack underneath the center compartment of said tank, and within about two minutes after applying said electric arc for the purpose of welding said crack, and just before the welding of said crack was completed, an explosion occurred, caused by the gasoline fumes from said auxiliary compartment, which explosion caused such damage to said tank as it suffered. That such damage as the plaintiff suffered because of the damage to said tank was caused by the acts of the plaintiff in instructing this defendant to proceed to make said repairs to said tank without removing said gasoline from said auxiliary tank, and was in no way due to any act of negligence or carelessness on the part of this defendant; that this defendant relied upon the assurance of said plaintiff that said repairs could be safely made.

"Wherefore this defendant prays judgment that this cause be dismissed as to it, and that it go without day, and that it recover of the plaintiff its costs incurred herein, to be taxed by the court."

The plaintiff replied to the answer, denied the above allegations, and reiterated its contention in detail as to the defendant's negligence.

At the close of plaintiff's evidence and at the close of all the evidence the defendant made motions in the court below for judgment as in case of nonsuit. C. S., 567. The court below sustained the motions and rendered judgment for defendant. Plaintiff excepted, assigned error, and appealed to the Supreme Court.

*Mel. J. Thompson and R. O. Everett for plaintiff.*
*Carr, James & LeGrand for defendant.*

CLARKSON, J. We think there was error in the court below sustaining the motions for judgment as in case of nonsuit made by defendant. C. S., 567.

The evidence which makes for plaintiff's claim, or tends to support its cause of action, is to be taken in its most favorable light for the plaintiff, and it is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.

The evidence introduced by plaintiff was plenary to establish the allegations in plaintiff's complaint and reply to defendant's answer. We will not recite the evidence, as the case goes back for trial.

The plaintiff, among other things, alleged: "That the defendant failed to exercise that care for the protection of the plaintiff's property required of it as a bailee, and through its own negligence destroyed plaintiff's property, and failed to return same in good condition as it agreed to do, all to plaintiff's great damage, to wit, in the sum of $2,015."

In *Beck v. Wilkins,* 179 N. C., 231 (232), it is said: "The burden of proving negligence was on the plaintiff, and this burden does not shift, but when it was shown, or admitted, that the machine was not returned by reason of its being destroyed, or stolen, or that it was returned in injured condition, it was the duty of the defendant 'to go forward' with proof to show that it had used proper care in the bailment. Therefore, it was error for the court to withdraw the case from the jury, and thus to hold, as a matter of law, that the defendant had exercised proper care."

In *Hutchins v. Taylor-Buick Co.,* 198 N. C., 777 (778), we find: "The appeal presents the single question as to whether the facts of the instant case bring it within the principle announced in *Beck v. Wilkins,* 179 N. C., 231, 102 S. E., 313, or the rule applied in *Morgan v. Bank,* 190

N. C., 209, 129 S. E., 585. We think the case is controlled by the decisions in *Beck v. Wilkins, supra,* and *Hanes v. Shapiro,* 168 N. C., 24, 84 S. E., 33. The relation of plaintiff and defendant was that of bailor and bailee. Ordinarily, the liability of a bailee for the safe return of the thing bailed is made to depend upon the presence or absence of negligence. In proving this, the bailor has the laboring oar, but it has been held in a number of cases that a *prima facie* showing of negligence is made out when it is established that the bailee received the property in good condition and failed to return it, or returned it in a damaged condition. *Trustees v. Banking Co.,* 182 N. C., 298, at page 305, 109 S. E., 6. In the absence of some fatal admission or confession, as against a demurrer to the evidence, on motion to nonsuit, a *prima facie* showing carries the case to the jury. *Jeffrey v. Mfg. Co.,* 197 N. C., 724, 150 S. E., 503; *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398." *Swain v. Motor Co.,* 207 N. C., 755 (758).

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

Reversed.

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STATE v. T. H. McDONALD.

(Filed 9 June, 1937.)

**1. Automobiles §§ 14, 31—Evidence held to show compliance with statute in parking on highway and failed to show culpable negligence.**

The evidence, without contradiction, tended to show that defendant, driving a cab with trailer heavily loaded with lumber, had a blowout in one of the tires, drove thirty feet and stopped the truck as far to the right as he could with safety because of soft, wet shoulders and a fill about 2 feet from the paved surface, leaving the truck extending over the paved surface 3 or 4 feet and a clear passage to the left of the truck of 14 or 15 feet, that he turned on the lights on the cab and trailer as required by statute, and went to the nearest town to phone his employer for aid, that the employer was unable to help him at that time, and that defendant then spent the night at a filling station, that during the night when the lights on the truck and trailer were not burning a car struck the lumber protruding from the trailer, resulting in the death of a passenger in the car, and that defendant, upon hearing of the accident the next morning, went immediately to the scene and found that the lights on the cab and trailer which he had left burning had gone out. *Held:* The evidence shows that defendant parked the truck in compliance with the statute, N. C. Code, 2621 (66), (94), and fails to show culpable negligence on the part of defendant, and his motion to nonsuit in a prosecution for homicide should have been granted.

**2. Criminal Law § 83—**

Where it is determined on appeal that the evidence of defendant's guilt is insufficient to be submitted to the jury, the case will be remanded in order that judgment may be entered as required by C. S., 4643.

CLARKSON, J., dissents.

APPEAL by defendant from *Parker, J.*, at February Term, 1937, of GRANVILLE. Reversed.

The defendant in this action was tried on an indictment for manslaughter.

It is alleged in the indictment that "T. H. McDonald, late of Granville County, on 14 December, A.D. 1936, with force and arms, unlawfully, willfully, and feloniously did kill and slay one William Odell Price, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

There was a verdict of guilty. From judgment that he be confined in the State's Prison for a term of not less than eighteen months or more than two years, the defendant appealed to the Supreme Court, assigning as error the refusal of the trial court to allow his motion, at the close of all the evidence, for judgment as of nonsuit.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*B. S. Royster, Jr., for defendant.*

CONNOR, J. The facts as shown by all the evidence at the trial of this action are as follows:

Between 3:30 and 4 o'clock on the morning of 14 December, 1936, S. L. Price and William Odell Price, both residents of Blackstone, in the State of Virginia, were riding in an automobile on a paved highway in Granville County, in the State of North Carolina. They had passed through the city of Oxford, N. C., and were traveling in the direction of the town of Creedmoor, N. C. S. L. Price was driving the automobile; William Odell Price was sitting on the front seat beside the driver. It was dark. The lights on the automobile were burning and were in good condition. They were traveling at a speed of about 40 miles per hour, and were engaged in conversation with each other.

When they were about a mile from the town of Creedmoor, the driver, S. L. Price, suddenly discovered a truck, loaded with lumber, standing or parked on the highway, on his right side. The truck was headed in the direction of the town of Creedmoor, and extended three or four feet on the paved surface of the highway, which was eighteen feet wide. There were shoulders on each side of the paved surface. There were no lights on the truck. As soon as he discovered the truck ahead of him,

the driver of the automobile put on his brakes and reduced his speed. He turned to his left and saw an automobile approaching him on the highway from the opposite direction. The lumber on the truck extended from the rear about eight feet. As the automobile passed the truck, the lumber struck the windshield, and shattered the glass. William Odell Price was struck on his head by the lumber and was fatally injured by the impact. He died almost immediately as the result of his injuries.

The defendant T. H. McDonald is about 21 years of age. His home is in the State of Georgia, but for the past two years he had resided at Wood, in Franklin County, North Carolina. During the month of December, 1936, he was employed by Mr. Green as a truck driver. Pursuant to instructions of his employer, he left the city of Henderson, N. C., about 8 o'clock on the evening of 13 December, 1936, driving a truck heavily loaded with lumber. The truck consisted of a tractor, on which was the cab in which he sat, and a trailer, on which the lumber was loaded. His destination was Thomasville, N. C. After he had passed through the city of Oxford, and when he was about a mile from the town of Creedmoor, a tire on one of the wheels of the truck "blew out." After the tire blew out, he drove the truck about thirty feet and stopped on the right shoulder of the highway. He drove the truck on the shoulder as far as he could do so with safety. The shoulder was wet and muddy. Beyond the shoulder, at a distance of about two feet, was a deep fill. When he found that he could not drive the truck further on the shoulder with safety, he "killed" the engine, leaving the truck extending a few feet on the paved surface of the highway. He turned on all the lights on the truck, ten or eleven on the trailer, and three on the tractor. These lights were in good condition and could be seen at a distance of five hundred feet by one approaching the truck on the highway from either direction. He then left the truck on the highway and caught a passing automobile and rode to the city of Oxford, a distance of about fifteen miles, where he notified his employer by telephone of the blowout. He requested his employer to come to his aid. His employer replied that he could not leave his home because of the illness of his wife. The defendant then went to a filling station, located about a mile from the city of Oxford, where he spent the night with a companion. The next morning he learned of the accident which had resulted in the death of William Odell Price, and at once went to the scene of the accident. Many witnesses testified that they knew the defendant and that he was a young man of excellent character. There was no evidence to the contrary.

It was the contention of the State at the trial of this action that all the evidence showed that the death of the deceased, William Odell Price, was the result of violations by the defendant T. H. McDonald of certain

statutes enacted by the General Assembly for the protection of persons lawfully on the highways of this State, and that for this reason the defendant is guilty of involuntary manslaughter.

The statutes are as follows:

"(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway: *Provided,* in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, or unless a clear view of such vehicle may be obtained from a distance of two hundred (200) feet in both directions upon such highway: *Provided, further,* that in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway bridge.

"(b) Whenever any peace officer shall find a vehicle standing upon a highway in violation of the provisions of this section, he is hereby authorized to move such vehicle or require the driver or person in charge of such vehicle to move such vehicle to a position permitted under this section.

"(c) The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position." Section 24, chapter 148, Public Laws of North Carolina, 1927; N. C. Code of 1935, section 2621 (66).

"Whenever a vehicle is parked or stopped upon a highway, whether attended or unattended, during the times mentioned in section forty-seven (*i.e.,* during the period from a half hour after sunset to a half hour before sunrise and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of two hundred feet ahead), there shall be displayed upon such vehicle one or more lamps projecting a white light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle, and projecting a red light visible under like conditions from a distance of five hundred feet to the rear, except that local authorities may provide by ordinance that no lights need be displayed upon such vehicle when parked in accordance with local ordinances upon a highway when there is sufficient light to reveal any person within a distance of two hundred feet upon such highway." Section 52, chapter 148, Public Laws of North Carolina, 1927; N. C. Code of 1935, section 2621 (94).

There was no evidence at the trial of this action which showed or tended to show that the defendant violated either of said statutes when he left his truck parked or standing on the highway, about 10:30 o'clock on the night of 13 December, 1936. When his truck, while traveling on the paved surface of the highway, became disabled as the result of the accidental blowout, the defendant drove the truck off the paved surface, onto the right-hand shoulder of the highway, driving a distance of about 30 feet. The right-hand wheels of the truck, which was heavily loaded with lumber, sank into the soft earth of the shoulder, causing the truck to stop. Upon ascertaining that he could not drive the truck further off the paved surface of the highway with safety, because of the fill about two feet from the paved surface, the defendant "killed" his engine. The truck then extended over the paved surface of the highway three or four feet, leaving a clear passage for passing vehicles of 14 or 15 feet. The defendant was unable to move the truck further off the paved surface on the shoulder of the highway. He thereupon turned on the electric lights with which the truck was equipped as required by statute, and left the truck on the highway, unattended, to seek aid. He caught a passing automobile and rode to Oxford, a distance of about fifteen miles. When he arrived at Oxford he called his employer by telephone and notified him of the blowout. He was informed that his employer could not come to his aid, because of the illness of his wife. He spent the remainder of the night at a filling station near Oxford and did not learn of the accident which had resulted in the death of William Odell Price until the next morning. He then went immediately to the scene of the accident, and there learned that the lights, which were burning when he left the truck, had subsequently gone out.

The unfortunate death of William Odell Price was not the result of any culpable negligence on the part of the defendant. Before leaving his truck on the highway, he had fully complied with the statutes applicable to his situation. For this reason the principle relied on by the State (see *S. v. Stansell,* 203 N. C., 69, 169 S. E., 580), is not applicable in the instant case.

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

The judgment is reversed, and the action remanded to the Superior Court of Granville County, that judgment may there be entered as required by the statute. C. S., 4643.

Reversed.

CLARKSON, J., dissents.

H. L. SCOGGINS v. L. H. GOOCH AND ALICE FLEAGLE GOOCH.

(Filed 9 June, 1937.)

**1. Receivers § 1—Receiver may not be appointed in action on simple, unsecured debt when no right to or lien on property is asserted.**

Plaintiff instituted this action on a note in the court of a justice of the peace against husband and wife. He obtained judgment against the husband, from which no appeal was taken, and plaintiff appealed from a judgment of nonsuit in favor of the wife. On appeal, plaintiff's petition for a receiver for the business operated by the husband and wife was granted. *Held:* The only issue on appeal was whether the wife was indebted to plaintiff, and it was error to appoint a receiver for the business on the action on a simple unsecured debt where no right to or lien on property of defendants was asserted, N. C. Code, 860, plaintiff's remedy being by execution on the judgment against the husband and against the wife if he should obtain judgment against her on the appeal.

**2. Same—**

Receivership is a harsh remedy and will be granted only when there is no other safe and expedient remedy.

APPEAL by defendants from *Spears, J.*, at Chambers in Durham, N. C., 27 February, 1937. Error.

This is an action brought by plaintiff against defendants in a justice of the peace court to recover of the defendants the sum of $200.00, with interest from 6 July, 1936. The return to notice of appeal was as follows:

"An appeal having been taken in this action by the plaintiff, I, Paul H. Robertson, the justice before whom the same was tried, in pursuance of the notice of appeal, do hereby certify and return that the following proceedings were had by and before me in this said action:

"On 9 January, 1937, at the request of the plaintiff H. L. Scoggins, I issued a summons in his favor and against the defendants, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties appeared.

"The plaintiff complained that the defendants are indebted to him in the amount of $200.00 as balance on note, with interest from 6 July, 1936, until paid, and for the cost of this action.

"The defendant moved for judgment as of nonsuit as to Alice Fleagle Gooch on the grounds that there was no consideration on her part in signing said note, and tendering judgment in the amount of $173.72 against L. H. Gooch.

"I render judgment in favor of plaintiff as to L. H. Gooch; and allowed the motion of nonsuit as to Alice Fleagle Gooch, for $173.72,

with interest on $173.72 from 6 July, 1936, until paid, together with $2.40 cost of this action.

"I also certify that on 13 January, 1937, the appellant paid me my fee of forty cents for making my return. All of which I send, together with the process and other papers in the cause."

In the Superior Court, H. L. Scoggins, the plaintiff, on 11 February, 1937, made an affidavit setting forth certain facts and prayed: "Wherefore plaintiff respectfully moves and prays the court to appoint a temporary receiver as provided by law to take charge of the business and property of the defendants to the end that the same may be preserved for the benefit of plaintiff and other creditors, as provided by law."

A temporary receiver was appointed, the order being as follows: "This cause coming on to be heard before Marshall T. Spears, judge of the Superior Court, at Durham, N. C., on 11 February, 1937, on the petition and affidavit of the plaintiff, and it satisfactorily appearing to the court that the defendants are insolvent, and that they have suspended their ordinary business for want of funds, and that there are executions against them now in the hands of the sheriff, and that plaintiff has a valid and good cause of action against defendants now pending in the Superior Court of Orange County, North Carolina, and that the only property and assets belonging to defendants out of which the claims of plaintiff and other creditors can be made are the fixtures, equipment, supplies, and other property of the defendants in their cafe business in Chapel Hill, N. C., known as Gooch's Cafe; and it further appearing that said property might be dissipated and wasted and that a receiver is necessary for the preservation of the assets for all creditors according to law. It is therefore ordered and adjudged that C. P. Hinshaw be and he is hereby appointed temporary receiver of the defendants L. H. Gooch and Alice Fleagle Gooch, of Chapel Hill, N. C., and as such he is directed to at once take charge of the affairs, assets, and property of said defendants, and particularly is he authorized, empowered, and directed to take charge of the assets and affairs in connection with the said cafe business of the defendants, and hold and administer the same under the powers by law conferred upon receivers, but before entering upon his duties he will file with the clerk of the Superior Court of Orange County a bond in the sum of seven hundred and fifty dollars to be approved by said clerk with at least two sureties. It is further ordered and adjudged that the defendants appear before his honor, Marshall T. Spears, judge, at Durham, N. C., at 10:00 a.m., on 27 February, 1937, and show cause, if any they have, why this receivership should not be made permanent. This 11 February, 1937."

At the hearing an affidavit was filed by Alice Fleagle Gooch setting forth certain facts, and she prayed: "Wherefore this defendant respect-

fully moves and prays the court that the order heretofore issued appointing a temporary receiver be vacated, that no permanent receiver be appointed, and that the plaintiff H. L. Scoggins be taxed with all costs and damages which this affiant has sustained by reason of the issuance of an order appointing a temporary receiver."

On 27 February, 1937, Spears, J., found certain facts and made an order appointing a permanent receiver.

The exception and assignment of error made by defendants are as follows: "That his honor committed error in signing judgment appointing permanent receiver and ordering a sale of the property of the defendant Alice Fleagle Gooch."

*Henry A. Whitfield for plaintiff.*
*L. J. Phipps and Roy W. McGinnis for defendants.*

CLARKSON, J. The question involved in this action is: Should a receiver be appointed before judgment in an action on an unsecured, simple contract, originally instituted in a court of a justice of the peace, where the party does not establish an apparent right to or lien upon the property of the defendants? We think not.

This is an action for debt against the defendants, brought in the court of a justice of the peace. The plaintiff, in the court of the justice of the peace, recovered judgment of $173.72, and interest from 6 July, 1936, and costs, against the defendant L. H. Gooch, and he took no appeal. A judgment of nonsuit was allowed as to Alice Fleagle Gooch. Plaintiff appealed from the judgment of nonsuit as to Alice Fleagle Gooch to the Superior Court. The sole issue in the Superior Court was whether Alice Fleagle Gooch was indebted to plaintiff. This issue was never tried, but an application was made by plaintiff for a receiver of the business and property of defendants. The court below, in the decree appointing a permanent receiver, says: "And he is hereby made a permanent receiver of the property, affairs, and assets of the defendants L. H. Gooch and Alice Fleagle Gooch, and as such he is hereby authorized, empowered, and directed to advertise and sell the cafe property and assets of every description used in and in connection with the cafe business of the defendants herein referred to," etc.

N. C. Code, 1935 (Michie), section 860, in part is as follows: "A receiver may be appointed: (1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court."

There is no property in this action which is the subject of the action and in possession of an adverse party. Plaintiff had a right to issue an execution against the property of the defendant L. H. Gooch, and, if on appeal he obtained a judgment against Alice Fleagle Gooch, to issue an execution against her. We cannot see how this action for a simple debt against defendant Alice Fleagle Gooch, on appeal to the Superior Court by plaintiff, can be converted into a receivership proceeding. It is, to say the least, an innovation.

In *Neighbors v. Evans,* 210 N. C., 550 (554), it is said: "A receiver may be appointed where a party establishes an apparent right to property, and the person in possession is insolvent, and ordinarily a receiver will be appointed to take charge of the rents and profits during the pendency of the action. Plaintiff does not come within the above rule. The courts look with jealousy on the application for the appointment of a receiver. It is ordinarily a harsh remedy. The right to relief must be clearly shown and also the fact that there is no other safe and expedient remedy. In some cases a bond is allowed the defendant instead of the appointment of a receiver. *Woodall v. Bank,* 201 N. C., 428." N. C. Prac. & Proc. in Civil Cases (McIntosh), sec. 887, p. 1002.

For the reasons given, in the judgment in the court below there is Error.

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D. R. HINKLE AND T. R. STYERS v. GUY SCOTT, SHERIFF OF FORSYTH COUNTY, AND PAUL MARSHALL, CHIEF OF POLICE OF THE TOWN OF KERNERSVILLE, NORTH CAROLINA.

(Filed 9 June, 1937.)

**1. Appeal and Error § 45a—Findings to support judgment will be presumed in absence of request for findings of fact.**

In this proceeding to enjoin defendant officers from seizing certain slot machines upon allegations that the machines were lawful, the court treated the complaint and answer denying their legality as affidavits, and heard contentions of counsel in regard to the mechanical operation of the machines, and entered judgment dissolving the temporary restraining order theretofore entered in the cause. The judgment did not find the facts and plaintiffs made no request for findings. *Held:* On appeal, it will be presumed that the court found facts sufficient to support the judgment, and the judgment will be affirmed.

**2. Gaming § 1—**

The payment of State and county license tax on slot machines does not justify the operation of the machines if they are illegal under the provisions of chs. 37 and 282, Public Laws of 1935.

STACY, C. J., dissenting.

CONNOR, J., concurs in dissent.

HINKLE *v.* SCOTT.

APPEAL by plaintiffs from *Armstrong, J.*, at November Term, 1936, of FORSYTH. Affirmed.

Action to restrain the sheriff of Forsyth County and the chief of police of Kernersville from interfering with plaintiffs' operation of certain slot machines. From judgment dissolving the temporary restraining order, plaintiffs appealed.

*W. Reade Johnson and W. H. Yarborough, Jr., for plaintiffs.*
*No counsel for defendants.*

DEVIN, J. It is alleged in the third and fourth paragraphs of the complaint that each of the plaintiffs has paid State and county license "for the privilege of operating certain coin operated devices known as predictable slot machines in that the operator thereof can ascertain in advance of each and every play, and before said play is made, the exact result thereof, and that the plaintiffs say and allege by reason of the fact that the result of each and every play is predictable before said play is made that said machines and the operation thereof are legal under the law of North Carolina." The defendants, in answer to paragraphs three and four of the complaint, say: "It is admitted the plaintiffs purchased State and county license; all other allegations in said paragraphs, not herein admitted, are denied."

Paragraph five of the complaint contains the further allegation that defendants, the sheriff of the county and the chief of police of Kernersville, have notified plaintiffs of their intention to take possession of said predictable machines and to prevent the use thereof, and that unless these officers be restrained plaintiffs will suffer loss of money paid for license and the loss of profits from the operation of the machines. In answer to paragraph five defendants say, "The allegations contained in paragraph five are admitted, except it is denied that said machines are legal."

In the judgment it is recited that "upon consideration of the facts set forth in the complaint and the admissions and denials in the answer, the same being considered as affidavits for the purpose of this hearing, and upon further consideration of contentions of counsel with respect to the mechanical operation of said machines, the court is of opinion that the temporary restraining order should not be continued to the hearing."

By chapters 37 and 282 of the Public Laws of 1935, an unlawful slot machine was substantially defined as one adapted for use in such a way that as a result of the insertion of a coin such machine may be operated, and, by reason of any element of chance over which the operator cannot have any control over the outcome of the operation of such machine each and every time it is operated, the user may receive something of

value. It was further enacted that the possession, operation, or ownership of such machines should constitute a misdemeanor, and the machines were declared to be public nuisances. The State and counties were prohibited from levying or collecting license for such machines. These acts were construed by this Court in *S. v. Humphries*, 210 N. C., 406.

That the slot machines, referred to in the complaint in the instant case, were in all respects legal was denied in the answer. The court below considered also the mechanical operation of the slot machines as contended by counsel. No findings of fact appear in the judgment, nor was request made therefor; hence, it will be presumed that the court found sufficient facts to support the judgment (*Dunn v. Wilson*, 210 N. C., 493; *Angelo v. Winston-Salem*, 193 N. C., 207). There was averment of anticipated money loss, but no allegation of irreparable injury, or insolvency of defendants, and by reason of the continued operation of the machines, which seems to have been permitted by the appeal, no substantial loss has been caused the plaintiffs. It will be noted that by chapter 196, Public Laws of 1937, effective 1 July, 1937, additional provisions were enacted with reference to slot machines, and their possession and operation made unlawful. The payment of State and county license tax on slot machines would not justify the operation of those machines which come within the definition of unlawful devices set forth in the statutes.

The ruling of the court below in declining to restrain law enforcement officers from taking steps to prevent the operation of slot machines, which are contended to be within the prohibition of the statutes as public nuisances, on the record before us, must be

Affirmed.

STACY, C. J., dissenting: The only suggestion of illegality of the slot machines in question is the bare *ipsi dixit* of the sheriff, "it is denied that said machines are legal." Thus, upon this denial, which is a mere conclusion, it is presumed by the majority "that the court found sufficient facts to support the judgment." No such presumption can be indulged when all the evidence is before us and there is none to support it. *Dunn v. Wilson*, 210 N. C., 493. Even findings without evidence are unavailing. *Howard v. Board of Education*, 189 N. C., 675, 127 S. E., 704. The present holding is at variance with the decision in *Hospital v. Rockingham County, ante*, 205; *Flemming v. Asheville*, 203 N. C., 810, 167 S. E., 77; and *Smith v. Comrs.*, 191 N. C., 775, 133 S. E., 1.

Under the principles heretofore established, the plaintiffs are denied the equal administration of the laws. *Advertising Co. v. Asheville*, 189

N. C., 737, 128 S. E., 149; *Sanders v. Ins. Co.*, 183 N. C., 66, 110 S. E., 597; *Tomlinson v. Cranor*, 209 N. C., 688, 184 S. E., 554. A government that demands and accepts $3,700 in license taxes for the privilege of operating said machines, as it has done here, ought, at least, to hear the plaintiffs on the question of the legality of their business, and not leave it to the sheriff to determine. The courts are open to all alike. To be just to everyone, regardless of race, color, creed, or condition, whether high or low, rich or poor, saint or sinner, is the first and foremost duty of a State. Of course, this is what the defendant contends has been done in the instant case, but he is not the one to decide the matter.

It is the general practice of equity courts, upon a *prima facie* showing for injunctive relief, to continue the restraining order to the hearing, when it appears that no harm can come to the defendant from such continuance, and great injury might result to the plaintiff from a dissolution of the injunction. *Little v. Trust Co.*, 208 N. C., 726, 182 S. E., 491; *Boushiar v. Willis*, 207 N. C., 511, 177 S. E., 632; *Porter v. Ins. Co., ibid.*, 646, 178 S. E., 223; *Troutman v. Shuford*, 206 N. C., 909, 174 S. E., 230; *Thomason v. Swenson*, 204 N. C., 759, 169 S. E., 620; *Parker v. Bank*, 200 N. C., 441, 157 S. E., 419; *Cullins v. State College*, 198 N. C., 337, 151 S. E., 646; *Wentz v. Land Co.*, 193 N. C., 32, 135 S. E., 480; *Hurwitz v. Sand Co.*, 189 N. C., 1, 126 S. E., 171. "Where it will not harm the defendant to continue the injunction, and may cause great injury to the plaintiff if it is dissolved, the court generally will restrain the party until the hearing"—*Walker, J.*, in *Seip v. Wright*, 173 N. C., 14, 91 S. E., 359.

The plaintiffs are entitled to invoke the procedure heretofore established by the decisions. This is all they are now asking.

What is said in reference to the 1937 act should be regarded as *obiter*. The statute is not applicable to the present controversy, and it is not before us for interpretation or construction. It could hardly be that all slot machines, including scales, music boxes, vending machines, etc., are made unlawful by the act. *S. v. Brockwell*, 209 N. C., 209, 183 S. E., 378. See dissenting opinion in *S. v. Humphries*, 210 N. C., 406, 186 S. E., 473.

CONNOR, J., concurs in dissenting opinion.

IN RE ALFRED L. MALICORD.

(Filed 9 June, 1937.)

**1. Criminal Law § 8—**

Under the New York law, a charge of second degree arson includes counseling, commanding, inducing, or procuring another to commit the crime.

**2. Extradition § 2—Accessory before the fact may be fugitive from justice although crime was actually committed after he left the State.**

Where the charge of crime by the demanding state includes counseling, commanding, inducing, or procuring another to commit the crime, the person charged is a fugitive from justice even though he was not in the demanding state at the time the crime was actually committed, if he committed overt acts while within the state resulting in the commission of the crime by another after he had absented himself therefrom.

**3. Extradition § 4—**

On *habeas corpus* in extradition proceedings, the papers of the demanding state are sufficient if they substantially charge petitioner with a crime under its laws.

APPLICATION by Alfred L. Malicord for *certiorari* to review judgment of *Barnhill, J.*, rendered 16 March, 1937, in the Superior Court of ALAMANCE, on return to writ of *habeas corpus* dismissing said writ.

It appears from the record that the petitioner is charged with the crime of arson—second degree—in the State of New York, and that extradition was ordered by the Governor of this State on 15 March, 1937.

It is found as a fact that the petitioner was a resident of the State of New York "up until 29 December, 1936," when he departed therefrom, and has since not returned. It is alleged that while in said state the petitioner counseled, commanded, induced, or procured one Jacob Lebowitz to burn a boat, owned by the petitioner and insured against loss by fire; that the actual burning took place on 7 January, 1937, and that thereafter the petitioner paid the said Jacob Lebowitz for burning the insured property as previously promised.

Upon the showing made at the hearing, it was further found and held that "the defendant was in the State of New York at the time of his alleged participation in the crime charged in the warrant, and that since his alleged participation in said crime, he has departed the State of New York, and is now a fugitive therefrom." Whereupon, the writ of *habeas corpus* was dismissed.

*Cooper A. Hall and Fred M. Beckwith for the State of New York.*
*Brooks, McLendon & Holderness for petitioner.*

STACY, C. J. If the petitioner were charged *eo nomine* with solicitation to burn the boat in question, a substantive common law offense, *S. v. Hampton,* 210 N. C., 283, 186 S. E., 251, or with counseling, commanding, inducing, or procuring another to burn it, styled under our law "accessory before the fact," C. S., 4175, there would perhaps be no debate as to the correctness of the court's ruling in dismissing the writ. *S. C. v. Bailey,* 289 U. S., 412; *In re Veasey,* 196 N. C., 662, 146 S. E., 599. But it is contended by the petitioner that he is charged with being a principal in the felony of 7 January, 1937, and that he has not been in the State of New York since 29 December, 1936, *ergo* he cannot be a fugitive from the crime charged. *Hyatt v. Corkran,* 188 U. S., 691; *Ex parte Shoemaker,* 25 Cal. App., 551, 144 Pac., 985.

The matter, then, comes to a narrow point: Does the charge of second degree arson, under the New York law, include that of counseling, commanding, inducing, or procuring another to commit the crime? The New York law answers the question in the affirmative. *People v. Peckens,* 153 N. Y., 576.

The section of the Penal Code, under which the petitioner is charged, provides that "a person who willfully burns . . . a vessel . . . which is at the time insured against loss or damage by fire, with intent to prejudice or defraud the insurer thereof, is guilty of arson in the second degree." The same code also provides that "a person who directly or indirectly counsels, commands, induces, or procures another to commit a crime is a 'principal.' "

In the case of *People v. McKane,* 143 N. Y., 455, the defendant and three inspectors of election were indicted jointly for a violation of the election laws. The evidence against the defendant was, that he had induced and procured the inspectors to commit the offense charged against them by command, counsel, or advice. Upon this evidence, and under the joint indictment, the defendant was convicted, which conviction was sustained, the Court saying: "He who by command, counsel, or assistance procures another to commit a crime is, in morals and in law, as culpable as the actual visible actor himself, for the reason that the criminal act, whatever it may be, is imputable to the person who conceived it and set the forces in motion for its actual accomplishment. The fact that he may, for some reason, be incapable of committing the same offense himself is not material so long as it can be traced to him as the moving cause by instigating another to do what he could not do himself. This was the rule of the common law and it has been applied to offenses like this under special statutes," citing many authorities in support of the position.

In other words, to state it compendiously, under the New York law, an "accessory before the fact" is a principal and may be tried and con-

victed as such. See *S. v. Bryson,* 173 N. C., 803, 92 S. E., 698, where similar procedure was approved in this jurisdiction.

It follows, therefore, that the petition for writ of *habeas corpus* was properly dismissed. We may add that the court's ruling finds full support among the authorities, especially in *Strassheim v. Daily,* 221 U. S., 280; *In re Cook,* 49 Fed., 833, affirmed *sub nomine, Cook v. Hart,* 146 U. S., 183; *Ex parte Hoffstot,* 180 Fed., 240; and *In re Sultan,* 115 N. C., 57, 20 S. E., 375.

In the *Strassheim case, supra,* where a much stronger showing against extradition was made out than in the instant proceeding, and in which the warrant of extradition was upheld, *Mr. Justice Holmes,* in delivering the opinion of the Court, uses this language: "Of course we must admit that it does not follow that Daily is a fugitive from justice. *Hyatt v. Corkran,* 188 U. S., 691, 712. On the other hand, however, we think it plain that the criminal need not do within the state every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice, when the crime is complete, if not before. *In re Cook,* 49 Fed. Rep., 833, 843, 844; *Ex parte Hoffstot,* 180 Fed. Rep., 240, 243; *In re William Sultan,* 115 N. C., 57. For all that is necessary to convert a criminal under the laws of a state into a fugitive from justice is that he should have left the state after having incurred guilt there, *Roberts v. Reilly,* 116 U. S., 80, and his overt act becomes retrospectively guilty when the contemplated result ensues. . . . We have given more attention to the question of time than it is entitled to, because of the seeming exactness of the evidence. But a shorter and sufficient answer is to repeat that the case is not to be tried on *habeas corpus,* and that when, as here, it appears that the prisoner was in the state in the neighborhood of the time alleged it is enough."

Much of the petitioner's brief is devoted to the sufficiency of the papers to warrant his extradition, but this is an afterthought. The point was not raised in his petition for writ of *habeas corpus,* nor yet in his application for *certiorari.* It is clear that, under the New York law, the petitioner is "substantially charged with a crime," and on *habeas corpus* in extradition proceedings this is enough. *Pierce v. Creecy,* 210 U. S., 387; *Strassheim v. Daily, supra.* No fatal defect appears on the face of the record. *U. S. v. Pridgeon,* 153 U. S., 48. Compare *In re Hubbard,* 201 N. C., 472.

Affirmed.

C. B. GOSWICK, NELLO L. TEER, AND HUBERT C. TEER, FOR THEMSELVES AND ON BEHALF OF ALL OTHER CITIZENS AND TAXPAYERS OF THE CITY OF DURHAM WHO MAY DESIRE TO JOIN IN THIS ACTION, *v.* CITY OF DURHAM.

(Filed 9 June, 1937.)

**1. Municipal Corporations § 43—Purchase of land for airport from surplus funds held within power of city.**

The purchase of lands by a city for a municipal airport is for a public purpose, ch. 87, Public Laws of 1929, and where a city has made such purchase from surplus funds in its treasury its purchase will not be held invalid as being *ultra vires*, even though a part of the surplus funds used to pay the purchase price was derived from *ad valorem* taxes, the executed contract not offending the provisions of Art. VII, sec. 7.

**2. Appeal and Error § 45a—**

An exception to a finding of fact not supported by the evidence will be sustained.

**3. Municipal Corporations § 43—Judgment that city may not use funds derived from taxes for airport improvements without vote is upheld.**

The judgment of the Superior Court sustained the purchase of land by defendant city for an airport, found that funds which the city proposed to spend for improvement of the airport were surplus funds derived from sources other than *ad valorem* taxes, and authorized the expenditure of such funds for that purpose, but held that the city was without power to expend money obtained from taxes for the airport unless authorized by a vote of the people. On plaintiff taxpayer's appeal, the executed contract of purchase was upheld, but it was determined that the finding that proposed expenditures for improvement were available from sources other than *ad valorem* taxes was not supported by the evidence, and the other part of the judgment being unexcepted to, the judgment as modified is affirmed.

STACY, C. J., concurs in result.

APPEAL by plaintiffs from *Williams, J.*, at December Term, 1936, of DURHAM. Modified and affirmed.

Taxpayers' suit to restrain the city of Durham from expending tax derived funds for the construction of a municipal airport.

The plaintiffs allege that the city of Durham, on 22 June, 1936, expended the sum of $40,000 for the purchase of land near the city for the purpose of constructing thereon an airport, or landing field for airplanes and aircraft, and that the city plans to expend large additional sums of money for the equipment and maintenance of said landing field; that the expenditures for this purpose were and are unlawful, in that the city used funds derived from *ad valorem* taxes for the fiscal year ended 30 June, 1936, and intends to continue to use funds obtained from taxation for the development of said airport, and that said expenditures

were not for the necessary expense of, nor approved by, the qualified electors of the city. Plaintiffs prayed that defendant be restrained from spending public funds for the development of said land as an airport, and from entering into any contract with the Federal Works Progress Administration, or in any way incurring obligation or pledging the credit of the city for that purpose.

The city of Durham, in its answer, admitted that it had purchased the land for the purpose of constructing and developing a municipal airport, and alleged that the expenditures therefor had been made out of the surplus funds of the city, and that the proposed expenditure of additional sums for the equipment of said property as a practical landing field for aircraft was for a public purpose in accordance with chapter 87, Public Laws of 1929, and that no expenditure of the funds of the city would be made except as authorized by law. The defendant admitted that it had secured an allotment of funds from the Federal Works Progress Administration for this purpose, but that in the agreement with the Federal agency it did not pledge the faith of the city beyond its lawful ability. It was further set forth in the answer that Durham is a city of substantial and expanding growth, with a present estimated population of 65,000, and total taxables in excess of seventy-one million dollars. It was admitted that the construction of a municipal airport constituted a public purpose though not a necessary expense within the meaning of Article VII, sec. 7, of the Constitution of North Carolina, and that no vote of the people had been had thereon, nor was one contemplated.

The trial judge, upon consideration of the pleadings and affidavits and exhibits offered, made full findings of fact, setting out in detail the condition of the finances and revenues of the city of Durham as of the close of the fiscal year ended 30 June, 1936, and among other things found that the expenditure for the purchase of the land for this airport was from available surplus revenues and in all respects valid, and that the sum of $4,923 then in the treasury and derived from sources other than *ad valorem* taxes and sale of cemetery lots, was available for use in connection with the construction and equipment of the airport.

It was held by the court below that the city of Durham did not have legal authority and was not authorized to expend for the purpose of constructing or operating airport facilities any fund derived from *ad valorem* taxes, whether surplus funds or otherwise, but that the city could lawfully use for this purpose the sum of $4,923 then available, which the court found was derived from sources other than *ad valorem* taxes and sale of cemetery lots. And it was adjudged that the city be "restrained from expending (unless authorized so to do by a vote of the people) any sums of money held in surplus account or elsewhere, now or hereafter, derived from money obtained by levying and collecting

taxes, or from contracting any debt, pledging its faith, loaning its credit, or levying and collecting any tax, for the purpose of constructing and establishing airport facilities of any nature or kind, either directly or indirectly."

Plaintiffs excepted to certain findings of fact, and from the judgment thereon appealed.

*Basil M. Watkins, L. P. McLendon, and W. P. Farthing for plaintiffs.*
*S. C. Chambers, City Attorney, and R. P. Reade for defendant.*

DEVIN, J. The plaintiffs contend that it sufficiently appears from the figures and mathematical calculations contained in the exhibits offered, evidencing the fiscal affairs of the city of Durham as of 30 June, 1936, upon which the findings of fact and the judgment of the court were based, that the funds used for the purchase of land for the municipal airport were derived in whole or in part from *ad valorem* taxes, and that therefore the purchase should be held invalid and the property required to be sold and the proceeds converted back into the city treasury for the benefit of the taxpayers in the reduction of prospective tax rate.

But we cannot hold that the purchase of the land was invalid or decree its sale. If it be conceded that a portion of the funds from which $40,000 was paid for the property was derived from *ad valorem* taxes, this was an executed contract for the purchase of property, for an admittedly public purpose (chapter 87, Public Laws 1929). The acquisition of the land from surplus funds was not beyond the power of the city and it in no way offended the provisions of Article VII, sec. 7, of the Constitution. *Adams v. Durham,* 189 N. C., 232; *Nash v. Monroe,* 198 N. C., 306.

The exception to the finding of fact that there was a net available amount of $4,923 of surplus revenue in the treasury of the city derived from sources other than taxes and sale of cemetery lots, and the adjudication that this amount was now available for expenditures in the construction and equipment of a municipal airport, must be sustained, as we are of opinion that the figures and calculations shown in the evidence adduced do not support the conclusions of the court below on this point.

No exception was noted by either side to that portion of the judgment restraining the city of Durham from expending money obtained from taxes for the purposes of a municipal airport, unless authorized to do so by a vote of the people, and the judgment in that respect must be affirmed.

The good faith of the officials of the city of Durham in the exercise of judgment in fixing its budgets and in the handling of public funds is in no way questioned.

While there is no contention that the construction, equipment, and maintenance of an airport and landing field is a necessary municipal

expense within the meaning of Article VII, sec. 7, of the Constitution (*Henderson v. Wilmington*, 191 N. C., 269), yet it may not be improper to say that man's constantly advancing progress in the conquest of the air as a medium for the transportation of commerce and for public and private use indicates the practical advantage and possible future necessity of adequate landing facilities for the use of the "argosies of magic sails . . . dropping down with costly bales" to the same extent that paved streets and roads are now regarded for the purposes of communication and transportation on land. *Hargrave v. Commissioners*, 168 N. C., 626; *Dysart v. City of St. Louis*, 321 Mo., 514. As was said by *Brogden, J.*, speaking for the Court in *Walker v. Faison*, 202 N. C., 694, "The law is an expanding science, designed to march with the advancing battalions of life and progress and to safeguard and interpret the changing needs of a commonwealth or community."

The judgment of the court below, except as herein modified, is Affirmed.

STACY, C. J., concurs in result.

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BOARD OF DRAINAGE COMMISSIONERS OF FORSYTH COUNTY, DISTRICT No. 2, v. MRS. BRYAN JARVIS ET AL.

(Filed 9 June, 1937.)

**1. Drainage Districts § 3—Where pleading does not allege cause against district in its corporate capacity, its demurrer should be sustained.**

While both a drainage district and its commissioners may be liable for injury to land caused by the negligent operation of the district, where in an action to foreclose a drainage lien defendant landowner sets up a cross action for damages caused by alleged negligent operation solely against the commissioners individually, the valid existence of the drainage district being denied, the drainage district's demurrer to the cross action should be sustained.

**2. Drainage Districts § 1—In this action to foreclose second drainage assessment landowner could not attack validity of district.**

A landowner was made a party defendant in the proceedings to establish a drainage district, the first drainage lien was paid, and in another action the validity of the district was adjudicated. *Held:* In this action by the district to foreclose the second assessment lien, the landowner is estopped to attack the validity of the district or is not in a position upon the record to question its validity. C. S., 5352, 5353.

APPEALS by plaintiff and defendant, Mrs. Bryan Jarvis, from *Hill, Special Judge*, at November Term, 1936, of FORSYTH.

DRAINAGE COMRS. *v.* JARVIS.

Civil action to foreclose second assessment lien against lands of Mrs. Bryan Jarvis, situate within the boundaries of Forsyth County Drainage District No. 2.

The defendant Jarvis first had the individual members of the board of drainage commissioners made parties defendant, then she filed answer denying the existence of the district and the validity of the assessment, and alleged that her codefendants, the individual commissioners, negligently flooded and damaged her lands, and asked judgment against "the plaintiff, if any," and her codefendants.

The plaintiff demurred *ore tenus* to the alleged cause of action set up in the further defense of the answer filed by Mrs. Jarvis, on the ground that the facts stated therein are not sufficient to constitute a cause of action against the plaintiff. Overruled; exception.

The jury returned the following verdict:

"1. Was and is the plaintiff duly created, organized, and existing as Forsyth County Drainage District No. 2, as alleged in the complaint? A. 'Yes.'

"2. If so, did said drainage district legally levy against the property of the defendant Mrs. Bryan Jarvis a drainage district assessment, as alleged in the complaint? A. 'Yes.'

"3. Is the said defendant, Mrs. Bryan Jarvis, by the summons, petitions, orders, decrees, and judgment roll in the proceeding for the alleged establishment of said Forsyth County Drainage District No. 2, and by the record and judgment roll in the action entitled 'H. P. Alspaugh *v.* Hire *et al.*,' estopped to contest the validity of the creation of the said drainage district, the levying of said assessment, and the issuance of bonds therefor, as alleged by the plaintiff? A. 'Yes.'

"4. In what amount, if any, are the said lands of the defendant, Mrs. Bryan Jarvis, liable to the plaintiff on the alleged drainage assessment sale certificate sued on herein? A. '$98.30.'

"5. Were the lands of the defendant, Mrs. Bryan Jarvis, damaged by the negligence of the Forsyth County Drainage District No. 2 and/or A. E. Hire, A. T. Cook, and S. B. Alspaugh, or either of them, and if so, by the negligence of which of said parties? A. 'Yes, Forsyth County Drainage District No. 2.'

"6. What amount of damages, if any, is the defendant, Mrs. Bryan Jarvis, entitled to recover? A. '$1,000.'"

Judgment on the verdict, from which the plaintiff and the defendant Jarvis both appeal.

*Manly, Hendren & Womble and W. P. Sandridge for plaintiff.*

*Elledge & Wells and Parrish & Deal for defendant, Mrs. Bryan Jarvis.*

STACY, C. J. Plaintiff's appeal challenges the ruling upon its demurrer interposed to the "further defense," or cross action, on the ground that the facts stated therein are not sufficient to constitute a cause of action against the plaintiff in its corporate capacity. C. S., 511. The challenge is well taken. The demurrer should have been sustained. *Newby v. Drainage District,* 163 N. C., 24, 79 S. E., 266. The answer contains no allegation of negligence against the plaintiff which may properly be made in this action. *Craven v. Comrs.,* 176 N. C., 531, 97 S. E., 470; *Shelton v. White,* 163 N. C., 90, 79 S. E., 427. All allegations of negligence are directed against the commissioners individually, parties defendant herein, and apparently they have been exculpated from any such negligence by the verdict. See *Leary v. Comrs.,* 172 N. C., 25, 89 S. E., 803.

The well considered cases of *Spencer v. Wills,* 179 N. C., 175, 102 S. E., 275; *Sawyer v. Drainage District, ibid.,* 182, 102 S. E., 273, cited and relied upon by the defendant, are not controlling on the facts presently appearing of record. The complete answer to the argument made on behalf of the defendant is that she has alleged no cause of action against the plaintiff in its capacity as a drainage district, the capacity in which it sues. It is established by the decisions that the board, as well as its individual members, may be liable for negligence, *Leary v. Comrs., supra,* but the pleadings are not cast in this double mold.

There was a directed verdict on the first three issues. The defendant's appeal brings in question the correctness of this ruling. Without undertaking to detail the evidence, it is enough to say, (1) the defendant Jarvis and her husband, who was then living, were made parties defendant, as nonpetitioners, to the original proceeding brought to establish the district, (2) the first assessment has already been paid—this action being to foreclose the second assessment, and (3) the validity of the district has heretofore been adjudicated in the case of *Alspaugh v. Comrs.,* 197 N. C., 776, 147 S. E., 923. It is not perceived wherein the result upon the first four issues should be disturbed. No fatal error in this respect has been made to appear. At any rate, it would seem that the appealing defendant is either estopped, *Lumber Co. v. Drainage Comrs.,* 174 N. C., 647, 94 S. E., 457; *Eaton v. Graded School,* 184 N. C., 471, 114 S. E., 689, or is in no position to question the validity of the district on the present record. C. S., 5352 and 5353.

On plaintiff's appeal, reversed.

On defendant's appeal, no error.

GURNEY P. HOOD, COMMISSIONER OF BANKS OF STATE OF NORTH CAROLINA, EX REL. NORTH CAROLINA BANK & TRUST COMPANY, *v.* CLARENCE I. CLARK.

(Filed 9 June, 1937.)

**1. Appeal and Error § 45e—**

On appeal from judgment of nonsuit, the evidence must be considered in the light most favorable to plaintiff in order to determine whether it was sufficient to be submitted to the jury.

**2. Banks and Banking § 16—Liability of transferor of bank stock.**

In order for a transferor of bank stock to escape the statutory liability thereon, the transfer must be made to person of age previous to any default by the bank, and in good faith and without intent to evade the statutory liability, intent and good faith to be determined by surrounding circumstances.

**3. Same—Evidence held for injury on issue of transferor's liability.**

Evidence that the owner of bank stock transferred same, without consideration, to his son, who was of age but was without property, six days after the only other commercial bank in the city closed its doors for liquidation, *is held* sufficient to be submitted to the jury in a suit to subject the transferor to the statutory liability.

**4. Same—Presumption arising from transfer of stock within 60 days prior to suspension relates to closing for liquidation and not to bank holiday.**

The *prima facie* presumption of intent to evade the statutory liability on bank stock arising from the transfer of the stock within sixty days prior to the suspension of the bank, N. C. Code, 219 (d), would seem to relate to the closing of the bank for liquidation and proceedings to enforce the statutory liability of stockholders rather than to its suspension and reopening under a restricted basis under ch. 120, Public Laws of 1933, and the orders of the Commissioner of Banks pursuant thereto.

APPEAL by plaintiff from *Armstrong, J.*, at February Term, 1937, of GUILFORD. Reversed.

Action to subject defendant to stockholders' liability on certain shares of stock in the North Carolina Bank & Trust Company.

At the close of the evidence motion for judgment of nonsuit was sustained, and from judgment dismissing the action plaintiff appealed.

*Brooks, McLendon & Holderness for plaintiff.*
*Hobgood & Ward for defendant.*

DEVIN, J. The allowance of defendant's motion for judgment of nonsuit requires consideration of the evidence in the light most favorable to the plaintiff to determine whether it was sufficient to warrant submission to the jury.

The evidence tended to show that defendant was the former owner of 240 shares of the stock of the North Carolina Bank & Trust Company, and that on 15 February, 1933, he transferred the stock to his son, Julian P. Clark, aged 24, without consideration, the son owning no property except a small amount of personalty. It also appeared in evidence that on 9 February, 1933, United Bank & Trust Company, the only other commercial bank in Greensboro, closed its doors and was taken over by the Commissioner of Banks for the purpose of liquidation. It was admitted that on 3 March, 1933, withdrawals from the North Carolina Bank & Trust Company were limited to five per cent; that the bank observed the banking holiday 4 March to 8 March, 1933, pursuant to chapter 120, Public Laws of 1933, and the orders of the Commissioner of Banks, and did not reopen therefrom for unrestricted business, although it did reopen at the end of said banking holiday under the terms and provisions of the orders of the Commissioner of Banks, and remained open for such restricted business as was permitted by the orders of the Commissioner of Banks until 20 May, when the Commissioner of Banks took possession of the bank for the purpose of liquidation, pursuant to the provisions of the statute relating to insolvent banks, and on 22 June, 1933, levied assessment equal to the stock liability of each stockholder in the bank, and filed the assessment roll in the office of the clerk of the Superior Court, under authority of C. S., 218 (c), (13).

The transfer of bank stock, to be effective against creditors of the bank, must be made in good faith and without intent to evade liability as a stockholder, to a person of full age and previous to any default in the payment of a debt by the bank. C. S., 219 (d). The question of intent and good faith must be determined by the surrounding circumstances. The fact that the defendant transferred his stock to his insolvent son without consideration, and that this was done six days after the only other commercial bank in the city had failed and been taken over for liquidation by the Commissioner of Banks, would, we think, constitute some evidence bearing on the question of the purpose of the transfer and be susceptible of the reasonable inference that it was done in order to evade personal liability on the stock.

It was also urged by the plaintiff that the evidence warrants the conclusion that the transfer of the stock was made within sixty days prior to the suspension of the bank, and was therefore *prima facie* evidence that the assignment was made with knowledge of the insolvency of the bank and with intent to evade the stockholders' liability. C. S., 219 (d). While the word "suspension" is ordinarily defined as a "temporary stop," a "temporary delay, interruption, or cessation," and as to commercial institutions, sometimes, "business failure," yet taken in the connection in which it is used in the statute, the reference is to bank stockholders'

liability and to the proceedings to enforce it. The statute (Public Laws 1921, ch. 4, sec. 24, codified in Michie's North Carolina Code as section 219 [d]) which sets forth the rule as to the liability of the assignor of stock and prescribes the period prior to the suspension of the bank within which an assignment would constitute *prima facie* evidence of intent to evade liability, occurs in connection with those provisions of the Banking Act which relate to the dissolution and liquidation of banks, and to the enforcement of the stockholders' liability accruing only upon the final closing of an insolvent bank for the purpose of liquidation.

However, without regard to the *prima facie* effect produced by the transfer of bank stock within the period prescribed by the statute, we conclude that there was sufficient evidence to go to the jury, and that there was error in sustaining the motion to nonsuit.

Reversed.

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STATE v. JOHN FOLGER.

(Filed 9 June, 1937.)

**Automobiles § 31—Driving automobile without due caution at speed or in manner endangering persons of property constitutes reckless driving.**

A defendant is guilty under N. C. Code, 2621 (45), if he drives an automobile on a public highway without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and an instruction that he would be guilty under this section if he drove an automobile without due caution and circumspection, or at a speed or in a manner so as to endanger or be likely to endanger any person or property is reversible error as failing to include all the facts constituting the statutory offense.

APPEAL by defendant from *Armstrong, J.*, at December Term, 1936, of FORSYTH. New trial.

The defendant was tried in the Superior Court of Forsyth County on a criminal warrant issued by the municipal court of the city of Winston-Salem, N. C., in which it was charged that "the defendant, John Folger, on or about 16 June, 1936, within the corporate limits of the city of Winston-Salem, did unlawfully and willfully operate a motor vehicle upon a public highway in a dangerous and reckless manner, carelessly and heedlessly in willful and wanton disregard of the rights and safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger the persons and property of others against the statute in such cases made and provided."

At the trial, the evidence for the State tended to show that between 4 and 5 o'clock, during the afternoon of 16 June, 1936, the defendant drove an automobile along Fourth Street in the city of Winston-Salem, and into the intersection of said street with Patterson Avenue, at a speed of 40 to 50 miles per hour, and collided with an automobile driven by Clyde Myers on Patterson Avenue, into said intersection at a speed in excess of 50 miles per hour.

The evidence for the defendant tended to show that before entering into the intersection of Fourth Street and Patterson Avenue, the defendant stopped his automobile, and looked in both directions along Patterson Avenue, and because of tall buildings located on said avenue, did not see the automobile driven by Clyde Myers along said avenue, and thereafter entered said intersection; and that the collision between the automobile driven by the defendant and the automobile driven by Clyde Myers was caused by the negligence of Clyde Myers in entering the intersection at an excessive rate of speed, and without giving warning of his approach to said intersection.

The court in its charge instructed the jury as follows:

"Now, the court charges you that if the State has satisfied you beyond a reasonable doubt that the defendant drove his automobile upon a public highway or street in the city of Winston-Salem, at the time and place alleged, carelessly—that is, without due care or reasonable care, and heedlessly—that is, without reasonable heed, and in willful and wanton disregard of the rights or safety of others, that is, in an intentional or reckless disregard of the rights and safety of others—then he would be guilty of reckless driving; (or if the State has satisfied you from all the evidence in this case that the defendant operated his automobile upon a public highway or street of the city of Winston-Salem without due caution and circumspection, or at a speed, or in a manner so as to endanger or be likely to endanger any person or property on the public street, then and in that event, if you so find beyond a reasonable doubt, from the evidence, it would be your duty to convict the defendant of reckless driving as charged in the warrant).

The defendant duly excepted to that portion of the foregoing instruction which is included in parentheses.

The jury returned a verdict of guilty. From judgment that he pay a fine of twenty-five dollars and one-half the costs of the action, the defendant appealed to the Supreme Court, assigning errors in the trial.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Folger & Folger for defendant.*

CONNOR, J. The defendant was charged with a violation of a statute which reads as follows:

"Any person who drives any vehicle upon a highway carelessly and heedlessly in a willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in section 60 of this act." Section 3, chapter 148, Public Laws of North Carolina, 1927; N. C. Code of 1935, section 2621 (45).

Under this statute, a person is guilty of reckless driving (1) if he drives an automobile on a public highway in this State, carelessly and heedlessly, in a willful or wanton disregard of the rights or safety of others, or (2) if he drives an automobile on a public highway in this State without due caution and circumspection *and* at a speed or in a manner so as to endanger or be likely to endanger any person or property.

At the trial of this action the court instructed the jury as follows:

"If the State has satisfied you from all the evidence in this case that the defendant operated his automobile upon a public highway or street in the city of Winston-Salem without due caution and circumspection, *or* at a speed, or in a manner so as to endanger or be likely to endanger any person or property on the public street, then and in that event, if you so find beyond a reasonable doubt, from the evidence, it will be your duty to convict the defendant of reckless driving as charged in the warrant."

There is error in this instruction, for which the defendant is entitled to a new trial. The jury should have been instructed that if they were satisfied beyond a reasonable doubt, by the evidence, that the defendant operated his automobile on a public highway or street in the city of Winston-Salem, without due caution and circumspection *and* at a speed or in a manner so as to endanger or be likely to endanger any person or property on said public highway or street, then and in that event it would be their duty to convict the defendant of reckless driving, as charged in the warrant. Where the defendant in a criminal action is charged with a statutory crime, it is incumbent on the State to satisfy the jury beyond a reasonable doubt, by the evidence, of all the facts which constitute the crime as defined by the statute.

The defendant is entitled to a new trial. It is so ordered.

New trial.

JOSIE RUTH McINTYRE v. JOHN G. McINTYRE.

(Filed 9 June, 1937.)

**Divorce § 12: Estoppel § 3—In suit for alimony, husband may not attack marriage on ground that his divorce decree from first wife was invalid.**

In a suit against the husband by his second wife for divorce from bed and board and for alimony, the husband may not attack the validity of his marriage to plaintiff by asserting that the divorce which he had himself obtained in another state from his first wife was null and void for want of personal service on her, since he will not be heard to impeach the decree which he had obtained, or to question the jurisdiction of the court rendering the decree, after new rights and interest had arisen as a result of his second marriage.

APPEAL by defendant from *Ervin, Special Judge,* at March Extra Civil Term, 1937, of MECKLENBURG. No error.

Action for divorce *a mensa et thoro,* and for alimony. Defendant pleaded the invalidity of his marriage with the plaintiff, on the ground that at the time of the marriage ceremony between them he had a living wife as result of a previous marriage, and that a divorce obtained from his former wife by virtue of a decree in the State of Nevada was and is null and void for want of service on his former wife and lack of jurisdiction of the Nevada court, and that therefore he and the plaintiff were and are not legally married to each other.

Upon issues submitted, the jury rendered the following verdict:

"1. Was there a ceremony of marriage performed between the plaintiff and defendant on 23 January, 1926, in accordance with the formalities prescribed by law? Answer: 'Yes.'

"2. Did the defendant, at the time of said contract of marriage, then have a living wife by a preceding marriage, as alleged in the answer? Answer: 'No.'

"3. Did the defendant abandon the plaintiff, as alleged in the complaint? Answer: 'Yes.'"

It appeared from the evidence of the defendant that the defendant John G. McIntyre, then and now a resident of North Carolina, married Cora Wyatt in 1920, and that thereafter the defendant went to the State of Nevada, for the purpose of obtaining a divorce and returning to North Carolina, and, after remaining in Nevada nine months, secured a decree of absolute divorce from his wife, Cora, on 3 September, 1925; that the Nevada divorce was based upon constructive service only, and no personal service was had upon nor general appearance entered by said Cora McIntyre; that defendant immediately returned to North

Carolina, and on 23 January, 1926, married the plaintiff, Josie Ruth McIntyre, having advised the plaintiff of the facts and believing the Nevada divorce in all respects legal.

There was evidence sufficient to sustain the verdict on the third issue that defendant abandoned the plaintiff.

Upon the second issue the court charged the jury in substance that the law of North Carolina prohibited the defendant from asserting the invalidity of a decree of divorce obtained by him in a foreign state, and that since the burden of proof on the second issue was on the defendant, there being no evidence to warrant an affirmative answer, the jury should answer that issue "No."

To this instruction defendant in apt time excepted and now assigns same as error.

From judgment on the verdict the defendant appealed.

*Taliaferro & Clarkson for plaintiff, appellee.*
*J. L. Delaney for defendant, appellant.*

DEVIN, J. The single question presented by this appeal is this: May a resident of the State, who is the defendant in a suit for alimony, be permitted to set up as a defense thereto the invalidity of a divorce decree which he himself obtained in another state dissolving a previous marriage with a former wife? The answer is "No."

While this precise question has never before been considered by this Court, it would not seem to be in accord with reason and justice that one who has voluntarily invoked the jurisdiction of another state for the purpose of obtaining a divorce from a former wife, and has thereby been enabled to enter into marital relations with another, should be heard to impeach the decree which he had obtained, or to question its jurisdiction, when new rights and interests have arisen as a result of his second marriage.

This is in accord with the decisions in other states where the question has been presented. *Bledsoe v. Seaman,* 77 Kan., 679; *Starbuck v. Starbuck,* 173 N. Y., 503; *People ex rel. Shrady v. Shrady,* 95 N. Y. Supp., 991; *Kaufman v. Kaufman,* 163 N. Y. Supp., 566; *Guggenheim v. Wahl,* 203 N. Y., 390; *Re Ellis,* 55 Minn., 401; *Laird v. Texas,* 79 Tex. Crim. Rep., 129; *Asbury v. Powers* (Ky.), 65 S. W., 605; 23 L. R. A., 287; 3 A. L. R., 522, and note; 39 A. L. R., 695, and note; 9 R. C. L., sec. 268; 19 C. J., 378; North Carolina Law Review, Vol. XV, No. 2, p. 136.

While the validity of the Nevada divorce might be successfully assailed by other parties and under other circumstances (*Pridgen v. Pridgen,* 203 N. C., 533), we conclude that on the facts of this case there

was no error in the instructions to the jury given by the court below on the second issue.

Other exceptions noted at the trial were not brought forward by the appeal and need not be considered.

No error.

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STATE OF NORTH CAROLINA EX REL. D. B. SWARINGEN v. LEET POPLIN.

(Filed 9 June, 1937.)

**Elections § 18a—Validity of election may be attacked in quo warranto proceedings.**

The procedure of *quo warranto* is available to test the validity of elections upon a proper showing, C. S., 870, and the contention that it is the duty of the county board of elections to determine the matter, and that the unsuccessful candidate is remitted solely to the statutory remedy, N. C. Code, 5923, 5927, 5933, is untenable, the jurisdiction of the Superior Courts never having been relinquished.

STACY, C. J., and CONNOR, J., concur in result.

APPEAL by defendant from *Alley, J.*, at March Term, 1937, of WILKES. Affirmed.

This is a *quo warranto* proceeding to try title to the office of county commissioner of Wilkes County, N. C. C. S., 869.

The plaintiff obtained leave of the Attorney-General to bring these *quo warranto* proceedings to try title to the office of county commissioner of Wilkes County, N. C. C. S., 870.

Among other things, it is alleged in the complaint: "That the plaintiff is a resident and citizen of the county of Wilkes and was such resident and citizen on, prior to, and since the general election held in Wilkes County on 3 November, 1936, and was a duly and legally nominated candidate on the Republican ticket for county commissioner of Wilkes County, and voted on in said election, and the defendant Leet Poplin is a resident and citizen of Wilkes County and was such citizen and resident on, before, and since said election, and was a duly nominated candidate for county commissioner of Wilkes County on the Democratic ticket, and voted on in said election. . . . That said election board in Wilkes County knew at the time that it unlawfully, willfully, and fraudulently and with intent to deprive this plaintiff of his office by issuing said certificate, that plaintiff had received in Rock Creek Township 441 votes, and that either the election officials of said township, the election board, or someone under their control, had unlawfully, willfully, fraudu-

lently, and with intent to deprive this plaintiff of his office, changed plaintiff's vote in said township from 441 to 341, and changed the vote of B. C. Brock, candidate for State Senate in said township, in the same manner, and a perusal of the report of said township shows beyond all doubt that this was done, as the sum of 100 votes cast for other candidates of the different political parties was not reflected in the vote for this plaintiff and said B. C. Brock. That the said election board in Wilkes County knew at the time that it unlawfully, willfully, fraudulently, and with intent to deprive this plaintiff of his office by issuing said certificate that the said election officials of Wilkes County had willfully, unlawfully, and fraudulently caused and permitted, as plaintiff is informed and believes, more than 100 voters to register and vote against this plaintiff, who were then upon the day of said election under 21 years of age, and knew that said votes were being illegally cast."

The defendant demurred to the complaint on the ground that "the complaint does not state facts sufficient to constitute a cause of action." C. S., 511 (6).

The court below rendered the following judgment: "After hearing the argument of counsel and considering said demurrer and complaint, the court is of opinion that this court has jurisdiction of the action, and that said complaint states a cause of action against the defendant. It is therefore ordered that said demurrer be and the same is hereby overruled. Felix E. Alley, Judge presiding."

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

*J. H. Wicker, Wm. M. Allen, and Chas. G. Gilreath for plaintiff.*

*W. H. McElwee, Trivette & Holshouser, and J. Milton Cooper for defendant.*

CLARKSON, J. The question for decision is: Does the complaint state facts sufficient to constitute a cause of action? We think so.

The defendant contends that under the law it is the duty of the county board of elections to judicially determine the result of the election from the report and tabulation made by the precinct officials. That the unsuccessful candidate must pursue his statutory remedy, citing N. C. Code, sections 5923, 5927, 5933, and especially C. S., 5923 (15), which reads as follows: "It shall be the duty of the State Board of Elections: (15) 'To have the general supervision over the primaries and elections in the State, and it shall have the authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable: *Provided,* same shall not conflict with any provisions of the law.' "

We think the decisions of this Court are contrary to the contentions of defendant. In *Harkrader v. Lawrence,* 190 N. C., 441 (442), speaking to the subject, we find: "One of the chief purposes of *quo warranto* or an information in the nature of *quo warranto* is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the Superior Court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election. *Rhodes v. Love,* 153 N. C., 469; *Johnston v. Board of Elections,* 172 N. C., 162, 167." *S. v. Carter,* 194 N. C., 293; *Bouldin v. Davis,* 197 N. C., 731; *Barbee v. Comrs. of Wake,* 210 N. C., 717.

In the present case fraud is alleged. The courts are open to decide this issue in the present action. In Art. I, sec. 10, of the Const. of North Carolina, we find it written: "All elections ought to be free." Our government is founded on the consent of the governed. A free ballot and a fair count must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot.

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

Affirmed.

STACY, C. J., and CONNOR, J., concur in result.

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STATE v. G. M. BROOKS.

(Filed 9 June, 1937.)

**Criminal Law § 61a—Defendant must be present when judgment of corporal punishment is pronounced.**

In this prosecution for abandonment, defendant entered a plea of *nolo contendere,* and an order was entered that defendant pay a certain amount into court monthly for the benefit of his wife and children. Thereafter, upon default, judgment was entered in the absence of defendant and without his knowledge, on his original plea, sentencing defendant to two years on the roads, sentence to begin on a stipulated day unless defendant paid all matured installments under the prior order. *Held:* The judgment attempting to impose corporal punishment, in the absence of defendant, unless avoided by compliance with the conditions annexed, was void.

STATE *v.* BROOKS.

PETITION by G. M. Brooks for *certiorari* as substitute for appeal, or in the nature of a writ of error (*S. v. Moore,* 210 N. C., 686), filed originally in the Supreme Court, and granted at the Spring Term, 1937.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*T. T. Thorne, C. C. Pierce, and J. L. Simmons for defendant.*

STACY, C. J. The petitioner entered a plea of *nolo contendere* at the March Term, 1932, Nash Superior Court, to an indictment charging him with abandonment and nonsupport of his wife and children. C. S., 4447; *S. v. Bell,* 184 N. C., 701, 115 S. E., 190. An order was entered requiring the defendant to pay into the clerk's office for the support and maintenance of his children certain monthly stipulated amounts, which were later increased, and subsequently reduced to the original sums. C. S., 4449. Default having been made in said payments, judgment was entered at the December Term, 1936, upon the defendant's original plea of *nolo contendere,* without his knowledge or presence, assigning the defendant to two years on the roads, "sentence to begin on the first day of the first January Term, 1937, Nash Superior Court, unless it shall appear that the defendant has paid into the office of the clerk of the Superior Court of Nash County all matured installments under the orders entered herein, and has likewise filed with said clerk a bond in the penal sum of $1,000, guaranteeing the payment of future installments as they mature. If said conditions are not complied with, then and in that event the clerk of the Superior Court of Nash County is ordered and directed to issue *capias* and commitment and the solicitor of the district is directed to take action to have the defendant extradited to the end that the sentence herein imposed may be put into effect."

The validity of this judgment, attempting to impose corporal punishment upon the defendant, unless avoided by compliance with the conditions annexed, is challenged on two grounds: First, because entered without the knowledge or presence of the accused; and, secondly, for alternativeness. The first ground of the challenge would seem to be valid, and will be sustained on authority of *S. v. Cherry,* 154 N. C., 624, 70 S. E., 294. Consideration of the second ground is pretermitted. See, however, *S. v. Perkins,* 82 N. C., 682; *Dunn v. Barnes,* 73 N. C., 273; *Hagedorn v. Hagedorn,* 210 N. C., 164, 185 S. E., 768, and cases there cited. Compare *S. v. Vickers,* 196 N. C., 239, 145 S. E., 175.

Speaking to the first ground of the challenge in the *Cherry case, supra, Hoke, J.,* delivering the opinion of the Court, said: "While our decisions have established that in case of waiver the presence of the accused is not necessary to a valid trial and conviction, all of the authorities here

and elsewhere, so far as we have examined, are to the effect that when a sentence, either in felonies less than capital or in misdemeanors, involves and includes corporal punishment, the presence of the accused is essential. Thus, in *S. v. Paylor,* 89 N. C., 540, *Ashe, J.,* delivering the opinion, said: 'But where the punishment is corporal, the prisoner must be present, as was held in *Rex v. Duke,* Holt, 399, where the prisoner was convicted of perjury, *Holt, C. J.,* saying: "Judgment cannot be given against any man in his absence for corporal punishment; he must be present when it is done." '" This accords with the general statement of the law on the subject. 8 R. C. L., 234; 16 C. J., 1292.

For the reason stated, the judgment entered at the December Term, 1936, will be stricken out.

Error.

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IN THE MATTER OF MRS. FLORENCE POPE JONES, GUARDIAN OF WILLIAM R. JONES.

(Filed 9 June, 1937.)

**Insane Persons § 9b—Issues of fact raised by pleadings on claim on contract executed by incompetent while sane must be determined by jury.**

Where the petition and answer on a claim against an incompetent's estate arising upon an alleged contract executed by the incompetent while sane raises issues of fact and law, and the cause is transferred by the clerk to the civil issue docket, the judge holding the courts of the district is without power to determine the matter at chambers in another county, and the cause will be remanded to the county in which the action is pending for determination of the issues according to law.

APPEAL by Mrs. Florence Pope Jones, guardian, from an order entered by *Williams, J.,* at Chambers in Hillsboro, N. C., 17 December, 1936. Error and remanded.

*Oscar G. Barker for appellee.*
*Jas. R. Patton, Jr., for appellant.*

DEVIN, J. Under appointment by the clerk of the Superior Court of Durham County, the appellant, Mrs. Florence Pope Jones, duly qualified as guardian of the estate of her husband, Wm. R. Jones, who was at the time and still is insane and a patient in the State Hospital at Raleigh. Subsequently, petition was filed with the clerk of the Superior Court of Durham County on behalf of Mrs. W. A. Couch and Mrs. A. C. Jones,

sister and mother of the ward, asking for an order directing the guardian to make certain payments for the support of Mrs. A. C. Jones, now 75 years of age, and residing and being cared for in the Old Ladies' Home in Durham, on allegations that contract for that purpose had been made by the ward while sane, and upon the additional ground of the dependence of the mother and the availability of sufficient funds for the purpose in the estate, under the provisions of C. S., 2296. The guardian answering, denied that any contract had been made by the ward for the support of his mother, or that there were any funds of the estate available for the purpose, denied that the income of the ward's estate was more than sufficient to defray the cost of the ward's maintenance and the support of his wife. The guardian set up the further defense that the clerk of the court was without power to determine a claim based upon the alleged contract of the ward, and that the facts were not such as to bring the case within the provisions of C. S., 2296, and that the issues raised must be decided by a jury. The clerk of the Superior Court of Durham County found that issues of fact were raised, and transferred the matter to the civil issue docket, under date of 4 December, 1936. There was no appeal from the order of the clerk to the judge.

Thereafter, at the instance of petitioner, upon notice, the cause was heard by Judge Clawson Williams, holding the courts of the Tenth Judicial District, at chambers in Hillsboro, North Carolina, 17 December, 1936. Judge Williams, from the petition and answer, found the facts substantially as alleged in the petition, and made an order directing the payment of certain sums by the guardian for the support of Mrs. A. C. Jones. To this order the guardian excepted and appealed to this Court.

Considering only the question of procedure, we are of opinion, and so decide, on the record before us, that the court below was without jurisdiction at chambers in Orange County to determine the controverted issues raised by the petition and answer in a case pending in the Superior Court of Durham County. Without deciding the other questions discussed on the argument, the cause is remanded to the Superior Court of Durham County for determination of the issues of law and fact raised by the pleadings. *Ledbetter v. Pinner,* 120 N. C., 455; *Lemly v. Ellis,* 146 N. C., 221; *Mills v. McDaniel,* 161 N. C., 112; *Read v. Turner,* 200 N. C., 773; *Hershey Corp. v. R. R.,* 207 N. C., 122; C. S., 558.

Error and remanded.

STATE v. FRED (MUTT) STEEL AND SAM JONES.

(Filed 9 June, 1937.)

**Criminal Law § 80—**

Where defendant, convicted of a capital crime, fails to serve his case on appeal within the time allowed, and fails to request extension of time, his appeal will be dismissed on motion of the Attorney-General in the absence of error on the face of the record.

APPEAL by defendants from *Rousseau, J.*, at February Term, 1937, of MECKLENBURG. Appeal dismissed.

Motion by the State to docket and dismiss the defendants' appeal.

PER CURIAM. The defendants were charged in the bill of indictment with the murder of one Clifford Fowler. The jury returned a verdict of guilty of murder in the first degree as to both defendants, and thereupon sentence of death was pronounced. The defendants gave notice of appeal, but no case on appeal has been served within the time allowed by law, and no request has been made for extension of the time.

The Attorney-General moves to docket and dismiss the appeal. This motion must be allowed, but according to the usual rule of this Court in capital cases, we have examined the record to see if any error appears. In the record we find no error.

Appeal dismissed.

STATE v. MELVIN COGGIN.

(Filed 9 June, 1937.)

**Criminal Law § 80—**

Where defendant, convicted of a capital crime, fails to serve his case on appeal within the time allowed, and fails to request extension of time, his appeal will be dismissed on motion of the Attorney-General in the absence of error on the face of the record.

APPEAL by defendant from *Frizzelle, J.*, at March Term, 1937, of NASH. Appeal dismissed.

Motion by the State to docket and dismiss the defendant's appeal.

PER CURIAM. The defendant was charged in the bill of indictment with the murder of H. J. Fogleman. The jury returned a verdict of guilty of murder in the first degree, and thereupon sentence of death was

pronounced. Defendant gave notice of appeal, but no case on appeal has been served within the time allowed by the order of the court below, and no request has been made for extension of the time.

The Attorney-General moves to docket and dismiss the appeal. This motion must be allowed, but according to the usual rule of this Court in capital cases, we have examined the record to see if any error appears. In the record we find no error.

Appeal dismissed.

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P. D. PENCE v. K. A. PRICE, W. W. BURNS, AND G. R. WOOTTEN.

(Filed 30 June, 1937.)

**1. Evidence § 38—Held: Proper foundation was laid for admission of secondary evidence of lost records.**

A finding by the court, supported by evidence, that judicial records relevant to the issue had been lost in moving the county offices to a new courthouse, and could not be found upon diligent search, *is held* sufficient foundation for the admission in evidence of copies of the records established by a finding of the court to be true copies of the originals.

**2. Homestead § 8—**

The homestead exemption will be enforced whenever possible, and waivers thereof are regarded with disfavor.

**3. Appeal and Error § 45a—**

Where jury trial is waived, the findings of fact by the court, when supported by competent evidence, are as conclusive as the verdict of a jury.

**4. Homestead § 8—Findings held to support judgment that defendant had waived his homestead right in surplus after foreclosure.**

Decree was entered in a suit for foreclosure that the land be sold and the proceeds applied to the mortgage debt and other claims constituting liens on the land. Confirmation of the sale was entered which stipulated that defendant mortgagor should be forever barred from asserting any right or title to the land and no appeal was taken from the decree or order of confirmation. The commissioner's report recited that judgment in another action had been entered against the mortgagor which stipulated that it should constitute a lien against the land from the filing of *lis pendens*, and that the commissioner was holding the surplus after payment of the mortgage debt pending the appeal in that action in order to determine priority of judgments against the mortgagor. Upon appeal, it was determined that the judgment was on a money demand, and that *lis pendens* did not apply. Defendant had asserted his homestead rights in the action on the money demand. A year after confirmation defendant first made motion in the foreclosure suit for allotment of homestead out of the surplus from foreclosure, and undisbursed funds were set aside by the commissioner pending determination of the motion. Defendant did

not have the motion for allotment of homestead placed on the motion docket until ten years after the motion was made. *Held:* The facts support the judgment of the court that defendant had waived his right to homestead in the surplus after foreclosure by failing to assert same, and evidence of the proceedings in the action on the money demand was competent on the question of waiver.

DEVIN, J., dissenting.

CONNOR, J., concurs in dissent.

APPEAL by K. A. Price, movant, from *Alley, J.*, at September Term, 1936, of CATAWBA. Affirmed.

This is a motion, filed 15 July, 1925, by defendant K. A. Price, in a civil action entitled "P. D. Pence *v.* K. A. Price, W. W. Burns, and G. R. Wootten," for allotment of his homestead from the proceeds of sale of his real estate, which was sold under judgment of foreclosure by Chas. W. Bagby, commissioner. The parties agreed to waive a jury trial, substituting therefor the judge presiding, to find the facts.

The facts found and judgment are as follows: "This cause coming on to be heard upon motion made by defendant K. A. Price, on 15 July, 1925, for the allotment of a homestead in the premises described in the complaint or in the proceeds derived from the sale thereof, and it having been agreed that the court should find the facts, the court finds the following facts:

"1. That at May Term, 1924, in the case of P. D. Pence against K. A. Price, W. W. Burns, and G. R. Wootten, which action was for foreclosure of a mortgage given by defendant Price to plaintiff upon the lands described in the pleadings, a judgment was rendered in favor of plaintiff and against defendant for $4,021.72, and interest on $3,400 from 5 May, 1924; and that by the terms of said judgment Chas. W. Bagby was appointed a commissioner to make a sale of the real estate; and it was further adjudged that 'said real estate is subject to sale and hereby ordered to be sold for the satisfaction of the judgment now rendered in favor of the plaintiff, for the settlement and discharge of the W. W. Burns note and mortgage now held by G. R. Wootten for $2,500, and all unpaid interest thereon, and after these for the satisfaction of any other claims which may constitute a lien upon the property in order of their priority.'

"2. There was no appeal from said judgment; and the defendant Price had filed no answer and had made no demand prior thereto for a homestead in the lands or the proceeds to be derived from a sale thereof.

"3. That prior to the May Term, 1924, and subsequent to the execution, delivery, and registration by K. A. Price of the mortgage to W. W. Burns and of the mortgage to P. D. Pence, a judgment was duly rendered and docketed in the office of the clerk of the Superior Court of

Catawba County, North Carolina, in favor of H. M. Price and against K. A. Price for $7,356.20, interest and costs.

"4. That on 26 June, 1924, after due and legal advertisement, the commissioner sold at public auction the property in accordance with the terms of the judgment, when and where G. R. Wootten became the last and highest bidder at the price of $15,000.

"5. That the original papers in this cause cannot, after diligent search, be found in the office of the clerk of the Superior Court, and the same appear to have been lost or misplaced during the moving of the county offices at the time the new courthouse was constructed; and the court finds that Exhibit A, hereto attached, is a true and correct copy of the report of sale by the commissioner.

"6. That at the July Term, 1924, of Catawba Superior Court, the court, at the request of defendant K. A. Price, granted him additional time within which to secure an increased bid, with the understanding that the court, at the expiration of said time, could enter judgment of confirmation or order a resale out of term and out of the district.

"7. That thereafter, in August, 1924, his Honor, Judge W. F. Harding—the judge holding the courts of the district—approved the order of confirmation signed by the clerk of the Superior Court of Catawba County on 11 July, 1924; that said judgment of confirmation cannot be found, after diligent search, and that Exhibit B, hereto attached, excepting the date of approval, is a true and correct copy thereof. No appeal was taken by defendant Price from this judgment of confirmation, although it expressly provided that the Commissioner's deed 'shall forever estop the said K. A. Price from claiming any title, interest, or equity in or to said property by reason of the fact that G. R. Wootten, the owner of the judgment and other liens against the property, became the last and highest bidder, and for any and all other reasons arising prior to the signing of this judgment: "That the commissioner is directed to receive the purchase money and to disburse the same in accordance with the terms of the prior judgment."'

"8. Thereafter, the commissioner filed his report of receipts and disbursements, which was duly audited and recorded in the official records in the office of the clerk of the Superior Court of Catawba County, North Carolina; that this report, after setting forth in detail the payment of the Pence and Burns mortgages and various other items of disbursements, contains the following: 'This leaves a balance of $6,873.60 uncredited. However, Mr. G. R. Wootten, the purchaser of the property, is the owner of a judgment against K. A. Price, the former owner of the property, for the sum of $7,356.20. There is also a judgment in the case of "J. T. Horney *v.* K. A. Price" for about $1,100, which judgment states it is a lien on the property I sold. I am author-

ized to make proper credit on the $7,356.20 judgment, when the "J. T. Horney *v.* Price" case is finally settled. As both judgments are now liens upon the property, and as K. A. Price will have nothing coming to him in either event, I have not required the purchaser to pay me the $6,873.60.'

"That in the judgment of the Superior Court in 'Horney *v.* Price,' it was set out that the judgment was effective from the time of filing of notice of *lis pendens,* which made it effective prior to the judgment in 'H. M. Price *v.* K. A. Price,' and G. R. Wootten and K. A. Price appealed therefrom.

"9. In June, 1925, the case of 'J. T. Horney *v.* K. A. Price' was decided by the Supreme Court of North Carolina, reported in 189 N. C., 820, and it was held that the Horney judgment did not constitute a special lien under the *lis pendens* statute.

"10. Thereafter, on 15 July, 1925, the defendant K. A. Price, in the case of 'P. D. Pence *v.* K. A. Price, W. W. Burns, and G. R. Wootten,' made a motion in open court for the allotment of his homestead in the premises or in the proceeds derived from the sale thereof.

"11. That after the decision of the Supreme Court in the case of 'J. T. Horney *v.* K. A. Price,' and after the making of the homestead motion on 15 July, 1925, the commissioner caused the judgment in the case of 'H. M. Price *v.* K. A. Price' to be credited with all proceeds, excepting $1,000 of the sale remaining after the payment of costs, tax liens, and the amount due on the Pence and Burns mortgages, and also wrote on the judgment docket, in substance, the following: 'A credit of $1,000 is being withheld pending disposition of motion by defendant K. A. Price for homestead.'

"12. That from the time of making the motion for homestead until about one year ago, the defendant K. A. Price made no further effort to have his homestead allotted, and that at said time he caused the action to be placed on the motion docket.

"Upon the foregoing facts, it is ordered and adjudged that the defendant K. A. Price has waived, and is estopped from claiming, his homestead rights, and that he is not entitled to a homestead in the lands or in any part of the proceeds derived from the sale thereof; and that the commissioner is authorized to enter an additional credit of $1,000, as of 25 August, 1924, upon the judgment of 'H. M. Price *v.* K. A. Price.' It is further ordered that the costs of this action, including the recording of this judgment, be taxed against K. A. Price.

"The parties, in open court, at September Term, 1936, agreed that the decision of the court herein and its findings of fact could be made and signed out of term and out of the district as of September Term, 1936. This 30 September, 1936.

FELIX E. ALLEY,
*Judge Presiding.*"

To the foregoing findings of fact and judgment, K. A. Price, movant, excepted, assigned error, and appealed to the Supreme Court.

*C. D. Swift, Bailey Patrick, and W. A. Self for respondents.*
*M. H. Yount for movant.*

CLARKSON, J. The movant, K. A. Price, excepted and assigned error (which we cannot sustain) to certain evidence as to lost records and the controversy in the case of "Horney *v.* Price." We think the foundation was properly laid for the evidence as to lost records and the evidence as to the "Horney case" was relevant and material on the question of waiver. We think the only serious question on this record is: Did K. A. Price waive his right to homestead exemption? We think he did.

The homestead exemption is a favorite of the law and the right will be sustained whenever it is possible to do so, but it can be waived and released and thus made ineffective.

It was agreed that the court below might find the facts.

It is well settled that where a jury trial is waived the findings of fact, supported by evidence, by the court are as conclusive on us as if the facts were found by a jury.

In regard to homestead exemptions of movant K. A. Price, the court below found as a fact that at May Term, 1924, an action had been instituted against K. A. Price to foreclose a certain mortgage given by him. At May Term, 1924, a judgment was rendered against Price. It is found as a fact that "There is no appeal from said judgment; and the defendant Price had filed no answer and had made no demand prior thereto for a homestead in the lands or the proceeds to be derived from a sale thereof."

A judgment was duly rendered against Price confirming the sale. It is found as a fact: "No appeal was taken by defendant Price from this judgment of confirmation, although it expressly provided that the commissioner's deed 'shall forever estop the said K. A. Price from claiming any title, interest, or equity in or to said property by reason of the fact that G. R. Wootten, the owner of the judgment and other liens against the property, became the last and highest bidder, and for any and all other reasons arising prior to the signing of this judgment: "That the commissioner is directed to receive the purchase money and to disburse the same in accordance with the terms of the prior judgment herein." ' "

It is further found as a fact that "Thereafter, on 15 July, 1925, the defendant K. A. Price, in the case of 'P. D. Pence *v.* K. A. Price, W. W. Burns, and G. R. Wootten,' made a motion in open court for the allotment of his homestead in the premises or in the proceeds derived from the sale thereof."

This was nearly a year after final confirmation. "That from the time of making the motion for homestead until about one year ago, the defendant K. A. Price made no further effort to have his homestead allotted, and that at said time he caused the action to be placed on the motion docket." This was some ten years after that K. A. Price made this motion.

In *Caudle v. Morris,* 160 N. C., 168 (171), is the following: "As contended by the learned counsel for plaintiffs, there is no such claim or plea of homestead set up in the answer of either Bryant Smith or Mollie Morris. It has been uniformly held by the Court that in an action to recover land, if the defendant desires to claim a homestead therein he should assert his rights by proper averment in the answer. *Wilson v. Taylor,* 98 N. C., 276. In the opinion the Court says: 'No issue in regard to the homestead was raised by the pleadings, and there was no question in relation thereto, as appears from the record, till after the verdict. The issues are raised by the pleadings,' citing *Hinson v. Adrian,* 92 N. C., 121. The Court further says: 'In all cases cited by counsel for the defendants, the claim to the homestead was presented by the pleadings.' This case has been cited and approved in a number of cases given in the annotation edition of our reports, and is directly in point and determinative of this appeal." *Simmons v. McCullin,* 163 N. C., 409; *Duplin County v. Harrell,* 195 N. C., 445; *Cheek v. Walden,* 195 N. C., 752; *Farris v. Hendricks,* 196 N. C., 439.

It may be noted that in the action "J. T. Horney *v.* K. A. Price" is the following: "Counsel at the same time stated that in any further proceedings, either in this cause or any other cause affecting the property in question, the defendant K. A. Price reserves his right at all times to seek the benefit of the Constitution in law for the preservation of his homestead rights in the lands, and defendant objects to the judgment tendered to the court and signed. To this judgment the defendant excepts and appeals to the Supreme Court. Notice given in open court." This appeal was never perfected.

The judgment in the "Horney case," entered at the September Term, 1924, recites that it is to be effective from the time of filing of *lis pendens* therein, 22 March, 1923, and the commissioner states that the question of Dr. Price's homestead was raised in that case. This was prior to the filing of the present motion on 15 July, 1925.

In *Simmons v. McCullin, supra,* at p. 414, we find: "A regular judgment against him, disposing of his homestead, would not be void, or even irregular, but at most only erroneous, and to be corrected, if wrong, by appeal. *McLeod v. Graham,* 132 N. C., 473; *Henderson v. Moore,* 125 N. C., 383." N. C. Prac. & Proc. in Civil Cases (McIntosh), sec. 652, pp. 735-6.

Under the facts found, supported by competent evidence, we think the movant, K. A. Price, has lost his right to his homestead exemptions.

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

Affirmed.

DEVIN, J., dissenting: I find myself unable to agree with the majority opinion holding that the judgment debtor has waived his right to the homestead under the facts of this case.

The right of a debtor to the exemption of his homestead from sale under execution or other final process, guaranteed by the Constitution, has been uniformly regarded as one peculiarly entitled to the protection of the court. The loss of the homestead exemption is not favored by the law. C. J., 931.

It is settled law in this State that a judgment debtor whose land has been sold under a prior mortgage is entitled to a homestead in the surplus over the mortgage debt. *Wilson v. Patton,* 87 N. C., 318; *Leak v. Gay,* 107 N. C., 468; *Montague v. Bank,* 118 N. C., 283; *Farris v. Hendricks,* 196 N. C., 439.

The only question presented in this case is whether the judgment debtor has lost his right to homestead by waiver or estoppel. The facts as they appear from the record and findings of the judge below do not justify the conclusion that the defendant debtor has waived his constitutional right. The defendant's land was subject to the two principal liens of a mortgage and a judgment. The mortgage creditor instituted action to foreclose and no defense was interposed either as to the debt or the right to foreclose, and judgment of foreclosure was entered and a commissioner named to sell. At the sale the land was purchased by G. R. Wootten, who was the owner of the debt secured, and also the assignee and owner of the judgment.

The foreclosure judgment, after adjudging the debt and decreeing sale, provided: "Any clear balance in his (commissioner's) hands shall be paid over to said K. A. Price. And the effect of this judgment and decision shall be to foreclose the said Price from any further equity or right of redemption in said land. And this cause is retained for such other and further orders as may be proper."

The order confirming the sale directed the commissioner to execute deed for the land to the purchaser free of all liens and equities, and decreed that the deed should forever estop Price from claiming any title, interest, or equity in said land, and the commissioner was directed to disburse the purchase money "in accordance with terms of prior judgment herein."

The final report of the commissioner, dated 14 February, 1925, showed a surplus of $6,873 over the mortgage debt, and recited that as there was

a pending action of "Horney *v.* Price," involving an asserted lien on the land, he was authorized to make the proper credit on the Wootten judgment when the "Horney case" was settled. The case of "Horney *v.* Price" finally resulted in decision that Horney had no specific lien on the land. As Horney's judgment in that case was subsequent to the Wootten judgment, it has no further relation to this case, except that reference was made in the appeal entries therein to Price's claim of homestead in the land.

On 15 July, 1925, defendant Price filed in the cause a written motion for the allotment of his homestead in the surplus proceeds from the sale of his land, and the minute docket of the court contains this entry: "Motion heretofore made and filed by K. A. Price for allotment of his homestead in the purchase money in the hands of Chas. W. Bagby, commissioner, over and above the amount due for payment of the mortgages, interest, and costs, was called and continued by the court for further hearing."

After the final decision of "Horney *v.* Price," and after the entry of the motion for homestead, the commissioner caused the Wootten judgment to be credited with all proceeds of sale after payment of mortgages, taxes, and credit of $1,000, and entered on the judgment docket the following: "A credit of $1,000 is being withheld pending disposition of motion by defendant Price for homestead." Thereafter no further entry was made as to the motion for homestead until it was heard at September Term, 1936. The court below found "that from the time of making the motion for homestead until about one year ago the defendant made no further effort to have his homestead allotted, and that at said time he caused the action to be placed on motion docket."

Upon the facts recited, it was adjudged that K. A. Price was "estopped from claiming his homestead rights"; that he was not entitled to homestead in the surplus, and the judgment thereupon authorized the commissioner to enter an additional credit of $1,000 upon the Wootten judgment. In this I think there was error.

In the last analysis, the facts show that after the sale under foreclosure and while the surplus belonging to the mortgage debtor was still in the hands of the commissioner and unapplied, the judgment debtor filed motion for the allotment of his homestead right therein. This motion was entered on the docket and continued for hearing by the court. The commissioner entered on the judgment docket that the $1,000 fund was withheld pending the disposition of this motion. There the matter rested. It does not appear whether it was the fault of the plaintiff, defendant, or the court that it was not called for hearing earlier. The creditor suffered nothing by the delay, while the debtor may have lost the income from the fund during that period. Conceding it was the

movant's duty to press his motion, he cannot be held to have waived his right to press it by permitting it to remain undisposed of. His motion was still pending in court and could only have been disposed of by some judgment or order of the court. *Hanks v. Utilities Co.*, 210 N. C., 312. As was said in that case, "No statute of limitation runs against a litigant while his case is pending in court."

The fact that defendant Price filed no answer to the foreclosure suit and did not appeal from the judgment cannot deprive him of his constitutional right. In order to preserve his right to homestead the debtor is not required to deny the obligation or to appeal from the judgment declaring the debt. The Constitution guarantees to him the right to his homestead and exempts it from sale under execution or other final process. The original judgment only foreclosed his right of redemption in the *land*, not to his homestead right in the *surplus*. The balance from proceeds of foreclosure sale was ordered paid over to the defendant, and the judgment ordered the cause retained for further orders.

The confirmation judgment directed the disbursement of the fund "in accordance with the terms of the prior (foreclosure) judgment."

This could not be held to estop defendant thereafter to claim his constitutional right while the fund was still not fully disbursed and while the amount of his homestead was, and still is, held pending the disposition of his motion for homestead.

The cases, cited in the opinion as authority for holding it was necessary for the defendant Price to have asserted his right to homestead by proper averment in the answer, do not sustain that rule as applicable to the facts in this case. "It is out of the facts that the law arises."

In *Caudle v. Morris*, 160 N. C., 168, the suit was to recover land from defendant Smith, who held a deed from J. C. L. Harris, commissioner. The plaintiffs claimed under a prior deed to their father, now deceased. Upon verdict for plaintiffs, the judgment there recited that the recovery of the land was subject to the homestead of the widow of plaintiffs' father. But in that case there were no debts and no creditors, and therefore the homestead right of the widow under sec. 5, Art. X, of the Constitution did not apply, and it further appeared that the widow was a party to the proceeding in which Harris was appointed commissioner while the plaintiffs were not. There were no pleadings to raise an issue as to the widow's right to a homestead, and the insertion in one of the issues, "Subject to homestead of A. V. Emery's widow," was held not sufficient to establish homestead in her.

The facts in the instant case are manifestly quite different.

In *Simmons v. McCullin*, 163 N. C., 409, there was a consent judgment that the plaintiff (the widow of a man who had been feloniously slain by the defendant) recover of the defendant $3,000, and "the sheriff

shall satisfy the same out of the property attached by him in the case of 'Bradshaw, administrator of Simmons, against defendant McCullin.'" It was there held that the homestead had been waived and that the judgment was not void, but at most erroneous and to be corrected on appeal.

In *Wilson v. Taylor,* 98 N. C., 275, the facts were that the defendant Taylor requested plaintiff to buy in the land for him at a sale by the sheriff under execution of a judgment by another against Taylor. It was held that plaintiff, for the amount so paid out at the request of the plaintiff, had a lien on the land, and that no question of homestead was raised. The opinion in that case uses this language: ". . . whether by any act, however fraudulent and misleading, the owner can be estopped from claiming a homestead, except by deed with the consent of the wife, evidenced by her privy examination, as prescribed by Art. X, sec. 8, of the Constitution, it is not necessary for us now to consider, and if it were, Edward Taylor, as appears from the evidence and verdict of the jury, having invoked the kindness and friendship of the plaintiff, and procured the purchase of the land for his own benefit, and for which, at his solicitation, the plaintiff had paid the claim of the defendants, does not present a very meritorious consideration. *Hinson v. Adrian,* 92 N. C., 121."

In *Duplin County v. Harrell,* 195 N. C., 445, Harrell's land was sold under various deeds of trust, resulting in a surplus. This was ordered paid over to a judgment creditor under a judgment docketed in 1923, for the reason that in 1925 Harrell had conveyed the land to Cooper, trustee for O. C. Blanchard, and therefore was not entitled to homestead, having conveyed it. The Court there said: "We think the prior judgment of Parker had priority over the subsequent deed in trust to Cooper, trustee for O. C. Blanchard."

In *Cheek v. Walden,* 195 N. C., 752, it was held that a judgment creditor was not permitted to sell the land under execution without allotting the homestead, notwithstanding the subsequent execution of a mortgage on the land by the judgment debtor.

In *Farris v. Hendricks,* 196 N. C., 439, it was held that the judgment debtor was entitled to homestead in the surplus but not to be paid its present cash value.

In *Hinson v. Adrian,* 92 N. C., 121, the homestead was allotted in the surplus after sale under mortgage, but not in the land itself.

It seems to me that none of the cases cited is sufficient authority for holding that the defendant, under the facts appearing in this case, has waived his constitutional right to homestead.

On the contrary, it was held in *Beavan v. Speed,* 74 N. C., 544, and in *Howell v. Roberson,* 197 N. C., 572, that a debtor could not waive his homestead by an agreement to that effect contained in the note.

And in *Abbott v. Cromartie,* 72 N. C., 292, where the debtor's land was sold under execution without allotting homestead, and the debtor leased the land from the purchaser for three years, it was held that this did not constitute a waiver or bar the debtor's claim to homestead.

In *Lambert v. Kinnery,* 74 N. C., 348, it was said that the homestead right could be lost or parted with only in the mode prescribed by law.

To the same effect, *Littlejohn v. Egerton,* 76 N. C., 468; *Edwards v. Kearsey,* 74 N. C., 241. See, also, *Ferguson v. Wright,* 113 N. C., 537; Connor and Cheshire, Constitution of North Carolina, pp. 393-394.

There was no estoppel upon defendant either by judgment, by deed, or *in pais.* There was no evidence of conduct on his part to mislead the creditor, or alter his position. Nor should the defendant be held to have waived a constitutional right by failing to press a motion pending in court as to a fund still held awaiting the disposition of his motion.

CONNOR, J., concurs in dissenting opinion.

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CAROLINA POWER & LIGHT COMPANY v. JOHNSTON COUNTY ELECTRIC MEMBERSHIP CORPORATION, AND J. W. WOODARD, A. F. HOLT, SNEAD SANDERS, A. J. WHITLEY, JR., WADE H. ATKINSON, J. L. LEE, AND G. T. SCOTT, INDIVIDUALLY AND AS DIRECTORS AND MEMBERS OF JOHNSTON COUNTY ELECTRIC MEMBERSHIP CORPORATION, AND THOMPSON ELECTRICAL COMPANY, A CORPORATION.

(Filed 30 June, 1937.)

**1. Electricity § 3—Corporation formed under ch. 291, Laws of 1935, need not get certificate of convenience before constructing power lines.**

Plaintiff utility company, operating in the community, instituted this action to restrain defendant corporation, which was formed under ch. 291, Public Laws of 1935 (N. C. Code, 1694, subsecs. 7 to 28), from constructing power lines in the community parallel or which would parallel lines already lawfully constructed by plaintiff company, on the ground that defendant corporation had not secured a certificate of convenience from the Utilities Commissioner, as required by ch. 455, Public Laws of 1931 (N. C. Code, 1037 [d]). *Held:* By express provision of the act of 1935, corporations formed thereunder are not subject to the provisions of any other act, and the temporary restraining order was properly dissolved, the Act of 1931 not being applicable to defendant corporation.

**2. Appeal and Error § 38—**

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed in accordance with the usual practice.

LIGHT CO. *v.* ELECTRIC MEMBERSHIP CORP.

APPEAL by plaintiff from *Small, J.*, at November Term, 1936, of WAKE. Affirmed.

This is an action for judgment:

1. That the defendants be perpetually restrained and enjoined:

"(a) From, in any manner or by any means, inducing, persuading, coercing, or intimidating any person or persons to fail or refuse to comply with his or their contracts or agreements with the plaintiff to wire his or their premises and to take electric service from the plaintiff.

"(b) From, in any manner or by any means, inducing, persuading, coercing, or intimidating any person or persons to discontinue the taking of electric service from the plaintiff in violation of his or their contracts or agreements with the plaintiff to take such service.

"(c) From, in any manner or by any means, interfering with the plaintiff in the construction and operation of its rural lines in Johnston County, where plaintiff has lawfully constructed and is now operating such lines, and from inducing, persuading, coercing, or intimidating prospective customers of the plaintiff along such lines not to take electric service from the plaintiff.

"(d) From constructing or operating any rural electric lines paralleling any rural lines of the plaintiff, or in territory occupied by the plaintiff, or in territory contiguous to the rural lines of the plaintiff, until or unless a certificate of convenience and necessity is first obtained by the defendant Johnston County Electric Membership Corporation from the North Carolina Utilities Commissioner as provided by law."

2. That the defendant Johnston County Electric Membership Corporation is a public utility corporation and as such is required to obtain from the North Carolina Utilities Commissioner a certificate of convenience and necessity before it may proceed further with the construction or operation of rural lines in competition with the plaintiff.

3. That plaintiff have such other and further relief as the court shall find it is entitled to, and recover of the defendants the costs of the action.

From judgment dissolving a temporary restraining order and dismissing the action, the plaintiff appealed to the Supreme Court, assigning error in the judgment.

*W. H. Weatherspoon, A. Y. Arledge, Abell & Shepard, and MacLean, Pou & Emanuel for plaintiff.*

*I. M. Bailey for defendants.*

CONNOR, J. At the hearing of this action in the Superior Court, the court was of opinion that on all the evidence offered by both the plaintiff and the defendants, the plaintiff is not entitled to the relief prayed for in its complaint. Accordingly, the temporary restraining order issued

in the action was dissolved, and the action was dismissed by judgment as of nonsuit. On its appeal to this Court, the plaintiff contends that there is error in the judgment:

1. For that the judgment is predicated primarily on the erroneous holding of the court that the defendant Johnston County Electric Membership Corporation was not required, before beginning the construction or operation of its facilities for serving its members by furnishing them electricity for lights and power, to obtain from the Utilities Commissioner of North Carolina a certificate that public convenience and necessity requires or will require the construction and operation of said facilities by the said defendant; and,

2. For that there was evidence at the hearing of the action sufficient to show that the defendants, other than Thompson Electrical Company, have wrongfully and unlawfully caused and will wrongfully and unlawfully continue to cause customers of the plaintiff to violate their contracts or agreements with the plaintiff, as alleged in the complaint, and that for this reason the action should not have been dismissed, but should have been continued for a final hearing.

The plaintiff is a public service corporation, organized and doing business under the laws of this State, with its principal office in the city of Raleigh, Wake County, North Carolina. It is engaged in business in this State and elsewhere as a public utility and as such furnishes its customers electricity for lights and power. Prior to the commencement of this action, the plaintiff had lawfully entered Johnston County, which adjoins Wake County, and had constructed lines and other facilities for the purpose of furnishing to residents of rural communities of Johnston County electric service. It had at great expense procured from many residents of rural communities of Johnston County contracts or agreements by which said residents had agreed to wire their premises, and to take from the plaintiff, as its customers, electric service. Many of these prospective customers of the plaintiff, notwithstanding their contracts and agreements, have failed to wire their premises, or to take from the plaintiff electric service. Such failures have resulted and will result in great loss and damage to the plaintiff.

The defendant Johnston County Electric Membership Corporation was organized under and pursuant to the provisions of chapter 291, Public Laws of North Carolina, 1935. N. C. Code of 1935, section 1694 (7 to 28). After its organization and prior to the commencement of this action, the said defendant applied to the Federal Rural Electrification Administration for a loan of money to enable it to construct facilities for the purpose of furnishing its members electric service. This application was approved by the North Carolina Rural Electrification Authority, and the Federal Rural Electrification Administration

has agreed to make the loan in accordance with said application. Relying upon said agreement, the defendant has entered into a contract with the defendant Thompson Electrical Company, of Raleigh, N. C., for the construction of said facilities. Pursuant to said contract, the defendant has constructed and will continue to construct lines in rural communities of Johnston County, which parallel or will parallel certain lines constructed by the plaintiff. There is now and will continue to be sharp competition between the plaintiff and the said defendant in certain rural communities in Johnston County. The defendant has not obtained or applied for a certificate of convenience and necessity, in accordance with the provisions of chapter 455, Public Laws of North Carolina, 1931. N. C. Code of 1935, section 1037 (d).

It is provided by statute in this State that "no person, or corporation, their lessees, trustees, or receivers, shall hereafter begin the construction or operation of any public utility plant or system, or acquire ownership or control of (such plant or system) either directly or indirectly, without first obtaining from the Utilities Commissioner a certificate that public convenience and necessity requires or will require such construction, acquisition, or operation: *Provided,* that this section shall not apply to new construction in progress at the time of the ratification of this act, nor to construction into territory contiguous to that already occupied, and not receiving similar service from another utility, nor to construction in the ordinary conduct of business." Chapter 455, Public Laws of North Carolina, 1931; N. C. Code of 1935, section 1037 (d).

This statute is not applicable to the defendant Johnston County Electric Membership Corporation, which was organized under the provisions of chapter 291, Public Laws of North Carolina, 1935. Section 23 of said chapter is as follows:

"This act is complete in itself, and shall be controlling. The provisions of any other law, general, special, or local, shall not apply to a corporation formed under this act."

By reason of the provisions of this section of the statute under which it was organized, there was no error in the holding of the court in the instant case that the defendant Johnston County Electric Membership Corporation was not required, before beginning the construction or operation of its facilities for serving its members by furnishing them electricity for lights and power, to obtain from the Utilities Commissioner of North Carolina a certificate that public convenience and necessity requires or will require the construction and operation of said facilities by said defendant. The judgment, in so far as the same is predicated upon this holding, is affirmed without division of opinion by members of this Court.

*Schenck, J.*, one of the members of this Court, not sitting at the hearing of this appeal, and the other members being evenly divided in opinion as to whether there was error in the judgment dismissing the action, on the ground that there was no evidence at the hearing tending to show that the defendants have wrongfully and unlawfully caused customers of the plaintiff to violate their contracts or agreements with the plaintiff, and will continue to wrongfully and unlawfully cause said customers to violate their contracts or agreements with the plaintiff, as alleged in the complaint, the judgment dismissing the action is affirmed in accordance with the practice of this Court in such cases. *Gott v. Ins. Co.*, 210 N. C., 832.

In accordance with this opinion, the judgment is

Affirmed.

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STATE v. RALPH C. FLOWERS.

(Filed 30 June, 1937.)

**1. Criminal Law § 29b—Evidence of guilt of distinct offense is competent if tending to show intent, guilty knowledge, or scienter.**

Defendant was charged with conspiracy to rob and with robbery committed pursuant thereto. The State introduced evidence that within a week after the robbery charged in the second count of the bill of indictment defendant conspired with the same confederate to burn an automobile in order to collect the fire insurance thereon. *Held:* The evidence was competent under the exception to the general rule that evidence of guilt of a distinct offense is competent if tending to show intent, design, guilty knowledge, or *scienter*.

**2. Criminal Law § 35—Evidence of association of coconspirator and defendant and flight of coconspirator held competent.**

Defendant was indicted for conspiracy to rob and with robbery committed pursuant to the conspiracy. The State introduced evidence of the association between defendant and his alleged coconspirator within a short time before and after the robbery, and that a few hours after the robbery defendant's alleged coconspirator left the city in an automobile with defendant's niece, and that a week after the robbery defendant and his alleged coconspirator entered into another conspiracy to burn an automobile belonging to defendant's niece in order to collect fire insurance thereon. *Held:* The evidence was competent not only to corroborate the testimony of the coconspirator upon the trial, but also as tending to show that defendant was a party to the conspiracy to rob, and that his presence at the scene of the robbery was in consequence of the conspiracy.

APPEAL by defendant from *Armstrong, J.*, at October Term, 1936, of FORSYTH. No error.

STATE *v.* FLOWERS.

This is a criminal action in which the defendant Ralph C. Flowers was tried on an indictment which contains two counts.

In the first count it is charged that on or about 11 September, 1936, at and in Forsyth County, Ralph C. Flowers and LeRoy Blackman did unlawfully, willfully, and feloniously conspire with each other to assault an employee of Powers and Anderson Dental Company with firearms or other dangerous weapons, and by means of said assault to rob the said Powers and Anderson Dental Company of money, gold, and other valuable personal property.

In the second count it is charged that pursuant to said conspiracy the said Ralph C. Flowers and LeRoy Blackman, on 11 September, 1936, did unlawfully, willfully, and feloniously assault one Frank Shoaf, an employee of Powers and Anderson Dental Company, with firearms or other dangerous weapons, and by means of said assault did rob the said Powers and Anderson Dental Company of one lot of gold bars of the value of $700.00.

When they were arraigned on the indictment, the defendant LeRoy Blackman entered a plea of guilty; the defendant Ralph C. Flowers entered a plea of not guilty.

At the trial, the jury returned a verdict that the defendant Ralph C. Flowers is guilty as charged in both counts of the indictment.

From judgment that he be confined in the State's Prison for a term of not less than seven or more than ten years, the defendant Ralph C. Flowers appealed to the Supreme Court, assigning errors in the trial.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Fred S. Hutchins, William E. Leahy, and William J. Hughes, Jr., for defendant.*

CONNOR, J. After he had offered evidence at the trial of this action tending to show that the defendant Ralph C. Flowers is guilty as charged in both counts of the indictment, and after the defendant had sought to impeach witnesses for the State, by their cross-examination, the solicitor for the State announced to the court that he would offer further evidence tending to show that after the robbery of the Powers and Anderson Dental Company by the defendant Ralph C. Flowers, on 11 September, 1936, as charged in the second count, pursuant to the conspiracy charged in the first count of the indictment, and within one week after the said robbery, the said Ralph C. Flowers and LeRoy Blackman unlawfully, willfully, and feloniously conspired with each other to burn an automobile owned by a niece of the defendant, and that pursuant to said conspiracy the said LeRoy Blackman, on 18 September, 1936, did unlawfully, willfully, and feloniously set fire to and burn said automobile.

Counsel for defendant stated to the court that they would object to the admission of such evidence.

The court thereupon ruled that evidence tending to show a conspiracy to burn and the burning of an automobile owned by a niece of the defendant would be admitted as evidence tending to show a conspiracy between the defendant Ralph C. Flowers and LeRoy Blackman, as charged in the first count of the indictment. The defendant excepted to this ruling.

The State thereupon offered evidence tending to show that some time during the week following 11 September, 1936, the defendant Ralph C. Flowers offered to pay to LeRoy Blackman the sum of $10.00 if the said Blackman would drive the automobile owned by his niece beyond the city limits of Winston-Salem, during the nighttime, and set fire to and burn the said automobile. LeRoy Blackman accepted the offer of the defendant, and on the night of 18 September, 1936, drove the automobile a short distance from the city limits of Winston-Salem, and set fire to and burned the automobile. After the automobile was burned, the defendant paid to the said LeRoy Blackman the sum of $9.00. The automobile was insured against loss by fire, the policy having been procured by the niece of the defendant in his office a few days before the automobile was burned. The defendant paid the premium for the policy.

The defendant objected to the admission of the evidence offered by the State tending to show the conspiracy between the defendant and LeRoy Blackman, and the subsequent burning of the automobile by the said LeRoy Blackman. The court repeatedly instructed the jury that the evidence should be considered by them only as tending to show that the defendant was a party to the conspiracy to rob the Powers and Anderson Dental Company, as charged in the first count in the indictment. The defendant excepted to each and all the rulings of the court upon his objections to the evidence tending to show a conspiracy to burn and the burning of the automobile of defendant's niece, and subsequently during the trial offered evidence in contradiction of such evidence. On his appeal to this Court, the defendant duly assigns as error each and all said rulings.

In *S. v. Miller,* 189 N. C., 695, 128 S. E., 1, it is said by *Stacy, C. J.*:

"It is undoubtedly the general rule of law, with some exceptions, that evidence of a distinct substantive offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. *S. v. McCall,* 131 N. C., 798; *S. v. Graham,* 121 N. C., 623; *S. v. Frazier,* 118 N. C., 1257; *S. v. Jeffries,* 117 N. C., 727; *S. v. Shuford,* 69 N. C., 486. But to this there is the exception as well established as the rule itself, that proof of the commission of other like

offenses is competent to show the *quo animo,* intent, design, guilty knowledge, or *scienter,* when such crimes are so connected with the offense charged as to throw light upon this question. *S. v. Simons,* 178 N. C., 679, and cases there cited. Proof of other like offenses is also competent to show the identity of the person charged with the crime. *S. v. Weaver,* 104 N. C., 758. The exceptions to the rule are so fully discussed by *Walker, J.,* in *S. v. Stancill,* 178 N. C., 683, and in a valuable note to the case of *People v. Molineaux,* 168 N. Y., 264, reported in 62 L. R. A., 193-357, that we deem it unnecessary to repeat here what has there been so well said on the subject."

We think that the evidence offered by the State and admitted subject to exceptions by the defendant comes well within the exceptions to the general rule, as recognized and applied in *S. v. Batts,* 210 N. C., 659, 188 S. E., 99; *S. v. Ray,* 209 N. C., 772, 184 S. E., 836; *S. v. Stancill,* 178 N. C., 683, 100 S. E., 241; *S. v. Simons,* 178 N. C., 679, 100 S. E., 239.

All the evidence at the trial of this action showed that the defendant Ralph C. Flowers, a dentist residing in the city of Winston-Salem, N. C., where he was employed by the R. J. Reynolds Tobacco Company to render professional services to its employees, had known LeRoy Blackman for several years prior to 11 September, 1936; that the said Blackman, a Negro, who, after pleading guilty to both crimes charged in the indictment, testified as a witness for the State, waited on the defendant almost daily at his office and at his home, and was constantly subject to his call; that both the defendant and the said Blackman were at the offices of Powers and Anderson Dental Company on 11 September, 1936, shortly before the robbery; and that within a few hours after the robbery the said Blackman left the city of Winston-Salem, in an automobile, with a niece of the defendant.

Evidence tending to show association of the defendant and LeRoy Blackman with each other, within a short time both before and after the robbery charged in the second count of the indictment, and also tending to show that within a week after the said robbery the defendant and LeRoy Blackman, who testified as a witness for the State, entered into another criminal conspiracy, was competent for the purpose of not only corroborating LeRoy Blackman, who was impeached on his cross-examination by the defendant, but also of showing that the defendant, who was present at the time the robbery was committed, was there in consequence of the conspiracy, charged in the first count of the indictment. Defendant's exceptions to this evidence cannot be sustained. See *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643. In the opinion in that case it is said by *Stacy, C. J.:* "The evidence upon which the defendants have been convicted comes in the main from their alleged coconspirators

and associates. If this be untrustworthy, as they now contend, it should be remembered the defendants were the first to repose confidence in these witnesses, and their appeal was to the jury. In this respect we are unable to help them. Our jurisdiction is limited to reviewing on appeal decisions upon any matter of law or legal inference. Const. of N. C., Art. IV, sec. 8."

We find no error in the trial of this action. The judgment is affirmed.

No error.

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BERTHA SMITH, ADMINISTRATRIX, v. J. CARL SINK ET AL.

(Filed 30 June, 1937.)

**1. Trial § 24: Pleadings § 20—**

A demurrer to the complaint, C. S., 511, challenges the sufficiency of the pleading, while a demurrer to the evidence, C. S., 567, challenges the sufficiency of the evidence, and the two are distinct in purpose and effect.

**2. Negligence §§ 19a, 19b—When nonsuit is proper in negligence cases.**

In negligence cases a demurrer to the evidence may be sustained only for insufficiency of plaintiff's evidence, considered in the light most favorable to him, to show actionable negligence on the part of defendant, or for that the evidence shows that the injury was independently caused by an outside agency or responsible third person, or for that plaintiff's own evidence establishes contributory negligence.

**3. Railroads § 11: Automobiles § 21—Active negligence of driver held intervening negligence insulating negligence of railroad company.**

The evidence tended to show that the driver of a car in attempting to negotiate a sharp curve, properly marked with danger signals, on the highway leading to an overpass constructed by defendant railroad company over its tracks, failed to make the curve and "sideswiped" the guard railing of the overpass for a distance of ten feet, and that a loose end of a broken railing entered the side rear curtain of the car and struck and killed plaintiff's intestate, who was a passenger in the car. *Held:* Even conceding that the railroad company was under duty to keep the overpass in repair, its negligence in failing to do so was passive, and the negligence of defendant driver was the real, efficient cause of intestate's death, and defendant railroad company's motion to nonsuit was properly granted.

**4. Negligence § 7—**

Where the passive negligence of defendant would not have resulted in injury except for the intervening active negligence of a responsible third party, the active negligence of such third party insulates the negligence of defendant, and defendant's negligence will not be held a proximate cause of the injury.

SMITH *v.* SINK.

APPEAL by plaintiff from *Armstrong, J.*, at February Term, 1937, of DAVIDSON.

Civil action to recover damages for plaintiff's intestate's death, alleged to have been caused by the joint and concurrent negligence of the defendants.

The record discloses that on the night of 12 January, 1936, plaintiff's intestate met his death while riding as a guest on the rear seat of a Model A Ford touring car, owned and operated by the defendant J. Carl Sink. Seven persons were in the car at the time—three on the front seat and four on the back seat—and they were going from Southmont to Lexington on State Highway No. 8. Five miles south of Lexington the highway crosses over and above the track and roadbed of the defendant railway company on an overhead bridge. This bridge was constructed many years ago by the corporate defendant, but is now maintained by the State Highway Commission, and has been under the latter's control for the last two years or more. The highway approaches this overhead bridge on a sharp curve, requiring approximately a right-angle turn. On either side of the bridge are large signs, reading "Sharp Turn"—"Danger," which are clearly visible at night. The night was cold and frosty. The driver entered the bridge at 20, 30, or 35 miles an hour, and was unable to make the curve. He skidded 23 feet on the bridge; "sideswiped" the railing and guard for a distance of ten feet; and broke down his left rear wheel. As the car passed along the side railing, the loose end of a broken rail entered through the left rear curtain of the car and struck plaintiff's intestate's chest with such force as to cause his death. The corporate defendant is sought to be held liable because of the broken rail and the dangling loose end.

At the close of plaintiff's evidence, judgment of nonsuit was entered in favor of the corporate defendant; whereupon, the plaintiff suffered a voluntary nonsuit as to the individual defendant, and appeals.

*T. S. Wall, Jr., and P. V. Critcher for plaintiff, appellant.*

*Craige & Craige and Phillips & Bower for defendant Railway Company, appellee.*

STACY, C. J. The case was here before, 210 N. C., 815, on demurrer to the complaint, C. S., 511. It is here now on demurrer to the evidence, C. S., 567. The two are not the same in purpose or result. One challenges the sufficiency of the pleading; the other the sufficiency of the evidence.

In negligence cases, it is proper to sustain a demurrer to the evidence and to enter judgment of nonsuit:

1. When all the evidence, taken in its most favorable light for the plaintiff, fails to show any actionable negligence on the part of the defendant. *Love v. Asheville,* 210 N. C., 476, 187 S. E., 562; *Cheek v. Brokerage Co.,* 209 N. C., 569, 183 S. E., 729; *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562; *Grimes v. Coach Co.,* 203 N. C., 605, 166 S. E., 599; *Eller v. R. R.,* 200 N. C., 527, 157 S. E., 800; *Poovey v. Sugar Co.,* 191 N. C., 722, 133 S. E., 12; *Young v. R. R.,* 116 N. C., 932, 21 S. E., 177; *Brown v. Kinsey,* 81 N. C., 245. See *S. v. Carter,* 204 N. C., 304, 168 S. E., 204; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285. "It all comes to this, that there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it"—*Walker, J.,* in *S. v. Prince,* 182 N. C., 788, 108 S. E., 330.

2. When it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person. *Newell v. Darnell,* 209 N. C., 254, 183 S. E., 374; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446; *Haney v. Lincolnton,* 207 N. C., 282, 176 S. E., 573; *Ward v. R. R.,* 206 N. C., 530, 174 S. E., 443; *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Chambers v. R. R.,* 199 N. C., 682, 155 S. E., 571; *Burke v. Coach Co.,* 198 N. C., 8, 150 S. E., 636; *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361; *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145; *Lineberry v. R. R.,* 187 N. C., 786, 123 S. E., 1; *Harton v. Tel. Co.,* 141 N. C., 455, 54 S. E., 299. Compare *Brown v. R. R.,* 208 N. C., 57, 179 S. E., 25.

3. When contributory negligence is established by plaintiff's own evidence. *Wright v. Grocery Co.,* 210 N. C., 462, 187 S. E., 564; *Stamey v. R. R.,* 208 N. C., 668, 182 S. E., 130; *Tart v. R. R.,* 202 N. C., 52, 161 S. E., 720; *Scott v. Tel. Co.,* 198 N. C., 795, 153 S. E., 413; *Davis v. Jeffreys,* 197 N. C., 712, 150 S. E., 488; *Lunsford v. Mfg. Co.,* 196 N. C., 510, 146 S. E., 129; *Davis v. R. R.,* 187 N. C., 147, 120 S. E., 827; *Horne v. R. R.,* 170 N. C., 645, 87 S. E., 523; *Wright v. R. R.,* 155 N. C., 325, 71 S. E., 306. See *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769. Compare *Absher v. Raleigh, ante,* 567; *Diamond v. Service Stores, ante,* 632; *Hayes v. Tel. Co., ante,* 192; *Boykin v. R. R., ante,* 113; *Oldham v. R. R.,* 210 N. C., 642; *Lincoln v. R. R.,* 207 N. C., 787, 178 S. E., 601.

Even if it be conceded that here the corporate defendant was under the duty of keeping the overhead bridge in repair, *Stone v. R. R.,* 197 N. C., 429, 149 S. E., 399, which may be doubted on the facts revealed by the record, *Pickett v. R. R.,* 200 N. C., 750, 158 S. E., 398, still the judgment of nonsuit would seem to be correct, it appearing that the active negligence of the driver of the car was the real, efficient cause of plaintiff's intestate's death. *Haney v. Lincolnton, supra; Baker v.*

*R. R.*, 205 N. C., 329, 171 S. E., 342; *Hinnant v. R. R., supra; Herman v. R. R., supra; Brigman v. Const. Co.*, 192 N. C., 791, 136 S. E., 125.

We had occasion to examine anew this doctrine of insulating the conduct of one, even when it amounts to passive negligence, by the intervention of the active negligence of an independent agency or third party, as applied to variant fact situations, in the recent cases of *Beach v. Patton, supra; George v. R. R.*, 207 N. C., 457, 177 S. E., 324; *Haney v. Lincolnton, supra; Baker v. R. R., supra; Hinnant v. R. R., supra; Herman v. R. R., supra; Craver v. Cotton Mills*, 196 N. C., 330, 145 S. E., 570; *Ballinger v. Thomas*, 195 N. C., 517, 142 S. E., 761; *Lineberry v. R. R., supra*. These decisions, and others, are in full support and approval of Mr. Wharton's statement in his valuable work on Negligence (sec. 134): "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured."

The same rule announced by *Mr. Justice Strong* in *R. R. v. Kellogg*, 94 U. S., 469, regarded as sound in principle and workable in practice, has been quoted with approval in a number of our decisions. He says: "The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

As the record discloses no sufficient predicate for a reversal of the judgment of nonsuit, it will not be disturbed.

Affirmed.

MRS. MYRTLE BLACKWELL v. COCA-COLA BOTTLING COMPANY OF ASHEVILLE, N. C.

(Filed 30 June, 1937.)

**Food § 16—**

Testimony of plaintiff that she drank part of a bottle of Coca-Cola containing foreign deleterious substances, resulting in injury, and evidence that like deleterious substances were found in Coca-Colas bottled by the same defendant at approximately the same time, *is held* sufficient to be submitted to the jury on the question of defendant's negligence.

APPEAL by defendant from *Pless, J.*, at January Term, 1937, of BUNCOMBE. Affirmed.

Action for damages for personal injury alleged to have been caused by the negligence of the defendant with respect to the presence of deleterious substances in Coca-Cola bottled and sold for human consumption.

The action was instituted in the general county court of Buncombe County. Upon the usual issues of negligence and damage there was verdict for the plaintiff, and defendant appealed to the Superior Court, assigning errors. In the Superior Court all the defendant's exceptions and assignments of error were overruled and the judgment of the general county court affirmed. Defendant appealed to this Court.

*Cathey & McKinney for plaintiff.*
*Johnston & Horner for defendant.*

DEVIN, J. The appellant assigns as error the overruling of its exception to the denial of its motion for judgment of nonsuit, but a consideration of the evidence, in the light of the decisions of this Court on a former appeal in this case (*Blackwell v. Bottling Co.*, 208 N. C., 751), and in *Collins v. Bottling Co.*, 209 N. C., 821; *Enloe v. Bottling Co.*, 208 N. C., 305; and *Hampton v. Bottling Co.*, 208 N. C., 331, warrants the conclusion that the evidence was sufficient to be submitted to the jury. In *Enloe v. Bottling Co., supra, Stacy, C. J.*, speaking for the Court, reviews the decisions on this subject and declares the law as established in this jurisdiction.

The plaintiff testified that on 25 December, 1933, in drinking a bottle of Coca-Cola, bottled and sold for consumption by defendant, she inadvertently swallowed portions of one or more bugs or insects; that she then observed in the bottle "a brownish gray slimy looking substance," and also found in it "a yellow jacket and cockroach"; that what she swallowed caused her to be made sick and resulted in injury to her stomach and throat. She offered the testimony of other witnesses that

in March and April following there were found in other bottles of Coca-Cola manufactured, bottled, and placed on the market for sale, in capped bottles, by the same defendant, in one instance foreign substance floating on top of the Coca-Cola in the bottle, and in the other a small decomposed mouse.

This evidence was competent and took the case out of the rule laid down in the *Collins case, supra,* and in the former opinion in this case.

The exceptions to the charge to the jury by the trial judge were properly overruled. A careful examination of the charge, both on the question of negligence and damage, leaves us with the impression that the rules of law were accurately stated in their application to the facts of the case and were in accord with the authoritative decisions of this Court.

The instant case seems to have been fairly and properly tried, and the judgment of the Superior Court in overruling appellant's assignments of error must be affirmed.

Affirmed.

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PHILLIPS & BUTTORFF MANUFACTURING COMPANY v. C. R. CALL, TRADING AS PIEDMONT FURNITURE COMPANY.

(Filed 30 June, 1937.)

**1. Appeal and Error § 39—**

Error must be prejudicial to entitle appellant to a new trial.

**2. Appeal and Error § 38—**

The burden is on appellant to show error.

APPEAL by plaintiff from *Harding, J.,* at February Term, 1937, of FORSYTH.

Civil action to recover on open account for goods sold and delivered over a period of thirteen years from 1921 to 1934.

Upon denial of liability, plea of payment and plea of the statute of limitations, there was a verdict and judgment for the defendant in the general county court of Forsyth County, which was affirmed on appeal to the Superior Court.

From this latter judgment, the plaintiff appeals, assigning errors.

*John Fries Blair and Hutchins & Parker for plaintiff, appellant.*
*Hastings & Booe and Peyton B. Abbott for defendant, appellee.*

PER CURIAM. In the trial court, the controversy narrowed itself principally to an issue of fact, determinable alone by the jury. There

is one exception to the admission of evidence and another to the charge, which may be subject to some slight criticism, but upon the entire record it is apparent that these matters were not prejudicial in the trial of the cause, as the jury evidently rejected the plaintiff's version of the matter—the accuracy and trustworthiness of its records being sharply questioned—and answered the issue of indebtedness in favor of the defendant. On the whole, it is concluded that no reversible error has been made to appear. *Rogers v. Freeman, ante,* 468. The burden is upon appellant to show error; it will not be presumed. *Cole v. R. R., ante,* 591.

Affirmed.

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LOU WILSON v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 6 January, 1937.)

**Insurance § 34d—**

In this action on a disability clause in a certificate under an employees' group policy, judgment of nonsuit in insurer's favor is affirmed under authority of *Fulton v. Insurance Co.*, 210 N. C., 394.

APPEAL by plaintiff from *Rousseau, J.*, at November Term, 1935, of ROCKINGHAM.

Civil action to recover on certificate of group insurance issued by defendant to plaintiff as an employee of the Riverside and Dan River Cotton Mills, Inc.

From judgment of nonsuit entered at the close of all the evidence, plaintiff appeals, assigning errors.

*P. T. Stiers for plaintiff, appellant.*

*Manly, Hendren & Womble and W. P. Sandridge for defendant, appellee.*

PER CURIAM. In principle, the facts of the instant case are identical with those appearing in the case of *Fulton v. Metropolitan Life Insurance Co.*, 210 N. C., 394, 186 S. E., 486. The master policy is the same. The judgment of nonsuit affirmed in the *Fulton case, supra,* is authority for the judgment entered here.

Affirmed.

FREDERIC F. BAHNSON, D. A. HEGGIE, AND SOUTHERN STEEL STAMPINGS, INC., v. WILLIAM P. YOW.

(Filed 27 January, 1937.)

APPEAL by plaintiffs from *Armstrong, J.*, at September Term, 1936, of FORSYTH. Affirmed.

This was a civil action instituted in the Forsyth County court to compel the specific performance of a written contract providing for the assignment of certain patent rights to the plaintiff corporation. The defendant filed an answer and also a further defense and counterclaim. In apt time, and before filing a reply or other pleadings, the plaintiffs filed a written motion to strike out said further defense and counterclaim, and also certain specified portions thereof for reasons assigned. The motion to strike out was allowed in part and denied in part by the Forsyth County court. The plaintiffs excepted to each adverse ruling of said court and appealed to the Superior Court for Forsyth County, as appears of record. The appeal was heard before his Honor, Frank M. Armstrong, who rendered the following judgment:

"This cause coming on to be heard and being heard before his Honor, Frank M. Armstrong, judge presiding at the 21 September, 1936, Term of the Superior Court, and being heard on appeal from the Forsyth County court, and it appearing to the court that this is an appeal from a motion to strike out certain portions of the further defense and counterclaim of the defendant, and after considering the matter and hearing argument of counsel. It is therefore considered, ordered, and adjudged that the action of the county court in overruling plaintiffs' motions and exceptions as set out in assignments of error Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, and 11 be and it is hereby affirmed; that as to assignment of error No. 7, the action of the Forsyth County court is affirmed in part and overruled in part, as follows: The court erred in failing to strike from the pleadings, in line two, the words 'secret, underhanded and,' and in line seven the word 'secret'; except as herein modified, the action of the trial court in overruling plaintiffs' motion and exception as set out in assignment of error No. 7 is hereby ratified and affirmed. Frank M. Armstrong, Judge presiding."

The plaintiffs made numerous exceptions and assignments of error, and appealed to the Supreme Court.

*Hastings & Booe and Peyton B. Abbott for plaintiffs.*

*John D. Slawter, L. L. Wall, and Richmond Rucker for defendant.*

PER CURIAM. We have read the record and briefs of the litigants with care. As this cause will be heard on its merits, we do not consider it necessary to go further than to state that we think the court below, on the present record, was correct in its rulings. Therefore, the judgment is

Affirmed.

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ERCEL JACKSON ET AL. v. BRANCH BANKING & TRUST COMPANY ET AL.

(Filed 24 February, 1937.)

**Appeal and Error § 38—**

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed, in accordance with the usual practice.

APPEAL by plaintiffs from *Barnhill, J.*, at October Term, 1936, of WASHINGTON.

Civil action for accounting.

Plaintiffs allege that in 1933 they secured a loan of $9,250 from the Home Owners Loan Corporation with which to pay off an indebtedness due the defendant, said indebtedness being secured by deed of trust on their residences; that in taking the bonds of the HOLC the defendant credited plaintiffs with only 85 per cent of their face value; wherefore, they sue for the remaining 15 per cent, amounting to $1,387.50, with interest and costs.

The defendant denies liability, pleads express agreement and ratification on the part of plaintiffs, prior to act of Congress inhibiting such agreements, and contends that plaintiffs may not accept the benefits of said agreement and at the same time repudiate its burdens; that if they would rescind they must do so *in toto*. *Starkweather v. Gravely*, 187 N. C., 526, 122 S. E., 297.

From verdict and judgment exculpating defendant from liability, the plaintiffs appeal, assigning errors.

*Sidney A. Ward and H. S. Ward for plaintiffs, appellants.*
*W. L. Whitley and Z. V. Norman for defendants, appellees.*

PER CURIAM. One member of the Court, *Schenck, J.*, being absent, and the remaining four being equally divided in opinion as to whether the matters of law or legal inference, debated on argument and brief, are presented by the record, the judgment of the Superior Court, accordant

with the usual practice in such cases, is affirmed and stands as the decision in this case, without becoming a precedent. *S. v. Swan*, 209 N. C., 836, 183 S. E., 285; *Sessoms v. R. R.*, 208 N. C., 844, 182 S. E., 112.

Affirmed.

J. J. JOHNSON AND O. H. LYON, GUARDIAN FOR TAZWELL WHEELOCK, v. W. B. COPPERSMITH AND MARSHALL H. JONES, TRADING AS COPPERSMITH & COMPANY, AND ELIZABETH CITY IRON WORKS, A CORPORATION.

(Filed 17 March, 1937.)

APPEAL by defendants from *Barnhill, J.*, at October Term, 1936, of WASHINGTON. No error.

*W. L. Whitley and H. S. Ward for plaintiffs, appellees.*
*Zeb Vance Norman for defendants, appellants.*

PER CURIAM. This was an action to recover damages for the failure of the defendants to return certain logging equipment, in accordance with the terms of a consent judgment rendered in a previous suit between the parties, and also for damages for the deterioration of portions thereof which were returned. Upon issues submitted, the jury assessed plaintiffs' damages at $650.00.

The principal contention of defendants, appellants, was that by reason of a settlement with defendant Iron Works, plaintiffs should be held to have released their claim against defendants Coppersmith and Jones, but the value of the property affected by plaintiffs' adjustment of a separate controversy with the Iron Works was excluded from the consideration of the jury.

The appellants and the Iron Works were not joint tort-feasors, nor did the plaintiffs, by settlement of another and different claim with the latter, obtain satisfaction for the matters here litigated. *Mason v. Stephens*, 168 N. C., 370; *Slade v. Sherrod*, 175 N. C., 346; *Young v. Anderson*, 33 Idaho, 522, 50 A. L. R., 1056.

The controversy related chiefly to questions of fact which have been determined in favor of the plaintiffs. Upon the record, we find

No error.

STATE v. GUY JONES.

(Filed 7 April, 1937.)

**1. Criminal Law § 30—**

Statements of witnesses at the coroner's inquest *held* competent in evidence for the purpose of corroborating the testimony of the witnesses at the trial.

**2. Criminal Law § 54b—**

A verdict will be interpreted in the light of all the evidence and the admission of the parties.

APPEAL by defendant from *Sinclair, J.*, at September Term, 1936, of JONES. No error.

The defendant was tried on an indictment in which he was charged with driving an automobile on a highway in Jones County, North Carolina, while under the influence of intoxicating liquor, in violation of the statute. N. C. Code of 1935, section 2621 (44).

There was a verdict that defendant is "guilty of driving under the influence of liquor."

From judgment that he be confined in the county jail of Jones County for twelve months, and be assigned to work on the public roads, the defendant appealed to the Supreme Court, assigning as error the admission of evidence over his objections.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*John D. Larkin and J. A. Jones for defendant.*

PER CURIAM. There was ample evidence at the trial of this action to sustain the charge made in the indictment that on 4 April, 1936, the defendant did drive an automobile on a public highway in Jones County, while under the influence of intoxicating liquor, in violation of the statute, N. C. Code of 1935, section 2621 (44).

There was no error in the admission of evidence tending to corroborate the testimony of witnesses for the State. Statements made by these witnesses at the coroner's inquest were competent as evidence tending to corroborate the testimony of the witnesses at the trial. See *S. v. Exum*, 138 N. C., 599, 50 S. E., 283.

The verdict appearing in the record, although on its face not sufficient to support the judgment, interpreted in the light of all the evidence, and of admissions made in the case on appeal, was sufficient for that purpose. See *S. v. Whitley*, 208 N. C., 661, 182 S. E., 338.

The judgment is affirmed.

No error.

A. J. PHILLIPS v. GULF REFINING COMPANY ET AL.

(Filed 7 April, 1937.)

APPEAL by plaintiff from *Sinclair, J.*, at December Term, 1936, of CARTERET.

Civil action to recover damages for an alleged negligent injury.

The record discloses that on 9 June, 1933, about the hour of 9:00 p.m., the plaintiff, while trying to berth a boat in the defendant's dock at Morehead City, fell from the pier and was seriously injured when his arm struck a protruding nail which had been driven into the side of one of the piling, about 8 or 10 inches from the top of the deck. The plaintiff was using the defendant's dock, after business hours, for his own convenience. He was neither an employee of the defendant nor engaged in any work for the defendant.

From a judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

*Ward & Ward for plaintiff, appellant.*
*Moore & Moore for defendants, appellees.*

PER CURIAM. It is not perceived upon what theory the defendant can be held liable for plaintiff's injury, unfortunate and distressing as it may have been. The judgment of nonsuit seems to be correct.

Affirmed.

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MINOUS B. ALLEN ET AL. v. MUTUAL LIFE INSURANCE COMPANY.

(Filed 7 April, 1937.)

**Appeal and Error § 38—**

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed, without becoming a precedent.

APPEAL by defendant from *Sinclair, J.*, at September Term, 1936, of PITT.

Civil action to reinstate and make effective policy of life insurance and to recover on total and permanent disability clause contained therein.

From verdict and judgment for plaintiffs, the defendant appeals, assigning errors.

*S. J. Everett for plaintiffs, appellees.*
*Frederick L. Allen and Gilliam & Bond for defendant, appellant.*

PER CURIAM. One member of the Court, *Schenck, J.*, being absent, and the remaining four being equally divided in opinion as to whether reversible error has been shown, particularly on the refusal to nonsuit, the judgment of the Superior Court, accordant with the usual practice in such cases, is affirmed and stands as the decision in this case, without becoming a precedent. *Jackson v. Trust Co., ante,* 733; *Brown v. Assurance Society,* 210 N. C., 825; *S. v. Swan,* 209 N. C., 836, 183 S. E., 285; *Sessoms v. R. R.,* 208 N. C., 844, 182 S. E., 112; *Beam v. Pub. Co., ibid.,* 837, 181 S. E., 326; *Trust Co. v. Hood, Comr.,* 207 N. C., 862, 177 S. E., 16; *Nebel v. Nebel,* 201 N. C., 840, 161 S. E., 223.

Affirmed.

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M. H. GOODRUM v. FARMERS GIN COMPANY, ANCHOR MILLS, INC., CHARLES BARNETT, AND MOORESVILLE FLOUR MILLS.

(Filed 28 April, 1937.)

APPEAL by defendants from *Cowper, Special Judge,* at November Term, 1936, of MECKLENBURG. No error.

Action to recover the value of certain crops acquired by defendants from H. A. Smith, which said crops were alleged to have been covered by plaintiff's registered chattel mortgages and crop liens.

Plaintiff alleged, and offered evidence tending to show, that H. A. Smith, then engaged in the cultivation of crops, in order to secure a debt, executed to him liens on all the crops by him raised on described lands, and that these liens were renewed from year to year by the execution of additional chattel mortgages and crop liens on succeeding crops, including the years 1933, 1934, and 1935; that while the debts were unpaid and the mortgages of record in the county, Smith sold and delivered certain crops of cotton and cotton seed, raised on the lands, to the defendants in 1933 and 1934 without the consent or previous knowledge of the plaintiff, and the plaintiff asked that he recover the value of the crops so delivered to the defendants by the lienor.

At the close of plaintiff's evidence, defendants moved for judgment of nonsuit. This motion was denied and defendants offered no evidence.

Issues were submitted to the jury and answered as follows:

"1. Did the 1935 mortgage cancel and release the lien of the 1934 mortgage? Ans.: 'No.'

"2. Did H. A. Smith sell his 1933 crops with the consent of the plaintiff? Ans.: 'No.'

"3. Did H. A. Smith sell his 1934 crops with the consent of the plaintiff? Ans.: 'No.'

"4. How much, if any, are the defendants indebted to the plaintiff? Ans.: '$254.52.'"

From judgment on the verdict defendants appealed.

*B. F. Wellons for plaintiff, appellee.*

*H. C. Jones and Brock Barkley for defendants, appellants.*

PER CURIAM. The only question presented by the appeal is the correctness of the ruling of the court below in denying the motion for judgment of nonsuit. There were no exceptions to the evidence or to the judge's charge to the jury.

The defendants contended that the evidence offered by the plaintiff showed that his course of dealing with the mortgagor with respect to the crops covered by his mortgage was such as to indicate that he had consented to the sale of the crops by the mortgagor, and that the execution of a new mortgage each year released the mortgage on the crops of the preceding year, and ratified the sales to defendants. But the plaintiff testified: "I never gave Mr. Smith permission to sell any part of mortgaged crops. Never agreed to release either mortgage. Had a definite understanding and agreement with Mr. Smith that each additional mortgage would be additional security with right to toll all crops previously disposed of unless 1935 note paid in full at maturity. Had no knowledge of either defendant purchasing crops, except Smith told me he had sold them to C. B. Barnett."

This evidence was sufficient to take the case to the jury on the issues raised. Liability for the recovery was apportioned among the defendants in accord with an agreement between them.

In the trial, we find

No error.

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W. O. STROTHER v. WESTERN UNION TELEGRAPH COMPANY ET AL.

(Filed 28 April, 1937.)

APPEAL by defendants from *Spears, J.*, at January Term, 1937, of WAKE.

Civil action to recover damages for personal injuries suffered by plaintiff when knocked down on public street in city of Raleigh by bicycle

operated by Earl Frazier while delivering messages on behalf of the Western Union Telegraph Company, and alleged to have been caused by the negligence of the defendants.

Upon denial of liability and plea of contributory negligence, the usual issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of plaintiff. From judgment thereon the defendants appeal, assigning errors.

*Douglass & Douglass and Sam J. Morris for plaintiff, appellee.*
*Francis R. Stark and Little & Wilson for defendants, appellants.*

PER CURIAM. The record presents no new question of law, and the trial seems to have been conducted in conformity to the established principles in such cases. *Brown v. Tel. Co.*, 198 N. C., 771, 153 S. E., 457. The demurrer to the evidence was properly overruled, as it is amply sufficient to carry the case to the jury. *Hayes v. Tel. Co., ante*, 192.

A careful perusal of the record leaves us with the impression that it is free from reversible error. The verdict and judgment will be upheld.

No error.

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VIRGINIA TRUST COMPANY, TRUSTEE, v. E. R. MERRICK, TRUSTEE, AND THE NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY OF DURHAM, N. C.

(Filed 28 April, 1937.)

**Appeal and Error § 38—**

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed, without becoming a precedent.

APPEAL by plaintiff from *Harris, J.*, at March Term, 1937, of WAKE. Affirmed.

This was an action by plaintiff, a creditor of the estate of Berry O'Kelly, deceased, to enjoin sale of land under deed of trust executed by the administrator of said estate to the defendant Merrick, trustee for the North Carolina Mutual Life Insurance Company, another creditor of said estate. The execution of the deed of trust by the administrator was authorized pursuant to the provisions of C. S., 75, as amended by chapter 222 of the Public Laws of 1927.

From judgment dismissing the action, plaintiff appealed.

*Shepherd & Shepherd and N. G. Fonville for plaintiff.*
*Clem B. Holding and Bryant & Jones for defendants.*

PER CURIAM. One member of the Court, *Schenck, J.*, being absent, and the remaining four being equally divided in opinion as to whether the statute permitting an administrator to execute a deed of trust on real estate is applicable to the facts in this case, the judgment of the Superior Court, in accord with the usual practice in such cases, is affirmed and stands as the decision of this case, without becoming a precedent. *Caffey v. Osborne,* 210 N. C., 252.

Affirmed.

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STATE v. C. G. MAY.

(Filed 19 May, 1937.)

APPEAL by defendant from *Hill, Special Judge,* at November Special Term, 1936, of GUILFORD.

Criminal prosecution, tried upon indictment charging the defendant with sodomy or crime against nature. C. S., 4336.

Verdict: Guilty of an attempt to commit the crime charged.

Judgment: Two years on the roads.

Defendant appeals, assigning errors.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*J. J. Henderson and George A. Younce for defendant.*

PER CURIAM. The case was properly submitted to the jury on the evidence offered by the State, and the record is barren of any reversible error; hence the verdict and judgment will be upheld.

No error.

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W. W. CARPENTER v. THE FIRST NATIONAL BANK OF WADESBORO.

(Filed 19 May, 1937.)

APPEAL by plaintiff from *Rousseau, J.*, at September Term, 1936, of ANSON.

Civil action for an accounting between plaintiff and defendant's intestate, and to recover balance due, alleged to have arisen out of certain "purchases and sales of cotton," which were "*bona fide* hedges" and made in the course of their business as cotton dealers.

The purchases and sales in question were made in the spring of 1923. Summons was issued 3 December, 1923; complaint filed 11 May, 1934; action tried September Term, 1936.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

*Armfield, Sherrin & Barnhardt for plaintiff, appellant.*
*Rowland S. Pruette and B. M. Covington for defendant, appellee.*

PER CURIAM. Plaintiff's chief complaint is to the exclusion of certain evidence, without which it is practically conceded no case has been made out. A careful perusal of the record fails to disclose any error in the exclusion of evidence or in the judgment of nonsuit. Nor has error been made to appear on the motion to recuse.

Affirmed.

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DAVID MURPHY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 19 May, 1937.)

APPEAL by plaintiff from *Grady, J.*, at October Term, 1936, of NEW HANOVER. Affirmed.

This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant.

At the close of the evidence for the plaintiff, on motion of the defendant, the action was dismissed by judgment as of nonsuit.

Plaintiff appealed to the Supreme Court, assigning error in the judgment.

*Rodgers & Rodgers for plaintiff.*
*Poisson & Campbell for defendant.*

PER CURIAM. In the absence of any evidence at the trial of this action tending to show that plaintiff's injuries were caused by the negligence of the defendant, as alleged in his complaint, there is no error in the judgment dismissing this action.

All the evidence showed that plaintiff's own negligence was the sole, proximate cause of his injuries. In no aspect of the case is the doctrine of "the last clear chance" applicable to the facts shown by all the evidence. See *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829.

The judgment is

Affirmed.

ALMA F. OWEN v. HENRY WILLIAMS, ADMINISTRATOR,
and
YOUNG OWEN v. HENRY WILLIAMS, ADMINISTRATOR.

(Filed 19 May, 1937.)

APPEAL by defendant from *Armstrong, J.*, at February Term, 1937, of DAVIDSON.

Civil actions, brought separately by husband and wife, to recover for services rendered defendant's intestate during her lifetime, by consent consolidated and tried together.

From verdict and judgment for plaintiff in each case, the defendant appeals, assigning errors.

*Don A. Walser, J. Lee Wilson, and Carl C. Wilson for plaintiffs, appellees.*

*W. O. Burgin and Phillips & Bower for defendant, appellant.*

PER CURIAM. It may be fairly debatable whether the case falls in the category of *Nesbitt v. Donoho*, 198 N. C., 147, 150 S. E., 875, or *Staley v. Lowe*, 197 N. C., 243, 148 S. E., 240, but as there was no motion to nonsuit, and the record is barren of any exceptive assignment of error predicable of a new trial, the verdicts and judgments will be upheld. See *Bank v. McCullers*, 201 N. C., 412, 160 S. E., 497; *Edwards v. Matthews*, 196 N. C., 39, 144 S. E., 300; *Winkler v. Killian*, 141 N. C., 575, 54 S. E., 540.

No error.

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STATE v. JOHN WHARTON AND ROY HENDERSON.

(Filed 19 May, 1937.)

**1. Criminal Law § 52b—**

Testimony of two witnesses identifying defendant as one of the perpetrators of the robbery charged, with conflicting evidence by defendant in support of the alibi relied on by him, raises an issue of fact for the jury, and defendant's motion to nonsuit is properly denied.

**2. Criminal Law § 52a—**

The weight of the testimony and the credibility of witnesses are matters in the exclusive province of the jury.

APPEAL by defendant John Wharton from *Sink, J.*, at January Term, 1937, of GUILFORD.

The defendants were indicted for robbery with weapons, and with assault with intent to kill. By consent, the cases were consolidated for trial. From judgment pronounced upon verdicts of guilty as charged in both indictments as to both defendants, the defendant John Wharton appealed.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Younce & Younce and James E. Coletrane for defendant.*

PER CURIAM. The appellant assigns as error the denial by the court below of his motion for judgment as of nonsuit at the close of the evidence, on the ground that he had not been sufficiently identified as one of the perpetrators of the crimes alleged in the bills of indictment.

However, it appears from the record that both the prosecuting witness, who was assaulted and robbed, and another witness identified the defendant Wharton as one of the two engaged in the unlawful acts. The motion for judgment as of nonsuit was properly overruled. The defendant denied his guilt and offered evidence that he was elsewhere at the time alleged, but the weight of the testimony and the credibility of the witnesses were matters exclusively in the province of the jury.

The charge of the court to the jury was in accord with the decisions of this Court, and we find no error in the rulings of the trial judge on the admission of evidence. The judgment followed the verdict and was within the limits of the pertinent statutes.

In the trial there was

No error.

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ROBERT L. STEELE III v. A. B. COLE.

(Filed 19 May, 1937.)

APPEAL by plaintiff and defendant from *Rousseau, J.*, at October Term, 1936, of RICHMOND.

Action to recover of defendant individually the purchase price of an interest in certain land in the State of Florida, conveyed by plaintiff to Fannie L. Steele, incompetent, at the request of defendant. The defendant answered, alleging, among other things, that he and George P. Entwistle were trustees of the estate of Fannie L. Steele, and that he was not personally liable; that plaintiff had been paid in full for his interest in the land; that his title to a portion of the interest conveyed was defective, and defendant set forth at length numerous transactions

between the parties and those from whom plaintiff's interest was derived, and asked that A. B. Cole and George P. Entwistle, as trustees of Fannie L. Steele, be made parties, and also that Mrs. M. E. Steele, both individually and as executrix of the estate of Robert L. Steele II, be made a party.

The plaintiff demurred to the answer and asked for judgment on the pleadings. Plaintiff thereafter filed a reply.

The court overruled the demurrer, denied the motion for judgment in the pleadings, ordered that A. B. Cole and George P. Entwistle, as trustees of Fannie L. Steele, be made parties defendant, and denied defendant's motion to make Mrs. M. E. Steele, individually and as executrix of Robt. L. Steele II, a party.

Both plaintiff and defendant appealed.

*A. M. Stack and Fred W. Bynum for plaintiff.*
*J. C. Sedberry for defendant.*

PER CURIAM. The plaintiff's demurrer to the answer and his motion for judgment on the pleadings, on the ground that the answer did not set up any defense to plaintiff's action, were properly overruled.

Likewise, we see no error in the denial of defendant's motion that Mrs. M. E. Steele be made a party defendant.

On both appeals

Judgment affirmed.

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IRIS WOOD v. WILLIAM BODENHEIMER.

(Filed 19 May, 1937.)

APPEAL by plaintiff from *Armstrong, J.*, at February Civil Term, 1937, of DAVIDSON. Affirmed.

This is an action for slander brought by plaintiff against the defendant, alleging damage. The plaintiff is a married woman and in her complaint made allegations against defendant which constituted slander *per se*. The defendant denied the allegations of plaintiff.

*J. Lee Wilson, A. J. Newton, and Don A. Walser for plaintiff.*
*Spruill & Olive for defendant.*

PER CURIAM. At the close of plaintiff's evidence, 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.

C. S., 2432, is as follows: "Whereas doubts have arisen whether actions of slander can be maintained against persons who may attempt, in a wanton and malicious manner, to destroy the reputation of innocent and unprotected women, whose very existence in society depends upon the unsullied purity of their character, therefore any words written or spoken of a woman, which may amount to a charge of incontinency, shall be actionable."

The allegations in the complaint of plaintiff charged that the defendant used words in the presence of others which amounted to incontinency and slander *per se*. This was denied by defendant. On the trial the plaintiff's proof did not sustain the allegations of the complaint. It would serve no useful purpose to set out the evidence, but the language used by the witnesses of plaintiff, which was alleged to have been spoken by defendant concerning plaintiff, did not amount to a charge of incontinency. *Harley v. Lovett,* 199 N. C., 793.

The judgment of the court below is

Affirmed.

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PEARL K. ADAMS v. CAROLINA MORTGAGE COMPANY.

(Filed 9 June, 1937.)

APPEAL by defendant from *Hill, Special Judge,* at November Term, 1936, of FORSYTH.

The plaintiff instituted her action to recover the statutory penalty for usury. The material averments of her complaint are these: C. B. Dunnagan and wife, the original borrowers and mortgagors, conveyed the land to R. M. Dunnagan and wife, who thereafter conveyed to the plaintiff, for the purpose of securing grantees' assistance in making the required installment payments on the loan, with agreement to reconvey. It is alleged the original loan was affected with usury, and that usurious interest was paid by C. B. Dunnagan and wife, and by the plaintiff, and that it was understood and agreed that plaintiff should have the benefit of any defense or claim on account of usury. Plaintiff paid the balance required by defendant for satisfaction of the loan.

Defendant answered denying the charge of usury, and pleaded the statute of limitations. No affirmative relief was prayed.

Subsequently, upon motion of C. B. Dunnagan and wife, they were made parties plaintiff and adopted the complaint. Thereupon, the defendant demurred on the ground of misjoinder of parties and causes of action.

When the cause came on for hearing, the trial judge permitted C. B. Dunnagan and wife to take voluntary nonsuit, and, after entering judgment dismissing the case as to them, declined to sustain the demurrer and defendant appealed.

*Ingle & Rucker for plaintiff.*
*William G. Mordecai and Ratcliff, Hudson & Ferrell for defendant.*

PER CURIAM. The court below, having dismissed the action as to all parties, except the original plaintiff, Pearl K. Adams, the demurrer on the ground of misjoinder of parties and causes of action could not be sustained.

The court's ruling is

Affirmed.

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SMITH GARRETT v. HOLLAND FURNACE COMPANY ET AL.

(Filed 9 June, 1937.)

APPEAL by defendant from *Hill, Special Judge,* at March Term, 1937, of FORSYTH.

Civil action to recover damages for personal injuries alleged to have been caused by the wrongful act, neglect, or default of the defendant.

Plaintiff was injured while riding on defendant's truck, and was, at the time, engaged in helping defendant's driver move a Heatrola from the home of a customer to defendant's store, for the purpose of storing it.

The jury found that plaintiff's injury was due to the negligence of the defendant and assessed his damages at $500. From judgment on the verdict, the defendant appeals, assigning errors.

*Williams & Bright for plaintiff, appellee.*
*William H. Boyer for defendant, appellant.*

PER CURIAM. The record discloses no fatal exceptive assignment of error. The allegation of negligence is, perhaps, narrowly stated, but its sufficiency is not challenged. Indeed, the theory of the trial may have been more favorable to the defendant than the facts in evidence warranted. However, the jury has answered for the plaintiff. The verdict and judgment will be upheld.

No error.

W. M. McMAHAN v. R. S. BASINGER.

(Filed 9 June, 1937.)

**Appeal and Error § 38—**

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed, in accordance with the usual practice.

APPEAL by plaintiff from *Armstrong, J.*, at November Term, 1936, of ROCKINGHAM. Affirmed.

This is an action to recover damages for the unlawful arrest and wrongful imprisonment of the plaintiff, procured, as alleged in the complaint, by the defendant.

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

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

*Sharp & Sharp for plaintiff.*
*Carlis T. Kennedy for defendant.*

PER CURIAM. One of the members of this Court not sitting at the hearing of this appeal, and the remaining members being divided in opinion, the judgment of the Superior Court is affirmed, in accordance with the practice in such case. See *Nebel v. Nebel,* 201 N. C., 840, 161 S. E., 223, and cases cited in support of the decision in that case.

Affirmed.

JESSIE SMITH v. G. M. CATHEY, PRESIDENT, BUSTER GREEN, MANAGER, TRADING AS ARROW TAXICAB COMPANY, AND BARTHER GROVES, AS AGENT AND INDIVIDUALLY.

(Filed 9 June, 1937.)

**Master and Servant § 23—**

In this action to recover for an assault, defendant employers' motions to nonsuit *held* properly granted for that the evidence disclosed that the wrongdoer was not about the employers' business and was not acting within the scope of his employment in making the assault.

APPEAL by plaintiff from *Hill, Special Judge,* 12 April, 1937. From FORSYTH. Affirmed.

This is an action for assault, brought by plaintiff against defendants, alleging damage.

The judgment in the court below is as follows: "This cause coming on to be heard and being heard before his Honor, Frank S. Hill, Judge presiding, at the 12 April Term of the Superior Court of Forsyth County, and after a jury was impaneled to try the issues, the defendants G. M. Cathey and Buster Green, trading as Arrow Taxicab Company, demurred *ore tenus* to the amended complaint, including the substituted paragraphs four and five of said complaint, on the grounds that it does not set out facts sufficient to constitute a cause of action against them. Upon hearing the argument of counsel, the court sustained the demurrer and dismissed the action as to the defendants G. M. Cathey and Buster Green, trading as Arrow Taxicab Company, and the plaintiff excepts and appeals to the Supreme Court of North Carolina. A juror was then withdrawn and a mistrial declared as to the defendant Barther Groves. This 20 April, 1937. (Signed) Frank S. Hill, Judge presiding."

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

*Williams & Bright for plaintiff.*
*Price & Jones for defendants.*

PER CURIAM. We see no error in the judgment of the court below. The allegations of the complaint, construed in a light most favorable to plaintiff, do not state facts sufficient to constitute a cause of action (C. S., 511 [6]) against defendants G. M. Cathey and Buster Green, trading as Arrow Taxicab Company. When the assault took place, Barther Groves, an employee of the Arrow Taxicab Company, was not about his master's business, nor was his act in the scope of his employment. *Ferguson v. Spinning Co.*, 196 N. C., 614; *Jackson v. Scheiber*, 209 N. C., 441.

The judgment of the court below is

Affirmed.

## STATE v. TAN MOORE AND M. B. THOMPSON.

(Filed 9 June, 1937.)

APPEAL by defendants from *Williams, J.*, at November Term, 1936, of ALAMANCE. No error.

This is a criminal action in which the defendants were tried on an indictment for highway robbery. N. C. Code of 1935, section 4267 (a).

By their verdict the jury found that defendants are "guilty of larceny from the person." C. S., 4251.

From judgment that the defendants be confined in the State's Prison, the defendant Tan Moore for a term of forty-eight months, and the defendant M. B. Thompson for a term of thirty months, each to be assigned to labor under the direction of the State Highway and Public Works Commission, the defendants appealed to the Supreme Court, assigning errors in the trial and in the judgment.

*Attorney-General Seawell and Assistant Attorney-General McMullan for the State.*

*Brooks, McLendon & Holderness and John J. Henderson for defendants.*

PER CURIAM. At the trial of this action the evidence for the State, tending to show that the defendants are guilty as charged in the indictment, was sharply contradicted by the evidence for the defendants, with respect to every fact alleged in the indictment.

All the evidence was properly submitted to the jury under instructions by the court, in which we find no error for which the defendants, or either of them, is entitled to a new trial.

It is apparent from their verdict that the jury were not satisfied beyond a reasonable doubt that the larceny of the prosecutor's money was accompanied by means of force, as contended by the State, but were so satisfied that the defendants are guilty of larceny from the person, a felony of less degree than that charged in the indictment. C. S., 4251.

The verdict is supported by evidence at the trial, and is sufficient to support the judgment. C. S., 4640. There is no error in the judgment.

It is affirmed.

*No error.*

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The owner of land died intestate leaving a widow and four children as his sole heirs at law. One of the children went into possession and remained in possession for more than twenty years, until his death. Plaintiffs, a son and representatives of deceased children of the original owner, introduced evidence

ADVERSE POSSESSION—*Continued.*

that the heir taking possession did so under an agreement that he should remain in possession during his lifetime and that he should care for and support his mother. *Held:* The heirs at law were tenants in common in the land, and, if the jury should find from the evidence that the one taking possession did so under the agreement, his possession would not be adverse to his cotenants or their legal representatives. C. S., 430. *Stallings v. Keeter*, 298.

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The pleadings are a necessary part of the record and may not be omitted by consent of the parties, and where the record is inadequate to establish the jurisdiction of the Supreme Court and put it in efficient relation and connection with the court below, the appeal will be dismissed. Rule of Practice in the Supreme Court, No. 19, sec. 1. *Bank v. McCullers*, 327.

The Supreme Court can judicially know only what appears of record, and where the transcript fails to contain the record proper the appeal will be dismissed, since the record is insufficient to establish the jurisdiction of the Supreme Court or put it in efficient connection with the court below. *Abernethy v. Trust Co.*, 450.

**§ 20. Form and Requisites of Transcript.**

A motion to dismiss an appeal for that the case on appeal is not a concise statement containing only matter reasonably necessary for the consideration of appellant's assignments of error, C. S., 643, Rule of Practice in the Supreme Court No. 19, is addressed to the discretion of the Supreme Court when the case on appeal is settled by the trial judge, C. S., 644, and the motion is denied in this case, since a dismissal would be a denial of justice to appellant. *Messick v. Hickory*, 531.

**§ 21. Matters Not Appearing of Record Deemed Without Error.**

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A contention of error in the charge will be deemed abandoned when the portion of the charge complained of is not assigned as error. Rule 19 (3). *Hancock v. Wilson*, 129.

**§ 26. Time for Filing Briefs.**

Plaintiff appellant's brief was filed six days after the time required, and plaintiff's appeal is dismissed upon appellees' motion under Rule of Practice in the Supreme Court, No. 28. *Wolfe v. Galloway*, 361.

**§ 31d. For Failure to File Briefs.**

Plaintiff appellant's brief was filed six days after the time required, and plaintiff's appeal is dismissed upon appellees' motion under Rule of Practice in the Supreme Court, No. 28. *Wolfe v. Galloway*, 361.

**§ 31f. For Insufficient or Improper Record.**

The pleadings are a necessary part of the record and may not be omitted by consent of the parties, and where the record is inadequate to establish the jurisdiction of the Supreme Court and put it in efficient relation and connection with the court below, the appeal will be dismissed. Rule of Practice in

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the Supreme Court, No. 19, sec. 1. *Bank v. McCullers*, 327; *Abernethy v. Trust Co.*, 450.

A motion to dismiss an appeal for that the case on appeal is not a concise statement containing only matter reasonably necessary for the consideration of appellant's assignments of error, C. S., 643, Rule of Practice in the Supreme Court, No. 19, is addressed to the discretion of the Supreme Court when the case on appeal is settled by the trial judge, C. S., 644, and the motion is denied in this case, since a dismissal would be a denial of justice to appellant. *Messick v. Hickory*, 531.

**§ 31g. Dismissal by Consent of Appellant.**

Plaintiff's appeal from judgment of nonsuit as to one defendant is dismissed in accordance with stipulation in her brief upon decision on appeals of other defendants sustaining plaintiff's recovery against them. *Cole v. R. R.*, 591.

**§ 37b. Matters in Discretion of Lower Court.**

A discretionary order of the trial court is conclusive on appeal in the absence of abuse or arbitrariness. *Cobb v. Cobb*, 146.

Whether a verdict is objectionable as excessive usually rests in the discretion of the lower court, and is not ordinarily reviewable upon appeal. *Cole v. R. R.*, 591.

**§ 37e. Findings of Fact.**

Where the court hears the evidence by agreement of the parties, the court's findings of fact therefrom are as conclusive as the verdict of a jury, and will not be disturbed on appeal when they are supported by any competent evidence. *Cobb v. Cobb*, 146; *Pence v. Price*, 707.

**§ 37f. Allowances to Attorneys, Guardians Ad Litem, and Trustees.**

The amount of allowances by the Superior Court for attorneys' fees, trustees, and guardians *ad litem* in connection with an action involving the liability of an estate is reviewable by the Supreme Court. *Hood, Comr., v. Cheshire*, 103.

**§ 38. Presumptions and Burden of Showing Error.**

Allowances by the Superior Court for attorneys' fees, trustees, and guardians *ad litem* in connection with an action involving the liability of the estate are deemed *prima facie* correct, and the allowances will not be disturbed on a creditor's appeal in the absence of any finding or evidence to support such finding that the allowances were inadequate or excessive. *Hood, Comr., v. Cheshire*, 103.

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. *Cole v. R. R.*, 591; *Light Co. v. Electric Membership Corp.*, 717; *Jackson v. Trust Co.*, 733; *Allen v. Ins. Co.*, 736; *Trust Co. v. Merrick*, 739; *McMahan v. Basinger*, 747.

The burden is on appellant to make error clearly appear. *Cole v. R. R.*, 591; *Mfg. Co. v. Call*, 730.

**§ 39a. Prejudicial and Harmless Error in General.**

A judgment will not be disturbed for error which is not prejudicial or material. *School District v. Alamance County*, 213.

Error must be prejudicial to entitle appellant to a new trial. *Mfg. Co. v. Call*, 730.

A judgment will not be disturbed on appeal, even if partly erroneous, when the judgment is in conformity with the ultimate rights of the parties, since the litigants are interested in practical errors which result in harm and not in theoretical ones which produce no injury. *Munday v. Bank*, 276.

APPEAL AND ERROR—*Continued.*

Where the jury finds that plaintiff was slandered but does not award damages, the failure of the court to instruct the jury that an affirmative answer to the issue entitles plaintiff to nominal damages at least does not entitle plaintiff to a new trial, but the judgment must be modified to adjudge nominal costs, C. S., 1241 (4), and affirmed, since the item of costs is too small to justify a new trial. *Wolfe v. Montgomery Ward & Co.*, 295.

A new trial will not be granted for error that is not prejudicial and material, amounting to a denial of some substantial right, and *held* in this case no prejudicial or material error was made to appear. *Rogers v. Freeman*, 468.

Appellant's exceptions relating to an issue answered in his favor will not be sustained. *Lowry v. Barker*, 613.

**§ 39b. Error Harmless Because Answer to Another Issue Determines Rights of Parties.**

Where, in an action for alimony without divorce, C. S., 1667, plaintiff alleges two grounds for divorce, which are both found for plaintiff by the jury, error in the trial in regard to one of the grounds only does not entitle defendant to a new trial, since the establishment of the other ground is sufficient under the statute. *Hagedorn v. Hagedorn*, 175.

**§ 39d. Prejudicial and Harmless Error in Admission or Exclusion of Evidence.**

An exception to the question only cannot be sustained when the answer is responsive to the purpose rather than to the form of the inquiry. *Southern v. Freeman*, 121.

Exceptions to the admission or exclusion of evidence which is immaterial or not prejudicial do not entitle appellant to a new trial. *Cobb v. Cobb*, 146.

The admission of incompetent evidence is harmless where the facts thereby sought to be established are proven by other competent evidence. *Pickett v. Fulford*, 160.

Where incompetent evidence is stricken out, error in its admission is cured. *Hagedorn v. Hagedorn*, 175.

The exclusion of opinion evidence will not be held for error when the proffered testimony is vague, uncertain, and immaterial, and has little or no probative force or value on the issues. *School District v. Alamance County*, 213.

Where the record does not disclose what the testimony of witnesses would have been, an exception to the exclusion of the testimony cannot be sustained on appeal, since it cannot be determined whether its exclusion was prejudicial, the burden being on appellant to show prejudicial error. *Stevens Co. v. Mooneyham*, 291.

An exception to the admission of evidence on the ground that it was incompetent as hearsay will not be sustained when the record fails to show that the testimony was not within the knowledge of the witness, the burden being upon appellant to show error clearly. *Cole v. R. R.*, 591.

Insurer's witnesses testified that insured was an habitual drunkard, but on cross-examination were permitted to testify that insured's general character was good. *Held:* Under the facts of this case the admission of the character evidence, if error, was not prejudicial. *Creech v. Woodmen of the World*, 658.

**§ 39e. Harmless and Prejudicial Error in Instructions.** (Instructions will be construed contextually see Trial § 36.)

An erroneous instruction on the burden of proof entitles the prejudiced party to a new trial, the burden of proof being a substantial right, and a later portion of the charge correctly placing the burden of proof will not cure the error, since inconsistent instructions upon a material point cannot be held harmless. *DeHart v. Jenkins*, 315.

APPEAL AND ERROR—*Continued.*

**§ 40a. Review of Judgments on Findings of Fact.** (Sufficiency of exceptions see above § 6d; conclusiveness of findings see above § 37e.)

Where the judgment entered by the court after waiver of trial by jury does not contain sufficient facts to enable the Supreme Court to decide the question of law sought to be determined, the case will be remanded. *Hospital v. Rockingham County*, 205.

Where the correctness of the court's ruling upon a motion is dependent upon facts *aliunde* or *dehors* the record, the appellant must request the court to find the facts, otherwise it will be presumed that the court found facts in support of the judgment, and the judgment will be affirmed. *Banking Co. v. Bank*, 328.

In this trial by the court under agreement of the parties, C. S., 568, the court found that the deeds to the person under whom defendants claim were insufficient to ripen title in him under color, and that plaintiff's intestate owned an undivided interest in the land at the time of his death, and entered judgment that intestate owned an undivided interest in the land and that plaintiff was entitled to sell intestate's interest to make assets, the personalty being insufficient. Defendants excepted to the judgment on the ground that the court erred in holding that the deeds were not such as to ripen title under color, but made no exception to the evidence or to the court's findings of fact. *Held:* The facts found support the conclusions of law by the court, and the judgment must be affirmed on appeal. *Best v. Garris*, 305.

In this proceeding to enjoin defendant officers from seizing certain slot machines upon allegations that the machines were lawful, the court treated the complaint and answer denying their legality as affidavits, and heard contentions of counsel in regard to the mechanical operation of the machines, and entered judgment dissolving the temporary restraining order theretofore entered in the cause. The judgment did not find the facts and plaintiffs made no request for findings. *Held:* On appeal, it will be presumed that the court found facts sufficient to support the judgment, and the judgment will be affirmed. *Hinkle v. Scott*, 680.

An exception to a finding of fact not supported by the evidence will be sustained. *Goswick v. Durham*, 687.

**§ 40b. Review of Orders on Motions to Strike Out.**

Refusal of motion to strike from complaint allegations of negligence against defendant appellant on the ground that they were conclusions of the pleader and not supported by the facts alleged, is upheld on authority of *Pemberton v. Greensboro*, 203 N. C., 514; *S. c.*, 205 N. C., 599. *Rucker v. Snider Brothers, Inc.*, 566.

**§ 40c. Review of Judgments on Motions to Nonsuit.** (Consideration of evidence on motion to nonsuit see Trial § 22.)

Plaintiff's appeal from judgment of nonsuit presents single question of whether evidence, considered in light most favorable to plaintiff, was sufficient to be submitted to the jury. *Smitherman v. Bank*, 65.

On appeal from judgment of nonsuit, the evidence must be considered in the light most favorable to plaintiff in order to determine whether it was sufficient to be submitted to the jury. *Hood, Comr., v. Clark*, 693.

**§ 40f. Review of Judgments Upon Demurrers.**

Upon appeal from judgment overruling a demurrer the sole question presented is whether the complaint states a cause of action in favor of plaintiffs against defendants, and whether the action should have been brought by another party is not necessary to be determined when the complaint does not

APPEAL AND ERROR—*Continued.*

allege facts disclosing that such other party had the sole or prior right to prosecute the action. *Morrow v. Cline*, 254.

Upon appeal from judgment sustaining a demurrer, the complaint and exhibits attached thereto will be examined to determine the sufficiency of the pleading to constitute a cause of action against demurring defendant. *Hood, Comr., v. Realty Co.*, 582.

**§ 40g. Review of Constitutional Questions.**

The constitutionality of an ordinance will not be decided upon an appeal from a conviction obtained upon an invalid warrant, since the appeal does not properly invoke the exercise of the judicial power. *S. v. Smith*, 206.

Appellate courts will not decide the constitutionality of a statute unless it is necessary to protect some constitutional right that has been invaded or threatened. *Hood, Comr., v. Realty Co.*, 582.

**§ 41. Questions Necessary to Determination of Appeal.**

Where a new trial is awarded on certain exceptions, other exceptions, relating to matters not likely to arise on a subsequent hearing, need not be determined. *Payne v. Stanton*, 43; *Tomberlin v. Buchtel*, 265; *Brooks v. Ins. Co.*, 274; *In re Will of Plott*, 451; *Absher v. Raleigh*, 568.

Where it is determined on appeal that defendants' motions to nonsuit should have been sustained, other exceptions of defendants need not be considered. *Lemings v. R. R.*, 499.

Where it is determined on appeal that the judgment that a devisee was not put to his election under the will is without error, exceptions to the admission of testimony by the devisee as to whether he intended to elect to take under the will become immaterial. *Bank v. Misenheimer*, 519.

Where the rights of the parties are determined by the answers to several of the issues, assignments of error relating to another issue need not be considered on appeal. *Creech v. Woodmen of the World*, 658.

**§ 47a. New Trial for Newly Discovered Evidence.** (For prejudicial error see above § 39.)

Defendant's motion in the Supreme Court for a new trial for newly discovered evidence, based upon verified statements of a number of prospective witnesses whose testimony it alleges it did not discover until after the trial and was unable to make use of at the trial, is granted in this case, without intimation as to the sufficiency of evidence or discussion of the facts in accordance with the rule of the Court in such instances. *Brantley v. R. R.*, 454.

**§ 47b. Partial New Trial.**

Where error is committed in the lower court in respect to one issue alone, the Supreme Court in its discretion may order a partial new trial when the issue in respect to which error was committed is entirely separable from the other issues and there is no danger of complication. *Messick v. Hickory*, 531.

**§ 50. Jurisdiction and Proceedings in Lower Court After Remand.**

A decision of the Supreme Court in reviewing a judgment as of nonsuit that plaintiff was not guilty of contributory negligence on her own statement, has reference only to the judgment as of nonsuit, and does not preclude the submission of the issue of contributory negligence upon the subsequent trial. *Jones v. Craddock*, 382.

Decision on a former appeal, upon consideration of a motion to remove, that the complaint alleged joint negligence on the part of defendants, disposes of a demurrer entered by one defendant at the subsequent hearing on the ground that the complaint failed to state a cause of action against it. *Rucker v. Snider Brothers, Inc.*, 566.

APPEARANCE.

**§ 2b. Effect of General Appearance.**

A party cannot, by consent or appearance, confer jurisdiction on the court when there is none in law, and appearance of counsel upon a hearing of a motion for change of venue does not waive such party's objection that the judge hearing the motion was without jurisdiction. *Howard v. Coach Co.*, 329.

ASSAULT AND BATTERY.

**§ 2. Defenses.**

Evidence *held* for jury on contention of defendant officer that assault was result of plaintiff's attempt to escape. *Lowry v. Barker*, 613.

ASSIGNMENTS.

(Assignment of judgments see Judgments § 37.)

**§ 5. Rights and Remedies of Assignee.**

An assignee of shares of the capital stock of a bank with knowledge that the bank had denied the assignor's ownership of the stock and had refused to issue the stock to him on his prior demand, is not an innocent purchaser of the stock, and takes only such right, title, and interest in the shares of stock as the assignor had on the date of the assignment. *Holloway v. Bank*, 227.

ASSISTANCE, WRIT OF.

**§ 1. Nature and Grounds of Remedy.**

The purchaser at a foreclosure sale by commissioners appointed by the court is entitled to a writ of assistance against persons in possession, even though they were not parties to the action in which foreclosure was decreed, when it appears that prior to the institution of the action they had entered a consent judgment stipulating that they had no interest in the land other than tenants at sufferance of the trustor. *Alexander v. Thompson*, 124.

ATTACHMENT.

**§ 18. Traversal of Grounds of Attachment.**

The filing of undertaking by defendant does not preclude him from traversing the ground upon which the attachment was based, and the issue may be determined before trial on the merits or, if demanded, with the trial of the main issue between the parties. C. S., 815. *Rushing v. Ashcraft*, 627.

**§ 24. Liabilities on Defendant's Undertaking.**

Where the ground of attachment as originally laid is not supported by evidence at the trial, but the original process is amended to allege another ground supported by evidence, the surety on the undertaking is relieved of liability since his obligation was entered into with reference to the cause as it stood at the time of his signature. *Rushing v. Ashcraft*, 627.

ATTORNEY AND CLIENT.

**§ 6. Scope of Authority.**

Attorney authorized to handle litigation has no authority to enter consent judgment on behalf of his principal. *Morgan v. Hood, Comr.*, 91.

**§ 10. Lien and Collection of Compensation.**

Executors paid part of a judgment against the estate to the judgment creditor without notice that his attorneys were entitled to a part of the recovery under a contingent fee agreement. *Held:* The executors cannot be held personally liable by the attorneys. *In re Estate of Bost*, 440.

## AUTOMOBILES.

**III. Operation and Law of the Road**
11. Passing Vehicles on Highway
12. Speed
c. Speed at Intersections and Bridges
d. Boulevards and Through Streets
13. Stopping, Starting, and Turning
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**IV. Guests and Passengers**
20. Contributory Negligence of Guest
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**V. Liability of Owner for Driver's Negligence**
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b. Scope of Employment and Furtherance of Master's Business

**VII. Criminal Responsibility for Negligent Operation**
31. Reckless Driving
33. Prosecutions: Evidence and Trial

**§ 11. Passing Vehicles on Highway.**

The charge of the court that drivers of cars going in *opposite* directions and passing on the highway should each turn to the right and give to the other one-half the main traveled portions of the roadway, and that upon approaching each other each may assume that, before the cars meet, the driver of the other car will turn to his right so that the cars may pass in safety *is held* without error. N. C. Code, 2621 (53). *Hancock v. Wilson*, 129.

The driver of a car approaching a vehicle going in the same direction on the highway must keep on the right side of the highway until he determines to pass the vehicle in front of him, and before attempting to pass must give warning of his intention to do so by blowing his horn. N. C. Code, 2621 (51), (54b). *Stovall v. Ragland*, 536.

**§ 12c. Speed at Intersections and Bridges.**

Chapter 140, sec. 15, Public Laws of 1917, providing a speed limit of 10 miles per hour in traversing a bridge, is not repealed by sec. 4, ch. 148, Public Laws of 1927, since the latter act does not purport to cover the whole field of speed regulation upon the State highways, and the provisions of the former act are not repugnant to those of the latter act, nor are the provisions of the Act of 1917 repealed by sec. 2, ch. 235, Public Laws of 1931, since this section is not inconsistent with the ten-mile limit, and in an action to recover for the death of plaintiff's *intestate* who was struck by a truck just after it had traversed a bridge entering an incorporated town, an instruction that the speed limit on the bridge was ten miles per hour, and that speed in excess of that limit constituted negligence *per se, is held* without error. *Kelly v. Hunsucker*, 153.

**§ 12e. Boulevards and Through Streets.**

Failure of a driver to stop before traversing a through street intersection, in violation of a city ordinance, is negligence *per se*. *Headen v. Transportation Corp.*, 639.

**§ 13. Stopping, Starting, and Turning.**

Where the driver of a car ascertains that there is no vehicle in sight, either ahead of him or behind him, on the highway, he is under no obligation, by virtue of N. C. Code, 2621 (59), to give any signal of his purpose to turn left across the highway to enter a driveway. *Stovall v. Ragland*, 536.

**§ 14. Parking and Parking Lights.**

Evidence *held* to show compliance with statute in parking on highway. *S. v. McDonald*, 672.

**§ 18c. Contributory Negligence of Person Injured.**

Plaintiff's evidence tended to show that plaintiff attempted to cross a street in a city in the middle of the block, with bundles in her arms, and that as she came from between parked cars, she was struck by a messenger boy riding a bicycle at a high rate of speed, without lights. *Held:* Plaintiff's evidence fails to show contributory negligence as a matter of law, and defendant's motion to nonsuit was correctly denied. *Hayes v. Tel. Co.*, 192.

AUTOMOBILES—*Continued.*

Evidence *held* not to show contributory negligence as a matter of law on part of motorist turning across highway without giving signal, in view of testimony that at the time no vehicle was in sight on highway, either in front of or behind him. *Stovall v. Ragland*, 536.

**§ 18g. Sufficiency of Evidence.**

Testimony that a bus was being operated on the wrong side of the highway at an excessive speed, and that it struck the car driven by plaintiff's intestate as it was being driven in the opposite direction at a lawful speed on its right side of the highway, *is held* sufficient to be submitted to the jury on the issues of negligence in the operation of the bus and proximate cause, and the fact that defendants introduced evidence in contradiction of plaintiff's evidence is immaterial on the question of the sufficiency of the evidence to overrule defendants' motions to nonsuit. *Hancock v. Wilson*, 129.

Evidence of negligence in traveling at excessive speed and failing to keep proper lookout *held* sufficient for jury. *Kelly v. Hunsucker*, 153.

Evidence that the automobile driven by one defendant in the course of his employment and owned by the other defendant was being operated at unlawful speed at the time of the accident in suit, and that the brakes thereon were inadequate and not sufficient to control it, *is held* sufficient to be submitted to the jury on the issues of negligence and proximate cause and to overrule defendants' motions to nonsuit. *Yates v. Chair Co.*, 200.

Evidence that many automobiles were passing on the street at the time of the accident, and that the automobile owned by one defendant and operated by the other was on the street near the place of the accident after the accident occurred, without further evidence identifying the automobile as the one which struck the bicycle which plaintiff was riding, *is held* insufficient to resist defendants' motions to nonsuit, the burden being upon plaintiff to affirmatively establish the truth of his allegations. *Adams v. Blue Bird Taxis*, 324.

**§ 18h. Instructions.**

Where the court correctly charges that under the statutory provision applicable to the legal speed limit at the *locus in quo* was ten miles per hour, error in the instructions in applying another provision of the statute limiting the speed to fifteen miles per hour approaching an intersection cannot be held for prejudicial error on defendant's appeal. *Kelly v. Hunsucker*, 153.

**§ 20b. Imputed Negligence.**

Evidence that the owner of a truck engaged in hauling merchandise for hire permitted customers hauling tobacco to ride on the truck to market without extra charge, and that plaintiff's intestate was so riding on the truck on the way to market and that at the time the truck was driven by the owner's employee, who was authorized to collect the transportation charges from the owners of the tobacco, *is held* plenary to be submitted to the jury on plaintiff's contention that his intestate was not engaged in a joint enterprise with the driver of the truck, and that therefore the negligence of the driver would not be imputed to him. *Harper v. R. R.*, 398.

**§ 21. Parties Liable.**

In an action against the driver of a truck and the receivers of a railroad company by the administrator of a passenger on the truck to recover for intestate's death in a collision, plaintiff may not recover of the receivers if the driver's negligence was the sole proximate cause of the injury, but where the driver's negligence is not imputed to intestate, plaintiff may recover of the receivers, if their agents operating the train were guilty of negligence which, in any degree, was a concurring proximate cause of the injury, since the negligence of one tort-feasor will not exonerate other tort-feasors. *Harper v. R. R.*, 398.

AUTOMOBILES—*Continued.*

The complaint alleged that the car in which plaintiff was riding as a guest was driven at seventy miles per hour approaching an intersection in a city without keeping a proper lookout and without warning, and collided with a truck driven into the intersection from the other street without first stopping as required by ordinance of the city. *Held:* The complaint states a cause of action for negligence of the driver of the car in which plaintiff was riding, and does not state facts warranting the deduction of intervening negligence on the part of the truck driver insulating the negligence of the driver of the car, nor that the truck driver's negligence was the sole proximate cause of the injuries, and demurrers of the owner of the car and the driver thereof were properly overruled. *Anthony v. Knight*, 637.

Active negligence of driver *held* intervening negligence insulating negligence of railroad company. *Smith v. Sink*, 725.

**§ 24b. Scope of Employment and Furtherance of Master's Business.**

Admissions and evidence to the effect that plaintiff telephoned defendant taxi company for a taxi, that a taxi with defendant company's name on its side called for plaintiff, and that she paid her fare to the driver for transportation to another part of the city, *is held* sufficient to be submitted to the jury on the question of defendant taxi company's ownership of the taxi and its employment of the driver, and that the driver was acting in the scope of his employment in driving plaintiff to the place designated. *Headen v. Transportation Co.*, 639.

**§ 31. Reckless Driving.**

A defendant is guilty under N. C. Code, 2621 (45), if he drives an automobile on a public highway without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and an instruction that he would be guilty under this section if he drove an automobile without due caution and circumspection, or at a speed or in a manner so as to endanger or be likely to endanger any person or property is reversible error as failing to include all the facts constituting the statutory offense. *S. v. Folger*, 695.

**§ 33. Prosecutions: Evidence and Trial.**

In a prosecution for manslaughter for reckless driving, it is competent for a witness to testify from his observation as to the skid marks on the concrete leading to defendant's car and as to its position after the accident as tending to show the speed at which the car was traveling at the time. *S. v. Ormond*, 437.

Evidence *held* to show compliance with statute in parking on highway and failed to show culpable negligence. *S. v. McDonald*, 672.

BAILMENT.

**§ 3. Care and Custody of Property.**

Where plaintiff shows delivery of property for repair and defendant's failure to return same as agreed in good condition he makes out a *prima facie* case sufficient to take the case to the jury, although the burden of proving negligence is on him, and the evidence in support of plaintiff's allegations of negligence in that defendant attempted to repair plaintiff's gasoline tank truck without taking proper precautions against an explosion *is held* sufficient to overrule defendant's motion to nonsuit, although defendant's evidence sharply contradicted plaintiff's evidence on the issue. *Oil Co. v. Iron Works*, 668.

## BANKS AND BANKING.

9. Loans and Discounts
16. Statutory Liability of Stockholders
18. Claims and Priorities

**§ 9. Loans and Discounts.**

The relationship of debtor and creditor exists between a bank and a guarantor of payment on a note payable to the bank, and the bank may apply the guarantor's deposit in a checking account to the note upon nonpayment at maturity by the maker. *Munday v. Bank*, 276.

**§ 16. Statutory Liability of Stockholders.**

In this action to reform a statutory stock assessment against trustees so as to render them personally liable, defendants' demurrers *held* properly sustained on authority of *Jones v. Franklin Estate*, 209 N. C., 585, and *held further*, such liability would have to be established prior to the effective date of ch. 99, Public Laws of 1935, relieving stockholders of double liability. *Tucker v. Arrowood*, 117.

The complaint in this action *is held* sufficient, as against demurrer, to allege that defendant was the real or beneficial owner of shares of stock appearing on the books of the bank in the name of another. *Hood, Comr., v. Realty Co.*, 582.

As between a stockholder and a creditor or depositor of a bank prior to the passage of ch. 99, Public Laws of 1935, the provisions of the statute relieving the stockholder of his statutory liability would seem to be an impairment of a contractual obligation prohibited by Art. I, sec. 10, of the Federal Constitution. *Ibid.*

A person not appearing on the books of a bank as a stockholder would seem to be relieved of liability in a suit alleging he was the real or beneficial owner of stock by ch. 99, Public Laws of 1935, since no rights had vested or assessment levied at the time of the passage of the act. *Ibid.*

The statutory liability of stockholders of a bank constitutes a trust fund for the benefit of all the creditors of the bank enforcible by the statutory receiver for their benefit upon the insolvency of the bank, and upon payment of all the creditors of an insolvent bank the statutory liability of stockholders is no longer enforcible. *Ibid.*

A bank, in consideration of paying or discharging all the debts of an insolvent bank, took over all its assets, including the statutory liability of the stockholders of the insolvent bank. *Held:* The transaction amounted to a sale and purchase and all debts of the insolvent bank being discharged, the statutory liability of its stockholders, upon which no assessment had been made nor judgment docketed, could no longer be enforced, and the transferee bank may not complain that some of the assets so bought were worthless, or maintain the position of creditor of the insolvent bank for the purpose of enforcing the statutory liability of its stockholders in the absence of a contract of guaranty, or undertaking to repay, or facts sufficient to raise the equity of subrogation. *Ibid.*

The Commissioner of Banks, as authorized by judgment of the Superior Court, transferred and assigned all assets of an insolvent bank, including judgments on stock assessments docketed and to be docketed, to a new bank in consideration of the new bank's paying or discharging all creditors of the old bank, and filed final account showing payment of all creditors of the old bank. Thereafter the new bank became insolvent and this action was instituted by the Commissioner of Banks for the benefit of creditors of the new bank to enforce the statutory liability against defendant by showing that defendant was the real or beneficial owner of stock in the old bank which appeared on the books of the bank in the name of another against whom

BANKS AND BANKING—*Continued.*

assessment had been levied and judgment docketed. *Held:* The statutory liability of stockholders of the old bank is enforcible solely for the benefit of the creditors of the old bank and is not a chose in action ordinarily assignable, and neither the new bank nor the Commissioner of Banks as its statutory receiver acquired the right to enforce the statutory liability against defendant by showing that he was the beneficial owner of stock in the old bank. *Ibid.*

The assignment of a judgment on an assessment of the statutory liability on bank stock does not entitle the assignee to subject another to liability thereon on the ground that such other person was the real or beneficial owner of the stock. *Ibid.*

In order for a transferor of bank stock to escape the statutory liability thereon, the transfer must be made to person of age previous to any default by the bank, and in good faith and without intent to evade the statutory liability, intent and good faith to be determined by surrounding circumstances. *Hood, Comr., v. Clark*, 693.

Evidence that the owner of bank stock transferred same, without consideration, to his son, who was of age but was without property, six days after the only other commercial bank in the city closed its doors for liquidation, *is held* sufficient to be submitted to the jury in a suit to subject the transferor to the statutory liability. *Ibid.*

The *prima facie* presumption of intent to evade the statutory liability on bank stock arising from the transfer of the stock within sixty days prior to the suspension of the bank, N. C. Code, 219 (d), would seem to relate to the closing of the bank for liquidation and proceedings to enforce the statutory liability of stockholders rather than to its suspension and reopening under a restricted basis under ch. 120, Public Laws of 1933, and the orders of the Commissioner of Banks pursuant thereto. *Ibid.*

**§ 18. Claims and Priorities.**

Plaintiff's note was assigned by the payee bank before its receivership to the Reconstruction Finance Corporation, with other notes, as collateral security for the bank's indebtedness to the corporation. Upon the bank's insolvency, plaintiff was forced to pay to the Reconstruction Finance Corporation, as the holder in due course, the full amount of the note, and was precluded from offsetting her deposit, outstanding at the time of the bank's closing, against the note. Plaintiff's payment resulted in a partial discharge of the bank's indebtedness to the Reconstruction Finance Corporation, and funds realized from other notes assigned, and assets not assigned, completely discharged the bank's indebtedness to the Reconstruction Finance Corporation, and assets and funds were left over exceeding the amount of plaintiff's claim for distribution to creditors. *Held:* Plaintiff's claim against the bank for the amount of her deposit was a preferred claim against the assets of the bank. *Powell v. Hood, Comr.*, 137; *In re Trust Co.*, 145.

Where assets are more than sufficient to pay all claims of the class, such claims draw interest from date of insolvency. *Ibid.*

BASTARDS.

**§ 6. Verdict and Judgment.**

Where jury finds, in response to written issues, that defendant is father of prosecutrix' child, but that defendant had not willfully refused to support the child, defendant is not guilty under the statute, and may not appeal from the finding on the first issue. *S. v. Hiatt*, 116.

BETTERMENTS.

**§ 4. Good Faith in Making Improvements.**

Where deed is set aside for undue influence, grantee is not entitled to recover for improvements. *Gilbert v. West*, 465.

BILL OF DISCOVERY.

**§ 1. Nature and Scope of Remedy in General.**

C. S., 900, 901, providing a substitute for the old bill of discovery, are remedial statutes and should be liberally construed. *Douglas v. Buchanan*, 664.

**§ 3. Affidavit and Proceedings to Secure Examination of Adverse Party.**

Where the pleadings have been filed, an adverse party may be examined under C. S., 900, 901, as a matter of right without leave of court, and in such instance the filing of an affidavit is unnecessary. *Douglas v. Buchanan*, 664.

**§ 5. Scope of Examination.**

Where an examination of an adverse party is founded on the pleadings, the pleadings determine the scope of the examination, and it is error to limit the scope of the examination further. *Douglas v. Buchanan*, 664.

BILLS AND NOTES.

**§ 10f. Rights of Purchasers and Holders Not in Due Course.**

Purchaser not a holder in due course takes note free from agreement between maker and third person not a party to note in absence of notice at the time of assignment to purchaser. *Pickett v. Fulford*, 160.

**§ 25. Presumptions and Burden of Proof.**

Party having and offering in evidence note endorsed in blank by payee establishes *prima facie* ownership. *Pickett v. Fulford*, 160.

**§ 26. Competency and Relevancy of Evidence.**

Evidence that taxes had not been paid on the land mortgage to secure the payment of the note sued on, and the financial credit of the makers *is held* competent in corroboration of plaintiff assignee's testimony as to what occurred at the time of the assignment. *Pickett v. Fulford*, 160.

**§ 27. Sufficiency of Evidence, Nonsuit and Directed Verdict.**

In an action on a note and to foreclose mortgage security plaintiff alleged that she was the owner of the note executed by one defendant to the other. The payee named in the note denied the allegation of ownership, and, upon the court's erroneous ruling that the burden was on him, proffered evidence, which was excluded, that he was the owner of the note. The court thereupon directed a verdict for plaintiff without the introduction of evidence by her. *Held:* Defendant's exception to the directed verdict is well taken. *Hall v. Boykin*, 391.

BOUNDARIES.

**§ 2. Definiteness and Conclusiveness of Description and Admissibility of Parol Evidence.**

In construing a deed the courts will endeavor to ascertain the intent of the parties at the time of the conveyance, and calls and courses will be established as of that time, and where the parties at the time go upon the land and locate a line, such line will prevail as against a contrary call in the deed, evidence of the line as established by them being competent to show that the description of the line in the deed was a mistake. *Realty Co. v. Boren*, 446.

BOUNDARIES—*Continued.*

**§ 8. Evidence in Special Proceedings to Establish.**

In this proceeding to establish a boundary line between the lands of the parties, testimony of a surveyor as to a line previously run by him in the presence of the parties *is held* competent. *Southern v. Freeman*, 121.

BROKERS AND FACTORS.

**§ 1. Licensing and Regulation.**

Statute providing for licensing of real estate brokers in designated counties *held* unconstitutional as discriminatory. *S. v. Warren*, 75.

**§ 9. Actions for Damages Against Brokers or Factors.**

The contract between the parties provided that defendant should sell certain personal property left with defendant by plaintiff for a stipulated price, defendant to retain a commission for his services. Plaintiff brought this action alleging that defendant had sold the property and failed to account to plaintiff. *Held:* Under the theory of trial, the action was for damages for breach of express contract, and the measure of damages was the price agreed upon by the parties, and defendant's contention that the damages should be measured by the rule governing damages for breach of contract by a factor in selling at a price less than that stipulated, cannot be sustained. *Rosenbloom v. Sinkoe*, 46.

BUGGERY.

**§ 2. Prosecution and Punishment.**

In this prosecution for buggery under C. S., 4336, the evidence of defendant's guilt *is held* insufficient to be submitted to the jury. *S. v. Catlett*, 563.

BURGLARY.

**§ 9. Sufficiency of Evidence.**

Evidence tending to identify defendant as the person who broke and entered a dwelling in nighttime, and that after he had broken and entered he went to the bed in which prosecutrix was sleeping and grabbed her by the feet, and, after threatening to kill her if she got up, he grabbed her around her waist, that he fought her for a considerable length of time, dragged her from her home and released her only after light, *is held* sufficient to be submitted to the jury on the question of defendant's intent, at the time of breaking and entering, of committing rape as charged in the bill of indictment, and defendant's motion to nonsuit on the ground that there was not sufficient evidence of felonious intent, was correctly denied. *S. v. Smith*, 93.

**§ 10. Instructions.**

In this prosecution for burglary, the charge to the jury *is held* to have sufficiently and correctly instructed the jury that in order for a conviction the jury must find that at the time of breaking and entering defendant must have had the specific intent to commit the crime of rape as charged in the bill of indictment and have had the intent to commit the crime in the house broken and entered, it not being necessary that the charge negative the intent to commit the crime in a place other than the house broken and entered in the absence of a special request for instructions. *S. v. Smith*, 93.

Where there is no evidence that the burglary was committed under circumstances which would make it burglary in the second degree, it is not error for the court to refuse to submit to the jury the question of defendant's guilt of that degree of the crime. *S. v. Walls*, 487.

CANCELLATION OF INSTRUMENTS.

**§ 2. For Fraud.**

Plaintiff is not entitled to set aside an instrument for fraud when it appears that plaintiff is an intelligent man, able to read and write, and signed the instrument, and that there was no trick or connivance to prevent his reading the instrument. *Breece v. Oil Co.*, 211.

**§ 14. Verdict and Judgment.**

Where a deed is set aside upon the verdict of the jury establishing mental incapacity of the grantor of which the grantee had knowledge and undue influence of the grantee, the grantee is entitled to have the consideration paid for the deed credited to the rental value of the property during his occupancy, since the object of the law is to put the parties *in statu quo*, and not to punish the grantee for his wrongdoing. *Gilbert v. West*, 465.

Where a deed is set aside upon the verdict of the jury establishing mental incapacity of the grantor of which the grantee had knowledge and for undue influence exerted by the grantee, the grantee is not entitled to credit for the amount expended by him in making permanent improvements on the land while he was in possession under the deed. *Ibid.*

CARRIERS.

**§ 4. Rates and Tariffs.**

The provisions of the monopoly statutes apply to railroads in the same manner as they apply to individuals and other corporations, and while C. S., 1112 (o), allows railroad companies to reduce rates at will and deprives the Utilities Commissioner of jurisdiction over reductions in rates, the statute applies to reductions in rates by railroad companies acting separately and with lawful intent, and does not permit railroad companies to violate the monopoly statutes by reducing rates in accordance with an agreement and conspiracy between them with intent to injure a competitor and thereafter to restore the rates, or to reduce rates to certain points where there is competition while maintaining higher rates to other points in the State without sufficient reason, with intent to injure a competitor, N. C. Code, 1112 (o), not being in conflict with the monopoly statutes. *Bennett v. R. R.*, 474.

**§ 21. Injuries by Accidents in Transitu.**

Evidence that plaintiff, when a child of twelve years, was put on a train by her uncle and placed in charge of the conductor, who seated her by a window, which he opened for her himself, that thereafter, upon a sudden slowing of the train, the window fell on plaintiff's arm and injured it, *is held* sufficient to be submitted to the jury in the plaintiff's action against the railroad upon reaching her majority. *Brantley v. R. R.*, 454.

**§ 22. Injuries in Boarding or Alighting.**

A company operating a union station under contract with several railroad companies and permitting "red cap" porters to call trains and direct passengers for tips may not escape liability for acts of the porters in the scope of their apparent authority on the ground that they are volunteers, since the station company uses such porters to discharge its contractual obligations to the railroad companies and their passengers. *Cole v. R. R.*, 591.

Evidence that a station company permitted porters to work upon the premises for tips, and that the porters customarily called trains and directed passengers to and from their trains, and that a porter who had called plaintiff's train instructed plaintiff that her train was standing on a certain track, *is held* sufficient to be submitted to the jury on the question of whether the porter was acting within the apparent scope of his authority in giving the instruction. *Ibid.*

CARRIERS—*Continued.*

The evidence tended to show that two trains were standing in a union station, that the warning of "all aboard" had been given for one of them, that a "red cap" porter standing in the station heard the signals and knew that the train attendants had boarded the train, and that it was expected to start momentarily, that plaintiff, coming into the station after the starting signals had been given with a ticket for the train not then ready to start, was erroneously instructed by the porter that the other train was hers, and that as she attempted to board the other train, it started and threw her, to her injury. *Held:* The evidence permits the inference that the porter, with knowledge of the circumstances, should have foreseen that injury might result to plaintiff, and the question of whether his failure to warn plaintiff of the danger was the proximate cause of plaintiff's injury is for the jury under the evidence. *Ibid.*

CONSTITUTIONAL LAW.

**III. Governmental Branches and Powers**
4. Legislative
6. Judicial, constitutional question will not be decided unless necessary to protect rights see Appeal and Error s 40g; statute will not be declared unconstitutional unless clearly so, see Statutes s 6; act permitting action to determine validity of proposed bond issue does not impose nonjudicial function of determining moot question see Actions s 2.

**V. Personal, Civil and Political Rights, Privileges, Immunities, and Class Legislation (Of persons accused of crime see hereunder Title XI).**
13. Equal Protection, Application and Enforcement of Laws

**VI. Due Process of Law: Law of the Land**
16. Notice and an Opportunity to be Heard

**VIII. Obligations of Contract**
21. Substantive Provisions of Contractual Obligations

**XI. Constitutional Guarantees to Persons Accused of Crime**
26. Necessity of Indictment
33. Due Process of Law

**§ 4. Legislative Power.**

The legislative powers of the people of the State are vested in the General Assembly, subject only to limitations contained in the State and Federal Constitutions. *Castevens v. Stanly County*, 642.

**§ 13. Equal Protection, Application and Enforcement of Laws.**

Ch. 241, Public-Local Laws of 1927, requiring real estate brokers and salesmen in certain designated counties of the State to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest, and requiring the payment of a license fee in the designated counties in addition to the State-wide license required by ch. 371, Public Laws of 1935, *is held* unconstitutional as being in contravention of Art. I, sec. 7, of the State Constitution in that it applies only to real estate brokers and salesmen in the designated counties and not to those in the other counties of the State, and is therefore discriminatory. Art. I, secs. 17, 31; Art. V, sec. 3, of the State Constitution; 14th Amendment to the Federal Constitution. *S. v. Warren*, 75.

**§ 16. Notice and an Opportunity to Be Heard.**

A suit by a taxing unit to have declared valid a proposed bond issue and proposed taxes for the payment of the indebtedness, N. C. Code, 2492 (55 to 59), is declared by the act to be in the nature of a proceeding *in rem*, and its provisions that residents and taxpayers of the unit may be served by publication without their names being stated in the complaint or summons is valid, and the contention of a taxpayer of the unit that a judgment under the act deprives him of property without due process of law because he was not personally served with summons is untenable, since a well defined class may be served with summons in this manner in proceedings *in rem*, and since the procedure prescribed by the act affords each taxpayer notice and an opportunity to appear and file such pleadings as he may be advised. N. C. Consti-

tution, Art. I, sec. 17; 14th Amendment to the Federal Constitution. *Castevens v. Stanly County*, 642.

**§ 21. Substantive Provisions of Contractual Obligation.**

Defendant town proposed to issue refunding bonds under an ordinance providing that the holders of the refunding bonds should be subrogated to all the rights and powers of the holders of the indebtedness so refunded, such provision being also in accord with N. C. Code, 2492 (50) b. Plaintiff contended that the refunding bonds would be subject to the power of the Legislature to exempt residences up to the value of $1,000 from taxation under the Constitutional Amendment of Art. V, sec. 5. *Held:* Even conceding that the refunding bonds would be evidenced by a new contract, the provision of the ordinance and statute that the holders should be subrogated to the rights of the holders of the original indebtedness, became a part of such new contract or obligation which may not be adversely affected by legislative act even under constitutional change, Federal Const., Art. I, sec. 10, and no exemption having been made by the Legislature under the permissive power of the amendment to Art. V, sec. 5, at the time of the issuance of the refunding bonds, the power to provide for the payment of the refunding bonds could not be adversely affected by the constitutional amendment. *Nash v. Comrs. of St. Pauls*, 301.

As between a stockholder and a creditor or depositor of a bank prior to the passage of ch. 99, Public Laws of 1935, the provisions of the statute relieving the stockholder of his statutory liability would seem to be an impairment of a contractual obligation prohibited by Art. I, sec. 10, of the Federal Constitution. *Hood, Comr., v. Realty Co.*, 582.

A person not appearing on the books of a bank as a stockholder would seem to be relieved of liability in a suit alleging he was the real or beneficial owner of stock by ch. 99, Public Laws of 1935, since no rights had vested or assessment levied at the time of the passage of the act. *Ibid.*

**§ 26. Necessity of Indictment.**

The necessity of an indictment, N. C. Constitution Art. I, sec. 12, does not apply to "petty misdemeanors," Art. I, sec. 13, and all crimes below the degree of felonies are "petty misdemeanors" within the meaning of the exception provided in the Constitution. C. S., 1541 (3), and upon appeal from a conviction in a recorder's court upon a warrant fully charging the offense, an indictment in the Superior Court is not necessary, the jurisdiction of the Superior Court being derivative. *S. v. Boykin*, 407.

**§ 33. Due Process of Law.**

The defendant filed a petition for removal from the State Superior Court to the United States Court for the district to be certified as to the place of trial. Act of Congress, 3 March, 1863, Title 28, secs. 74 and 75. The court denied the petition for that the petition did not allege any denial of any rights by reason of State law. *Held:* The denial of the petition was without error, defendant's remedy for alleged denial of equal protection of the laws on account of prejudice or in the exclusion of colored persons from the grand jury, being in the State Court and ultimately by writ of error to the Supreme Court of the United States. *S. v. Walls*, 487.

The trial court found, upon supporting evidence, that the grand jury which returned the bill of indictment was selected from a jury list of taxpayers of the county eligible to serve, the names of colored persons on the list being in red ink and the names of white persons being in black ink, but that there was no discrimination as to color, the different ink being used merely for identification, and that the names of all those eligible, both white and colored, were placed in the box and drawn therefrom by a four-year-old child, and

CONSTITUTIONAL LAW—*Continued.*

that one colored person served on the grand jury which returned the indictment. *Held:* The findings support the court's denial of defendant's motion to quash the indictment on the ground that the grand jury was illegally organized and that defendant was denied the equal protection of the laws for that persons of the Negro race were excluded therefrom solely because of race, it appearing that the grand jury was selected according to law. C. S., 2312, 2313, 2314. *Ibid.*

CONTRACTS.

**§ 7d. Gaming Contracts.**

Evidence on issue of illegality of slot machines *held* conflicting and directed verdict that contract relating thereto was not void *held* error. *Tomberlin v. Bachtel*, 265.

A contract for "cotton futures" in which no actual delivery is intended or contemplated is void and no action may be maintained thereon. *Bodie v. Horn*, 397.

**§ 25b. Measure and Assessment of Damages by Jury.**

The contract between the parties provided that defendant should sell certain personal property left with defendant by plaintiff for a stipulated price, defendant to retain a commission for his services. Plaintiff brought suit alleging that defendant had sold the property and failed to account to plaintiff. *Held:* Under the theory of trial, the action was for damages for breach of express contract, and the measure of damages was the price agreed upon by the parties, and defendant's contention that the damages should be measured by the rule governing damages for breach of contract by a factor in selling at a price less than that stipulated, cannot be sustained. *Rosenbloom v. Sinkoe*, 46.

CORPORATIONS.

**§ 14. Stock Subscription Agreements.**

Individual subscribing to stock in his name *held* to acquire no interest therein where another pays purchase price under agreement that stock should be issued as directed by him. *Holloway v. Bank*, 227.

**§ 15. Repurchase of Stock by Corporation.**

Plaintiff purchased a considerable amount of a new issue of preferred stock of defendant corporation, the sale having been made by a director of the corporation under an agreement, in accordance with a letter in regard to the sale written the director by the treasurer and general manager of the corporation, under which the corporation agreed to repurchase at par a stipulated amount of the stock every three-year period upon demand of the purchaser. Thereafter, upon demand of plaintiff, defendant corporation repurchased part of the stock over a three-year period, but refused to repurchase more of said stock during the subsequent three-year period, and plaintiff instituted this action. *Held:* Plaintiff had a right to rely on the apparent authority of the treasurer and general manager of the corporation to make the repurchase agreement in good faith in the interest of the corporation to induce the purchase of the stock, and defendant's contention that its officer did not have authority to make the agreement is untenable, and the corporation being solvent and the rights of creditors not being involved, and the corporation not being prohibited by statute or its charter from purchasing certain shares of its own preferred stock, and there being no suggestion of collusion or fraud, a directed verdict for plaintiff is without error. *Aydlett v. Major & Loomis Co.*, 548.

COUNTIES.

**§ 5. County Commissioners.**

*Mandamus* will not lie to compel chairman to sign county voucher since county commissioners are vested with control of finances. *Reed v. Farmer*, 248.

**§ 10. Assumption of Debt of School Districts.** (Constitutional requirements and restrictions in taxation see Taxation.)

The evidence disclosed that a special charter school district, comprising territory lying in two counties, voted and issued bonds for a school building and equipment, which were necessary to the maintenance of the constitutional school term in the district, that appellant county had assumed the indebtedness of all of its school districts with the exception of that of plaintiff district and three others, and that it levied a special tax in plaintiff district to pay debt service for the district's indebtedness. *Held:* Under provision of the State Constitution, Art. IX, it was the duty of the county as an administrative agency of the State to provide the constitutional school term in the district, and plaintiff district is entitled to *mandamus* to compel the county to assume the indebtedness incurred by the district for this purpose, and the defense that the duty to assume the debt was discretionary and that *mandamus* does not lie to compel the performance of a discretionary duty is untenable, it being mandatory on the county, having assumed the indebtedness of some of its districts, to assume the indebtedness of all its districts, and the courts having jurisdiction in the matter to hear evidence and determine whether the indebtedness was incurred by the district to provide the constitutional school term. *School District v. Alamance County*, 214.

COURTS.

**§ 2c. Appeals from Clerk to Superior Court.**

A contention that the clerk was without jurisdiction in that the pleadings raised issues of fact which should have been transferred to the civil issue docket, and that therefore the Superior Court acquired no jurisdiction by appeal, is untenable, since the jurisdiction of the Superior Court on appeals from the clerk is not derivative. *Southern v. Freeman*, 121.

In this proceeding for the allotment of dower, issues of law and of fact were raised by the pleadings, and at the hearing before the clerk the parties waived jury trial and filed a statement of facts agreed. Upon rendition of judgment on the facts agreed by the clerk, plaintiff excepted to the judgment adverse to her, appealed to the Superior Court in term time, gave notice of appeal at the time judgment was signed, and further notice was waived by defendants, and the clerk transferred the appeal to the civil issue docket as required by C. S., 634. *Held:* The appeal is governed by C. S., 634, and judgment of the Superior Court dismissing the appeal on the ground that plaintiff was guilty of laches in failing to have the clerk prepare and forward to the judge a transcript of the record as required by C. S., 635, is error, C. S., 635, not being applicable to the appeal. *McLawhorn v. Smith*, 513.

**§ 3. Motions and Hearings After Orders or Judgments of Another Superior Court Judge.**

A judge holding a succeeding term of the Superior Court has no power to review or disregard a judgment or order affecting substantial rights entered at a former term by another judge upon the ground that such judgment or order is erroneous, since a judgment or order may be reviewed for error only upon appeal to the Supreme Court. *Fertilizer Co. v. Hardee*, 56.

A judge of the Superior Court may not vacate a prior order of another judge on the Superior Court for error of law, since no appeal lies from one Superior Court to another. *Dail v. Hawkins*, 283.

COURTS—*Continued.*

**§ 4. Terms of Court.**

It is required by N. C. Code, 1452, that a special term of court, duly called, shall be advertised in some newspaper published in the county, and news items regarding the court are not sufficient to comply with the terms of the statute, but the provision for advertisement is for the benefit of the public and not the jurors, and failure of due advertisement does not affect the jury, but goes only to the organization of the court and is merely an irregularity, the provision of the statute in regard to advertisement being directory and not mandatory. *S. v. Boykin*, 407.

## CRIMINAL LAW.


**II. Capacity to Commit and Responsibility for Crime**
7. Evidence and Burden of Proving Mental Incapacity
**III. Parties and Offenses (See, also, Homicide § 2.)**
8. Principals
11. Felonies and Misdemeanors
**V. Arraignment and Pleas**
16. Arraignment
18. Plea of Not Guilty
**VII. Evidence (Evidence of particular offenses see particular titles of crimes.)**
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83. Determination and Disposition of Cause


**§ 7. Evidence and Burden of Proving Mental Incapacity.** (Opinion evidence of mental capacity see hereunder § 31b.)

Testimony by defendant as to injuries received by him and the effect of such injuries upon his mind and ability to know what he was doing is competent upon his plea of insanity as tending to establish facts from which the jury might infer, in connection with other evidence, that defendant was insane, and the exclusion of his testimony is reversible error. *S. v. Nall*, 61.

**§ 8. Principals.**

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Triplett*, 105; *S. v. Holland*, 284.

Under the New York law, a charge of second degree arson includes counseling, commanding, inducing, or procuring another to commit the crime, and a person guilty thereof is a principal. *In re Malicord*, 683.

CRIMINAL LAW—*Continued.*

**§ 11. Felonies and Misdemeanors.**

A crime punishable by death or imprisonment in the State's Prison is a felony. C. S., 4171. *S. v. Callett*, 563.

**§ 16. Arraignment.**

The court, upon his finding that defendant is a deaf mute, subpœnaed an interpreter, who after being duly sworn and after the reading of the indictment, interpreted and explained the indictment to defendant. After defendant had indicated to the interpreter that he understood the indictment, the interpreter translated the solicitor's question of whether defendant was guilty or not guilty, and upon a negative reply given through the interpreter, a plea of not guilty was entered. No contention or plea involving defendant's sanity or his capacity to understand the nature of the crime charged or the purpose and effect of the trial was tendered by defendant's counsel. *Held:* There was no error on the arraignment of defendant or in the acceptance of his negative answer as a plea of not guilty. C. S., 4632. *S. v. Early*, 189.

**§ 18. Plea of Not Guilty.**

Under the plea of not guilty the defense of insanity and every other defense to the charge in repelling, mitigating, or reducing the offense to a lower grade is admissible. *S. v. Nall*, 61.

**§ 29a. Relevancy in General.**

Where an officer testifies on cross-examination that he did not swear out a warrant for defendant until twelve days after the commission of the offense because he did not know defendant's name, and that a confederate of defendant suggested that defendant was the person, and that he then found defendant, identified him, and swore out the warrant, and that defendant was the offender, the exclusion of testimony as to the name and residence of the confederate is not prejudicial, the excluded testimony being irrelevant. *S. v. Boykin*, 407.

**§ 29b. Evidence of Guilty of Distinct Offense.**

Defendant was charged with conspiracy to rob and with robbery committed pursuant thereto. The State introduced evidence that within a week after the robbery charged in the second count of the bill of indictment defendant conspired with the same confederate to burn an automobile in order to collect the fire insurance thereon. *Held:* The evidence was competent under the exception to the general rule that evidence of guilt of a distinct offense is competent if tending to show intent, design, guilty knowledge, or *scienter*. *S. v. Flowers*, 721.

**§ 29c. Evidence That Crime Charged Was Committed by Another.**

Defendant, charged with burglary, relied upon an alibi, and offered evidence tending to show that another was in the neighborhood of the scene of the crime at the time it was alleged to have been committed. *Held:* The evidence was properly excluded, since evidence that another had committed the crime charged is competent only when it points unerringly to the guilt of such other person and raises a reasonable inference of defendant's innocence, and evidence which merely creates an inference or conjecture as to the guilt of such other person is inadmissible. *S. v. Smith*, 93.

**§ 30. Evidence and Record at Prior Trial or Proceedings.** (Evidence of guilt of distinct offense see hereunder, §§ 29b, 40.)

Statements of witnesses at the coroner's inquest *held* competent in evidence for the purpose of corroborating the testimony of the witnesses at the trial. *S. v. Jones*, 735.

CRIMINAL LAW—*Continued.*

**§ 31b. Opinion Testimony as to Sanity and Mental Capacity.**

A nonexpert witness who testifies that he had known defendant all his life and had a number of conversations with him, but that he had not talked with him much during the prior year, but who has an opinion satisfactory to himself from his observation of defendant as to defendant's mental condition, is competent to give his testimony on the question, and the exclusion of his testimony that defendant was irresponsible for his actions is reversible error upon defendant's exception. *S. v. Nall*, 61.

**§ 32a. Circumstantial Evidence in General.**

Intent, being a mental attitude, must ordinarily be proven by circumstantial evidence, that is, by proof of facts from which intent may be inferred. *S. v. Smith*, 93.

Although circumstantial evidence is a recognized instrumentality for the ascertainment of truth, where it is relied on for a conviction it must establish defendant's guilt to a moral certainty, and exclude every other reasonable hypothesis, and the instruction in this case on the question *is held* for error. *S. v. Stinciuter*, 278.

Circumstantial evidence in this case, including testimony as to the action of bloodhounds, admitted for the purpose of corroboration, *is held* to constitute more than a scintilla, and sufficient to take the case to the jury. *S. v. Lee*, 326.

**§ 33. Confessions.**

Defendant is entitled to have exculpatory as well as incriminating portions of confession considered by jury. *S. v. Edwards*, 555.

**§ 35. Acts and Declarations of Coconspirators.**

Where the State establishes a *prima facie* conspiracy to which defendant was a party, testimony of an alleged conspirator as to a conversation between him and another conspirator, in the absence of defendant, is competent. *S. v. Herndon*, 123.

Defendant was indicted for conspiracy to rob and with robbery committed pursuant to the conspiracy. The State introduced evidence of the association between defendant and his alleged coconspirator within a short time before and after the robbery, and that a few hours after the robbery defendant's alleged coconspirator left the city in an automobile with defendant's niece, and that a week after the robbery defendant and his alleged coconspirator entered into another conspiracy to burn an automobile belonging to defendant's niece in order to collect fire insurance thereon. *Held:* The evidence was competent not only to corroborate the testimony of the coconspirator upon the trial, but also as tending to show that defendant was a party to the conspiracy to rob, and that his presence at the scene of the robbery was in consequence of the conspiracy. *S. v. Flowers*, 721.

**§ 40. Character Evidence of Defendant as Substantive Proof.**

Defendant, on trial for maliciously burning a barn, did not testify in his own behalf. A witness, who was not the owner of the barn, was allowed to testify as to difficulties with defendant after the witness had testified against defendant upon an indictment for larceny, a year or two before the indictment for arson, resulting in the witness' indictment of defendant for assault with a deadly weapon. *Held:* The testimony tended to discredit and impeach defendant about a collateral matter when he had not gone upon the stand, and was erroneously admitted. *S. v. Lee*, 326.

**§ 41f. Credibility of Defendant.**

Exculpatory matter contained in a confession of guilt introduced in evidence by the State should be given the same weight by the jury as incriminating

portions of the confession, unless disproved or weakened by other evidence, since a confession must be considered as given, in its entirety, and the exculpatory statements do not constitute evidence by defendant in his own behalf, and an instruction that such statements should be scrutinized because of defendant's interest in the verdict, is error. *S. v. Edwards*, 555.

It is error for the court to charge that defendant's testimony should be scrutinized and received with caution in view of defendant's interest in the verdict, without adding that if they find defendant worthy of belief, they should give as full credit to his testimony as any other witness, notwithstanding his interest. *Ibid.*

**§ 50. Course and Conduct of Trial.**

Defendant, charged with homicide, testified as to his version of the fatal killing upon his contention of self-defense, and narrated the actions of himself, his oldest son, and the deceased. Upon the conclusion of his testimony the court, by interrogation objected to by defendant's counsel, brought out the fact that the son was seventeen years old, and was present in the courtroom. In his charge the court set forth the contention of the State that defendant's testimony could not be relied upon because uncorroborated, notwithstanding the fact that defendant's oldest son, who saw what happened, was present in the courtroom. *Held:* Although the prosecuting attorney might impeach defendant's testimony by developing the fact that defendant's son was not called as a witness to corroborate defendant's testimony, the interrogatories by the court to the same effect, emphasized by the statement of the State's contentions, constitute reversible error, the statute, C. S., 564, inhibiting an expression or showing of opinion by the court as to whether a fact is fully or sufficiently proven by interrogation as well as by statement or action. *S. v. Bean*, 59.

**§ 52a. Province of Court and Jury in General.**

The weight of the testimony and the credibility of witnesses are matters in the exclusive province of the jury. *S. v. Wharton*, 742.

**§ 52b. Nonsuit.**

Testimony of two witnesses identifying defendant as one of the perpetrators of the robbery charged, with conflicting evidence by defendant in support of the alibi relied on by him, raises an issue of fact for the jury, and defendant's motion to nonsuit is properly denied. *S. v. Wharton*, 742.

**§ 53a. Form and Sufficiency in General.**

The court need not instruct the jury what the punishment would be upon a conviction upon a count in the indictment, the rendition of judgment upon the verdict being a responsibility of the court alone. *S. v. Walls*, 487.

**§ 53b. Applicability to Counts and Evidence.**

Where there is no evidence that the burglary was committed under circumstances which would make it burglary in the second degree, it is not error for the court to refuse to submit to the jury the question of defendant's guilt of that degree of the crime. *S. v. Walls*, 487.

**§ 53c. On Burden of Proof and Presumptions.**

The instruction in this case that the burden was on the State to prove defendant guilty beyond a reasonable doubt, and that the jury should ascertain the facts from the evidence *is held* sufficiently full in the absence of prayers for special instructions. *S. v. Ormond*, 437.

The charge of the court in this case, correctly construed, *is held* to have correctly instructed the jury that the burden was on the State to satisfy the

CRIMINAL LAW—*Continued.*

jury beyond a reasonable doubt as to each aspect on which defendant could be convicted under the bill of indictment, and to have correctly defined reasonable doubt. *S. v. Walls*, 487.

**§ 53e. Requests for Instructions.**

In the absence of a special request for instructions, the failure of the charge to define certain terms constituting a subordinate feature of the charge will not be held for error. *S. v. Puckett*, 66.

An exception to the failure of the court to charge more fully on the weight to be given the testimony of a coconspirator will not be sustained in the absence of a special request for instructions. *S. v. Herndon*, 123.

**§ 53f. Objections and Exceptions to Instructions.**

Exceptions to the statement of the contentions of the State must be taken in time to afford the trial court opportunity for correction. *S. v. Herndon*, 123; *S. v. House*, 470.

**§ 53g. Construction of Instructions.**

Where the charge is without error when read contextually as a whole, exceptions to unconnected portions of the charge cannot be sustained. *S. v. Smith*, 93.

**§ 54b. Form and Sufficiency of Verdict.**

A verdict will be interpreted in the light of all the evidence and the admission of the parties. *S. v. Jones*, 735.

**§ 54d. Rendition and Acceptance of Verdict.**

An inquiry by the court as to whether the jury's verdict of guilty referred to the count of first degree burglary *is held* not error as an expression of opinion by the court, it appearing from the record that such was the freely returned verdict of the jury, and that defendant was not prejudiced thereby, since the jury was polled. *S. v. Walls*, 487.

**§ 56. Motions in Arrest of Judgment.**

Defendant was tried for murder under an indictment charging disjunctively murder with malice, premeditation, and deliberation and murder in the perpetration of a robbery. C. S., 4614. After the return of a verdict of guilty of murder in the first degree, defendant moved in arrest of judgment for that the indictment was alternative, indefinite, and uncertain. *Held:* Although the indictment was alternative, either charge constituted murder in the first degree, C. S., 4200, informing defendant of the crime charged, and defendant's remedy, if he desired greater certainty, was by motion for a bill of particulars, C. S., 4613, or to require the solicitor to elect at the close of the evidence, but the charge in the alternative was *not a vitiating defect*, and the motion in arrest after verdict was properly denied, such motion being available only for vitiating defects upon the record proper. C. S., 4625. *S. v. Puckett*, 66.

A motion in arrest of judgment on the ground that the court was without jurisdiction for defect in its organization for that due advertisement of the special term at which defendant was tried upon appeal from a recorder's court, was not had as required by N. C. Code, 1452, cannot be made in the trial court because such motion assumes that the court is validly created, nor can the question be presented by appeal from the trial court's denial of the motion, the defect complained of going to the organization of the court and not to the capacity of the jury, and the provisions of the statute being directory and not mandatory. *S. v. Boykin*, 407; *S. v. Ormond*, 437; *S. v. House*, 470.

**§ 61a. Formalities and Requisites of Judgments in General.**

In this prosecution for abandonment, defendant entered a plea of *nolo contendere*, and an order was entered that defendant pay a certain amount

into court monthly for the benefit of his wife and children. Thereafter, upon default, judgment was entered in the absence of defendant and without his knowledge, on his original plea, sentencing defendant to two years on the roads, sentence to begin on a stipulated day unless defendant paid all matured installments under the prior order. *Held:* The judgment attempting to impose corporal punishment, in the absence of defendant, unless avoided by compliance with the conditions annexed, was void. *S. v. Brooks*, 702.

**§ 61b. Formalities and Requisites of Judgments in Capital Crimes.**

The punishment for a capital crime committed prior to 1 July, 1935, is death by electrocution, the statute substituting lethal gas being applicable only to crimes committed on and subsequent to that date. Ch. 294, Public Laws of 1935. *S. v. McNeill*, 268.

**§ 67. Nature and Grounds of Appellate Jurisdiction.**

Where there is no error of law in the trial, the judgment appealed from must be affirmed, the question of whether clemency should be extended defendant not being determinable by the Supreme Court, but being a matter for the Governor if and when it shall be duly presented to him for official action. *S. v. Early*, 189.

The jurisdiction of the Supreme Court upon appeal in criminal cases is limited to matters of law or legal inference. N. C. Constitution, Art. IV, sec. 8. *S. v. Jackson*, 202.

Defendant was tried for the violation of an ordinance upon a warrant which was insufficient to charge the offense. An appeal was taken to test the constitutionality of the ordinance. *Held:* The Supreme Court will not decide the constitutional question sought to be presented, but will dismiss the action in the exercise of its supervisory power over proceedings of lower courts. *S. v. Smith*, 206.

**§ 68b. Right of Defendant to Appeal.**

Defendant may appeal only from conviction or from prejudicial judgment final in its nature. *S. v. Hiatt*, 116.

**§ 71. Pauper Appeals.**

Where an affidavit for appeal *in forma pauperis* fails to aver that it is in good faith, it is fatally defective and is insufficient to support an order granting the appeal or to confer jurisdiction on the Supreme Court, the requirements of the statute, C. S., 4651, being mandatory and jurisdictional, and not directory, nor may the defect be cured by amendment after expiration of the ten-day period. *S. v. Holland*, 284.

**§ 77d. Conclusiveness and Effect of Record.**

The record duly certified imports verity, and the Supreme Court is bound thereby. C. S., 643. *S. v. Stwinter*, 278.

**§ 78c. Motions.**

Where defendant does not move for judgment as of nonsuit as required by C. S., 4643, and fails to request a directed verdict for insufficiency of the evidence, he waives his right to contend on appeal that the evidence was insufficient to sustain a conviction. *S. v. Ormond*, 437.

**§ 79. Briefs.**

Those exceptions and assignments of error which are not set forth in defendant's brief are deemed abandoned. Rule of Practice, No. 28. *S. v. Walls*, 487.

**§ 80. Prosecution of Appeals and Dismissal.**

Where an affidavit for appeal *in forma pauperis* fails to aver that it is in good faith, it is fatally defective and is insufficient to support an order granting the appeal or to confer jurisdiction on the Supreme Court, the require-

CRIMINAL LAW—*Continued.*

ments of the statute, C. S., 4651, being mandatory and jurisdictional, and not directory, nor may the defect be cured by amendment after expiration of the ten-day period. *S. v. Holland*, 284.

Where defendant, convicted of a capital crime, fails to make out and serve his statement of case on appeal, the appeal will be dismissed on motion of the Attorney-General in the absence of error on the face of the record, but where the record discloses only error in the judgment, the case will be remanded for proper judgment. *S. v. McNeill*, 286.

Where defendant, convicted of a capital crime, fails to serve his case on appeal within the time allowed by order of the court, and fails to request any extension of time, his appeal will be dismissed on motion of the Attorney-General in the absence of error on the face of the record. *S. v. Winchester*, 637; *S. v. Steel*, 706; *S. v. Coggin*, 706.

**§ 81a. Matters Reviewable.**

The State offered plenary evidence of defendant's guilt of the crime charged. Defendant relied chiefly upon an alibi. The evidence was submitted to the jury in a charge free from prejudicial error, and the jury returned a verdict of guilty. *Held:* The verdict of the jury in a trial free from error of law is conclusive on appeal. *S. v. Smith*, 93.

The verdict of the jury on conflicting evidence is conclusive in the absence of error of law or legal inference in the trial. *S. v. Herndon*, 123.

The findings of the trial court that the jurors were drawn, sworn, and impaneled in accordance with law are conclusive on appeal when supported by evidence, in the absence of gross abuse. *S. v. Walls*, 487.

**§ 81c. Prejudicial and Harmless Error.**

An exception to the admission of evidence cannot be sustained when the evidence objected to corroborates the testimony of another witness and its admission is not prejudicial to defendant. *S. v. Ormond*, 437.

Where defendant is tried upon two counts and judgment is pronounced on a general verdict of guilty, the refusal of the defendant's motion for judgment as of nonsuit on one count, there being no motion to nonsuit as to the other count, cannot be held for prejudicial error. *S. v. House*, 470.

**§ 81d. Questions Necessary to Determination of Appeal.**

Where a new trial is awarded upon certain exceptions, other exceptions relating to matter not likely to arise upon a subsequent hearing need not be determined. *S. v. Nall*, 61.

**§ 83. Determination and Disposition of Cause.**

Where defendant, convicted of a capital crime, fails to make out and serve his statement of case on appeal, the appeal will be dismissed on motion of the Attorney-General in the absence of error on the face of the record, but where the record discloses only error in the judgment, the case will be remanded for proper judgment. *S. v. McNeill*, 286.

Where it is determined on appeal that the evidence of defendant's guilt is insufficient to be submitted to the jury, the case will be remanded in order that judgment may be entered as required by C. S., 4643. *S. v. McDonald*, 672.

DAMAGES.

**§ 2. Direct and Remote Injury or Loss.**

Charge *held* for error in failing to confine *quantum* of damages to injuries sustained as direct result of alleged negligence. *Payne v. Stanton*, 43.

**§ 12. Sufficiency of Evidence.**

Where plaintiff, a married minor, introduces evidence that she nevertheless became liable on a note given for money borrowed and used to pay for medical

DAMAGES—*Continued.*

attention for her after the injury, the evidence is sufficient to support the recovery of such item by her as an element of her damages. *Hawkins v. Mauney*, 467.

DEAD BODIES.

**§ 5. Mutilation.**

Minor children have a right to maintain an action for the mutilation of the dead body of their father, and a demurrer to their complaint in such action on the ground that the complaint should allege facts showing that a widow with right to maintain the action did not survive, and that plaintiffs were all the children of deceased, is properly overruled, since it does not appear from the face of the complaint that a widow having a prior right to maintain the action survived or that there were other children surviving deceased, the defense that plaintiffs are not the real parties in interest being new matter which may be taken advantage of only by positive allegations in the answer disclosing such defense. *Morrow v. Cline*, 254.

DEATH.

**§ 1. Presumption of Death After Seven Years Absence.**

The presumption of death from seven years absence is a presumption of fact which may be rebutted, but the presumption stands in the absence of any evidence to weaken the presumption or prohibit it from applying to the facts of the case. *Chamblee v. Bank*, 48.

**§ 8. Expectancy of Life and Damages in Actions for Wrongful Death.**

The court instructed the jury in regard to the statutory mortuary table, that the table was based upon the experience of insurance companies, that under the statutory table a normal man of intestate's age would have a life expectancy of a stated number of years, that the jury could consider the table in making its verdict, but that the jury was not bound by it, and that the jury should consider not only the table, but the health, habits, and character of intestate. *Held:* The charge is not subject to the objection that it made the statutory mortuary table binding upon the jury in determining intestate's life expectancy. C. S., 1790. *Hancock v. Wilson*, 129.

The court instructed the jury to consider intestate's age, strength, health, skill, industry, habits, and character to the end that they might determine his pecuniary worth to his family, how much net income might be reasonably expected, that the jury should rid itself of prejudice, if any, that the matter of damages was a practical question and not a question of sympathy, and that defendants contended that intestate made only enough for his living expenses, and that consequently there would be no net income. *Held:* The charge that the jury should determine intestate's pecuniary worth to his family is not objectionable, when read in connection with other portions of the charge, as allowing the jury to consider intestate's family in determining the amount of damages. *Kesler v. Smith*, 66 N. C., 154, cited and distinguished for that evidence of the number of intestate's children was admitted in that case. *Ibid.*

DEEDS.

**§ 2a. Mental Capacity of Grantor.**

Where there is competent evidence that at the time of the execution of the deed in question the grantor was without mental capacity to execute the deed, the granting of defendant grantee's motion to nonsuit is error, since, if the jury should find the issue in the affirmative, the deed is void and conveys no title or interest in the land. *Stallings v. Keeter*, 298.

DEEDS—*Continued.*

**§ 13b. Rule in Shelley's Case.**

A deed to L., "the said party of the second part, for and during the term of his natural life," and at his death "said lands shall descend to his heirs at law or to such collateral relations as may be entitled to same upon failure of issue," *is held* to convey the fee simple title to L. under the rule in *Shelley's case*, the controlling principle for the operation of the rule being the nature of the second estate and not the estate conveyed to the first taker, and the *habendum* in this case not altering the course of descent, but casting the estate on those who would take in the character and quality of heirs of the first taker. *Rowland v. Building & Loan Assn.*, 456.

**§ 15. Reservations and Exceptions.**

Deed to defendant described the land conveyed by metes and bounds less ¼ acre that H. "holds her life time rite in." Thereafter the deed of a life estate to H. in the ¼ acre, describing same by metes and bounds, was recorded. *Held:* The ¼ acre was excepted from the land conveyed to defendant, and upon the death of H. the land reverts to the heirs of the grantor, subject to the dower rights of his widow. *Byrd v. Myers*, 394.

**§ 16. Restrictive Covenants.**

Covenant restricting residence to minimum cost stipulated *held* to apply only to lot conveyed by the deed and not to other lots in the development. *Pepper v. Development Co.*, 166.

A building restriction is a negative easement coming within the statute of frauds, and cannot be shown by parol. *Ibid.*

The owner of a five-hundred-acre tract of land executed an agreement imposing building and residential restrictions on a thirteen-acre tract included in the larger tract. Thereafter he conveyed the entire five-hundred-acre tract subject to all the restrictions, conditions, and stipulations contained in the agreement, and also certain general restrictions set out in the conveyance. Part of the five-hundred-acre tract could not be developed for residential purposes, the land being mountainous and the cost of installing water and sewer being prohibitive. *Held:* The conveyance did not enlarge the restrictions to cover the entire five-hundred-acre tract, but conveyed the land subject only to the residential restrictions on the thirteen-acre tract and the general restrictions set out in the conveyance, it being obvious that the owner did not intend the residential restrictions to apply to the entire tract. *Trust Co. v. Foster*, 331.

A large tract of land was mortgaged subject to restrictive covenants applicable only to a small part of the entire tract. Thereafter the mortgagor conveyed the entire tract subject to the mortgage. The purchaser and subsequent owners attempted to further develop the tract for residential purposes, plotted part of the tract, and sold certain lots by deeds containing restrictive covenants in accordance with a general plan of development, some of the lots so sold being released from the mortgage on the entire tract. Thereafter the mortgage was foreclosed and title under the sale conveyed to plaintiffs, trustees for the deceased original owner. *Held:* The title of the purchaser at a foreclosure sale relates back to the date of the mortgage, and plaintiffs acquired the land free from the restrictions imposed by intervening owners subsequent to the execution of the mortgage. *Ibid.*

DESCENT AND DISTRIBUTION.

**§ 12. Advancements.**

Intestate's grandchild, a daughter of intestate's deceased daughter, was charged with advancements for sums paid by intestate for her schooling and

DESCENT AND DISTRIBUTION—*Continued.*

expenses incurred after she was eighteen or twenty years old, but no charge was made for expenses of rearing the grandchild. *Held:* Upon the facts found by the referee the charge of advancements was correct. N. C. Code, 139. *Wolfe v. Galloway*, 361.

**§ 13. Encumbrances on Property Inherited.**

The execution sale of land of a deceased judgment debtor was set aside for failure to allot homestead, but judgment was entered that the purchaser, who had paid taxes and a mortgage executed by the judgment debtor, was entitled to a lien therefor superior to all rights of the heirs of the judgment debtor, all material facts being admitted in the pleadings, and the land was sold to satisfy the lien created by the judgment. *Held:* All the heirs at law who were parties to the action, including minors who filed answer through a guardian *ad litem*, are concluded by the judgment, but heirs who were not parties are not estopped by the judgment or their interests in the land divested thereby, although such interests are liable proportionately for the lien of the purchaser for taxes and the mortgage executed by their ancestor, and, in a proper proceeding, for the judgment paid out of the proceeds of the execution sale, there being no personalty of the estate available for that purpose. *Mitchell v. Mitchell*, 308.

DIVORCE.

**§ 1. Grounds for Divorce from Bed and Board.**

Only the injured party, husband or wife, is entitled to divorce *a mensa et thoro* on the ground of abandonment. N. C. Code, 1660 (1). *Vaughan v. Vaughan*, 354.

**§ 11. Alimony Pendente Lite.**

In the husband's suit for divorce *a mensa et thoro*, defendant wife set up a cross action asking divorce *a mensa et thoro* and alimony *pendente lite*. Upon the hearing of the wife's motion for alimony *pendente lite*, the court found "from the affidavits . . . and oral testimony . . . that plaintiff willfully abandoned defendant . . . and that since said date he has not provided the defendant with a home and necessary subsistence." *Held:* In the absence of a request for specific findings of fact in regard to the abandonment of the wife and her lack of financial means, the court's findings are sufficient to support its order granting the wife alimony *pendente lite*, and the order will not be held for error on an exception to the "entire findings of fact." C. S., 1666. *Vaughan v. Vaughan*, 354.

The right to alimony *pendente lite* is a question of law, while the amount of alimony and counsel fees is a matter of judicial discretion. *Ibid.*

Upon application for alimony *pendente lite* the trial court is required to find the facts in order that the correctness of its ruling may be determined on appeal, and the granting of the application solely upon a finding that defendant was the owner of certain properties is error. C. S., 1666. *Dawson v. Dawson*, 453.

**§ 12. Alimony Upon Divorce from Bed and Board.**

In a suit against the husband by his second wife for divorce from bed and board and for alimony, the husband may not attack the validity of his marriage to plaintiff by asserting that the divorce which he had himself obtained in another state from his first wife was null and void for want of personal service on her, since he will not be heard to impeach the decree which he had obtained, or to question the jurisdiction of the court rendering the decree, after new rights and interest had arisen as a result of his second marriage. *McIntyre v. McIntyre*, 698.

DIVORCE—*Continued.*

**§ 13. Alimony Without Divorce.**

Proof of one ground for divorce is sufficient under C. S., 1667. *Hagedorn v. Hagedorn*, 175.

Alimony without divorce, C. S., 1667, may be had only by independent suit, and application for alimony *pendente lite* may not be treated as application for alimony under this section. *Dawson v. Dawson*, 453.

**§ 14. Enforcing Payment of Alimony.**

In an action for alimony without divorce, the wife stands in the position of a creditor of her husband, and as against her claim the husband's deed, absolute on its face, but intended only as security, will not avail, and where the grantee in the deed admits that title was placed in her name as security for money loaned the husband, she may not complain at the provision of the judgment reforming her deed so as to constitute it a mortgage for the debt in the amount ascertained by the jury. *Hagedorn v. Hagedorn*, 175.

The court, upon the hearing, entered an order granting a wife alimony *pendente lite* with provision that if the sum provided were not paid as stipulated in the order the amount due should be a lien on the husband's lands. The husband appealed from the order. Pending the appeal the wife moved, after notice, that the husband having failed to make the payments as required, a commissioner be appointed to sell his lands. The court appointed a commissioner to sell so much of the husband's lands as might be necessary, but provided that the husband might file a stay bond under the provisions of C. S., 650. *Held:* The appeal took the case out of the jurisdiction of the Superior Court and it was *funtus officio* to render the order appointing the commissioner, but by the provision of the judgment the husband became indebted to the wife, and she might issue the ordinary execution against his property to collect the judgment, the husband having given no stay bond as required by the court. *Vaughan v. Vaughan*, 354.

DOWER.

**§ 2. Lands to Which Dower Attaches.**

The owner of land, prior to his marriage, deeded certain lands to his mother. Thereafter the deed was set aside by his creditors as being fraudulent as to them, the judgment in the action being entered subsequent to his marriage, although the action was instituted and notice of *lis pendens* was filed before the marriage. *Held:* The deed conveyed title as between the grantor and grantee, although it was executed to delay, hinder, and defraud creditors, and the judgment setting aside the deed reinvested the grantor with title only for the purposes of subjecting the land to sale for the benefit of his creditors, and did not affect the title as between the grantor and the grantee, and upon the death of the grantor, his widow is not entitled to dower therein, since her husband was never beneficially seized of title during coverture. *McLawhorn v. Smith*, 513.

DRAINAGE DISTRICTS.

**§ 1. Establishment and Validity of Corporate Existence.**

A landowner was made a party defendant in the proceedings to establish a drainage district, the first drainage lien was paid, and in another action the validity of the district was adjudicated. *Held:* In this action by the district to foreclose the second assessment lien, the landowner is estopped to attack the validity of the district or is not in a position upon the record to question its validity. C. S., 5352, 5353. *Drainage Comrs. v. Jarvis*, 690.

DRAINAGE DISTRICTS—*Continued.*

**§ 3. Operation and Negligent Injury to Lands.**

While both a drainage district and its commissioners may be liable for injury to land caused by the negligent operation of the district, where in an action to foreclose a drainage lien defendant landowner sets up a cross action for damages caused by alleged negligent operation solely against the commissioners individually, the valid existence of the drainage district being denied, the drainage district's demurrer to the cross action should be sustained. *Drainage Comrs. v. Jarvis*, 690.

EJECTMENT.

**§ 5. Parties.**

Although an agent of the lessor may make the oath in writing required in summary ejectment, C. S., 2367, the action must be prosecuted in the name of the lessor as the real party in interest, C. S., 446, and it may not be maintained in the name of the lessor's rental agent. *Rental Co. v. Justice*, 54.

**§ 15. Instructions.**

In this action for the possession of land, title was made to depend upon the location of corners as contended for by plaintiffs. Defendant introduced evidence seeking to establish different corners. Issues were submitted as to each of the two corners in dispute phrased so that the jury should determine whether each corner was as contended for by plaintiff or defendant. *Held:* Defendant was not attempting to set up an affirmative defense, but introduced evidence of different corners merely to attack plaintiffs' claim, and an instruction that the jury should find the corners as contended for by plaintiffs if plaintiffs had so satisfied them by the greater weight of the evidence, and that they should find the corners contended for by defendant if the defendant had so satisfied them by the greater weight of the evidence, *is held* erroneous as placing the burden of proof on both parties at the same time, the burden being upon plaintiffs throughout to prove title by establishing the corners as contended for by them. *DeHart v. Jenkins*, 314.

ELECTIONS.

**§ 18a. Procedure to Test Validity of Election.**

The procedure of *quo warranto* is available to test the validity of elections upon a proper showing, C. S., 870, and the contention that it is the duty of the county board of elections to determine the matter, and that the unsuccessful candidate is remitted solely to the statutory remedy, N. C. Code, 5923, 5927, 5933, is untenable, the jurisdiction of the Superior Courts never having been relinquished. *Swearingen v. Poplin*, 700.

ELECTRICITY.

**§ 4. Construction and Maintenance of Lines.**

Plaintiff utility company, operating in the community, instituted this action to restrain defendant corporation, which was formed under ch. 291, Public Laws of 1935 (N. C. Code, 1694, subsecs. 7 to 28), from constructing power lines in the community parallel or which would parallel lines already lawfully constructed by plaintiff company, on the ground that defendant corporation had not secured a certificate of convenience from the Utilities Commissioner, as required by ch. 455, Public Laws of 1931 (N. C. Code, 1037 [d]). *Held:* By express provision of the Act of 1935, corporations formed thereunder are not subject to the provisions of any other act, and the temporary restraining order was properly dissolved, the Act of 1931 not being applicable to defendant corporation. *Light Co. v. Electric Membership Corp.*, 717.

ELECTRICITY—*Continued.*

**§ 5. Service to Customers.**

The facts disclosed by the admissions in the pleadings and at the trial were that defendant power company furnished plaintiff electricity over a four-mile transmission line extending from defendant's main transmission lines to the property of plaintiff, defendant making necessary repairs to the four-mile transmission line at its own expense: that after the suspension of service for good cause, defendant refused to restore service unless plaintiff repaired the four-mile transmission line at plaintiff's expense. *Held:* Upon the facts appearing of record, defendant's refusal to restore service upon the payment of all charges for service, unless plaintiff also repaired the four-mile transmission line, was wrongful. *Sweetheart Lake, Inc., v. Light Co.*, 269.

Where a power company furnishes electricity to a customer for years, and then the service is discontinued for nonpayment of charges, the customer, upon payment of all charges for service, is entitled to have the service restored without first obtaining an order to that effect from the Utilities Commission, the power company not having obtained an order from the Commission to discontinue the service under the provisions of N. C. Code, 1112 (32). *Ibid.*

**§ 7. Condition of Wires, Poles, and Equipment.**

A complaint alleging that plaintiff, an eleven-year-old boy, was injured when he accidentally threw a small wire attached to an improvised spool across a heavily charged, uninsulated electric wire suspended approximately 23 feet above the ground on a main public highway, *is held* not to state a cause of action. *Stanley v. Smithfield*, 386.

EMINENT DOMAIN.

**§ 3. Public Use.**

The fact that property owners along one side of a proposed municipal alley agree to pay the damages assessed in favor of the property owners along the other side of the proposed alley does not affect the question of whether the taking of the land for the alley is for a public purpose, the contribution by the property owners whose land would be enhanced in value by the alley being proper, and the municipal authorities finding that the growth of the city and the desirability of the alleyway for business property made the acquisition of the land for the alley necessary in the public interest. *Deese v. Lumberton*, 31.

**§ 23. Instructions.**

In this action to recover permanent damages to plaintiffs' land resulting from defendant municipality's inadequate surface drains, plaintiffs introduced evidence of damage from overflow of water during two months of heavy rains, and introduced testimony of the value of the land at the time of the institution of the action some eighteen months after the injury, and the value the land would have had at that time if defendant's drainage system had been adequate. Plaintiffs offered no evidence of the value of the land immediately before and immediately after the injury. *Held:* An instruction to the effect that plaintiffs had introduced evidence of the value of the land immediately before and immediately after the injury, and that the jury should ascertain said values from the evidence and award as damages the difference in values, is erroneous as an inadvertent misstatement of plaintiffs' evidence, which constitutes prejudicial error when taken with the charge on the measure of damage, and it was also prejudicial error for the court to fail to state defendant's contentions, based upon its evidence duly admitted, that the property had not been permanently damaged by the overflow of surface waters during the two months of heavy rains. *Messick v. Hickory*, 531.

EQUITY.

**§ 3. Equitable Jurisdiction.**

Where a court of equity acquires jurisdiction for any purpose it will proceed, as a general rule, to determine the whole cause, and where an accounting is demanded, which is an equitable matter, the court may proceed to order the sale of the property for partition between the parties in accordance with their rights as determined by the accounting, where such procedure is necessary to determine the cause, equity having jurisdiction to order a sale for partition independent of statute, although it will follow the analogous statutory provisions. *Wolfe v. Galloway*, 361.

ESCAPE.

**§ 5. Force Permissible in Preventing Escape.**

Plaintiff brought this action for wrongful assault, and offered evidence in support of his contention that after he had been taken to jail he was assaulted and beaten, without provocation, by the officer who had arrested him. Defendant officer introduced evidence to the effect that a highway patrolman had helped him arrest plaintiff, that after plaintiff had been taken to the jail and while a cell was being prepared for him, plaintiff attacked the patrolman in an attempt to escape, and that defendant officer had beaten them both with a small stick in order to stop the fight and separate them. *Held:* The conflicting evidence was properly submitted to the jury, under proper instructions, and the jury's verdict that plaintiff had not been wrongfully assaulted is upheld. *Lowry v. Barker*, 613.

ESTOPPEL.

**§ 2. After Acquired Title.**

Partners executed a mortgage on a tract of land in which each partner owned an undivided half interest, and the proceeds of the loan were used for the benefit of both. Thereafter, the partnership was dissolved, and in the division of the property one partner deeded his interest in the tract of land in question to the other partner by full warranty deed, and each thereafter recognized the debt secured by the mortgage by making payments to the mortgagee. After the death of the partners, the mortgage was foreclosed, and the executor of the grantor partner, upon paying the balance due on the debt, had the bid assigned and deed made to him in his representative capacity. *Held:* The heirs at law of the grantee partner, upon paying into court one-half the balance of the debt paid by the executor upon the assignment of the bid, are the owners of the land and are entitled to have the mortgage and deed to the executor canceled of record, the executor being estopped by his testator's deed from asserting the after acquired title as against the heirs at law of the grantee partner. *Kelly v. Davis*, 1.

**§ 3. Nature and Essentials of Estoppel by Record.**

In suit for alimony, husband may not attack marriage on ground that his divorce decree from first wife was invalid. *McIntyre v. McIntyre*, 698.

**§ 5. Nature and Essentials of Equitable Estoppel in General.**

The foundation of estoppel *in pais* is error or inadvertence on the one side, and fault or dereliction on the other, and the doctrine has no application when both parties are in the right. *Davis v. Montgomery*, 322.

**§ 6c. Estoppel by Silence.**

Plaintiff, having knowledge of facts, *held* estopped by his silence when his failure to speak resulted in disadvantage to defendants. *McNeely v. Walters*, 112.

ESTOPPEL—*Continued.*

A lessee, owning an unfixed chattel in the building, is not estopped from asserting ownership as against the purchaser at the sale under foreclosure by failing to assert title at the sale when the description of the property at the sale covers only property "belonging to the mortgagors" and does not include the lessee's chattel. *Development Co. v. Bon Marche*, 272.

EVIDENCE.

**III. Privilege Communications**
12. Husband and Wife
14. Physician and Patient
**VII. Competency of Evidence in General**
32. Transactions or Communications with Decedent
**IX. Best and Secondary Evidence**
38. Secondary Evidence of Lost or Destroyed Instruments
**X. Parol or Extrinsic Evidence Affecting Writings**
40. Exceptions to General Rule
**XI. Hearsay Evidence**
42f. Admissions in Pleadings
**XII. Expert and Opinion Evidence**
47. Subjects of Expert Testimony
52. Examination of Experts

**§ 12. Husband and Wife.**

C. S., 1801, providing that no husband or wife shall be compelled to disclose any confidential communication made by one to the other during their marriage, does not render incompetent a voluntary disclosure of such communications, but only precludes involuntary testimony in regard thereto. *Hagedorn v. Hagedorn*, 175.

**§ 14. Physician and Patient.**

Whether a physician should be compelled to disclose information acquired by him in his treatment of his patient rests in the sound discretion of the trial court upon its determination of whether such testimony is necessary for the administration of justice, C. S., 1798, and in this action to recover on a policy of insurance the trial court's refusal to require a physician to testify as to his treatment of insured within five years prior to the application for the policy upon the court's finding from the evidence that insured died from pneumonia contracted after the issuance of the policy, *is held* not prejudicial error, especially in view of the fact that the physician's sworn proof of death was admitted in evidence. *Creech v. Woodmen of the World*, 658.

**§ 32. Transactions or Communications With Decedent.**

In this caveat proceeding issues as to undue influence and mental capacity were submitted to the jury. A caveator interested in the result was permitted to testify to the effect that testatrix had stated to him that propounders had forced her to leave the witness out of her will. The court stated that the evidence would be competent only to show mental capacity and the execution of the will. *Held:* The testimony related solely to the issue of undue influence, and testatrix' statement having been made more than a year after the execution of the will, did not constitute *pars res gestæ*, and the testimony was of a transaction or communication with a decedent prohibited by C. S., 1795, and the jury having answered the issue of undue influence in favor of caveators, its admission constitutes reversible error. *In re Will of Plott*, 451.

**§ 38. Secondary Evidence of Lost or Destroyed Instruments.**

Foundation for the admission of secondary evidence *held* sufficiently laid under authority of *Chair Co. v. Crawford*, 193 N. C., 531. *School District v. Alamance County*, 213.

A finding by the court, supported by evidence, that judicial records relevant to the issue had been lost in moving the county offices to a new courthouse, and could not be found upon diligent search, *is held* sufficient foundation for the admission in evidence of copies of the records established by a finding of the court to be true copies of the originals. *Pence v. Price*, 707.

EVIDENCE—*Continued.*

**§ 40. Exceptions to General Rule.**

A provision in a stock certificate that the corporation should have the option to repurchase its stock at any interest period at a price five dollars above par does not preclude evidence of an agreement by the corporation at the time of the sale to redeem a part of the stock at par every three-year period, upon demand of the purchaser, the agreement not being inconsistent with the provision in the certificate. *Aydlett v. Major & Loomis Co.*, 548.

**§ 42f. Admissions in Pleadings.** (Plaintiff need not prove matters admitted see Pleadings § 25.)

Where the answer admits the allegations of a paragraph of the complaint, plaintiff may introduce in evidence the admission in the answer and also the paragraph of the complaint admitted, and where the answer contains a qualified admission, that portion of the corresponding allegation of the complaint may be admitted to explain the relevancy of the admission. *Lupton v. Day*, 443.

In their answer, one defendant admitted the allegations of fact in a paragraph of the complaint and testified on the trial in accordance therewith, but another defendant did not admit the allegations or introduce evidence in regard thereto. *Held:* The introduction of the paragraph of the complaint was harmless as to the defendant admitting its allegations, but constitutes prejudicial error as to the other defendant, since as against such other defendant the paragraph was a self-serving declaration on the part of plaintiff. *Ibid.*

**§ 47. Subjects of Expert Testimony.**

Experts in the administration of public schools may testify from their own knowledge as to whether the expenditure of funds by a school district was necessary for the maintenance of the constitutional school term in the district. *School District v. Alamance County*, 214.

**§ 52. Examination of Experts.**

An expert may give his opinion directly on facts within his knowledge and may give his conclusion or opinion on facts outside his knowledge upon proper hypothetical questions reciting the facts, and an exception to the expert testimony of a doctor who had treated and observed plaintiff after the accident in suit that at the time plaintiff signed the release in question she did not have sufficient mental capacity to understand the nature and effect thereof, cannot be sustained, the opinion being based on facts within the knowledge of the expert. *Yates v. Chair Co.*, 200.

EXECUTION.

**§ 6. Issuance of Execution.**

It is error for the clerk to issue execution on a consent judgment without notice and a hearing when the amount for which execution should issue is not determinable from the face of the instrument, but must be ascertained by evidence *dehors* or *aliunde*, and a motion in the cause to recall the execution should be allowed until the controverted amount is determined by a jury. *Cason v. Shute*, 195.

**§ 11. Procedure to Stay, Quash, or Recall Execution.**

The procedure to attack a consent judgment on the ground that the party did not in fact consent thereto, and to recall execution issued thereon is by motion in the cause. *Cason v. Shute*, 195.

**§ 25. Nature and Grounds of Execution Against the Person.**

An affirmative answer to an issue establishing that defendant had retained and converted to his own use, in violation of the terms of the contract of

EXECUTION—*Continued.*

assignment with plaintiff, property belonging to plaintiff, is sufficient to support a judgment that execution against the person of defendant issue upon application of plaintiff upon return of execution against the property unsatisfied, intent of defendant in doing the acts constituting a breach of trust being immaterial, and a specific finding of fraud being unnecessary. C. S., 673. *Fertilizer Co. v. Hardee*, 653.

## EXECUTORS AND ADMINISTRATORS.

**I. Appointment and Qualification**
3. Jurisdiction and Appointment
**II. Assets of the Estate**
6. Title and Right to Possession of Assets of Estate
**III. Control and Management of Estate**
10. Actions to Collect Assets
**V. Allowance and Payment of Claims**
15d. Claims for Personal Services Rendered Deceased
15h. Secured Claims
16. Priorities
17. Filing of Claims
**VI. Distribution of Estate**
24. Family Agreements
**VII. Accounting and Settlement**
29. Costs and Commissions
**VIII. Liabilities of Executors and Administrators**
30. Personal Liability
b. For Wrongful or Unauthorized Payment of Claims or Distribution of Assets
c. For Wrongful or Unauthorized Investment or Use of Funds of Estate

### § 3. Jurisdiction and Appointment of Administrators.

The clerk of the Superior Court has jurisdiction to appoint an administrator for an estate upon his finding that the person in question is dead and died intestate, C. S., 28. 1, upon affidavit showing that such person had been absent for over seven years and had not been heard from by relatives or friends, and the fact that at the time of the appointment it was contemplated that an action should be brought to determine any question that might arise contrary to the legal presumption does not invalidate the appointment or nullify the proof afforded by the jurisdictional affidavit. *Chamblee v. Bank*, 48.

### § 8. Title and Right to Possession of Assets of Estate.

An administrator appointed by the clerk for the estate of a person presumed dead under the presumption of death from seven years absence is entitled to judgment for the recovery of the assets of the estate against the guardian of such person upon the verdict of the jury in his favor upon evidence showing that the person in question had been absent for seven years, and had not been heard from by relatives or friends, when the guardian controverts the fact of death for its own protection, but introduces no evidence weakening the presumption or prohibiting it from applying to the facts established by plaintiff's evidence, and the guardian's contention that the recovery of the assets was without due process of law in that the person alleged to be dead was not served with summons is without merit. *Chamblee v. Bank*, 48.

### § 10. Actions to Collect Assets.

Plaintiff alleged that she was duly appointed administratrix of her intestate, and that she was then in the active discharge of her duties as such administratrix, which allegations were admitted to be true in defendants' answers. *Held:* The admission of the allegations establishes them, N. C. Code, 543, and makes it unnecessary for plaintiff to introduce evidence in support thereof, and the allegations are sufficiently broad to establish plaintiff's right to maintain the action as administratrix, and a contention that the allegations were insufficient in that it was not alleged that plaintiff had duly qualified, is untenable, the allegation that plaintiff was actively engaged in the discharge of her duties as administratrix, liberally construed, being sufficient to imply qualification. *Little v. Rhyne*, 431.

EXECUTORS AND ADMINISTRATORS—*Continued.*

**§ 15d. Claims for Personal Services Rendered Deceased.**

In an action by a son against the estate of his mother to recover for sums advanced by him for her care and necessary medical attention prior to her death, evidence tending to show that said sums were not gifts, and tending to rebut the presumption to that effect arising from the relation, is competent. *Doe v. Trust Co.*, 319.

A son advanced certain sums for the care and necessary medical attention of his mother, defendant's intestate, prior to her death, and by agreement with his sisters, received certain sums from a trust fund payable to intestate's children after her death. In his suit against his mother's estate to recover for advancements made by him, *it was held* that advancements made prior to three years from the institution of the action were barred by the statute of limitations, and it appeared that the advancements barred by the statute were in excess of sums received by him from the trust estate. *Held:* Conceding that sums received by him from the trust estate should be applied to advancements made by him such sums should be applied to advancements barred by the statute, and the exclusion of evidence of the agreement under which he received the sums from the trust estate could not be prejudicial to defendant administrator. *Ibid.*

**§ 15h. Secured Claims.**

The holder of a note secured by a mortgage must first exhaust the security and apply same on the debt, and may then file claim against the estate of the deceased maker only for the balance due on the note, and he may not file claim and receive *pro rata* dividend on the basis of the full claim. The Chancery rule, followed in receiverships and assignments for benefit of creditors, not being applicable, claims against an estate being governed by the administration laws, C. S., 93, which have been construed to favor the Bankruptcy rule. *Rierson v. Hanson*, 203.

**§ 16. Priorities.**

Medical services rendered deceased within a year prior to his death are payable in the sixth class of priority by provision of the statute, C. S., 93, and the term "medical services" includes hospital expenses incurred within the twelve months period which are reasonably necessary for the care and comfort of deceased while under treatment by his physician, and which are incurred upon the physician's advice, and where the condition of deceased necessitates the constant attendance of trained nurses, the hospital may properly include the charges for board for such graduate nurses as an item of its charges included in the sixth class of priority. *Hospital Association v. Trust Co.*, 244.

**§ 17. Filing of Claims.**

Creditors filing claims more than twelve months after publication of notice may assert their demands only against undistributed assets. *In re Estate of Bost*, 440.

An action against an administrator on a subrogated claim for funeral expenses and to recover a legacy is not completely barred by any statute of limitations, even when claim is not filed within twelve months from notice, when plaintiff shows undistributed assets of the estate. C. S., 101. *Jackson v. Thomas*, 634.

**§ 24. Distribution of Estate Under Family Agreements.**

Family agreement for distribution of estate approved under facts of this case. *Trust Co. v. Wade*, 27.

EXECUTORS AND ADMINISTRATORS—*Continued.*

**§ 29. Costs and Commissions.**

Allowances by the Superior Court for attorneys' fees, trustees, and guardians *ad litem* in connection with an action involving the liability of the estate should be fair and reasonable. *Hood, Comr., v. Cheshire*, 103.

**§ 30b. Liability for Wrongful or Unauthorized Payment of Claims or Distribution of Estate.**

The will provided that not less than $4,500 be spent on testatrix' burial and gravestone, etc. The executors, at a time when it appeared the estate was solvent, spent more than $100 for a gravestone and other burial expenses without an order of court, C. S., 108. *Held:* Upon later insolvency of the estate, creditors may not hold the executors personally liable as for a breach of trust for the expenditure of funds of the estate for this purpose in good faith. *In re Estate of Bost*, 440.

Creditors filing their claims more than twelve months after the publication of the first notice by the executors may assert their demands only against the undistributed assets of the estate, C. S., 101, and may not hold the executors personally liable for distributing household and kitchen furniture to the legatees shortly after the death of testatrix in accordance with specific bequests in the will, at a time when it appeared the estate was amply solvent. *Ibid.*

Executors paid part of a judgment against the estate to the judgment creditor without notice that his attorneys were entitled to a part of the recovery under a contingent fee agreement. *Held:* The executors cannot be held personally liable by the attorneys. *Ibid.*

**§ 30c. Liability for Wrongful or Unauthorized Investment or Use of Funds of Estate.**

An administrator and trustee is subject to suit upon allegations that he had invested funds of the estate in and through his own partnership and had failed and refused to pay over or account for same, C. S., 135, and a demurrer on the ground that the action would lie only to compel the filing of a final account and settlement of the estate is untenable. *Leach v. Page*, 622.

In an action against an administrator and trustee for wrongful investment of funds of the estate in a partnership of which he was a member, his demurrer on the ground that his personal liability had been discharged and waived by the beneficiaries of the estate, accepting the obligation and notes of the partnership therefor, should be overruled, where the complaint does not show that the notes of the partnership had been paid or that its notes were accepted with the intention to waive and discharge the liability of the administrator and trustee. *Ibid.*

EXTRADITION.

**§ 2. Charge of Crime and Fugitive from Justice.**

Where the charge of crime by the demanding state includes counseling, commanding, inducing, or procuring another to commit the crime, the person charged is a fugitive from justice even though he was not in the demanding state at the time the crime was actually committed, if he committed overt acts while within the state resulting in the commission of the crime by another after he had absented himself therefrom. *In re Malicord*, 684.

**§ 4. Extradition Papers of Demanding State.**

On *habeas corpus* in extradition proceedings, the papers of the demanding state are sufficient if they substantially charge petitioner with a crime under its laws. *In re Malicord*, 684.

FALSE IMPRISONMENT.

**§ 1. Nature and Essentials of Right of Action.**

Involuntary restraint and its unlawfulness are the two essential elements of the offense of false imprisonment, which generally include assault and battery, and must include a technical assault at least. *Parrish v. Mfg. Co.*, 7.

**§ 2. Actions for False Imprisonment.**

Conflicting evidence on the question of whether the individual defendant forced plaintiff to submit to a search for money of two employees which had been lost, takes the case to the jury as to the individual defendant, and the fact that the liability of the corporate defendant was erroneously submitted to the jury in the action cannot avail the individual defendant. *Parrish v. Mfg. Co.*, 7.

Under the facts of this case, the good faith of an officer in making an arrest under an invalid warrant *is held* material on the question of the amount of actual damages, if any, plaintiff is entitled to recover for the false arrest, and an instruction to this effect is not held prejudicial in view of the jury's finding upon supporting evidence that plaintiff suffered no actual damages. *Lowry v. Barker*, 613.

FOOD.

**§ 16. Sufficiency of Evidence.**

Testimony of plaintiff that she drank part of a bottle of Coca-Cola containing foreign deleterious substances, resulting in injury, and evidence that like deleterious substances were found in Coca-Cola bottled by the same defendant at approximately the same time, *is held* sufficient to be submitted to the jury on the question of defendant's negligence. *Blackwell v. Bottling Co.*, 729.

FORNICATION AND ADULTERY.

**§ 4. Sufficiency of Evidence.**

In this prosecution for fornication and adultery, the evidence, though largely circumstantial, *is held* sufficient to be submitted to the jury. *S. v. Stinvinter*, 278.

Evidence merely that defendants had an opportunity to commit the crime charged is insufficient to be submitted to the jury in a prosecution for fornication and adultery. *S. v. Woodell*, 635.

FRAUDS, STATUTE OF.

**§ 5. Application of Statute Requiring Promise to Answer for Debt or Default of Another to Be in Writing.**

The evidence disclosed that defendant was engaged in business and during a number of years plaintiff sold goods to him, that thereafter defendant told plaintiff's agent he wished plaintiff to continue to ship merchandise upon order of his son, that the agent replied that his company would ship on open account to defendant and son, and that they would look to defendant for goods sold on open account, that thereafter a receipt for payment on account was made out in the name of defendant and son company, and that defendant's name appeared over the door of the store throughout the transactions, and that the first notice plaintiff had that defendant was not in business was a telephone call, after the goods in question had been shipped, notifying plaintiff not to ship any more goods on open account. *Held:* The evidence was sufficient to be submitted to the jury on the question of whether defendant had an interest in the purchase of the goods so as to take the case out of the operation of the statute of frauds, C. S., 987. *Noland Co. v. Jones*, 462.

FRAUDS, STATUTE OF—*Continued.*

**§ 9. Contracts Affecting Realty.**

A building restriction is a negative easement coming within the statute of frauds, and cannot be shown by parol. *Pepper v. Development Co.*, 166.

GAMING.

**§ 1. Nature and Elements of the Offense.**

The payment of State and county license tax on slot machines does not justify the operation of the machines if they are illegal under the provision of chs. 37 and 282, Public Laws of 1935. *Hinkle v. Scott*, 680.

GUARDIAN AND WARD.

(Venue of actions by guardian see Venue § 1.)

**§ 3. Jurisdiction to Appoint Guardian.**

Clerk is without authority to appoint guardian for minor having estate and residence in another county. *Duke v. Johnston*, 171.

**§ 13. Charges and Liabilities of the Estate.**

A minor residing with her mother and having an inherited fund deposited in a bank in the city of her residence, was committed to an orphanage by the clerk of the court of that county. Upon her discharge from the orphanage after a number of years, she was returned to her mother, who still resided in the city and county in which the commitment was made. The orphanage was located in another county, and the superintendent of the orphanage had himself appointed guardian by the clerk of that county, received the funds belonging to the minor from the bank, and disbursed same in defraying the expenses of the minor for maintenance in the orphanage. *Held:* The appointment of the guardian by the clerk of the county in which the orphanage was located was void, N. C. Code, 2150, since it appeared that the minor was a resident of another county and that her estate was located in such other county, and in a suit by the minor by her next friend, the minor is entitled to recover from the superintendent the funds of her estate disbursed by him. *Duke v. Johnston*, 171.

HABEAS CORPUS.

(In extradition proceedings see Extradition § 4.)

**§ 4. To Obtain Custody of Minor Children.**

*Habeas corpus* is not available to determine the custody of a child as between its divorced parents, C. S., 2241, 2242, and where the divorce is granted in another state of which the parents were residents, the writ is not available to enforce the provisions of the divorce decree relating to the custody of the child as against the mother moving to this State and bringing the child with her. *In re Ogden*, 100.

**§ 8. Appeal and Review.**

A decree in *habeas corpus* proceedings to determine the custody of a child as between its divorced parents is not appealable, since the proceeding does not come within the provisions of C. S., 2241, 2242, nor will the provisions made for the child be considered when the judge below finds that the child is in school and is being properly cared for by the parent having its custody, and awards its custody to such parent during the school term, the sole remedy being by *certiorari* to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts, N. C. Constitution, Art. IV, sec. 8. *In re Ogden*, 100.

## HOMESTEAD.

**§ 6. Debts Prior to Homestead Rights.**

Where land of a deceased judgment debtor is sold, and the purchaser pays taxes and a mortgage on the land executed by the judgment debtor, and thereafter the sale is set aside by the heirs because no homestead was allotted, the purchaser at the sale is entitled to a lien for the taxes and mortgage superior to the homestead or any other rights of the heirs. *Mitchell v. Mitchell*, 308.

**§ 8. Waiver and Abandonment of Homestead Exemption.**

The homestead exemption will be enforced whenever possible, and waivers thereof are regarded with disfavor. *Pence v. Price*, 707.

Findings *held* to support judgment that defendant had waived his homestead right in surplus after foreclosure by failure to assert same.

## HOMICIDE.

**I. Homicide in General**
2. Parties and Offenses
**II. Murder in the First Degree**
4. Elements of the Offense
c. Premeditation and Deliberation
**V. Justifiable or Excusable Homicide**
11. Self-Defense
**VI. Indictment and Pleas**
14. Requisites and Sufficiency of Indictment
**VII. Evidence**
17. Relevancy and Competency of Evidence in General
18. Dying Declarations
20. Evidence of Motive and Malice
21. Evidence Competent on Question of Premeditation and Deliberation
**VIII. Prosecutions**
27. Instructions
f. On Question of Self-Defense
g. On Question of Parties and Offenses

**§ 2. Parties and Offenses.**

Each person taking part in robbery in which victim was killed is guilty of murder in first degree. *S. v. Puckett*, 66.

**§ 4c. Premeditation and Deliberation.**

Evidence of defendant's drunken condition at the time of the homicide is competent on the question of premeditation and deliberation, since if defendant is too intoxicated to be capable of premeditation and deliberation he cannot be convicted of first degree murder, unless the deliberate purpose to kill was formed when sober, though executed when drunk. *S. v. Edwards*, 555.

**§ 11. Self-Defense.**

Person upon whom unprovoked murderous assault is made may stand ground and kill adversary if necessary in self-defense. *S. v. Thornton*, 413; *S. v. Godwin*, 419.

**§ 14. Requisites and Sufficiency of Indictment.**

An indictment charging defendant disjunctively with murder committed with malice, premeditation, and deliberation and with murder committed in the perpetration of a robbery, is not void for uncertainty, since either charge constitutes murder in the first degree, and defendant's remedy, if he desires more specific information in order to prepare his defense, is by motion for a bill of particulars, C. S., 4613, but a motion in arrest of judgment after a verdict of guilty of murder in the first degree is properly denied. *S. v. Puckett*, 66.

**§ 17. Relevancy and Competency of Evidence in General.** (Necessity of allegation in indictment to support proof see Indictment § 24.)

The evidence disclosed that immediately after the assault later causing death, the victim took refuge some distance from the house in which the altercation transpired, and called for help. The witness and one of the assailants went to his aid. The witness testified to the effect that when the assailant called to the victim to come to him and let him see how badly he was

HOMICIDE—*Continued.*

hurt, the victim refused and declared that he was afraid the assailant would continue the fight. *Held:* The testimony disclosing the victim's fear of the assailant was competent certainly as to the assailant referred to, and its admission solely against him is not error, either upon his exception or the exceptions of the other defendants. *S. v. Triplett*, 105.

**§ 18. Dying Declarations.**

Testimony that the victim of the fatal assault by defendants stated in the hospital that "he was killed" by defendants *is held* to show that he appreciated the seriousness of his condition and apprehended his approaching dissolution, and the trial court's refusal to strike out testimony of his declaration thereafter made containing statements constituting *pars res gestæ* will not be disturbed on appeal. *S. v. Triplett*, 105.

**§ 20. Evidence of Motive and Malice.**

Evidence that prior to the commission of the homicide, deceased had a certain amount of money on his person, largely in twenty-dollar bills, which was gone after the commission of the crime, and that prior to the crime defendant was without money, but that soon thereafter he had about the same amount of money that was missing from the person of the deceased, and that the money in defendant's possession was largely in twenty-dollar bills, *is held* competent, in connection with the evidence identifying defendant as the perpetrator of the crime, to show that the motive of the crime was robbery as charged in one count of the bill of indictment, the weight and credibility of the evidence being for the jury. *S. v. Puckett*, 66.

**§ 21. Evidence Competent on Question of Premeditation and Deliberation.**

Evidence of drunkenness is competent on question of premeditation and deliberation. *S. v. Edwards*, 555.

**§ 27f. On Question of Self-Defense.**

Instruction on question of self-defense *held* erroneous for failing to charge, upon supporting evidence, that person, without fault, upon whom murderous assault is made, need not retreat but may stand his ground and kill adversary if necessary in self-defense. *S. v. Thornton*, 413; *S. v. Godwin*, 419.

**§ 27g. On Question of Parties and Offenses.**

The State's evidence tending to show that defendant, in company with two others, went to a filling station with the purpose of robbing the owner, that in execution of their purpose, all being present and participating in the crime, the owner was killed. The court charged the jury that defendant would be guilty of first degree murder even if one of the others fired the fatal shot, if it was fired in the execution of their unlawful conspiracy and agreement. Defendant excepted on the ground that the court did not define "conspiracy." *Held:* The exception cannot be sustained, in the absence of a special request for instructions, the term "conspiracy" being used synonymously with "agreement," and the charge being clear and easily understood, and defendant being guilty of murder in the first degree under the evidence regardless of the existence of a technical conspiracy. *S. v. Puckett*, 66.

HUSBAND AND WIFE.

(Confession of judgment by husband and wife see Judgments § 5.)

**§ 20. Construction, Operation, and Modification of Deeds of Separation.**

The deed of separation between plaintiff husband and defendant wife which was duly executed by the parties and approved by the court, provided that if in the future the husband's income should be materially reduced below the

HUSBAND AND WIFE—*Continued.*

amount received by him in the twelve months preceding the execution of the deed of separation, he might apply to a court of competent jurisdiction for a reduction in the amount of the monthly payments to the wife provided in the instrument. The husband instituted action in this State after he had removed his residence to the State and had been living here more than twelve months preceding the institution of the action. Defendant filed answer, and both parties were present and represented in court. Upon evidence heard by him, the court found that plaintiff's income from all sources had been materially reduced, and reduced the monthly allowance to defendant by one-third, effective as of the date of the institution of the action. *Held:* The court had jurisdiction, in the exercise of its discretion, to enter the order reducing the allowance, and its judgment will not be disturbed on appeal of either party in the absence of any showing of arbitrariness or abuse of discretion. *Cobb v. Cobb*, 146.

**§ 21. Attack and Setting Aside Deeds of Separation.**

A deed of separation between husband and wife, duly executed and approved by the court, is a valid and binding contract between the parties, and may not be set aside upon application of either except for mutual mistake, or mistake of one party induced by the fraud, undue influence, etc., of the other, and mistake on one side alone without fraud on the other is insufficient ground for cancellation of the agreement. *Cobb v. Cobb*, 146.

INDICTMENT.

**§ 7. Formal Requisites.**

A crime punishable by death or imprisonment in the State's Prison is a felony, C. S., 4171, and an indictment therefor must use the word "feloniously" or it is fatally defective, and should be quashed or judgment arrested on motion of defendant. *S. v. Callett*, 563.

**§ 11. Definiteness and Sufficiency in General.** (Necessity of indictment see Constitutional Law § 26. Exclusion of persons of Negro race from grand jury as denial of due process of law see Constitutional Law § 33.)

Indictment charging disjunctively premeditated murder and murder in perpetration of robbery *held* not void for uncertainty. *S. v. Puckett*, 66.

**§ 17. Nature and Scope of Bill of Particulars.**

The purpose of a bill of particulars is to afford defendant a fair opportunity to procure his witnesses and to prepare his defense as to the particular transactions in which he is accused, and to limit the evidence to the transactions stated, and in this prosecution of an insurance agent for embezzlement, the furnishing by the State of accounts and records disclosing itemized credits and amounts due by defendant to the insurance company *is held* a sufficient compliance with an order theretofore entered requiring the State to furnish a bill of particulars. *S. v. Williams*, 569.

**§ 24. Necessity of Allegations to Support Proof.**

Where the indictment jointly charges several persons with premeditated murder, evidence of acts done in furtherance of a common purpose, design, or unlawful conspiracy, leading to the murder, are competent, although the indictment makes no specific charge of conspiracy. *S. v. Triplett*, 105.

INFANTS.

**§ 1. Disabilities of Unemancipated Infants.**

An unemancipated infant, being *non sui juris*, cannot of his own volition select, acquire, or change his domicile. *Duke v. Johnston*, 171.

## INSANE PERSONS.

**§ 9b. Claims on Obligations or Contracts of Incompetent.**

Where the petition and answer on a claim against an incompetent's estate for support of his aged mother and arising upon an alleged contract executed by the incompetent while sane raises issues of fact and law, and the cause is transferred by the clerk to the civil issue docket, the judge holding the courts of the district is without power to determine the matter at chambers in another county, and the cause will be remanded to the county in which the action is pending for determination of the issues according to law. *In re Jones*, 704.

## INSURANCE.

**IV. The Contract in General**
13. Construction and Operation of Policy Contract in General
**VI. Life Insurance**
30. Forfeiture for Nonpayment of Premiums or Dues
a. In General
c. Evidence and Proof of Payment
31. Avoidance or Forfeiture of Policy for Misrepresentation or Fraud
a. Policies Issued without Medical Examination
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34. Disability Clauses
a. Construction and Operation and Sufficiency of Evidence of Disability
b. Occurence and Notice of Disability During Life of Certificate Under Group Policy
36. Persons Entitled to Payment
a. Beneficiaries
37. Actions on Policies
**VII. Accident Insurance**
38. Construction and Operation
**VIII. Liability Insurance Against Personal Injury to Others or Damage to Property**
43. Construction of Policy as to Risks Covered and Property Insured
45. Notice and Proof of Accident or Claim
48. Rights of Persons Injured or Damaged as Against Insurer
51. Payment and Subrogation
**X. Burglary Insurance**
55. Construction of Policy as to Losses Covered

**§ 13. Construction and Operation of Policy in General.**

Laws in force at the time of the issuance of a policy of insurance become a part of the contract, and stipulations in the policy contrary to statutory provisions are of no effect. C. S., 6287, 6288. *Wells v. Ins. Co.*, 427.

Where the insurance contract is expressed in clear and unmistakable language, without ambiguity, its construction is for the court. *Taft v. Casualty Co.*, 507.

**§ 30a. Forfeiture of Policy for Nonpayment of Premiums in General.**

The provision in a life insurance policy that the policy should be void if the stipulated premium is not paid on the due date or within the thirty-one days grace period thereafter is valid. *Knight v. Ins. Co.*, 108.

**§ 30c. Evidence and Proof of Payment.**

Evidence of duplicate payment of a monthly premium *held* insufficient to be submitted to the jury on plaintiff beneficiary's contention that the premium for the month was twice paid, and that if the duplicate payment were credited to a subsequent month the policy would have been in force on the date it was canceled by insurer for nonpayment. *Knight v. Ins. Co.*, 108.

Evidence that insured made an agreement with insurer's agent that the agent would collect the monthly premium from insured's employer on the due date, and that the employer was ready, able, and willing to make the payment, but that the agent did not call as agreed because of the termination of his employment with insurer prior thereto, and that insurer gave no notice to insured or his employer that it would require payment direct to it or to its successor agent, *is held* sufficient to be submitted to the jury on the question of payment of the premium in the beneficiary's action on the policy after the death of insured during the month for which such payment would have kept the policy in force. *Bosceman v. Ins. Co.*, 392.

INSURANCE—*Continued.*

**§ 31a. Policies Issued Without Medical Examination.**

Policy issued without medical examination may be avoided for misrepresentations relating to matters other than physical condition of applicant even in the absence of fraud. *Inman v. Woodmen of the World*, 179.

**§ 31b. Policies Issued Upon Medical Examination.**

It is provided by C. S., 6289, that misrepresentations in an application for insurance will not prevent recovery on the policy unless the misrepresentations are fraudulent or material, and under this section all representations which would naturally influence the judgment of insurer in making the contract are material, and it is not necessary that they be fraudulent in order to bar a recovery, but a stipulation in the policy that all representations in the application should be deemed material is contrary to the statutory provision, and is of no effect. *Wells v. Ins. Co.*, 427.

The evidence, considered in the light most favorable to plaintiff, tended to show that insured stated in her application for insurance that she had not consulted a doctor for any cause other than as disclosed in the application, while insured had consulted a physician who determined that she had a mild form of malaria causing one-half degree of fever, that at the time of signing the application insured had completely recovered and that the malaria was in no way a cause or contributing cause of her death. *Held:* Whether the misrepresentation in the policy was material is a question for the jury under the evidence in the beneficiary's action on the policy, and the granting of insurer's motion to nonsuit is error. *Ibid.*

The evidence disclosed that insured stated in her application that she was not pregnant and that her menstruation was regular and normal, and that she died in childbirth nineteen days less than nine months thereafter. It also appeared that insured was thirty-three years old and married, and paid an additional premium to insurer to cover the risk of childbirth, and that a physician whom insured consulted more than a month after signing the application was unable to determine at that time that she was pregnant. *Held:* The evidence does not affirmatively show that the childbirth was not premature, and is insufficient to establish as a matter of law that insured's representations in regard thereto in her application were false, and the granting of insurer's motion to nonsuit in the beneficiary's action on the policy is error. *Ibid.*

**§ 31c. Knowledge and Waiver by Insurer.**

Knowledge of the soliciting agent of misrepresentations in an application for life insurance will not be imputed to insurer when the applicant represents in the application that the statements therein made are true and signs same without reading it or having it read to him and his failure to ascertain its contents is not induced by any fraud on the part of the agent. *Inman v. Woodmen of the World*, 179.

**§ 34a. Construction and Operation and Sufficiency of Evidence of Disability.**

Insured's performance of work of permanent nature, although handicapped by disease, *held* to preclude recovery on disability clause. *Lee v. Assurance Society*, 182.

The policy in suit provided monthly disability benefits of $30.00, but stipulated that if the disease causing disability were chronic, insurer's liability should be limited to two monthly payments per year. The evidence tended to show that insured was disabled for a period of five months, which disability was caused by pulmonary tuberculosis, and there was evidence that the disease causing the disability was and is chronic. *Held:* Under the terms of

the policy insurer could recover only two months disability benefits if the jury should find from the evidence that the disease causing the disability was and is chronic, and it was error for the trial court to peremptorily instruct the jury that insurer was entitled to recover disability benefits for the five months sued for. *Brooks v. Ins. Co.*, 274.

**§ 34d. Occurrence and Notice of Disability During Life of Certificate Under Group Policy.**

In this action on a disability clause in a certificate under an employees' group policy, judgment of nonsuit in insurer's favor is affirmed under authority of *Fulton v. Insurance Co.*, 210 N. C., 394. *Wilson v. Ins. Co.*, 731.

**§ 36a. Beneficiaries.**

Where insurance policies are assigned by insured under a trust agreement, and thereafter the trust is revoked by judgment conclusive on the trustee and all the beneficiaries of the trust, the right to the policies reverts to insured and he is entitled to have the trustee beneficiary named therein changed by insurer in accordance with his directions. *Smathers v. Ins. Co.*, 345.

**§ 37. Actions on Policies.**

Where plaintiff beneficiary offers the policy in evidence, and insurer admits its execution and delivery and the death of insured, plaintiff establishes a *prima facie* case, and the burden is on insurer to establish misrepresentations relied on by it to avoid the policy, and the burden of proof is not affected by anticipation of such defense and the offering of evidence upon the issue of misrepresentation by plaintiff, and in passing upon insurer's motion to nonsuit on the ground of such misrepresentations, all the evidence must be considered in the light most favorable to plaintiff. *Wells v. Ins. Co.*, 427.

Where the evidence and admissions establish the issuance and delivery of the policy and the death of the insured, and that plaintiff is named beneficiary in the policy and that demand for payment had been made and refused, plaintiff makes out a *prima facie* case, and the burden is on insurer to establish affirmative defenses relied on by it, and ordinarily its motion to nonsuit, based on such defenses, is properly denied. *Creech v. Woodmen of the World*, 658.

**§ 38. Construction and Operation of Policies of Accident Insurance.**

The policy in suit provided liability for accidental injury or death while insured was driving or riding in a "passenger automobile." At the time the policy was issued, insured owned only trucks to the knowledge of insurer's soliciting agent, and at the time of the accidental injury causing insured's death, he was riding in a truck with trailer attached, both of which carried the licenses as prescribed by law, and at the time the vehicle was being used solely for pleasure and not for business purposes. *Held:* The provisions of the policy are not ambiguous, and the policy does not cover the accidental injury resulting in death while insured was riding in the truck, and the fact that the truck was being used for passenger purposes cannot change the nature of the vehicle or the terms of the policy limiting liability to accidental injury or death while insured is riding in a passenger automobile. *Taft v. Casualty Co.*, 507.

**§ 43. Construction of Policy as to Risks Covered and Property Insured.**

Plaintiff insured testified that the truck which was covered by the policy of liability and property damage insurance had been repaired by having a second-hand motor installed in place of the original motor in the truck, and a part of the cab replaced with second-hand parts, but that the truck involved in the accident was the same truck which was insured, although the serial numbers on the engine and cab, as set out in the policy, were not the same.

INSURANCE—*Continued.*

*Held:* The serial numbers on the engine and cab as set out in the policy were solely for the purpose of identification, and the question of the identity of the truck as the truck insured was a question for the jury under plaintiff's evidence. *Anderson v. Ins. Co.*, 23.

**§ 45. Notice and Proof of Accident or Claim.**

The truck covered by a policy of liability and property damage insurance was repaired by having the motor and parts of the cab replaced by second-hand motor and cab parts, so that the serial numbers of the motor and cab were not the same as those set out in the policy. The truck was involved in a collision and notice thereof was sent insurer in less than 17 days, and notice of suit by the injured third party was given insurer immediately and before the time for answering expired. Insurer denied liability on the ground that the truck involved in the collision was not covered by the policy. *Held:* Although denial of liability was a waiver of notice, notice was given within a reasonable time, and the notice that a truck insured under the policy was involved in a collision was sufficient under the terms of the policy. *Anderson v. Ins. Co.*, 23.

**§ 48. Rights of Person Injured or Damaged as Against Insurer.**

Lienholder on truck damaged by third person *held* not entitled to enforce payment against third person's insurer. *Mercer v. Casualty Co.*, 288.

**§ 51. Payment and Subrogation.**

The right to contribution among joint tort-feasors exists solely by provision of statute, C. S., 618, and an insurer of one joint tort-feasor paying the judgment recovered against both joint tort-feasors is not entitled to equitable subrogation as against the insurer of the other tort-feasor, there being no relation between the tort-feasors outside the provision of the statute upon which the doctrine of equitable subrogation can be based, and the insurers of the tort-feasors not coming within the provision of the statute in regard to contribution. *Casualty Co. v. Guaranty Co.*, 13.

**§ 55. Construction of Policy as to Losses Covered.**

Findings that persons entered insured's store by the rear door with a master key but that they first prized the screen doors apart with some instrument leaving visible marks of force and violence on the doors, *is held* to sustain judgment that the store was burglariously entered within the terms of the burglary insurance policy sued on. *Stamey's, Inc., v. Indemnity Co.*, 293.

INTOXICATING LIQUOR.

**§ 4c. Possession of Husband or Wife.**

Where the husband, with full knowledge, permits his wife to possess intoxicating liquor on the premises for the purpose of sale, the husband is equally guilty with the wife. *S. v. Rigsbee*, 128.

**§ 9e. Instructions.**

The instruction of the court upon the presumption from the possession of more than one gallon of whiskey *held* without error. *S. v. House*, 470.

JUDGES.

**§ 2a. Regular Judges.**

The resident judge of a district, when not holding court in the county in his district in which the cause is pending, has no jurisdiction to hear an appeal from the clerk refusing defendant's motion for change of venue on the ground of the residence of the parties, and where the record does not show that the judge was holding court in the county the cause will be remanded for determination by a judge holding court. *Howard v. Coach Co.*, 329.

## JUDGMENTS.

**I. Judgments by Consent**
1. Nature and Essentials
4. Attack and Setting Aside
**II. Judgments by Confession**
5. Nature and Essentials
**VI. Judgments on Trial of Issues or Hearing of Motions**
17. Form and Requisites
d. Process and Notice
**VIII. Validity, Attack, and Setting Aside**
22. Procedure: Collateral and Direct Attack
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**IX. Conclusiveness of Judgments**
29. Parties Concluded
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32. Matters within Scope of Judgment or Pleadings in Former Action
33. Judgments as of Nonsuit
**XI. Assignment**
37. Rights and Remedies of Assignee
**XII. Actions on Judgments**
40. Actions on Foreign Judgments

**§ 1. Nature and Essentials of Consent Judgments.**

A consent judgment is a contract of the parties recorded with the sanction and permission of the court, and should be construed and dealt with as if the parties had entered into a written contract embodying the terms of the judgment. *Cason v. Shute*, 195.

Where the pleadings admit all material facts, a judgment thereon rendered by the court in a hearing by consent is not a consent judgment, since the judgment adjudicates the legal rights of the parties upon the facts. *Mitchell v. Mitchell*, 308.

**§ 4. Attack of and Setting Aside Consent Judgments.**

An attorney employed to defend an action may not enter a consent judgment therein without special authority, nor may an agent authorized to look after and handle the litigation give the attorney employed by him for his principal authority to enter a consent judgment, and where the court finds that a party did not consent to the judgment which was entered by consent of her agent authorized to handle the litigation, it is error for the court to deny the party's motion, aptly made, to set aside the judgment. *Morgan v. Hood, Comr.*, 91.

The procedure to attack a consent judgment on the ground that the party did not in fact consent thereto, and to recall execution issued thereon is by motion in the cause. *Cason v. Shute*, 195.

A judgment entered upon solemn consent of the parties cannot be changed or altered without the consent of the parties to it, or set aside except upon proper allegation and proof and a finding of the court that it was obtained by fraud or mutual mistake, or that consent was not in fact given, the burden being on the party attacking the judgment. *Boucher v. Trust Co.*, 377.

The proper procedure to set aside a consent judgment as to a stipulated item on the ground that such item was not included in the settlement, and was not, therefore, consented to by the parties, is by motion in the cause. *Ibid.*

**§ 5. Nature and Essentials of Judgment by Confession.**

A judgment by confession in favor of creditors against a husband and wife is valid if taken in conformity with C. S., 623, 624, 625, and the private examination of the wife is not necessary, the statute, C. S., 2515, being applicable only to contracts between husband and wife, and the wife being *sui juris* and having capacity to make the contract sued on, C. S., 2507. *Davis v. Cockman*, 630.

**§ 17d. Process and Notice.**

A judgment in a special proceeding rendered less than ten days after service of summons is irregular, C. S., 753, but not void, and the judgment may not be attacked collaterally, but only by motion in the cause. *Nall v. McConnell*, 258.

JUDGMENTS—*Continued.*

A summons in a proceeding for the appointment of a substitute trustee which commands the trustor to appear and answer the petition of the *cestui que trust* and show cause why a trustee should not be appointed in the stead of the original trustee in the deed of trust referred to in the petition filed, *is held* to give full notice to the trustor and to sufficiently comply with the statutory provision that the summons must state in substance that if defendant fails to answer, plaintiff would apply to the court for the relief demanded in the complaint, N. C. Code, 476, the petition filed being accessible to the trustor if she desired more information, and the trustor's contention that the judgment appointing the substitute trustee was void for failure of the summons to give the requisite notice is untenable. *Ibid.*

**§ 22. Procedure: Collateral and Direct Attack.**

A judgment against a party who has not been brought into court in some way sanctioned by law, or who has not made a voluntary appearance, is void and may be treated as a nullity without any direct proceeding to vacate it. *Downing v. White*, 40.

Action was brought by a creditor to set aside a deed from the debtor to his daughter for fraud. All papers in the action were lost except the judgment setting aside the conveyance, and the judgment did not disclose that the daughter was a party to the action. The daughter instituted this action to set aside the judgment as a cloud upon her title, and introduced testimony that she had never been served with summons in the action to set aside the conveyance to her. *Held:* The record as constituted fails to disclose that the daughter was a party to the action, and therefore she may attack the judgment by independent action, although if the papers in the action should be found and should disclose on their face that she was served with summons in the action, her sole remedy would be by motion in the cause to establish the fact of nonservice or "false return." *Ibid.*

A judgment in a special proceeding rendered less than ten days after service of summons is irregular, C. S., 753, but not void, and the judgment may not be attacked collaterally, but only by motion in the cause. *Nall v. McConnell*, 258.

An order of abatement is improperly set aside upon motion in the cause even if the order is erroneous if it were entered in accord with the course and practice of the court, the sole remedy against an erroneous judgment being by appeal or *certiorari*. *Dail v. Hawkins*, 283.

A judgment rendered in accordance with the decision of the court on the issue of law raised by the pleadings in an action in which all persons having an interest in the subject matter of the suit are made parties and all infant defendants are represented by a guardian *ad litem*, who files answer denying plaintiff's right to the relief sought, may be erroneous, but is not void and may not be collaterally attacked by the infant defendants. *Smathers v. Ins. Co.*, 345.

**§ 23. For Surprise, Inadvertence, and Excusable Neglect.**

Presence of counsel for a party when a plea is heard precludes such party from asserting excusable neglect upon his motion to set aside the court's order entered upon the plea. C. S., 600. *Dail v. Hawkins*, 283.

A party moving to set aside a judgment for surprise, excusable neglect, etc., C. S., 600, must allege facts in her affidavit showing a meritorious defense, and a mere allegation of nonliability and that she has a meritorious defense is insufficient. *Hooks v. Neighbors*, 382.

Where it appears that a party was in the courtroom at the time the court announced that motions in his case would be heard the following day, his

JUDGMENTS—*Continued.*

motion to set aside the order made on the day stipulated on the ground of excusable neglect is properly denied. C. S., 600. *Abernethy v. Trust Co.*, 450.

**§ 25. Irregular Judgments.**

An irregular judgment is one entered contrary to the course and practice of the court. *Dail v. Hawkins*, 283.

Where the court hears a cause by consent and renders judgment upon the pleadings, all material facts being admitted therein, a motion to set aside on the ground of irregularity is properly denied, an irregular judgment being one rendered contrary to the course and practice of the court. *Mitchell v. Mitchell*, 308.

Judgment entered in accordance with decision of court on issue raised by pleadings may be erroneous, but is not irregular or void. *Smathers v. Ins. Co.*, 345.

**§ 26. Want of Jurisdiction.**

Where the record does not disclose that a person whose vested rights were involved in the action was made a party thereto, such person attacking the judgment on the ground that she was not a party to the action, has the burden of overcoming the *prima facie* presumption of jurisdiction arising from the rendition of the judgment. *Downing v. White*, 40.

**§ 27. Erroneous Judgments.**

An erroneous judgment is one entered contrary to law. *Dail v. Hawkins*, 283.

**§ 28. Judgments on Substituted Service.**

A judgment by default final rendered upon service of summons by publication may be set aside upon proper affidavit of defendant filed within the prescribed time, showing "good cause" and a meritorious defense. C. S., 492. *Blankenship v. DeCasco*, 290.

**§ 29. Parties Concluded.**

Only heirs who were parties are concluded by judgment for sale of land to pay superior liens. *Mitchell v. Mitchell*, 308.

Parties who are *sui juris* and file answer admitting that plaintiff is entitled to the relief sought are concluded by a consent judgment entered in the cause against them in favor of plaintiff. *Smathers v. Ins. Co.*, 345.

Parties *sui juris* who file answer denying plaintiff's right to recover are concluded by a judgment on the issue entered in the cause adverse to their contentions from which they do not appeal. *Ibid.*

Infants represented by a guardian *ad litem* who files answer raising the issue of plaintiff's right to the relief sought are concluded by a valid judgment entered in the cause adverse to them, even though the judgment is erroneous, in the absence of an appeal. *Ibid.*

**§ 32. Matters Within Scope of Judgment or Pleadings in Former Action.**

Consent judgment, by its terms, *held* to include in the settlement item sought to be litigated in this action, and consent judgment bars plaintiff from maintaining this action. *Boucher v. Ins. Co.*, 376.

**§ 33. Judgments as of Nonsuit.**

Where the record supports the findings of the court that the allegations and evidence are substantially identical with those of a prior action nonsuited, and that the merits of the two causes are identical, judgment that the prior action constituted *res adjudicata* and dismissing the second action is proper. C. S., 415. *Ingle v. Cassady*, 287.

**§ 37. Rights and Remedies of Assignee.**

The assignment of a judgment on an assessment of the statutory liability on bank stock does not entitle the assignee to subject another to liability

JUDGMENTS—*Continued.*

thereon on the ground that such other person was the real or beneficial owner of the stock. *Hood, Comr., v. Realty Co.*, 582.

**§ 40. Actions on Foreign Judgments.**

In an action on a judgment of another state in which defendant insurance company had been doing business at the time of the institution of the action, the recitation in the judgment that process had been served on defendant by service on the insurance commissioner of that state in accordance with a statute of the state, without evidence to controvert such service, is conclusive, defendant being precluded from showing its own violation of the statute requiring it to constitute the insurance commissioner its process agent as a condition precedent to doing business in that state. *Dansby v. Ins. Co.*, 120.

LANDLORD AND TENANT.

**§ 18a. Termination or Cancellation for Failure to Pay Rent.**

Acceptance of rents after due dates *held* not a waiver by the landlord of his right under the terms of the lease to declare the lease void for lessee's failure to pay promptly the rent for a subsequent month. *Tucker v. Arrowood*, 118.

**§ 18b. Tender of Rent Prior to Judgment.**

Where the lease provides that the landlord shall have the option to declare the lease void upon failure of lessee to pay rent when due, and waives notice to vacate, lessee may not prevent forfeiture by tendering rents due upon the trial, C. S., 2372, nor claim the benefit of C. S., 2343. *Tucker v. Arrowood*, 118.

LIBEL AND SLANDER.

**§ 2. Words Actionable Per Se.**

The rule determining whether words used in a libel are actionable *per se* is different from the rule applicable to actions for slander, and libelous words are actionable *per se* when they subject a person to disgrace, ridicule, odium, or contempt in the estimation of friends and acquaintances or the public, and it is not necessary that they impute a crime. *Davis v. Retail Stores*, 551.

A letter imputing that plaintiff had wrongfully removed merchandise not belonging to him from the State in violation of a criminal statute, and stating that if payment were not immediately made defendants would assume that the violation of the statute was intentional and would turn the matter over to the authorities for action prescribed by law, *is held* libelous and actionable without averment of special damages. *Ibid.*

**§ 4. Publication.**

The complaint alleged that defendants mailed to plaintiff, then seventeen years of age, a letter containing language which, on account of plaintiff's inexperience and youth, would cause him to believe he was threatened with criminal prosecution, that plaintiff showed the letter to others and that defendants knew that plaintiff, by reason of his youth, and fear which the letter would engender, would show the letter to others for advice as a natural and probable result of defendants' wrong. *Held:* The complaint sufficiently alleges that defendants were responsible for the publication of the libelous matter complained of. *Davis v. Retail Stores*, 551.

**§ 13. Verdict and Judgment.**

Verdict that plaintiff was slandered but suffered no substantial damage entitles plaintiff to costs. *Wolfe v. Montgomery Ward & Co.*, 295.

## LIMITATION OF ACTIONS.

**§ 1. Nature and Construction in General.**

Sums for which creditor must account should be applied to items barred by statute of limitations. *Doe v. Trust Co.*, 319.

**§ 2a. Actions Barred in Ten Years.**

An action on a judgment by confession is not barred until ten years after its rendition. C. S., 437. *Davis v. Cockman*, 630.

**§ 3. Accrual of Right of Action.**

A cause of action does not accrue until the injured party is at liberty to sue, and where a contract obligates a party to repurchase stock upon demand after a stated period, a cause of action thereon does not accrue until the seller has a right to demand repurchase and the demand made in accordance therewith is refused by the seller. *Aydlett v. Major & Loomis Co.*, 548.

**§ 10. Death and Administration.**

An action against an administrator on a subrogated claim for funeral expenses and to recover a legacy is not completely barred by any statute of limitations, even when claim is not filed within twelve months from notice, when plaintiff shows undistributed assets of the estate. C. S., 101. *Jackson v. Thomas*, 634.

**§ 12a. Part Payment.**

The application by the payee bank of the checking deposit of the guarantor of payment of the note is a part payment repelling the bar of the statute of limitations. *Munday v. Bank*, 276.

## MANDAMUS.

**§ 1. Nature and Grounds of Writ in General.**

*Mandamus* will lie only to compel the performance of a clear legal duty at the instance of a party having a legal right to demand its performance. *School District v. Alamance County*, 213.

*Mandamus* will lie only to compel the performance of a legal duty of defendant at the instance of a party having a clear legal right to demand its performance, and where the party sought to be coerced has no power or duty to perform the act, his demurrer is properly sustained. *Reed v. Farmer*, 249.

## MASTER AND SERVANT.

**IV. Liability for Negligent Injury of Third Persons**
20. Liability of Servant
21. Liability of Master
a. "Employees" within Meaning of Rule
b. Course of Employment, Scope of Authority and Furtherance of Superior's Business
23. Negligence or Wrongful Act of Servant
**V. Federal Employers' Liability Act**
27. Negligence of Railroad Employer
**VII. Workmen's Compensation Act**
37. Nature and Construction of Compensation Act in General
42. Change of Condition and Review of Award by the Commission
46. The Industrial Commission
d. Procedure and Administration of the Act in General
47. Filing of Claim
55. Appeal and Review of Award
c. Notice and Docketing Appeal
d. Matters Reviewable

**§ 20. Liability of Servant for Injuries to Third Persons.**

The omission of an employee, while acting in the scope of his employment, to perform a legal duty owed to a third person, ordinarily imposes liability on the employee as well as the employer. *Clevenger v. Grover*, 240.

**§ 21a. "Employees" Within Meaning of Rule.**

A company operating a union station under contract with several railroad companies and permitting "red cap" porters to call trains and direct passengers for tips, may not escape liability for acts of the porters in the scope of their apparent authority on the ground that they are volunteers, since the

station company uses such porters to discharge its contractual obligations to the railroad companies and their passengers. *Cole v. R. R.*, 591.

**§ 21b. Course of Employment, Scope of Authority, and Furtherance of Superior's Business.** (Of driver of employer's car see Automobiles § 24b; of agents see Principal and Agent § 7.)

A master or principal is liable for torts committed by his servant or agent in the scope of his employment and in furtherance of the superior's business, or which are authorized or ratified by the superior, but the master or principal is not liable to third persons for wrongful acts of the servant or agent committed outside the legitimate scope of the employment and without specific authority from or ratification by the superior. *Parrish v. Mfg. Co.*, 7.

Evidence that a station company permitted porters to work upon the premises for tips, and that the porters customarily called trains and directed passengers to and from their trains, and that a porter who had called plaintiff's train instructed plaintiff that her train was standing on a certain track, *is held* sufficient to be submitted to the jury on the question of whether the porter was acting within the apparent scope of his authority in giving the instruction. *Cole v. R. R.*, 591.

Doubt as to whether a servant was acting within the scope of his authority will be resolved in favor of the person injured by the servant's act, so as to require submission of the question to the jury, since the master puts the servant in a position to do the act. *Ibid.*

In this action to recover for an assault, defendant employers' motions to nonsuit *held* properly granted for that the evidence disclosed that the wrongdoer was not about the employers' business and was not acting within the scope of his employment in making the assault. *Smith v. Cathey*, 747.

**§ 23. Negligence or Wrongful Act of Servant.**

The evidence tended to show that two trains were standing in a union station, that the warning of "all aboard" had been given for one of them, that a "red cap" porter standing in the station heard the signals and knew that the train attendants had boarded the train, and that it was expected to start momentarily, that plaintiff, coming into the station after the starting signals had been given with a ticket for the train not then ready to start, was erroneously instructed by the porter that the other train was hers, and that as she attempted to board the other train, it started and threw her, to her injury. *Held:* The evidence permits the inference that the porter, with knowledge of the circumstances, should have foreseen that injury might result to plaintiff, and the question of whether his failure to warn plaintiff of the danger was the proximate cause of plaintiff's injury is for the jury under the evidence. *Cole v. R. R.*, 591.

**§ 27. Negligence of Railroad Employer.**

Evidence that an experienced fireman left the engine to perform his duties in interstate commerce while the engine was standing on a trestle over a creek, and fell and was drowned, *is held* not to disclose negligence on the part of the railroad company or the engineer, and their motions to nonsuit were properly granted. *Howell v. R. R.*, 297.

**§ 37. Nature and Construction of Compensation Act in General.**

Under the Workmen's Compensation Act the employer, in exchange for exclusive and limited liability under the act, N. C. Code, 8081 (r), consents to pay claims where no liability existed before, and the employee, in return for certainty and celerity in obtaining the compensation provided in the act, consents to give up trial by jury and the possibility of a larger recovery, and the act should be administered by the Industrial Commission to the end that

both the employer and employee, in view of their mutual concessions, shall receive the benefits and enjoy the protection of the act. *Winslow v. Carolina Conference Assn.*, 571.

**§ 42. Change of Condition and Review of Award by the Commission.**

Consent award accepted in full settlement of claim *held* to bar petition for review of award for changed condition. *Morgan v. Norwood*, 600.

**§ 46d. Procedure and Administration of the Act in General.**

The Industrial Commission has power to make rules governing the administration of the Compensation Act, and to construe and apply its rules. Compensation Act, section 54. *Winslow v. Carolina Conference Assn.*, 571.

**§ 47. Filing of Claim.**

The provision of the Compensation Act, N. C. Code, 8081 (ff), that claim for compensation must be filed with the Commission within one year from the accident is a condition precedent to the right of compensation and not a statute of limitation, and where claim has not been filed or the Commission has not acquired jurisdiction within the one-year period, the right to compensation is barred. *Winslow v. Carolina Conference Assn.*, 571.

**§ 55c. Notice and Docketing Appeal.**

Either party may appeal from the award of the Industrial Commission within thirty days from the date of the award or within thirty days from the receipt of notice of the award by registered mail, and where appellant causes notice of appeal to be served on the adverse parties within the thirty-day period, the notice and service are sufficient. N. C. Code, 8081 (ppp). *Winslow v. Carolina Conference Assn.*, 571.

An appeal from an award of the Industrial Commission may be docketed in the Superior Court at any time before or during the next ensuing regular term of the Superior Court. *Ibid.*

Statutory provisions with respect to appeals from judgments of justices of the peace do not control appeals from awards of the Industrial Commission. *Ibid.*

**§ 55d. Matters Reviewable.**

The construction and application of rules of administration of the Compensation Act, duly made and promulgated by the Industrial Commission in proceedings before it, ordinarily are final and conclusive and not subject to review by the courts on appeal. *Winslow v. Carolina Conference Assn.*, 571.

The findings of fact by the Industrial Commission in a proceeding before it are final and conclusive on appeal when supported by evidence, the review by the Superior Court being limited to matters of law appearing in the record as certified by the Commission. Compensation Act, section 60. *Ibid.*

The evidence tended to show that the employer did not give notice of the accident to the insurance carrier until more than eleven months after its occurrence, that the insurance carrier did not transmit said notice to the Industrial Commission until more than a year after the accident, and that claim for compensation was not filed with the Commission by the employee until some eighteen months after the accident. The Commission found as facts that the proceeding was not begun nor claim for compensation filed within the one-year period prescribed by the act, N. C. Code, 8081 (ff). On appeal, the Superior Court modified the findings and concluded as a matter of law that the filing of notice with the insurance carrier, under the rules of the Commission, constituted filing of the claim with the Commission. *Held:* The Superior Court was without authority to modify or change the findings of fact of the Commission, the construction and application of rules of administration by the Commission being ordinarily conclusive. *Ibid.*

## MONEY RECEIVED.

**§ 1. Nature and Essentials of Right of Action.**

An action for money had and received may be maintained whenever defendant has money in his hands which belongs to plaintiff, and which in equity and good conscience he ought to pay plaintiff, the money belonging to plaintiff having been secured by defendant without plaintiff's consent, or, if with his consent, without consideration. *Wilson v. Lee*, 434.

**§ 2. Pleadings and Evidence.**

Plaintiff alleged and offered supporting evidence that he had paid defendants a certain sum upon a modified agreement between plaintiff and defendants that defendants would recall an execution issued against plaintiff's father, that unknown to plaintiff the land had been sold under the execution at the time the money was paid, and the land bought in by defendants, that plaintiff paid the money in reliance on the prior agreement for the recall of the execution, and that the return of the money had been demanded and had been refused. *Held:* The action was for money had and received, plaintiff having received no consideration for the money paid over, and plaintiff having waived all other causes of action, and plaintiff's evidence, if believed by the jury, would entitle plaintiff to recover, and the granting of defendants' motion to nonsuit was error. *Wilson v. Lee*, 434.

## MONOPOLIES.

**§ 3. Rights and Remedies of Individuals.**

Plaintiffs, carriers by truck, instituted this action alleging that defendant railroad companies, pursuant to an agreement and conspiracy between them, had reduced rates for transporting gasoline and kerosene, between certain points in the State, intending later to restore them after competition had been removed, and charged lower rates to certain points in the State, where there was competition, than to other points, without sufficient reason, with intent to injure plaintiffs. Defendants demurred on the ground that the alleged acts were criminal offenses which could be inquired into only by prosecution by the Attorney-General. *Held:* The right of action for damages is expressly conferred by C. S., 2574, and defendants' demurrer was properly overruled. *Bennett v. R. R.*, 474.

An individual suing for damages caused by alleged monopolistic acts of defendants, C. S., 2563, 2574, must show a casual relation between the alleged violation of the monopoly statute and the injury, but where plaintiffs alleged unlawful acts in violation of the monopoly statute and injury resulting to them as a proximate cause of such acts, defendants' contention that the injury is *damnum absque injuria* is untenable. *Motor Service v. R. R.*, 210 N. C., 36, distinguished in that that action was for an injunction and based upon the Public Utilities Act, while this is an action for damages resulting from a violation of the statute against monoplies and trusts. C. S., 2574. *Ibid.*

## MORTGAGES.

**III. Construction and Operation**
13. Appointment and Tenure of Trustee
b. Substitute Trustees
**IV. Estates, Rights and Duties of Parties to the Instrument**
17. Mortgagees and Cestui Que Trustents
**VIII. Foreclosure**
30. Right to Foreclose and Defenses
a. In General
h. Receivership Pending Foreclosure
31. Foreclosure by Action
c. Pleadings
37. Disposition of Proceeds of Sale
39. Attack of Foreclosure
c. Waiver of Right to Attack Foreclosure and Estoppel
e. Actions for Damages
g. Purchasers from Purchaser at Foreclosure Sale
42. Title of Purchaser

MORTGAGES—*Continued.*

**§ 13b. Substitute Trustees.**

A trustee, duly substituted for the original trustee under the provisions of the deed of trust and the statute, may execute deed to the purchaser at a sale duly conducted by the original trustee. N. C. Code, 2583 (a). *Pendergrast v. Mortgage Co.*, 126.

Judgment appointing a substitute trustee entered less than ten days after service of summons upon the trustor is irregular, C. S., 753, but not void, and such irregularity will not support an action, instituted some four years after such substitution, to set aside the foreclosure sale conducted by the substitute trustee, the trustor's remedy to correct such irregularity being by motion in the cause and the right to complain being barred by laches. *Nall v. McConnell*, 258.

**§ 17. Mortgagees and Cestuis Que Trustents.**

Legal title to mortgaged lands, for the purposes of security, is vested in the mortgagee, and in the absence of an agreement to the contrary, certainly after default, the mortgagee is entitled to enter and hold the land until redeemed in order to protect his security, and to this end he may maintain an action in ejectment, even against the mortgagor, or an action in trespass *quare clausum fregit* against anyone tortiously injuring the land, or file suit in equity to restrain waste, such rights of action being based upon the mortgagee's interest in the land. *Bank v. Jones*, 317.

**§ 30a. Right to Foreclose and Defenses in General.**

Allegations of answer that mortgage was executed to avoid foreclosure of another mortgage *held* properly stricken out. *Ins. Co. v. Smathers*, 373.

Where a party liable for a debt secured by a deed of trust enters into a consent judgment with the *cestui* by which he is given a certain length of time to put the loan in good standing and in consideration of indulgences, agrees not to again restrain foreclosure if he should fail to make the payments called for in the agreement, he is bound by his agreement, and judgment denying him any further restraining order after the expiration of the time agreed without performance on his part is without error. *Sutton v. Bank*, 448.

**§ 30h. Receivership Pending Foreclosure.**

Cross action for damages for wrongful appointment of receiver may not be set up in action to foreclose. *Ins. Co. v. Smathers*, 373.

**§ 31c. Pleadings and Evidence.**

After the execution of the mortgage in question, the mortgagor conveyed an easement over the land giving defendant corporations the right to pond water thereon. After default, mortgagee instituted this suit to foreclose the mortgage and to recover from defendant corporations damages resulting to the land from the ponding of water thereon. *Held:* The actions against defendant corporations for tortious injury to the land could be maintained by plaintiff after default but prior to foreclosure, and the cause of action against them was properly joined with the suit against mortgagor for foreclosure. *Bank v. Jones*, 317.

**§ 37. Disposition of Proceeds of Sale.**

Plaintiff, the *cestui que trust*, instituted this action against the trustee, contending that the trustee had foreclosed the deed of trust and had failed to apply the proceeds of the sale to the satisfaction of the note secured by the instrument. *Held:* Plaintiff's action is for an accounting of the proceeds of sale, and not an action on the note, and defendant's contention that plaintiff could not maintain the action without introducing the note and deed of trust in evidence is untenable. *Gahagan v. Whitehurst*, 280.

MORTGAGES—*Continued.*

**§ 39c. Waiver of Right to Attack Foreclosure and Estoppel.**

Upon advertisement of the property for sale under the terms of the deed of trust securing the note in default, trustor requested and was granted forbearance. Upon a second advertisement, more than nine years thereafter, trustor instituted this action to restrain foreclosure on the ground that his brother, who had died subsequent to the first advertisement of the property, had executed the note and deed of trust in trustor's name without authority. *Held:* Trustor is estopped by his silence when he requested and accepted indulgence with knowledge of all the facts at the time his brother was living and the note was not barred by the statute of limitations, from asserting the alleged unauthorized execution of the instruments by his brother. *McNeely v. Walters*, 112.

Where,after the foreclosure of a deed of trust, the trustor leases the land from the *cestui*, who purchased same at the sale, and thereafter judgment is entered, unappealed from, ordering the trustor to surrender possession, the trustor is estopped from attacking the validity of the sale on the ground that it was conducted by an agent of the *cestui*, both by the lease and the judgment. *Bank v. Hardy*, 460.

**§ 39e. Actions for Damages.**

Evidence that after substantial payment of the debt secured by the deed of trust, the *cestui* took possession of the property and collected the rents and profits, with allegation that the rents were sufficient to pay the balance of the debt, and a demand for an accounting, *is held* sufficient to overrule the *cestui's* motion to nonsuit in the trustor's action for damages for wrongful foreclosure, although the intervention of the rights of innocent purchasers for value precludes trustor from setting aside the foreclosure. *Smitherman v. Bank*, 65.

**§ 39g. Purchasers from Purchaser at Foreclosure Sale.**

The complaint, as amended, alleged in substance that the property was bought at the foreclosure sale by the secretary and treasurer of the corporate mortgagee acting in such capacity as an agent of the mortgagee, that he shortly thereafter conveyed to the mortgagee, constituting in effect a purchase of the property by the corporate mortgagee at its own sale, and that defendant purchasers took deed directly from the corporate mortgagee with a recited consideration of ten dollars and other valuable considerations, and that defendant purchasers took with express or implied knowledge of the facts, since the facts were matters of public record. *Held:* Defendant purchasers' demurrer to the complaint should have been overruled, since the complaint is not wholly insufficient to allege a cause of action against them to set aside their deed, leaving the question of whether plaintiffs can establish the allegations with competent proof to be determined on the trial. *Council v. Bank*, 262.

**§ 42. Title of Purchaser.**

The owners of a building executed a deed of trust on same, "together with all engines, boilers, . . . all heating apparatus, . . . and all fixtures of every description belonging to the mortgagors." Thereafter a lessee of the *cestuis* bought and installed an Iron Fireman Stoker for use in connection with the heating plant. The deed of trust was foreclosed, the property being described in the identical terms used in the deed of trust. It was found as a fact that the stoker was complete in itself and could be removed without injury to the freehold, and plaintiff purchaser abandoned any contention that it was a fixture. *Held:* Since the stoker was not covered by the deed of trust and was not affixed to the realty, the lessee is entitled to remove same as against the grantee of the purchaser at the sale, nor is the lessee estopped to

MORTGAGES—*Continued.*

assert its claim by failing to assert title at the sale and give notice of its claim, since only property "belonging to said mortgagors" was sold under the foreclosure, and since it was found as a fact that no officer or agent of the lessee made any representation in regard to the ownership of the stoker. *Development Co. v. Bon Marche*, 272.

Purchaser at foreclosure takes title free from restrictions placed on property subsequent to mortgage. *Trust Co. v. Foster*, 331.

MUNICIPAL CORPORATIONS.

**IV. Torts of Municipal Corporations**
12. Exercise of Governmental and Corporate Powers
14. Defects or Obstructions in Streets or Sidewalks
17. Condition and Use of Public Buildings or other Public Places

**VIII. Public Improvements**
30. Power to Make Improvements
33. Validity, Appeal, and Attack of Assessments

**X. Fiscal Management and Debt**
42. Levy and Collection of Taxes
43. Application of Revenue

**§ 12. Exercise of Governmental and Corporate Powers.**

A municipality is not necessarily relieved of liability as a matter of law for negligence proximately causing injury in the maintenance of a public park, even if the maintenance of the park be a governmental function. *White v. Charlotte*, 186.

A municipality cannot avoid liability for injuries suffered by a caddy on its municipal golf course, as a result of its negligent failure to exercise reasonable care for his safety, on the ground that it owned and operated the golf course in the exercise of a governmental function. *Lowe v. Gastonia*, 564.

**§ 14. Defects or Obstructions in Streets or Sidewalks.**

In this action against a municipality to recover for injuries sustained by plaintiff in a fall caused by a defective condition in a sidewalk, defendant elicited on cross-examination of plaintiff's witnesses evidence that the defect could be seen from the street while riding in an automobile, and that a person could step over the defective place. Plaintiff introduced evidence that the defect could not have been seen by her in the dark. *Held:* The evidence was sufficiently equivocal and contradictory to require the submission of an issue of contributory negligence to the jury. *Absher v. Raleigh*, 567.

In this action against a municipality to recover for injuries sustained by plaintiff in a fall, on a dark night, over timbers obstructing a sidewalk of the town, the evidence that the town had placed the timbers there in working its adjacent street, and that the timbers had been in such dangerous position for a length of time sufficient to give the town implied notice thereof, *is held* sufficient to be submitted to the jury, and defendant town's motion to nonsuit on the ground that the evidence did not show that it had either actual or implied notice of the condition was properly refused. *Denham v. Whiteville*, 618.

**§ 17. Condition and Use of Public Buildings or Other Public Places.**

The evidence tended to show that plaintiff's intestate was fatally injured in a fall from a swing in a municipal park, that intestate and a companion were standing on the seat of the swing "pumping," so that the swing was caused to move rapidly from side to side, that the swing was so constructed that the links in the chain were loose and would slip and cause the swing to jerk when the seat had reached the maximum height on each side, and that while so swinging intestate was thrown or fell therefrom to her fatal injury. *Held:* The evidence fails to show whether intestate's fall was the result of a jerk caused by the slipping of the chain of the swing, or was the result of some

inadvertence on the part of intestate or her companion, and defendant municipality's motion to nonsuit was properly granted, since the cause of the fatal accident is a matter of conjecture on the evidence. *White v. Charlotte*, 186.

A caddy on a municipal golf course, offering his services to the players on the course, is at least an invitee, and the city is liable for injuries resulting from its failure to exercise reasonable care for his safety in maintaining a defective bridge across a creek on the course. *Lowe v. Gastonia*, 564.

**§ 30. Power to Make Improvements.**

Since C. S., 2791, empowers a city to purchase land for establishing or widening necessary streets either "within or outside the city," and to control and manage same, a city acquiring by dedication a street lying just outside its limits and connected with the streets within its limits, has the power to pave such street so acquired by it, and its paving of the street upon petition of the owners or abutting property is not *ultra vires* the city. *High Point v. Clark*, 607.

**§ 33. Validity, Appeal, and Attack of Assessments.**

The owners of land, in developing same for residential purposes, plotted streets for the development and dedicated them to the city, filed petition for improvement of the streets with total cost to be assessed against the abutting property, and in proceedings in substantial conformity with C. S., ch. 56, Art. 9, the city levied assessments and made the improvements. The owners listed the land for taxation by the city, did not appeal from confirmation of the assessment role, and both the owners and the city thought the land lay within the city limits, until a survey some years after the confirmation of the assessment role disclosed that one of the streets ran outside of and parallel to the city limits. *Held:* The owners of the land, by petitioning for the improvements and accepting the benefits thereof are estopped to deny the validity of the assessments, the paving of the street outside the city limits not being *ultra vires* the city. *High Point v. Clark*, 607.

**§ 42. Levy and Collection of Taxes.** (Constitutional requirements and restrictions see Taxation.)

Statute prohibiting municipal peddlers' tax *held* not to preclude municipal privilege tax upon bakeries. *S. v. Bridgers*, 235.

**§ 43. Application of Revenue.**

The purchase of lands by a city for a municipal airport is for a public purpose, ch. 87, Public Laws of 1929, and where a city has made such purchase from surplus funds in its treasury, its purchase will not be held invalid as being *ultra vires*, even though a part of the surplus funds used to pay the purchase price was derived from *ad valorem* taxes, the executed contract not offending the provisions of Art. VII, sec. 7. *Gosnick v. Durham*, 687.

The judgment of the Superior Court sustained the purchase of land by defendant city for an airport, found that funds which the city proposed to spend for improvement of the airport were surplus funds derived from sources other than *ad valorem* taxes, and authorized the expenditure of such funds for that purpose, but held that the city was without power to expend money obtained from taxes for the airport unless authorized by a vote of the people. On plaintiff taxpayer's appeal, the executed contract of purchase was upheld, but it was determined that the finding that proposed expenditures for improvement were available from sources other than *ad valorem* taxes was not supported by the evidence, and the other part of the judgment being unexcepted to, the judgment as modified is affirmed. *Ibid.*

## NEGLIGENCE.

(Negligence in driving see Automobiles; negligence of person charged with particular duties or in particular relationships see Master and Servant, Railroads, Electricity, Municipal Corporations.)

**I. Acts and Omissions Constituting Negligence**
1. In General
4. Condition and Use of Lands and Buildings
b. Invitees and Licensees
d. Attractive Nuisance
**II. Proximate Cause**
6. Concurring Negligence
7. Intervening Negligence
10. Last Clear Chance
**III. Contributory Negligence**
11. Of Persons Injured in General
12. Contributory Negligence of Minors
**IV. Actions**
19. Sufficiency of Evidence and Nonsuit
a. On Issue of Negligence
b. On Issue of Contributory Negligence
c. Res Ipsa Loquitur
20. Instructions

### § 1. Acts and Omissions Constituting Negligence in General.

Negligence is the failure to exercise that degree of care for others' safety which an ordinarily prudent man in like circumstances would exercise, and is actionable when such failure directly and proximately causes injury, and injury or harm might have been reasonably foreseen under the circumstances. *Cole v. R. R.*, 591.

Negligence is the failure to exercise that degree of care for others' safety which a reasonably prudent man, under like circumstances, would exercise, and may consist either of acts of commission or omission. *Diamond v. Service Stores*, 632.

### § 4b. Invitees and Licensees.

This action was instituted by a welder to recover for injuries sustained when his acetylene torch heated and exploded a container of alcohol on defendant's premises, where he had been sent by his employer in response to a call by defendant. *Held:* The evidence should have been submitted to the jury on the questions of whether defendant was negligent in failing to warn plaintiff of the presence of inflammable material, and whether plaintiff was guilty of contributory negligence. *Diamond v. Service Stores*, 632.

### § 4d. Attractive Nuisance.

The complaint alleged that one defendant owned and the other defendant had control as realty agent of a certain house and lot within the city limits, that the house had become dilapidated and had been condemned as unfit for occupation by the city, that defendants knew of its condition, and that children were attracted thereto and were in the habit of playing on the lot and in the house, that plaintiff, a child of seven years, while playing with other children on the premises, climbed up the inside wall to the ceiling, and out over the ceiling into the loft, and that the ceiling was rotten and gave way, causing plaintiff to fall to his injury. Defendants demurred to the complaint. *Held:* The demurrers should have been sustained, since the complaint fails to state facts from which it can be held that defendants were under duty to foresee that a child would climb up the inside wall of the house and then crawl out on the ceiling under the roof, and the doctrine of attractive nuisance cannot be extended to apply to injuries which could not have been reasonably foreseen. *Prather v. Bank*, 98.

### § 6. Concurring Negligence.

Passenger on truck may hold all parties liable whose negligence was concurring proximate cause of injury. *Harper v. R. R.*, 398.

### § 7. Intervening Negligence.

Where the passive negligence of defendant would not have resulted in injury except for the intervening active negligence of a responsible third party, the active negligence of such third party insulates the negligence of

NEGLIGENCE—*Continued.*

defendant, and defendant's negligence will not be held a proximate cause of the injury. *Smith v. Sink*, 725.

**§ 10. Last Clear Chance.**

Doctrine of last clear chance *held* inapplicable to evidence showing contributory negligence continuing to moment of accident, and that defendants could not have avoided the injury. *Lemings v. R. R.*, 499.

**§ 11. Of Persons Injured in General.**

Contributory negligence, *ex vi termini*, implies that it need not be the sole proximate cause of the injury, and bars recovery if it concurs with the negligence of defendant in proximately causing the injury. *Absher v. Raleigh*, 567.

**§ 12. Contributory Negligence of Minors.**

A minor is required to exercise that degree of care for his own safety which a child of his years, capacity, and experience may be expected to possess, and unless he is wholly irresponsible, the question is usually one for the jury. *Boykin v. R. R.*, 113.

A four-year-old boy is conclusively presumed to be incapable of negligence, primary or contributory. *Kelly v. Hunsucker*, 153.

Evidence *held* properly submitted to jury on issue of contributory negligence of eight and one-half year intestate, struck by car while skating in street after dark, under instruction correctly charging that intestate was not held to same degree of care as adult, but was required to exercise care and prudence according to her maturity and capacity. *Leach v. Varley*, 207.

**§ 19a. On Issue of Negligence.**

Where evidence leaves cause of injury in conjecture, nonsuit is proper. *White v. Charlotte*, 186.

In negligence cases a demurrer to the evidence may be sustained only for insufficiency of plaintiff's evidence, considered in the light most favorable to him, to show actionable negligence on the part of defendant, or for that the evidence shows that the injury was independently caused by an outside agency or responsible third person, or for that plaintiff's own evidence establishes contributory negligence. *Smith v. Sink*, 725.

**§ 19b. On Issue of Contributory Negligence.**

A motion to nonsuit on the ground of contributory negligence may be allowed only when plaintiff's own evidence establishes contributory negligence and there is no conflict in the evidence as to the pertinent facts. C. S., 567. *Hayes v. Tel. Co.*, 192; *Smith v. Sink*, 725.

Whether the evidence on the issue of contributory negligence is conflicting or equivocal, the issue must be submitted to the jury. *Absher v. Raleigh*, 567.

**§ 19c. Res Ipsa Loquitur.**

Plaintiff's evidence tended to show that she sent her new dress to the cleaners, that after it was cleaned she tried it on at the cleaning plant, and then put it away, that she got the dress out about a week later and wore it to a party, and that the next morning she discovered brown spots on the dress which completely ruined it. *Held:* In plaintiff's action against the cleaners for alleged negligence, the doctrine of *res ipsa loquitur* is not applicable, since more than one inference can be drawn from the facts established by the evidence as to the cause of the injury, and since proof of the occurrence leaves the matter resting only in conjecture. *Wilson v. Perkins*, 110.

**§ 20. Instructions.**

The court is not required to charge the jury on the question of last clear chance when there is no pleading or evidence entitling plaintiff to the issue, and no request for instructions or tender on the question. *Leach v. Varley*, 207.

NUISANCE.

**§ 2. Noise and Disturbance.**

The evidence disclosed that defendant operated a gold mine on property inside the corporate limits of a city, and that plaintiffs owned adjacent property, also within the city limits. The court instructed the jury, in effect, that the operation of the mine by defendant would not constitute a nuisance unless its manner of operation occasioned more noise, lights, and vibration than would result from the operation of other mines of like kind and character operated as a reasonably prudent miner would operate them under like circumstances. *Held:* Construing the charge contextually as a whole in the light of the evidence, an objection that it failed to charge that the location of the mine as well as the manner of its operation should be considered in determining whether it was a nuisance, is untenable. *Mearborn v. Rudisill Mine, Inc.*, 544.

PARTIES.

**§ 1. Necessary Parties Plaintiff.** (Defense that plaintiff is not real party in interest may not be taken advantage of by demurrer see Pleadings § 18.)

The requirement that an action must be maintained by the real party in interest, C. S., 446, means some interest in the subject matter of the litigation and not merely an interest in the action. *Rental Co. v. Justice*, 54.

PARTITION.

**§ 5. Hearings and Decree.**

Property may be sold for partition where actual partition cannot be had with justice to all the parties, but the burden is on the party seeking sale for partition to show necessity therefor, N. C. Code, 3233, and where sale for partition is decreed by the court without hearing evidence or finding facts to show the right to sell, the cause will be remanded. *Wolfe v. Galloway*, 361.

**§ 11. Operation and Effect of Partition by Parties.**

The rule that partition among tenants in common merely allots the land in severalty without creating any title, does not apply to prevent a deed from one tenant to the other from operating to estop the grantor tenant from setting up title to the property later acquired by transfer of a bid at the foreclosure sale of a mortgage executed on the property by both tenants, the proceeds of the loan secured by the mortgage having been used by both tenants, and the deed from the grantor tenant expressly warranting that the grantor would warrant and defend the title against the lawful claims of all persons. *Kelly v. Davis*, 1.

Where tenants in common go upon the land and effect a partition by building a dividing wall with a staircase in the middle which both thereafter use in getting to their respective properties, and exchange deeds for the property as thus divided, the center of the partition wall as thus established is the dividing line of the properties binding upon the tenants and their privies, and will govern as against calls in the deeds giving one tenant the wall and stairway. *Realty Co. v. Boren*, 446.

PAYMENT.

**§ 8. Failure of Debtor to Direct Application and Application by Creditor.**

Where the creditor of a debtor owing two accounts collects the rents from the separate properties securing the debts, and renders statement to the debtor showing application of part of the rents from one property to the payment of the amount delinquent upon the debt secured by the other property, the debtor must protest such application within a reasonable time from receipt of the

PAYMENT—*Continued.*

statement, even if such application is contrary to the agreement between them for the application of rents, and where the debtor fails to make such protest she is estopped from thereafter asserting that the application was wrongful in her effort to save one of the properties after both loans had become delinquent. *Davis v. Montgomery*, 322.

PHYSICIANS AND SURGEONS.

**§ 15g. Damages.**

In this action to recover of a physician for alleged negligence in diagnosis and treatment of plaintiff's shoulder, which had been injured by a run-away mule, the charge of the court *is held* for error in inadvertently failing to confine the *quantum* of damages to the suffering and injury resulting from defendant's alleged negligence in diagnosis and treatment, and in embracing in the *quantum* of damages recoverable the suffering and injury caused by the injury inflicted by the run-away mule, plaintiff being entitled to recover, if at all, only for those injuries which proximately and naturally resulted from the wrong complained of. *Payne v. Stanton*, 43.

PLEADINGS.

**I. The Complaint**
2. Joinder of Clauses
**II. The Answer**
10. Counterclaims and Set-Offs
**IV. Demurrer**
15. For Failure of Complaint to State Cause of Action
16. For Misjoinder of Parties and Causes
18. Defects Appearing on Face of Pleading and "Speaking Demurrers"
20. Office and Effect of Demurrer
**V. Amendment of Pleadings**
22. Amendment During Trial
**VI. Issues, Proof and Variance**
25. Question and Issues Raised by Pleadings
**VII. Motions Relating to Pleadings**
27. Motions for Bill of Particulars or that Allegations be Made more Definite
29. Motions to Strike Out (Review of judgments on, see Appeal and Error s 40b)

**§ 2. Joinder of Causes.**

After default, mortgagee may join suit for foreclosure with action to recover for tortious injury to land. *Bank v. Jones*, 317.

Complaint may join causes of action arising out of same transaction or series of transactions forming one course of dealing. *Barkley v. Realty Co.*, 540; *Leach v. Page*, 622.

Actions against joint judgment debtors to set aside their respective deeds as fraudulent as to creditor, *held* properly joined. *Barkley v. Realty Co.*, 540.

**§ 10. Counterclaims and Set-Offs.**

In this action to foreclose a deed of trust a receiver was appointed to hold the rents and profits from the property pending the sale in accordance with plaintiff's prayer. Defendant set up a cross action in his answer alleging that the appointment of the receiver was illegal and void, and resulted in damage to defendant in injuring him in his character, reputation, and financial standing. *Held:* The cross action was in tort for abuse of process and could not be set up in plaintiff's action to foreclose, and judgment sustaining plaintiff's demurrer to the cross action is without error. *Ins. Co. v. Smathers*, 373.

**§ 15. For Failure of Complaint to State Cause of Action.**

Upon demurrer the complaint must be liberally construed with a view to substantial justice between the parties, C. S., 535, and the demurrer should be overruled unless the complaint is wholly insufficient to state a cause of action, taking its allegations to be true and adopting every intendment in behalf of the pleader. *Council v. Bank*, 262.

A demurrer on the ground that the complaint fails to state a cause of action will not be sustained unless the complaint is wholly insufficient. *Bennett v. R. R.*, 474.

**§ 16. For Misjoinder of Parties and Causes.**

If the causes of action united in the same complaint are not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, the complaint is not multifarious, C. S., 507, and a demurrer thereto on the ground of misjoinder of causes should be overruled, C. S., 511 (5). *Barkley v. Realty Co.*, 540.

The widow and heirs instituted this action against the administrator and trustee of the estate and the corporate surety on his bond and the receivers of the corporate surety, alleging that the administrator had invested funds of the estate in a family partnership of which he was a member; against the members of the partnership, including another family partnership as a member of the larger firm, and the personal representatives of deceased partners, upon written agreement of the partnership to be responsible for the funds; against the receivers of a bank alleging that the family partnerships were subsidiaries of the bank and that the receiver had assets of the partnerships which in equity belonged to plaintiffs; that demand for repayment of the funds had been made on each of defendants, and demand refused. *Held:* The complaint relates a connected series of events and relationships, growing out of the same transaction or connected with the same subject of action, and a demurrer for misjoinder of parties and causes should have been overruled. *Leach v. Page*, 622.

**§ 18. Defects Appearing on Face of Pleadings and Speaking Demurrers.**

Where the allegations of the complaint are sufficient to state a cause of action in favor of plaintiffs, the defense that another party had a prior right to maintain the action, or that there were others of the class having an equal right to sue who were not made parties, may not be taken advantage of by demurrer when the allegations of the complaint do not show such prior or co-ordinate right in other parties, such demurrer being bad as a "speaking demurrer," and in such instance the defense being available only by positive allegations in the answer disclosing such right of action in parties other than plaintiffs. *Morrow v. Cline*, 254.

Where, in an action attacking the validity of a foreclosure sale, defendants file answer alleging that the substitute trustee who conducted the sale was duly appointed by the clerk upon petition in a special proceeding in which plaintiff trustor was served with summons, plaintiff's demurrer to the answer on the ground that the alleged appointment of the substitute trustee was void for that the personal representative of the deceased original trustee was not served with summons, N. C. Code, 2578, 2583, is bad as a "speaking demurrer." *Nall v. McConnell*, 259.

Demurrer for that plaintiff was not real party in interest *held* bad as "speaking demurrer." *Nall v. McConnell*, 259; *Leach v. Page*, 622.

Positive defenses may not be taken advantage of by demurrer. *Leach v. Page*, 622.

**§ 20. Office and Effect of Demurrer.**

A demurrer admits facts properly alleged aside from deductions of the pleader, and requires that the pleading should be liberally construed. *Hood v. Realty Co.*, 582.

Upon examination of a pleading to determine its sufficiency as against a demurrer, its allegations will be liberally construed with a view to substantial justice, C. S., 535, and every reasonable intendment and presumption will be

PLEADINGS—*Continued.*

given the pleader, and the demurrer overruled unless the pleading is wholly insufficient. *Council v. Bank*, 262; *Leach v. Page*, 622; *Anthony v. Knight*, 637.

Indefiniteness and uncertainty in a complaint, which sufficiently states a cause of action, may not be taken advantage of by demurrer, the remedy being by motion to make the pleading more definite by amendment. C. S., 537. *Leach v. Page*, 622.

A demurrer to the complaint, C. S., 511, challenges the sufficiency of the pleading, while a demurrer to the evidence, C. S., 567, challenges the sufficiency of the evidence, and the two are distinct in purpose and effect. *Smith v. Sink*, 725.

**§ 22. Amendment During Trial.**

Where plaintiff moves to amend his complaint almost a year after the filing of the complaint, and after defendant had moved for judgment on the pleading, an order of the trial court denying the motion to amend is without error. *Bank v. Hardy*, 459.

Process may be amended to justify the original service or to validate previous action taken only when rights of third persons have not intervened. *Rushing v. Ashcraft*, 627.

**§ 25. Questions and Issues Raised by Pleadings.** (Introduction of pleadings in evidence see Evidence § 42f.)

Plaintiff need not introduce proof of allegations which are admitted to be true in answer.

**§ 27. Motions for Bill of Particulars or That Allegations Be Made More Definite.**

Indefiniteness and uncertainty in a complaint, which sufficiently states a cause of action, may not be taken advantage of by demurrer, the remedy being by motion to make the pleading more definite by amendment. C. S., 537. *Leach v. Page*, 622.

**§ 29. Motions to Strike Out.**

Ordinarily, irrelevant or redundant matter inserted in a pleading may be stricken out on motion of any party aggrieved thereby, but the question is largely in the sound discretion of the trial court. N. C. Code, 537. *Ins. Co. v. Smathers*, 373.

Plaintiff *cestui que trust* instituted this action to foreclose two deeds of trust on two separate tracts of land executed by defendants. Defendants filed separate answers. Plaintiff moved to strike out the allegations of the answers that the second deed of trust on the home place was executed because of threats of plaintiff to foreclose the first deed of trust on the male defendant's business property, that at the time the male defendant was sick and disabled, and that defendants would not have executed the second deed of trust except for the threats, coercion, and duress of plaintiff, and the allegations in the male defendant's answer that since the institution of the action the male defendant had received an offer for the business property greatly in excess of any sums of money due plaintiff upon a proper accounting. *Held:* The motion to strike out was properly granted. *Ibid.*

PRINCIPAL AND AGENT.

**§ 7. Evidence and Proof of Agency.**

Testimony of declarations of an alleged agent are incompetent to prove either the fact of agency or the nature and extent of the authority, but the direct testimony of the alleged agent is competent on either question. *Parrish v. Mfg. Co.*, 7.

PRINCIPAL AND AGENT—*Continued.*

Plaintiff testified that the individual defendant, an assistant superintendent, stated she had talked with the manager of the corporate defendant over the phone and had been authorized to search plaintiff and others for wages paid two employees which had been lost. The individual defendant testified that she had not been authorized to search plaintiff. *Held:* The testimony of the declarations of the individual defendant was incompetent as hearsay, while her direct testimony as to the nature and extent of her authority was competent, and the competent evidence establishes that the corporate defendant did not authorize or ratify the individual defendant's act of searching plaintiff. *Ibid.*

**§ 10. Wrongful Acts of Agent.**

A master or principal is liable for torts committed by his servant or agent in the scope of his employment and in furtherance of the superior's business, or which are authorized or ratified by the superior, but the master or principal is not liable to third persons for wrongful acts of the servant or agent committed outside the legitimate scope of the employment and without specific authority from or ratification by the superior. *Parrish v. Mfg. Co.*, 7.

The evidence disclosed that the wages of two employees which had been paid them by the corporate defendant had been lost and that all employees in the room had been searched in an effort to recover the money, and plaintiff contended that she did not voluntarily submit to the search but was forced to submit thereto by the assistant superintendent of the corporate defendant. *Held:* The money did not belong to the corporate defendant, but to the two employees who had lost it, and the search of plaintiff was outside the scope of the assistant superintendent's authority, the recovery of the money not being in furtherance of the corporate defendant's interest, or within the scope of the assistant superintendent's authority. *Ibid.*

PROCESS.

**§ 1. Form and Requisites.**

Summons in this proceeding for appointment of substitute trustee *held* to give trustor sufficient notice. *Nall v. McConnell*, 258.

**§ 5. Service by Publication.**

Persons in well defined class may be served by publication in action *in rem* without being named in summons. *Castevens v. Stanly County*, 642.

Service by publication is complete the day the last notice is published. *Ibid.*

**§ 7c. Service on Foreign Insurance Companies by Service on Insurance Commissioner.**

Where a statute provides that all insurance companies, as a condition precedent to doing business in the State, should constitute the insurance commissioner of that state agent for the service of process, an insurance company cannot maintain that service under the statute was void by showing its own violation of the statute in failing to so constitute the insurance commissioner its process agent. *Dansby v. Ins. Co.*, 120.

**§ 7d. Service on Corporations in Receivership.**

The court found, upon defendant corporation's motion to dismiss for want of service, that the corporation was in receivership at the time the action was instituted, that personal service was had on the agent of the receivers, but that the agent had at no time been an agent of the corporation since its receivership, although he had been an agent of the corporation prior thereto. *Held:* The facts found support the judgment dismissing the action as to the corporation on the ground that no service had been had upon it. *Harper v. R. R.*, 398.

RAILROADS.

**§ 2. Rights of Way and Crossings.**

A road in use from two houses to the highway prior to the construction of railroad tracks by defendant across the road, and thereafter used by the public and others desiring to go to the houses, is a crossing which the railroad is under duty to keep in a reasonably safe condition. C. S., 3449. *Cashatt v. Brown*, 367.

**§ 9. Accidents at Crossings.**

Evidence *held* insufficient to disclose contributory negligence as a matter of law on part of ten-year-old boy struck by train while attempting to walk across grade crossing. *Boykin v. R. R.*, 113.

Evidence tending to show that plaintiff's intestate drove his car upon a crossing, that ballast was not kept between the rails, but that the crossties or spikes holding the rails were visible, so that when the car was driven over the rail the wheels dropped several inches, causing the car to stop, and that defendant's rapidly approaching train, which gave no signal or warning for the crossing, struck the car and killed plaintiff's intestate, *is held* sufficient to be submitted to the jury on the issues of negligence and proximate cause, and the question of whether defendant was guilty of contributory negligence in driving upon the crossing, and whether such contributory negligence was a proximate cause of the injury is for the jury under the evidence. *Cashatt v. Brown*, 368.

Evidence *held* competent on question of whether crossing was so dangerous that railroad should have maintained safety devices. *Harper v. R. R.*, 398.

The evidence tended to show that a railroad company's motor train approached a much used crossing in an incorporated town at an excessive speed without giving any warning signal, that the driver of a truck approaching the crossing at twenty miles per hour, with his vision of the crossing partially obstructed, did not see the motor train until within about ten feet of the track, at which time the whistle blew, that the driver put on brakes but was unable to stop the truck before it ran into the side of the front part of the train, with evidence that no watchman or warning devices were maintained at the crossing, and that the horn or whistle on the motor train was similar to that on large trucks or automobiles and unlike the whistle on a steam locomotive, *is held* sufficient to be submitted to the jury, in an action against the receivers of the railroad company by the administrator of a passenger on the truck who was killed in the collision, on the issue of whether the receivers' agents were guilty of negligence which was a concurring proximate cause of the accident, the negligence of the driver of the truck not being imputed to plaintiff's intestate. *Ibid.*

**§ 10. Injuries to Persons on or Near Track.**

The evidence tended to show that plaintiff's intestate, a man of sixty years, in good health physically and mentally, sat down upon a crosstie on the corporate defendant's tracks, where the tracks were straight and unobstructed for at least 3,000 feet, that he was warned by several passers-by of his dangerous position, that he responded to the warnings, but continued to sit on the crosstie with his elbows on his knees and his head between his hands, that defendant's train, pulled by two engines, approached at a speed of 40 to 50 miles an hour in violation of an ordinance of the town in which the accident occurred limiting the speed of trains to six miles per hour, that the whistles of the engines were blown repeatedly in warning, and that when the train was about 160 feet from intestate and the engineers realized he was not going to heed their warning, they put on brakes and exerted themselves to the utmost of their ability to stop the train and avoid hitting intestate, but were unable to

RAILROADS—*Continued.*

do so. *Held:* The evidence was insufficient to support the submission of an issue of last clear chance, since the evidence shows contributory negligence of intestate continuing up to the moment of impact, and does not show that intestate was in a helpless or even an apparently helpless condition on the track, and that therefore the engineers had a right to assume up to the last moment that he would get off the track and avoid injury, and that when they realized he would not, it was too late to avoid the accident, although they exerted themselves to do so. *Lemings v. R. R.*, 499.

**§ 11. Accidents at Underpasses.**

The evidence tended to show that the driver of a car in attempting to negotiate a sharp curve, properly marked with danger signals, on the highway leading to an overpass constructed by defendant railroad company over its tracks, failed to make the curve and "sideswiped" the guard railing of the overpass for a distance of ten feet, and that a loose end of a broken railing entered the side rear curtain of the car and struck and killed plaintiff's intestate, who was a passenger in the car. *Held:* Even conceding that the railroad company was under duty to keep the overpass in repair, its negligence in failing to do so was passive, and the negligence of defendant driver was the real, efficient cause of intestate's death, and defendant railroad company's motion to nonsuit was properly granted. *Smith v. Sink*, 725.

RECEIVERSHIP.

**§ 1. Nature and Grounds of the Remedy.**

Receivership is a harsh remedy and will be granted only when there is no other safe and expedient remedy. *Scoggins v. Gooch*, 677.

Plaintiff instituted this action on a note in the court of a justice of the peace against husband and wife. He obtained judgment against the husband, from which no appeal was taken, and plaintiff appealed from a judgment of nonsuit in favor of the wife. On appeal, plaintiff's petition for a receiver for the business operated by the husband and wife was granted. *Held:* The only issue on appeal was whether the wife was indebted to plaintiff, and it was error to appoint a receiver for the business on the action on a simple unsecured debt where no right to or lien on property of defendants was asserted, N. C. Code, 860, plaintiff's remedy being by execution on the judgment against the husband and against the wife if he should obtain judgment against her on the appeal. *Ibid.*

**§ 13. Actions.** (Service of process see Process.)

Contention that action could not be maintained against defendant corporation in receivership *held* untenable when the record discloses that the receivership was dissolved and the corporation made a party defendant before the trial in the Superior Court. *Tucker v. Arrowood*, 118.

Allegations that defendant receivers held assets belonging to another defendant, and that such assets in equity were held for plaintiffs' benefit and should be subjected to plaintiffs' claim against such other defendant, *is held* to state a cause of action against the receivers. *Leach v. Page*, 622.

RECEIVING STOLEN GOODS.

**§ 2. Knowledge and Felonious Intent.**

Knowledge that the goods were stolen at the time of receiving them is an essential element of the offense of receiving stolen goods, and although guilty knowledge may be inferred from incriminating circumstances, a charge that such knowledge might be actual or implied, without specifying that it would have to exist at the time of the receiving, is erroneous. *S. v. Spaulding*, 63.

REFERENCE.

**§ 3. Pleas in Bar.**

A compulsory reference may not be ordered prior to the determination of defendant's plea in bar when such plea, if determined in defendant's favor, entirely destroys plaintiff's right of action, and renders an accounting useless. *Preister v. Trust Co.*, 51.

Plaintiff alleged that he purchased, at the sale of a bankrupt's estate, certain stocks and bonds which had been given as collateral security for a note by the bankrupt, that subsequent credits had paid the note in full, and that defendant bank had sold certain of the security without notice and purchased same at its own sale, and refused to surrender the securities to plaintiff. Defendant bank filed answer alleging that plaintiff was not the owner of the securities, but that defendant bank purchased the securities at the sale conducted by the payee of the note upon default after due advertisement. *Held:* The answer raised issues which are determinative of the entire controversy, and an order for compulsory reference prior to the determination of the question of title to the securities is erroneous. *Ibid.*

**§ 4a. Effect of Consent Reference.**

This cause involving plaintiff's claim for goods sold on consignment and defendant's alleged conversion of the proceeds was referred to a referee by consent. Upon the filing of the report by the referee, judgment was entered for plaintiff for a stipulated sum in accord with the report, and the cause was expressly retained for jury trial upon the issue of fraud raised by the pleadings. No exception was entered to this judgment and no appeal taken. At a subsequent term, plaintiff's motion for a jury trial was refused on the ground that the consent reference waived the right to have any of the matters tried by jury. *Held:* The judge of the Superior Court at the later term was without authority to disregard the express provision of the judgment entered at the prior term that the cause be retained for jury trial on the issue of fraud, there being no exception to the judgment or appeal therefrom, and the judgment being *res judicata* as to the matters therein determined. *Fertilizer Co. v. Hardee*, 56.

By consenting to a reference the parties waive the right to have issues of fact determined by a jury, C. S., 572, and the tender of issues on exceptions in a consent reference may be treated as surplusage. *Anderson v. McRae*, 197.

**§ 8. Exceptions and Preservation and Waiver of Grounds of Review.**

In the absence of exceptions to the factual findings of the referee, his findings are conclusive, and the case must be determined upon the facts found by him. *Anderson v. McRae*, 197.

Where the parties agree that the findings of fact of the referee and his conclusions in regard to advancements found due by the various heirs at law should be conclusive and that exceptions might be filed only to his conclusions of law, an heir is estopped to contend that the advancements charged against her by the referee were not correct. *Wolfe v. Galloway*, 361.

**§ 9. Duties and Powers of Court in General.**

It is error for the court to refuse to pass upon exceptions to the report in a consent reference, or to approve the findings excepted to simply because they are supported by the evidence, the findings of the referee not being binding on the court even if supported by evidence, but it being the duty of the court to review the evidence and judicially determine the facts as established by the preponderance of the evidence, C. S., 578, and in passing upon the exceptions, he may affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of the referee. *Anderson v. McRae*, 197.

REFERENCE—*Continued.*

By consenting to a reference the parties waive the right to have issues of fact determined by a jury, C. S., 572, and the tender of issues on exceptions in a consent reference may be treated as surplusage. *Ibid.*

Upon appeal from the referee in a consent reference, the court amended the report of the referee by making additional findings of fact, confirming the findings of the referee not inconsistent with the court's findings and by striking out a portion of the referee's conclusions of law and substituting other conclusions of law therefor. Appellant excepted to the judgment approving the referee's judgment, and to the court's failure to sustain appellant's exceptions, and to the court's additional findings and to the striking out of part of the referee's conclusions of law, and in refusing the motion to remand to the referee. *Held:* Under the court's power to affirm, disaffirm, or modify the referee's report, the court had the authority to make the modifications complained of, and the court's additional findings of fact being supported by evidence, the judgment in accord with the findings is affirmed. *Mineral Co. v. Young*, 387.

REMOVAL OF CAUSES.

**§ 4a. Determination of Whether Controversy Is Separable.**

Whether a controversy is separable is to be determined by the complaint. *Clevenger v. Grover*, 240.

A complaint alleging that plaintiff purchaser gave the seller a title retaining contract, to which the certificate of title was attached, for balance due on the purchase price of the truck, that the contract was sold and assigned to a nonresident, who failed and refused to surrender the certificate of title upon the completion of the payment of the purchase price, *is held* to show a separable controversy, and the nonresident's petition to remove was properly granted. *Burleson v. Snipes*, 396.

**§ 4b. Determination of Whether Joinder of Resident Defendant is Fraudulent.**

Whether resident defendants are joined fraudulently to prevent removal is to be determined by the petition, which must allege facts leading to that conclusion apart from the pleader's deduction. *Clevenger v. Grover*, 240.

*Held:* Petition failed to show that resident employee was joined fraudulently to prevent removal. *Ibid.*

**§ 8. Removal of Criminal Actions on Ground of Invasion of Federal Constitutional Rights of Prisoner.**

The defendant filed a petition for removal from the State Superior Court to the United States Court for the district to be certified as to the place of trial. Act of Congress, 3 March, 1863, Title 28, secs. 74 and 75. The court denied the petition for that the petition did not allege any denial of any rights by reason of State law. *Held:* The denial of the petition was without error, defendant's remedy for alleged denial of equal protection of the laws on account of prejudice or in the exclusion of colored persons from the grand jury, being in the State Court and ultimately by writ of error to the Supreme Court of the United States. *S. v. Walls*, 487.

SALES.

**§ 19. Actions for Purchase Price.**

Where the uncontradicted evidence shows that goods described in the complaint were delivered to defendant purchaser in accordance with the contract, and that the purchase price was due in the amount claimed, a directed verdict for plaintiff seller on the issue is proper. *Stevens Co. v. Mooneyham*, 291.

SALES—*Continued.*

**§ 25. Actions or Counterclaims for Breach of Warranty.**

A directed verdict against the purchaser on his counterclaim for alleged defect in the goods sold and delivered is proper when there is no evidence in the record tending to support the counterclaim. *Stevens Co. v. Mooneyham*, 291.

SCHOOLS.

(Taxation for schools see Taxation; assumption of school debt by county see Counties.)

**§ 15. Deeds and Conveyances of School Property.**

A chartered school district acquired the property in question by foreclosure of a loan made from its sinking fund, the property thus acquired being in no way connected with the operation of its schools. The trustees of the district instructed the property committee of the district to investigate the legality of a private sale, to consider any offers for the property in excess of a stipulated sum, and delegated "power to act" in the matter. The chairman of the property committee thereafter entered into a contract for the sale of the property for the stipulated price. Plaintiff taxpayer of the district instituted this suit to restrain conveyance to the purchaser in the contract. *Held:* The trustees of the district were without power to delegate authority to sell the school property, and the district was not bound by the contract entered into by the chairman of the property committee, and decree restraining the execution of the contract was proper. Whether the property could be sold by private sale, *quære*. *Bowles v. Graded Schools*, 36.

STATUTES.

**§ 2. Constitutional Prohibition Against Passage of Special Acts.**

A municipal corporation was given jurisdiction by its charter over streets, and the act provided machinery for laying out, opening, altering, and maintaining its public streets. (Ch. 343, Private Acts of 1907.) Thereafter, a private act was passed enlarging the town's jurisdiction so as to include therein sidewalks and alleys, but prescribed no method for condemnation of lands for alleys. (Ch. 216, Private Laws of 1925.) *Held:* The later act merely enlarged the jurisdiction of the town to include sidewalks and alleys under the machinery set out in the prior act, and the later act is not a special statute relating to roads inhibited by Art. II, sec. 29, of the State Constitution, the act not relating to the laying out, opening, altering, or discontinuance of any particular and designated highway, street, or alley. *Deese v. Lumberton*, 31.

**§ 6. Construction in Regard to Constitutionality.**

An act of the General Assembly will not be declared unconstitutional unless plainly and clearly so. *S. v. Warren*, 75; *Hood, Comr., v. Realty Co.*, 582.

**§ 10. Repeals by Implication and Construction.**

Repeals by implication are not favored, and two acts relating to the same subject matter must be irreconcilable in order for the later to repeal the former. *Kelly v. Hunsucker*, 153.

## TAXATION.

(Power of municipality to levy privilege tax see Municipal Corporations § 42; assumption of school district debt by county see Counties § 10.)

**I. Constitutional Requirements and Restrictions**
1. Uniform Rule and Discrimination
3. Limitation of Tax Rate and Debt, and Provisions for Levy of Taxes for Payment of Bonds
4. Necessity of Vote
**IV. Property Exempt from Taxation**
23. Real Property Exemptions
**VIII. Actions to Determine Validity of Levy of Taxes or Issuance of Bonds**
37. Actions by Taxing Unit to Establish Validity of Proposed Bond Issue
38. Remedies of Taxpayer
a. *Enjoining Issuance of Bonds*

### § 1. Uniform Rule and Discrimination.

While the General Assembly may authorize municipalities to tax trades and professions, it may not impose, in addition to the State-wide license tax, a special tax upon those following a particular trade or profession in certain designated counties while not requiring such tax of others following the same trade or profession in other counties of the State. *S. v. Warren*, 75.

### § 3. Limitation on Tax Rate and Debt and Provisions for Levy of Taxes for Payment of Bonds.

An exemption of real property from taxation under the provisions of the constitutional amendment of Art. V, sec. 5, would not affect the validity of bonds already issued by a municipality. *Nash v. Comrs. of St. Pauls*, 301.

### § 4. Necessity of Vote.

N. C. Code, 1334 (8), giving special authority to counties to issue bonds and notes for the special purposes therein named, including the erection and purchase of schoolhouses, as administrative agencies of the State, does not grant special authority to issue bonds or notes for the erection and maintenance of teacherages in connection with consolidated rural schools, and where a proposed bond issue for this purpose has not been approved by the majority of the qualified voters of the county, an order restraining the issuance of the bonds is proper. *Denny v. Mecklenburg County*, 558.

Judgment that city may not use funds derived from taxes for airport improvements without vote is upheld. *Goswick v. Durham*, 687.

### § 23. Real Property Exemptions.

The constitutional amendment to Art. V, sec. 5, is not self-executing, but merely gives the General Assembly permissive power to grant the exemption from taxation to the extent therein mentioned, which power the General Assembly may exercise in whole or in part, or not at all, as it may in its wisdom determine. *Nash v. Comrs. of St. Pauls*, 301.

### § 37. Actions by Taxing Units to Establish Validity of Proposed Bond Issue.

Ch. 186, Public Laws of 1931, secs. 4 to 8, inclusive, as amended (N. C. Code, 2492 [55 to 59]), providing that a taxing unit of the State may institute action against its residents and taxpayers to have the validity of a proposed bond issue and proposed taxes for payment of the indebtedness determined by judgment of the court, provides for an action in the nature of an adversary proceeding *in rem*, and contemplates that the court should determine whether the proposed bond issue is valid or not in accordance with the issues of fact and law which may be raised by the pleadings, and the act is not unconstitutional as attempting to impose upon the courts the nonjudicial function of determining moot or hypothetical questions. N. C. Constitution, Art. I, sec. 8; Art. IV, sec. 12. *Castevens v. Stanly County*, 642.

In this suit by a taxing unit to have a proposed bond issue declared valid, N. C. Code, 2492 (55 to 59), summons was served by publication for three

successive weeks as required by the act, and defendants were required by said publication to file answer within twenty-one days from the date of the last publication. *Held:* "Full publication" was complete as required by the act on the day the last notice was published, and the contention that publication was not complete until a week from the publication of the last notice and that defendants should have been given twenty days from that date to file answer is untenable, publication once a week for three successive weeks being all that is required by the statute. *Ibid.*

A judgment in a suit by a taxing unit declaring that bonds which the unit proposed to issue were for the purpose of refunding bonds of the unit which had been issued by it as an administrative agency of the State for the purpose of maintaining the constitutional school term, and that other bonds which the unit proposed to issue were for refunding bonds which had been issued by it for necessary expenses, and that therefore taxation to pay principal and interest on the bonds would not be subject to the constitutional limitation on the tax rate, *is held* conclusive on a taxpayer in his subsequent suit challenging the validity of the bonds on the very issues determined by the prior judgment. *Ibid.*

**§ 38a. Enjoining Issuance of Bonds.**

A home owner in a municipality is not entitled to restrain the issuance of refunding bonds by it on the ground that the refunding bonds would be subject to any exemption from taxation that might be allowed the General Assembly under the amendment to Art. V, sec. 5, since he would be benefited rather than injured by any exemption which may be allowed, and since the validity of the proposed bonds would not be affected by such exemption. *Nash v. Comrs. of St. Pauls*, 301.

TENANTS IN COMMON.

(Adverse possession against cotenants see Adverse Possession § 4a.)

**§ 6. After Acquired Title.**

One tenant in common, under obligation to discharge an encumbrance on the land, may not procure a foreclosure sale thereunder and acquire, directly or indirectly, the title to the entire interest to the exclusion of his cotenant. *Sutton v. Sutton*, 472.

TORTS.

(Particular torts see Particular Titles of Torts.)

**§ 5. Liabilities of Tort-Feasors to Person Injured.**

Plaintiffs held a lien on a truck damaged by the negligence of the driver of a truck belonging to a third person who carried indemnity insurance on his truck. Although insurer had notice of plaintiffs' lien and the owner of the negligently damaged truck had agreed that check be made payable to him and plaintiffs jointly, insurer paid the owner of the truck, who failed to pay plaintiffs' lien from the proceeds. *Held:* Insurer was not a tort-feasor, nor obligated by its contract with the owner of the truck negligently causing the damage to pay lienholders on the truck negligently damaged, and plaintiffs are not entitled to enforce payment against insurer either in contract or in tort in the absence of fraud or collusion. *Mercer v. Casualty Co.*, 288.

**§ 6. Right to Contribution Among Tort-Feasors.**

A person injured in a collision between two cars obtained judgment against the drivers of the cars as joint tort-feasors. Thereafter, the injured person sued the driver of one of the cars and the insurer in a liability policy on the car driven by him, and the insurer paid the total amount of the judgment,

TORTS—*Continued.*

and had one-half the judgment assigned to a trustee for its benefit, and instituted this action against the insurer in a policy of liability insurance on the other car, contending that it was entitled to contribution under the provisions of C. S., 618. *Held:* The statute providing for contribution among joint tort-feasors does not apply to insurers of joint tort-feasors, and the demurrer of defendant insurer was properly granted on the allegations in plaintiff's insurer's action to force contribution. *Casualty Co. v. Guaranty Co.*, 13.

TRIAL.

**III. Reception of Evidence**
16. Withdrawal of Evidence
**IV. Province of Court and Jury**
19. In Regard to Evidence
20. Issues of Law and Fact
**V. Nonsuit**
21. Time and Necessity of Making Motion and Renewal Thereof
22. Office and Effect of Motion
a. Purpose and Effect of Motion
b. Consideration of Evidence upon Motion
23. Contradiction and Discrepancies in Evidence
24. Sufficiency of Evidence
**VI. Directed Verdict and Peremptory Instructions**
27. Directed Verdict in Favor of Party Having Burden of Proof
**VII. Instructions**
29. Form, Requisites, and Sufficiency of Instructions
b. Statement of Evidence and Explanation of Law Arising Thereon
c. Charge on Burden of Proof
32. Requests for Instructions
33. Statement of Contentions and Objections Thereto
36. Construction of Instructions
**VIII. Issues**
39. Tender of Issues

**§ 16. *Withdrawal of Evidence.***

In this action for alimony without divorce, C. S., 1667, plaintiff's counsel inadvertently examined plaintiff wife in regard to defendant husband's alleged adultery. Counsel, admitting the incompetency of the testimony under the provisions of C. S., 1801, asked that the testimony be stricken out, which was done by the court. *Held:* The error in the admission of the evidence was thus cured. *Hagedorn v. Hagedorn*, 175.

**§ 19. Province of Court and Jury in Regard to Evidence.**

The competency, admissibility, and sufficiency of the evidence is a matter for the court, its credibility, probative force, and weight is for the jury. *Hancock v. Wilson*, 129.

**§ 20. Issues of Law and of Fact.**

Where the record does not show what admissions, if any, were made on the hearing, the decision of the court on a controverted issue raised by the pleadings, without the introduction of evidence, in the absence of waiver of jury trial or agreement as to facts, will be held for error. *Horton v. Horton*, 390.

**§ 21. Time and Necessity of Making Motion and Renewal Thereof.**

Where defendant moves for nonsuit after the close of plaintiff's evidence but fails to renew the motion after the introduction of his evidence, he waives his motion and is not entitled to have the action dismissed thereon. C. S., 567. *Rental Co. v. Justice*, 54.

**§ 22a. Purpose and Effect of Motion to Nonsuit.**

A demurrer to the complaint, C. S., 511, challenges the sufficiency of the pleading, while a demurrer to the evidence, C. S., 567, challenges the sufficiency of the evidence, and the two are distinct in purpose and effect. *Smith v. Sink*, 725.

**§ 22b. Consideration of Evidence on Motion to Nonsuit.** (Review of judgments on motion to nonsuit see Appeal and Error § 42.)

On a motion to nonsuit, all the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Hancock v.*

TRIAL—*Continued.*

*Wilson*, 129; *Harper v. R. R.*, 398; *Debnam v. Whiteville*, 618; *Headen v. Transportation Co.*, 639; *Oil Co. v. Iron Works*, 668.

Upon motion to nonsuit, the evidence is to be considered in the light most favorable to the contentions of plaintiff. C. S., 567. *Stovall v. Ragland*, 536.

On motion to nonsuit, plaintiff is entitled to the benefit of every germane fact and inference of fact reasonably deductible from the evidence, and evidence supporting plaintiff's claim will be taken as true although contradicted by defendants' evidence. C. S., 567. *Cole v. R. R.*, 591; *Diamond v. Service Stores*, 632.

**§ 23. Contradictions and Discrepancies in Evidence.**

Where plaintiff's evidence is sufficient to be submitted to the jury, the fact that plaintiff's evidence is contradicted by evidence introduced by defendants does not entitle defendants to nonsuit, it being for the jury to determine which evidence they will believe. *Hancock v. Wilson*, 129.

Where portions of the testimony of a material witness are inconsistent or contradictory, and permit more than one inference to be drawn therefrom, it is a matter for the jury to decide which view of the evidence should be accepted. *Tomberlin v. Bechtel*, 265.

**§ 24. Sufficiency of Evidence.**

A demurrer to the evidence goes to plaintiff's entire right to recover, and may not be sustained if, in any aspect or to any extent, a cause of action within the pleadings is made out. C. S., 567. *Jackson v. Thomas*, 634.

**§ 27. Directed Verdict in Favor of Party Having Burden of Proof.**

A directed verdict may not be given in favor of plaintiff having the burden of proof on the issue unless there is no evidence from which the jury could find or which would justify an inference contrary to plaintiff's contention, and evidence in this action *is held* insufficient to support a directed verdict in plaintiff's favor on the issue of defendant's wrongful conversion of plaintiff's property. *Fertilizer Co. v. Hardee*, 653.

**§ 29b. Statement of Evidence and Explanation of Law Arising Thereon.**

Under C. S., 564, it is the duty of the court to charge in a plain and correct manner the evidence in the case and explain the law arising thereon, and he is required to give a correct charge on these substantive features without tender of prayers for instructions, but a party desiring a fuller explanation on some subordinate feature of the case or some particular phase of the testimony should aptly tender request therefor, and the charge in this case *is held* not to impinge the statute. *School District v. Alamance County*, 213.

**§ 29c. Charge on Burden of Proof.**

An erroneous instruction on the burden of proof entitles the prejudiced party to a new trial, the burden of proof being a substantial right, and a later portion of the charge correctly placing the burden of proof will not cure the error, since inconsistent instructions upon a material point cannot be held harmless. *DeHart v. Jenkins*, 315.

**§ 32. Requests for Instructions.**

A party desiring elaboration on a subordinate feature of the charge must aptly tender a proper prayer for instructions. *Hancock v. Wilson*, 129; *Leach v. Varley*, 207; *School District v. Alamance County*, 213.

Where the charge of the court meets the requirements of C. S., 564, a party desiring a fuller charge must aptly tender request therefor. *Headen v. Transportation Co.*, 639.

**§ 33. Statement of Contentions and Objections Thereto.**

Where the charge states that defendant makers contended that plaintiff acquired the note sued on after maturity, defendants should aptly object and

TRIAL—*Continued.*

offer correction if they do not admit that plaintiff was a holder after maturity. *Pickett v. Fulford*, 160.

A misstatement of the contentions of a party will not be held for error when the injured party fails to bring the matter to the attention of the trial court in apt time. *Noland Co. v. Jones*, 462.

Where the trial court states the contention of one of the parties on the evidence, it is error for the court to fail to state the contentions of the adverse party based on its evidence on the same aspect of the case. *Messick v. Hickory*, 531.

**§ 36. Construction of Instructions.**

A charge will be read contextually as a whole, and exceptions thereto will not be sustained when the charge, so construed, is not prejudicial. *Hancock v. Wilson*, 129.

An instruction will be considered contextually as a whole and interpreted in the light of all the evidence. *Mewborn v. Rudisill Mine, Inc.*, 544.

**§ 39. Tender of Issues.**

An exception to the refusal to submit issues tendered cannot be sustained when the issues submitted are identical with the issues tendered except for the addition of an issue determinative of the rights of the parties upon the evidence and theory of trial. *Pickett v. Fulford*, 160.

TRUSTS.

**§ 1. Creation and Validity.**

A devise of land to one person with direction that the rents therefrom be used for the benefit of another, creates an active trust in accordance with the express intention of the testator, even though the testator does not use the words "trust" or "trustee," no particular language being necessary for the creation of a trust if the intent to do so is evident. *Stephens v. Clark*, 84.

**§ 8b. Title and Rights of Respective Parties.**

Testator devised the lands in question to certain of his children with limitation over to certain other children if devisees died without surviving children, and by codicil provided that devisees should have the right to dispose of their respective shares by deed or will in fee, with limitation over in the event they should die without surviving children and without having disposed of the property. *Held:* The devise was for the benefit of the devisees, and the unrestricted power of disposition included the power to mortgage, and a deed of trust executed by one of the devisees is a valid encumbrance on his allotted share of the land. *Ferrell v. Ins. Co.*, 423.

**§ 9. Revocation of Trusts.**

Judgment that interests of the minor children were contingent and revoking the trust, C. S., 996, from which no appeal was taken, *held* conclusive on trustee and beneficiaries, even if erroneous. *Smathers v. Ins. Co.*, 345.

USURY.

**§ 1. Statutory Provisions and Exceptions in General.**

C. S., 6291, providing that where an insurance company requires as a condition precedent to the lending of money that the borrower take out a policy of life insurance and assign it to insurer as security for the loan, the premiums paid on such policy shall not be considered as interest on the loan when such premiums do not exceed premiums charged on like policies issued to persons who do not obtain loans, *is held* not to exempt insurance companies from the provisions of C. S., 2305, 2306, relating to usury, the purport and effect of the statute being merely to allow insurance companies to require as

a condition precedent to the loan of money that the borrower take out a policy of insurance and assign same as security for the loan, and the statute does not authorize insurance companies to charge interest in excess of six per cent on loans made by them, C. S., 2305, or exempt insurance companies from the penalties for usury when such companies charge an illegal rate of interest on loans, C. S., 2306. If C. S., 6291, did provide that insurance companies should be exempt from C. S., 2305, 2306, it would be void. N. C. Const., Art. I, sec. 7. *Cowan v. Trust Co.*, 18.

A ten-year endowment policy comes within the provisions of C. S., 6291, allowing insurance companies to require a borrower to take out and assign a life insurance policy to the insurer as collateral security for a loan, when such endowment policy provides that the face amount thereof shall be paid to the beneficiary if insured dies during the ten-year period while the policy is in force. *Ibid.*

**§ 2. Contracts and Transactions Usurious.**

An insurance company required a borrower to execute a deed of trust on realty and to take out an endowment life insurance policy and to assign same as collateral security as a condition precedent to making the loan. The borrower paid the premiums for a number of years, and then canceled the policy, and had the cash surrender value credited to the loan. *Held:* The borrower may not recover the penalty for usury upon his contention that the amount the insurance company reserved upon the cancellation of the policy as its profit therefrom, and interest on the premiums paid, were amounts received by the insurance company as interest in excess of the six per cent interest charged on the note, since C. S., 6291, expressly authorizes insurance companies to require a borrower to take out and assign a life insurance policy as a condition precedent to making a loan. *Cowan v. Trust Co.*, 18.

## VENUE.

**§ 1. Residence of Parties.**

This action to recover for alleged negligent injuries inflicted upon a person subsequently adjudged insane was brought by the injured person's guardian in the county of the guardian's personal residence. Defendants made a motion, under C. S., 470 (1), to remove to the county in which the injured person and the defendants resided and in which the cause of action arose and in which the guardian for the injured person was appointed and qualified. *Held:* The guardian was entitled to maintain the action in the county of his personal residence, C. S., 469, 446, 449, 450, 2169, and defendants' motion to remove should have been denied. *Lawson v. Langley*, 526.

**§ 3. Actions Involving Realty.**

An action to recover damages to land caused by alleged wrongful obstruction of a river causing ponding of water on plaintiff's land, does not involve title to or any interest in land, and is transitory for the purposes of venue, and defendant's motion to remove to the county of its residence, where its land is situate upon which the obstruction was built, is properly refused. *Cox v. Cotton Mills*, 473.

**§ 8d. Notice, Jurisdiction, and Hearings.**

The resident judge of a district, when not holding court in the county in his district in which the cause is pending, has no jurisdiction to hear an appeal from the clerk refusing defendant's motion for change of venue on the ground of the residence of the parties, and where the record does not show that the judge was holding court in the county the cause will be remanded for determination by a judge holding court. *Howard v. Coach Co.*, 329.

## WILLS.

**IX. Construction and Operation of Wills**
31. General Rules of Construction
33. Estates and Interests Created
c. Vested and Contingent Interests
d. Estates in Trust
f. Devises with Power of Disposition
34. Designation or Devisees and Legatees and their Respective Shares (Legacy void for failure of competent legatee see hereunder s 43.)
39. Actions to Construe Wills
**X. Rights and Liabilities of Devisees and Legatees**
43. Void and Forfeited Legacies
44. Election
46. Title, Rights, and Conveyances by Devisees
48. Crops, Rents, and Interest

**§ 31. General Rules of Construction.**

Rule that devise shall be construed to be in fee *held* inapplicable to language creating active trust with provision vesting estate in others upon termination of the trust. *Stephens v. Clark*, 84.

**§ 33c. Vested and Contingent Interests.**

A devise of an estate to a class described as heirs or legal heirs, either immediately or after the termination of a particular estate, passes the property or the remainder to testatrix' heirs as determined by the canons of descent as of the date of the death of testatrix. *Stephens v. Clark*, 84.

Testator left certain realty to his wife for life, "the same to revert to and become the property of my heirs in equal proportion under the rules of descent at the death of my said wife." *Held:* The words "my heirs" have a definite legal significance, and the remainder vested in the heirs as of the time of the death of the testator, and upon the death of a son of the testator prior to the death of testator's widow, the lands so devised to the son belong to his estate as against his children him surviving. *Jones v. Franks*, 281.

Testator and his son each owned an undivided one-half interest in the lands in controversy. Testator devised his one-half interest to his wife for life, "and upon her death to revert to my son. . . . if he be alive, or to his heirs, if he be dead." *Held:* The son took a remainder in the interest devised contingent upon his surviving testator's widow, and upon his prior death, his children then living became the owners of the remainder. *Redden v. Toms*, 312.

**§ 33d. Estates in Trust.**

A devise of land to one person with direction that the rents therefrom be used for the benefit of another, creates an active trust in accordance with the express intention of the testator, even though the testator does not use the words "trust" or "trustee," no particular language being necessary for the creation of a trust if the intent to do so is evident. *Stephens v. Clark*, 84.

A bequest to "any organization which may be organized for the purpose of enforcing the prohibition laws" of the county may not be upheld as a trust so as to enable a corporation formed for the stipulated purpose after the death of the testator to take, since the bequest purports to vest sole ownership in the legatee without restriction, and constitutes an absolute gift rather than a trust. *Dry Forces v. Wilkins*, 560.

**§ 33f. Devises With Power of Disposition.**

Devise for benefit of devisees with full power of disposition *held* to empower devisees to mortgage the land. *Ferrell v. Ins. Co.*, 423.

**§ 34. Designation of Devisees and Legatees, and Their Respective Shares.**

Testatrix created an active trust and provided that, upon the termination of the trust upon the death of the beneficiary, all her property should go "to the legal heirs." *Held:* In the absence of language clearly showing a contrary intent, the words "legal heirs" will be given their definite legal meaning, and take the property to testatrix' heirs according to the canons of descent as of

WILLS—*Continued.*

the date of testatrix' death, and testatrix' brother living at the time of testatrix' death is entitled to an undivided interest in the estate with the children of testatrix' sister, who predeceased testatrix. *Stephens v. Clark*, 84.

Where a will devises property after the termination of an active trust to testatrix' heirs or legal heirs, who are the legal heirs under the canons of descent is a question of law for the courts, after the jury has determined the identity of persons claiming relationship with testatrix. *Ibid.*

**§ 39. Actions to Construe Wills.**

Where a will devises property to testatrix' heirs without expressions limiting or qualifying the phrase, the estate goes to the heirs as determined by the canons of descent, and the language being clear and unequivocal, parol evidence tending to show that testatrix intended to limit the term to include children of a deceased sister to the exclusion of testatrix' brother her surviving, is properly excluded. *Stephens v. Clark*, 84.

**§ 43. Void and Forfeited Legacies.**

A will speaks at the time of the death of testator, and if at that time there is no organization or entity answering the description and capable of taking the bequest, the bequest is void, even though a corporation is thereafter formed conforming to the description. *Dry Forces v. Wilkins*, 560.

**§ 44. Election.**

The principle of election under a will requires that he who takes under the will must conform to all of its provisions, but the *prima facie* presumption is that the testator intended to dispose only of his own property, and in order for this presumption to be overcome and the principle of election to apply, the intention of testator to dispose of property not his own must be clear and unmistakable. *Bank v. Misenheimer*, 519.

Evidence *held* to support finding that testator did not intend to dispose of property not his own and put beneficiary to election. *Ibid.*

**§ 46. Title, Rights, and Conveyances by Devisees.**

The owner of a one-half interest in lands devised his interest to his wife for life with contingent limitation over to T., the owner of the other one-half interest, if he should survive testator's wife. Testator's widow and T. jointly executed a deed in fee to the lands. *Held:* The deed conveyed the widow's life estate and T.'s fee in one-half the land and his contingent remainder in the other half, and upon T.'s death neither his widow nor his estate has any interest in the land. *Redden v. Toms*, 312.

Devisees of property take same subject to prior mortgage debt thereon, and judgment that if the debt were not arranged for by the interested parties, the executor should sell the land to satisfy the liens, and disburse the excess in accordance with the terms of the will, is proper. *Bank v. Misenheimer*, 519.

**§ 48. Crops, Rents, and Interest.**

While ordinarily rents collected by the executor from devised realty go to the devisee, an order directing application of rents to repairs, taxes, insurance, and mortgage indebtedness against the property, is not injurious to the devisees, and an exception to such order is without merit. *Bank v. Misenheimer*, 519.

WITNESSES.

Cross References: Privileged communications see Evidence §§ 12, 14.

**§ 4. Age.**

The competency of a nine-year-old girl to testify is a matter resting in the sound discretion of the trial court. *S. v. Jackson*, 202.

## WORDS AND PHRASES CROSS REFERENCE.

Attractive Nuisance see Negligence § 4d.
Chattels, Unfixed, rights of purchaser at foreclosure sale see Mortgages § 42.
Counterclaims and Set-Offs see Pleadings § 10.
Covenants, Restrictive, see Deeds § 16.
Damnum Absque Injuria see Actions § 3.
Deaf Mute, Arraignment of, see Criminal Law § 16.
Discovery see Bill of Discovery.
Grand Jury, exclusion of persons of Negro race from, as denial of due process see Constitutional Law § 33.
Improvements see Betterments.
Last Clear Chance see Negligence § 10.
Licenses see Brokers and Factors § 1, Taxation § 1, Gaming § 1.
Moot Actions see Actions § 2.
Negroes, Exclusion from Grand Jury, see Constitutional Law § 33.
Quo Warranto see Elections § 18a.
Reckless Driving see Automobiles § 31.
Rule in Shelley's Case see Deeds § 13b.
Slot Machines see Contracts §7d, Gaming.
Statute of Frauds see Frauds, Statute of.
Statute of Limitations see Limitation of Actions.
Summons see Process.
Workmen's Compensation see Master and Servant, Title VII.
Writ of Assistance see Assistance, Writ of.

## CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC. 93. Secured creditor must exhaust security and file claim only for balance due after credit of proceeds of sale. *Rierson v. Hanson*, 203. Hospital expenses reasonable necessary for care of deceased within year prior to death *held* preferred claim. *Hospital Assn. v. Trust Co.*, 245.

SEC. 101. Creditors filing claims more than twelve months after publication of notice may assert demand only against undistributed assets. *In re Estate of Bost*, 440.

SEC. 108. Expenditure of over $100 for gravestone in accordance with stipulations in will without order of court *held* not to render executors personally liable, it appearing at time of expenditure that estate was amply solvent. *In re Estate of Bost*, 440.

SEC. 135. Administrator may be sued for wrongful investment and refusal to account for funds without demand for settlement of estate. *Leach v. Page*, 622.

SEC. 139. Grandchild *held* answerable for advancements under facts of this case. *Wolfe v. Galloway*, 361.

SEC. 219 (d). Presumption arising from transfer of stock within 60 days prior to suspension relates to closing of bank for liquidation and not to emergency bank holiday. *Hood, Comr., v. Clark*, 693.

SEC. 357. Ordinarily irrelevant matter will be stricken out on motion, but matter is largely in discretion of trial court. *Ins. Co. v. Smathers*, 373.

SEC. 415. Judgment on nonsuit bars subsequent action upon substantially identical pleadings and evidence. *Ingle v. Cassady*, 287.

SEC. 430. Where heir, as tenant in common, takes possession under agreement with coheirs, his possession is not adverse. *Stallings v. Keeter*, 298.

CONSOLIDATED STATUTES—*Continued.*

SEC. 437. Action on judgment by confession is not barred until ten years from rendition. *Davis v. Cockman*, 630.

SEC. 446. Requirement that action be maintained by real party in interest means interest in subject matter of litigation and not merely interest in the action. *Rental Co. v. Justice*, 54.

SEC. 467. Summons in this proceeding for appointment of substitute trustee *held* to give trustor sufficient notice. *Nall v. McConnell*, 258.

SECS. 469, 446, 449, 450, 2169. Guardian for incompetent may maintain action in county of his personal residence although cause arose in county of his appointment in which incompetent resided. *Lawson v. Langley*, 526.

SEC. 492. Judgment by default final on service by publication may be set aside upon proper affidavit filed within prescribed time showing good cause and meritorious defense. *Blankenship v. DeCasco*, 290.

SECS. 507, 511 (5). Complaint may join causes of action arising out of same transaction or series of transactions forming one course of dealing. *Barkley v. Realty Co.*, 540.

SEC. 511. Demurrer challenges sufficiency of pleading, while motion to nonsuit challenges sufficiency of evidence. *Smith v. Sink*, 725.

SEC. 535. Upon demurrer, pleading will be liberally construed with view to substantial justice. *Council v. Bank*, 262; *Leach v. Page*, 622; *Anthony v. Knight*, 637.

SEC. 537. Indefiniteness may not be taken advantage of by demurrer, the remedy being by motion to make the pleading definite by amendment. *Leach v. Page*, 622.

SEC. 543. Admission of allegations in answer establishes them and makes it unnecessary for plaintiff to introduce evidence in support of them. *Little v. Rhyne*, 431.

SEC. 564. Court must charge in plain and correct manner the evidence in the case and explain law arising thereon, and no request is necessary for charge on substantive features. *School District v. Alamance County*, 213. Where charge of court meets requirement of C. S., 564, party desiring fuller charge must aptly tender request therefor. *Headen v. Transportation Co.*, 639. Instruction *held* for error in failing to charge defendant's right, arising on evidence, to stand ground and repel murderous assault. *S. v. Thornton*, 414; *S. v. Godwin*, 419. Interrogatories by court addressed to defendant testifying in own behalf *held* error as expression of opinion by court on the evidence. *S. v. Bean*, 59.

SEC. 567. Motion to nonsuit challenges sufficiency of evidence, while demurrer challenges sufficiency of pleading. *Smith v. Sink*, 725. Motion to nonsuit must be renewed after introduction of defendant's evidence. *Rental Co. v. Justice*, 54. On motion to nonsuit all evidence must be considered in light most favorable to plaintiff. *Hancock v. Wilson*, 129; *Harper v. R. R.*, 398; *Stovall v. Ragland*, 536; *Cole v. R. R.*, 592; *Denham v. Whiteville*, 618; *Headen v. Transportation Co.*, 639; *Oil Co. v. Iron Works*, 668. Motion to nonsuit on ground of contributory negligence may be allowed only when plaintiff's evidence establishes contributory negligence and there is no evidence to contrary. *Hayes v. Tel. Co.*, 192. If to any extent cause of action is made out, motion should be denied. *Jackson v. Thomas*, 634.

SEC. 568. Findings of court are conclusive when supported by evidence, and exception to judgment without exception to evidence or court's findings presents sole question of whether facts found support judgment. *Best v. Garris*, 305.

CONSOLIDATED STATUTES—*Continued.*

SEC. 572. By consenting to reference, parties waive right to jury trial. *Anderson v. McRae*, 197.

SEC. 578. Court must pass upon exceptions in consent reference and review evidence relating to findings excepted to. *Anderson v. McRae*, 197.

SEC. 600. Presence of counsel for a party when a plea is heard precludes such party from asserting excusable neglect. *Dail v. Hawkins*, 283. Where party is in courtroom at time it was announced that motions in his case would be heard the following day, he may not set up excusable neglect. *Abernethy v. Trust Co.*, 450. Movant must allege facts showing meritorious defense, and mere allegation of nonliability and meritorious defense is insufficient. *Hooks v. Neighbors*, 382.

SEC. 618. Insurer of one tort-feasor paying judgment *held* not entitled to assignment of judgment as against insurer of other tort-feasor. *Casualty Co. v. Guaranty Co.*, 13.

SECS. 634, 635. Appeal from clerk in dower proceeding in which questions of law and fact are raised by pleadings *held* governed by C. S., 634, and not C. S., 635, and plaintiff need not have clerk prepare and forward to judge transcript of the record. *McLawhorn v. Smith*, 513.

SEC. 643. Record duly certified imports verity, and Supreme Court is bound thereby. *S. v. Stiwinter*, 278.

SECS. 643, 644. Where judge settles case on appeal, motion to dismiss for prolix record is addressed to discretion of Supreme Court. *Messick v. Hickory*, 531.

SEC. 650. Where husband files no stay bond, wife may issue execution against his property, but after appeal the Superior Court is without jurisdiction to hear motion to enforce payment of alimony. *Vaughan v. Vaughan*, 354.

SEC. 673. Verdict establishing conversion of plaintiff's property is sufficient to support judgment for execution against the person. *Fertilizer Co. v. Hardee*, 653.

SEC. 753. Judgment in special proceeding rendered less than ten days after service of summons is irregular but not void. *Nall v. McConnell*, 258.

SEC. 869. Receiver may not be appointed in action on simple, unsecured debt when no right to or lien on property is asserted. *Scoggins v. Gooch*, 677.

SEC. 815. The filing of undertaking does not preclude defendants from traversing ground upon which attachment is based. *Rushing v. Ashcraft*, 627.

SECS. 900, 901. Statutes should be liberally construed. *Douglas v. Buchanan*, 664. Where pleadings have been filed, adverse party may be examined without leave of court, and affidavit is unnecessary, and pleadings determine scope of examination. *Ibid.*

SEC. 987. Evidence *held* for jury on question of financial interest of person promising to answer for debt of another. *Noland Co. v. Jones*, 462.

SEC. 996. Trustee and beneficiaries *held* concluded by judgment that interests of minor children was contingent and revoking trust. *Smathers v. Ins. Co.*, 345.

SEC. 1037 (d). Corporation formed under ch. 291, Public Laws of 1935, need not get certificate of convenience before constructing power lines. *Light Co. v. Electric Membership Corp.*, 717.

SEC. 1112 (32). Customer is entitled to restoration of electric service after suspension without first obtaining an order from Utilities Commission. *Sweetheart Lake, Inc., v. Light Co.*, 269.

CONSOLIDATED STATUTES—*Continued.*

SEC. 1112 (o). Carriers may not reduce rates when such reduction is made pursuant to agreement in violation of monopoly statute. *Bennett v. R. R.*, 474.

SEC. 1241 (4). Where jury finds that plaintiff was slandered but does not award damages, plaintiff is entitled to nominal costs. *Wolfe v. Montgomery Ward & Co.*, 295.

SEC. 1334 (8). Section does not give special authority to counties to erect teacherages in connection with consolidated schools. *Denny v. Mecklenburg County*, 558.

SEC. 1452. Proper authorities should make due advertisement of special term of court in compliance with statute, but statute is directory and not mandatory, and motion in arrest of judgment for failure of due advertisement will not be granted. *S. v. Boykin*, 407.

SEC. 1541 (3). All crimes below degree of felony are "petty misdemeanors" within meaning of constitutional exception relating to indictment. *S. v. Boykin*, 407.

SEC. 1660 (1). Only the injured party, husband or wife, is entitled to divorce *a mensa et thoro* on the ground of abandonment. *Vaughan v. Vaughan*, 354.

SEC. 1666. Trial court is required to find facts in order that correctness of ruling may be reviewed, and finding merely that defendant was owner of certain properties is insufficient to support order. *Dawson v. Dawson*, 453. Order for alimony *pendente lite held* to sufficiently set forth fact of abandonment and financial necessity of wife. *Vaughan v. Vaughan*, 354.

SEC. 1667. Alimony without divorce may be had only by independent suit, and application for alimony *pendente lite* may not be treated as application for alimony under this section. *Dawson v. Dawson*, 453. Proof of one ground for divorce is sufficient under this section. *Hagedorn v. Hagedorn*, 175.

SEC. 1744. Action to sell lands under statute abates upon death of contingent remainderman prior to death of life tenant when his estate was contingent upon his surviving life tenant. *Redden v. Toms*, 312.

SEC. 1790. Charge *held* to have sufficiently instructed jury that mortuary table was merely evidential and that jury was not bound thereby. *Hancock v. Wilson*, 129.

SEC. 1795. *Held:* Testimony related to communication with decedent by interested party and was incompetent. *In re Will of Plott*, 451.

SEC. 1798. Whether physician should be compelled to disclose information concerning patient lies in sound discretion of trial court. *Creech v. Woodmen of the World*, 658.

SEC. 1801. Husband or wife may voluntarily disclose confidential communications. *Hagedorn v. Hagedorn*, 175.

SECS. 1850, 1851. Party may impound loose sow, have sow sold, and pay himself lawful fees for impounding and damages. *Beasley v. Edwards*, 393.

SEC. 2150. Clerk is without authority to appoint guardian for minor having estate and residence in another county. *Duke v. Johnston*, 171.

SECS. 2241, 2242. *Habeas corpus* does not lie to determine custody of minor child as between divorced parents. *In re Ogden*, 100.

SECS. 2312, 2313, 2314. Evidence *held* to support finding that grand jury was legally drawn and that colored persons were not illegally barred therefrom. *S. v. Walls*, 487.

CONSOLIDATED STATUTES—*Continued.*

SECS. 2343, 2372. *Held* inapplicable where lease contract provides for termination of lease contract for nonpayment of rent. *Tucker v. Arrowood*, 118.

SECS. 2367, 446. Although agent of lessor may make oath in writing required in summary ejectment, the action may not be maintained in name of agent. *Rental Co. v. Justice*, 54.

SEC. 2492 (50). Provision that holders of refunding bonds should be subrogated to rights of holders of indebtedness refunded *held* not adversely after by constitutional amendment allowing Legislature to exempt residences up to $1,000 from taxation. *Nash v. Comrs. of St. Pauls*, 301.

SEC. 2492 (55 to 59). Statute providing for action by taxing unit to have bond issue declared valid is constitutional. *Castevens v. Stanly County*, 642.

SEC. 2515. Private examination of wife is not required for confession of judgment by husband and wife in favor of creditors taken in conformity with C. S., 623, 624, 625. *Davis v. Cockman*, 630.

SEC. 2574. Individual may maintain action for damages caused by defendants' violation of C. S., 2563, but plaintiff has burden of showing causal connection between violation and damage. *Bennett v. R. R.*, 474.

SEC. 2578. Where pleading alleges that foreclosure was had by duly substituted trustee, demurrer on ground that summons was not served on personal representative of deceased original trustee is bad as speaking demurrer. *Nall v. McConnell*, 258.

SEC. 2583 (a). Substitute trustee may execute deed to purchaser at sale conducted by original trustee. *Pendergrast v. Mortgage Co.*, 126.

SEC. 2616. Ch. 140, sec. 15, Public Laws of 1917, is not repealed by sec. 4, ch. 148, Public Laws of 1927. *Kelly v. Hunsucker*, 153.

SEC. 2621 (45). Driving automobile without due caution at speed or in manner endangering persons or property constitutes reckless driving. *S. v. Folger*, 695.

SEC. 2621 (51), (54b). Law in passing vehicle going in same direction. *Stovall v. Ragland*, 536.

SEC. 2621 (53). Instruction in regard to passing vehicles on highway *held* without error. *Hancock v. Wilson*, 129.

SEC. 2621 (59). Driver is not required to give signal for turn when no vehicle is visible in front or behind. *Stovall v. Ragland*, 536.

SEC. 2621 (66), (94). Evidence *held* to show compliance with statute in parking on highway and failed to show culpable negligence. *S. v. McDonald*, 672.

SEC. 2703, *et seq.* Party petitioning for public improvements and accepting benefits *held* estopped to attack assessments. *High Point v. Clark*, 607.

SEC. 2791. City *held* to have power to pave street acquired by it by dedication, although street was outside city limits. *High Point v. Clark*, 607.

SECS. 2976, 3040. Party having and offering in evidence not endorsed in blank by payee establishes *prima facie* case. *Pickett v. Fulford*, 160.

SEC. 3039. Purchaser not a holder in due course takes note free from agreement between maker and third person not a party to the note in absence of notice at the time of the assignment to the purchaser. *Pickett v. Fulford*, 160.

SEC. 3233. Burden is on party seeking sale for partition to show necessity therefor. *Wolfe v. Galloway*, 361.

CONSOLIDATED STATUTES—*Continued.*

SEC. 3449. Where railroad tracks are laid across road connecting dwellings with highway, railroad company is required to maintain such crossing in reasonably safe condition. *Cashatt v. Brown*, 367.

SEC. 4162. Rule that devise shall be construed to be in fee *held* inapplicable to language creating active trust with provision vesting estate in others upon termination of the trust. *Stephens v. Clark*, 84.

SEC. 4171. Indictment for crime punishable by death or imprisonment must use the word "feloniously." *S. v. Callett*, 563.

SECS. 4200, 4624. Indictment charging defendant disjunctively with murder with malice, premeditation, and deliberation, or murder in perpetration of robbery *held* not void for indefiniteness. *S. v. Puckett*, 66.

SECS. 4226, 4227. In prosecution under this section, evidence that deceased took anæsthetic at time of taking medicine to produce abortion, and evidence that she was suffering with disease facilitating abortion, *held* irrelevant. *S. v. Evans*, 458.

SEC. 4336. Evidence *held* sufficient for jury. *S. v. Callett*, 563.

SEC. 4625. Motion in arrest of judgment will not be allowed for defects which do not vitiate. *S. v. Puckett*, 66.

SEC. 4632. Arraignment of deaf mute and acceptance of plea of not guilty through interpreter *held* without error in this case. *S. v. Early*, 189.

SEC. 4643. Failure of defendant to move for judgment as of nonsuit or request directed verdict waives his right to have sufficiency of evidence considered on appeal. *S. v. Ormond*, 437. Where it is determined on appeal that evidence is insufficient, case will be remanded in order that proper judgment may be entered. *S. v. McDonald*, 672.

SEC. 4651. Failure of affidavit to aver that it is in good faith is fatal defect not curable after statutory time. *S. v. Holland*, 284.

SECS. 5352, 5353. In this action to foreclose second drainage assessment, landowner could not attack validity of district. *Drainage Comrs. v. Jarvis*, 690.

SECS. 5923, 5933. Statutory remedy is not exclusive, but validity of election may be tested by *quo warranto*. *Swaringen v. Poplin*, 700.

SECS. 6287, 6288. Laws in force at time of issuance of policy become part thereof, and stipulation in policy contrary to statutory provisions are of no effect. *Wells v. Ins. Co.*, 427.

SEC. 6289. Material misrepresentations for which policy may be avoided are those which would influence insurer in making contract. *Wells v. Ins. Co.*, 427.

SEC. 6291. Does not exempt insurance companies from provisions of C. S., 2305, 2306. *Cowan v. Ins. Co.*, 18. Endowment policy *held* life insurance policy within meaning of C. S., 6291. *Ibid.*

SEC. 6460. Policy issued without medical examination may be avoided for misrepresentations relating to matters other than physical condition of applicant, even in the absence of fraud. *Inman v. Woodmen of the World*, 179.

SECS. 7880 (51), (e), (g), 2677. Statute prohibiting municipal peddlers' tax *held* not to preclude municipal privilege tax upon bakeries delivering inside city. *S. v. Bridgers*, 235.

SEC. 8081 (r). Compensation Act should be administered so that employer and employee receive benefits and protection of the act. *Winslow v. Carolina Conference Assn.*, 571.

CONSOLIDATED STATUTES—*Continued.*

SEC. 8081 (ff). Requirement that claim be filed within one year is condition precedent to right to compensation. *Winslow v. Carolina Conference Assn.*, 571.

SEC. 8081 (ppp). Notice of appeal may be served on adverse parties within thirty days from award or receipt of notice thereof. *Winslow v. Carolina Conference Assn.*, 571.

CONSTITUTION, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART. I, SEC. 7. Statute providing for licensing of real estate brokers in designated counties *held* unconstitutional as discriminatory. *S. v. Warren*, 75.

ART. I, SECS. 12, 13. Necessity for indictment does not apply to "petty misdemeanors," and indictment in Superior Court is not necessary upon appeal from conviction in recorder's court. *S. v. Boykin*, 407.

ART. I, SEC. 17. Persons in well defined class may be served by publication in action *in rem* without being named in summons. *Castevens v. Stanly County*, 642.

ART. I, SEC. 28. Administrator may be appointed upon presumption of death from seven years absence. *Chamblee v. Bank*, 48.

ART. II, SEC. 29. Statute enlarging jurisdiction of town to include sidewalks and alleys *held* not special act inhibited by this section. *Deese v. Lumberton*, 31.

ART. IV, SEC. 1. Distinction between actions at law and suits in equity is abolished. *Wolfe v. Galloway*, 361.

ART. IV, SEC. 8. Remedy for review of *habeas corpus* proceedings for custody of minor child as between divorced parents is by *certiorari* to invoke supervisory power of Supreme Court. *Hagedorn v. Hagedorn*, 175. Jurisdiction of the Supreme Court upon appeal in criminal cases is limited to matters of law or legal inference. *S. v. Jackson*, 202.

ART. IV, SEC. 12. Statute providing for suit by taxing unit to have proposed bond issue declared valid does not impose nonjudicial function of determining moot question on courts. *Castevens v. Stanly County*, 642.

ART. V, SEC. 5. Constitutional amendment permitting Legislature to exempt residences up to $1,000 from taxation is not self-executing. *Nash v. Comrs. of St. Pauls*, 301.

ART. V, SEC. 6. Taxpayer *held* concluded by judgment in action under N. C. Code, 2492, declaring bonds were necessary for constitutional school term. *Castevens v. Stanly County*, 642.

ART. VII, SEC. 2. Power to pass upon claim against county is vested in county commissioners and not in chairman of the board. *Reed v. Farmer*, 249.

ART. VII, SEC. 7. City's purchase of land for airport with surplus funds will not be disturbed, but city may not make improvements thereon from funds derived from *ad valorem* taxes. *Goswick v. Durham*, 687.

ART. IX. *Mandamus held* to lie under facts of this case to compel county to assume indebtedness incurred by special charter school district to provide constitutional school term. *School District v. Alamance County*, 213.