NORTH CAROLINA REPORTS.

VOL. 128.

Cases Argued and Determined

IN

THE SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1901.

BY

ZEB. V. WALSER,

STATE REPORTER.

ANNOTATED BY

WALTER CLARK.

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FEBRUARY TERM, 1901.

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WALTER A. MONTGOMERY, CHARLES A. COOK.†

ATTORNEY-GENERAL:

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SUPREME COURT REPORTER:

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CLERK OF THE SUPREME COURT:

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*Appointed January 5, 1901, vice Wm. T. Faircloth, who died December 30, 1900.
†Appointed January 7, 1901, vice D. M. Furches, appointed Chief Justice.

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FEBRUARY TERM, 1901.

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BOYD, ROBERT W.....Haywood County.
BROOKS, FREDERICK H.....Johnston County.
CRAIGE, BURTON .....Rowan County.
DANCY, OSCAR C.....Wilkes County.
DAVIS, ROBERT W.....Brunswick County.
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GREENE, CHARLES E.....Mitchell County.
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RECTOR, WILEY C.....Henderson County.
ROSSER, CARNEY K.....Moore County.
SHAW, DUNCAN P.....Robeson County.
STEWART, PLUMMER .....Union County.

CASES REPORTED IN THIS VOLUME.

CASES CITED BY THE COURT.

I. Cases From North Carolina Reports.

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CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

FEBRUARY TERM, 1901.

POOL v. LAMB.

(Filed 26 February, 1901.)

LANDLORD AND TENANT—*Title—Estoppel.*

A tenant can not deny the landlord's title during the tenancy, and this rule is not affected by the fact that the building stands upon rented ground.

ACTION by W. G. Pool, administrator, against E. F. Lamb, heard by Judge *A. L. Coble* and a jury, at March Term, 1900, of PASQUOTANK. From a judgment for defendant, the plaintiff appealed.

E. F. Aydlett, G. W. Ward and P. H. Williams, for the plaintiff.

Busbee & Busbee, for the defendant.

CLARK, J. This was an action to recover rents for a building rented to defendant by plaintiff's intestate. The Court erred in refusing to charge, when requested, "that the defendant can not deny the title of the plaintiff." The defendant took possession as tenant of W. A. Greenleaf, 2 December, 1892, and not having surrendered possession to said Greenleaf or his admitted agent, Mrs. H. T. Greenleaf, nor to the plaintiff, he can not be heard to deny that title, during the existence of his tenancy of the property which contin- (2) ued till 19 May, 1899, shortly before the beginning of this action. If the defendant had surrendered possession to another and received possession back from him, thus attorning to the new lessor, this would not abrogate this rule of law. In order to convert a tenancy into an adverse possession, there must be a clear, positive and continued disclaimer and disavowal by tenant of his landlord's title and assertion of an

adverse right for the requisite length of time brought home to the landlord. *Bonds v. Smith,* 106 N. C., 553; *Conwell v. Mann,* 100 N. C., 234; *Springs v. Schenck,* 99 N. C., 551. Though a tenant acquire a better title than that of his landlord, he can not avail himself of the possession acquired as tenant, but must surrender and bring his action of ejectment.

Even if plaintiff's intestate did not own the rented building, the defendant having entered into possession of the same as his tenant is estopped to deny his title to receive the rents. This rule is not affected by the fact that the building stood on rented ground and was afterwards moved to another lot, also rented. It was the building, not the lot, which the defendant rented of plaintiff's intestate and which the defendant occupied continuously from that time until May, 1899. Where one rented a farm and implements of the husband, he was estopped to deny plaintiff's right to recover the rent, although in fact the property belonged to the estate of the plaintiff's deceased wife. *Hamer v. McCall,* 121 N. C., 196. If anyone else wishes to set up claims to the rents, he could be made a party to the action and assert his title by interpleading. The tenant can not do so for him.

This renders it unnecessary to consider the other exceptions, since they may not arise on another trial.

Error.

Cited: Shell v. West, 130 N. C., 172.

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(3)

LAND COMPANY v. JENNETT.

(Filed 26 February, 1901.)

1. CLERKS OF COURTS—*Interest—Disqualification—The Code, Sec.* 104.

   No clerk can act as such in relation to any estate or proceeding if he has, or claims to have, an interest therein, or if he is so related to any person having, or claiming to have, such interest that he would by reason of such relationship be disqualified as a juror.

2. DEEDS—*Probate—Clerk of Superior Court.*

   Probate of a deed by a clerk interested therein is a nullity.

3. DEEDS—*Probate—Order.*

   When the probate of a deed is a nullity, the defect is not cured by the approval of the final decree under which it is made by the Judge of the Superior Court.

4. WAIVER—*Infants—Guardian ad Litem—The Code, Sec.* 105.

Waiver under The Code, sec. 105, of disqualification of Clerk of Superior Court must appear affirmatively. Questionable whether a guardian *ad litem* can make such waiver.

5. COSTS—*Appeal—Transcript.*

An appellee sending up unnecessary matter will be taxed with the cost of making and printing the transcript.

ACTION to recover land by the Scranton and North Carolina Land and Lumber Company against George Jennett and others, heard by Judge *Thomas McNeill* and a jury, at Fall Term, 1900, of HYDE. From a judgment of nonsuit, the plaintiff appealed.

(4)

Small & McLean, and *W. B. Rodman,* for the plaintiff.
Chas. F. Warren and *S. S. Mann,* for the defendants.

CLARK, J. The plaintiff claims under a deed from D. Wahab, administrator, which on its face purports to be authorized by orders and decrees in a special proceeding, entitled "D. Wahab, Adm'r of H. W. Wahab, against W. H. Wahab and others." It appeared in evidence that the order of sale in said special proceeding and the order confirming the sale by which the deed to plaintiff was directed and the probate of deed to plaintiff, were all made by J. H. Wahab, Clerk of the Superior Court, who was one of the heirs-at-law and distributees of the deceased and a party to the proceeding, that he drew the answer of the guardian *ad litem* of the infant defendants, that he was brother of the plaintiff in the special proceeding and brother and uncle of the defendants. The relationship is fully set out in the pleadings in said special proceeding.

The Court below properly held that said orders and decrees were void and that the plaintiff could not recover. The Code, sec. 104, subsecs. 1, 2; *Gregory v. Ellis,* 82 N. C., 225; *Freeman v. Person,* 106 N. C., 251; *Long v. Crews,* 113 N. C., 256; *McAllister v. Purcell,* 124 N. C., 262. The waiver in writing, authorized by section 105, must have affirmatively appeared, but it was not shown to exist at all, and if it had been it is questionable if a guardian *ad litem* could have made such waiver for the infant defendants. *White v. Connelly,* 105 N. C., at page 71. The defect in this case was apparent upon the face of the proceedings. *Blanton v. Bostic,* 126 N. C., 418.

What may be the remedy of plaintiff, who has paid the purchase money ($216) for the land in question, is not a mat-

ter before us. But clearly the plaintiff can not recover the land by virtue of a deed whose probate is a nullity and
(5) which was made under decrees made by a party to the action, the disqualification not having been waived in any mode, as required by statute, and some of the parties being incapable of making a waiver by reason of infancy. These defects were not cured by the approval of the final decree by the Judge of the district.

The appellee will, however, be taxed with costs of those parts of transcript and the printing thereof, which are embraced in secs. 2, 3 and 4 of appellant's exceptions, for sending up unnecessary matter, as provided by rules 22 and 31 of this Court. See cases cited in Clark's Code (3 Ed.), p. 918.

The judgment of nonsuit is affirmed.

Affirmed.

BIGGS v. LIFE ASSOCIATION.

(Filed 5 March, 1901.)

1. POWER OF ATTORNEY—*Irrevocable—Insurance—Laws* 1899, *ch.* 54.

   A power of attorney made in conformity with Laws 1899, ch. 54, sec. 52, subd. 3, is irrevocable.

2. PROCESS—*Service—Insurance.*

   Service of process upon State Commissioner is valid notwithstanding the insurance company attempted to annul the power of attorney conferred upon him under Laws 1899, ch. 54, sec. 62, subd. 3, and did not domesticate under Laws 1899, ch. 62.

ACTION by Noah Biggs against the Mutual Reserve Fund Life Association, heard by Judge *A. L. Coble,* upon
(6) agreed state of facts, at November Term, 1900, of HALIFAX. From a judgment for defendant, the plaintiff appealed.

W. A. Dunn and *Spier Whitaker,* for the plaintiff.

J. W. Hinsdale, Shepherd & Shepherd, and *R. C. Lawrence,* for the defendant.

CLARK, J. By virtue of chap. 54, sec. 62, subsec. 3, Laws 1899, one of the conditions precedent upon which a foreign insurance company should be authorized to do business in this State was that such company should file a duly executed in-

strument with the Insurance Commissioner, appointing him its attorney, upon whom all lawful process against said company could be served, "the authority thereof shall continue in force *irrevocable* so long as any liability of the company remains outstanding in this Commonwealth." The defendant accepted these terms, and on 13 April, 1899, filed its duly executed power of attorney to the required purport with the Insurance Commissioner, wherein it is stipulated and agreed by said company, "said company does hereby expressly agree that any lawful process against it, which may be served upon said James R. Young, Insurance Commissioner, or his successor, shall be of the same force and validity as if served upon the company, and this authority shall continue in force *irrevocable* so long as any liability of said company remains outstanding in the said State."

The State had the right to prescribe the conditions upon which a nonresident corporation would be permitted to do business here. *Paul v. Virginia,* 75 U. S., 168, and cases cited thereunder, 7 Rose's Notes, 33; 6 Thomp. Corp., sec. 8028; *Gibson v. Insurance Co.,* 144 Mass., 81; *Parks v. Accident Association,* 100 Iowa, 466; *Strauss v. Insurance Co.,* 126 N. C., 223. The object in requiring some one to be appointed upon whom process could be served is apparent. (7) If that appointment could be revoked by the company at will, the end sought to be attained would be as illusory as a will o' the wisp, which fleets when it is sought to grasp it. The defendant has, since 17 May, 1899, ceased to do any business in this State "through any local officer or agent." Without discussing whether it is "ceasing to do business in this State," to transact that business through agents located outside the State by means of the mail (*Insurance Co. v. Spratley,* 172 U. S., 603), it is sufficient to point out that the statute requires the power of attorney to be irrevocable *not* "as long as the company continues to do business" in this State, but as long as "any liability of the company remains outstanding" in this State, and the contract with the State as expressed in the power of attorney filed by the company so specifies. No amount of authorities having a more or less fancied analogy can overcome these plains words of the statute and of the power of attorney drawn and filed in conformity thereto. *Green v. Life Association,* 105 Iowa, 628, *Insurance Co. v. Gillett,* 54 Md., 213. Indeed it does not even appear that the defendant has ceased doing business in this State otherwise than through local agents. *Insurance Co. v. Spratley,* 172 U. S., 603.

The plaintiff seeks to enforce an outstanding liability against the defendant, and the service of process upon the Insurance Commissioner was valid service.

The fact that the defendant's attempt to become a domestic corporation of this State under the terms of the "Craig Law," chap. 62, Laws 1899, was declared to be a nullity and the defendant was held not to be a domestic corporation, (8) has no bearing upon this question.

Upon the facts agreed the judgment of the Court below was erroneous and must be reversed.

Reversed.

Cited: *Moore v. Life Asso.*, 129 N. C., 32; *Ins. Co. v. Scott*, 136 N. C., 158; *Fisher v. Ins. Co.*, 136 N. C., 225; *Scott v. Ins. Co.*, 137 N. C., 519; *Williams v. Life Asso.*, 145 N. C., 131.

REYBURN v. SAWYER.

(Filed 5 March, 1901.)

1. INJUNCTION—*Public Nuisance—Burden of Proof.*

   To restrain an alleged public nuisance, it must be irreparable and immediate, and must affect the complainant injuriously in some manner peculiar to himself.

2. INJUNCTION—*Estoppel.*

   An order dismissing a temporary injunction is no bar to a permanent injunction after the final hearing.

3. INJUNCTION—*Appeal.*

   An appeal from an order dismissing a temporary injunction does not continue the injunction.

ACTION by J. E. Reyburn against D. C. Sawyer, heard by Judge *George H. Brown*, at Chambers, 27 December, 1900, at Washington. From a decree in favor of defendant, the plaintiff appealed.

B. G. Crisp and *Hinsdale & Lawrence*, for the plaintiff.
E. F. Aydlett and *G. W. Ward*, for the defendant.

CLARK, J. This is an action to restrain defendant from constructing, maintaining or using certain pound nets in Albemarle Sound. It appeared that the grand jury had ignored a bill to indict a similar act as a public nuisance. The Judge,

upon conflicting affidavits, held: "After considering all the affidavits filed and the allegations contained in the pleadings and the argument of counsel, I am of opinion that the burden of proof is on the plaintiff to prove to the satis- (9) faction of the Court that the acts complained of as a public nuisance affect him injuriously in some manner peculiar to himself and not in common with the general public. It is also incumbent on plaintiff to show that such alleged nuisance is irreparable in its nature and the injurious effects are immediate so as to warrant the granting of the extraordinary remedy before the alleged nuisance is established by the findings of the jury. I am of opinion that the plaintiff has failed to show the above requirements to the satisfaction of the Court or by a preponderance of the evidence"—and refused to continue the restraining order to the hearing.

In this, on examination of the affidavits, we find no error. Fishing is a public industry against which an injunction will not lie when the injury to the private citizen is doubtful. This, however, does not debar the plaintiff from making out his case for a permanent injunction upon issues found by a jury at the final hearing, if he can. Appeals in this and like cases are unnecessary, as such final hearing will usually take place almost as early as, if not before, the opinion of this Court can be certified down, and the appeal can not have the effect to confer, pending the appeal, the injunction which The Judge refused. *James v. Marcom,* 125 N. C., 145; *Green v. Griffin,* 95 N. C., 50; High Injunction, sec. 893.

No error.

Cited: *Harrington v. Rawls,* 131 N. C., 41.

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(10)

FLOYD v. ROOK.

(Filed 12 March, 1901.)

PARTITION—*Report of Commissioners—Exceptions—Time for Filing—The Code, Sec.* 1896.

Exceptions to report of commissioners appointed to make partition of land must be filed within twenty days after report is filed.

ACTION by M. A. Floyd, W. J. Floyd, Bettie P. Gray, C. L. Floyd, T. T. Floyd, J. M. Floyd and E. I. Floyd against

Ellen Squire, June Squire and E. S. Rook, heard by Judge *A. L. Coble,* at October Term, 1900, of NORTHAMPTON. From the order of the Court affirming the report of the Commissioners, the plaintiffs appealed.

R. B. Peebles, for the plaintiff.
Gay & Midyett, for the defendants.

MONTGOMERY, J. An order for the partition of the lands described in the complaint, between the plaintiffs and the defendants, was made by the Clerk of the Superior Court of NORTHAMPTON County on 24 August, 1898, and on 29 November following, the report of the commissioners, who had been appointed to divide the lands, was filed in the Clerk's office. The plaintiffs, except E. J. Floyd, through their counsel, on 2 January, 1899, issued a notice to the defendants that they would move before the Clerk on 18 January, to set aside the judgment for partition in the cause.

On 2 February following, the plaintiffs filed exceptions to the report of the commissioners, and moved to continue the motion to set aside the judgment, and also the hearing of the exception. The defendants at the same time moved
(11) for a confirmation of the report of the commissioners. The Clerk continued all the motions in the cause to 7 March. On the hearing, the plaintiff's motions were overruled, and they appealed to the Superior Court. His Honor refused to hear the exceptions to the commissioners' report on the ground that they had not been filed within 20 days after the filing of the commissioners' report, and because the Court had no power in law to hear the exceptions for the reason that they had been filed after 20 days from the date of the filing of the commissioners' report. His Honor confirmed the report of the commissioners, and ordered the same to be enrolled and certified according to law.

There was no error in the rulings of the Court. It is provided in section 1896 of The Code that the report of commissioners, who may be appointed to make partition of lands between tenants in common, shall be filed in the office of the Clerk of the Superior Court, and, that if no exceptions thereto be filed within 20 days, the same shall be confirmed. The proceedings can only be impeached for mistake, fraud or collusion. That language of The Code is peremptory, and can not be explained or altered by judicial decree. Great inconveniences had arisen in the past, before the enactment of that section of The Code, in reference to the giving of proper no-

tices to the often numerous parties interested in the partition of lands, of the report of the commissioners. Revised Code, p. 452; Battle's Rev., p. 665. And to make those matters certain both as to the parties themselves and to subsequent purchasers for value, conclusive notice was to be presumed that all persons interested in partition proceedings had received notice of the particulars of the partition from the filing of the report of the commissioners, and that 20 days only after that time would be allowed in which to file exceptions to the report. The requirement of The Code in that (12) respect is not a rule of practice, nor is the report of the commissioners a pleading in the cause. The report is an act done by the representatives of the parties as well as of the Court, and of that act all parties interested must take notice. That requirement of The Code is a rule of law, and exceptions filed after 20 days have passed from the filing of the report of the commissioners are too late to be considered, and it makes no difference whether the report has been confirmed or not when the exceptions are filed, if they are filed after the time allowed by law.

We find no exception in so many words to the judgment of his Honor refusing to set aside the judgment and decree in partition of the Clerk, but, if such an appeal was intended, there is no error in that respect.

No error.

Cited: *McDevitt v. McDevitt,* 150 N. C., 645.

MOODY v. STATE PRISON.

(Filed 12 March, 1901.)

STATES—*Suability—Torts—State Prison—The Code, Sec.* 663.

The State Prison, being an agency of the State, can not be sued unless such authority is expressly given by statute.

ACTION by J. R. Moody against the State Prison, heard by Judge *W. S. O'B. Robinson,* at October Term, 1900, of WAKE. From a judgment for defendant, the plaintiff appealed.

Douglass & Simms, for the plaintiff.
Busbee & Busbee, and *Argo & Snow,* for the defendants.

CLARK, J. The plaintiff brings this action against the State Prison for damages sustained by him while a prison guard by the breaking of a ladder under him, which he alleges was in a dilapidated condition, and which he says he
(13) was compelled to use though its defective condition had been repeatedly called to the attention of the officers.

The defendant demurred that the complaint did not state a cause of action, because:

1. This is an action against the State, as such, the State Prison being merely an agency of the State to secure certain public and general services.

2. For the above reason, and even if it were a corporation, the State Prison is not liable to an action for tort.

The Court properly sustained the demurrer, and dismissed the action.

Being an agency of the State, the State Prison could only be sued when expressly authorized to be sued. *County Board v. State Board,* 106 N. C., 81. The statute incorporating the defendant (Laws 1899, ch. 24), does not contain the authority "to sue and be sued." The general authority to that purport conferred on corporations by The Code, sec. 663, has reference only to private and *quasi* public corporations, and not to corporations like the present, which are merely governmental agencies. As to these latter, the authority to be sued must be expressly given. *College v. Willis,* 6 Okla., 593; *S. c.,* 40 L. R. A. 677, and cases there cited.

But even if such authority was given, it would cover only actions ordinarily incidental in its operation, and would not extend to causes of action like the present. There is a distinct difference between conferring suability as to "debts and other liabilities for which the State Prison is now liable," and extending liability for causes not heretofore recognized. *Grate Co. v. Commonwealth,* 152 Mass., 28. "The exemption
(14) of the State from paying damages for accidents of this nature does not depend upon its immunity from being sued without its consent, but rests upon grounds of public policy, which deny its liability for such damages. *Bourn v. Hart,* 93 Cal., 338.

This is substantially a suit against the State. The defendant is a mere agent of the State in the administration of its government. The management and control of the State Prison is essentially a governmental function, being an indispensable part of the administration of the criminal laws of the State. The matter is so fully and completely settled that nothing is left us beyond the citation of authority.

In *Clodfelter v. State,* 86 N. C., 51, it was held that even an action instituted before this Court under the Constitution Art. IV, sec. 9, would not lie where a convict had lost his eyesight by the gross negligence of the supervising manager of the penitentiary, because, says SMITH, C. J., "the State, in administering the functions of government through its appointed agents and officers, is not legally liable to a claim in compensatory damages for an injury resulting from their misconduct or negligence. That the doctrine of *respondeat superior* applicable to the relations of principal and agent, created between other persons, does not prevail against the sovereign in the necessary employment of public agents, is too well settled upon authority and practice to admit of controversy."

If judgment upon such liability could be guarded against the defendant, it would be in effect a judgment against the State to be enforced by execution against the State property placed in the hands of its agency to be used for governmental purposes—the operation of the State Prison.

In the note to *Clodfelter v. State,* 41 Am. Rep., 442, (15) among cases cited to same purpose are *Alamango v. Supervisors,* 25 Hun., 551, which held that a convict injured by the negligence and illegal operation of a sawmill could not maintain an action therefor. *Lorillard v. Monroe,* 11 N. Y., 392; *Brown v. People,* 75 N. Y., 441. The editor adds: "It is not necessary to discuss the reason of the rule, for there is no break in the long line of authorities by which it is established. *Russell v. Men of Devon,* 2 Term (Dumf. & E.), 667; *Hill v. Boston,* 122 Mass., 344; *Hollenbeck v. Winnebago,* 95 Ill., 148; *Kincaid v. Hamlin,* 53 Iowa, 430; *Woods v. Colfax,* 10 Neb., 552; *French v. Boston,* 129 Mass., 392."

"No government," says Justice Miller, "has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers or agents." *Gibbons v. U. S.,* 8 Wall. (75 U. S.), 269. And Judge Story says in his work on Agency, section 319: "The government does not undertake to guarantee to any person the fidelity of any of its officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests." This is approved with citation of other authorities in *Robertson v. Nichol,* 127 U. S., at page 515.

In a case where a convict was injured by the breaking of a ladle in which he was carrying molten metal, whose defect had been called by him to the attention of the overseer, it was held

on above grounds (*Lewis v. State,* 96 N. Y., 71) that an action did not lie, the Court saying, "The doctrine is so uniformly asserted by writers of approved authority and the courts, that fresh discussion would be superfluous." To same purport *Splitdorf v. State,* 108 N. Y., 205; *Chapman v. State,* 104 Cal., 690; *Melvin v. State,* 121 Cal., 16.

In the late case of *Grate Co. v. Commonwealth,* 152 Mass., 28, already cited, where the statute gave the Superior
(16) Court jurisdiction of "all claims against the Commonwealth, whether at law or in equity" (which could not be done in this State, Const., Art. IV, sec. 9), it was, notwithstanding, held that the suability thus conferred only applied to recognized liabilities of the State, and did not therefore extend to a claim for damages resulting from the misfeasance or negligence of the Commonwealth's officers and agents in performing their duties. The reason given is that liability, founded on the neglect or torts of public officers engaged as servants in the performance of duties which the State as a sovereign has undertaken to perform, has always been denied—not on the narrow ground that such liability can not be enforced, but on the larger ground that no liability arises therefrom.

Even as to counties, we have an unbroken line of authorities that they can be sued only in such cases and for such causes of action as are authorized by statute, and such cases do not embrace liabilities for negligence or other torts of their officers and agents. *White v. Commissioners,* 90 N. C., 437; *Manuel v. Commissioners,* 98 N. C., 9; *Threadgill v. Commissioners,* 99 N. C., 352; *Pritchard v. Commissioners,* 126 N. C., 908; *Bell v. Commissioners,* 127 N. C., 85. To same purport, *Moffit v. Asheville,* 103 N. C., at page 258; Dillon Mun. Corp., sections 963, 965.

As to cities and towns, though by their charters they are broadly authorized "to sue and be sued," it is equally well settled that this suability does not create any liability for damages caused by the torts of their officers and agents when acting in a governmental capacity. *McIlhenny v. Wilmington,* 127 N. C., 146, and numerous cases there cited.

For a stronger reason there can be no liability in-
(17) curred by the State, or its agent the defendant, for the negligence of the officer in question, if it caused the damage complained of.

Affirmed.

MONTGOMERY, J., concurring, thinks it unnecessary in this case to pass upon whether the State Prison is or is not an incorporated institution. In either view of that matter this action can not be maintained, being founded on a tort for the recovery of damages for a personal injury.

Cited: *Jones v. Comr's,* 130 N. C., 452; *Nelson v. Relief Dept.,* 147 N. C., 104.

DOWDY v. WHITE.

(Filed 12 March, 1901.)

VENDOR AND PURCHASER—*Breach of Contract—Evidence—Sufficiency.*

The facts in this case held sufficient to constitute a contract to sell the land and that there was a breach thereof by the defendant.

ACTION by D. W. Dowdy against E. A. White, Emma White and Rufus White, executors of E. A. White, deceased, heard by Judge *A. L. Coble* and a jury, at November Term, 1900, of CRAVEN. From judgment for plaintiff, the defendants appealed.

O. H. Guion, for the plaintiff.
D. L. Ward and *Simmons & Ward,* for the defendants.

MONTGOMERY, J. This action was brought to recover from the defendant damages for an alleged breach of a written contract on the part of the testator of the defendant to convey to the plaintiff the tract of land described in the complaint. The contract does not consist of one paper writing, but is alleged to be embraced in a correspondence containing numerous letters between plaintiff and the defendant's testator. The first letter, dated 4 April, 1898, was from the plaintiff, in which he inquired of the defendant's testator the very lowest figure that would buy the land. The defendant's testator answered that letter four days later, writing that he would take $75 for the 33 acres, and further that "that is less than $2.50 per acre and is very cheap. Were it not so far from me, I would not sell it at that. Would make you a deed at any time you may set." Four days afterwards, the plaintiff replied that he would take the land at the defendant's testator's price, and that in a few days he would place the money in bank subject to the defendant's testator's order to be paid

upon the delivery of the deed. The plaintiff further wrote in the reply that he had heard conflicting reports about the acreage and title, and requested the testator to let him know by return mail, and concluded the letter as follows: "I am a poor man, and cannot afford to lose or have a lawsuit. You understand that of course you consider it sold, and I will have the money ready in a short time." The testator in rejoinder two days afterwards (14 April, 1898), gave an abstract of the title and averred that there were 33 acres in the tract; and closed by saying, "Let me know and I will make you a deed at any time, so you do not wait too long." A week later the plaintiff wrote to the defendant's testator that he was satisfied about the matter, and would take the land at the price agreed on; that he did not have the money on hand at present, and asked defendant to wait on him ten or fifteen days; that he hoped the defendant would indulge him that much and not let anyone else have the land until he should be heard from again. Ten days afterwards (2 May), the plaintiff

(19) wrote to the defendant's testator as follows: "New Bern, N. C., 2 May, 1898, Hon. E. A. White. Sir:—I have acted under Mr. Pope's instructions and deposited the money in the Farmers & Merchants Bank of New Bern. You can send the deed and get the money at any time you see fit. I would like to have it as soon as possible. I send herewith a receipt from the bank. Yours etc., D. W. Dowdy."

On 7 May, the defendant's testator wrote the plaintiff a letter in the following words: "Belvidere, N. C., 7 May, 1898. Mr. D. W. Dowdy, New Bern, N. C. Dear Sir:—Am in receipt of your favor of 2d inst., with Mr. J. W. Biddle's receipt for $75 to be paid me upon delivery of deed by me to you. This receipt is a mere personal receipt, and not a receipt by the bank, as you seem to think. In looking over the correspondence, I find that it has been a month or thereabout since I offered to take $75 for the land. If you had at once placed the money in bank and called for a deed, I should have felt in honor bound to have made it. As you did not do this, you will have to excuse me, and let me see if I cannot do much better than what you offer. I learn that there is some improvements going on in and around New Bern that will make my land more valuable. This I knew nothing about until within the last few days. I want to investigate the matter before I make a deed to any one. Respectfully, E. A. White."

The receipt was returned by defendant's testator to the plaintiff on 20 May. It contained a recital that the purchase money ($75) had been placed with the teller of the bank for

the payment of the land, and the teller testified that the money was kept as other moneys of the bank were kept, but separate to itself, and was to be paid out on the delivery of the deed, and that the money would have been paid out on delivery of the deed whether the teller had been there or not; that if plaintiff had called for the money, he thinks he would (20) have given it to him.

The first issue submitted to the jury was: "Did the defendant's testator E. A. White contract as alleged in the complaint to convey to the plaintiff the land referred to and described in the complaint?" And the second issue was, "Was there a breach of said contract on the part of the defendant's said testator?"

The defendant requested the Court to instruct the jury that if they believed the evidence they should answer the first and second issues "No." His Honor declined to give the defendant's instructions, but charged the jury that if they believed the evidence they should answer the first and second issues "Yes."

There was no error in the refusal of the Court to give the instructions requested by the defendant, and the instructions which he did give were correct. If it be conceded that the letter written by the plaintiff to the defendant on the 12th of April was a conditional acceptance by the plaintiff of the defendant's testator's offer to sell, certainly the letter of the testator to the plaintiff of 14 April, and the answer thereto by the plaintiff of 21 April made the contract complete—the offer certain and the acceptance certain. Up to the writing of those last two letters, whatever difficulties had been in the way had been adjusted and satisfactorily settled. Afterwards the defendant's testator said, "Let me know and I will make you a deed at any time, so you don't wait too long." Within the time agreed upon by the plaintiff the money had been deposited in bank by the plaintiff and the receipt therefor sent to the defendant's testator. Between the time of the plaintiff's letter to the defendant's testator asking for ten or fifteen days in which to raise the money, and the second of May, when the receipt for the deposit was sent by the plaintiff to the testator, the testator made no dissent to the time desired by the plaintiff to raise the money because of its (21) unreasonableness, or for any other cause; and the defendant's testator retained the receipt 18 days. The testimony of Biddle, the teller, tended to show that the purchase money had been deposited in the bank on 2 May, and that it was ready to be paid out on the delivery of the deed.

There is nothing in the correspondence on the part of the defendant's testator to show that time was of the essence of the contract—"So you do not wait too long" was all that was required. The plaintiff delayed only ten or twelve days after notifying the defendant's testator of his wish for that much delay, which was altogether reasonable.

The correspondence of the testator after 14 April did not concern the contract, but was merely an excuse for the non-performance of his part of the contract.

No error.

Cited: Rodman v. Robinson, 134 N. C., 515.

BATTS v. BATTS.

(Filed 12 March, 1901.)

EJECTMENT—*Exception in Deed—Burden of Proof.*

Where there is an exception in a deed, the burden of proof is upon him who would take advantage of the exception.

ACTION by D. L. Batts against J. E. Batts, heard by Judge *H. R. Starbuck* and a jury, at November Term, 1900, of WILSON. From a judgment for the plaintiff, the defendant appealed.

(22) *H. G. Connor & Son,* for the plaintiff.
No counsel for the defendant.

MONTGOMERY, J. This action is for the possession of a lot of land of three acres upon which there are valuable improvements. On the trial the plaintiff offered in evidence a deed to himself from the defendants in which was conveyed a tract of five hundred acres with an exception of seventy-three acres in the southwest corner, and which seventy-three acres are well described by metes and bounds. There was also evidence on the part of the plaintiff locating the 500-acre tract, and further evidence that the 3-acre lot was included in the boundaries of the 500-acre tract, and that the defendant was in possession of the 3-acre lot and premises.

The defendant offered no evidence, but requested the Court to charge the jury that the burden was on the plaintiff to

show that the *locus in quo* was outside the exception mentioned in the deed. The instruction was refused, and the jury were charged that if they were satisfied by a preponderance of the evidence that the lot of three acres was a part of and included within the boundaries of the 500-acre tract, then the burden was on the defendant to show by a preponderance of the evidence that the 3-acre lot was included in the exception. The defendant excepted, and appealed to this Court.

The only question presented is, upon whom does the *onus* lie, upon the plaintiff or upon the defendant? It is upon the defendant. The plaintiff's deed conveyed and covered the whole 500 acres; 73 acres were excepted. The defendant insists that the lot of 3 acres is a part of the exception, and certainly that is an affirmative, and he must prove it. *McCormick v. Monroe,* 46 N. C., 13; *Gudger v. Hensley,* 82 N. C., 481; *Steel Co. v. Edwards,* 110 N. C., 353.

No error.

Cited: Laffoon v. Kerner, 138 N. C., 284.

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(23)

HOSPITAL v. FOUNTAIN.

(Filed 12 March, 1901.)

HOSPITALS AND ASYLUMS—*Indigent Insane—The Code, Sec.* 2278—*Laws* 1899, *Ch.* 1, *Sec.* 44.

Under The Code, sec. 2278, and Laws 1899, ch. 1, sec. 44, an insane person able to pay expenses at the State Hospital is not entitled to free admission.

ACTION by the State Hospital at Raleigh against G. M. T. Fountain, guardian of Nancy L. Hargrove, heard by Judge *A. L. Coble,* at October Term, 1900, of EDGECOMBE. From judgment for defendant, the plaintiff appealed.

Shepherd & Shepherd, for the plaintiff.
G. M. T. Fountain, in propria persona.

COOK, J. This is a controversy submitted without action under section 567 of The Code, upon appeal by the plaintiff from the judgment of the Superior Court.

It being admitted in the case that the defendant, Nancy L. Hargrove, is possessed of an estate sufficient to defray her

expenses in the plaintiff Hospital, there are but two questions submitted for our decision: First, whether her estate is liable for her maintenance and treatment; second, is the institution required by law to maintain and treat her, as heretofore, without compensation?

Both of these questions are answered in section 2278 of The Code, which is in the following language: "In the admission of patients to an insane asylum, priority of admission shall be given to the indigent insane; provided that the boards of directors may regulate the admissions, having in view the curability of patients and the welfare of their institutions:

Provided further, that said boards may, if there be suffi-
(24) cient room, admit other than indigent insane persons upon payment of proper compensation."

It is plainly expressed in said section that it was the paramount purpose of the Legislature to care for the indigent—an insane person whose property is insufficient to support himself and his family immediately dependent upon him.

This section of The Code is taken from Laws 1883, chapter 156, section 39, and we have searched in vain to find any Act repealing it. We find it substantially re-enacted in chapter 1, section 44, Laws 1899, which is as follows: "In the admission of patients to any State Hospital, priority of admission shall be given to the indigent insane: *Provided,* that the boards of directors may regulate admissions, having in view the curability of patients, the welfare of their institutions and the exigencies of particular cases: *Provided further,* that said boards may, if there be sufficient room, admit other than indigent patients. If any inmate of any State Hospital shall require private apartments, extras, or private nurses, the directors, if practicable, shall provide the same at a fair price, to be paid by said patient." So that section 2278 of The Code is still in full force, except in such particulars as it may have been modified or changed by the last quoted section, which does not repeal the provision made for the "payment of proper compensation," but goes further and allows the directors to furnish private apartments, extras or private nurses, if practicable, for the use and comfort of those patients who are able to pay for it.

Thus the law is written and must be so held, unless it
(25) be in conflict with the Constitution, which we will now consider.

The former method of providing for the deaf mutes, the blind and insane, at the expense of the counties of their residence, was changed by the Constitution of 1868, Article XI,

section 10, which declared that "the General Assembly shall provide that all the deaf mutes, the blind and the insane of the State shall be cared for at the charge of the State." But this section was stricken out, and the following substituted in its place, to-wit: "The General Assembly *may* provide that the indigent deaf mutes, blind and insane of the State shall be cared for at the charge of the State" (the italicizing of "may" being ours), by an amendment submitted pursuant to Laws 1879, chapters 254, 268 and 314, which was ratified at the election held in 1880, and has ever since formed a part of the organic law of the State. And the laws of the State show that no other charge has been authorized. However, the attention of the Court has been called by counsel to the fact that that section of the Constitution of 1868 is incorporated in the copy of the Constitution as published with Laws 1889, 1891, 1893, 1895, 1897 and 1899. By what means or for what purpose it was so published, is of no concern to the Court, and can have no effect other than to confuse and mislead, as seems to have occurred. *In re Hybart,* 119 N. C., 359.

The Constitution as amended in 1879 empowers the General Assembly in its wisdom and discretion to provide for the indigent at the charge of the State, or otherwise, and being silent as to the expense to be borne by those of sufficient property, we must conclude it was not intended that any requirement should be put upon the Legislative Department as to them.

There is error. The judgment must be reversed.

Cited: S. c., 129 N. C., 90.

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(26)

MILLER v. RAILROAD.

(Filed 12 March, 1901.)

1. RAILROADS—*Negligence—Contributory Negligence—Questions for Court.*

   Where there is no conflict in the evidence, the question of contributory negligence is for the Court.

2. RAILROADS—*Negligence—Contributory Negligence.*

   A person who, seeing an engine standing near a crossing letting off steam in the usual manner, drives across in front of it, can not recover for personal injuries caused by his horse becoming frightened and running away.

ACTION by W. W. Miller against the Wilmington and Powellsville Railroad Company, heard by Judge *A. L. Coble* and a jury, at September Term, 1900, of BERTIE. From a judgment for the plaintiff, the defendant appealed.

B. B. Winborne and *St. Leon Scull,* for the plaintiff.
F. D. Winston and *R. B. Peebles,* for the defendant.

COOK, J. After introduction of plaintiff's evidence, the defendant moved for judgment as in case of nonsuit under the statute, Laws 1897, chap. 109, as amended by Laws 1899, chap. 131; motion refused and defendant excepted. Then defendant introduced its evidence, and after all the evidence was in renewed its motion, which was again refused and defendant again excepted. There was a verdict and judgment for plaintiff, and defendant appealed.

The contention of plaintiff is that he was injured by the negligence of defendant in its reckless and careless handling of its engine and train of cars, at or near the town of Windsor,

(27) in that defendant unnecessarily obstructed the public highway, crossing defendant's track, for an unreasonable length of time by allowing its trains to remain thereon, and carelessly allowing steam to escape, causing such noises as frightened his horse and unreasonably interfered with the rights of the plaintiff and general public, by reason of which his horse became frightened and ran away with him, throwing him from his buggy and doing him serious injury, causing him much pain, to his great damage, etc.

The defendant denies the same, and avers that the injury, if any, was caused by negligence in the careless driving of a wild horse by the plaintiff himself, and that it was not responsible for the same.

It appears from all the evidence (there being no material discrepancy in the testimony of the witnesses) that the first question presented for the decision of the Court is as to the *negligence* of the defendant; so that if the Court shall be of the opinion that the injury was caused other than by the defendant's negligence, then it will be unnecessary to consider the defendant's other exceptions.

"When the facts are agreed upon, or otherwise appear, *what* is ordinary care is a question of law for the Court; when the facts are in dispute, it is the duty of the trial Judge to explain what would be ordinary care under certain hypotheses as to facts, and leave the jury to apply the law to the facts as it may find them. In the case at bar the undisputed facts appear

in the evidence, so that *what* constitutes negligence or contributory negligence is a question of law to be decided by the Court, and should not be left to the jury." *Smith v. R. R.*, 64 N. C., 238; *Wallace v. R. R.*, 98 N. C., 494.

In *Pleasants v. R. R.*, 95 N. C., 195, MERRIMON, J., delivering the opinion of the Court, says: "The counsel for the appellant on the argument insisted that the Court ought to have submitted to the jury the question whether or (28) not the plaintiff used due diligence, or, to state it more definitely and appropriately, whether what the plaintiff did or failed to do was material, as shown by the evidence, constituted negligence or contributory negligence on his part. We think the Court ought not to have submitted such a question. It is not the province of the jury to decide such question. In this State, what constitutes negligence or reasonable diligence is a question of law to be decided by the Court. The facts appearing, the Court decides that there is or is not negligence or there was or was not due diligence." *Herring v. R. R.*, 32 N. C., 402; *Biles v. Holmes*, 33 N. C., 16; *Heathcock v. Pennington, Ibid*, 640; *Avery v. Sexton*, 35 N. C., 247; *Smith v. R. R.*, 64 N. C., 238; *Anderson v. Steamboat Co., Ibid*, 397."

Upon the close of plaintiff's evidence, the defendant admitted it to be true and moved for judgment as of nonsuit; and then, after defendant's evidence was concluded, the motion was renewed. The evidence offered by defendants does not contradict the plaintiff's in any material particular. So the question is one of law. Taking all the evidence of the plaintiff to be true, does it amount to negligence upon the part of the defendant? Or taking *all* the evidence submitted, does it establish negligence? The evidence bearing upon the question is as follows:

Oscar Speller said—

"This year, in winter time, was date of alleged injury. It was near the depot. I was at the blacksmith shop in front of the depot of the defendant company. The engine was standing about three or four steps from the sidewalk. The ditch is next to the street on the edge of the sidewalk. Measuring that in feet it would be nine or twelve feet. The sidewalk is about three or four steps wide. From the inner edge of the sidewalk to the engine was about eight steps. That is, from Turner's shop to the engine was about eight steps. The entire street from Turner's shop across to the fence is twenty-four steps. There is a sidewalk on one side next to Turner's shop, none the other side. The engine blocked

(29) up eight steps of the road. I think about one-third of the road was blocked up. That left the balance for a passway.

"There is grass next to the fence on the side away from the engine, where people don't drive. Between the engine and grass there were three or four steps. One would have to pass very close to the pilot cow-catcher to get by, as near as the distance of a little more than a step, not quite two steps (a step is a yard). I saw plaintiff coming by. I saw him coming down the hill. I had heard of his mare being a trotter. The plaintiff came on and as she got in about two steps of the track, she made a spring and jumped nearly across both the tracks, the sidetrack and the main line. At the first jump the plaintiff pulled on the reins, and the girth broke, and that pulled the buggy up on her, and she continued to run, and when he turned the corner, he fell out, or jumped out, I don't know which, and the wheel struck him, and knocked him down, and he stayed down. The engine was standing on the sidetrack on the switch. The engine could have been placed back from the road, could have placed it back as far as they wanted to. I do not know how long the engine had been there. I had been there about half an hour. From the time engine got there until the plaintiff came was ten or fifteen minutes. The engine was standing there when I got there. The engine was making no more noise than usual. The steam was escaping from the safety valve and cylinder cocks. There was not much smoke. The escape of steam from safety valves is a sort of stewing noise like it usually does when steam is up. I do not know what frightened the horse, but from my judgment she got scared of the engine."

(30) *Cross-Examination.* "There was plenty of room to pass. A gentle horse, not being afraid of the engine, there was plenty of room for him to pass. She was trotting along a slow gait. There were about four steps clear of the grass. He could have driven out on the grass. Two buggies could have passed, by one driving in the ditch. There were twenty-four steps from one sidewalk to the other. Take eight steps from twenty-four leaves sixteen steps.

"When plaintiff came along he could see the engine as well as I could. I don't think there would have been any trouble if the girth had not broken. I don't know which track the engine was on. It was the freight train. There was nothing unusual about the engine. No whistle blew. Nothing but the noise made by escaping steam as it always makes. All engines

make noise when they get steam on them. The warehouse is next to the sidetrack—the switch. The plaintiff used to be a rapid man with a horse. He used to drive mighty fast."

W. W. Miller, plaintiff, testified:

"On 2 January, early in the morning, after I passed engine, it blew off, and horse run, and harness broke. After I found the harness broke I had no way to do but to make my escape. I knew if I didn't get out I would be thrown out as it turned the corner. If I hadn't got out I would have been thrown out. I had driven this horse by there the Wednesday evening before. That time the engine was from the road about thirty steps, and she didn't show fright. I had passed three times with the engine there. The engine popped off was the reason my horse took fright. She would not have run but for that locomotive standing there popping off. My horse got frightened as near the engine as to post (pointed by him some twenty feet) in about twenty feet of the engine. I was (31) right against the engine side of it when the horse jumped. She went quietly till she got side of the engine and it popped off and frightened her. I was holding the reins as tight as possible. I didn't know whether the horse was gentle. I had just had her one week, and had driven her four or five times, and she showed no attempt to run."

Cross-Examination. "Robert Burden did not say anything to me about the harness, when I bought the horse. Fred Dunstan did not tell me she was a dangerous horse. There was plenty of room to drive by going close. I thought I could drive by without any trouble. I jumped out of the buggy because I thought I was going to be thrown out, and be hurt. If the girth had not broke I thought I could have held her; I think now that I could. I do not mean to say that they blew the whistle of the engine. The steam was escaping out of the steamcocks, was what I meant by popping off. I don't know whether the place where they were standing was the place they usually put off and take on freight or not.

"I thought my harness was a right good driving harness."

James Bond testified:

"Just as the mare crossed the track she jumped and ran. I thought the escaping steam frightened her. The plaintiff told me that after the girth broke he was afraid to sit in the buggy any longer, said he was afraid she'd kick. She was going a right good gait as she crossed the track; she was running as long as I saw her. After the girth broke I think

I would have done the same thing as plaintiff did; any prudent man would have done the same as plaintiff did after the girth broke. The ankle was very much swollen when I
(32) saw him at the doctor's office, and he seemed to be suffering great pain."

Cross-Examination. "I felt certain that the mare would run away and throw him out when she started to run."

Don't you know that the plaintiff is a reckless driver of horses?

(The plaintiff objected. Objection sustained, and defendant excepted. First exception.)

Evidence of the Defendant. Whit Lawrence testified:

"I am one of the engineers of the defendant company. I remember the morning when the plaintiff's horse passed and ran away. The engine and cars had pulled up there from the river for the conductor to get bills and orders, and for the purpose of passengers getting on the train. I saw the horse after the plaintiff was out of the buggy; and the engine up to that time had not been standing there over four minutes. I was sitting on the right-hand seat when the engine pulled up and had gotten off to oil up. The business of the company on this return trip did not require the engine to remain there over five or ten minutes. When plaintiff's horse passed, there had not been time to attend to the business of the company. We did not remain there that morning any longer than was necessary to attend to the business of the company. The steam was escaping from the cylinder cocks. The whistle was not blown. It is not safe to have an engine which does not permit the escape of steam through the
(33) safety valves and cylinder cocks. It is dangerous to have one that does not permit this.

Cross-Examination. "There was not room for the engine to stand without coming out there for the passengers to get on. We could have cut the train in two, and pulled across the road and kept the engine out of the highway; we were on the main track. We could not have cut the train in two without delaying the work, but it could have been done. I don't remember how many freight cars there were. I could have stopped, so far as oiling the machinery went, before we reached the road. When the engine is stopped the cylinder is always reversed; it could be shut off for a little while, but it is not safe. There is danger of bursting the cylinder heads out. The lower the steam the greater the condensation. It would not have taken but two or three minutes to have backed and recoupled if they had placed part of the train across the road."

Re-Direct Examination. "If the engine had been on the other track, it would have been as near the street as it was. We had not had time to cut the engine loose, and to have gone further up the track when the plaintiff passed. We did not intend to do it."

Ed. Davis testified:

"I have been a fireman for the defendant company for some time. I was on the engine when Mr. Miller passed. We had been to the river getting coal. We had been to the depot not over three minutes when plaintiff passed. We had stopped for the conductor to get his freight bills, and to oil the engine, and for the passengers to get on. This work had not been finished when plaintiff drove up. We had not been there long enough when he drove up to have cut the train in two. He was in ten or fifteen feet of the track when I first saw him. He was pulling back on her. When she got to the rail-road she jumped and ran. No whistle blowed, no bell (34) was ringing, the engine was making a sizzling noise."

Cross-Examination. "They could have cut the train loose, and run the engine across the road. They have done this several times when they blocked the road and people came along. That morning they did not intend to stay there long enough to cut the train loose. It was necessary for them to pull the train up there for passengers to get on. For the conductor to get his way bills, he could have stopped before he got there and walked up. The engineer could have oiled his engine before he got there by losing time. The train was not running on any schedule. There was no danger of running into any other train by a few minutes delay."

Re-Direct. "The train was standing at the regular place for passengers to get on, at the regular depot. They had to get to Ahoskie in time for the afternoon train, and this required them to hurry."

H. T. Waters testified:

"I was the conductor in charge of that train. It had a time for passing a point where the Norfolk and Carolina train went to their sand pit. I remember the occurrence. We had been at the depot not to exceed three minutes. I first saw the plaintiff before he reached the track. His horse seemed frightened and the plaintiff forced his horse across the track, and the girth broke, and the horse ran, and plaintiff jumped from his buggy. We had not been at the depot long enough to transact the company's business when the plaintiff passed.

The engine was making no unusual noise. The escaping of the steam from the safety valve is necessary. When the plaintiff got there, we had not been there long enough to cut the engine loose. It depends upon the coupling as to the time it
(35) takes to cut the engine loose. We had the best coupling we could get. We were at the regular depot."

Cross-Examination. "If we had narrow gauged cars altogether we could have gotten out of the way, but we had both. It was not necessary to stop in the street to get my waybills. They could have stopped before getting to the street to oil the engine."

Re-Direct. "It was necessary to stop there to get passengers, or have them walk in muddy places down the track away from the depot."

James C. Gurley testified:

"I was assistant agent of the company. The train had just pulled up and I went in to get the seals to put on the cars, and while I was in the house the plaintiff passed. When the plaintiff passed I would say the train had not been there two minutes. That was the regular place for receiving passengers. The train has a passenger coach."

J. L. Coletrain testified:

"I was at the time depot agent. I remember this occasion. I was in the office when the train came up. Mr. Waters, conductor, came from the train to the platform, and asked for his bills, and as he turned to leave, I heard him say the horse was frightened. This was the usual place for the train to be."

Robert Burden testified:

"I owned this horse at one time; I sold this horse to plaintiff; I told him she was gentle enough for a man to drive. Something was broken about the harness when I sold
(36) him the mare, and I told him he had better put better harness on her. I had known the horse about two years."

On cross-examination, plaintiff says on day he sold Miller the horse, Miller was driving a double team and using a double set of harness, and don't know what harness he had on day of accident.

Defendant closed.

Evidence for Plaintiff. Hannah Gillam testified:

"I remember the day the plaintiff's horse ran away. The

train had been standing in the edge of the road. I don't know how long the train had been standing there when plaintiff's horse came along. After the train came, I went across the street and got a bucket of water, and train was still standing there before plaintiff came along. Not very far across the street to get water. I had been in, and put the bucket up, and went back to the door, when the plaintiff came along. I had not seen the train before I went out to get the water. I think it was about ten minutes from the time I went to get the water and take it back and go to the door."

James Bond recalled:

"The train obstructed at least one-third of the road. No one could have passed right by the blacksmith shop."

Cross-Examination. "In saying one-third of the road taken up, means that sidewalk is included."

(37)

This evidence clearly shows that the defendant was operating its train in the usual manner and with proper care. Its train was stopped temporarily at one of defendant's stations; the crew were engaged in billing freight, sealing cars, oiling the engine, etc.; the conductor had put the train in such a place that the passengers could get aboard without having to pass through muddy places. In so placing the train, the engine stood, in part, upon the road, or street crossing the railroad track, but leaving ample room for travelers to pass. The engine was under steam, making only the noises necessarily incident to its use. As applicable to this state of facts, it is held "that a traveler, who, seeing an engine standing near a crossing, letting off steam in the usual manner, drives across in front of it, can not recover for personal injuries caused by his horse becoming frightened and running away." Elliott Roads and Streets (2 Ed.), 798. And in *Morgan v. R. R.*, 98 N. C., 247, MERRIMON, J., delivering the opinion, says: "The noises ordinarily, naturally, incident to this work when done where it may lawfully be done, do not constitute negligence or a nuisance. Railroads are lawful things, useful and highly important in the well-being and prosperity of society, and must be tolerated and encouraged, notwithstanding the annoying and fearful noises sometimes naturally incident to their use in particular places that frighten horses and other animals, and thus occasion accident and injury to individuals. Harm thus sustained is *damnum absque injuria.*"

While the evidence shows positively that the occupancy by the train of that part of the track at the crossing was neces-

sary, and only for a reasonable time, yet that was of no concern to the plaintiff on this occasion; for he neither knew when it came nor when it was expected to leave. Down
(38) the hill he came driving his trotter. He saw the condition as it existed. It was his duty to have used his ears in hearing as well as his eyes in seeing. But he did not even stop, nor acquaint the defendant's servants of his presence, nor did he choose to inquire as to the length of time the train would remain, nor request the removal of the engine out of his way. He had every opportunity necessary for his safety; but he did not deem it fit to avail himself of it. Seeing the engine under steam, hearing the "popping" and "sizzing" of the escaping steam, he assumed the risk; inspired by his confidence in the integrity of his horse, based upon his recent experience with her around the train, he urged her forward; she became frightened—jumped—the insecure girth broke, and off she ran, carrying her unwilling driver at such a rate of speed that he too took fright, and then the frightened two separated, paying but little attention to the order in which it was accomplished, resulting in leaving the plaintiff in pain upon the ground, recalling to mind the wisdom and truth of the Psalmist in saying that "An horse is a vain thing for safety."

Under no aspect of the case do we discover a scintilla of evidence showing negligence on the part of the defendant.

There is error.

Cited: House v. R. R., 131 N. C., 104.

PRICE v. STANLEY.

(Filed 12 March, 1901.)

MALICIOUS PROSECUTION—*Probable Cause.*

An action for malicious prosecution can not be sustained where a verdict and judgment of conviction have been had in a court of competent jurisdiction.

ACTION by W. G. Price against J. H. Stanley, heard by Judge *W. S. O'B. Robinson,* at November Term, 1900, of JOHNSTON. From a judgment for the defendant, the
(39) plaintiff appealed.

Jas. H. Pou, for the plaintiff.

E. S. Abell and *Wellons & Morgan,* for the defendant.

PRICE *v.* STANLEY.

MONTGOMERY, J. This action was brought by the plaintiff to recover damages from the defendant for alleged malicious prosecution. A Justice of the Peace of Johnston County, upon the complaint of the defendant in this action (Stanley), issued a warrant against the plaintiff in this action (Price), in which Price was charged with wilfully and unlawfully trespassing upon the lands of Stanley "by raking up and hauling off manure." After hearing the evidence in the criminal proceedings, the Justice of the Peace adjudged that Price was guilty. He, however, bound him over to the next term of the Superior Court of JOHNSTON. At that term of the Superior Court a *nol pros.* was entered by the Solicitor in the action.

On the trial of the present action the plaintiff testified that the defendant had told him not to go on the land again; that the fences were all on his, defendant's, land, and that he, the plaintiff, must not rake up manure or any more dirt from the fence jambs, as all the jambs and the fence were on defendant's land. The defendant demurred to the plaintiff's evidence. His Honor sustained the demurrer and dismissed the action, and the plaintiff appealed.

We think that his Honor committed no error in the matter. The offence charged in the warrant was not as clearly set out as it might have been, but on the hearing and the trial before the Justice of the Peace the evidence made clear any seeming uncertainty of the offence charged, and that it was for a misdemeanor of which the Justice of the Peace had jurisdiction.

After the judgment of guilty had been rendered against the plaintiff, the Justice of the Peace bound the plaintiff over to the Superior Court instead of having disposed (40) of the matter by a final judgment. But for this error on the part of the Magistrate the defendant is not responsible. The Justice of the Peace had jurisdiction of the offence which he investigated and tried, and there was a judgment of guilty. If by any means a trial had been afterwards had in the Superior Court, and the same had resulted in an acquittal of the plaintiff Price, nevertheless the conviction in the Justice's court—a court of competent jurisdiction—established probable cause for the prosecution. *Griffis v. Sellars,* 19 N. C., 493.

No error.

Cited: Smith v. Thomas, 149 N. C., 102.

COOPER v. JONES.

(Filed 12 March, 1901.)

LIMITATION OF ACTIONS—*New Promise—The Code, Sec.* 172.

An acknowledgment and promise, in order to sustain an action under The Code, sec. 172, must be express, specific, and unconditional.

ACTION by G. H. Cooper against E. C. Jones, heard by *H. R. Starbuck,* upon an agreed state of facts, at October Term, 1900, of FRANKLIN. From a judgment for plaintiff, the defendant appealed.

T. W. Bickett, for the plaintiff.
W. M. Person, for the defendant.

COOK, J. It is the policy of the law that there shall be an end of litigation—*interest reipublicæ ut sit finis litium.* And after a cause is once barred, it can not be revived except by a strict and full compliance with the statute permitting it.

The "due bill" sued upon was barred before the action was begun, and the statute of limitations was pleaded. The (41) plaintiff then declared upon a new promise and sets up two letters written him by the defendant. The language relied upon in one letter to establish the *promise* is, "You have my due bill, and I am going to pay it as soon as I possibly can." In the other, it is, "As soon as I can, I am going to settle all of my indebtedness." The latter expression is vague and indefinite. The former is conditional—predicated upon the possibility of his ability.

It has been uniformly held by this Court that the acknowledgment and promise, in order to sustain an action under section 172 of The Code, must be express, specific and unconditional. See cases cited thereunder in Clark's Code.

This case differs from that of *Taylor v. Miller,* 113 N. C., 340; in that Miller wrote, "I promise to settle both of your claims the first of next month"; while in this case the promise is to pay "as soon as I possibly can." In the former, the promise was distinct, specific and certain; in this case, it is conditional.

This construction is sustained in *Mallock v. Chadwick,* 71 Maine, 313, the language being, "when I was (am) able." *Bidwell v. Rogers,* 10 Allen (Mass.), 438 ("as soon as I can"); *Sedgwick v. Gerding,* 55 Ga., 261 ("as soon as I have

the money I shall remit"); *Tompkins v. Brown,* 1 Denio (N. Y.), 247 ("as soon as he is able"). In no view can the language used in the letter be so construed as to come within the requirements of the statute. Code, sec. 172.

There is error.

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(42)

PORTER v. WHITE.

(Filed 12 March, 1901.)

1. DEEDS—*Absolute on Face—Mortgages.*

Evidence in this case held sufficient to warrant a finding that a deed absolute on its face was in fact a mortgage.

2. ISSUES—*Proof—Trial.*

Refusal of Court to submit an issue on which there is no proof, is not erroneous.

3. DEEDS—*Separate Instruments.*

It is immaterial that a contract is contained in several instruments.

4. INSTRUCTIONS—*Presumptions.*

Where no exception to the charge is sent up, it is presumed to be correct.

5. CONTRACTS—*Terms—Essence.*

Where suit is brought to have a deed absolute on its face declared a mortgage, the time for redemption is not of the essence of the contract.

6. LIMITATION OF ACTIONS—*Possession.*

The statute of limitations has no application to a party in possession who brings suit to have a deed absolute upon its face declared a mortgage.

7. WITNESSES—*Competency—The Code, Sec.* 590.

The sons of a grantor, in a deed, which grantor is suing the heirs of the grantee to have such deed declared a mortgage, are not incompetent witnesses under The Code, sec. 590, to show transactions between the grantor and grantee.

8. NOTICE—*Deed—Mortgage—Devisee.*

A registered deed may be declared a mortgage, though the land is held by the devisee of the grantee in the deed.

ACTION by A. T. Porter against C. A. White, executor, *et al.,* of Samuel Corey, heard by Judge *H. R. Starbuck* and a jury, at December Term, 1900, of PITT. From judgment for plaintiff, the defendants appealed.

Skinner & Whedbee, for the plaintiff.

Jarvis & Blow, and *Shepherd & Shepherd,* for the defendant.

CLARK, J. The plaintiff introduced in evidence a deed, dated 13 May, 1878, absolute on its face, from himself to S. Corey, and the following paper writing bearing same
(43) date from S. Corey to himself, whose execution is admitted: "This is to certify that A. T. Porter does not owe me only $178.78 and interest on same, and when it was paid the right of his property is to be returned to his heirs. May 13, 187. S. Corey."

The complaint alleges payment in full, asks for an accounting and the execution of a deed by defendants, heirs-at-law of Cory, back to plaintiff.

In the late case of *Watkins v. Williams,* 123 N. C., 170, in which the facts much resemble this, it is said: "Since *Streator v. Jones,* 10 N. C., 423, two principles have been established and uniformly followed, when bills are preferred to convert a deed absolute on its face into a mortgage or security for debt—

"(1) It must appear that the clause of redemption was omitted through ignorance, mistake, fraud or undue advantage.

"(2) The intention must be established, not by simple declaration of the parties, but by proof of facts and circumstances *dehors the deed* inconsistent with the idea of an absolute purchase; otherwise the solemnity of deeds would always be exposed to 'the slippery memory of witnesses.' *Kelly v. Bryan,* 41 N. C., 283.

"The plaintiff makes no attempt to shelter himself
(44) under the first proposition, but he insists, and we think he has shown, that he is protected by the second proposition."

This covers the present controversy. The first proposition is settled beyond controversy. *Sprague v. Bond,* 115 N. C., 530; *Egerton v. Jones,* 107 N. C., 284; *Green v. Sherrod,* 105 N. C., 197; *Norris v. McLamb,* 104 N. C., 159; *Egerton v. Jones,* 102 N. C., 278; *Link v. Link,* 90 N. C., 238; *Bonham v. Craig,* 80 N. C., 224; *Briant v. Corpening,* 62 N. C., 325; *Brown v. Carson,* 45 N. C., 272; *McDonald v. McLeod,* 36 N. C., 221; and other cases.

But the plaintiff does not come within this class. Though he alleged in his complaint that the clause of defeasance was omitted "through ignorance, mistake, fraud and undue advan-

tage," he offered no evidence in proof of it, and in fact the written agreement of S. Corey set out by him negatived the allegation of inadvertence or fraudulent omission. The defendant received no detriment by an issue not being submitted on a matter as to which there was no proof, and his exception to the refusal of such issue can not be sustained.

The plaintiff's case rested on the second proposition, quoted above from *Watkins v. Williams*. The written agreement upon the evidence was a part of the same transaction with the deed of the same date, and taken in connection with the other evidence showing inadequacy of price (*Howlett v. Thompson,* 36 N. C., 369), subsequent payments, retention of possession by plaintiff (grantor in deed), and the admissions of grantee, justified the form of the issues submitted to the jury and their finding that the deed absolute on its face was in fact intended as a security for debt. *Waters v. Crabtree,* 105 N. C., 394; *Robinson v. Willoughby,* 65 N. C., 520; *Blackwell v. Overby,* 41 N. C., 38; *McLaurin v. Wright,* 37 N. C., at page 97. (45)

It is immaterial that the contract was in several instruments. *Watkins v. Williams, supra; Robinson v. Willoughby, supra; Mason v. Hearne,* 45 N. C., 88.

The two prior mortgages were competent evidence to show the indebtedness. *Robinson v. Willoughby, supra.*

The Court is presumed to have charged that the proof must be "clear and cogent and incompatible with the idea of a purchase, and should leave no fair doubt that a security was intended" (*Blackwell v. Overby,* 41 N. C., 38; *Kelly v. Brian, Ibid,* 283), as no exception to the charge is sent up.

In such cases, time is not of the essence of the contract. *Mason v. Hearne,* 45 N. C., 88. Besides, the statute of limitations has no application, for the plaintiff has been in continuous uninterrupted possession since 1870.

The exception to the sons of the plaintiff, under The Code, section 590, as witnesses because they fall under the description "heirs" of grantor—plaintiff—is without force. The jury have found that the conveyance was in reality a security for debt. The witnesses are not "heirs" as long as their father (the plaintiff) lives, and may never have any interest in the land. They certainly have no disqualifying interest now.

The conveyance to Corey being registered as a deed, and not as a mortgage, a purchaser for value from the grantee would occupy a very different position from the defendant, Armetta Worthington, who is the devisee of S. Corey. *Waters v. Crabtree,* 105 N. C., 394.

It might be surmised that the transaction was intended to defraud the creditors of the plaintiff. In such case the Courts would help neither party, but even then the maxim *potior est conditio possidentis* would apply. However, there is no proof that the transaction was for a fraudulent purpose.

The judgment below is

Affirmed.

Cited: Frazier v. Frazier, 129 N. C., 30; *Fuller v. Jenkins,* 130 N. C., 555; *Helms v. Helms,* 135 N. C., 176; *Morrisett v. Cotton Mills,* 151 N. C., 32.

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(46)

MANUFACTURING CO. v. HOBBS.

(Filed 12 March, 1901.)

1. CONTRACTS—*Validity—Logs and Logging.*

A contract for the sale of standing timber which allows the purchaser an indefinite time in which to cut and remove the same is void for uncertainty.

2. CONTRACTS—*Waiver—Reasonable Time.*

The rights of a purchaser under a contract for the sale of growing timber allowing a reasonable time to remove it are waived by failure to commence to remove for 13 years.

3. JUDGMENT—*Supreme Court—The Code, Sec.* 957.

The Supreme Court will render such judgment as shall appear to be proper from inspection of the whole record.

ACTION by the Gay Manufacturing Company against J. A. Hobbs and others, heard by Judge *Thomas McNeill* and a jury, at Fall Term, 1900, of CHOWAN. From judgment for defendant, the plaintiff appealed.

Shepherd & Shepherd, and *Pruden & Pruden,* for the plaintiffs.

W. M. Bond and *Charles Whedbee,* for the defendants.

MONTGOMERY, J. It was admitted on the trial below that the logs belonged to the plaintiff, and that the plaintiff would be entitled to recover them if the contract, which was in writing, was sufficient and valid in law to convey them. The contract was entered into on 26 April, 1887, between Noah Hollowell and his wife and the plaintiff, and it was set forth therein

that for the consideration of two hundred dollars, one-half to be paid on the execution and delivery and the other half to be paid in twelve months, Hollowell and wife had sold and conveyed to the plaintiff "all the timber down to 14 inches across the stump when cut on 50 acres of Hollowell's (47) land." It was further stipulated in the contract that Hollowell was to pay all taxes, dues, assessments, etc., on the land and on the timber, and that there was allowed to the plaintiff "the full term of five years within which to cut and remove the timber hereby conveyed, said term to commence from the time said party of the second part begins to manufacture said timber into wood or lumber."

The trial below was conducted altogether upon issues of fraud alleged to have been committed by the plaintiff on Hollowell and his wife in the treaty and the inducement leading up to the contract. The issues were found in favor of the defendants, and a judgment was entered for the value of the logs—the plaintiff having taken them into his possession. It was further adjudged that the contract between Hollowell and his wife and the plaintiff was void, and that the defendants are the owners of the timber trees standing on the land.

We are of the opinion that there is on the face of the pleadings an insuperable obstacle to a recovery on the part of the plaintiff, and that we ought, under section 957 of The Code, to affirm the judgment of the Court below. *Thornton v. Brady,* 100 N. C., 38; *Carter v. Rountree,* 109 N. C., 29. The matter to which we refer is that provision of the contract by which is granted the full term of five years within which to cut the timber, the term to commence from the time the plaintiff (party of the second part) begins to manufacture the timber into wood or lumber. We think that that feature of the contract renders the whole void. The contract may be treated as a lease, or a term for years, for a lease can be made of the right to cut trees or dig minerals. An indispensable legal requirement to the creation of a lease for a term of years is that it shall have a certain beginning and a certain end. Blackstone says that such an estate is frequently called (48) a term, *terminus,* because its duration or continuance is bounded, limited and determined. If no time at which a lease is to commence has been mentioned, the law would fix that time as of the date of the contract. *Moring v. Ward,* 50 N. C., 272; 2 Blk. Com. But there is an attempt to fix the beginning of the lease in the contract before us. It is when the plaintiff shall begin to manufacture the timber into lumber. That act on the part of the plaintiff may never take place; it

is entirely uncertain. The plaintiff can not be made to commence to manufacture the timber into wood or lumber, and no rule can be thought of by which the commencement of the term can be fixed. It is evident from the reading of the contract that the fee in the land was not to pass, and yet no one can tell how long the land and the other timber upon it may remain useless to the defendants and to the Commonwealth under the indefinite and uncertain time at which the lease is to begin.

If the doctrine of reasonable time could be invoked in this case, the plaintiff would be in no better condition than he now occupies. The price was $200 for the timber, 14 inches on the stump *when cut,* and the defendants to pay all taxes, and the contract made 13 years ago, and not a stick of timber yet cut by the plaintiff. Under these circumstances it would certainly be held as matter of law that the plaintiff had allowed a reasonable time to cut the timber to elapse, and, not having done so, its rights under the contract had been lost. The judgment below is

Affirmed.

Cited: *Rumbo v. Mfg. Co.,* 129 N. C., 9; *Bunch v. Lumber Co.,* 134 N. C., 117; *Hawkins v. Lumber Co.,* 139 N. C., 164; *Moore v. McClain,* 141 N. C., 473.

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(49)

SHERROD v. VASS.

(Filed 12 March, 1901.)

FORECLOSURE OF MORTGAGE—*Purchase by Agent of Mortgagee.*

Where agent of mortgagee purchases land at sale under mortgage by agreement with mortgagor, the mortgagor to have ten days in which to redeem, a purchaser from the agent acquires the land free from any trust in favor of the mortgagor.

ACTION by H. H. Sherrod against W. W. Vass, as executor of W. W. Vass, R. B. White and J. N. Perry, heard by Judge *H. R. Starbuck,* at October Term, 1900, of FRANKLIN. From judgment for defendants, the plaintiff appealed.

C. M. Cooke and *W. M. Person,* for the plaintiff.

R. B. White, T. W. Bickett, F. S. Spruill and *T. B. Womack,* for the defendants.

MONTGOMERY, J. The plaintiff in March, 1889, became indebted to the testator of the defendant W. W. Vass, and to secure the debt and interest executed a mortgage to the testator upon the tract of land described in the complaint. The defendant Vass, through his agent, the defendant White, after due advertisement sold the land under the power in the mortgage on 5 September, 1899. At that sale, White bid off the land, and afterwards the defendant Vass made a deed to him for the land. White afterwards made a deed to the defendant Perry to the land for a valuable consideration.

This action was brought by the plaintiff to have the sale made under the mortgage set aside and the defendant Perry declared a trustee for the benefit of the plaintiff that he might make redemption under the mortgage. The case was heard below upon facts agreed, which are substantially the following: White bid off the land at the mortgage sale, (50) in his own name, upon and pursuant to an agreement with the plaintiff entered into on the day of the sale, and just before the sale, that White should bid the land off at a bid equal to the mortgage debt if there should be no higher bid by any other person than the mortgage debt, and that the plaintiff should be allowed ten days after the sale within which to redeem the land by paying the debt secured by the mortgage; Vass was not present at the sale, but White was acting as his attorney; the sale was fairly conducted; and after the ten days had expired, the time was extended four days; the plaintiff failed to pay any part of the debt within the fourteen days and made no offer to do so, and on 8 November, 1899, Vass the defendant, as executor, executed a deed to the land to White, by virtue of the sale under the mortgage, and White afterwards for a valuable consideration executed and delivered a deed to the land to the defendant Perry, who had notice of the agreement between the plaintiff and White. Upon the hearing below the Court adjudged that the defendant Perry was the owner in fee of the land and was entitled to the possession of the same, and the receiver should pay over to Perry the rents in his hands less his commissions.

We see no error in the judgment. The general rule, well settled in this State, is that a trustee or a mortgagee who sells property under the power conferred upon him as such trustee or mortgagee can not purchase at his own sale either directly or indirectly through an agency. The reason for the rule has been so often given in our reported cases that it is unnecessary again to state it. Such a sale is, however, not void, but voidable. But the facts of this case do not bring it within

the scope of the rule. No estate in the land passed to the plaintiff Sherrod by the agreement with White at the time of the sale under the mortgage. Only the assent of the
(51) mortgagor was given to the bidding in of the property by White, the agent of Vass, for Vass, at a bid for an amount no greater than the mortgage debt—thus dispensing with the rule which prohibited Vass from buying at his own sale. The time granted after the sale to the plaintiff in which to redeem was a sufficient consideration for the agreement on plaintiff's part, and was valid though in parol. *Blount v. Carraway,* 67 N. C., 396. No assent to the sale was necessary, for the power to sell was contained in the mortgage. There was no fraud, and the effect of the transaction was to place the legal title in White, with the right in the plaintiff to redeem or reacquire the land on the terms agreed upon at the mortgage sale between White and the plaintiff. The debt was nearly ten years old, and only an insignificant payment had been made on it. The extension of time granted by White, agent of Vass, was a favor to and not an oppression of the plaintiff, and when he failed to avail himself of the favor within the time allowed, the contract was ended.

The facts in *Dawkins v. Patterson,* 83 N. C., 384, are so much like the facts in this case that we can discover no substantial difference between them, and in the application of the law to the facts there is a precedent for the application of the same principles to the facts here.

In *Joyner v. Farmer,* 78 N. C., 196, cited by the plaintiff's counsel, there is an expression somewhat conflicting with the law as declared later in *Dawkins v. Patterson, supra,* but the facts were not similar in the two cases.

Affirmed.

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(52)

CAMP MFG. CO. v. LIVERMAN.

(Filed 12 March, 1901.)

1. DESCENT AND DISTRIBUTION—*Deeds—The Code, Sec.* 1442.

A deed conveying timber on land inherited by the grantors is void as to creditors of intestate if made within two years after the granting of letters testamentary.

2. ESTATES—*Life Estates—Deed—Remaindermen.*

A life tenant can not by deed convey timber standing on land at the time of his death.

ACTION by the Camp Manufacturing Company against A. T. Liverman, P. C. Jenkins, W. W. Jenkins, B. F. Renfrow, M. F. Raby, E. E. Jenkins, P. C. Tyler and Pulaski Tyler, heard by Judge *A. L. Coble,* at April Term, 1900, of HERTFORD. From a judgment for the plaintiff, the defendant Renfrow appealed.

Winborne & Lawrence, F. D. Winston and *George Cowper,* for the plaintiff.

Pruden & Pruden and *Shepherd & Shepherd,* for the defendant.

MONTGOMERY, J. The defendant Renfrow, the only appellant in the case, in his original answer, set up title to the tract of land of 200 acres which was specifically devised by W. P. Jenkins, deceased, in his will to his wife and daughter Stella. He claims the land under a deed alleged to have been executed to him by the half-brothers and sisters of Stella (more than two years after the granting of letters testamentary on the estate of W. P. Jenkins, but after proceedings had been commenced to sell the land to make assets to pay debts), the persons named in the will, who were to take the land in remainder after the death of Stella if she died without issue. She intermarried with the appellant Renfrow and died without issue. That claim of the appellant Renfrow has never (53) been passed on. He has not had his day in Court. Other children of the testator W. P. Jenkins had executed a deed to the plaintiff to the timber on the land, which was devised to them by their father. But the deeds to the same were executed within two years of the grant of letters testamentary and were therefore void as to the creditors of the testator W. P. Jenkins. Stella and her mother had conveyed to the plaintiff the timber on the land which was devised to them after two years from the granting of letters testamentary, and the deed itself, if it had conveyed anything, was not void under section 1442 of The Code.

The contention of the appellant Renfrow is that the deed to him by the half-brothers and sisters of Stella conveys the timber and all else that is on the land to him, subject to be sold for the debts of the testator if the other lands of the testator should not be sufficient for that purpose, and that the deed of Stella and her mother to the plaintiff, though not void under section 1442 of The Code, yet conveys nothing, for the reason that neither Stella nor her mother had the right to convey the timber on the land, especially that part of the timber

standing on the land at the time of Stella's death. The last words of the opinion in this case reported in 123 N. C., 7, had reference to the *time* of the execution of the deed from Stella and her mother to the plaintiff as not being void under section 1442 of The Code, and not to any *interest* or *estate* which might have been conveyed in the deed. His Honor put the reverse construction upon the words above referred to, and in his judgment substantially decreed title to the timber in the tract devised to Stella and her mother in the plaintiff. His Honor was misled by the lack of clearness in the expression in the opinion above referred to; hence the error in the judgment.

An issue must be submitted to the jury as to the claim of the appellant Renfrow, and if it should be found that
(54) he is the owner of the land and timber claimed by him, *i. e.*, the two hundred acre tract, then he would be entitled to whatever might remain over of the proceeds of the land sales after the payment of the debts of the testator; or, if it should not be necessary to sell that tract under the former opinion of this Court in this case, then he would be entitled to a decree to the tract of land itself and its possession with the timber standing upon it. The case is remanded for future orders of the Court below.

Reversed.

IN RE SHEPPARD'S WILL.

(Filed 12 March, 1901.)

WILLS—*Holograph—Evidence—Questions for Jury—The Code, Sec.* 2136.

Facts in this case held sufficient to submit to the jury on the question whether the paper writing was found among the "valuable papers" of the deceased.

A PAPER purporting to be the last will and testament of Thomas J. Sheppard was propounded for probate by William Shaw as executor. Caveat was entered by J. E. Smithwick and others; heard by Judge *H. R. Starbuck* and a jury, at December Term, 1900, of PITT. From a judgment for the caveator, the propounder appealed.

Skinner, Whedbee, and *B. B. Nicholson,* for the propounder.

Jarvis & Blow, and *Gilliam & Gilliam,* for the caveators.

CLARK, J. The script in question was found in a book in which the deceased kept valuable memoranda, among other things, accounts and also statements of the (55) amounts of money he had on hand, which correspond exactly with the amount found and with the several packages of money specifically bequeathed in the will. His money was found in a chest in the adjoining room.

It was admitted that the book was found in his bed, under his body, the day he died. The finder placed it on the bureau at the head of the bed; it fell behind it and was found a week later on the floor behind the bureau. The Court charged the jury that this did not constitute a finding "among the valuable papers and effects of the deceased, and hence the script was not the last will and testament of said Thomas J. Sheppard." The propounders excepted, and this presents the sole question for our determination. We think there was error, and that the evidence should have been submitted to the jury. *Simms v. Simms,* 27 N. C., 684; *Hill v. Bell,* 61 N. C., 122; *Hughes v. Smith,* 64 N. C., 493. In the latter case it is said, "The requirements of the statute are sufficiently complied with if the script is found among the valuable papers and effects, under such circumstances as to show that the deceased regarded it as a valuable paper, and desired it to take effect as his will." Here the script was written in a book containing valuable papers, the memorandum of his moneys, accounts, etc. It had been kept in a box on a table in his reach, which contained his deeds and account books, and when that had been moved out three weeks before his death, he had caused this book to be brought back to him and he retained it in his immediate possession, in the bed with him, and it was found under his body at his death. Certainly this was evidence upon which the jury should be allowed to find whether or not he "regarded it as a valuable paper and desired it to take effect as his will," for the only defect suggested is as to the place where it was found. (56)

In *Winstead v. Bowman,* 68 N. C., 170, the Court criticised, if it does not overrule, the narrow rule which had been laid down in *Little v. Lockman,* 49 N. C., 494, and says, "The phrase 'among the valuable papers and effects' can not necessarily and without exception mean 'among the *most* valuable' etc. * * * The phrase can not have a fixed and unvarying meaning to be applied under all circumstances. It can only mean that the script must be found among such papers and effects as show that the deceased considered it a paper of value, one deliberately made and to be preserved and

intended to have effect as a will. This would depend greatly upon the condition, and business, and habits of the deceased, in respect to keeping valuable papers."

A very similar case is *Brown v. Eaton,* 91 N. C., 26, in which the script was written in a book containing accounts due deceased and was found eight months after his decease in a bureau drawer.

In Tennessee, in which the statute is our act of 1784 (now found in our Code, section 2136), it is said in *Tate v. Tate,* 30 Tenn. (11 Humph.), 466, "the intention of the statute is that it shall appear to be a will, whose existence and place of deposit were known to the testator, and that he had it in his care and protection, preserving it as his will." In *Regan v. Stanly,* 79 Tenn. (11 Lea), 316, in a diary was found, imbedded among other entries, a disposition of property, written and signed. This diary was found among his books of account, and the will therein written was admitted to probate.

The script here propounded was written in a book which itself contained valuable papers. The testator's conduct as to this book, his calling for it when his deeds and other books of account, which he had always kept by him in reach, were moved out of his room during his last illness, and his
(57) retention of it in his immediate custody and possession, were circumstances which the propounders were entitled to have passed upon by the jury, to say the least.

New trial.

HODGES v. LIPSCOMB.

(Filed 26 March, 1901.)

ESTATES—*Wills—Sale of Contingent Remainder.*

The Courts will not decree a sale of land where it is limited in remainder to persons not *in esse.*

ACTION by Samuel Hodges and wife Minnie D. Hodges, Eliza D. Hodges, Wiley D. Hodges, Emily N. Hodges, S. W. Hodges, Robert G. Hodges and Minnie R. Hodges (the last six being infants and appearing by their next friend, Samuel Hodges), E. F. McDaniel and wife Bettie E. McDaniel, Paul Slocumb and wife Minnie C. Slocumb, Sarah H. McDaniel, Georgia B. McDaniel, Bettie McDaniel, Madge McDaniel, and Albert A. Slocumb (the last five being infants and appearing

by their next friend, E. F. McDaniel), plaintiffs, against James Lipscomb, Ernest Deans, Herbert Rountree and James B. Rountree, heard by Judge *A. L. Coble,* at February Term, 1901, of WILSON. From judgment ordering a sale of property, the defendants appealed.

Connor & Connor, for the plaintiffs.

No counsel for the defendants.

CLARK, J. When one closes his eyes on sublunary scenes, and from his cold grasp drops the things for which he has toiled, or sinned, he has no natural right to direct what shall become of them thereafter. The right to dispose (58) of property by will is purely statutory, as Mr. Blackstone tells us. From the Conquest down to the comparatively recent Statutes of Wills, 27 and 32 Henry VIII, the power to dispose of realty by will did not exist in England (2 Bl. Com., 374). This right is not recognized, or recognized only to a limited part of the estate, in France and many other countries. As it is given by statute it may be modified or revoked by statute.

Few men comparatively can manage their estates to the best advantage when living. When one undertakes by will to tie up his estate and confer it upon contingent remainders, and remainders in a double aspect, and upon the other complications presented in the case before us, the result is almost necessarily detrimental to those intended to be benefited, and calls in question the wisdom of the statute which permits a dead hand to control to such an extent the devolution of property. No human wisdom can foresee the condition of the beneficiaries and of the property in the shifting combination of events. Circumstances will always arise which inevitably will make desirable a change of investment or of the limitations. But as long as the law remains unchanged by statute, the Courts can not change it. Desirable as is the relief here sought, the law is so well settled that it is a matter of some surprise that the point could be again submitted to the courts. The abuse possible from the power of a testator over devised estates in tying them up even when the courts had restricted such power of future control to "life, or lives in being and twenty-one years thereafter" was illustrated by the will of Peter Thellusson which caused the enactment in England of 39 and 40 George III, ch. 98. This act restricted such power to the life of the grantor or settler and 21 years thereafter. Gray on Perpetuities, sec. 686. It is for the legislative power, not for the courts, to consider whether that act should not be ex-

tended so as to prevent limitations such as here appear and which are equally against public policy and the interest of the immediate devisees.

(59) In the present case the testator devised one piece of property to his adopted daughter Minnie for life and "at her death to such child or children as she may leave surviving her, and if any of said children shall die, leaving issue, prior to the death of said Minnie, in that event such issue shall represent and take the share of its immediate ancestor." Another piece of realty is given to testator's adopted daughter Bettie for life, with remainders over in the same terms used above.

Another tract is given to Minnie and Bettie "to be divided between them in the following proportions, to-wit: to the said Minnie such part as the number of children which she may have living at my death, or (*sic*) born unto her thereafter, as hereinafter provided, shall bear to the whole number of children which she and the said Bettie may have living at my death, *or* born unto her, as herein provided, shall bear to the whole number of children which she and the said Minnie shall have living at my death, *or* born unto them thereafter.

"If either the said Minnie or the said Bettie shall after my death have born unto them any child or children, then and in that event I wish and direct the portions hereinbefore given to them to be so changed that the same may and shall conform to the principle of division hereinbefore set forth; that is to say, that the said after-born child or children shall be counted and provided for in the same manner as if living at the time of my death, my purpose and intention being to make the number of children the said devisees may have the basis of the division of my estate between them. The said devisees shall have and take the said plantation, in the proportion hereinbefore set forth, for and during their natural lives and the life of each of them, and upon their death, or the death of either of them, the share or portion given to the one so dying shall pass to and vest in the child or children which may survive her and the issue of such child or children as may die during the life-

(60) time of the said mother, such issue representing and taking the portion of its immediate ancestor in the same proportion as such ancestor would have done if surviving the mother."

By the residuary clause the residue is left to Minnie and Bettie "in the same proportion and subject to the same limitations" as the tract of land last above mentioned. The testator then says: "If, however, the said Minnie or the said Bettie shall die leaving no child or children living at her death,

nor the issue of any child or children, then and in that event the portion or shares given her in severalty in this will shall pass to and vest in the survivor, in the same manner and subject to the same limitations as herein set forth in respect to the original share or portion. If both the said Minnie and the said Bettie shall die leaving no child or children, nor the issue of any child or children, living at their death, or the death of the survivor, then and in that event, I direct that my entire estate shall be divided equally between my heirs-at-law and distributees and the heirs-at-law and distributees of the said Minnie and Bettie, claiming and entitled through their mother. In making such partition my executors shall be guided and controlled by the canons of descent and the statute of distribution in force in North Carolina."

Both Minnie and Bettie are living, one aged 45 years and the other 43. The complaint avers, as we may well believe, that their interest and that of their living children, all of whom are minors, except one, would be enhanced by a sale of portions of the real property and its conveyance to the purchasers "free from the limitations set out in the will" and the investment of the proceeds in buildings on the (61) other realty, subject to the approval of the Court.

The complaint further avers, as we may well believe also, that in consequence of above limitations parties refuse to purchase, fearing that they can not get a good title.

The complaint avers that "the defendants will be the heirs-at-law and distributees of said Minnie and Bettie in the event of their death without issue, or the issue of such issue." It is difficult to see how that can be averred. It is true they might be the heirs-at-law and distributees if Minnie and Bettie should die now without issue, but it is impossible to say who would be their heirs-at-law and distributees when they shall die, if they shall then leave no issue—the contingency named in the will.

Besides, the testator's heirs-at-law and distributees who are to share with the heirs-at-law and distributees of Minnie and Bettie, in event of their decease without issue, are not even named as defendants, and of course who they would be when that contingency might happen could not now be known.

The confidence of testators who thus think they can wisely control the management and descent of their property uncounted years after they have gone hence is not less astonishing than their willingness to entrust to the wisdom of grandchildren, or great-grandchildren, or contingent and still more remote and utterly unknown remaindermen, an untrammelled ownership of the property which they are unwilling to bestow upon their own children.

But as such latitude is allowed, we must take the law as we find it written.

In *Watson v. Watson,* 56 N. C., 400, where the devise was to "testator's son for life, then to such children as might be living at his death and the issue of such as might have died leaving issue, and if the testator's son should die without leaving issue living at his death then to certain persons" (named in the will), it was held that the Court could not sell the property on petition of the son though he was young and unmarried and all the persons named in the will as contingent remaindermen except one had released to the son—all of them being parties defendant and the testator's son being plaintiff. The reason given is that where the contingency is limited to a person not *in esse* the Court can not decree a sale.

(62) To same effect *Watson v. Dodd,* 68 N. C., 528; *S. c.,* 72 N. C., 240. A contingent remainder can not be sold under execution (*Bristol v. Hallyburton,* 93 N. C., 384), and of course it can not be sold by order of Court when the contingency has not yet happened which shall determine who the remaindermen are, as the heirs-at-law and distributees of testator and of Minnie and Bettie at the time when they may happen to die leaving no issue.

In *Ex Parte Dodd,* 62 N. C., 97, it was held that where any members of a class to whom an executory devise is limited are *in esse* the Court may order, in a proper case, a sale of the devised land, *otherwise* when no such members are *in esse.* This has been well settled ever since. *Irvin v. Clark,* 98 N. C., 445.

In *Williams v. Hassell,* 74 N. C., 434, affirming *S. c.,* 73 N. C., 174, it is held that under a devise to "A, B and C for life, with remainder to such of their children as should be living at their death," the land could not be sold for partition though one of the life tenants had died leaving two children, because though these two remaindermen were known the others were not yet ascertained and the land "can not be sold in any way or by any person" till they are. This case has been cited and approved in many cases which can be readily found upon turning to Mr. Monroe's valuable table of "Marginal Annotations." In that case the Court calls attention to the distinction between a limitation over "to the children of the life tenant" in which event the class being known the land can be sold upon proper proceedings (for the children then born represent those thereafter) and a devise (like this) to "such children as shall be living at death of life tenant."

There are several other complications in the case at bar,

among them the devise "to such children as may then (63) be living *or* born thereafter." Among many cases on same line, *Justice v. Guion,* 76 N. C., 442; *Miller Ex Parte,* 90 N. C., 625; *Overman v. Simms,* 96 N. C., 451; *Young v. Young,* 97 N. C., 132; *Irvin v. Clark,* 98 N. C., at page 445; *Aydlett v. Pendleton,* 111 N. C., 28; *Whitesides v. Cooper,* 115 N. C., 570; *Smith v. Smith,* 118 N. C., 735.

If the Courts possessed the power it would doubtless be to the interest of the parties to order the sale here asked for. The act of 1748, ch. 204 (now Code, 1325), converted by one stroke of the legislative pen estates tail into fee simple, and a similar act placing settlements of the kind before us, whether made by deed or will, in the power of the courts, or else cutting off the remainders beyond the first takers after the life tenant might commend itself to the law-making power, by reason of the public policy to disincumber and unfetter the disposal and transfer of realty. But the courts had no power to convert estates tail into fee simple, and they have not the power to do what is here asked by the plaintiffs.

Judgment reversed and

Action dismissed.

Cited: *Springs v. Scott,* 132 N. C., 554; *Hodges v. Lipscomb,* 133 N. C., 200; *Anderson v. Wilkins,* 142 N. C., 160.

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(64)

STRAUSE v. INSURANCE CO.

(Filed 26 March, 1901.)

1. INSURANCE—*Title to Property Insured.*

   The purchaser of property on credit, the vendor retaining no lien thereon, has an insurable interest therein.

2. INSURANCE—*Use of Property Contrary to Policy.*

   An insurance agent may issue a permit to operate a mill at night, though the policy prohibits operation of the mill at that time.

3. INSURANCE—*Adjusting Loss—Waiver.*

   An adjuster of an insurance company may, by his acts or declarations, waive a requirement as to proof of loss, especially as to time.

4. PLEADING—*Filing Replication after Verdict.*

   It is discretionary with the Court to permit a replication to be filed after verdict.

STRAUSE *v.* INS. CO.

ACTION by N. P. Strause and H. P. Strause, trading as Strause Bros., against The Palatine Insurance Company, heard by Judge *H. R. Starbuck* and a jury, at December Term, 1900, of PITT. From a judgment for plaintiff, the defendant appealed.

Fleming & Moore, and *Skinner & Whedbee,* for the plaintiff.
Burwell, Walker & Cansler, Jarvis & Blow, Shepherd & Shepherd, for the defendant.

CLARK, J. This is an action upon a policy of fire insurance, the property therein insured having been destroyed by fire. The defendant's brief relies upon three grounds.

1. That the interest of the insured in the property is not truly stated therein, and that it was not unconditional and sole ownership.

2. That the manufacturing establishment therein insured was operated at night contrary to the provisions of the policy.

3. That plaintiffs did not file proofs of loss as required by the policy.

As to the first ground, the plaintiffs had bought the property on credit and on trial, but the vendor retained no
(65) lien on it, and the plaintiff testified that he fully and accurately described his interest in the property to the defendant's agent who took down the description of the property, filled up the blanks in the policy, countersigned and issued the same. This was left to the jury. In such case "the agent is the *alter ego* of the company and his knowledge is the knowledge of the company." *Grubbs v. Ins. Co.,* 125 N. C., 395; *Bergeron v. Ins. Co.,* 111 N. C., 45, and cases there quoted from N. C. Reports.

The plaintiff had an insurable interest, 13 A. and E. 2nd Ed.), 144, 145, 178, 179, and cases cited. The knowledge by the agent of the facts at the time he issued the policy and taking plaintiff's money for insurance, estops the company, after the loss, to set up as a defense that the insured "did not have the sole and unconditional ownership required by the policy." *Hamilton v. Ins. Co.,* 22 L. R. A., 527; *Creed v. London,* 23 L. R. A., 177; *Forward v. Ins. Co.,* 25 L. R. A., 637; *Dowling v. Ins. Co.,* 31 L. R. A., 112; *Ins. Co. v. Fuller,* 40 L. R. A., 408; *Carpenter v. Ins. Co.,* 135 N. Y., 298.

As to the second ground, it is true that operating the mill at night would be a substantial violation of the terms of the policy, *Alspaugh v. Ins. Co.,* 121 N. C., 290; but here the agent was notified and night permits to operate mill were obtained

from the agent. The fire occurred more than three months thereafter and was in nowise traceable, so far as the evidence shows, to the working at night, which had long ceased.

3. As to the last ground of objection, the adjuster of (66) defendant company a week after the fire said to plaintiff that the property was a total loss; that he was going off; that plaintiff need not telegraph, but the following week he would make up proofs of loss and send them in to the company.

It is well settled that the adjuster of the insurance company may by his acts or declarations waive the requirements as to proofs of loss, especially as to time. *Dibbrell v. Ins. Co.*, 110 N. C., 193; *Horton v. Ins. Co.*, 122 N. C., 504; *Little v. Ins. Co.*, 123 Mass., 380; *Perry v. Ins. Co.*, 11 Fed., 482; 13 Am. and Eng. Enc. (2 Ed.), 350, note 6.

The "non-waiver" clause does not extend to conditions to be performed after the loss. *Dibbrell v. Ins. Co., supra.*

The Court had the discretionary power to permit plaintiff to file replication after verdict. Clark's Code, sec. 273 (3 Ed.), and cases cited. In the present case "the Court inquired of defendant's counsel whether, if this reply had been filed before the trial, they would have conducted the case otherwise than as they had done, and offered for that cause to set aside the verdict and judgment and to grant a continuance if desired. The counsel informed the Court that they would not have offered other evidence, and did not desire verdict and judgment set aside on account of permission to file reply, but stood upon their exceptions taken during the trial and exception to said permission."

No error.

(67)

HOLT v. JOHNSON.

(Filed 26 March, 1901.)

REFERENCES—*Referee—Report—Review by Superior Court Judge.*

In passing upon the report of a referee, the Judge of the Superior Court *must* review the findings of the referee.

ACTION by T. B. Holt, as executor of N. G. Burns, against Barney Johnson and F. M. Johnson, heard by Judge *W. S. O'B. Robinson,* at October Term, 1900, of WAKE. From a judgment for plaintiff, the defendant appealed.

H. E. Norris, for the plaintiff.

W. J. Peele, for the defendants.

COOK, J. The trial of this action was by a referee under a *consent order*. Upon the hearing, the testimony of several witnesses offered by defendants was excluded upon objection by plaintiff, to which defendants excepted. The report of the referee was duly made to the Superior Court. Upon the hearing and argument of counsel his Honor "refused to consider the evidence offered by defendants, it being all the evidence contained in the report of the referee," and overruled all of the exceptions and confirmed the report in all respects, to which defendants excepted.

The first question, then, presented for the consideration of this Court, is that raised by the exception taken by defendant to the "judgment and ruling of his Honor upon the evidence of defendants contained therein," which ruling is as follows: "After hearing argument of counsel upon said exceptions, and the Court refusing to consider the evidence offered by defendants, it being all the evidence contained in the report
(68) of the referee, the same are overruled and the report of S. F. Mordecai, referee herein, is hereby in all respects confirmed, except wherein it allowed the excluded evidence."

We deem it unnecessary to review the mode of trial by referees further than to refer to *Green v. Castlebury,* 70 N. C., 24; *Vaughan v. Lewellen,* 94 N. C., 472; *Battle v. Mayo,* 102 N. C., 413, and cases there cited. The rule is clearly stated that the Judge of the Superior Court will *review* the *findings* of the referee, and his findings upon the facts will be conclusive. At the hearing of this case the Judge failed to review the findings of fact. He positively *refused* to consider the evidence—the basis of the finding.

In concluding his report the referee says: "The burden being upon the defendant to prove the alleged agreement to reduce the rate of interest from that fixed by the bond and mortgage, the evidence on his behalf fails to satisfy me as to the affirmative of that issue. Sitting as a juror I can not say I *believe* such to be the fact, and consequently I can not *find* such to be the fact. While there is *some evidence*—to my mind there is no *satisfactory* evidence to overcome the solemn agreement of the parties."

Now, then, this finding being in the nature of a special verdict, it was the duty of the Judge to have acquainted himself fully with the *evidence* upon which it was found. The testimony of all the witnesses is required by statute to be reduced to writing by the referee and signed by them and filed as a part of the record (which was done in this case) for no other purpose than to be considered by the Judge in passing upon the findings of the referee.

It may or may not have been that the Judge would have set aside the finding of fact, as being against the weight of evidence (as he might have done in case of a verdict by jury), had he considered the evidence. While in reviewing the report made under a *consent* order the Court the (69) no power to change or modify the facts as found, yet it is his *duty to consider* the evidence upon which they were found, to the end that he may act intelligently in confirming, modifying or setting it aside. As there was error in his Honor's *refusal* to consider the evidence at all, we do not now pass upon the other exceptions of defendant. So this action is remanded to the Court below to the end that it be fully reviewed and passed upon.

Error.

WHEEDON v. AMERICAN BONDING AND TRUST CO.

(Filed 26 March, 1901.)

DAMAGES—*Contracts—Default—Penalty.*

Where a sum specified in a contract as "liquidated damages" is disproportionate to actual damages, such damages should be treated as a penalty and only actual damages can be recovered.

ACTION by L. A. Wheedon against the American Bonding and Trust Company, heard by Judge *George A. Brown,* at April Term, 1900, of NEW HANOVER. From a judgment for the plaintiff, the defendant appealed.

Bellamy & Peschau, for the plaintiff.
Iredell Meares, for the defendant.

CLARK, J. This is an action upon a building contract upon the following provision in the contract, that the contractor should wholly finish said work by 10 October, 1899, "and in default thereof the contractor shall pay the owner ten dollars for every day thereafter that the said work shall remain unfinished, as and for liquidated dam- (70) ages." It is admitted that the work was not completed by 10 October. The plaintiff on 12 October notified the defendant that the time had expired and that he would take the work and complete it unless the defendant desired to do so, who replied that it would not complete the building, and for the plaintiff to go ahead and do so. He got an architect, who

completed the work as soon as possible, which was 1 February following. The plaintiff paid the architect out of balance due on contract price, leaving a small balance in his hands, but against this parties who have furnished material, labor and supplies to the contractor have served notice on the owner for the same, aggregating far more than the said balance due contractor.

This is an action for the ten dollars per day default from 10 October, 1899, till 1 February, 1900, but the contractor being insolvent, the plaintiff limits his demands to six hundred dollars, the amount of the bond in which the defendant became surety to the plaintiff for the execution by the contractor of the stipulations in aforesaid contract.

The contract price for the building was $1,600. The defendant contends that the sum of $10 per day is in truth a penalty to be relieved against, that only actual damages should be recovered, and that the only element of actual damages shown is that the rental value of the house was $30 per month, even after it had been made to cost $3,000 by additions outside the contract. The plaintiff contends that the stipulation of $10 per day "as liquidated damages" takes it out of the power of the Court to treat the specified amount as a penalty, and to reduce it to actual damages. The Judge below held with plaintiff, and rendered judgment for six hundred dollars.

In an action on a penal bond for the perforcance of a contract, equity always interposes to relieve, and the measure of damages is compensation for actual loss, not exceeding
(71) the penalty named. As there is often difficulty in ascertaining the amount of actual damages the custom has sprung up of stipulating for a certain sum "as liquidated damages." When such sum is not plainly and clearly so excessive as to be in fact a penalty the courts will abide by the stipulation of the parties as the correct measure of damages. But the use of the phrase "as liquidated damages" does not have that effect, when the sum stated is in reality a penalty.

While the cases are somewhat conflicting, we think the true rule is stated in the following: "The fact that the parties use the words 'liquidated damages' is not conclusive. The Court will endeavor to ascertain the true intention of the parties and if the sum fixed by the contract is in fact a penalty the measure of damages is the actual loss." *Hennessy v. Metzger*, 152 Ill., 505; Sedgwick on Dam. (8 Ed.), 582, 584.

"When the sum specified in the contract as 'liquidated damages' is disproportionate to the presumed or probable damage or to readily ascertainable loss, the courts will treat it as a

penalty and will relieve on the principle that the precise sum was not of the essence of the contract, but was in the nature of security for performance." *Ward v. Building Co.,* 125 N. C., 230; *Thoroughgood v. Walker,* 47 N. C., at page 19; *Burrage v. Crump,* 48 N. C., 330; *Lindsay v. Anesly,* 28 N. C., 186.

Here the contract price of the building was $1,600. A stipulation of $10 for each day's delay to complete it after the time specified in the contract is palpably a penalty, however styled in the contract. The only damage really shown is the rental, and possibly the discomfort of not occupying one's own home. Such rent and discomfort fall far short of $10 per day, or even the $600 allowed for a delay from 10 October to 1 February, when the evidence shows that the rental value of a $3,000 house (nearly double the value) is $30 per month or $1 per day.

The judgment must be set aside and a new trial or- (72) dered that actual damages by the delay to complete the building at the specified date shall be ascertained and judgment awarded therefor.

Error.

Cited: *Disosway v. Edwards,* 134 N. C., 256; *S. c.,* 137 N. C., 490.

HUTCHINS v. BANK.

(Filed 26 March, 1901.)

BANKS AND BANKING—*National Banks—Guaranty—Ultra Vires.*

A contract of guaranty by a national bank can not be avoided on the ground of *ultra vires.*

ACTION by J. W. Hutchins against The Planters National Bank of Richmond, heard by Judge *W. B. Council,* at January Term, 1901, of DURHAM. From a judgment sustaining demurrer of defendant, the plaintiff appealed.

Boone, Bryant & Biggs, for the plaintiff.
Manning & Foushee, for the defendant.

CLARK, J. The defendant demurred on the ground that "being a National Bank it had no power under the National Banking Act creating it to guaranty the debt sued upon."

The Judge sustained the demurrer and dismissed the action. The plaintiff's appeal presents only the correctness of that ruling for review.

The allegation in the complaint, which is admitted by the demurrer, is that the defendant, by letter, agreed that a draft drawn by plaintiff, not to exceed $300, upon Chalkley & Co. for hides to be shipped them by plaintiff should be paid, and that in consideration of that guarantee the plaintiff
(73) shipped the hides to Chalkley & Co., but "defendant failed and refused to pay the draft as it had contracted and agreed to do, and the same was protested for nonpayment," etc.

The National Banking Act contains no prohibition against such banks guaranteeing paper, but it is contended that the terms of the statute do not authorize a National bank to make a contract of guarantee. In *Bank v. Bank,* 101 U. S., 181, 183, it is said "A guaranty is a less onerous and stringent contract than that created by endorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question. It is to be presumed that the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences."

In *R. R. v. McCarthy,* 96 U. S., 258, 267, it is said, "The doctrine of *ultra vires,* when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong," citing several cases. And in *Board of Agriculture v. R. R.,* 47 Ind., 407, "Although there may be a defect of power in the corporation to make a contract, yet, if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has, by its promise, induced a party relying on the promise, and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract." In *R. R. v. Trans. Co.,* 83 Pa. St., 160, "Where a corporation has entered into a contract which has been fully executed on the other part and nothing remains for it to do but to pay the consideration promised, it will not be allowed to set up the plea of *ultra vires.*" To same purport 5 Thomp. Corp., sec. 6024, and cases there cited.

"Even if a contract is *ultra vires,* yet if it is not illegal the defendant is estopped from setting up that defense, as it would be fraud on the plaintiff to allow this to be done, he

having entered into the transaction relying upon said (74) contract." *Bushnell v. Bank,* 17 N. Y., 378; *Whitney Arms Co. v. Barlow,* 63 N. Y., 62; *Waterman Corp.,* 604, and indeed the authorities and the text-writers seem fairly uniform to this purport. The case strongly relied on to the contrary is *Bowen v. Bank,* 94 Fed. Rep., 925, but there the learned Judge stresses the fact that in that case the plaintiff (unlike the present) "had notice that there were no funds in the bank to meet the checks and that he knew that the contract was one of guaranty pure and simple." It may be doubted if the latter case could be sustained on review, but it is very different from this.

Here if it be conceded that the guaranty was *ultra vires* it was not expressly prohibited nor illegal, the plaintiff acted on it and relying on it he parted with his property and shipped the hides. The defendant is estopped on both reason and precedent to aver that it was not empowered to give the guarantee. It does not lie in the defendant's mouth to say that it had no authority to do what it did, after the plaintiff has shipped his hides relying upon the defendant's promise that the draft should be paid.

In the preface to 4 Ed., Cook on Corporations, it is well said: "The doctrine of *ultra vires* is disappearing. The old theory that a corporate act beyond the express and implicit corporate powers was illegal and not enforceable, no matter whether actual injury had been done or not, has given way to the practical view that the parties to a contract which has been wholly or partially executed will not be allowed to say it was *ultra vires* of the corporation."

The judgment sustaining the demurrer is

Reversed.

Cited: *Victor v. Mills,* 148 N. C., 111.

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(75)

LYON v. BANK.

(Filed 26 March, 1901.)

1. WILLS—*Construction*—*"Personal Representatives."*

The words "personal representatives," as used in the will in this case, mean the executor or administrator, not the next of kin.

2. WILLS—*Right to Devise*—*Beneficiary.*

Where interest on money is bequeathed, the principal to be paid to the personal representative of the beneficiary at her death, said beneficiary may dispose of the same by will.

LYON *v.* BANK.

ACTION by Robert E. Lyon against The Fidelity Bank, as executor and trustee of R. B. Lyon and William O'Rouke, heard by Judge *W. B. Council,* at February Term, 1901, of DURHAM. From judgment for defendant, the plaintiff appealed.

Boone, Bryant & Biggs, and *Graham & Graham,* for the plaintiffs.

Winston & Fuller, for the defendant.

CLARK, J. By the fifth clause of the will of Mrs. Mary E. Lyon, she bequeathed and devised the bulk of her estate, to be divided in equal shares, to her husband and children, the division to be made by her executors. At the end of this clause she adds: "But after ascertaining and allotting the share of each beneficiary under this item, they shall retain out of the share of each child, or issue of a dead child, one-tenth part
(76) thereof, which part so remaining may be held in specie or converted into money at the election of said executors, and invested for the benefit of such beneficiary, to whom all the interest accruing thereon shall be paid so long as said beneficiary lives; and as each beneficiary dies, his or her retained part shall be paid or delivered to his or her personal representative."

The sole question presented is whether by the last two words she meant "executors and administrators" or "next of kin."

These words are to be construed in their ordinary and usual signification unless the context shows that the testator had a different intention, in which event that construction should be placed upon the words which will effectuate the evident intention of the testator. We are cited to many cases in which the meaning of words used in a will have been construed in other than the most usual sense to conform to the context, but they have no application here. The will is carefully and accurately drawn. The draftsman seemed to know well the meaning of the legal expressions used. The intent of the will seems to be that each beneficiary was to have the absolute enjoyment of his share except as to the retained one-tenth, of which he was to enjoy only the interest, but at the death of the beneficiary this one-tenth was to go to his executors and administrators—his personal representatives. *Overman v. Jackson,* 104 N. C., 4. That is to say, it was to constitute a part of his estate, and as such was subject to disposition by the will of such beneficiary and to liability for his debts. It could not be touched during his life, as he could receive only the interest thereon. There is nothing to indicate an intention to tie up such one-tenth for a

longer period than the life of the beneficiary, or to give it over in remainder to his next of kin. *Holt v. Holt,* 114 N. C., 241. The one-tenth was retained solely for the benefit of the beneficiary that the income thereon might provide him (77) a support in the event of the loss of the nine-tenths given him absolutely at the death of the testator.

Whether the *corpus* of the one-tenth should go at the death of the beneficiary to his estate or over to the next of kin in remainder, in either case, the beneficiary was not disabled to assign or dispose of the interest accruing thereon, and there is nothing indicating an intention of the testator to put a greater restriction as to the principal of the one-tenth after the death of the beneficiary, either in favor of the next of kin or to prevent disposition of it by will of the beneficiary or to exempt it from liability for his debts. Such provision might have been inserted in the will, but it is not expressed by the words used. The provision, as it is written, merely prevents any control over the principal of the one-tenth by the beneficiary, or its being subjected for his debts, as long as he may live.

No error.

WRIGHT v. RAILROAD.

(Filed 2 April, 1901.)

1. APPEAL—*Former Appeal—Former Adjudications.*

   An appeal on a point decided on a former appeal will not be allowed.

2. MASTER AND SERVANT—*Railroads—Negligence—Personal Injuries—Damages.*

   The doctrine of fellow servant does not apply to a brakeman who is injured in consequence of a defective roadbed caused by the negligence of the road master.

ACTION by R. Lee Wright, administrator of Wilson Williams, against the Southern Railway Company, heard by Judge *George H. Brown* and a jury, at February Term, 1901, of ROWAN. From a judgment for the plaintiff the de- (78) fendant appealed.

Lee S. Overman, A. C. Avery and *R. Lee Wright,* for the plaintiff.

A. H. Price, for the defendant.

CLARK, J. The only exception taken at the trial which is relied on in the argument here is the refusal of the Judge to submit the further issue, "Was the death of the said intestate caused by the negligence of a fellow servant?" The defendant contends, as set forth in his brief, that there was evidence upon his third defense in the answer, which, if submitted to the jury upon such issue, was sufficient to show that the defendant "furnished sound ties to keep the road in good and safe repair, and other proper material and a good, reliable section master, whose duty it was to keep the road in repair; and if it was not in good and safe repair it was negligence on the part of the section master, whose negligence was that of a fellow servant. The duty owed by the master to the servant, the brakeman (plaintiff's intestate), was to furnish the ties, and a competent section master, and when this is done its duty is discharged."

This is the defendant's contention, as clearly and succinctly set out in the brief of its learned and able counsel. The Judge properly held that on former appeal in this case, this Court had held that defense untenable, and he refused to submit it to the jury. The injury occurred before the passage of the "fellow servant act" of 1897, and hence is not affected by it. *Rittenhouse v. R. R.*, 120 N. C., 544. The same contention was before this Court in this case on a former appeal, 123 N. C., 280,

(79) and as ruled by his Honor below, it was expressly decided. It was there said, "When this case was here before (122 N. C., 959), the Court said: 'If the defendant, by having proper appliances (airbrakes) and a good roadbed, could have avoided the injury to the intestate, it is liable.' That it is the negligence of the *master* not to have a safe roadbed, and that this duty can not be shifted off on a subordinate, as the fellow servant of an employee, who is injured or killed, is almost universally recognized," (here the Court cited numerous authorities) and added, "Indeed, the proposition requires no citation of authority. *Pleasants v. R. R.*, 121 N. C., 492, instead of being an authority for the defendant, clearly concedes (page 496) that it was the duty of the railway company to keep its roadbed in safe condition, and that it could not delegate this duty to a servant so as to exempt the company from liability to an employee for injury caused by a defective roadway."

After this express decision on a former appeal in this same case, of the very point now presented, the present appeal is neither more nor less than an attempt to review the former ruling, not by a rehearing, in the required method, but by a second appeal presenting the same point, and this is not allow-

able. *Pretzfelder v. Ins. Co.*, 123 N. C., 164; *Shoaf v. Frost*, 127 N. C., 306.

Besides, as an original proposition (*i. e.*, if it had not been already decided on the former appeal and in the cases therein cited), the fellow servant doctrine never extended further than those things happening in the operation of the road. The furnishing proper appliances and safe roadbed is the duty of the master. The master can not be heard to say that it is not responsible for defective roadbed, or dangerous engines and cars, because it furnished good iron, and crossties and other material —and by the negligence of its employees the construction of appliances or roadbed was unsafe. The responsibility of supervision and acceptance is on the master. It is not like the negligence of a fellow servant in the operation of the business, which is instantaneous and beyond control of the master other than in the selection of careful, proper servants. (80) But even in that regard, the exemption of the employer from responsibility which grew up by judicial construction has been repealed by statute so far as railroad companies are concerned.

No error.

Cited: Kramer v. R. R., post, 270; *Perry v. R. R.*, 129 N. C., 334; *Jones v. R. R.*, 131 N. C., 135; *Holland v. R. R.*, 143 N. C., 437.

FLEMING v. RAILROAD.

(Filed 2 April, 1901.)

ANOTHER ACTION PENDING—*Dismissal and Nonsuit—Federal Courts—The Code, Secs.* 142, 166—*Demurrer.*

One taking a nonsuit in a Federal Court is entitled to bring a new action in the State Court within one year thereafter.

ACTION by D. E. Fleming against the Southern Railway Company, heard by Judge *H. R. Bryan*, at November Term, 1900, of IREDELL. From a judgment for the plaintiff, the defendant appealed.

Long & Nicholson, for the plaintiff.
A. B. Andrews, Jr., for the defendant.

CLARK, J. The complaint, after setting out the cause of action, avers that a previous action, which had been brought by

plaintiff against defendant demanding $20,000 damages for the same cause of action, had been removed into the Federal Court, and that at the following term of that Court "the plaintiff, with consent of defendant's attorney, agreed to take a nonsuit in the Federal Court provided it should simply terminate the action for the $20,000 claim, and that plaintiff might then bring action in the State Court anew for $2,000. Hence this action."

The demurrer admits this averment. It was therefore properly overruled. Indeed, whether the nonsuit was taken
(81) with or without consent of the defendant, the plaintiff had a right to bring this new action within one year thereafter by the express terms of our statute. Clark's Code (3 Ed.), secs. 166, 142, and cases there cited.

We are referred by defendant's counsel to *R. R. v. Fulton,* 59 Ohio St., 575, which holds that a nonsuited action can be reinstated in the Federal Court against consent of defendant. Whatever be the practice in Ohio such is not the statute or practice in this State, and the Federal Courts, in matters of practice, follow the practice of the courts of the States in which they are held. Even if the contrary were true, the action for $20,000 had not been reinstated when the summons in this action for $2,000 was issued, and the point attempted to be raised by the demurrer that another action for the same cause was pending has nothing to rest upon.

Affirmed.

BARRETT v. McCRUMMEN.

(Filed 2 April, 1901.)

1. INSTRUCTIONS—*Exceptions and Objections—Appeal.*

   Instructions can not be objected to for the first time on appeal.

2. PARTNERSHIP—*Torts.*

   If one partner commits a tort, the partnership will not be bound, unless it be either authorized or adopted by the firm, or be within the proper scope or business of the partnership.

3. PARTNERSHIP—*Individual Liability.*

   Where a partnership is sued, no judgment can be had against individual members.

4. EVIDENCE—*Sufficiency—Partnership.*

   Where there is not any sufficient evidence on a point to submit to the jury, the Court should so charge.

BARRETT *v.* MCCRUMMEN.

ACTION by R. A. Barrett against M. D. McCrummen, (82) Duncan McCrummen and Malcom McCrummen, trading as M. D. McCrummen & Co., heard by Judge *Frederick Moore* and a jury, at January Term, 1901, of MOORE. From a judgment for the plaintiff, the defendant appealed.

Seawell & Burns, for the plaintiff.
Black & Adams, for the defendants.

MONTGOMERY, J. This action was brought to recover damages for the destruction of personal property belonging to the plaintiff by fire alleged to have been kindled by the defendants in their own woods, and by them negligently permitted to spread to the lands of the plaintiff.

The summons was issued against and served on the three defendants, who were described as trading "as M. D. McCrummen & Co." In the complaint there is no allegation of the partnership, the pleader seemingly intending to hold the defendants liable both as partners and individuals. The issues were as follows: (1) Did the defendants set fire to certain woods as alleged in the complaint? (2) Did the defendants negligently permit said fire to spread to and burn the property of the plaintiff as alleged in the complaint? The defendants, after the evidence was in, requested the Court to instruct the jury "that the defendants having been sued as a partnership, the jury can not return a verdict against the individual members of the firm, or either of them," and the instruction was given. Whether that instruction was correct or not, is not before us for determination, for, as we have said, it was given at the defendants' request, and the plaintiff filed no exception. But in connection with that instruction the defendant made exception to another instruction of the Court, which was in these words: "If you find from the evidence that Duncan McCrummen set out the fire *which the defendants afterwards negligently per-* (85) *mitted to spread* to the property of the plaintiff and burn it, and at the time of setting out the fire the defendants M. D. McCrummen and Malcom McCrummen knew that the fire was being set out, and caused or procured it to be set out, you should answer the first and second issues in favor of the plaintiff, although you should further find from the evidence that they did not set out the fire while acting within the scope of the partnership business."

There was no inconsistency between the instructions; the one was, that, because the partnership had been sued no judgment could be had against the individual members; the other was

that if one of the partners did the negligent act and the other two knew that the fire was being set out, and caused or procured it to be set out, the first and second issues should be answered affirmatively, although the fire was not set out as an act within the scope of the partnership business. That was a correct charge. "As to torts not committed in the course of the partnership business, it is very clear that the partnership is not liable therefor in its social character unless indeed they are assented to or accepted as the act of the partnership." Story on Partnership, section 166. If one partner commits a tort the partnership will not be bound unless it be either authorized or adopted by the firm, or be within the proper scope or business of the partnership. The defendant in his brief insists that his Honor committed error when he instructed the jury in these words, "And in no view of the case can you return a verdict against one of the defendants unless you return it against all." However that may be, there was no exception to it by the defendant. The defendants were father and two sons and all engaged in a mercantile business as partners; and it is probable that no exception was intended to be made at the trial; anyway, none was made.

The defendants requested one instruction which was refused, but which ought to have been given, and that was, "That there is no sufficient evidence that the plaintiff's property was
(84) destroyed by any act or negligence of the defendants, or either of them, while acting within the scope of the partnership business." The evidence was voluminous, but it has been carefully examined by the Court, and we find that there is not a line of it going to show that the land on which the fire originated was used in any way whatever for partnership purposes or was in the least connected with the business of the firm—that business being simply one for the sale of general merchandise.

For the errors pointed out there must be a new trial.

Error.

DOSH v. LUMBER CO.

(Filed 2 April, 1901.)

PUBLIC LANDS—*Entry and Grant—Collateral Attack—Trespass.*

A grant of land lying in a county to which the entry laws apply can not be attacked collaterally for fraud or mistake in procuring such grant.

DOSH *v.* LUMBER CO.

ACTION by L. P. Dosh and M. V. Dosh against The Cape Fear Lumber Company, heard by Judge *Frederick Moore* and a jury, at December (Special) Term, 1900, of PENDER. From a judgment for the plaintiffs the defendant appealed.

Stevens, Beasley & Weeks, for the plaintiffs.
J. O. Carr, for the defendant.

MONTGOMERY, J. This action was commenced to recover damages against the defendant for an alleged trespass upon the lands of the plaintiff, and cutting and carrying off timber therefrom. The defendant made no claims to possession or title to the property, and resisted the recovery on the (85) ground that the grant under which the plaintiff claimed was void. The plaintiff had no actual possession of the land. The grant from the State to G. A. Ramsey was introduced in evidence by the plaintiff, over the objection of the defendant, and also evidence tending to show that the boundaries covered the *locus in quo.* The defendant introduced evidence going to prove that the land was swamp land and was a part of a body of swamp land containing about 60,000 acres; and then requested the Court to instruct the jury as follows: "That if the jury find that the land covered by the Ramsey patent is a part of a body of marshy or swamp land exceeding 2,000 acres, then the State had no right to grant the same, and the title of the plaintiff is not good." His Honor refused to give the instruction, but told the jury that if they believed the evidence the plaintiff was owner of the lands embraced in the grant.

We see no error in the course pursued by the Court. The contention of the defendant is that the grant under which the plaintiff claims title is void, and that it can be attacked collaterally, by an individual, in a suit in the nature of ejectment, and that too by parol evidence. The outline of the argument of the defendant's counsel is that the State Board of Education, by Article IX, section 10, of the State Constitution, has succeeded to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina; that when the constitutional provision was adopted all the swamp lands belonging to the State and all of such lands that might thereafter come to the State were vested in the President and Directors of the Literary Fund in trust as a public fund of education and the support of the common schools. Revised Code, chap. 66. That by section 2514 of The Code the State Board of Education is authorized and empowered to reclaim and sell the swamp lands, and that therefore that right and power can not be di-

vided or shared in by the executive officers of the State; that marsh or swamp lands, where the quantity of land in
(86) any one marsh or swamp exceeds two hundred acres is excepted from entry by subsection 3 of section 2751 of The Code, and that section 2755 of The Code declares that "every entry made and every grant issued for any lands not herein authorized to be entered or granted shall be void." The defendant's deduction from the premises and argument is that the State Board of Education alone had the power to sell and convey the lands described in the grant; and further, that if that is not so, then the statute, 2751 of The Code, particularly forbids the entry and grant of any part of swamp lands out of a body of swamp lands of more than 2,000 acres; and the cases of *Stanmire v. Powell,* 35 N. C., 312, and *Lovinggood v. Burgess,* 44 N. C., 407, are cited in support of the position.

In the first-mentioned case (ejectment) the lessor of the plaintiff claimed title as follows: The General Assembly of 1848 passed a resolution which was ratified on the 26th of the following January, in these words: "(1) Resolved, That the Secretary of State be and he is hereby authorized and required to issue to Ailsey Medlin for the services of her father, Benjamin Schoolfield, in the Continental line of the State in the war of the Revolution, or her heirs or assigns, a grant or grants for a quantity of land not exceeding 640 acres, to be located in one body or in quarter sections not less than 160 acres, or any of the lands of this State now subject to entry by law; said grant or grants to be issued on the application of the said Ailsey Medlin, her heirs or assigns, as she or they may prefer in one or four grants. (2) That the said warrant or warrants shall or may be laid so as to include any lands now belonging to the State for which the State is not bound for title: *Provided,* that this act does not extend to any of the swamp
(87) lands of this State." In September, 1849, a grant was issued for the premises to the lessor of the plaintiff, and in the grant the resolution in favor of Ailsey Medlin was recited; also that Stanmire was her assignee, and that the land was described as being situated in Cherokee County, with the metes and bounds and quantity also set forth. The defendant there, who was in possession, claimed the land through purchase in 1838 from certain commissioners appointed by law to sell the same. This Court in that case, after laying down the broad proposition "that it is settled in this State that a grant founded on an entry made when vacant land is subject to appropriation by entry can not be collaterally impeached for defects in the entry or irregularity in any preliminary proceeding," did say,

"but a distinction is equally well established that when the law forbids the entry of the vacant land in a particular tract of country a grant for a part of such land is absolutely void; and that may be shown in ejectment." There, the land entered by the plaintiff's lessor and granted by the State lay within the Cherokee boundary, and entries were forbidden within that boundary by the acts of 1778 and 1789, and upon that ground the grant was held void. It is true that the Court said in the last-mentioned case, "The state of the law respecting the swamp lands was not looked into, for, if it had been, it would have been seen that, by the act of 1836, the whole of the swamp lands had been vested in the President and Directors of the Literary Fund, with power and duty to drain, sell and convey them for the best price that could be had, as part of a trust fund for the establishment of common schools, and therefore those lands did not belong to the State in the sense of being hers, without any obligation on her part for title." But that was said incidentally and only in answer to the argument of counsel of the plaintiff's lessor that, notwithstanding the act of 1778 forbidding the entry of lands within the Cherokee boundary, the resolution of 1848 in favor of plaintiff's lessor made an exception in her favor because of the use of the words at (88) the end of the second section of the resolution, provided that this act does not extend to any of the swamp lands of this State." The argument having been that all the lands of the State were open to that entry except the swamp lands notwithstanding the prohibitory legislation in reference to the Cherokee lands.

So that in that case the grant was void because entries were prohibited by law to be made within the Cherokee boundary, and no grant, therefore, of any lands of any quantity or description could be made on an entry laid within that boundary because of a want of power and jurisdiction in the executive officers of the State to make the grant; and that that fact could be shown in ejectment proceedings by the production of the statute which forbade the entry. But that case is not like the case at bar. On the contrary, the entry laws extend to vacant lands in Pender County where the lands in question are situated; and the question before us is, whether in a county where the entry laws extend, a grant for vacant lands there can be attacked collaterally for either a fraud or a mistake in the procuring of the grant. We think it can not be. In *Reynolds v. Flind,* 2 N. C., 106, it was said, "here the plaintiff has a State grant and it would be of the most dangerous consequences to void it by parol testimony." It is true that the Act of 1777, chap. 1,

sec. 9, says, "that every right, title, claim, etc., obtained in fraud, elusion or evasion of the premises of that act shall be deemed void; but the meaning is it shall be void as to the State, who may proceed to void it by *sci. fa.*, and having a judgment founded on that on record expressly against it—not that it shall be voided upon evidence in an ejectment by an individual citizen." In *Sears v. Parker, Ibid,* 126, it was also said, "We have often decided, and we are now of opinion that the State having granted vacant lands, the first patentee will be entitled to hold them notwithstanding any attendant circum-
(89) stances that render it voidable until it be actually avoided in the court of equity; and that it can not be avoided by any parol evidence given to a jury on a trial in ejectment. In *Gilchrist v. Middleton,* 107 N. C., 663, this Court held that "grants that appear upon inspection to have been issued in the face of any positive prohibition contained in a statute have been uniformly treated even in legal as distinguished from equitable proceedings as utterly void; but courts of law under the former practice would refuse to hear testimony *dehors* a grant to impeach it for fraud in obtaining it and would hear parol evidence to invalidate it only on the ground that the law forbade it to be issued." The reason of the rule is stated in *Stanmire v. Powell, supra.* "The reason why grants for land taken up as vacant within the counties to which the entry laws extend can not be impeached collaterally is that there is a general authority in the public officer to issue such grants; and they are therefore to be taken as having been rightly issued unless that matter be directly put in issue in a proceeding to impeach them"; and in *Gilchrist v. Middleton, supra,* "while the presumption is, when no defect of authority appears upon the face of the grant, that the executive officers, who have the right to issue it, had acted within the scope of their general powers, it is otherwise when, by reading it, it is manifest that the entry had become void before its issue. With such apparent defect of power in the maker, it becomes subject to attack in the trial of issues involving the title to land, just as any deed may be impeached in such trials for want of capacity in the maker, or of fraud in the *factum,* notwithstanding the fact that the grantor is the sovereign State."

No error.

Cited: *Holly v. Smith,* 130 N. C., 86; *Weaver v. Love,* 146 N. C., 416; *Call v. Robinett,* 147 N. C., 617.

(90)

RAY v. LONG.

(Filed 2 April, 1901.)

HUSBAND AND WIFE—*Separate Estate—Ejectment—Trusts.*

Where a marriage has taken place since 1868, a husband who invests money of his wife in land, taking title to himself, becomes a trustee for her.

ACTION by H. M. Ray and Elizabeth Ray, his wife, against J. A. Long, heard by Judge *W. A. Hoke* and a jury, at September Term, 1900, of ALAMANCE.

J. A. Long purchased the land in controversy on an execution sale to satisfy a judgment docketed against H. M. Ray. In an action brought on the ejectment, sale, and deed. H. M. Ray was ejected from the land, and the defendant Long put in possession under writ of the Court. H. M. Ray and wife then instituted this action, contending that the wife, Elizabeth Ray, had paid part of the purchase money, under which her husband, H. M. Ray, had bought and taken a deed for land, and, under the circumstances attending the sale, was entitled to have a trust declared in her favor for seven-eighths of the same. On amended complaint filed by leave of Court, plaintiff declared in ejectment for the whole tract of land, and contended that H. M. Ray and wife Elizabeth had bought land together, and held the same, as husband and wife, by entries, and that, holding the land in this way, the same was not subject to sale under execution on a judgment against H. M. Ray, the husband. From a judgment for the defendant, the plaintiffs appealed.

J. W. Graham and *R. D. Douglas,* for the plaintiffs.
E. S. Parker, for the defendant.

CLARK, J. Exceptions 4 and 5 must be sustained. It was error when his Honor told the jury, "If, when the land was bought and deed taken from Thomas H. Long, if it was done *under an agreement* that husband and wife were (91) to hold by entireties," or "to hold an interest in the land according to the amount of her payment," the wife was entitled to the land, or the half thereof (as the case might be). The marriage having taken place since 1868, he should have said to the jury, as laid down in *Kirkpatrick v. Holmes,* 108 N. C., 206, and approved in *Ross v. Hendrix,* 110 N. C., 405: "If her separate estate went into the hands of her husband, and he

invested it in land, taking title in his own name *in the absence of any agreement to the contrary,* a trust would have resulted to her." In *Brisco v. Norris,* 112 N. C., 676, it is said this equitable title was "such as to enable her, upon the strength of it, to recover the land from her husband, or from any one purchasing of him with notice of her rights, or *from any one who had bought the land at a sale under execution against her husband,* for such person would acquire only such title as her husband had."

This renders it unnecessary to consider the other exceptions, since they may not arise on another trial.

New trial.

Cited: *S. c.,* 132 N. C., 892.

HUNTER v. RANDOLPH.

(Filed 2 April, 1901.)

SALES—*Vendor and Vendee—Delivery to Carrier—Bill of Lading.*

Delivery of goods by a vendor to a common carrier is a delivery to the vendee, and this rule is not affected by failure of vendor to furnish vendee a bill of lading.

ACTION by Hunter & Sims against C. T. Randolph, heard by Judge *O. H. Allen* and a jury, at December (Special) Term, 1900, of LENOIR. From a judgment for the defendant, the plaintiffs appealed.

Y. T. Ormond, for the plaintiffs.

No counsel for the defendant.

COOK, J. The defendant purchased through their salesman, certain wheels from the plaintiffs. Upon receipt of the
(92) order plaintiffs delivered the wheels to the proper common carrier, in Richmond, where plaintiffs resided and carried on their business, and took bill of lading for same and sent to defendant an invoice of the goods. Upon arrival of the wheels in Kinston, to which place they were shipped by defendant's order, they were burned while in possession of the common carrier and before delivery to vendee. This action was brought by plaintiffs to recover against the vendee, the purchase price.

It is a well settled principle that when a vendor delivers the goods to the carrier, consigned to the vendee, both title and possession pass from vendor and vest in the vendee, the common carrier becoming the agent of the vendee. *Ober v. Smith*, 78 N. C., p. 313; *Gwyn v. R. R.*, 85 N. C., 429; *Crook v. Cowan*, 64 N. C., 743. And the vendor has no further interest in or control over the goods thus shipped—in the absence of an agreement of the parties varying this rule, or in case of stoppage *in transitu* in case where its principles apply.

The defendant resisted payment upon the grounds that the wheels were not his as he had received none, and further that the plaintiffs failed to send him the bill of lading without which the carrier's agent refused to recognize his claim for the value of the goods.

There is no dispute as to the amount claimed. Upon the trial the plaintiffs requested the Court to give the following four instructions to the jury, viz:

1. "As soon as an order for goods is accepted by the vendor the contract is complete without further notice to vendee, and such contract is fully performed on the part of the vendor by the delivery of the goods in good condition to the (93) proper carrier." Refused. Plaintiffs excepted.

2. "A delivery to a proper carrier is of the same legal effect as a delivery to the vendee himself." Refused. Plaintiffs excepted.

3. "The fact that no bill of lading was sent to the vendee does not affect the right of the vendor to recover the price of the goods." Refused. Plaintiff excepted.

4. "If the jury believe the evidence they should find for the plaintiffs." Refused. Plaintiffs excepted.

Thereupon his Honor gave the following instruction, viz:

1. "If the plaintiffs deliver the goods to the railroad company, nothing else appearing, the defendant would be liable."

2. "The bill of lading is not necessary to complete the contract, but it was the duty of the plaintiff, with due diligence, to inform the defendant Randolph of the delivery to the railroad company, and to provide him with proper means to collect in case of loss."

3. "If the plaintiffs, by want of due care and diligence, failed to provide the defendant with the bill of lading or other proper information and means for collectng out of the railroad company, the defendant would not be liable, and you will answer the issue, 'Nothing.'"

4. "Was there an assignment of the bill of lading to the plaintiffs? To constitute an assignment it is not necessary to

be in writing, but there must be an agreement by both parties. If you find that the conversation between Murray, the traveling salesman, and the defendant, as to the bill of lading, shows an assignment of bill of lading by defendant to plaintiffs, and that the plaintiffs held the bill of lading for the purpose of collecting from the railroad company then the defendant would not be liable, and you will so find."

(94) To the second, third and fourth instructions plaintiffs excepted.

The plaintiffs were clearly entitled to the instructions as requested, and his Honor erred in refusing to so instruct either in words or substance. And there was error in the instructions given; the plaintiffs having no interest in or control over the wheels after delivery to the carrier, their duty ceased, and it was not incumbent upon them to provide defendant with means to collect their value. In *Ober v. Smith, supra,* it was held that the vendor was entitled to recover the value of the goods from the vendee notwithstanding the fact that no bill of lading was sent him. The bill of lading in nowise affects the title to the property, but is an acknowledgment of the delivery for shipment—terms, conditions, etc., upon which it is to be carried. The title to it is not obtained through nor conveyed by the bill of lading, unless otherwise agreed between the parties.

New trial.

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(95)

CARSON v. RAILROAD.

(Filed 2 April, 1901.)

1. APPEAL—*Instructions—Exceptions and Objections—Supreme Court Rule* 27.

   An exception to a charge which fails to point out specifically the errors complained of will not be considered.

2. INSTRUCTIONS—*Defense—Evidence.*

   The Court will not charge on a point not relied on in the trial and as to which no evidence was introduced.

3. EVIDENCE—*Sufficiency—Railroads—Damages.*

   Evidence in this case of title of plaintiff held sufficient to sustain an action for damages.

4. LIMITATIONS OF ACTIONS—*Trespass—Damages—Acts* 1893, *Ch.* 152—*Acts* 1895, *Ch.* 224.

   Where the period of limitation is lessened, the time within which an action not barred must be commenced is the balance of the time

unexpired according to the law as it stood when the amendatory act passed, provided it shall never exceed the time allowed by the new statute.

5. DAMAGES—*Measure of—Negligence—Evidence.*

In an action for damages for the negligent construction of a railroad, evidence as to the market value of the land before and since the construction of the road is inadmissible.

6. DAMAGES—*Measure of—Negligence.*

The measure of damages for the negligent construction of a railroad, is the difference in the value of the land with the railroad constructed as it was, and what would have been its value had the road been properly constructed.

ACTION by S. T. Carson and wife against the Norfolk and Carolina Railroad Company, heard by Judge *A. L. Coble* and a jury, at October Term, 1900, of EDGECOMBE. From a judgment for the plaintiffs, the defendant appealed.

(96)

No counsel for the plaintiffs.

John L. Bridgers & Son, for the defendant.

COOK, J. This was an action brought to recover permanent damages alleged to have been done to plaintiffs' land by the wrongful and negligent cutting down and removing the dam and embankment, which protected the land from overflowing, by the defendant in the construction of its road in 1889. The issues submitted to the jury and their findings were as follows:

1. Are the plaintiffs the owners of the lands described in the complaint?

2. Did the defendant negligently cut and remove the dam and embankment as alleged?

3. Did the defendant wrongfully divert water from its natural flow and direction and throw same upon plaintiffs' lands?

4. Is plaintiffs' cause of action barred by the statute of limitations?

5. What damage have plaintiffs sustained?

To the first issue the jury responded "Yes," to the second "Yes," to the third "Yes," to the fourth "No," and to the fifth "four hundred and fifty dollars."

The defendant assigns as errors:

1. That the Court erred in the instructions as given to the jury.

2. That the Court erred in refusing to instruct the jury as requested in the several prayers of the defendant.

3. That the Court erred in refusing to permit the defendant to ask the witness Davenport the question set out in the record.

The first assignment of error is not within the pale of review by this Court, but is excluded from consideration under Rule 27, as heretofore construed. See Clark's Code, p. 920, and cases there cited.

In *Dugger v. McKesson,* 100 N. C., p. 17, one of the
(97) errors assigned was that the plaintiffs "excepted to the charge because of the charge as given" (substantially the same as No. 1), which the Court refused to entertain because of its failure to point out specifically the errors complained of.

As to the second assignment there is no averment in the answer that the plaintiffs released their claim for damages by deed or otherwise; or that damages had theretofore been assessed and paid to them. The amendment to the answer sets up an award and satisfaction as an estoppel to the action, but the record fails to show that the same was introduced upon the trial, or there relied upon as a defense; nor does it show that any evidence was offered to support it. So the Court properly refused to give the instruction as prayed for in numbers 1 and 3.

The second prayer was properly refused, and will be considered in connection with the third assignment of errors.

Nor do we find any error upon the part of the Judge in refusing to give the 4th prayer, "that if you believe the evidence, the Court instructs you that in law the plaintiffs are not the owners of the land as alleged in the complaint, and you will answer the issue as to the ownership "No." The defendant does not claim to own the land in controversy, nor does it set up any title in itself. It is established by the verdict that defendant is a trespasser, and the uncontroverted evidence shows such to be the case. The *ownership,* then, becomes material to the defendant only in one aspect, to-wit, To whom is it liable for the damage thus committed? Would the recovery had by the plaintiffs in this action be a bar to any other action?

James Knight devised the "Knight tract" of about 400 acres to James W. Knight, for life, and after his death to his children. The life tenant died eighteen or twenty years before the trial, leaving six children, who then owned the tract as
(98) joint tenants—having unity of title, unity of interest, unity of time and unity of possession. In 1890 four of the children, under a partition proceedings begun in 1888, had their shares assigned to them in severalty, thus dissolving the joint tenancy between themselves and the other two, viz., the *feme* plaintiff and Theresa, and debarring themselves of all rights and interest in that tract (the one in controversy) assigned to the other two, who held the same still as joint tenants. But in 1895 this jointure was dissolved, by a sale on

the part of Theresa, of her interest (an undivided moiety of the whole) to S. T. Carson; then he and *feme* plaintiff became tenants in common of the land alleged to have been damaged. Now, then, Theresa, by reason of her deed, is barred of any action for or on account of said land. So, then, the *feme* plaintiff and her husband, S. T. Carson, are the owners in fee of said land, and were so seized and possessed at the time of the commencement of this action, said *feme's* title and possession being unbroken, and S. T. Carson and those under whom he holds, also being unbroken for many years before the trespass down to the time of the institution of this action. Thus we see that the plaintiffs alone have an action against the defendant, no suggestion being made in the pleadings as to any other claim being made to said land. We now come to consider the 5th prayer—to instruct the jury that the action was barred by the statute of limitations. The original trespass having taken place in 1889 the twenty years would not expire till 1909; but defendant contends that Laws of 1893, ch. 152, as amended by Laws 1895, ch. 224, limits the time to five years, which would have been a bar in 1895—the action having been brought in 1896. But not so. In *Culbreth v. Downing,* 121 N. C., p. 206, that statute is construed and it is settled that the *reasonable time* given for the commencement of an action not barred, "shall be the balance of the time unexpired according to the law as it stood when the amendatory act passed, provided it shall never exceed the time allowed by the new statute."

As to the third assignment, the defendant asked its (99) witness, W. J. Davenport, this question, "Taking the farm before the railroad was built and since the railroad has been built, what is the market value of the farm with railroad constructed as it is, taking into consideration the general market value of lands?" Plaintiffs' objection to this question was sustained, and defendant excepted.

This question was addressed to the fifth issue "What damage have the plaintiffs sustained?" This exception can not be sustained. Whether the market value of the farm had increased by reason of the presence of the railroad, or whether its market value, burdened with the injuries inflicted by defendant's trespass was greater than before the road was built, was of no concern to the defendant. The fact that lands increase in value by reason of running a railroad through the country does not entitle the railroad company to share with land owners in his increase. Nor does it follow that the railroad can damage the lands to the extent, or any part thereof,

of this increase of value. Nor would the increased value of the land, by reason of locating a depot on or near plaintiff's land enure to defendant's profit, as prayed for in its second prayer.

The true measure of damages was stated in his Honor's charge to the jury, "The difference in the value of the land with the railroad constructed as it was and what would have been its value had the road been skillfully and properly constructed."

There is no error.

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(100)

IN RE SNOW'S WILL.

(Filed 9 April, 1901.)

1. WILLS—*Testamentary Capacity—Execution—Attesting Witnesses.*

   In making a will, the testator must actually see, or be in a position to see, not only the witnesses, but the will itself, at the time of signing the same.

2. EVIDENCE—*Conflicting—Questions for Jury.*

   Where there is conflicting evidence as to a matter, it should be left to the jury.

3. APPEAL BONDS—*Time for Filing—Laws* 1889, *Ch.* 135.

   An appeal bond, filed and sent up with the record, is in time within Laws 1889, ch. 135.

IN THE matter of the will of Ice Snow, heard by Judge *E. W. Timberlake* and a jury, at November Term, 1900, of SURRY. From a judgment sustaining the will, the caveators appealed.

Thos. H. Sutton, for the propounder.
Watson, Buxton & Watson, for the caveators.

MONTGOMERY, J. On the trial of the issue *devisavit vel non* there was a verdict sustaining the will, and a judgment was rendered by the Court for the propounders. At the time of the execution of the will and the attestation of the witnesses, about ten days before the death of the testator—he was a very sick man and had to be propped up in bed to sign the paper. The only exceptions before the Court by the appellants, the caveators, is upon the refusal of his Honor to give the two special instructions numbered 3 and 4, they being in the following words.

3. That in order to find the witnesses subscribed in the presence of the testator, as contemplated by the statute, they must find that Ice Snow should have evidence of his own senses to the subscribing by the witnesses, just as he should (101) to a signing for him by another, by his direction and in his presence, so as to exclude the almost impossibility of imposition by substituting one paper for another without detection by the testator; and if they find that he was in such condition that he could not tell whether they signed the paper offered as his will or some other paper, they should answer the issue "No."

4. That upon the testimony as a matter of law, the will offered had not been proved, nor attested as required by statute, and the propounders are not entitled to recover.

The fourth prayer was properly refused, for while there was conflicting evidence both as to the mental capacity of the testator and his ability to see the attestation of the witnesses, and so the matter had to be left to the jury to be decided by them under proper instructions by the Court.

The third prayer the propounders were entitled to, or to one of equivalent import and meaning; and his Honor gave such a one substantially, though not in the same terms. His instruction to the jury was as follows: "In order that the will should have been duly executed, the decedent must be in such a situation, such a position, as will enable him, if he will look, to see the paper writing which he has signed as it is being subscribed by the witnesses; he must have the opportunity, through the evidence of ocular observation, to see the attestation of the paper from the position or situation in which he is, if he will look, and thus exclude the almost impossibility of a substitution of the paper which he has signed with another by some other person." That instruction is in the language of this Court used in *Burney v. Allen,* 125 N. C., 314, on the same point, and where the circumstances as to the facts of signing and attestation were very similar. If the word *condition* in the third prayer may be taken as bearing upon the testamen- (102) tary capacity of the testator, his Honor in that connection instructed the jury correctly that the testator must have known at the time of the signing of the paper, the nature of the business, the property he was disposing of, and to whom he was giving it, and that if they were not satisfied that he had such capacity they should answer the issue "No." The evidence in this case introduced by the caveators, tending to prove lack of testamentary capacity, was very strong. That tending to show testamentary capacity was not strong from one standpoint.

but the jury, whose province it was to pass upon the evidence, delivered their verdict and we have no control over it, for there was no error of law committed by his Honor, as we have seen.

The motion of the propounders, the appellees, on the ground that the appeal bond was not filed in time under The Code provision was not granted. It is enacted in Chapter 135, Laws 1889, that no appeal should be dismissed in the Supreme Court on the ground that the undertaking on appeal was not filed earlier, or the deposit made earlier, provided the bond should be given or the deposit made before the record of the case is transmitted by the Clerk of the Superior Court to the Supreme Court. The bond was filed and sent up with the record. There was no error in the trial below, and the judgment is

Affirmed.

Cited: *In re Thorp,* 150 N. C., 492.

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BENNETT v. TELEGRAPH CO.

(Filed 9 April, 1901.)

1. APPEAL—*Exceptions—Waiver.*

   A defective averment of a good cause of action is cured by a failure to demur thereto.

2. TELEGRAPHS—*Mental Anguish—Damages—Relationship of Parties —Presumption.*

   Mental anguish will not be presumed from failure of father-in-law to be at funeral of daughter-in-law, but is a matter of proof.

3. TELEGRAPHS—*Relationship of Parties.*

   The relationship of the parties need not be disclosed in the message, where the telegram relates to sickness or death.

4. INSTRUCTIONS—*Special Instructions—Trial.*

   It is the duty of the trial judge to set out specifically in the case on appeal the charge he gave in lieu of the instruction requested.

ACTION by R. L. Bennett against The Western Union Telegraph Company, heard by Judge *E. W. Timberlake* and a jury, at November Term, 1900, of SURRY. From a judgment for the plaintiff, the defendant appealed.

Watson, Buxton & Watson, for the plaintiff.
Glenn & Manly, for the defendant.

CLARK, J. The defendant objects in this Court for the first time, that the complaint does not aver directly that the sendee would have come if he had received the message promptly. It is alleged inferentially. The direct averment should have been made, but upon the face of the complaint there is not a "statement of a defective cause of action," but a "defective statement of a good cause of action," which is cured by failing to demur thereto. *Ladd v. Ladd,* 121 N. C., 118, and other cases cited in Clark's Code (3 Ed.), sec. 242; *Bank v. Cocke,* (104) 127 N. C., 473. As the case goes back on another ground, the plaintiff will have opportunity to ask leave to amend.

The objection that the relationship of sendee (father-in-law) does not entitle plaintiff to recover for mental anguish, by reason of failure to be at his daughter's funeral, is answered by the discussion and decision in *Cashion v. Tel. Co.,* 123 N. C., 267. The relationship of the parties need not be disclosed in the message where the telegram relates to sickness or death. *Lyne v. Tel. Co.,* 123 N. C., 129; *Cashion v. Tel. Co.,* 124 N. C., 549; *Kennon v. Tel. Co.,* 126 N. C., 232. In fact, however, in this case it was shown on the face of the telegram and the agent also had knowledge of the fact. *Kennon v. Tel. Co.,* 126 N. C., 232.

Without discussing the other matters, which may not arise in another trial, it appears that in response to the sixth prayer for instruction (which taken and construed as a whole was proper), the case merely states, "The Court charged the jury fully upon the law, to which there was no exception." But the appellant was entitled to have the Judge set out what he charged in lieu of that prayer, that this Court might see whether it "substantially" or "fully" covered the prayer asked. *Wilson v. R. R.,* 120 N. C., 531.

New trial.

Cited: *Mfg. Co. v. Bank,* 130 N. C., 609; *Meadows v. Tel. Co.,* 132 N. C., 42; *Harrison v. Garrett, Ib.,* 178; *Hunter v. Tel. Co.,* 135 N. C., 463; *Helms v. Tel. Co.* 143 N. C., 394; *Holler v. Tel. Co.,* 149 N. C., 344.

(105)

FAIR v. SHELTON.

(Filed 9 April, 1901.)

CONTRACTS—*Consideration—Patents.*

A person who purchases the exclusive use of certain territory for the sale of a patent can not set up, as a failure of consideration of a note given therefor, that the article patented was worthless.

ACTION by A. J. Fair against D. D. Shelton and W. A. Whitaker, heard by Judge *E. W. Timberlake* and a jury, at November Term, 1900, of FORSYTH. From a judgment for the plaintiff, the defendants appealed.

Swink & Swink, for the plaintiff.
Jones & Patterson, for the defendants.

COOK, J. The execution of the note, coupled with the terms and conditions stated in the contract sued upon, and also the delivery of the deed to defendants, are admitted.

For their defense the defendants aver:

"1. They admit the execution of the note and contract sued on; but they allege that they were induced to sign the said note and contract upon the representations of plaintiff that the tobacco steamer was properly constructed out of good and durable material; that its mechanism was perfect, and that it would be readily sold and meet the demands of the farmers and raisers of tobacco, while in truth and in fact it was badly constructed and out of inferior material, and could not be operated as represented by the plaintiff, and because of such defects defendants have been unable to sell the steamer.

"2. That there has been a failure of the consideration upon which the note was executed, and therefore judgment should not be rendered against them for said note."

As to the first averment there is no proof offered, and it seems to have been abandoned. It will not be further considered.

As to the second—the defendants rely upon a failure of consideration of the contract, and undertake to prove it by
(106) showing that the patent tobacco steamer was worthless, which evidence was excluded by the Court, and defendants excepted. Defendants do not rely upon a partial but an entire failure of consideration, which alone can defeat a sale or contract. *Johnston v. Smith,* 86 N. C., 501. It matters not whether the subject of the sale was of value to the purchaser

or vendee—as to him it may be absolutely worthless, but if it be of some value to the grantor or vendor, however little, the consideration does not fail. To render a promise void upon an entire failure of consideration, it must appear that the consideration upon whch it was supposed to be based, *did not in fact exist,* and its nonexistence was unknown to the parties. For instance, where the grantor sells and conveys land to which he has no title (both parties assuming that he has) the grantee gets nothing—there is a failure of consideration; but otherwise should the grantee purchase such right, title and interest as grantor might have, for here the maxim of *caveat emptor* applies. *Fox v. Haughton,* 85 N. C., 168. Likewise if a vendee gets that which he buys, though worthless (in the absence of deceit), for he buys upon his own judgment and at his own risk, in not requiring a warranty. So also in the absence of fraud, the buyer is liable for the price agreed to be paid for worthless stock in a corporation, where he receives that for which he contracted, though it was known by the seller to be worthless. *Hunting v. Downer,* 151 Mass., 275. In the case under consideration no deceit was practiced, nor was there any warranty. The defendants purchased the exclusive use of the territory for the sale of the steamer, and obtained what they purchased. The grantor owned the right and did sell. He also had applied for the patent and there is no suggestion that he failed to acquire it. What more was necessary to be performed upon the part of plaintiff? If the invest- (107) ment proved to be unprofitable to defendants it was their misfortune. Failure to realize profits upon experiments and speculations are too frequent to excite surprise. While the patent law allows a patent to issue only for a new and useful art, machine, etc., yet there is no implied warranty that it will be profitable. Judge Story says, "By 'useful invention,' in the statute, is meant such a one as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, the health, or the good order of society. * * * If this practical utility be very limited, it will follow that it will be of little or no profit to the inventor; and if it be trifling, will sink into utter neglect."

In *Wilson v. Hentges,* 26 Minn., 290 (and cited and approved in *Van Norman v. Barrean,* 54 Minn., 393), it is held: "If, however, the patent be valid, the right to sell the article is exclusive, and is in law a valuable right, although it may not in fact be a profitable one; and as one may pay or agree to pay what he pleases for such a right, the grant of it to him is a valid consideration for his promise to pay for it."

In this case the plaintiff owned the patent and the exclusive right to sell in the territory described. Defendants bought that right and nothing more. No steamers were sold. Defendants had the right under the contract to return the deed at the expiration of ninety days in cancellation of the note, but did not choose to do so. The basis of the consideration of this contract was the existence of the exclusive right to sell the patent tobacco steamer in that territory, conditioned upon the issuance of the patent to the plaintiff, about which there is no contention, for it is admitted.

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This being the case, we think his Honor properly excluded the evidence, and hold that there is

No error.

NICHOLS v. NICHOLS.

(Filed 9 April, 1901.)

1. DIVORCE—*Affidavit—The Code, Sec.* 1287—*Jurisdiction.*

   All the requisites mentioned in the affidavit required by sec. 1287 of The Code are mandatory, and a failure to set out these averments in the affidavit ousts the Superior Court of jurisdiction.

2. JURISDICTION—*Exceptions and Objections—Supreme Court.*

   Exception to the jurisdiction may be made for the first time in the Supreme Court.

ACTION by Dicey Nichols against William Nichols, heard by Judge *E. W. Timberlake* and a jury, at November Term, 1900, of FORSYTH. From a judgment for plaintiff, the defendant appealed.

Jones & Patterson, for the plaintiff.
Watson, Buxton & Watson, for the defendant.

MONTGOMERY, J. The appellant, in this Court, moved to dismiss the action on the ground that the Superior Court did not have jurisdiction upon the complaint, to try the case. The action was for divorce a *vinculo,* and the affidavit accompanying the complaint did not contain one of the averments prescribed in The Code, Sec. 1287. There was omitted from the affidavit the statement that the facts set forth in the complaint as ground for divorce had existed to plaintiff's knowledge at least six months prior to the filing of the complaint. The question,

then, is presented, Do the matters which are required to be set forth in petitions for divorce, The Code, sec. 1287, affect the jurisdiction of the Court, or are they matters merely (109) directory, and if not complied with, demurrable only, and cured by verdict and judgment in the cause if not demurred to? There is no fault found with the complaint in the case. In *Dickinson v. Dickinson,* 7 N. C., 327, this Court said, "It should, however, be distinctly stated in the affidavit that the petitioner knew of the facts charged six months before the filing of the petition; and this that the application may appear to the Court not dictated by passion or resentment but an affair of deliberation." That point was decided, as the Court said, that it might serve to prevent fruitless litigation and settle the practice in other cases; the case, however, had been disposed of on another point upon which the argument in chief had been made. It is true that that decision was rendered upon the statute of 1814, brought forward in the Revised Statutes, chap. 39, and that section 6 of that act declared that, "No petition for divorce *should be sustained* unless the petitioner stated and swore to the facts, the ground of his or her complaint had existed to her knowledge at least six months prior to the filing of the petition." That section also declared that no person should be *entitled* to sue under the act unless he or she should have resided within the State three years immediately preceding the exhibition of his earlier petition. Nevertheless, we are of the opinion that although the prohibitory words in section 6 of the act of 1814 in reference to the maintenance of actions in divorce, unless the requirements of the section are complied with, are not used in sec. 1287 of The Code, yet the materiality of these requisites is not lessened so as to affect the matter of jurisdiction of the Courts. It is necessary in order that the Courts may take jurisdiction of the matter of divorce that each and all of the requisites mentioned in the affidavit required by The Code, sec. 1287, shall be set out and sworn to by the plaintiff. The requirements are mandatory. The matter of divorce not only affects the parties immediately concerned, but the (110) whole fabric of our social life; and the Courts, before they will act, must see that a fit case is before them to be heard, and that can not be seen under our statute unless all the matters required by sec. 1287 of The Code are set out in the affidavit accompanying the complaint, as well as that the complaint should set out a good cause of action. The policy of the law in requiring the averment in the affidavit that the knowledge of the facts which are alleged as the grounds for divorce have existed six months prior to the filing of the complaint, appears

in the quotation which we have made from the opinion of the Court in *Dickinson v. Dickinson, supra.*

The motion was properly made in this Court, although made for the first time. *Ladd v. Ladd,* 121 N. C., 118.

The action is dismissed.

Cited: *Martin v. Martin,* 130 N. C., 28; *Moore v. Moore, Ib.,* 338; *Hopkins v. Hopkins,* 132 N. C., 23; *Clark v. Clark,* 133 N. C., 30; *Williams v. Smith,* 134 N. C., 252.

HODGIN v. BANK.

(Filed 9 April, 1901.)

1. PARTNERSHIP—*Right of Surviving Partner—Receiver.*

It is the duty of a surviving party to close up the affairs of the firm.

2. PARTNERSHIP—*Payment of Debts.*

A surviving partner is not compelled to pay the debts *pro rata* or in any prescribed order.

ACTION by the Peoples National Bank against G. D. Hodgin, heard by Judge *E. W. Timberlake* at November Term, 1900, of FORSYTH. From an order refusing to appoint a receiver, the defendant appealed.

Holton & Alexander, and *Shepherd & Shepherd,* for (111) the plaintiff.

Glenn & Manly, and *Watson, Buxton & Watson,* for the defendant.

MONTGOMERY, J. At the September Term, 1899, of this Court, upon a rehearing of this case granted at the instance of the plaintiff against whom judgment had been rendered in the Court below, it was held that the amount of money, $3,037.77, which had been deposited by the plaintiff as surviving partner of Hodgin Bros. & Lunn, with the defendant bank, was a special fund belonging to the plaintiff to be disbursed by him in the payment of partnership debts, and that the defendant could not apply the deposit to the payment of a debt due to the bank by the partnership. The case was remanded to the Superior Court for a new trial, and at the November Term,

1900, of that Court the defendant moved for a receiver, and for an order of reference to have the account of George D. Hodgin, surviving partner, stated. The motion was refused and the defendant excepted and appealed.

We find no error in the rulings of his Honor. It is the right as well as the duty of a surviving partner to close up the affairs of the firm. He has the right, therefore, to receive and to collect the debts and assets of the partnership, and apply the same toward the payment of the debts and liabilities of the firm. Story on Partnership, sec. 344; *Weisel v. Cobb,* 114 N. C., 22; *Hodgin v. Bank,* 124 N. C., 540. In case of danger of misapplication by the surviving partner of partnership funds, the Courts would certainly, in behalf of the representatives of a deceased partner, interfere and restrain by injunction the surviving partner from such acts, or grant other proper relief; and we see no reason why they should not interfere in behalf of a creditor in such a case.

But we see no reason in the case before us for such action on the part of the Court below, if it could be had in this action. There is no charge made against the personal (112) character or business capacity of the plaintiff, and the only allegation upon which the relief was sought was that the plaintiff had already preferred debts due to his own relatives, who were creditors of the partnership, by paying them more on their debts than he had paid to other creditors, and that he was insolvent. But at that time such a preference he had a right to make. As surviving partner, he was not compelled to pay the debts of the partnership *pro rata,* or in any prescribed order. *Hodgin v. Bank,* 124 N. C., 540. It is true that he held the funds in trust for the payment of the partnership debts, but he had the same discretion as to preference in the payment of those debts as the firm would have had before the dissolution by the death of one of the partners. He was not bound by any rule prescribed by statute, as are executors and administrators, in this respect. His Honor required a bond of the plaintiff—proper under all the circumstances of this case—but that was more for the security of the future management of the fund and its distribution according to law than for indemnification for past transactions, as we suppose.

A judgment was rendered for the amount of the deposit with interest and cost for the plaintiff, and we see no error therein.

Affirmed.

Cited: *Bank v. Hodgin,* 129 N. C., 248.

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WILKIE v. RAILROAD.

(Filed 9 April, 1901.)

1. DAMAGES—*Mental Anguish—Instructions—Loss of Mental Power.*

Where damages are sought to be recovered for mental anguish or loss of mental power, there must be evidence of such suffering introduced on the trial.

2. DAMAGES—*Speculative—Evidence—Personal Injuries.*

In an action for personal injuries, evidence as to how much a person might have gained by trading is speculative, and incompetent to show earning capacity.

ACTION by C. D. Wilkie against the Raleigh and Cape Fear Railroad Company. Petition to rehear. Petition allowed. For prior report, see 127 N. C., 203.

Douglass & Simms, for the petitioner.
Womack & Hayes, for the defendant.

MONTGOMERY, J. This case is now being considered on a petition to rehear, granted on the application of the defendant, appellant. The original hearing was at the September Term, 1900, and the case is reported in 127 N. C., 203. It appears now to the Court that we overlooked the exceptions of the defendant to the last two paragraphs of his Honor's charge. They are in the following words, the one: "These (damages) are understood to embrace indemnity for loss of time or loss from inability to perform ordinary labor or loss of capacity to earn money, and for actual sufferings of body and mind," and the other: "Plaintiff is to have a reasonable satisfaction (if he is entitled to recover) for loss of both bodily and mental powers and for actual suffering, both body and mind, which are the immediate and necessary consequences of the injury."

We are of the opinion that in cases where damages are sought to be recovered for mental anguish—sufferings of the
(114) mind—there must be evidence of such suffering introduced on the trial. The authorities in the several States are in conflict on this subject, but we will adhere to the rules laid down in *Smith v. R. R.*, 126 N. C., 712. There, we said that an instruction of his Honor that the plaintiff could recover for mental anguish endured by him was erroneous in the absence of evidence of mental anguish.

Neither in this case was there evidence of loss of mental powers, and his Honor was in error in submitting that ques-

tion to the jury in the absence of evidence. The plaintiff did, it is true, testify that he had a fainting or unconscious spell at the time of the accident, but there was no evidence of permanent impairment of the plaintiff's mental capacity.

As to the evidence in respect to the earning capacity of the plaintiff in reference to his furnishing the hands under his charge with rations, and the instructions of his Honor on that evidence, we think the new trial ought also to be extended.

There was error in the trial below in the respects pointed out in this opinion, *i. e.*, as to the measure of damages, and there must be a new trial on the matters embraced in the third issue —"What damages, if any, is the plaintiff entitled to recover?"

Petition allowed. Partial new trial.

Cited: *Bryan v. R. R.*, 134 N. C., 539; *Rushing v. R. R.*, 149 N. C., 163.

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(115)

LIPE v. HOUCK.

(Filed 9 April, 1901.)

1. CONTRACT—*Breach—In Loco Parentis.*

Evidence in this case held sufficient to establish a contract between a grandfather and grandson to pay for services to be performed by grandson.

2. ACTION—*Contract.*

The cause of action in this case arose on death of decedent for breach of contract whereby plaintiff was to have a part of property of decedent, notwithstanding he was not to have the property until the death of the widow of decedent.

ACTION by J. A. Lipe against W. A. Houck and J. S. Lipe, Adm'rs of W. A. Lipe, heard by Judge *H. R. Bryan* and a jury, at November Term, 1900, of ROWAN. From a judgment for defendants, the plaintiff appealed.

R. Lee Wright and *B. B. Miller*, for the plaintiff.
Overman & Gregory, for the defendant.

COOK, J. The question presented for our decision is, "Whether the evidence established a contract, express or implied, between the plaintiff and defendants' intestate."

The construction, which is a question of law, is not involved. It is the existence of a contract and its terms, which is a ques-

tion of fact to be found by a jury. As to this, we think his Honor erred in not submitting the issue to the jury.

In ascertaining whether there was a contract, the relations of the parties must be taken into consideration in connection with their transaction and dealing. The plaintiff was recognized by the intestate as his grandson, and so treated. He received the support and care from his grandfather dur-
(116) ing his minority, and in return rendered valuable and efficient service. There was no legal obligation resting upon him to remain with and submit to the control of his grandfather, who was not his natural guardian, nor was the grandfather under such obligations to him as are imposed upon the father or natural guardian.

These conditions were recognized by them, as is shown by the conduct of the intestate as testified to by the plaintiff. It was *when* he became *twenty-one* years old, that the intestate called the plaintiff to him and had an understanding with him as to their *future* relations. There was no *continuation* of parental control or filial service *after* the plaintiff arrived at his majority, but promptly an agreement and understanding was had between them.

It appears that the intestate was moved to this understanding by his own necessities and for his own benefit. He realized and appreciated the valuable and efficient services of the plaintiff—"Jim was worth as much as any two hands he had" —recognizing and speaking of him as "a hand;" "if it was not for Jim, he could not get anything done;" "plaintiff was a good hand and treated intestate alright. Intestate esteemed him just as much as his own son."

Under these conditions (intestate growing old) the agreement was made, as appears from testimony of plaintiff: "When I became twenty-one years old W. A. Lipe, who was my grandfather, called me and asked me if I was going to stay with them. I said 'yes, sir.' He then said 'if you will stay and be a good boy, I will give your mother's part of the land and property,' and then he asked me if that was not as good as anybody could do. I said 'yes, sir.' He then said I was to get it after his death and after his wife's death; he
(117) said he would give me my patches on which I could raise wheat and cotton."

Taking this, in connection with the testimony of intestate's widow as follows: "Mrs. Catharine Lipe, and the widow of the intestate. I helped to raise plaintiff. My children are dead. Plaintiff has been living with me and his grandfather all his life. We raised him. He worked for his grandfather.

Jim had principal management. Lipe told him what to do. He said he would give the use of the land for a gift. I know when plaintiff became twenty-one years old. It was about seven years ago. An agreement was entered into between intestate and plaintiff. Mr. Lipe asked him if he was going to stay with us all his life. Plaintiff said 'yes.' Then Lipe said you can have your mother's part. My sister, Albertine Freeze, was present. Plaintiff was a good hand and treated intestate alright. Intestate esteemed him just as much as his own son. His services were worth $200 per annum," and the fact that plaintiff *did* remain with intestate and work and serve him as before, what conclusion could be reached other than that he was complying with his part of their understanding? He was of age; capable of contracting; the understanding was based upon a valuable consideration (*do ut facias*) and the intestate accepted the service and received the benefits. From the evidence it appears that the intestate intended to perform his part of the agreement or understanding, from declarations made to several parties: "If Jim stays he should have half of everything there, and he wanted a good man to testify to it;" "Jim might get shingles and finish this porch—it would be his anyhow;" "he would like to have Jim in the yard, and if he did as he had been doing he expected to give him a good home and part of his property." But his death came suddenly and unexpectedly—killed accidentally. No provision by will or otherwise appears to have been made for the per- (118) formance of his promise.

The facts in this case are unlike those in *Williams v. Barnes,* 14 N. C., 348, cited by counsel for defendants, where RUFFIN, J., says. "I think such claims, without probable evidence of a contract, ought to be frowned on by courts and juries," and in other similar cases, wherein the child (or grandchild) upon arrival at full age continues to reside with and serve the parent, without any agreement as to the change of relations theretofore existing—notably *Hudson v. Lutz,* 50 N. C., 217; *Callahan v. Wood,* 118 N. C., 752, and cases there cited.

In this case, the grandfather, not being the natural guardian, and only assuming the act *in loco parentis,* recognized the fact that the grandson had become of full age, and that his merit would be appreciated and services wanted by others who would compensate him for the same; otherwise, why should he ask, "if that was not as good as anybody could do?" The compensation thus offered was such share of his estate as his mother would have taken according to the law of descent and

distributions in case of his dying intestate and she surviving him. But the mother was dead, and his promise to make this provision was not complied with, and under the peculiar circumstances of this case he could not take her share. Wherefore, he bring this action to recover upon a breach of the contract, having no other remedy.

It would be unjust for the estate to retain the products of his labor and services for seven years unless they were rendered gratuitously, which does not appear to have been the fact.

Nor is there force in the contention that the action could not be maintained until after the widow's death. This is not an action for specific performance, but upon a breach of contract—the action for which accrued upon the death of the intestate. For, thereafter, a compliance with their understanding was impossible.

His Honor erred in holding that the plaintiff could not recover upon the evidence presented, and there will have to be a new trial.

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WOOTEN v. RAILROAD.

(Filed 9 April, 1901.)

1. CORPORATIONS—*Transfer of Stock—Liability For.*

   Where a transfer of stock of a corporation is made on its books by an executor, the corporation is fixed with knowledge of the will and its contents.

2. CORPORATIONS—*Wrongful Transfer of Stock by Executor.*

   Where an executor wrongfully transfers specifically bequeathed stock to a purchaser, the corporation would not be liable in the absence of reasonable grounds to believe such transfer was not proper.

3. CORPORATIONS—*Wrongful Transfer of Stock by Executor—Negligence—Proximate Cause.*

   The wrongful transfer by executors of stock in a corporation, making possible subsequent transfers, is the proximate cause of the loss of such stock through such subsequent transfers.

4. LIMITATIONS OF ACTIONS—*Remainders—Stock.*

   The statute of limitations does not run against one holding a remainder in stock, in an action for the wrongful transfer of the same, until the death of the person holding life interest.

ACTION by Edward Wooten and wife, Eliza Wooten, R. B. Jewett, W. L. Jewett, Stephen Jewett, Henry B. Jewett and

R. D. Jewett against the Wilmington and Weldon Railroad Company, heard by Judge *George H. Brown,* at January Term, 1900, of NEW HANOVER. From a judgment for plaintiffs, the defendant appealed.

(120)

John D. Bellamy, for the plaintiffs.
Junius Davis and *Rountree & Carr,* for the defendants.

MONTGOMERY, J. This case was heard in the Court below upon an agreed state of facts—those material to the decision of the case being as follows: Eliza Claudia Bradley died in 1854, leaving a last will and testament in which she bequeathed to her son, Charles W. Bradley, 20 shares of capital stock of the Wilmington and Raleigh Railroad Company (now the Wilmington and Weldon Railroad Co.), registered in her own name on the stock ledger of the company, to be held by him in trust for the sole and separate benefit of the testatrix's daughter, Lucy D. Jewett, during her life, and upon her death to the use and benefit of such children as she might leave surviving her. On 1 December following, Charles W. Bradley and James A. Bradley, the duly qualified executors named in the will, transferred the 20 shares of stock on the books of the company "to Charles W. Bradley, trustee for Lucy A. Jewett," and a new certificate of stock was issued by the company in those words. In July, 1869, Charles W. Bradley, trustee, transferred the stock to Lucy A. Jewett absolutely—the word "trustee" appearing on the company's transfer ledger after Bradley's name, and a new certificate of stock was issued by the company to Mrs. Jewett individually. Afterwards, in the same year, 1869, after her husband's death, Mrs. Jewett sold and transferred the stock to other persons absolutely, and new certificates of stock were issued to the purchasers, but the stock can not now be identified, nor its ownership traced. The stock was not sold by the executors to pay the debts of Mrs. Bradley—the financial condition of her estate not requiring a sale for that purpose. The defendant company had no knowledge of the condition of Mrs. Bradley's estate, and no (121) actual knowledge of the contents of her will. Mrs. Jewett died in 1898, and the plaintiffs are her children, except the plaintiff Edward Wooten, who intermarried with Eliza Yonge Jewett.

The action is brought to recover from the defendant the value of the stock and the increment by way of dividends which has accrued since the death of Mrs. Jewett.

The question for decision then is this: Does the transfer

of the stock of a corporation on the books of the company by an executor fix the corporation with knowledge of the contents of the will? If so, then the transfer of the stock by the executors of Mrs. Bradley to Mrs. Jewett was wrongful, because the trust created in the will in favor of the plaintiffs was not observed in the transfer, and the plaintiff would be entitled to recover the value of the stock and the accrued dividends since the death of Mrs. Jewett. It is incumbent on a corporation to protect the rights of persons interested in the stock of the corporation against unauthorized transfer of the stock. *Cox v. Bank,* 119 N. C., 302; *Lowery v. Bank,* 15 Fed. Cases, 1040. The contention of the plaintiffs is that when the exectuors of Mrs. Bradley transferred on the books of the company the stock of Charles W. Bradley as trustee for Mrs. Jewett, the company was fixed with knowledge of the *contents* of the will, and that in the transfer the trust in favor of the children of Mrs. Jewett, the plaintiffs, should have been preserved, under the provisions of the will; that the defendant should have seen that the transfer should have been made to Charles W. Bradley, in trust, or as trustee for Mrs. Jewett for her life, and at her death to her children who might survive her. The plaintiffs further contend that the defendant also committed a wrongful and unlawful act in permitting on its books the transfer of the stock by Charles W. Bradley, trustee of Mrs. Jewett to his *cestui que trust* absolutely, and the transfer by Mrs. Jewett to others.

The defendants insist that, as the stock on the books stood in the name of Mrs. Bradley, the only thing necessary
(122) for it to take notice of when an entry of transfer of the stock should be requested to be made on the books, was the exhibition to it of the *letters testamentary* from the proper court by the executors, the transfer to follow as a matter of course according to the directions of the executors; that the executors, so far as defendant's liability is concerned, could have *sold* and transferred not only the stock, notwithstanding it was specifically bequeathed, but that they could have done so even in fraud, provided the company had no reasonable ground to believe that they were acting fraudulently or disposing of the money for their own benefit in the transaction, and that they could have negligently or fraudulently failed to execute the trust imposed by the will upon them in reference to this stock and its transfer, provided the defendant did not have actual knowledge or information which might reasonably put them on their guard concerning the fraud or negligence, at or before the time of the transfer, and on the ground that in law the

personal property of a testator is vested in the executor with the right to sell or dispose of it, and that the company was not compelled to take notice of the contents of the will.

The plaintiffs rely principally for authority on the case of *Lowery v. Bank,* decided in the Circuit Court, District of Maryland, at its April Term, 1848, Chief Justice Taney delivering the opinion. In that case the future dividends on a number of shares of stock in the Commercial and Farmers Bank of Baltimore were bequeathed in trust for the complainant during her life and at her death to her daughter Mary, during her life, the executors to receive and pay the same over. The stock and the other property of the testator were bequeathed to the executors in trust for a number of persons named in the will, subject to the disposition of the stock to the complainant and her daughter. Samuel Jones, one of the executors, transferred, as acting executor, this stock to the Merchants Bank as a security for money lent to the executor who was trading under the firm name of Talbot Jones & Co., by the Merchants Bank; and in default of payment for the debt due to the bank the stock was transferred by a broker and by him sold (123) to pay the debt. Upon these facts the Court said: "The question then is, had the bank (Commercial and Farmer's Bank) at the time of the transfer actual or constructive notice that the executor was abusing his trust and applying his stock to his own use? The bank by its answer denies that it knew anything of the contents of Talbot Jones' will or of the bequest to the complainant, and there is no proof of actual notice; but it did know that this stock was the property of Talbot Jones at the time of his death, for it so stood upon its own books; and as the transfer was made by Samuel Jones as his executor, the bank must of course have known that Talbot Jones left a will. Although it may not have had actual notice of the contents of the will, yet, as it was dealing with an executor in his character as such, the law implies notice. This is the doctrine in the English Court of Chancery. 4 Madd., 190." And it was further said by the Court that the rule stood upon still firmer ground in Maryland, for every person in that State had constructive notice of a properly registered deed for real or personal property, while in England the weight of authority was perhaps to the contrary, and that "now in Maryland every will of real or personal property is required to be recorded; and if third persons are bound at their peril to take notice of a registered deed when there is nothing to lead them to inquiry, the obligation must be still stronger upon one who is dealing with an executor concerning the assets of the deceased, for his char-

acter of executor of itself gives actual notice that there is a will open to inspection upon the public records. The bank was therefore bound to take notice of the will when this transfer was proposed to be made by one of the executors, and is chargeable to the same extent as if it had actually read it. It was negligence in the bank not to examine it, and if it
(124) was ignorant of the contents of the will and of the specific bequest of this stock, it was its own fault. It must be dealt with in this case as if it had possessed actual knowledge that the stock in question was specifically bequeathed by the testator and was not, by the will, to be transferred or in any manner disposed of by the executors during the lifetime of the complainant, and that it was the duty of the bank during that time to pay the dividends to them in trust for the complainant."

The plaintiffs also cited as supporting the case of *Lowery v. Bank, supra,* that of *Caulkins v. Gas Light Co.,* 85 Tenn., 683, and *Stewart v. Ins. Co.,* 53 Md., 564. In *Caulkins v. Gas Light Co.,* it was held that knowledge of the *contents* of a will on the part of a corporation is presumed by law from its knowledge of the fact there is a will, upon the terms of which the title to its stock is made to depend. In *Stewart v. Ins. Co., supra,* the Court said: "The fact that Simms and Tyson in making these transfers professed to act as *executors* of Johnson, the deceased stockholder, gave the company or its officers, to whom superintendence of transfers of its stock was committed, actual notice that Johnson left a will which was open to inspection upon the public records, and made the company chargeable to the same extent as if such officers had actually read it and thereby made themselves acquainted with its contents."

In support of its position, the defendant's counsel referred the Court to the cases in our own reports of *Tyrrell v. Morris,* 21 N. C., 559, *Gray v. Armistead,* 41 N. C., 75; *Bradshaw v. Simpson, Ibid.,* 246; *London v. R. R.,* 88 N. C., 384;
(125) *Wilson v. Doster,* 42 N. C., 231; to the Bank of England cases on the same subject, to *Hutchins v. Bank,* 12 Metc., 421, especially among other decisions of other States; to Thompson's Commentaries on the Law of Corporations, Schouler Executors and Administrators; Cook on Corporations and Lowell's Transfer of Stock. We will now examine these citations of the defendant.

We think the cases referred to in our own reports have no application directly to the question to be decided. They are upon a point about which there is no controversy, to-wit, that executors and administrators having the right of property in

the personal property of the decedent have therefore the right to sell securities of the estate, and the mere fact of selling is no branch of trust, and a *purchaser* is not liable without actual notice that the administrator intended to misapply the funds or to use them for his own purpose; for the purposes of the estate may require the representative to dispose of it. In 1 Cook Corporations, sec. 330, there is a treatise concerning the *sale* of stock by executors and administrators and the rights and duties of corporations in allowing and refusing to allow a registry on the corporate transfer book of the sale of the stock by an executor or administrator, and the concluding part of the section is read: "In general, a corporation has a right to assume that the executor is transferring stock for the purposes of the estate. It is not obliged to inquire into the purposes of the party, nor to investigate whether the transaction is in good faith or fraudulent, nor to examine the will." That seems to sustain the defendant, although the matter treated of is the *sale* of stock, and not the registration of the transfer of stock to a *legatee* and its effect upon the corporation without taking notice of the contents of the will. But the only case cited under that section (*Smith v. R. R.*, 91 Tenn. 221) is diametrically opposed to the doctrine of the text. In that case, the owner of the stock died testate, but without (126) having named an executor. An administrator *cum testamento annexo* was appointed, and he delivered a part of the stock to a legatee named in the will absolutely, although she had only a life estate therein, and had the same transferred to the legatee on the books of the corporation. He made the transfer as administrator *simply* without the words *"cum testamento annexo."* The Court said there, "We are of the opinion that upon the facts of this case the corporation is not now liable to an action on this ground. It had no knowledge that there was a will limiting the title of Fannie Baugh to this stock, and there were no circumstances connected with the transfer by Mr. Howe, as administrator, calculated to put it upon inquiry as to the existence or terms of a will. He assigned the certificate standing in the name of his decedent simply as administrator. If he had assigned as administrator *cum testamento annexo* it would have been notice of a will. The assignment was to the "heirs and distributees," not *legatees* of J. W. Baugh. In this respect, the case is to be distinguished from *Covington v. Anderson,* 16 Lea, 310, and *Caulkins v. Gas Co.,* 85 Tenn., 685."

Section 2531 of Thompson's Commentaries on the Law of Corporations contains the broad statement that the "letters

testamentary show an apparent right to dispose of the stock of the testator, even though bequeathed specifically; and, on principle, the company is bound to respect his title and transfer them according to his desire." And *Bayard v. Bank,* 52 Pa. St., 232, and *Hutchins v. Bank,* 12 Metcalf, 421, support the text.

The matter embraced in sec. 351 Schouler Executors and Administrators is to the same effect, with a reference to *Bayard v. Bank, supra.*

But in addition to the authorities cited by defendant's counsel, they say that *Lowery v. Bank, supra,* when prop-
(127) erly understood, is authority for the defendant, and Mr. Rountree in his brief quotes an extract from the opinion in that case, to-wit: "Undoubtedly the mere act of permitting this stock to be transferred by one of the executors furnishes no ground for complaint against the bank, although it turns out that this executor was by the act of transfer converting the property to his own use, for an executor may sell or raise money on the property of the deceased in the regular execution of his duty; and the party dealing with him is not bound to inquire into his object, nor liable for his misapplication of the money. Such is the doctrine of the English courts, and would seem to have been the law of this State prior to the act of Assembly of December Session, 1843, chapter 304; and the transaction now before us took place before that act went into operation. But it is equally clear that if a party dealing with an executor has at the time reasonable ground for believing that he intends to misapply the money, or is in the very transaction applying it to his private use, the party so dealing is responsible to the persons injured."

But in that part of the opinion last quoted the Chief Justice was considering the matter of a *sale* of the stock by the executor without intending to weaken the force or to affect the correctness of the other doctrine decided in the case, and which we have been discussing, that is, that knowledge by a corporation that there is an executor is knowledge that there is a will, and also constructive knowledge that the contents of the will are known to the corporation.

After mature consideration of all the cases cited and the text in the law books to which our attention has been called, our opinion is:

First. That where a transfer of stock of a corporation is made on its books by an executor, the corporation is fixed with a knowledge that there is a will, and is chargeable with

a knowledge of its contents to the same extent as if the (128) officers had actually read it.

Second. That, notwithstanding such knowledge of the contents of the will, the executor may, even with intent to convert to his own use the money, sell and transfer such stock to a purchaser under the corporation's supervision, and that even though the stock be specifically bequeathed in the will, without liability on the part of the corporation unless it has at the time of the transfer reasonable ground to believe that the executor intends to misapply the money, or is in the very transaction applying it to his own private use.

We have arrived at the conclusion, however, that, as the corporation is fixed with the knowledge of the contents of the will when the executors transfer stock on its books, the provisions of the will in reference to the stock must be carried out in the transfer at the peril of the company in cases where the transferee is a *legatee* named in the will, that is, the corporation must, at the time of the transfer, ascertain whether the transfer is to a *purchaser* from the executor in the usual course of administration and the regular execution of his duty as executor, or to a *legatee* named in the will.

The defendant, for another defense, takes the position that before a recovery can be had the negligence of the defendant must not only be established, but that it must be shown that the transfer by the executor to Charles W. Bradley, trustee for Lucy B. Jewett, individually, was the proximate cause of the loss to the plaintiffs. Mr. Davis, in his brief, says: "But assuming, for the sake of the argument, that the defendant was negligent in this respect, yet it is clear that this was not the proximate cause of the loss to the plaintiffs. The title was in their trustee, and under the law he held it as well for them as for Lucy A. Jewett. No loss was occasioned to them by this transfer, and no injury or damage sprung from it; and, but for another and subsequent intervening cause, to-wit, the act of the trustee, Charles W. Bradley, in 1869, (129) in transferring the stock to Lucy A. Jewett, none would have occurred."

But the legal title to the stock was not in any trustee of the plaintiffs; it was in Charles W. Bradley, the trustee of Mrs. Jewett, individually. The first transfer, however, was the effective cause of the loss, and the other transfers were steps made possible by the first one which led to the loss even of the identity of the stock or its ownership.

The first transfer was wrongful in that it was the duty of the defendant to have protected the rights of the plaintiffs,

and the plaintiffs had the right at the death of their mother to call for a return of the stock or its value. *St. Romes v. Cotton Press Co.*, 127 U. S., 614.

The defendant further sets up the statute of limitations against the demand of the plaintiffs. We are not deciding that the plaintiffs had no right to interfere in the transfer of the stock to have it restored to its proper ownership at any time after the wrongful transfer, but they were not compelled to take action for the recovery of the stock or its value until after the death of their mother, which occurred in 1898. This action was commenced in 1899, and is not therefore barred by the statute of limitations.

His Honor rendered judgment upon the facts agreed that the defendant company was liable to the plaintiffs for the value of stock at the date of the death of Mrs. Jewett, and by consent that the matter be referred to a referee "to hear evidence and take testimony and determine the value of said stock and all other issues of law and fact raised by the pleadings not herein set out and adjudicated, and to determine what sum, if any, the plaintiffs are entitled to recover." There was no error in the judgment of the Court and the same is affirmed.

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WEEKS v. MCPHAIL.

(Filed 16 April, 1901.)

1. JUDGMENT—*Decree—Estoppel—Res Judicata—Ejectment.*

   A decree not appealed from is an estoppel upon the parties thereto and those claiming under them, though it may be erroneous in law.

2. EVIDENCE—*Documentary Evidence—Admissibility—Trial.*

   A certified copy of a petition in a suit is admissible in evidence upon proof of the loss of the original record.

3. JUDGMENT—*Collateral Attack.*

   A decree can not be impeached collaterally on the ground that one recited therein as a party was not a party, or was an infant.

4. EVIDENCE—*Documentary Evidence—Affidavit—Trial.*

   A person can not put an affidavit in proof as substantive evidence on cross-examination of witness for other party.

DEFENDANT'S APPEAL.

ACTION by Sampson Weeks against Isaiah McPhail, Bertha Herring and husband, Rufus Herring, Ada R. Weeks and hus-

band, I. C. Weeks, J. F. Wilkins, George Daughtry and Daniel Lockamy, heard by Judge *George H. Brown* and a jury, at May Term, 1900, of SAMPSON. From a judgment for plaintiffs the defendants appealed.

F. R. Cooper, for the plaintiffs.

J. L. Stewart, H. E. Faison and *J. D. Kerr,* for the defendants.

CLARK, J. Richard Warren, by his will executed in 1850, devised, among other property, the 70 acres herein sued for, to Hester Weeks and her children. The plaintiff is (131) one of said children and holds a deed executed in 1899 from the other children of Hester Weeks. The defendant McPhail claims under a deed to him from Hester Weeks in 1859, under which he has been ever since, and is now, in possession. Hester Weeks died 10 July, 1896, and this action was brought 20 June, 1899. The common source of title was the will of Richard Warren.

The plaintiff offered in evidence from the minutes of the Superior Court of Cumberland, November Term, 1854, the following decree, "John Raynor and wife against Hester Weeks and others. This cause coming on to be heard upon petition and answer and having been debated by counsel, it is declared by the Court that Richard Warren, by his last will and testament devised and bequeathed the lands, slaves and chattel property mentioned in the pleadings to the defendant Hester Weeks and her children, and the Court doth declare that by the proper construction of the said will, Hester Weeks took an estate for life with remainder to her children (of whom *feme* plaintiff is one) in fee. It is further declared that the plaintiffs are not tenants in common with the defendant and not entitled to partition," and the decree thereupon further dismisses the petition with costs.

The decree was not appealed from and is an estoppel upon the parties thereto and those claiming under them, though it may be erroneous in law (*Silliman v. Whitaker,* 119 N. C., 89) in the construction thus placed upon the terms of the devise.

The plaintiff further offered a certified copy of a petition in the Court of Common Pleas and Quarter Sessions of that county, which recites that it is filed by John Raynor and wife (the latter a child of Hester Weeks) and the other (132) children of Hester Weeks, naming them, and Hester Weeks, setting out the 2d clause of the will of Richard Warren

devising the realty and other property therein named to Hester Weeks and her children, that the executor has put Hester Weeks in sole possession, and averring that she is merely a tenant in common and asking for a decree of partition. The petition, which is in regular form, is signed by C. G. Wright and Dobbin & Shepherd, Solicitors. At the bottom of this document is written the following, "A true copy from the petition now filed in office, 16 December, 1852. J. R. Beaman, Clerk."

Witness Faircloth, attorney, testified: "Have searched in Clerk's office fully for original papers in above cause. Others helped me. Searched diligently. Examined nearly all the papers in the office. Failed to find the originals." Two other witnesses, including Deputy Clerk, testified the same as Faircloth.

W. K. Pigford, Clerk Superior Court, testified that J. R. Beaman was his father-in-law. That he knew his handwriting and that the aforesaid copy of the petition was all in his (Beaman's) handwriting, and that the signature was his. Another witness testified that he resided there in 1852, and at that time J. R. Beaman was Clerk of the County Court, as it was commonly called. The Court thereupon permitted said certified copy of the petition to be read in evidence along with the judgment decree above set out, which was rendered apparently in the same cause at November Term, 1854, of the Superior Court, and defendant excepted. In this we see no error. The judgment decree was read from the original minutes of the Superior Court, and it would seem reasonable that the aforesaid copy of the petition which had been filed in the Court of Pleas and Quarter Sessions and certified by the Clerk of that Court, was part of the transcript sent up to the Superior Court when the case was taken to that Court. But however that may
(133) be, it was made by the proper officer, duly certified, and it was shown that the original could not be found.

In *Aiken v. Lyon,* 127 N. C., 171, it was held that a copy from the transcript, which had been filed on appeal in this Court, was competent upon proof of loss of the original records in the Superior Court. Here, the Court on the same proof of loss allowed a certified copy of the pleadings in the Court from which the cause had been carried to the Superior Court, and which indeed in all probability was the very transcript which had been sent to that Court.

It was also objected, on the argument here, that it did not appear that the cause had been regularly taken by appeal to the Superior Court. But the judgment of the Superior Court,

upon the original minutes of that Court, recites the same parties, and that it is a construction of the will of Richard Warren as to the property devised to Hester Weeks, *i. e.*, the same parties and the same subject matter. The said will was in proof from the Book of Wills.

This judgment is not attacked directly, and it can not be impeached collaterally on the ground that one recited in the pleadings and judgment, as a party, was not in fact made a party. *Doyle v. Brown,* 72 N. C., 373. "The fact that the party complaining was at the rendition of the judgment a lunatic or an infant, constitutes no exception to this rule." *Brittain v. Mull,* 99 N. C., 483; *Syme v. Trice,* 96 N. C., 243; *Morrill v. Morrill,* 11 L. R. A., 154, and cases cited; *Williams v. Haynes,* 77 Texas, 283. There is a presumption of the regularity of the judgment.

The plaintiff under cross-examination was shown a paper purporting to be the affidavit of Hester Weeks, and in reply to question by defendant's counsel stated that this affidavit was signed and sworn to by his mother, and that he had offered or introduced the same in evidence upon trial of another case between himself and his brothers and sisters upon the issues as to the ages of his brothers and sisters. The defendant then, before plaintiff had closed, offered the said affi- (134) davit in evidence. The plaintiff objected, objection sustained, and defendant excepted. The defendants could not thus put a paper in proof as substantive evidence for themselves on cross-examination of plaintiffs' witness. *Olive v. Olive,* 95 N. C., 485; *Andrews v. Jones,* 122 N. C., at page 667. Besides, as his Honor ruled, it was incompetent for the reason above given that the decree could not be attacked collaterally upon the ground (if it could be shown by the affidavit) that some of the parties were infants at the date of the decree.

No error.

Cited: *S. c.,* 129 N. C., 73; *S. c.,* 134 N. C., 525; *Rutherford v. Ray,* 147 N. C., 261.

WEEKS v. MCPHAIL.

(Filed 9 April, 1901.)

1. NONSUIT—*Dismissal—Appeal.*

A plaintiff may at any time before verdict, in deference to an intimation of the Court, submit to a nonsuit, either as to the whole or a part of the defendants, or as to one or more causes of action, and appeal.

2. ACTIONS—*Joinder.*

It is not a misjoinder to unite in the same action a demand for two tracts of land if contiguous and forming part of one larger body.

3. DEMURRER—*Action—Misjoinder—Pleading—Exceptions and Objections.*

Objection to misjoinder of action must be taken by demurrer.

4. ACTIONS—*Misjoinder—Division.*

Where there is a misjoinder of causes of action, the court may allow the action to be divided.

PLAINTIFF'S APPEAL.

ACTION by S. M. Weeks against Isaiah McPhail, Bertha Herring and her husband, Rufus Herring, Ada R. Weeks (135) and her husband, J. C. Weeks, J. T. Wilkins, George Daughtry and Daniel Lockamy, heard by Judge *George H. Brown* and a jury, at April Term, 1900, of SAMPSON. From a judgment for less than relief demanded, the plaintiff and defendant appealed.

F. R. Cooper, for the plaintiff.

J. L. Stewart, H. E. Faison and *J. D. Kerr,* for the defendants.

CLARK, J. This is an action for the recovery of real estate. The complaint alleges that the plaintiff is the owner and entitled to the immediate possession of two tracts of land, first, a tract of 70 acres, describing it by metes and bounds; second, another tract of 208 acres, describing it also by metes and bounds. The complaint further alleges that the several defendants named are "in the wrongful possession of said two tracts of land and unlawfully withhold possession of the same," etc. The defendants, McPhail, Herring and Weeks, admit possession of the 70-acre tract, deny plaintiff's title thereto, and deny any possession by them of the 208-acre tract. The defendant Lockamy admits possession of 26 acres of the 208-acre, or Brit-

ton Edwards tract; the defendant Daughtry of 130 acres of same tract, and Wilkins of 65 acres of same tract, but each of these denies plaintiff's title, and that he, himself, is in possession of any other part of the land sued for. Two issues were submitted to the jury, one as to the 70-acre tract, and the other as to the 208-acre tract.

The Court below correctly held that, as to the "Britton Edwards" (208 acres) tract, the plaintiff had failed to connect defendants with the deed to Britton Edwards and failed to show a common source of title; that plaintiff had failed to show title out of the State and to make out title to the land, and that upon the entire evidence offered the plain- (136) tiff was not entitled to recover as to that tract.

Upon announcement of this opinion and before the Court had so charged the jury, the plaintiff's counsel announced that the plaintiff took a nonsuit as to the defendants, Lockamy, Daughtry and Wilkins, who were severally in possession of separate pieces of the 208-acre tract. As to the 70-acre tract sued for in the same action, of which the other defendants were in possession and as to which there was a separate issue, the plaintiff recovered judgment.

The defendants, Lockamy, Daughtry and Wilkins, contended that while the plaintiff could enter a *nolle prosequi* as to individual defendants, he could not submit to judgment of nonsuit and appeal, except as to the action itself. The Court being of opinion with defendants offered to let plaintiff submit to a judgment of nonsuit in the action, which he declined. Thereupon the Court instructed the jury that upon the entire undisputed facts and evidence they should answer the issue as to the 208-acre tract "No."

Technically, where the plaintiff declines to proceed, as to the whole action, it is a nonsuit, and where he declines to proceed as to some of the defendants, or as to one cause of action, or as to a definite subject matter—as in this case, one of two tracts sued for—the entry should be a *nolle prosequi. Grant v. Burgwyn,* 84 N. C., 560; *Hill v. Overton,* 81 N. C., 393.

But the difference is purely technical. The substantial distinction between *non pros, nol pros,* nonsuits voluntary and nonsuits involuntary, never very clear, has long since passed away. When a plaintiff at any time before verdict, in deference to an intimation of the Court, so desires, he can submit to a nonsuit either as to the whole or a part of the defendants, or as to one or more causes of action, and ap- (137) peal. *Wharton v. Currituck,* 82 N. C., at page 15, and cases there cited; *Hedrick v. Pratt,* 94 N. C., 103; *McKesson*

v. Mendenhall, 64 N. C., 502. In Rawles' Revision of Bouvier's Law Dictionary, 504, it is said: "A *nolle prosequi* is now held to be no bar to a future action for the same cause except in those cases where from the nature of the action judgment and execution against one are a satisfaction of all the damages sustained by the plaintiff. In civil actions, a *nolle prosequi* may be entered as to one of several counts, 7 Wend. 301, or to one of several defendants, 1 Pet. 80."

Though the intimation of his Honor that upon the evidence as it stood the issue as to the 208-acre tract should be answered "No," proves to be correct, the plaintiff had a right to take a nonsuit (or a *nol pros,* to be technically correct), as to such ruling, and have the same reviewed without as a penalty to be paid for such privilege losing the judgment he obtained as to the 70-acre tract.

Upon fuller proof, and in a new action, the plaintiff may correct, if he can, any inadvertence or omission of evidence on this trial as to the 208-acre tract. It would be a hardship and no benefit to anyone to require the plaintiff to take a nonsuit as to the 70-acre tract, as to which he recovered judgment, and as to which he could offer no exception on appeal, as a price for permission to take a nonsuit as to the 208-acre tract, as to which he desired to appeal. Had he taken such nonsuit as to the whole, the defendants in the 70-acre tract could not have appealed, and the plaintiff could not have urged any exception to the intimation in his favor as to that cause of action, which therefore he might possibly have lost on appeal. *Hedrick v. Pratt,* 94 N. C., 101.

It was not a misjoinder to unite the two tracts, if contiguous and forming part of one larger body, in the same action. *Bryan v. Spivey,* 106 N. C., 95. And if it were, that objection was waived by failing to demur. Clark's Code (3 (138) Ed.), sec. 239 (5) 267. Though the Court in its discretion could have notwithstanding divided the action. Code, sec. 272, 407; *Pretzfelder v. Insurance Co.,* 116 N. C., at page 496.

The verdict must be set aside as to the 208-acre tract, but there was no error in the intimation that upon the evidence the plaintiff could not recover as to that issue.

Modified and affirmed.

Cited: *Dunn v. Aid Society,* 151 N. C., 134.

BROWN v. MORISEY.

(Filed 16 April, 1901.)

DOWER—*Color of Title—Possession—Ejectment.*

Dower interest is not shown by a widow proving only a deed to her husband, without proving title in the grantor or possession for seven years under the deed.

ACTION by Dicey A. Brown against D. G. Morisey, heard by Judge *Frederick Moore* and a jury, at December Term, 1900, of DUPLIN. From a judgment for the defendant, the plaintiff appealed.

Stevens, Beasley & Weeks, for the plaintiff.
H. E. Faison, and *Allen & Dortch,* for the defendant.

FURCHES, C. J. This is an action for dower in the lands described in the complaint, the defendant being in possession claiming said land as his own and denying plaintiff's right to dower.

The plaintiff is the widow of George Brown, who, she alleges, was the owner of said land at the time of his death, which occurred during the late war between the States. (139) To establish her right to dower, it was necessary for her to establish title in her husband at the time of his death. This she undertook to do by showing a deed from one Absalom Best to her husband, dated 4 September, 1854, and registered in 1855, and that she and her husband entered upon said land, under this deed, and lived upon the same for one year—when they left the land in 1855, and have never lived upon or occupied any part thereof since that time.

While on the other hand the defendant introduced in evidence a deed from the Sheriff of Duplin County, dated in 1855 and registered in 1856, under which he took possession in 1856, and has had continuous possession of said land ever since that time. The execution under which the Sheriff sold and defendant bought was against one Robert Best, and, it is alleged by the plaintiff, conveyed no title to the defendant. This may be so, still it was color of title which ripened into an absolute title in seven years, unless there was some disability or special reason to rebut the presumption.

But the plaintiff's right to recover does not depend upon the weakness of the defendant's title, but upon the strength of her own title, as it now clearly appears that the defendant does not

claim under George Brown, husband of plaintiff. To do this, as we have said, she must show title in her husband, and this she has not done. It does not appear that Absalom Best had any title to the land; and, this being so, his deed to George Brown, husband of plaintiff, was but color of title, which might have been ripened into title by a continuous occupation thereunder for seven years. But this was not done, as the grantee only occupied it for one year, and therefore never became the owner thereof; while the defendant's color was ripened into a title by his holding possession thereunder for more than seven years. The lapse of time does not aid color of title (140) without possession thereunder. Without possession, it is no better at the end of fifty years than it was when it was made. *Hunnycutt v. Brooks,* 116 N. C., 788.

This case has been here before, upon a judgment of nonsuit and was affirmed. (See 124 N. C., 292). But this opinion was reversed on petition to rehear (126 N. C., 772), and in delivering the last opinion the Court said the plaintiff was entitled to dower. This was an inadvertence, caused by not recurring to the status of the case on appeal; and the Court below was correct in not signing the judgment presented, giving the plaintiff dower.

Affirmed.

TERRY v. ROBBINS.

(Filed 16 April, 1901.)

1. CONTRACT—*Married Women—Common Law—Presumptions—Mortgages.*

   In the absence of proof to the contrary, the contract of a married woman made in New Jersey will be presumed to be void, as at common law.

2. NOVATION — *Contract — Payment — Intent— Questions for Jury— Mortgages.*

   Whether a bond given in payment of an installment upon a mortgage is a novation, is a question for the jury.

ACTION by Harvey Terry against T. H. Robbins and Adelia S. Robbins his wife, and Lillian F. Naylor, heard by Judge *A. L. Coble* and a jury, at March Term, 1900, of PASQUOTANK. From a judgment for the defendants, the plaintiff appealed.

Shepherd & Shepherd, and *Pruden & Pruden,* for the plaintiff.

Busbee & Busbee, for the defendants.

MONTGOMERY, J. This action was for the foreclosure of a mortgage upon real estate executed by defendants Thomas H. Robbins and his wife to the plaintiff on 15 (141) January, 1896, the plaintiff alleging that the first two payments of $2,000 each were past due and unpaid, and that according to the terms of the mortgage the whole debt was due.

The defendant averred in his answer, and introduced evidence on the trial to that effect, that the first note of $2,000 had been paid, and that it was provided in the mortgage that upon the payment of that installment the plaintiff should execute to the defendant Robbins a release of a certain part of the land described in the mortgage, and that the plaintiff had refused to release the land and that therefore the defendant had committed no breach of his contract in the nonpayment of the second installment.

The alleged payment of the first $2,000 installment was by the bond of the defendant Robbins, and his wife, the other defendant (she not having been a party to the original obligation), substituted for the first installment of $2,000 in full discharge and extinguishment thereof—the bond being delivered to the plaintiff and received by him in full satisfaction of the said installment. The bond was executed in New Jersey and was made payable in Keyport in the same State.

His Honor was requested by the plaintiff to instruct the jury that if they believed the evidence in the case they should answer the sixth issue "Has the defendant Robbins made default upon the mortgage set out in the complaint?" "Yes." The instruction was refused and the plaintiff excepted and appealed.

We think his Honor committed no error in refusing to give the instruction. As was contended by the plaintiff, that the addition of the wife's name to the new bond (142) gave it no additional weight or worth, because it was void, so far as she was concerned. There was no evidence going to show that the common law had been changed or repealed in the State of New Jersey, as to the power of married women to make contracts, and the presumption therefore is that the common law prevailed in New Jersey at the time of the execution of the bond, and by the common law all such contracts by a *feme covert* were void. *Gooch v. Faucett,* 122 N. C., 268; *Griffin v. Carter,* 40 N. C., 413.

But the bond of Robbins was valid and binding on him, and whether or not there was a novation by the substitution of the bond for the installment under the mortgage was a question for the jury under proper instructions from the Court. A prior

existing debt can be extinguished by the acceptance of a promissory note or bond, if it is so intended by the parties, the only question being as to the proof of such intention. Generally, unless it is otherwise specially agreed, if the holder of a promissory note takes a new note for the original debt, that is *prima facie* a conditional payment only, that is, the original debt will be extinguished upon the payment of the substituted note. But Judge Story in his work on Promissory Notes, section 404, says: "Promissory notes either of the maker himself or of a third person, are often received by the holder or the creditor in payment of the original note or debt due by the maker. And the question often arises when and under what circumstances the receipt of a substituted note will be deemed a due and absolute extinguishment or satisfaction of the original debt or note, or not. In general, by our law, the receipt of a promissory note of the maker or of a third person will be deemed a conditional satisfaction or extinguishment only of the original debt or note of the maker (that is, if the substituted note is regularly paid), unless otherwise agreed between the parties.

But if it is agreed between the parties, as it well may
(143) be, that the substituted note shall be an absolute payment of the original debt or note, then it will operate as an absolute satisfaction and extinguishment thereof. *Sherly v. Mandeville,* 6 Cranch 253, 264; 1 Jones Mortgages, sec. 926.

There were other exceptions made to the charge of his Honor, but they related to the question we have just discussed and need no further consideration. The defendants' objection to the evidence were properly overruled. The motion for a new trial because of evidence discovered since the trial of the case is refused.

No error.

Cited: *Hicks v. Kenan,* 139 N. C., 346; *Woods v. Tel. Co.,* 148 N. C., 7.

NEAL v. RAILROAD.

(Filed 16 April, 1901.)

RAILROADS—*Right of Way—Damages—Personal Injuries.*

A railroad, by permitting the use of its right of way for public travel, does not thereby become liable for an injury to a person caused by a defect in said right of way.

ACTION by Lizzie C. Neal against the Southern Railway Company, heard by Judge *Thos. J. Shaw,* at January (Special)

Term, 1900, of McDOWELL. From a judgment for the defendant, the plaintiff appealed.

E. J. Justice, Davidson & Jones, and *J. T. Perkins,* for the plaintiff.

George F. Bason, and *A. B. Andrews, Jr.,* for the defendant.

FURCHES, C. J. This is an action to recover damages for injuries caused by the alleged negligence of the defendant. The town of Marion was also made a party defendant and damages demanded of it for the same injury.

The plaintiff filed the following complaint: (144)

The plaintiff, complaining of the defendants, alleges:

1. That the plaintiff is a resident and citizen of the town of Marion, N. C., McDowell County, and was such at the time of the injury hereinafter complained of.

2. That the defendant, the Southern Railway Company, is a foreign corporation incorporated under the laws of the State of Virginia, doing business in the State of North Carolina as a common carrier, and owning a right of way of one hundred feet wide on either side of its railroad track in the town of Marion, N. C., at the point where the injury hereinafter occurred.

3. That the said defendant, the Southern Railway Company, has become a domestic corporation of the State of North Carolina by filing a copy of its charter and by-laws as provided by the Acts of the Legislature of North Carolina of 1899, as plaintiff is informed and believes.

4. That the corporation of Marion is incorporated under the laws of North Carolina, Acts 1889, as a municipal corporation with the usual powers and liabilities conferred upon and assumed by such municipal corporations, and the corporate name of Marion is "The Corporation of Marion."

5. That in the town of Marion, N. C., the defendant railway company permits and invites the public to use its right of way leading from the Main street in said town at a point in front of the store of J. S. Dysart, and just south of the bridge across the defendant's railroad track in a westerly direction parallel with the said track to a point in the depot yard of the defendant railway company, and then crossing the track to the depot of the said defendant in the town of Marion, N. C.; that by reason of said invitation thus held out to the public, all persons passing between the defendant railway company's depot and the southern part of the town of Marion, N. C., (145) have for a long number of years used the aforesaid portion of the defendant's right of way until the same has be-

come much worn as a passway, and the defendant railway company, recognizing the right of the public to travel along this portion of its right of way has placed a fence between said traveled portion of its right of way and a cut through which its track passes in the town of Marion, N. C., and the said fence, at the time of the injury hereinafter complained of, and for a long time prior thereto, and at the present time, was and is constructed from the corner of the said bridge parallel with the defendant railway company's track by the point where the injury hereinafter complained of is alleged to have occurred, to a point near the said defendant's depot yard.

6. That in addition to the use to which the defendant railway company had invited the public to subject said portion of its right of way as above alleged, it had permitted the defendant the corporation of Marion to adopt and use its said right of way as a public street and to hold the same out to the public as a street, and the said corporation of Marion, without formally condemning said land or accepting the same in a formal manner, has for ten years used the said portion of the defendant's right of way leading parallel with said defendant railway company's track and over the place where the injury hereinafter occurred, as a street, causing the same to be worked and allowing it to be used by the public generally, and inviting the citizens of Marion to use the same as a street, holding out that it would be safe to travel it, by working it and repairing it when it was in need thereof.

7. That the plaintiff, who has for a long number of years been a citizen and resident of the town of Marion, N. C., has often traveled said right of way, and on or about 18 January, 1899, she left her home in the town of Marion, N. C., and went to Virginia, where she remained on a visit until her re-

(146) turn on 11 April, 1899. When the plaintiff left the town of Marion as aforesaid on 18 January, 1899, the said portion of the right of way was in good condition, free from any defect or hole endangering travelers who used it.

8. That upon the return of the plaintiff as aforesaid to her home in the town of Marion, N. C., at about 12 o'clock at night, she alighted as a passenger from the train of the defendant railway company upon its depot yard where passengers usually alight, and as was her custom, and the custom of all persons when alighting from defendant's train, and going from the said depot yard to any point on Main street or east of Main street on the south side of said railroad track which runs through the said town of Marion, N. C., she crossed defendant's track and went along its right of way between the depot

yard and the south side of said bridge, until traveling the said well-beaten and worn path so generally used by the public as aforesaid she fell into a hole, seriously injuring herself as follows: by spraining and bruising her left knee and left hip and other portions of her left leg, causing great pain and suffering and a permanent injury to her, preventing her from walking without great pain and suffering, and permanently impairing her ability to support herself, to her great damage, to-wit, in the sum of nineteen hundred and ninety-nine dollars.

9. That at the point where the injury occurred there was a railroad cut at a depth of about twenty feet, the edge of said cut being about thirty feet from the railroad track and about six feet from the path or walkway along which plaintiff was traveling; and between the said upper edge of the said cut and the said pathway was the fence constructed as aforesaid to prevent persons traveling said pathway from falling in said cut. That the rain had washed under said fence at this point gradually for the space of a month a deep gulch, the dirt first caving away along the bank of the said cut and be- (147) tween the fence and the track and lodging upon the defendant railway company's right of way by the side of its track, and the said excavation gradually increased at each recurring rain until it had washed an excavation across the path which the plaintiff was traveling of a depth of about seven feet, three feet wide at the top and about five feet at the bottom, and extending across the said pathway about three feet and about eight feet into the right of way used as a street.

10. That the said excavation remained open and in this unsafe and dangerous condition for a space of several weeks, and this was well known to the defendant railway company, or might by due diligence have been so known, it being almost in plain view of its depot and the route along which its depot agent traveled from his home to the depot, and it being in plain view and only about fifty feet from the section house where the section hands of the defendant company slept when at work on this part of the road. The said excavation could be seen from every train on defendant's road passing this point in the day time, the said excavation being in plain view of the residence of the section master of the defendant railway company having charge of the said defendant company's roadbed and right of way at this point.

11. That the dangerous and unsafe condition of the said passway used as a street by the corporation of Marion, N. C., as above alleged, was well known to all the officers of the said corporation, or might have been so known by the exercise of due care.

12. That there were no lights or other means by which plaintiff could discern said excavation at the time of her injury, and nothing placed around said excavation to prevent her from falling into it and being injured.

13. That the injury to the plaintiff was caused by no fault of hers, but by the gross negligence and carelessness of
(148) the defendant railway in failing to repair said passway or stop it up after it had allowed the public to pass over it for so long a time and under the circumstances as above alleged.

14. That the injury to the plaintiff would have been prevented if the defendant, the corporation of Marion, had done its duty, and said injury therefore occurred by reason of the wrongful and negligent conduct of the corporation of Marion in failing to repair the passway before the injury to the plaintiff occurred.

15. That it was the duty of the defendant railway company to have repaired said passway prior to the time the plaintiff was injured.

16. That it was also the duty of the corporation of Marion to have repaired said passway prior to the time the plaintiff was injured. Wherefore, the paintiff demands judgment against the defendant for the sum of $1,999 and costs, and such other and further relief as to the Court may seem just and proper.

To this complaint the town of Marion answered, and the defendant railroad demurred *ore tenus*.

The action as to the town of Marion was tried at January Term, 1900, of McDOWELL, when the plaintiff recovered a judgment against the defendant town for $500, from which the defendant appealed (see 126 N. C., 412).

But the Court sustained the defendant's demurrer and the plaintiff appealed, and the plaintiff's complaint, the defendant's demurrer and the ruling of the Court thereon constitute the case now under consideration.

The complaint shows that the injury complained of was received by the plaintiff's falling into a hole in one of the streets of Marion, and that this street was parallel with the defendant's railroad, but it does not state how far it was from the defendant's depot to the place where the injury was received.

It does state that there was a deep cut or excavation
(149) opposite the point where the plaintiff was injured, but this was guarded by a fence, and it is not alleged that plaintiff was injured by reason of this excavation, but by falling in a hole washed out in one of the streets of Marion.

While it is alleged that people had for years, and before the town of Marion erected it into a street had been in the habit of passing along that way, going to the defendant's depot, and defendant had not objected to their doing so, but there is nothing alleged to show that defendant has ever opened this as a means of approach to its depot.

The road was not the owner of the land upon which this street was located and where the plaintiff was injured. It only had an easement for the benefit of the road, which it could only use when necessary for the purposes of the road, or for its protection. *Railroad v. Sturgeon,* 120 N. C., 225. It is not the duty of the defendant to open up and keep in repair roads along its railroad track, though it had an easement of 100 feet on either side of said track for the purposes stated above, but only to the approaches to its depot. And we do not understand this to mean roads leading to and traveled by parties going to and from the defendant's depot. We therefore see no obligation resting upon the defendant to make or keep a road where the plaintiff was injured, and there could be no negligence in not doing so.

But most certainly this was so after the town of Marion had erected it into a public street and had been working and repairing it, as such, for the last ten years.

The plaintiff having failed to state a cause of action against the defendant railroad, the judgment is

Affirmed.

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(150)

SMITH v. CARR.

(Filed 23 April, 1901.)

PRINCIPAL AND SURETY—*Contribution—Presumption—Parol Evidence.*

Coprincipals and cosureties are presumed to assume equal liability, but this presumption may be rebutted by parol evidence.

ACTION by John W. Smith against J. S. Carr and the Golden Belt Hosiery Company, heard by Judge *W. A. Hoke* and a jury, at October Term, 1900, of DURHAM. From a judgment for the defendant, the plaintiff appealed.

Boone, Bryant & Biggs, for the plaintiff.

Manning & Foushee, Guthrie & Guthrie, for the defendant Carr.

COOK, J. A careful investigation of the exceptions taken to the charge given to the jury by his Honor, and his refusal to

give the instructions prayed for, fails to discover any error. The counterclaim, which is the subject of this controversy now before us, pleaded by defendant Carr, grows out of a loan of $10,000 made to the defendant company by the Wachovia National Bank upon the suretyship and endorsement of plaintiff and defendant Carr, who were stockholders and officers of said company. The original sum (as was evidenced by their note) was reduced to $3,500 by payments made by the company. For this residue, a renewal note was given by the company and signed by plaintiff and Carr in the following form and words:

"Durham, N. C., 17 Dec., 1897. Four months after date we, Golden Belt Hosiery Company, promise to pay to the order of J. A. Gray, cashier, thirty-five hundred dollars, (151) with interest after maturity until paid, interest to be paid semi-annually, in advance, negotiable and payable at Wachovia National Bank, Winston, N. C., for value received. The parties agree to take no advantage of any agreement for indulgence after maturity.

"GOLDEN BELT HOSIERY COMPANY.
"J. OTHO LUNSFORD,
"Secretary and Treasurer.
"J. S. CARR,
"J. W. SMITH.

On back: "J. S. Carr, J. W. Smith."

Upon its maturity the company was unable to pay, and defendant Carr paid it out of his own money, and in this action demands of Smith one-half of the sum so paid by him, in contribution of the moiety due to him as a cosurety. Smith denies his liability to Carr upon two grounds, viz: First, that when he signed the original note for $10,000 with Carr and at his request, Carr promised to hold him harmless from loss, and, secondly, that by the form and terms of said note Carr is not a cosurety with him, but a coprincipal with the company.

The questions of fact involved in these two contentions were submitted to the jury upon the evidence introduced pro and con (to which there was no exception) and found in favor of defendant Carr, which is conclusive, and the verdict must stand unless the jury were erroneously instructed by the Court.

The 1st, 2d, 3d, 4th and 8th exceptions taken to the charge of the Court relate to the joint ability; the 5th, 6th and 9th, for refusing to give instructions as prayed for, relate to the same subject. The charge as excepted to fully appears in the following paragraph:

"As to the counterclaim: The law presumes that per- (152) sons who engage in a common venture assume an equal liability; and it appearing that the defendant Carr and the plaintiff Smith formed and organized the defendant Golden Belt Hosiery Company as a corporation, and when the said corporation required money to carry on or enlarge its business, signed and endorsed notes and drafts for the benefit and accommodation of said corporation without consideration or benefit moving to either one of them, then there is presumption of law that each assumed a common and equal liability; and if one has paid a larger share than one-half, the other is liable in such sum as will make him equal. It is admitted that the Golden Belt Hosiery Company is the principal debtor, and the plaintiff, in order to rebut the presumption of cosuretyship, must prove to the satisfaction of the jury that he is supplemental surety, that he signed the note, not for the accommodation of the principal, but for the accommodation of the defendant Carr, or at the request of and by agreement with the defendant Carr, that he, the said Carr, would protect the plaintiff from any liability on said notes, and unless the plaintiff has so satisfied the jury, they will answer the issue 'Yes,' and proceed to ascertain the amount."

The correctness of this charge can not be successfully challenged. The form and manner in which the note was drawn and signed were not conclusive as to the relations of the parties to the contract. Upon the face of the note, they both appear to be coprincipals and coendorsers—their liability was assumed gratuitously; and the fact that Carr was the first to sign does not put upon him a greater burden than upon him who signed next, "and," as is said by HALL, J., in *Daniel v. McRae,* 9 N. C., on page 601, "on that account when made, a *prius* or *posterius* gave no rule of liability." However, their relations to it, whether as principal or surety, when questioned, become a matter of *fact* to be established by evidence, either written or oral, and found by the jury.

In *Williams v. Glenn,* 92 N. C., 253, the note (under (153) seal) was made with "Williams as *principal*" and Boyden and Glenn *"as sureties,"* yet as between the obligors the Court held that *parol* evidence was admissible to show that Boyden and Glenn were *coprincipals,* and that the rule of contribution obtained among them. While all of the makers may appear as principals upon the face of the paper, or some principals and some sureties, yet it may be shown that while appearing as principals they were *in fact* sureties, or some principals and others sureties; and upon the establishment of the fact of cosuretyship, the right of contribution follows.

The rule of contribution is founded upon the maxim that "equality is equity," and not upon contract. It is a rule of common justice whereby parties who undertake to account for the default or miscarriage of another, should equally bear the burden imposed by a failure of their principal. As between them, there is no agreement implied, but an equitable presumption raised by the fact of the payment by one, that the others will equalize the burden thus borne by him, by paying to him such sum as will make the loss equal upon each, which *can* be rebutted by showing that there was an agreement, whether verbal or written, to the contrary (1 Brand Suretyship and Guaranty, sec. 261) as was charged by his Honor, of which the plaintiff can not complain, as it was one of his positive contentions.

As to the question raised by the seventh exception: We are unable to see that these two notes have any relevancy other than as evidence in corroboration of plaintiff's testimony concerning the special agreement, alleged to have been made when he signed the original note for $10,000, and for that purpose they were submitted to the jury, and the jury were so charged by the Court. They show upon their face that Carr signed as *coprincipal* and *also* as coendorser with plaintiff, which was some evidence in corroboration of Smith's testimony as (154) to the alleged special agreement. Their materiality, however, is limited to the evidence. They are not *subjects* of this controversy. The counterclaim is not based upon *them,* but upon the $3,500 note. They appear to have been the *means by which* the defendant Carr raised the money with which he paid off the $3,500 note; he has paid these two notes, and no loss has or can befall Smith on their account. They bear no relation to the subject of the counterclaim. If Carr had raised the money upon his note with the endorsements of strangers to this transaction, and with that money had paid off the $3,500 note, surely the relations between Smith and Carr would have remained unchanged. And the same effect would have existed had Carr paid the note in full when due out of his own money without the intervention of a loan from or by any one at all.

The questions of fact have been found by the jury, and, no error appearing in the charge or rulings of his Honor, the judgment entered below must be

Affirmed.

Cited: Comrs. v. Dorsett, 151 N. C., 308.

ROSEMAN v. HOKE.

(Filed 23 April, 1901.)

NEW TRIAL—*Appeal—Record—Defect—Practice—Supreme Court.*

Where, upon appeal from a ruling upon a sufficiency of description of land conveyed in a deed, it appears from the case on appeal that the entire description as contained in the deed, and upon the sufficiency of which the ruling was made, is not set out, a new trial will be granted.

ACTION by R. M. Roseman, administrator of Thomas Hoke, against Nora Hoke and others, heard by Judge *E. W. Timberlake* and a jury, at December Term, 1900, of LINCOLN.

From a judgment for the defendants, the plaintiff appealed.

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A. L. Quickely, and *S. G. Finley,* for the plaintiff.

L. B. Wetmore, for the defendants.

MONTGOMERY, J. This action was commenced as a special proceeding in the Superior Court of Lincoln for the purpose of subjecting the real estate of the plaintiff's intestate to the payment of his debts. In the complaint the land is described fully, and consists of three distinct tracts. The defendant, Nora Hoke, the widow of the intestate, claimed the land described in the complaint, and an issue being joined upon the pleadings, the same was transferred to the next term of the Superior Court, by the Clerk, for trial. The only question raised on the trial was whether or not the description of the land embraced in the deed from the intestate to his wife, the defendant Nora, was sufficient to convey all three tracts. The only description of the land mentioned in the deed from the intestate to the defendant, as appears in the statement of the case on appeal, is as follows: "Lying and being in Lincoln county, State of North Carolina, in Lincolnton township, adjoining the town of Lincolnton." The appellant's counsel here argued orally, and also in his brief, that "the description in the deed (that of the intestate to the defendant) in question might locate the land as well on one side of the town of Lincolnton as on the other; it does not give the number of acres he meant to convey; it does not give the number of tracts (it is admitted by the defendants that he owned more than one); it does not give a single boundary, nor refer to any place where the boundary can be ascertained."

The counsel of the appellee in his brief admits that the description set out in the case on appeal is not sufficient to pass

the land, and that it can not be aided by parol proof, but he insists that, as a fact on the trial, the deed from the in-
(156) testate to the defendant was read, and that there were conveyed therein three distinct tracts of land definitely and particularly described, and that they were shown to be the same tracts of land as those described in the complaint. He further says that in the appellant's statement of the case on appeal, the real description of the land conveyed to the defendant by the intestate was not set out, but that a space was left for that purpose, with the words written in the blank space "fill in description here," and that at the time the case was served on the appellee, the space for the description of the land was still in blank. And he further says that in making out his counter case on appeal, he left space for the description, as did the appellant's counsel, and that he did not "feel called upon to insert the full description, as the burden was on the other side to show error, the law presuming that the Judge below acted rightly and within the law, unless the contrary be made to appear by those claiming error to exist." The Judge adopted the appellee's statement of the case on appeal.

It seems to be upon reading the case on appeal that the deed from the intestate to the defendant contained a fuller description of the land mentioned therein than the words "lying and being in Lincoln County, State of North Carolina, in Lincolnton township, adjoining the town of Lincolnton." For instance, in the case it is stated that "Here, it is admitted by counsel on both sides that the land claimed by Nora Hoke, the defendant, as the land set out in the complaint, consists of three tracts adjoining each other." Again, the witness Carson testified that "all three of the tracts described in the complaint were those mentioned in the deed above set out from Thomas Hoke to Nora Hoke;" and again, that witness said, "I know who now owns the land set out in the deed from Caleb Motz above as the Coble land (that is, the land that is said in that deed to adjoin the 6-acre tract). Mr. Killian now owns the Coble land, and as the deed from Thomas Hoke to
(157) Nora Hoke calls for Mr. Killian's land as adjoining it, I know it conveys the six acres, or Motz tract, for it would not join the Killian (formerly Coble) land at all, if it did not." And still, again, it is stated in the case on appeal that "the deed of D. Schenck to Nora Hoke, above mentioned, dated 10 February, 1876, was admitted by the plaintiff to cover the two and three-fourths acre tract, mentioned in the deed of Hoke to his wife, Nora, and it was agreed that it was out of the controversy." The contention, too, of the parties as set out

in the case on appeal shows that there was a fuller description in the deed from Hoke to his wife than appears in the case on appeal. Those contentions appear as follows: "Defendants contend that the deed from Thomas Hoke to his wife Nora conveyed all three tracts, because it especially mentions three tracts and because the witness Carson identifies all three as being embraced in the deed from Thomas Hoke to Nora Hoke, and as being the same as set out in the complaint."

"Plaintiffs say that it is impossible to say what land he did convey in said deed, and that the description is too vague and uncertain to convey any land that belonged to Thomas Hoke; that none of the three tracts were bought from J. C. Jenkins, and none of them could be bounded by Thomas Hoke on the north if all were conveyed."

It seems necessarily to be the case that his Honor, when he adopted the appellee's statement of the case on appeal, either overlooked the failure to insert the description or thought that the parties could do it before the transcript should be sent up; and as we can not tell what the description was, we are, of course, unable to say whether or not his Honor's ruling was correct when he held that the description was sufficient in law and in the light of the parol evidence of the defendant in aid thereof, to pass all three of the tracts set out in the complaint, and instructed the jury to answer in the negative the issue, "Did Thomas Hoke die seized and possessed of the three tracts of land mentioned and described in the complaint?"

New trial.

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NEW HOME SEWING MACHINE COMPANY v. SEAGO.

(Filed 23 April, 1901.)

1. BONDS—*Penal—Interest—The Code, Sec.* 530.

   The recovery upon a penal bond can not exceed the penalty named therein, though the excess is for interest on the amount of the defalcation after breach of the bond.

2. EVIDENCE—*Agency.*

   An agent who takes a bond for the execution of a contract may testify as to his agency in an action on the bond.

CLARK, J., dissenting.

ACTION by the New Home Sewing Machine Company against Henry E. Seago, D. R. Seago and W. A. Marks, heard by

Judge *Thomas J. Shaw* and a jury, at the December Term, 1900, of STANLY. From a judgment for the plaintiff, the defendants appealed.

Austin & Smith, for the plaintiff.
J. Milton Brown, for the defendants.

FURCHES, C. J. This is an action of debt upon a penal bond of $500, given by the defendants to the plaintiff to indemnify it against loss on account of the agency of the defendant Seago. Upon the trial it was found that the plaintiff was entitled to recover $442.27 for defalcations upon which he was al-
(159) lowed $104.44 interest, making together the sum of $546.71. For this amount the plaintiff was allowed judgment and defendants excepted.

While cases may be found in many jurisdictions to sustain the judgment of the Court, we do not think it can be sustained upon principle, nor under the statutes and decisions of this State.

The penalty of the bond sued on is $500. This, we think, is the extent of the defendants' liability. The Court can not change the terms of the bond, nor increase the liability of the defendants.

We understand it to be admitted by the plaintiff that this would be so if the principal of the plaintiff's recovery was more than the *penalty* of the bond sued on. But it is contended for the plaintiff that this makes the difference; that the principal of the plaintiff's recovery, or in other words, the amount of the agent's defalcation, was only $442.27, and the balance of the judgment is interest, and incident to the debt. But it is incident to the debt created by the defalcation of the agent, and collateral to the bond sued on, and can not increase the liability of the bond unless the bond draws interest. It seems to us that the contention of plaintiff can not be so upon principle and sound reasoning.

The plaintiff had no debt against the defendants—the sureties—and none against the principal on the bond, until it obtained its judgment; and this judgment under our statute draws interest until it is paid. At early common law, no indebtedness drew interest. 16 Am. & Eng. Enc. Law, 991 and note 8. There were English statutes passed afterwards providing for interest. Interest is a creature of legislation and has been provided for by our Legislature. Code, sec. 530. And in this legislation providing for interest, it is expressly provided that *penal* bonds shall not draw interest; and as this suit

is on a bond which can not draw interest, it would seem that this should end the discussion.

At common law, the judgment on a penal bond was (160) for the amount of the penalty, when a breach of the condition was shown. The actual damages were not assessed in that action; and, if they were not so great as the penalty of the bond, defendants' remedy was to go into a court of chancery and ask for relief against the plaintiff's judgment. He there obtained a writ of inquiry, called *"Quantum Damnificalus,"* when the real damages were inquired into and determined. *Governor v. Evans,* 13 N. C., 383. This was troublesome and expensive, and considered a hardship on defendants; and to prevent this trouble and expense, and for the benefit of defendants, it was provided by statute that the actual damages might be assessed by the Court and jury trying the action on the bond. Before the statute providing that the real damages might be tried and determined in the suit on the bond, the judgment could only be for the *penalty* of the bond. And it would be singular if this statute, intended for the benefit of defendants, should prove a boomerang and subject them to greater damages than they were liable for before its passage. Before the passage of this statute, a plaintiff recovered judgment upon the *bond* for the *amount* of the bond, because his action was upon the bond. After the statute, he still recovered judgment on the bond, but if it turned out that the actual damages sustained by plaintiff were less than the *penalty* of the bond, the judgment was still for the amount of the bond, but to be discharged by the payment of the actual damages and costs of action.

This seems to have been so well understood by the profession in this State, that we have but little direct authority on the subject. But these are in harmony with the English authorities, and show that plaintiff can only have judgment for the penalty of the bond. *Anthony v. Estes,* 101 N. C., 541. It is claimed that *Stafford v. Jones,* 91 N. C., 189, is authority to sustain the judgment of the Court below. But it does not seem to us that it is. That was not an action on a *penal bond,* but a construction put upon a mortgage in an (161) action to foreclose. And whether the construction put upon the mortgage in that case is correct or not, we can not think it is authority in this case. Justice MERRIMON, who wrote the opinion in *Stafford v. Jones,* and Chief Justice SMITH were both on the bench when that opinion was delivered, and they were both on the bench when Chief Justice SMITH wrote the opinion in *Anthony v. Estes,* and *Stafford v. Jones*

is not referred to. This shows, to our minds, that *Stafford v. Jones* was not considered by that Court as being in conflict with *Anthony v. Estes.* But if it was, *Anthony v. Estes,* being the later case, which expressly decides the point in this case, must be held to overrule *Stafford v. Jones.*

As we have said, we do not find many direct authorities in our Court, but we find quite a number of cases which bear upon the question—such as *Bell v. Jasper,* 37 N. C., 597; *Jones v. Hayes,* 38 N. C., 502; *Bryan v. Rosseau,* 71 N. C., 194; *Branch v. Elliott,* 14 N. C., 86, where it is held that it is not necessary for the jury to find the amount of the bond sued on, as that is settled by the penalty of the bond, and the judgment is for that amount; *Thoroughgood v. Walker,* 47 N. C., 15, where there is a clear discussion of the doctrine.

There is one other exception: The plaintiff produced its general agent, who testified that he was a general agent of the plaintiff, and as such made the contract with the defendant Seago and took the bond sued on. The defendant objected to this evidence upon the ground that agency could not be proved by declarations or acts of the agent. This proposition is correct in a proper case, but does not apply in this case. It applies where a party is trying to establish an agency for the purpose of making the principal liable for the acts of the agent. But that is not the case here. In this case, it is for the purpose of holding the agent liable. Besides, we know of no rule of evidence that does not allow an agent to
(162) go on the witness stand and testify that he is an agent. It is not a declaration, but the sworn evidence of a witness. This exception can not be sustained.

As this is the only error pointed out affecting the trial, we are of the opinion that the judgment should be corrected by reducing the same to $500, and, being so corrected, it should be

Affirmed.

CLARK, J., dissenting. The defendant, H. E. Seago, gave bond in the penal sum of $500 with the two other defendants as his sureties for the faithful discharge of his duties as agent for the sale of sewing machines, and accounting for all sums received by him as such. This action is to recover of him and the sureties on said bond the sum of $442.27 alleged to have been illegally retained by him in breach of said bond, with interest thereon from the date of such breach.

A witness testified that he was general agent of the plaintiff in this State and produced his written authority as such. Defendants' exception to this evidence is a misconception. It is

true that an agency can not be proved by declarations of the agent, *Taylor v. Hunt,* 118 N. C., 173; but that is where the declarations of one holding himself out as agent are sought to be given in evidence by another person to prove the agency against the principal. But here the agent goes on the stand himself to prove the fact, and the evidence is competent. It was also competent to corroborate his statements on the stand by showing the same statement had been made by him previously in a letter offered in evidence. *S. v. Whitfield,* 92 N. C., 831. The Court also held correctly that there was no evidence to go to the jury to justify the release of Marks as a surety.

It was not contested on the trial that the principal of the defalcation is $442.27, which, with interest, amounted to $546.71 at the date of the judgment. Judgment was (163) thereupon rendered against all the defendants for $546.71, with interest on $442.27 from the date of the judgment till paid, and for costs. It is not contested that this is correct as to the principal, but exception is made that judgment can not be rendered against the sureties for more than $500, the penalty named in the bond.

No consideration is attached to the addition after the $500, of the words "with ten per cent attorney's fees for collection," that stipulation is held invalid. *Martin v. Boger,* 126 N. C., 300.

Where the damages recovered upon a bond of this nature do not exceed the amount of the bond, no difficulty of this nature can arise. But where, as in this case, the recovery is for a greater sum, the question arises as to whether interest upon the default (the principal of course not to exceed the penalty of the bond) can be recovered against the sureties. Upon this subject there has been some diversity in the Courts. On such state of facts, New York, Maine, Vermont, Kentucky and Kansas, and indeed the great weight of authority is that judgment goes against the sureties for the principal of said default (not to exceed the amount of the penalty of said bond) with interest thereon from the date of the breach. *Brainard v. Jones,* 18 N. Y., 35; *Wyman v. Robinson,* 3 Me., 384; 2 Sutherland Damages, sec. 478 (19); *Carter v. Thorne,* 57 Ky. (18 B. Monroe), 613; *Williams v. Wilson,* 1 Vt., 266; *Perit v. Wallis,* 2 Dallas, 252; *Carter v. Carter,* 4 Day, 30; *U. S. v. Arnold* (Story, J.), 1 Gall, 348; *Burchfield v. Haffey,* 34 Kan., 42, overruling prior case: *Lyon v. Clark,* 8 N. Y., 148; *Ringle v. O'Matthiessen,* 39 N. Y., Supp., 92.

Massachusetts allows judgment against sureties for the

principal sum of default or damages (not to exceed penalty) with interest thereon from the beginning of the action.
(164) *Warner v. Thurlow,* 15 Mass., 154; *Bank v. McGill,* 1 Paine (C. C. R.), 661.

In a very few old cases judgment was given against the sureties for the principal of the bond with interest only from the date of the judgment. *Tyson v. Sanderson,* 45 Ala., 364; *Bonsall v. Taylor,* 1 McCord (S. C.), 503. This seems to have been the English rule, 2 Sedgwick Damages, sec. 678, with some contrariety, however. *Gainsforth v. Griffith,* 1 Sanders, 51, note 1, but even in England the later cases all tend toward the American rule.

Owing to this diversity and the very great importance of the ruling as affecting all bonds of this nature, including official bonds, bonds of guardians and administrators, bonds in injunction, attachment and claim and delivery proceedings, and penal bonds generally, a great number of decisions have been examined, only a part of which have been cited above, and by the great weight of authority, especially in the more recent cases, the rule first cited above is now quite well settled, which was also the view taken by the Court below.

In 2 Sutherland Damages, sec. 478, after thoroughly discussing the question, it is said, citing a column of cases in note 2: "The weight of American authority, however, is in favor of allowing interest on damages beyond the penalty. The penalty is the limit of the liability *at the time of the breach;* interest is given afterwards, not on the ground of contract, but as damages for its violation; for delay of payment after the duty to pay damages for breach of the condition to the amount of the penalty had attached." *Ibid,* it is said: "Interest may properly be charged against sureties for delay after it became their duty to pay, as well as against the principal."

In 2 Sedgwick Damages, sec. 678, after a similar discussion, the same conclusion is reached: "The better opinion is that interest may be recovered in addition to the penalty in an action, whether against principal or surety" and a
(165) large number of authorities to that effect is cited in the notes. To the same purport is the weight of the authorities, all of which are to be found collected in 8 American Digest (Century Ed.), sec. 243. To same purport, 4 Am. & Eng. Enc. (2 Ed.), note 2, and Field Damages, sec. 546, and cases there cited.

The reasoning of this rule, which seems now the prevailing one, and the better one, is thus given (1882) in *Wyman v. Robinson, supra,* S. C., 40 Am. Rep., 361: "It is commonly

said that the damages can not exceed the penalty of the bond. Rightly understood, the statement is true. But what is the penalty in a bond for the payment of damages? It is the amount which the obligors agree to pay, if the whole penalty be needed for the purpose, for the damages sustained by the obligee by a breach of the bond, the amount to be paid as soon as the breach occurs. The obligee is to have the penalty at a particular and definite time. Immediately upon a breach of the bond the penalty is due to him. If he gets it then, he gets what the contract provides; if he gets it later, he gets less than what the contract provides. If then the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach. After the penalty is forfeited, it becomes a debt due.

The sureties then stand in the relation of principals to the obligee, owing him so much money. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs."

This reasoning is sound, and accounts for the consensus of the more recent cases upon that line.

In our own State, we have two decisions, *Stafford v. Jones,* 91 N. C., 189, which is to above result, but on a somewhat different line of reasoning; and *Anthony v. Estes,* 101 N. C., 541, in which it is said that no more than the (166) penalty named in a guardian bond can be recovered against either the guardian or his sureties; the question of interest, however, is not raised, and this ruling is expressly stated to be "not material in disposing of the appeal." The form there cited from Mr. Eaton evidently is intended for cases where the recovery is for a sum less than the penalty of the bond. The question will rarely arise as to guardian, administration and similar bonds, as to which it is customary to require a bond in double the sum at risk.

Our only direct authority, *Stafford v. Jones, supra,* being in conformity with the better reasoning and the rule as settled by the great weight of authority elsewhere and eminent text-writers, we should adhere to it.

The Code, sec. 530, has no application. Of course the penalty of the bond bears no interest. Here, the sureties bound themselves to make good any breach of the principal, not to exceed $500. But they bound themselves to make that good when it occurred. Their failure to do so is their own default and they are liable for $442.27, which is the amount of their principal's default, and by virtue of their contract to pay such

default the sureties are liable for interest on said $442.27 for every day they delayed to make it good. There is nothing in the bond or in the contract which delays the running of interest on this breach by the sureties of their own contract till after judgment. "It is not so nominated in the bond."

Cited: *Bernhardt v. Dutton,* 146 N. C., 209.

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HOWE v. HALL.

(Filed 23 April, 1901.)

APPEAL—*Exceptions—Time—Practice.*

Where a verdict *non obstante veredicto* is reversed, the appellee can not appeal from a judgment entered on the remand and bring up exceptions taken at the original trial.

ACTION by S. B. Howe against J. G. Hall and David Hemphill, receivers of the Chester and Lenoir N. G. R. R. Company, and G. W. F. Harper, receiver of the Chester and Lenoir N. G. R. R. Company, and the Carolina and Northwestern Railway Company, heard by Judge *W. S. O'B. Robinson,* at February Term, 1901, of GASTON. From a judgment for the plaintiff, the defendants appealed.

Jones & Tillett, for the plaintiff.
J. H. Marion and *O. F. Mason,* for the defendants.

MONTGOMERY, J. This case was tried at the August Special Term, 1900, before *Starbuck,* J., and a jury. After the plaintiff had introduced his evidence, each of the defendants made a motion for judgment dismissing the complaint as of nonsuit upon the ground that the evidence had disclosed the fact that neither of the defendants was the corporation, or the representative of the corporation, which had inflicted the injury complained of by the plaintiff, and that the injury had in fact been inflicted by a corporation which had not been sued. The motion was refused, but was renewed when all the evidence on both sides had been introduced. His Honor, desiring
(168) further time for the purpose of examining certain records constituting a part of the evidence, before deciding the motion, the counsel agreed at his Honor's suggestion that the issues of fact be submitted to the jury and answered

by them without prejudice, and that the question of law as to the liability of any or all of the defendants, raised by the motion, should be reserved for the subsequent determination of the Court out of term time.

The issues were therefore submitted to the jury, and they found that the "person or persons operating the Chester and Lenoir Railroad Company on 31 March, 1894," had negligently injured the plaintiff to the extent of $500.

On 18 September thereafter, Judge *Starbuck* rendered the judgment set out in the record, in which it was adjudged that the defendants were not liable to the plaintiff for the damages assessed by the jury, that the plaintiff take nothing by this action, and that the defendants go without day. The plaintiff appealed from this judgment, and this Court, at its September Term, 1900, reversed the judgment of the Superior Court, and held that the plaintiff was entitled to recover of the defendant, the Carolina and Northwestern Railroad Company, the amount of damages sustained by the plaintiff as fixed by the jury.

The opinion of this Court was duly certified to the Superior Court, and at the February Term, 1901, thereof, Judge *Robinson* presiding, a judgment was rendered in accordance with the opinion of this Court.

The present condition of this case, as it is now presented to us, furnishes an anomaly in the practice as regulated by our courts. It purports to be an appeal from a judgment rendered by Judge *Robinson* at the February Term, 1901, of GASTON, when in reality it is an appeal from a judgment rendered by Judge *Starbuck* at the August Special Term, 1900, of that county between the same parties.

The defendants' appeal from the judgment of Judge *Robinson* is merely nominal, for there was no trial when that judgment was rendered, and the judgment was simply (169) one following the decision of this Court in the appeal heard at the September Term, 1900. It was in reality entered for the purpose of bringing up, for a hearing before this Court, certain exceptions made by the plaintiff in the trial before Judge *Starbuck* to the rejection of certain evidence offered by the defendant in the trial before that Judge.

The course pursued by the defendant in the matter is a departure from both the statutory provisions in force in this State upon the subject of appeals to the Supreme Court and the settled practice of this Court, and can not be allowed. Upon the rendition of a final judgment in the Superior Court, any person aggrieved thereby may appeal to this Court, but he must do so within the time allowed under section 549 of The Code,

and the statutes amendatory thereof, unless by an agreement of counsel the time be waived. There is no provision in our law by which a party, in an appeal from a judgment rendered at one term, can bring up for review to this Court exceptions pertaining to another trial where final judgment has been rendered, even though the trial be between the same parties and in the same action, thus holding in abeyance exceptions made at a former trial beyond the time allowed by law for appeal.

If a party, who has recovered judgment in the Superior Court, is so confident that the Supreme Court will affirm the judgment in his favor that he does not deem it necessary or worth his while to carry up, by his own appeal, his exceptions, it will be too late to complain when his adversary, the appellant, on his appeal succeeds in having the judgment of the lower court reversed. Such a course on the part of an aggrieved party, an appellee with exception, is attended with the risk that the judgment in his favor may be reversed by the appellate court, in which event the benefit of his exceptions will be lost to him.

And there is no hardship in the requirement that, in each trial where a final judgment is pronounced, the appeal
(170) shall follow upon that judgment by the aggrieved party; and the aggrieved party is the appellee who has filed exceptions as well as the appellant against whom judgment has been rendered.

If any other course were permitted the appellate court would be troubled, most probably, with inaccuracies of statement in the record, uncertainties in the recollection of Judges and attorneys as to what occurred on the various trials, and complications that would invariably attend the statements of the cases on appeal made out by the different judges—all embraced in one record.

The judgment of Judge *Robinson* is conclusive on the defendant. The defendants' appeal must be dismissed on the motion made in this Court by plaintiff's counsel.

Appeal dismissed.

Cited: *King v. Cooper,* 128 N. C., 351.

SETZER v. SETZER.

(Filed 23 April, 1901.)

1. DIVORCE—*A mensa et thoro—A vinculo—Abandonment—The Code, Sec.* 1285—*Laws* 1895, *Ch.* 277—*Laws* 1899, *Ch.* 211.

Where a husband is compelled to abandon his wife on account of her cruelty; he is entitled to an absolute divorce.

2. DIVORCE—*Abandonment—Adultery—Defense.*

Where cruelty of a wife compelled her husband to abandon her, adultery by him after the abandonment is no valid defense to his suit for divorce.

(171)

ACTION by Henry T. Setzer against Laura A. Setzer, heard by Judge *Frederick Moore* and a jury, at August Term, 1900, of CATAWBA. From a decree of divorce *a mensa et thoro,* instead of *a vinculo,* as prayed, the plaintiff appealed.

Self & Whitener, for the plaintiff.
L. L. Witherspoon, for the defendant.

COOK, J. The object of this suit is to dissolve the bond of matrimony existing between the plaintiff and defendant. Upon the finding by the jury of the issues, his Honor granted a decree of divorce *a mensa et thoro,* to which the plaintiff excepted. The question thus presented for our decision is, whether his Honor erred in not granting a decree of divorce *a vinculo matrimonii,* as prayed for.

The relief sought is based upon the ground of abandonment, under sec. 1285 of The Code, as amended by chapter 277, Laws 1895, and chapter 211, Laws 1899.

The issues as found establish the marriage, residence, etc., and that "the plaintiff left his home where the defendant resided, more than twelve months before the commencement of this action, and before 1 January, 1899."

The 8th issue, "Was plaintiff compelled to leave defendant and live separate from her on account of the cruel treatment and misconduct of defendant to plaintiff?" was also found in the affirmative.

Upon this verdict, it is clear to the Court that the plaintiff was entitled to a decree of dissolution of the bonds, pursuant to said Act of 1895, and that the Court below erred in rendering the decree, set out in the record, for divorce from bed and board. The grounds upon which the statute authorizes the dis-

solution is the *abandonment* by the wife and living *separate and apart* from her husband. The method or manner by which the abandonment was obtained is not material. Whether (172) she left him, or forced him to unwillingly leave her, is to the same effect and accomplishes the same purpose. Should the husband have driven his wife from his house, or obtained her removal by stratagem, or have withheld from her a support while there, he would have been deemed to have *abandoned her.* 1 Bishop Marriage and Divorce, sec. 1711; *High v. Bailey,* 107 N. C., 70. But "abandonment" is not a complete cause for divorce, nor is "living separate and apart." Both must exist at the same time to constitute a cause of action. In this case it was the wife who, by her *cruelty* and *misconduct,* compelled the husband to leave and live separate and apart from her, which entitled him to the relief sought.

However, in bar of his action, she contends that he is not entitled to a decree, because he is *in pari delicto* in that he has committed acts of adultery "after the separation;" and it is so found by the jury in answer to the 16th issue. It is not charged that any infidelity existed upon his part until *after* he was driven away, notwithstanding the facts as found by the jury that she had refused him bed and cohabitation since 1890. This defense as thus established is unsound. In *Foy v. Foy,* 35 N. C., 90, it is held (PEARSON, J., delivering the opinion), "If a wife leave a husband and refuse to live with him *without* sufficient cause, and he afterwards lives in adultery, there is no cause for divorce; for the consequence may be ascribed to her prior violation of the duty of a wife. No one should be allowed to take advantage of his own wrong." To the like effect are *Whittington v. Whittington,* 19 N. C., 64, and numerous other cases in our reports.

So that she could not be considered the injured, but the injuring party, and, being the cause of the wrong, would not be allowed a decree in her favor. To sustain this defense, in bar, she must show a separate and distinct offense against (173) the marriage relation, as established by law, which would be a *cause* for divorce. It must be such as would entitle her to a decree of divorce in an action against the plaintiff. Nelson Divorce and Separation, secs. 433, 434; 2 Bishop, *supra,* sec. 381. This she has not done. Under our statutes, adultery *alone,* committed by the husband, is not a cause. He must separate from his wife "and live in adultery," Code, sec. 1285, subsec. 1, neither of which is shown by the defendant.

The exceptions of the plaintiff are sustained and the judgment rendered in the court below must be stricken out, and a

decree for divorce from the bonds of matrimony be entered in conformity with the statute and the verdict of the jury.

Error.

Cited: S. c., 129 N. C., 296; *House v. House,* 131 N. C., 142.

UPTON v. RAILROAD.

(Filed 23 April, 1901.)

1. NEGLIGENCE—*Contributory Negligence—Railroads—Nonsuit.*
   Upon the evidence in this case the plaintiff was properly nonsuited.

2. PLEADING—*Contributory Defenses—The Code, Sec.* 245.
   Contradictory defenses are permissible under section 245 of The Code.

ACTION by T. L. Upton and Ella Upton, administrators of J. A. Upton, against the South Carolina and Georgia Extension Railway Company, heard by Judge *E. W. Timberlake* and a jury, at Spring Term, 1901, of McDOWELL. From a judgment of nonsuit, the plaintiffs appealed.

Justice & Pless, and *J. T. Perkins,* for the plaintiffs. (174)
P. J. Sinclair, for the defendant.

MONTGOMERY, J. This intestate of the plaintiff was killed by a train of the defendant, which was moving northwardly toward Marion from Thermal City, at about 8 o'clock of the night of 24 March, 1900. There was no witness to the occurrence.

It is alleged in the complaint that the intestate was "sitting on the track on the end of a crosstie asleep, with his head and body bowed forward and his back to the track and to the west, in an apparently unconscious and helpless condition."

The evidence introduced by the plaintiff, to be taken as true, because at its close his Honor granted the motion made by the defendant for judgment as of nonsuit and for dismissal of the action, disclosed the following facts:

The intestate about two hours before his death was seen to be about half drunk, but able to handle himself all right, as one of the witnesses said. He was found about an hour after he was killed lying along the east side of the track, on his right side, with his face turned to the crossties, three or four inches

off, his head towards Marion and his feet toward the south, a foot from the ties. On either side of one of the crossties there was a shoe print on the soft ground, the heels towards the iron and the soles projecting beyond the crossties a few inches. When the body was found, the feet were the distance of the width of a crosstie from the tie on which he apparently had been sitting. The back of the head was crushed in, the wound being ostensibly about two inches long and an inch wide, the blood and brains oozing out. There was a bruise on the right shoulder five inches long in the shape of an L and a bruised place on the right arm about three fingers wide. The wheels had not run over the intestate, nor had the body been dragged by the train. One of the witnesses, after describing the various parts of the machinery and the attachments of the en-
(175) gine and cars, in answer to a question by the counsel of plaintiff as to what part of a man's body would be struck and what would strike him if he was sitting on the end of the crosstie with his feet on each side and his face from the track, stated: "I know he would be struck on the upper part of his body, about the head or shoulders. It would depend a great deal on where he was sitting on the ties and what position he was in, where he would be struck. I think it possible a man sitting on the end of a tie, if he was humped away over, perhaps it would not strike him; but if he was sitting in anything like an upright position, I don't believe he could sit there without being hit." The same witness also said that that part of the train which was lowest, the machinery, would strike him, and that the boxes which hold the axles were the lowest parts of the machinery, but that they did not project as far as the steps; that he could hardly tell what would strike him first. "I would think that the step would, if it came on first. There are parts of the engine, though, that come before the steps."

The complaint and answer were also put in evidence.

We do not see any error in the granting of the motion by his Honor. As we have said, there was no eyewitness to the occurrence, and it was an hour or more after the intestate was killed before the body was found. The allegation in the complaint then was purely theoretical as to the position of the intestate when he was struck, and there was nothing in the evidence going to prove the allegation of the complaint that the intestate was sitting on the track on the end of a crosstie asleep, with his head and body bowed forward. The evidence shows beyond question, from the nature of the wounds and the testimony as to the shoe prints that the intestate was not standing when he was struck; that he was not between the rails or lying

down, but that he must have been sitting. If, then, he was struck while in the position in which he was alleged to have been in the complaint, he was guilty of negligence (176) in placing himself in such a perilous situation. *Arrowood v. R. R.*, 126 N. C., 629; *McAdoo v. R. R.*, 105 N. C., 140. And if he was awake and sat down on the crosstie to rest, or for any other purpose, and was stricken by a moving engine, his refusal or failure to keep a sharp lookout and to get off the track on the approach of the engine was a negligent act on his part. *Norwood v. R. R.*, 111 N. C., 236; *Wykoff v. R. R.*, 126 N. C., 1152; *Flake v. R. R.*, 125 N. C., 744.

The intestate having been negligent, before a recovery can be had against the defendant on the ground of its negligence in not availing itself of "the last clear chance," it must be shown by the plaintiff, by proper evidence, not simply that the intestate was on the track in the way of the engine, but that he was there apparently asleep or in other helpless condition, and that the engineer had discovered his situation, or by keeping a reasonable watchout could have discovered it in time to have prevented the injury, and that after he had discovered it, or could by proper watchfulness have had reasonable ground to believe that such was the condition of the intestate, he failed to use all available means to prevent the injury. *Norwood v. R. R.*, 111 N. C., 236.

There is no presumption in this State of negligence against railroad companies upon simple proof of injuries or death caused by their trains.

We will now refer to the character of the evidence offered by the plaintiff. A description of the wounds, as given by the witnesses and recited in this opinion, throws no light upon the position of the intestate when he was struck, except that he was sitting on the end of a crosstie with his face from the track. Neither does the nature or location of the wounds, nor the evidence of Sheriff Neal in describing the machinery and the appliances of the engine and cars, tend in the least to prove what particular part of the engine or coaches or their (177) appliances struck him. The testimony of Thomas Upton, a witness of the intestate, that there was a wound on the right shoulder, in the shape of an L over five inches long, furnished an argument to counsel that that evidence ought to have been submitted to the jury as tending to prove that the intestate was struck by one of the steps of the coaches. It did not reach to the height of evidence. There was nothing brought out to show the size, shape or length of the steps, or how far they projected, or what part of them might have struck the in-

testate's shoulder. And if there had been such testimony, it would have been no proof as to the position of the intestate, except that he was sitting. In truth, there is nothing in the evidence in the least going to show that the head or shoulders of the intestate were bowed or lowered as he sat on the ties, and that fact was necessary to be proved before the defendant could be shown negligent, in view of the law which we have announced as governing this case.

In reference to that part of the evidence consisting of the complaint and answer, it was contended by the plaintiff's counsel that the second defense interposed by the defendant was an admission of that part of the seventh allegation of the complaint, in which it was alleged that the intestate was sitting on the track, on the end of a crosstie asleep, with his head and body bowed forward. The pleader had in the first defense emphatically denied, with great particularity, each and every charge in allegation seven of the complaint. And it was especially denied that the intestate's head and body were bowed forward, and that he was asleep or in an apparently helpless condition.

In the second defense, the defendant avers that the intestate was negligent in sitting down on the end of a crosstie *as alleged in the complaint,* and in a place plainly hazardous, and where the defendants' servants could not by due diligence
(178) have discovered his dangerous position; and that he was further negligent in sitting down and falling asleep in such a dangerous position, placing himself thereby in such a situation as to be unable to see or hear the train.

If these defenses are contradictory, such a course of pleading is permissible under section 245 of The Code. But the second defense may be considered as a plea of the contributory negligence of the plaintiff's intestate, although that plea was not necessary, to be made in this action, because the complaint stated facts which in law constituted negligence on the part of the plaintiff's intestate, and there was no negligence imputed in the complaint to the defendant, except that it had the "last clear chance" to avoid killing the intestate, and failed to stop the train in time to prevent his death. We think, taking the answer together, that it can not be construed to be an admission without qualification of the seventh allegation of the complaint.

No error.

Cited: Hanes v. Land Co., 129 N. C., 311; *McArver v. R. R., Ib.,* 388; *Clegg v. R. R.,* 132 N. C., 295; *Marks v. R. R.,* 133 N. C., 92; *Clegg v. R. R.,* 133 N. C., 304; *Carter v. R. R.,* 135 N. C., 499; *Plemmons v. R. R.,* 140 N. C., 288.

HARDY v. HARDY.

(Filed 30 April, 1901.)

JUDGMENT—*Setting Aside—Discretion of Court—Review by Supreme Court—Appeal.*

The trial court may set aside a judgment at the term at which it is rendered, and this discretion is not reviewable on appeal.

MONTGOMERY, J., dissenting.

ACTION by R. H. Hardy and W. D. Mewborn against W. A. Hardy, heard by Judge *O. H. Allen,* at December (Special) Term, 1900, of LENOIR. From an order setting aside a judgment for plaintiffs, they appealed.

(179)

George M. Lindsay, for the plaintiffs.
No counsel for the defendant.

CLARK, J. The defendant made a motion to set aside a verdict and judgment at the same term at which they were entered. He does not aver that there was excusable negligence, and the facts alleged, even if they had been found to be true, did not constitute excusable negligence. They were evidently urged solely as an appeal to the discretion of the Judge to set aside a verdict at the same term. If the setting aside the judgment had rested upon the ground of excusable neglect, there would have been error. But that ground nowhere appears in the motion, nor is it intimated anywhere in the record, and was evidently as foreign to the defendant as it was to the Judge. The Judge did not find whether there had been excusable neglect or not. No one suggested or urged that there had been such, nor is The Code, sec. 274, referred to. The Judge stated that he considered the affidavits filed, but without any finding what state of facts they proved, beyond the recital that the defendant had no notice of the special term at which the case was tried, and which he was then holding, he immediately adds "in the *exercise of the discretion* reposed in the Court," that he sets aside "the verdict of the jury herein *rendered at this term,*" and the order entered upon such verdict, and continued the cause for trial by jury at next term.

The rule that all action, taken at any term of the Court, is *in fieri,* and can be set aside at that term by virtue, as the Judge recited, "of the discretion reposed in the Court," has for wise purposes always existed in the English law from time imme-

morial. No case can be found restricting the exercise of that discretion, and there ought to be none. *Allison v. Whit-*
(180) *tier,* 101 N. C., 490. Certainly there are none in the North Carolina Reports. The only case relied on, *Quincy v. Perkins,* 76 N. C., 295, is not a limitation upon "the exercise of the discretion of the Judge" (as he recites in this case) to set aside the verdict at the same term at which it was rendered, but is an extension of the power to set aside for excusable neglect at that term. The reason for this is plain. The Judge might not wish to exercise his discretionary power, which he says he did in this case, and, if he did, whether he refused or granted the motion, there was no appeal; whereas, if he found there was or was not excusable neglect, his conclusion upon the facts found could be reviewed.

But here the defendant did not choose to take that course. He did not aver excusable neglect. His counsel was doubtless fully aware that his client's ignorance of the special term would give him no legal rights, not being excusable neglect, but thought it was a fact which, if believed by the Judge, might, with the other circumstances of this case, appeal to his discretionary power to set the verdict and judgment aside. He therefore properly relied upon the discretionary power of the Judge, as reasonably informed counsel would do. The Judge hence did not find the facts, nor did he adjudge that there was or was not excusable neglect. Hence, also, there is nothing for us to reveiw. The suggestion by plaintiffs' counsel in this Court, that the Judge set aside the action taken for excusable negligence is directly contrary to his judgment that he did so as a "matter of discretion," and is unsupported by a single word in the record. He simply said that he had considered the affidavits, and "in the exercise of the discretion reposed in the Court," set aside a verdict and order made "at this term."

The uniform and unbroken policy of the courts has been that the appellate courts have always refused to interfere with the exercise of such discretionary power reposed in the
(181) trial Judges.

The facts recited in the motion and affidavit appealed to the Judge's discretion, but the defendant did not aver that they constituted excusable neglect, nor did the Judge so hold, and, to overrule him on that ground, would be to hold erroneous a ruling which he has not made.

No error.

DOUGLAS, J., concurring. I am of opinion that the Judge had the power to set aside the judgment during the term at

which it was rendered; and it does not appear to me that he exceeded his just discretion in doing so.

As to what would be the law applicable thereto if the Judge had set aside the judgment after the term at which it was rendered, and upon the ground of excusable neglect, I do not care to express an opinion, as no such case is before us.

MONTGOMERY, J., dissenting. The Superior Court acquired jurisdiction of this case upon an appeal by the plaintiffs, who are judgment creditors of the defendant, from the appraisers' allotment of the defendant's homestead. The appeal, notice of which was served on the defendant, was returned to the regular November Term of the Superior Court, and at that term the case was continued. A Special Term of Superior Court was duly and legally called and held in December, 1900, at which term the case was reached and called for trial (the defendant, however, not being present in person or by attorney), and an issue was submitted to the jury as to the true value of the land allotted to the defendant as a homestead. The response to the issue was that the land was worth $1,300, whereupon a judgment was entered that certain commissioners appointed for that purpose should lay off to the defendant as his homestead a part of the land embraced in the first allotment of the value of $1,000. During the same Special Term of the Court the defendant lodged a motion to set aside the verdict and judgment. He affirmed in his affidavit made to (182) support of the motion, after alleging that the value of the land was less than $1,000, and that he believed he could show it by witnesses; (4) "that he attended the November Term, 1900, of this Court for the purpose of giving attention to this action and his interest therein involved; (5) that the defendant had no knowledge or information whatever that the present December Special Term of this Court had been called, or that it would be held, and that this defendant was for the first time informed that the court was in session and being held, by J. E. Turnage, who, on the day after the trial of this action by the court and jury, by chance saw this defendant on the public road near his house, and to the great surprise of this defendant informed him that court was in session in Kinston, and that on the day preceding, the issue herein had been submitted to and passed upon by a jury; (6) that the defendant was not represented at said trial, no evidence was offered in his behalf, and defendant verily believes that upon a trial of the issue on the evidence which defendant desires and will expect to offer if opportunity be given, the allotment of

the homestead heretofore made herein will duly appear to be just and equitable and not in excess of the amount prescribed by law, to-wit, $1,000."

The motion was resisted and counter affidavits filed for the plaintiffs, and the Court, after consideration upon the matter, found "that the defendant had no notice of the present term of the Court," and rendered judgment as follows: "It is, after considering the affidavits and defendant in the exercise of the discretion reposed in the Court, ordered, considered and adjudged that the verdict of the jury herein rendered at this term and the judgment and order appointing commissioners and appraisers to allot and set apart to the defendant his homestead, be and the said verdict and judgment are hereby
(183) rescinded and set aside, and this cause is continued for trial by jury."

I think there was error in allowing the motion. There can be no objection that the motion was made under sec. 274 of The Code, although it was made at the same term of the Court at which the verdict and judgment were rendered. *Quincy v. Perkins,* 76 N. C., 295. It is there said by the Court: "By sec. 133, C. C. P. (274 of The Code), the Judge in his discretion may relieve a party from judgment, order or other proceeding taken against him through his surprise, etc., at any time in one year." Of course, therefore, he may do it at the term at which a verdict (for this is included in the term "other proceeding") is taken. By the way, it may be proper to remark that the word "verdict" itself has been added to sec. 274 of The Code, by chapter 81, Laws 1893.

The finding of the fact by his Honor that the defendant had no notice of the present term of the Court is conclusive and can not be reviewed on the evidence in this Court. *Weil v. Woodard,* 104 N. C., 94. But the fact as found does not constitute excusable neglect, neither was the defendant excusable on the ground of surprise or mistake. Special Terms of the Superior Court are provided for by law for the purpose of enabling parties litigant to have their cases speedily tried; and of the sessions of such courts all suitors must take notice of their peril. It can be no sufficient excuse for relief against a judgment for the defendant to urge that he did not know of the term of the court at which judgment was rendered against him. "Parties to an action pending in court are fixed with notice of all motions and orders made at term." *Coor v. Smith,* 107 N. C., 430; *Stith v. Jones,* 119 N. C., 428.

But when the facts found by the Court do not constitute

excusable neglect in law, there is no discretion in the (184) trial Judge to set aside a verdict and judgment on a motion for that purpose. *Marsh v. Griffin,* 123 N. C., 660; *Stith v. Jones, supra.*

Cited: Cutler v. R. R., post, 492; *Turner v. Davis,* 132 N. C., 188.

GLENN v. RAILROAD.

(Filed 30 April, 1901.)

NEGLIGENCE—*Contributory Negligence—Personal Injuries—Railroads —Trespasser on Track.*

This action for injuries received on a railroad track was properly dismissed under the evidence.

ACTION by Samuel Glenn, by his next friend, J. W. Glenn, against the Norfolk and Western Railway Company, heard by Judge *E. W. Timberlake* and a jury, at November Term, 1900, of FORSYTH. The following is the testimony of the plaintiff:

"I live out in the country in this county about four miles. I went to West Virginia about 1897. I was 19 years old. I went over there to work. I thought of working the mines at that time. My brother James and Fred Bennett were with me. I was injured at Falls Mills Station. I was going to the station. I should suppose as near as I could guess it to be about 250 or 200 yards to the station. I was going to Pocahontas. I was to take the train at Falls Mills Station. It was in the daytime, in the morning about 11 o'clock, I reckon. It was between 11 and 12 o'clock. They did not blow any station blow. It did not blow any road crossing. I started to the station, Bramish. I thought I would walk down that way and see part of the country. I was told it was about three miles and I could get there in time going through that way. The cars (185) overtook me. It looked like the train would get to the station first. I was walking lively. My brother was not along with me, he went on ahead and was already down there at the station waiting for us to come on the next mail. I was walking down the track to get to station to get there in time to get on.

"The fellow that was with me said: 'I will run on ahead of the train and get the tickets and you can get right on.'

"He went on and got the tickets and I came on behind walking pretty swift. There were two tracks. I thought one was

a sidetrack. I was not thinking I was in any danger. When I got about 100 yards to the depot I thought I would stop and let the train go by and just as I looked around to see the train pass, it struck me right here somewhere on the foot and threw me over on the ground and knocked me on the head and somewhere on the side. That track led right direct to the depot. I took it to be the sidetrack. There was no signal given. There was a crossing right there. It knocked a hole in my head. It struck my shoes and hurt my foot. I did not do anything for four or five weeks. It was three or four days before I could walk. Every cloudy spell of weather now, and damp days, my foot and head hurt so I can not do scarcely anything at all. I had a grip-sack in my hand which I kept when my partner ran on ahead to get the tickets, I was going to the station and the train was coming behind me."

Upon cross-examination, by counsel for defendant, witness testified: "It was a bright clear day. It was about 11 or 12 o'clock in the day. I had never been about in that part of the country before. I had walked about three miles. I had Fred. Bennett with me. My brother had gone on ahead. I heard the train coming just before I got to the depot, but I did not look back. I told Fred. to run on ahead and get the tickets and I took the baggage. I was going down track same direction train was. First time I heard train it was up the road. (186) It was a mile and a half. I could hear it coming all the way. It did not blow anywhere. The last time I heard it blow I could not tell, I reckon it was about one mile off. I could hear it plainly coming on the track. I changed from one track to the other directly after I heard the train coming. I said to myself, 'I will get on the sidetrack.' I did not turn round to see whether it was coming on the track I was on or not. I thought to myself I was on the sidetrack because I thought the main line was the one that runs closer to the depot. I could not say which one was the main line at this time. I did not look back when I came on the track behind me. When I did look back I could not discover what track the line was on. I do not know how long these double tracks are."

A map was here shown the witness, who said: "I was on the left hand track before I was struck. I was on the right hand track when I was struck. I came on the track before I got to the bridge. I crossed just a little bit before I got to the public road. When I looked back I could not discover which track the train was on. I said to myself, 'Here's the depot standing on this side,' and I got on the other track. I knew the train generally blew for cattle. I thought I was right and

did not change. If they had rung a bell they could have told me better. I knew which track I was on. I had not noticed the double track, except about a mile, I just took it to be a side-track. It was confusing to me which track to get on when the engine was coming. I was used to single tracks in this country. I could not tell what track the engine was on; I made a mistake in getting on the wrong track."

The following statement was read to witness after examination by him and his admitting he signed it: (Objection by plaintiff.)

Statement Signed "Sam Glenn." "I was coming to Pocahontas and wanted to take the train at Falls Mills. (187) Fred. Bennett was with me; when we were about half a mile from Falls Mills we heard the train. We ran to get to depot before train and when near depot looked back and saw train coming. Fred. ran on ahead of me to get tickets; I saw train was coming on behind me and thought it was on left hand track and I got on right hand track and looked back, but it was too late to get off and train struck me and knocked me off to one side. They backed train and got me and brought me to Pocahontas. After train struck me I rolled myself under platform. SAM. GLENN."

"April 21, 1897."

Witness continuing, said:

"That statement is about right. It was just about what I told the jury today. When I was struck I was right opposite the platform. The train slowed up before it got to the station. It stopped in less than its length. I was not insensible after it hit me. I didn't exactly get under the platform; I was knocked under. I crawled out and got on the train and went to Pocahontas. I do not remember speaking or smiling at the engineer when I got off at Pocahontas."

Re-Direct Examination. "The train was about half a mile from the station when I changed tracks."

The counsel for the plaintiff here announced that he rested the case. Counsel for defense then moved to dismiss the case on the evidence of plaintiff's witness. The Court allowed the motion under exceptions from plaintiff. The plaintiff took nonsuit and appealed.

J. S. Grogan, for the plaintiff. (188)

Watson, Buxton & Watson, for the defendant.

COOK, J. The plaintiff is not entitled to recover, upon his own testimony, which is the only evidence offered. It was

immaterial to him whether warning signals were given or not. He heard the train when a mile and a half away, and heard it coming all along. The sounding of whistles and ringing of bells could not have increased his knowledge of the approach of the train. When it was within 200 or 250 yards, he looked back and saw it coming, and changed from one track to the other. He recognized the fact of danger. The railroad track itself was a warning of danger, made imminent by the approaching train. It was then his duty to keep his "wits" about him and to use them for his own safety. He knew or ought to have known that he was a trespasser, and it was his duty to have gotten out of the way of the train. The defendant was under no obligation to stop its train at the sight of a man on its track. It was apparent to the engineer that the plaintiff was in full possession of his faculties and could take care of himself, as was manifested by his "walking lively," carrying a gripsack and looking back, and he had a right to presume that the plaintiff would get out of the way of the train in due time. That he did not do so was his own fault, and he should suffer the consequences of his own folly.

The time has not yet come when railroad companies are obliged to furnish trespassers with personal guides and guardians to protect them from their own wilful misconduct, while experimenting with themselves around trains and engines. The paramount duty of a railroad company is to serve the best interests of public travel and traffic, which can not be done if delays have to be made in deference to those who wrongfully appropriate to their own use the rights of way on the (189) railroad tracks, while in possession of their mental faculties and physical power to take care of themselves and avoid injury.

No negligence upon the part of the defendant appearing, his Honor very properly dismissed the action.

No error.

LINDSAY v. BEAMAN.

(Filed 30 April, 1901.)

1. VERIFICATION—*Partition—Petition—Pleading.*

It is not necessary to verify a petition for partition.

2. EVIDENCE—*Documentary—Partition—Petition—Verification.*

It is not necessary that a petition for partition should be verified to make it competent evidence.

3. ESTOPPEL—*Judgment—Partition—Infant—The Code, Sec.* 286.

One who joins an infant in a petition for partition is bound by the judgment, though it is not approved by the Judge of the Court.

4. EVIDENCE—*Documentary—Partition—Record—The Code, Sec.* 1897.

The record of partition proceedings is admissible in evidence though not recorded as required by section 1897 of The Code.

5. ESTOPPEL—*Record—Partition.*

When land is incorporated and assigned in a decree in partition proceedings with the knowledge and consent of the parties thereto, the administrator of one of the parties is estopped from denying that the land was not originally included in the petition.

6. ADVERSE POSSESSION—*Color of Title—Partition.*

The record of partition proceedings is color of title and possession for seven years thereunder gives a good title.

APPLICATION by George M. Lindsay, administrator, (190) for leave to sell lands for the payment of debts, heard on appeal from the Superior Court Clerk, by Judge *Frederick Moore,* at Special (Fall) Term, 1900, of GREENE. R. E. Beaman and B. W. Edwards claimed title to the land, and from a judgment for the claimants, the plaintiff administrator appealed.

George M. Lindsay, in propria personam.
H. G. Connor & Son, and *L. V. Morrill,* for the defendant.

COOK, J. A trial by jury having been waived, the issues were found by the Judge. The case is presented for our decision upon exceptions taken by the plaintiff to the admissibility of evidence. The facts found by his Honor are fully set out in the judgment. The first exception is to the admission of the record of the Superior Court in the special proceedings in the case of R. E. Beaman and Charity Beaman, petitioners, *ex parte,* for partition of land, upon the following grounds:

(1) On the ground that the petition was not verified.

(2) On the ground that the judgment was not approved by the Judge of the Superior Court. (Charity Beaman being an infant and appearing by guardian.)

(3) On the ground that the proceeding had not been recorded in the office of Register of Deeds of Greene County as required by section 1897 of The Code.

(4) On the ground that the land in controversy is not included in the lands described in the petition in said cause, and therefore the same is irrelevant and incompetent.

(1) We know of no statute which requires the petition in a special proceeding to be verified. And if there be such, coun-

sel failed to cite it to the Court. The rules of The Code of Civil Procedure (which are applicable to special proceedings) do not *require* any pleading to be verified; but when one
(191) plea is verified every subsequent one, except a demurrer, must be verified also. Secs. 278, 257 and 1923 of The Code.

(2) While the final judgment was not approved by the Judge, yet it is binding upon the defendant, R. E. Beaman. He is not under disability and can not complain. As to the infant petitioner, it is invalid only in so far as it may be prejudicial to her interest. Code, sec. 286. It is good so long as it remains unchallenged, which she may do by motion in the cause, and for proper cause shown have it set aside. Those holding title thereunder would do so subject to her legal rights, which may or may not be exercised, which is not material to this exception. For all other purposes and as to all persons, other than the infant, it is just as effective and binding as if it had been submitted to and approved by the Judge, and can not be collaterally impeached.

(3) And for the purpose of evidence this record of the Superior Court was admissible, notwithstanding it had not been registered in the office of Register of Deeds as required by section 1897 of The Code. It obtains no additional verity or authority by reason of such registration, nor is such registration required for the purpose of fixing parties with notice, but simply for convenience in tracing titles, and to keep evidence of titles by purchase under one system and in the same office.

(4) The defendant claimed under color of title and introduced the record in the partition proceeding to show color, and it was material to his defense to show that the tract of 100 acres (the one in litigation) was embraced in the record. It was immaterial whether it was set out in the petition, or incorporated in the record, and thus assigned by decree of the Court to defendant, so far as plaintiff's intestate was concerned; for it is found as a fact that he was present, together with R. E. Beaman, and it was incorporated with their knowledge and under their supervision; and they are mutually
(192) estopped from denying truth or regularity of record. A record of partition proceedings is color of title and seven years adverse possession thereunder gives a good title. *Bynum v. Thompson,* 25 N. C., 578; *Smith v. Tew,* 127 N. C., 290. And it is immaterial for purpose of evidence, whether it was registered or not, in office of Register of Deeds. Partition proceedings are public records of the Superior Court of which all parties have to take notice. *Titles* are acquired by deeds, but not by

partition proceedings. In the case of deeds title passes from owner to purchaser, and to constitute color of title must be registered (*Austin v. Staten*, 126 N. C., 783), while in partition proceedings between tenants in common no title passes, only the unity of which is fully given by the record itself—the common source of title resting undisturbed.

The other exceptions taken by plaintiff are to the competency of the witness Henry Doring to testify under section 590 of The Code, and the relevancy and materiality of his testimony.

We fail to find any error upon the part of his Honor in overruling these exceptions. Doring was not a party to the action, nor did he have any interest in the event or result, nor can his interest in any way be affected by it; he had derived no interest from, through or under either of the parties to the action, or anyone interested in the result, nor from intestate. It nowhere appears that his evidence contradicted the partition proceedings, or the deed executed to intestate. But it tends to establish the fact that intestate bought the "Nancy Doring" land with the debt due to defendants' father's estate, and that it was agreed between intestate and R. E. Beaman that intestate was to have 65 acres of it and said R. E. Beaman to have the residue, the "100-acre" tract; and the further fact that they caused the 100-acre tract to be incorporated in the (193) report of the commissioners and assigned to defendant, and that immediately thereafter each entered into possession of his respective tract and has had exclusive adverse possession ever since. There is

No error.

Cited: Carter v. White, 131 N. C., 16; *Harrington v. Rawls, Ib.*, 41; *Collins v. Davis*, 132 N. C., 111; *Carter v. White*, 134 N. C., 479; *S. c., Ib.*, 480; *Janney v. Robbins*, 141 N. C., 408; *Hill v. Lane*, 149 N. C., 272.

EXCHANGE BANK v. APALACHIAN LAND AND LUMBER CO.

(Filed 30 April, 1901.)

1. JURISDICTION—*Justices of the Peace—Attorney's Fees.*

A provision in a promissory note for attorney's fees in the event of failure to pay without suit is no part of the principal debt, and when the amount of the note and interest is less than $200, a justice of the peace has jurisdiction.

2. CONFLICT OF LAWS—*When Lex Fori Governs—Negotiable Instruments—Attorney's Fees.*

The validity of a provision in a note for attorney's fees executed and payable in Georgia, must be determined by the laws of North Carolina.

3. FEES—*Attorney's Fees.*

A provision in a promissory note for attorney's fees in case of suit on note is invalid.

ACTION by the Exchange Bank against the Apalachian Land and Lumber Company, heard by Judge *O. H. Allen* and a jury, at Fall Term, 1900, of CHEROKEE. From a judgment for the plaintiff, the defendant appealed.

E. B. Norvell, for the plaintiff.
Dillard & Bell, and *Busbee & Busbee,* for the defendant.

CLARK, J. This action began by a warrant before a justice of the peace which summoned the defendant (no written (194) complaint being filed) "to answer the complaint of plaintiff in a civil action for the recovery of $191.67, due by note." At the trial the promissory note put in evidence was for $191.67, with 7 per cent interest from date (15 June, 1899) "with all costs of collection including 10 per cent attorney fees in case suit is necessary for collection," with a further collateral agreement to waive "homestead and personal property exemption under the Constitution and laws of North Carolina or any other State." The note was executed in Georgia and made payable there.

The justice of the peace rendered judgment for $191.67 and 7 per cent interest and costs and the further sum of $19.16 for ten per cent attorney's fees. The defendant appealed to the Superior Court where the Judge struck out the addition of the ten per cent attorney fees and rendered judgment for $191.67 with 7 per cent interest and costs. Thereupon the defendant, singularly enough, appeals to this Court on the ground that the attorney fees made the principal debt in excess of $200, and therefore the justice of the peace had no jurisdiction.

The sum demanded in the summons was $191.67, which was less than $200, and on the face of the record the justice of the peace had jurisdiction. The allowance of 7 per cent interest was proper, for that was a part of the contract of indebtedness and the *lex loci contractus* governs. *Arrington v. Gee,* 27 N. C., 590; *Morris v. Hockaday,* 94 N. C., 286. It is otherwise as to the collateral agreement for the addition of 10 per cent attorney fees, "in case suit is necessary for collection." This is no part

of the indebtedness, for the note could have been discharged before action brought by payment of $191.67 and interest. This addition was therefore merely a penalty or stipulation for liquidated costs in event a suit was necessary. (195) Hence it is matter affecting purely the remedy, *lex fori governs,* and this stipulation is construed by our procedure (as is also the further agreement as to waiver of homestead and exemptions, *Beavan v. Speed,* 74 N. C., 544), under which such stipulation will not be enforced. In *Tinsley v. Hoskins,* 111 N. C., 340, the point is fully discussed, quoting with approval from *Bank v. Sevier,* 14 Fed., 662, "Such a provision is a stipulation for a penalty or forfeiture, tends to the oppression of the debtor and to encourage litigation, is a cover for usury, is without any valid consideration to support it, contrary to public policy and void," and citing very many other cases to like purport, among them *Bullock v. Taylor,* 39 Mich., 137, in which Judge *Cooley* says: "This provision in the notes is as much void as it would have been had it called the sum unpaid by its true name of forfeiture or penalty," and among others also *Witherspoon v. Mussehuan,* 14 Bush, 214, where the Courts said such provisions are "not only in the nature of penalties, but they are contrary to public policy and tend to encourage litigation." *Tinsley v. Hoskins* has been since cited and followed as authority in *Brisco v. Norris,* 112 N. C., 671, and *Williams v. Rich,* 117 N. C., 235, and more recently in *Turner v. Boger,* 126 N. C., 300.

It is true we are cited to Georgia cases holding that such stipulation is an addition to the capital of the debt. But as matter of general law we can not concur in the proposition that a penalty, for failing to pay without suit, is a part of the principal debt, and as this is a matter affecting the remedy we are further forced to follow our own decisions, in which we have consistently refused to enforce the collection of such penalty, because contrary to public policy and hence void. Besides, in Georgia itself a statute was adopted prior to the date of this note (Ch. 267, Laws 1890-1, Vol. 1, p. 221), "to declare all obligations to pay attorney's fees, in addition to the interest specified therein, upon any note or other indebtedness, void and of no effect, and to prohibit collection of (196) the same," and the justice of the peace would have had jurisdiction of this action even if it had been brought in that State, especially as there held, because not claimed in the summons. *Rimes v. Williams,* 99 Ga., 281.

The jury having found that the plaintiff was an innocent purchaser for value before maturity, the other finding that the

note was procured by fraudulent misrepresentations by the original payee became immaterial and indeed was not pressed in this Court.

No error.

NORTH v. BUNN.

(Filed 30 April, 1901.)

1. VENDOR AND PURCHASER—*Betterments.*

The vendor is not entitled to damages for betterments placed on land before the contract for the sale of the land, the contract having been repudiated by the vendor.

2. VENDOR AND PURCHASER—*Betterments by Vendor—Measure of Damages.*

The measure of damages for failure of vendor to convey land under a parol contract is the value of the land as increased by the betterments.

ACTION by Linus North and Sophia E. North, his wife, against Albert Bunn and Kittie Bunn, his wife, heard by Judge *O. H. Allen* and a jury, at Fall Term, 1900, of TRANSYLVANIA. From the following judgment, the plaintiff appealed:

L. North and S. E. North v. Albert Bunn and wife Kit-
(197) *tie Bunn, and J. O. Dermid.*

This cause coming on to be heard at the present term of the Court, before Judge *Allen* and a jury, and being tried on the issues submitted, and the jury having found all the issues in favor of the defendants, it is, therefore, on motion of W. A. Smith and Gash & Pless, attorneys for defendants, ordered, adjudged and decreed:

1. That the defendant Kittie Bunn recover from the plaintiffs the tract of land mentioned in the pleadings as having been purchased from Samuel King, and described as follows: Beginning at a locust post in the old King and England line 3 poles and 4 links west of the old King corner and runs with said line west 3 poles and 18 links to the locust post; thence north 20 degrees east 2 poles and 4 links to a stake; thence south 52 degrees east 3 poles and 15 links to the beginning, and that the plaintiffs, L. North and S. E. North, his wife, be declared trustees of the legal title of said property to be held in the same plight, condition and estate as though the conveyance ordered was in fact executed.

2. That the plaintiffs recover from the defendants the sum of eighteen dollars ($18) as rents and profits received from said land and heretofore received in this action.

3. It is further ordered and adjudged that the defendants recover of the plaintiffs the sum of fifty dollars ($50) as the value of the permanent improvements put upon the plaintiffs' land under the parol contract, together with the costs of this action, to be taxed by the clerk.

It is further ordered that the plaintiffs recover of the defendants the land described in the complaint, and that the plaintiffs be restrained from ejecting the defendants from the premises until they fully comply with the provisions of the decree.

George A. Shuford, for the plaintiffs.
No counsel for the defendants. (198)

FURCHES, C. J. This case involves mighty little, but it has given the parties and the Court a great deal of trouble.

The doctrine of betterment, arising upon the repudiation of parol contracts for the sale of land, is purely equitable (*Luton v. Badham,* 127 N. C., 96), and was established to prevent fraud. It will not allow a party to repudiate his contract and profit thereby. But the measure of damage is not what it cost to put the improvements on the land, but only to the extent the land is improved—enhanced in value—by the improvements. The bargainee may put such buildings—"improvements"—on the land as not to "improve" it; that is, not to make it more valuable. And it is not clearly seen by the Court how it is that defendants, putting the corner of the house on plaintiffs' land, has improved it, that is, made plaintiffs' land more valuable; nor does it appear to the Court upon what rule the jury assessed the value of these "improvements," whether by ascertaining the cost of putting them there, or their value to plaintiffs' land. As we are unable to see how the value of plaintiffs' land is enhanced at all by the corner of defendants' house being over the line, it would seem that they estimated the cost of building this corner of the house; and, if so, it was error; but there is no exception pointing it out, and therefore the Court can not correct it, if there be error.

The only exception contained in the record is to the judgment. And the only error we see in this is that it gives the defendant Bunn $50 damage for the "improvements" she has put upon plaintiffs' land. We think this was not justified by the finding of the jury, and is error. The jury in response to issues submitted to them found the value of the "improvements" to be

(199) $50, but that $25 of this was put on plaintiffs' land before the parol contract of plaintiff to sell to defendant.

That part of the "improvements" put upon the land before plaintiff contracted to sell could not have been induced by the contract; and, therefore, it could be no fraud on defendant not to pay her for the "improvements" made before the contract. The judgment must be reformed in this respect, and made to read $25, instead of $50.

We know of no power this Court has, in this action, to compel defendant to move her house, as plaintiffs' counsel says she may do. But upon plaintiffs' paying the defendants' judgment for the "improvements," the plaintiff will be entitled to a writ of possession, and to have defendant removed from that part of the house which is on plaintiffs' land.

Each party will pay one-half of the costs of this appeal.

Modified and affirmed.

POST-GLOVER ELECTRIC CO. v. McENTEE-PETERSON ENGINEERING COMPANY.

(Filed 7 May, 1901.)

1. ATTACHMENT—*Judgment—The Code, Sec.* 370.

Where a person in possession of property is not a party to the attachment suit, the plaintiff, in addition to a judgment for his debt, is not entitled to a judgment for such property, but must proceed under section 370 of The Code.

2. ATTACHMENT—*Judgment—Execution—Title.*

A sale under an execution issuing upon a judgment on an attachment only passes the right of the defendant in attachment.

DOUGLAS, J., dissenting.

ACTION by the Post-Glover Electric Company against (200) the McEntee-Peterson Engineering Company, heard by Judge *W. S. O'B. Robinson,* at March Term, 1901, of MECKLENBURG, by consent, as of February Term, 1901, of GASTON. The plaintiff, in addition to the judgment against the defendant for the debt, asked a further judgment subjecting to the satisfaction of the judgment the property which had been attached. To the refusal of this additional judgment, the plaintiff excepted and appealed.

R. L. Durham, for the plaintiff.
Burwell, Walker & Cansler for the garnishee.

CLARK, J. The plaintiff brought this action to recover the sum of $302.88, alleged to be due by defendant, and attached certain property alleged to be owned by defendant, and also garnisheed a certain debt alleged to be due defendant by the town of Gastonia. At the first term of court, no answer having been filed, the plaintiff obtained judgment by default final upon its verified complaint. After such judgment, the garnishee obtained leave to file an amended answer, which was filed and sets up a defense, but this was not passed upon by the Judge, and hence is not before us. The plaintiff asked, in addition to the judgment against defendant for the debt, a further judgment subjecting to the satisfaction of the judgment taken upon the debt the property which had been attached. To the refusal of this additional judgment the plaintiff excepted and appealed. This is the only point presented.

There was no error. The plaintiff's remedy was to proceed under The Code, sec. 370. The execution is issued by the Clerk as a matter of course upon the judgment and, under it, the property levied upon under the attachment is sold (if liable to sale), and what title the purchaser gets will be determined after the execution sale, for the purchaser buys (201) only the right of the defendant in the attached property (*Davis v. Garret,* 25 N. C., 459), as in all other cases of sale under execution. Should the Clerk not issue the execution, the remedy is pointed out in *Gooch v. Gregory,* 65 N. C., 142, but no refusal is here averred.

The Court will not determine beforehand what title will be conveyed by sale under the execution. There is no interpleader by any one claiming to own the attached property, so as to raise an issue now. The town of Gastonia has only answered as to the fund garnisheed, but it has not interpleaded or in anywise made itself a party as to the attached property. The attachment is only upon the interest of the defendant in the attached property. The town of Gastonia could not be made a party to the original action and has not seen fit to interplead so as to raise an issue as to the title of the attached property. It was unnecessary to adjudge defendant's interest therein to be sold, for that is marked out by the attachment, and as a matter of course will be sold under the execution issued thereon. What the plaintiff desires, and asks, is that the attached property be adjudged subject to sale in this action so as to give the purchaser title thereto, but this can not be done, seeing the

party in possession and claiming the same, the town of Gastonia, is not a party and has not interpleaded.

For these reasons, whether the town is subject to garnishment process, or whether the property, if owned by the town, is liable to attachment, are interesting questions not now before us.

In refusing to sign the desired judgment to subject the property to the payment of plaintiff's debt, there was

No error.

Cited: *May v. Getty,* 140 N. C., 318.

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(202)

SUMMERROW v. BARUCH.

(Filed 7 May, 1901.)

1. AGENCY—*Declarations—Admissions—Res Gestæ—Principal and Agent.*

   The declarations and admissions of an agent are not competent to prove the agency unless a part of the *res gestæ*.

2. EVIDENCE—*Res Gestæ—Declarations and Admissions of Agent—Agency.*

   The declarations in this case are inadmissible to prove agency as part of the *res gestæ*.

MONTGOMERY, J., dissents.

ACTION by B. J. Summerrow and Lizzie L. Summerrow against Herman and D. H. Baruch, heard by Judge *W. S. O'B. Robinson* and a jury, at January Term, 1901, of MECKLENBURG. From judgment for plaintiff, the defendants appealed.

Jones & *Tillett* and *Jas. A. Bell,* for the plaintiffs.

Burwell, Walker & *Cansler* and *Osborne, Maxwell* & *Keerans,* for the defendants.

FURCHES, C. J. This is an action for damages for assault and slander, growing out of the same transaction. The defendant D. H. Baruch is the wife of Herman Baruch, and the owner of a store in the city of Charlotte, and the defendant Herman is her general manager of the store. In December, 1899, the plaintiff, Mrs. Summerrow, in company with a lady friend (Mrs. Barnwell) went into this store with the view of making

some purchases. The store was very much crowded, but the *feme* plaintiff and her friend made their way through the crowd to one of the counters and commenced to examine a piece of lace, while her friend turned to another counter and (203) was examining some dress goods. At this time and while the *feme* plaintiff had the lace in her hands, her friend called her attention to the dress goods she was examining, and the *feme* plaintiff, with the lace in her hands, turned around to answer the call of her friend, when one Friedham put his hand on her shoulder and asked her what she had there. She replied, a piece of embroidery, and wanted to know the price, when Friedham said: "I know you want to know the price; you stand here; you need watching, madam. I will call Mr. Baruch." He called Baruch and then turned around and took the embroidery and said: "You would have made a pretty haul if you had hauled off this;" to which plaintiff replied: "I give you to understand I am not trying to haul anything." He then said: "What have you got there in that bundle?" to which she replied: "It is none of your goods," and threw the bundle on the counter, and it was examined and found to be a pair of shoes she was taking to the shop to be repaired. Friedham had called Mr. Baruch, who came up, and plaintiff said: "Mr. Baruch, this man has accused me of trying to steal goods," and Mr. Baruch said: "That is all right, that is all right; I know this lady," and Friedham said: "Mr. Baruch, you had better get someone else to watch this counter; they are tearing up goods and I don't know what has become of them."

Mrs. Summerrow also testified that Mr. Baruch told her to look at any goods and bring them to him and he would price them; that it was in the forenoon when she was insulted by Friedham, and she went back to the store that evening when she saw Friedham waiting on two ladies, measuring some goods.

There was much evidence introduced during the trial by plaintiffs, but none that tended to establish the agency of Friedham, except that stated above.

The agency of Friedham was denied by defendants, and defendants and Friedham testified that he was not employed by them; that he had nothing to do in or with (204) the store, and was in no way the agent of the defendants, and they were not responsible for any wrongful act of his.

Not denying the wrongful acts and conduct of Friedham, the defense is put upon two grounds: That there is no evidence that Friedham was the employee or agent of the defendant D. H. Baruch; and, if there was any evidence tending to show that he was the employee of D. H. Baruch, he was not author-

ized by such employment to commit the assault and slander the plaintiff, and she is not liable therefor. These are interesting questions. But if it is found that defendants' contention as to the first ground is true, it will not be necessary to consider the second.

There is no evidence showing or tending to show that Friedham was the employee or agent of D. H. Baruch, except what Friedham said at the time of the occurrence of the transaction complained of, and the implied admissions of Herman Baruch when Friedham said to him: "Mr. Baruch, you had better get someone else to watch this counter; they are tearing up goods and I don't know what has become of them."

The general rule is that the declarations and admissions of an agent are not competent to prove the agency—they do not of themselves establish agency. Mecham Agency, secs. 714, 715, 716, 717; Story Agency, secs. 134-137; *Willis v. R. R.*, 120 N. C., 512, where almost this very case is put by way of illustration; *Taylor v. Hunt,* 118 N. C., 168; *Gilbert v. James,* 86 N. C., 244; *Grandy v. Ferebee,* 68 N. C., 356.

The fact that it was admitted that Herman Baruch was the general manager of the store of D. H. Baruch makes no difference. He is still but an agent and his declarations or admissions do not bind his principal. They are classed as (205) hearsay, and are not under oath. *Williams v. Telephone Co.*, 116 N. C., 558; *Rumbough v. Improvement Co.*, 112 N. C., 751; *Southerland v. R. R.*, 106 N. C., 100.

This seems to be admitted to be the general rule. But plaintiffs sought to take it out of the general rule, and bring it under the exception to the general rule by claiming that it was a part of the *res gestæ*. It is admitted there is such an exception, that is, where the words spoken are a part of the *res gestæ,* they are admissible evidence. The question then is, were they a part of the *res gestæ? Res gestæ* is generally defined to be what is said or done contemporaneous with the fact sought to be established, or, at least, so nearly contemporaneous in point of time as to constitute a part of the fact to be proved and to form a part of it, or to explain it.

This, we understand to be the rule laid down by the best authorities, and is the one that seems to have been adopted in this State, and is the one we adopt. Even with this plainly defined rule, it is sometimes difficult to determine whether the words spoken, or the admissions made, are a part of the *res gestæ* or not. But when we consider what these declarations were intended to prove, we meet with no such trouble in this case.

The fact desired to be proved by these declarations of Friedham, and the implied admissions of Herman Baruch, is that Friedham had been employed by the defendant D. H. Baruch before, and was employed by her at the time he committed the assault and insulted the *feme plaintiff*. It can not be contended that the acts and words of Friedham proved his agency. Indeed, we do not think that was insisted on by the learned counsel for the plaintiff; nor can what Herman Baruch "said" by saying nothing when Friedham said to him: "You had better get someone else to watch this counter," proved that Friedham had been employed by defendants. It can not, as we think, be contended that this, if taken to be an admission, was any part of the *res gestæ* of Friedham's (206) employment, if he ever was employed, and that is what it was offered to prove. And if it was not a part of the *res gestæ*, then it was incompetent, for Herman himself was only an employee and agent of the defendant D. H. Baruch, and it falls directly within the case of *Williams v. Telephone Co., supra*, and the other case there cited.

To this general rule, and the exception thereto of being a part of the *res gestæ*, there seems to be some authority for another exception, that is, where there is a *special* agent, who is authorized to receive payment of the debt—that his admission that he had received the money or payment is competent evidence. *Bank v. Wilson*, 12 N. C., 484; Story Agency, sec. 137, note 3. But if these be authority for such an exception, this case does not fall within it. And such exception seems not to have been recognized in the many cases in our Reports, since that of *Bank v. Wilson*, decided in 1828.

After a careful examination of this case and the authorities, we are of the opinion that the defendants' motion to dismiss as of nonsuit should have been allowed.

Error.

DOUGLAS, J., concurring. While concurring in the result, under the circumstances of this case I am not prepared to say that an agent having entire charge of the principal's business, or of some independent branch thereof, can never bind his principal by admissions made in the distinct line of his employment. Where a principal (for instance a wife, as in the present case), simply owns a business and leaves its entire management and control to a general agent, over whom she exercises no supervision whatever, it seems to me that cases might arise where the inherent nature of the transaction would make his admissions binding upon her. How far a merchant having

(207) an open store into which he invites the public, is bound to protect them from insult or assault by his employees, I am not now prepared to answer. This question can not arise without legal admission or proof of the employment. A merchant can not be held to the strict obligations of an innkeeper or a common carrier; but it seems to me that there must be some measure of duty resting upon him, arising either from public policy or in the nature of implied contract, to exercise reasonable care in protecting his customers from the tortious acts of his employees, especially when such acts are done under color of their employment.

Cited: Jennings v. Hinton, post, 216; *Parker v. Brown,* 131 N. C., 264; *Bumgardner v. R. R.,* 132 N. C., 443; *Machine Co. v. Hill,* 136 N. C., 129.

DUNHAM v. ANDERS.

(Filed 7 May, 1901.)

CONSTITUTIONAL LAW—*Vested Right—Judgment of Justice of the Peace—Penalty—The Constitution, Art. XIV, Sec. 7—The Code, Sec.* 1870.

A judgment of a justice of the peace for a penalty, though appealed from, is a vested right, and can not be divested by legislative enactment.

ACTION by the State on relation of J. R. Dunham against W. K. Anders, heard by Judge *Frederick Moore* and a jury, at Spring Term, 1901, of BLADEN.

This is an action originally brought before a Justice of the Peace to recover a penalty of two hundred dollars under the provisions of Article XIV, section 7, of the Constitution, and section 1870 of The Code. The 3d paragraph of the complaint alleges: "That from the first Monday in July, 1897, up to and including the first Monday in April, 1898, the defend-
(208) ant exercised and performed the duties, powers and functions of both the officers aforesaid, to-wit, the office of County Commissioner of Bladen County and the office of member of the Board of Education for Bladen County." On March 25, 1899, the plaintiff obtained judgment for the amount of the penalty, from which the defendant appealed to the Superior Court. Upon the trial in the Superior Court, the defendant introduced the following act of the General Assembly, ratified on 2 March, 1901, which is as follows:

AN ACT FOR THE RELIEF OF CERTAIN CITIZENS.

Whereas, the Supreme Court of North Carolina decided in the case of *State ex rel. Barnhill v. L. G. Thompson,* at February Term, 1898, that the same person can not hold the office of County Commissioner and also be a member of the board of education; and, whereas, certain persons honestly believing that they had the right to hold both positions, did hold the same, till the rendition of said decision, and thereby incurred the penalty prescribed in section 1870 of The Code;

The General Assembly of North Carolina do enact:

SECTION 1. That all persons who held the office of County Commissioner and the office of member of the board of education at the same time prior to and up to the 1st day of July, 1898, be and they are hereby relieved and shall not be held liable for the penalty prescribed in section 1870 of The Code, or for any other penalty by reason of the holding of the said two offices.

SEC. 2. This act shall apply to suits now pending for the collection of said penalties: *Provided,* that the court in which such action is pending may order the costs in the action to be paid by either party in the event such action is (209) dismissed by reason of the provisions of this act.

SEC. 3. This act shall be in force from and after its ratification.

Whereupon, the following issues were submitted to the jury and answered in manner and form following:

ISSUES.

1. Did the defendant hold two offices, as alleged in the complaint?

Answer. Yes.

2. Did the plaintiff obtain judgment against the defendant for the penalty sued for in this action on 25 March, 1899, before J. M. Bryan, an acting Justice of the Peace for Bladen County?

Answer. Yes.

3. Did the defendant appeal from said judgment rendered by the Justice of the Peace, and is said appeal now pending?

Answer. Yes.

4. Was said appeal pending on 2 March, 1901?

Answer. Yes.

5. Did the plaintiff's cause of action exist within twelve months prior to the commencement of this action?

Answer. Yes.

Upon which verdict the plaintiff moves for judgment. Motion refused, and his Honor, *Fred. Moore,* Judge presiding, being of the opinion that the act of the General Assembly, ratified 2 March, 1901, and introduced in evidence by the defendant, destroyed the plaintiff's cause of action and relieved the defendant of any penalty incurred by reason of Article XIV, section 7, Constitution of North Carolina, and section 1870, chapter 45, Volume I, of The Code of North Carolina,
(210) rendered judgment in favor of defendant.

From a judgment for defendant, the plaintiff appealed.

R. S. White (*and Lewis* & *Schulken* by brief), for the plaintiff.

James H. Pou and *C. C. Lyon,* for the defendant.

DOUGLAS, J., after stating the facts. The only point presented for our consideration is whether a plaintiff can by a Justice's judgment, remaining unreversed, acquire such a vested right in the penalty as can not be taken from him by the Legislature.

Cooley, in his work on Constitutional Limitations, says at page 443: "So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered." But the same distinguished author says at page 443: "But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference."

In the recent case of *Dyer v. Ellington,* 126 N. C., 941, this Court says on page 944: "An informer has no natural right to the penalty, but only such right as is given to him by the strict letter of the statute. It is not such a right as is intended to be protected by the act, but is one created by the act. He has in a certain sense an inchoate right when he brings his suit, that is, the bringing of the suit designates him as the man thereafter exclusively entitled to sue for that particular penalty; but he has no *vested* right to the penalty until judgment. Until it becomes *vested,* we think it can be destroyed by the Legislature. If the penalty had been reduced to judgment, or had been given to the injured party in the nature of liquidated damages, the case would be essentially different."

In that case the act of remission was passed while the action was pending in the Justice's Court, and *before judg-*
(211) *ment.* In the case at bar, the act was passed *after* judgment in the Justice's Court, and while the action was pending on appeal in the Superior Court. Upon the trial in the latter Court, all the issues involved in the case before

the magistrate were found for the plaintiff. It thus appears that no error was found in the justice's judgment, which neither was, nor could have been, reversed upon its original merits. It therefore stands in full force and effect, subject only to the plea in bar of the remitting statute, upon which alone the Judge below based his judgment in favor of the defendant.

This brings us to the consideration of the nature of a judgment obtained before a Justice of the Peace, and the effect thereon of an appeal to the Superior Court. If such a judgment is a final judgment, that is, a judgment finally disposing of the subject matter of the action, subject only to reversal on appeal, and remains in full force and effect until such reversal, notwithstanding the mere fact of appeal, then, in our opinion, it becomes a vested right of property in the plaintiff that can not be divested except by a reversal on its original merits. In other words, the plaintiff can not be divested of his property therein by merely legislative action.

Of course if the plaintiff had failed to recover before the Justice of the Peace, and had himself appealed, he would have had no vested right, as he would have had no judgment to which such a right could attach. He would have only a qualified right of action, exclusive as far as the particular penalty is concerned, but subject to loss by legislative interference. A judgment of a Justice of the Peace is a *final* judgment when it fully disposes of the subject matter of the action, since, unless reversed on appeal, it finally determines rights of parties.

An appeal to Superior Court does not vacate the judg- (212) ment, nor even suspend its operation. Code, sec. 875. It is true the appellant may obtain a stay of execution of the judgment by giving an undertaking to secure the full amount of the judgment, together with all costs, as provided by sections 882, 883, 884 and 885 of The Code; but the judgment otherwise remains in full force and effect, even retaining its lien on real estate when properly docketed, which is one of the highest attributes of a judgment. While the trial on appeal in the Superior Court is *de novo,* yet the judgment appealed from remains in force until reversed or modified by a judgment of the Superior Court. *Hiatt v. Simpson,* 35 N. C., 72, 74; *Whitehurst v. Transportation Co.,* 109 N. C., 342, 344. In *Dysart v. Brandreth,* 118 N. C., 968, 973, this Court says: "A Justice's judgment, when duly docketed in the office of the Clerk of the Superior Court, becomes a judgment of the Superior Court to all intents and purposes"—citing *Cannon v. Parker,* 81 N. C., 320; *Adams v. Guy,* 106 N. C., 275; "and it

becomes a lien on all the real estate of the defendants in the county where it is docketed, which continues for ten years from the date of docketing"—citing *Cannon v. Parker, supra; Murchison v. Williams,* 71 N. C., 135. "The fact that defendant appealed from the judgment of the Justice of the Peace, and gave security to stay execution, did not deprive the plaintiff of the right to have the judgment docketed, nor *did it take away the lien of the judgment.*"

The defendant's counsel cited some authorities in other jurisdictions to the effect that the legislative authority may, by repealing a law imposing a penalty pending an appeal from a judgment therefor, defeat the judgment; or, after judgment and before execution, defeat the execution. All such cases appear to have been decided upon particular facts or principles not applicable to the case at bar; as for instance (a), the construction of local statutes; (b) where the national or State government itself prosecuted the action with only a contingent interest going to the informer; (c) where the effect of the
(213) appeal was to vacate or completely suspend the judgment.

That such is not the general effect of an appeal is shown by Black on Judgments, where the learned author says, in section 522: "The judgment of a Justice of the Peace or other inferior tribunal (in a case where jurisdiction of the parties and subject matter appears from the face of the proceedings) so long as it remains *unreversed,* is, for every purpose, as binding and conclusive between the parties as that of the highest court of record in the State." Freeman on Judgments says, in section 524: "Where a court of special jurisdiction, having authority to decide the matter in controversy, acquires jurisdiction over the parties to the suit, its judgment is final and conclusive unless *reversed* by some appellate court."

The case at bar is the counterpart of *Dyer v. Ellington, supra,* inasmuch as the act pleaded in bar was passed *after* judgment was rendered in the Justice's Court. We are, therefore, of opinion that when the plaintiff obtained judgment for the penalty before the Justice of the Peace, he acquired a vested right of property that could be divested only by judicial, and not by legislative, proceedings.

On the issues found in the Superior Court, judgment should have been rendered for the plaintiff, and its judgment is therefore

Reversed.

Cited: *Robinson v. Lamb,* 129 N. C., 19; *Bank v. Hodgin, Ib.,* 249; *Grocery Co. v. R. R.,* 136 N. C., 401.

(214)

JENNINGS v. HINTON.

(Filed 7 May, 1901.)

1. PLEDGES—*Fiduciary Relations—Contracts—Sale—Burden of Proof—Collateral Security.*

Where a married woman assigns to the mortgagee of her husband an insurance policy upon the life of her husband as collateral security for the mortgage debt, the law presumes fraud in a subsequent absolute sale of the policy to the mortgagee, and the burden is upon him to show that the purchase was *bona fide* and for a fair consideration.

2. AGENCY—*Declarations.*

Evidence of declarations of agent to prove agency is incompetent.

3. HARMLESS ERROR—*Error—Evidence.*

Where evidence erroneously admitted could not have damaged a party, its admission was harmless error.

ACTION by Sarah E. Jennings against John L. Hinton, heard by Judge *T. A. McNeill* and a jury, at July Term, 1900, of PASQUOTANK. From a judgment for the plaintiff, the defendant appealed.

E. F. Aydlett, for the plaintiff.

Shepherd & Shepherd and *Pruden & Pruden,* for the defendant.

FURCHES, C. J. This case was here at February Term 1900 (126 N. C., 48), but the only question then passed upon was as to whether the husband had given his written assent to the assignment of the wife; while this appeal presents a question of fiduciary relations, presumptive fraud, and equitable relief. (215)

The facts may be had by reference to the case as reported, when here before, as to plaintiff's execution of the assignment to the defendant.

But this appeal develops the fact that B. F. Jennings, husband of plaintiff, owed defendant $1,500, secured by mortgage on real estate; and that on 19 August, 1892, the policy of insurance for $5,000, payable to the plaintiff, was put into the hands of the defendant, as collateral security, in addition to the mortgage. To show this, the plaintiff put in evidence the following paper writing:

"19 August, 1892. Mrs. S. E. Jennings:—Your husband has given me the policy you assigned to secure yours and his

note given to me for $1,500. I have handed to him the $1,500 in currency, and when said note is paid you shall have the policy. Respectfully, John L. Hinton."

The defendant kept the policy under this agreement, until 1897, and on 22 April, 1897, the defendant got from the plaintiff the following instrument of writing:

"For value received I hereby assign and set over to John L. Hinton all my right and interest in Benefit Certificate No. 73836, in The American Legion of Honor Insurance Company, the same being insurance on the life of my husband, Benjamin F. Jennings, dated 23 June, 1884, the said certificate or policy being in the sum of $5,000, being for my benefit. The said Hinton to have the said $5,000 in the policy absolutely with power, at the death of said Benjamin F. Jennings, to collect the same and apply to his own use.

"SARAH E. JENNINGS. (Seal.)

"Witness: B. F. Jennings."

The last instrument was signed at the house of the plaintiff, and plaintiff and her two daughters and a son testified that the defendant came to their house about one o'clock in the afternoon, stood at the gate, which is about fifteen yards from the house, until the paper was signed late in the evening;
(216) that B. F. Jennings, husband of plaintiff, stood at the gate with defendant the greater part of his time; that they could hear defendant and the said B. F. Jennings talking at the gate, but could not understand what they said; that occasionally the said B. F. Jennings would come in the house and talk to plaintiff; she did not know what they were talking about at the gate, except what her husband told her.

She was then asked whose agent the said B. F. Jennings was on that occasion, and she answered that he was the defendant's agent. She was also asked what he told her. These questions and answers were objected to, but allowed and defendant excepted.

If the first question and answer, that "B. F. Jennings was the agent of defendant," were competent, the second question and answer were competent; but if the first question and answer were not competent, then what B. F. Jennings told the plaintiff was not competent.

The plaintiff says she had no talk with the defendant, and it would seem that any information the plaintiff had, as to B. F. Jennings being the agent of the defendant, must have

been received from B. F. Jennings, the alleged agent. This was not competent to prove the agency, as we have decided in *Summerrow v. Baruch, ante,* 202. It thus seems that this first question and answer being improperly allowed, the declarations of B. F. Jennings were incompetent. And if they are material, or, in other words, unless they are harmless, the defendant is entitled to a new trial.

But it is shown that the defendant received this policy in 1892 as collateral security for a $1,500 debt the plaintiff's husband owed him. At the time he received this policy in 1892, it was expressly stipulated that he received it as collateral security, and that when the $1,500 debt was paid, he would return it to the plaintiff. The defendant admits that he continued to hold it under this agreement until April, 1897 (what time in April he does not state), when he returned (217) it to the husband, and afterwards took the absolute assignment, dated 22 April, 1897, for which he paid $25; while the plaintiff testifies that it was never returned, and was never in the possession of herself or husband after it was delivered to the defendant in 1892, and that the defendant paid nothing for the assignment of 1897. These questions were submitted to the jury, and they found that said policy was assigned to the defendant as collateral security. The defendant objected to this issue and all evidence introduced to sustain it, contending that it was to contradict the written contract of 22 April, 1897. He also says that said contract is under seal and needs no consideration to support it.

In a court of law, under the old practice, this would have been so, and it is so now under our present practice, where the action is purely legal; but where it is equitable in its nature and a question of fraud is involved, it is not so. Fraud vitiates all contracts, whether under seal or not.

When the defendant took his policy in August, 1892, as a collateral security for his debt of $1,500, with the agreement to return the same to the plaintiff when that debt was satisfied, it established a fiduciary relation between the plaintiff and the defendant—the same as that of trustee and *cestui que trust,* or mortgagor and mortgagee. This being so, the law not only looks upon any purchase of the absolute title, or reversion in the *res,* with suspicion, but *presumes fraud.* And the burden is cast upon such purchaser (the defendant in this case) to show that such purchase was fair, open and *bona fide,* and for a fair consideration. *Hall v. Lewis,* 118 N. C., 509; *McLeod v. Bullard,* 84 N. C., 515. And the defendant failing to allege and *show* that this transaction of 22 April, 1897, was *fair,*

open, bona fide and for a fair consideration, it is void. Indeed the jury finding there was no consideration, it falls to (218) the ground, and, the parties stand upon the original contract, and the fiduciary relations between them still exist.

It therefore appears to us that the evidence erroneously admitted could not have damaged the defendant and its admission harmless error.

Affirmed.

Cited: *Parker v. Brown,* 131 N. C., 264; *Freeman v. Brown,* 151 N. C., 114; *Farris v. R. R., Ib.,* 492.

PEEBLES v. GRAHAM.

(Filed 7 May, 1901.)

1. BOUNDARIES—*Location—Question for Jury—Questions for Court —Devises—Ejectment.*

   The Court should instruct the jury what are boundaries, and the jury should find and locate them.

2. BOUNDARIES—*Description—Legacies and Devises—Wills—Ejectment.*

   A devise of certain tracts of land east of a road passes no part of such tracts west of such road.

ACTION by R. B. Peebles, trustee of R. B. Peebles and A. R. Peebles, against John W. Graham, trustee of Geo. M. Graham, heard by Judge *Fred. Moore* and a jury, at March Term, 1900, of DURHAM. From a judgment for the plaintiff, the defendant appealed.

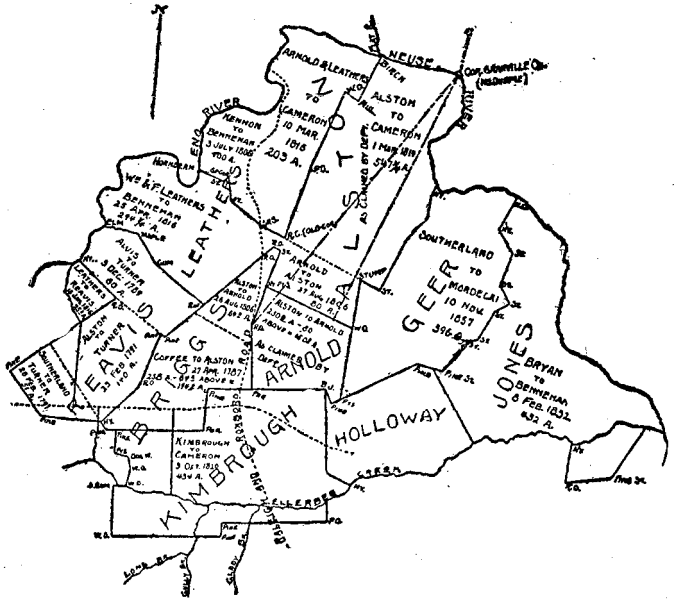
Winston & Fuller, Shepherd & Shepherd and *R. B. Peebles,* for the plaintiff.

Manning & Foushee and *Graham & Graham,* for the defendant.

DEFENDANT'S APPEAL.

FURCHES, C. J. This is an action of ejectment to recover possession of a triangular piece of land lying on the west side of the Raleigh and Roxboro road. Both parties claim (219) under the will of Paul C. Cameron; the plaintiff under item 11, which is as follows: "I also give, devise and bequeath to R. B. Peebles, as trustee aforesaid, all the lands

included under the name of the Arnold, the Geer and the Jones lands—all east of the Raleigh and Roxboro road and south of Neuse River, in Durham County, and the title papers all with my sister Margaret's papers in the Citizens Bank at Raleigh"; and the defendant under item 9, which is as follows: "I also give and devise to John W. Graham as trustee aforesaid, for



his son George M. Graham, all the lands known and called as the 'Leathers,' 'Briggs,' 'Reavis' and 'Southerland,' on the south side of Eno, and on the Raleigh and Roxboro and Hillsboro and Fish Dam roads, and all now in Durham County; and all title deeds registered in Orange and containing between 1,500 and 1,700 acres—to George and his heirs an in- (220) heritance in fee simple when he comes of age."

The plaintiff claims the land in dispute as a part of the Arnold land, and the defendant claims it as a part of the "Briggs" land.

Upon the trial it appeared that the Geer land, the Jones land and the greater part of the Arnold land were on the east side of the Raleigh and Roxboro road. But there was evidence tending to show that the triangular piece claimed by the plaintiff was a part of the Arnold tract; and the Court submitted

this question to the jury and instructed them that if they found from the evidence that the 64 acres in dispute was a part of the "Arnold" tract, to find for the plaintiff. The first issue was as follows: "Are the plaintiffs the owners and entitled to the possession of the lands claimed by them as described in the complaint, or any part thereof, and if so, what part?" And the jury answered this issue, "Yes; 64½ acres triangle west of the R. and R., as shown on the plat." In this submission and instruction there was error.

In matters of location it is the duty of the Court to instruct the jury what are the boundaries, and it is the duty of the jury to find and locate them. There being no dispute as to the Raleigh and Roxboro road, and it being admitted that the 64½ acres claimed by the plaintiff were on the west side of the road, and it being admitted that plaintiff had no claim to this 64½ acres except under the 11th section of Paul C. Cameron's will, quoted above, it became a question of law for the Court.

If the description had closed with "all the lands included under the name of the 'Arnold,' the 'Geer' and the 'Jones' lands," and there being a dispute as to whether the 64½ acres were a part of the "Arnold" land, it would have been proper for the Court to submit that question to the jury. But
(221) the description did not stop here; it added, "all east of the Raleigh and Roxboro road." This qualification must mean something. It would not have been added if it did not. The description without this qualifying clause would undoubtedly have given the plaintiff all the "Arnold" land, including the 64½ acres—as the jury have found that to be a part of the Arnold land. So it could not have been added to enlarge the gift, nor to explain the devise; for if it was the intention of the testator to give the whole of the "Arnold" land to the plaintiff, he had done so without the additional qualifying words—"all on the east side of the Raleigh and Roxboro road." As to this language, according to all rules of interpretation, the only meaning it can have is to restrict the gift to the east side of the road. *Carter v. White,* 101 N. C., 30; *Branch v. Hunter,* 61 N. C., 3.

We think the testator intended to give the plaintiff the Geer land, the Jones land, and all the Arnold land east of the Raleigh and Roxboro road.

Putting this construction upon the devise to plaintiff, he had no title to the 64½ acres on the west side of the Raleigh and Roxboro road, and being the plaintiff he could not recover, whether the defendant was the owner of the 64½ acres or not.

The view we have taken of this case, it seems to us, is sus-

tained by *Midgett v. Twyford,* 120 N. C., 4, and many other cases, while we do not think it is in conflict with *Cox v. McGowan,* 116 N. C., 131, nor *Proctor v. Pool,* 15 N. C., 374, nor any other case cited by the plaintiff.

The plaintiff having failed to show *any title* to the 64 1-2 acres which lies on the west side of the road, there was error in the Court's submitting that question to the jury.

Error.

CLARK, J., did not sit on the hearing of this case.

Cited: *Modlin v. R. R.,* 145 N. C., 222, 231.

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(222)

PEEBLES v. GRAHAM.

(Filed 7 May, 1901.)

1. BOUNDARIES—*Quantity—Devise—Description.*

   Where the location or boundary of land is doubtful, quantity becomes important.

2. BOUNDARIES—*Description—Designation—General Description—Devises—Evidence.*

   If one description in a devise designates land with certainty, evidence is admissible to show that a general designation of the land is an inadvertence and should be disregarded.

ACTION by R. B. Peebles, as trustee, and A. R. Peebles, against John W. Graham, as trustee, and Geo. M. Graham, heard by Judge *Fred. Moore* and a jury, at March Term, 1900, of DURHAM. From a judgment for the defendant on a cross action, the plaintiff appealed.

Winston & Fuller, Shepherd & Shepherd and *R. B. Peebles,* for the plaintiff.

Manning & Foushee and *Graham & Graham,* for the defendants.

FURCHES, C. J. This is an action of ejectment. A part of the lands involved in this appeal were not embraced in the plaintiff's complaint, but were brought into the controversy by the defendant's answer, in the nature of a cross action.

The contentions of the parties grow out of the devises in the will of Paul C. Cameron, and are the same sections that were

set out in the defendant's appeal. But for convenience, and to prevent the necessity of referring to the other opinion, we quote them again:

The devise to the plaintiff is contained in the eleventh item, and is as follows: "I also give, devise and bequeath to
(223) R. B. Peebles, as trustee aforesaid, all the lands included under the name of the Arnold, the Geer and the Jones land—all east of the Raleigh and Roxboro road and south of Neuse River in Durham County, and the title papers all with my sister Margaret's papers in the Citizens Bank at Raleigh."

That under which the defendant claims is included in item 9, and is as follows: "I also give and devise to John W. Graham, as trustee aforesaid, for his son George M. Graham, all the lands known and called as the 'Leathers,' 'Briggs,' 'Reavis' and 'Southerland,' on the south side of Eno, and on the Raleigh and Roxboro and the Hillsboro and Fish Dam roads, and all now in Durham County, and all title deeds registered in Orange, and containing between 1,500 and 1,700 acres—to George and his heirs an inheritance in fee simple when he comes of age."

While this is an action of ejectment, the land involved in this appeal was not included in the plaintiff's complaint, but brought in by the defendant's answer in the nature of a cross action, in which the defendant asks affirmative relief. Therefore, while the principle is preserved, the general rule is reversed, and the burden is thrown on the defendant to show title in himself, and it was so stated in the charge of the Court. The controversy is as to the 203 acres, the 547¾ acres and the 80 acres (as will be seen by the map which will be published.)

The plaintiff claims that it appears from the map that the 80-acre tract and the 203-acre tract were Arnold lands, that is, that they had at one time belonged to people by the name of Arnold, and he says that being so, he has offered evidence tending to show that the 547¾-acre tract was used in connection with these tracts, and that they are all known and called the Arnold lands, and that he is entitled to them under the name of Arnold lands. And he says they were never owned by any one named Southerland, nor were they ever called
(224) by that name; while it appears by the map that the testator owned a tract of 51 acres at the southwest corner of the map, adjoining the Reavis tract, that was known as Southerland land. The defendant denies that the testator ever owned the 51 acres, called on the map Southerland lands; that the testator's father, Duncan Cameron, did own this small tract of land at one time, but that he sold it before his death, and

that the testator, Paul Cameron, never owned it. And the defendant offered evidence tending to sustain this contention—that the testator Paul never owned this 51-acre tract. The defendant also denies that the 80-acre tract, the 203-acre tract, or the 547¾-acre tract was ever called or known as the Arnold lands. He says that all these lands at one time belonged to the Alstons, and were sold off by them at different times and to different persons, and, in that way, some of them acquired different names. But that the 547¾-acre tract was conveyed directly from the Alstons to the Camerons, and never acquired any other name than the Alston lands. The defendant contends that the word "Southerland" was a slip—an inadvertence; but however made, the defendant contends it should be rejected as a description of any lands devised by the testator.

And the defendant contends that this being done, there is still sufficient description left to identify this land as a part of the devise to the defendant; that it will stand with this description—that it is on "the south side of Eno River," and "on the Raleigh and Roxboro road," "the title deeds registered in Orange County," and with the Reavis and Briggs land which are on the Fish Dam road, and the Leathers land on the Raleigh and Roxboro road, making in all about 1,640 acres—while the other tracts conceded by the plaintiff to have passed by the will only contain a little over 800 acres.

The plaintiff contends that the word "Southerland" was not put in the will by inadvertence or mistake; that there is no evidence that it was, and there is no reason for re- (225) jecting it. He further contends that if it were rejected —considered as not in the will—there is not sufficient description left to identify the 203 acres, nor the 547¾ acres, nor the 80 acres, as a part of the land devised to the defendant.

It is a presumption of fact that every man that makes a will intends to dispose of all of his estate. *Blue v. Ritter,* 118 N. C., 580; *Jones v. Perry,* 38 N. C., 200. This presumptiom may be rebutted, but it stands until it is rebutted. It is therefore presumed that Mr. Cameron did not intend to die intestate as to this large body of land, amounting to some 800 acres. And besides this presumption the law makes, we have other evidence in the will tending to show that he did not intend to die intestate as to any part of his estate. We find that in the sixteenth item of his will he says: "And to provide for any omissions I name my daughter Mildred the residuary legatee," but she is to have her full share and not to account for anything she may receive under this residuary clause. And we can hardly think that he *omitted* to dispose of so large a body of land as

this, when it is admitted that he disposed of all his lands adjoining it. He must have intended to give it to some one, and if he did, it was either the plaintiff or the defendant.

It lies on the "south side" of the Eno River, which is one of the descriptions. It is true that all of it is not directly south of the Eno—taking the meridian. But it is on the "south side" of the Eno. It is on the Raleigh and Roxboro road, which is another part of the description. It is all in Durham County, and the title deeds are registered in Orange County. This is so as to the 203 acres and the 547¾ acres. The land devised contains "about 1,500 or 1,700 acres," and the 203 acres and the 547 3-4 acres (in which are the 80 acres) are included, this is so; but to exclude them, the devise only (226) contains a little more than 850 acres.

Suppose the will had said, I devise to the defendant the Briggs tract, the Reavis tract, the Leathers tract, and the land on the south side of the Eno, and on the Raleigh and Roxboro road, lying in Durham County, the title deeds all registered in Orange County, making in all 1,500 or 1,700 acres; and we find the Briggs land, and the Reavis land, and the Leathers land as described, and we find the 203-acre tract, the 547¾-acre tract, including the 80-acre tract, belonging to the testator, lying on the south side of the Eno, on the Raleigh and Roxboro road in Durham County, the title deeds registered in Orange County, and adjoining the other land admitted to be devised to the defendant, making in all about 1,600 or 1,700 acres, the amount specified, and not disposed of unless it be to the defendant; and without these three last-named tracts the devise only covered about 800 acres—could it be said there was no description in the will tending to identify this land as a part of the devise?

Of course, if the testator owned the land on the Raleigh and Roxboro road known or called by the name of the Southerland land, it would be presumed that the word "Southerland" was intended to identify that land, and it could not be considered an error in the testator. And the word "Southerland" would have to be made to apply to that land. But this question was specifically submitted to the jury in the charge of the Judge, in the following instructions: "Understand, gentlemen, in the first place, if you find that the testator owned Southerland land, then only Southerland land can pass under this description, and land known by the name of Alston land can not pass; but if you find that he did not, then Southerland is a misdescription, and then you should proceed to inquire whether, in the first place, this land was devised to any one else or not." And

as the jury found for defendant, they must necessarily (227) have found that testator owned no land known or called Southerland land. And this being so, the word "Southerland" in the devise was meaningless, and must be rejected in construing the will. The jury have also found that these tracts are not a part of the Arnold tract, willed to the plaintiff, as this question was submitted to them and they found against the plaintiff's claim.

In *Proctor v. Pool,* 15 N. C., 371, it is said that if one description in a *deed* sufficiently points out the thing with certainty, a false description may be rejected.

In *Simpson v. King,* 36 N. C., 13, it is said: "An incorrect and unnecessary part of the description must be disregarded, rather than the whole disposition should fail; provided that the thing claimed be found to agree with those parts of the description that are retained."

In *Scull v. Pruden,* 92 N. C., 173, it is said: "Where the subject matter of a conveyance is completely identified by its location and by certain other marks of description, the addition of another particular which does not apply to it will be rejected, as having been inserted through misapprehension or inadvertence."

In *Mayo v. Blount,* 23 N. C., 283, it is held that "A perfect description, which fully ascertains the *corpus,* is not to be defeated by the addition of further and false description."

The general rule is that the quantity of land stated to be conveyed will not be considered in determining location or boundaries. But there is a well-known exception to this rule that is as firmly established as the rule itself. And that is this: Where the location or boundary is doubtful, quantity becomes important. *Brown v. House,* 116 N. C., 866; *Cox v. Cox,* 91 N. C., 256.

The rule of construction is to adopt that one which will give validity to the instrument, if sufficient appears upon the instrument to enable the Court to do so. *Shaffer v.* (228) *Hahn,* 111 N. C., 1; *Proctor v. Pool,* 15 N. C., 371.

We do not think the authorities cited by plaintiff are in conflict with the views we have expressed in this opinion, or the authorities we have cited. Nor do we think the exceptions of the plaintiff can be sustained. And we are of the opinion that there was evidence sufficient to submit the question to the jury, as to whether the testator owned any land known or called by the name of "Southerland," and as the jury have found that he did not, we are of the opinion that the word "Southerland" in the devise to the defendant should be rejected as an inadver-

tence, and meaningless; that the word "Southerland" being rejected, we are of the opinion that there was sufficient other evidence to authorize the Court to submit the question to the jury. And as they have decided it in favor of the defendant, their finding and the verdict must stand.

No error.

CLARK, J., did not sit on the hearing of this appeal.

Cited: *S. c.*, 130 N. C., 261; *Harper v. Anderson, Ib.*, 540; *S. c.*, 132 N. C., 90; *Rowe v. Lumber Co.*, 13 N. C., 442.

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(229)

WHITESIDES v. SOUTHERN RAILWAY CO.

(Filed 14 May, 1901.)

1. NEGLIGENCE—*Evidence — Sufficiency — Railroads — Questions for Jury.*

   The evidence in this case is sufficient to have been submitted to the jury on the question whether the defendant was negligent in not seeing the intestate of plaintiff on the trestle, or, if it saw him, in not stopping and caring for him.

2. NEGLIGENCE—*Railroads—Track—Trestle.*

   It is negligence on the part of the employees on a train, where a person on a trestle is struck without their knowledge.

3. NEGLIGENCE—*Railroads—Track—Trestle—Personal Injuries.*

   Where a person on a trestle is struck by a train, it is negligence not to stop and care for him.

4. NONSUIT—*Contributory Negligence—Evidence.*

   In case of nonsuit, evidence of contributory negligence should not be considered.

COOK, J., dissenting.

ACTION by Lethia Whitesides against the Southern Railway Company, heard by Judge *E. W. Timberlake*, at Spring Term, 1901, of MCDOWELL. From a judgment for the defendant, the plaintiff appealed.

E. J. Justice and *Morris & Morgan*, for the plaintiff.
George F. Bason, for the defendant.

FURCHES, C. J. Action by an administratrix under the statute for damages. The plaintiff alleged that her intestate was

killed, or injured, by the negligence of the defendant, (230) from which he died. The evidence disclosed these facts.

The plaintiff's intestate was seen on the streets of Marion about 8 o'clock at night; that he lived near defendant's road, west of Marion, and west of Bailey's trestle across a small stream, about a mile and a quarter west of Marion, and 40 or 50 feet high; that defendant's westbound vestibule train, according to schedule time, was due at Marion about 11 o'clock at night; that it was on time that night and passed over Bailey's trestle shortly after 11 o'clock; that it was a cold night in January and the ground was slightly covered with snow; the next morning the intestate was found under the bridge upon a sill of the trestle, with one thigh broken and with some other bruises about his body, and a little greasy spot on the sleeve of his coat that looked like it might have come off an engine. The evidence showed that he had been in the creek, as his clothing was wet and frozen upon him, and there were signs of a drag, showing that he had dragged himself out of the creek and onto the sill, which was some three or four feet above the water. Some of the witnesses stated that he was under the bridge, while others spoke of his being on the side of the bridge. He was found early next morning, but was not dead when found; that some time after he was found, the defendant's depot agent at Marion was notified of his condition, but gave the matter no attention unil about 10 o'clock in the day, when he went to the trestle and had the intestate removed to his home where he died that evening. Two doctors testified that he probably died from the exposure. The plaintiff also put defendant's answer in evidence.

The defendant offered no evidence, and moved, at the close of plaintiff's evidence, to nonsuit the plaintiff, which motion was allowed, and she appealed.

The plaintiff puts her appeal on two grounds: That defendant was negligent in running over the intestate while on the trestle; and for not stopping the train and caring for the intestate who, as plaintiff alleges, died from exposure and (231) want of attention in his helpless condition.

We do not think the plaintiff's first ground—the negligent running over the intestate—is sustained by the evidence, as there is no evidence offered to show that the intestate was seen, nor as to the condition of the road approaching the trestle so as to show negligence in the conductor's not seeing him in time to have prevented the injury.

But if the intestate was on the trestle and was stricken by the train, it was negligence in the defendant not to have seen

him. *Arrowood v. R. R.*, 126 N. C., 629; *Powell v. R. R.*, 125 N. C., 374. Of course it must be shown that the intestate was on the road when he was injured, or there could be no negligence in defendant's not seeing him. This is the turning point in the case, because, if the defendant knocked the intestate off the trestle and knew it had done so, and went on without stopping to look after and care for him, especially on such a night as that, that was such negligence as would make the defendant liable for the result. Black Contributory Negligence (Ed. 1885), page 221; *R. R. v. State*, 29 Md., 420; 96 Am. Dec., 545. If the intestate was on the trestle, and struck by the train while on the trestle, and the defendant did not see him when struck, this was negligence, because the defendant must have seen him if the engineer had kept a proper lookout. And this negligence would make the defendant liable for the injury resulting from such negligence.

Then, was the intestate on the bridge when defendant's train passed over it? There is no direct evidence showing that he was, and it is suggested that he was not. It is also suggested as evidence in support of this claim that he was not on the trestle; that if he had been stricken by the train he (232) would have been injured much more than he was. It is also suggested that when the intestate found he was about to be overtaken by the train, he let himself down through the trestle and was injured by the fall; or, that he jumped from the trestle and was injured in that way. It may be true that the intestate was injured in some one of the ways suggested.

But the defendant in its answer says "that one of defendant's regular trains, No. 35, was due to pass the trestle *upon which plaintiff was injured*," etc. This answer was offered in evidence and plaintiff contends that this, together with the other evidence in the case, was sufficient to carry the case to the jury.

And when we consider that, in case of nonsuit, evidence of contributory negligence can not be considered, and that the evidence must be considered in the most favorable light for the plaintiff, we are of the opinion that the case should have gone to the jury.

Error. New trial.

COOK, J., dissenting. Plaintiff's intestate was found on the side of a creek under the trestle, which was about 75 feet long and 35 to 50 feet high. From impressions in the sand and on bank of the creek, it appeared that he had crawled or dragged

himself out of the water upon the sill on which he was found. When found, there was no evidence of injury done him, except that his leg was broken; nor was there any evidence of his having been injured by the train, other than a spot or place on his coat sleeve which looked like grease from an engine. He was partly frozen and died from the exposure. The night of the injury, some one was heard going along defendant's railroad track in the direction of the trestle, a short time before the westbound vestibule train passed. During the night, and after the train had passed one of the witnesses (Poteat) and members of his family heard cries of distress. Next morning the witness, after feeding his cow and horse, (233) walked down to the trestle and saw intestate lying upon the sill, and went off and delivered a message about providing a fire, and returned after eating his breakfast.

Plaintiff insists, first, that intestate was knocked off the trestle by defendant's train carelessly and negligently; second, if it were not done carelessly and negligently, then his death was caused by its negligence in not stopping its train and caring for him after committing the injury. There is no evidence showing that he was knocked off by defendant's train, but plaintiff insists that there is evidence of the fact from the circumstances under which he was found, and the following part of defendant's answer which was put in evidence by plaintiff and relied upon as an admission: "The defendant, further answering, says, that at the time the plaintiff was killed he knew, or could by reasonable diligence have known, that one of defendant's regular trains, to-wit, No. 35, westbound, was about the trestle upon which the plaintiff was injured, and notwithstanding this notice he took the risk of using said trestle as a footpath."

It appeared from the evidence of plaintiff's witnesses that people were forbidden by defendant to walk upon the trestle, and it was generally so known, and at each end of the trestle a notice, printed in large letters, was posted, forbidding people to do so. Notwithstanding, some people, including some of the witnesses, did at times walk across it, but the fact is not shown to have been known or consented to by the defendant. There was no public crossing near the trestle which required the signal to be given, nor was it necessary or incumbent upon the defendant to give it at that point. *Unusual* watch and vigilance in approaching and passing over it, were not imperative upon the engineer. It was not incumbent upon the defendant to give the warning signals when approaching it. If intestate was knocked off by defendant's train, then it was incumbent

(234) upon plaintiff to show the defendant *could* have seen intestate, had its engineer kept proper lookout; that intestate was in *such* a position and at *such* a place that the engineer *could* have seen him, and *ought* to have seen him, had he been vigilant, and could have stopped the train in time to prevent injury; for negligence is not presumed from the mere fact that damage was done. *Herring v. R. R.*, 32 N. C., 406. There is no evidence to show that the engineer did see him, or that intestate was in such a position or place that he could possibly have done so. Whether intestate could have seen by the vigilant eye, or, in trying to extricate himself from his imperiled position, got into such a position or place upon or under the crossties, beams or other part of the structure, that he could not possibly be seen, does not appear. In the absence of such evidence, no presumption of negligence is raised against the defendant.

It is the duty of a railroad company not to wilfully injure a trespasser and to use due care to prevent injury after discovering his danger and inability to escape if such care would have prevented the injury (3 Elliott Railroads, secs. 1253, 1254), of which there is no evidence. It is not to be expected that people will enter upon such parts of the track as they are forbidden to do, and therefore those who thus wrongfully enter to do so at such times and places when and where the *utmost* vigilance is not required, and they have no right to claim such care and vigilance as are due to persons lawfully exercising a right or privilege.

The facts in this case differ from those in many of the cases cited. In *Arrowood v. R. R.*, 126 N. C., 629, the intestate was killed upon that part of the track where "the public were in the habit of using the railroad * * * as a passway"; therefore "a greater degree of care would be required of defendant in running its trains at this point than the defendant would have exercised in running its train along the
(235) track where the public had not been habitually permitted to use the track as a passway." At the trestle where the intestate was injured, the public had not been permitted to pass, but, on the contrary, had been forbidden to enter upon it.

In *Powell v. R. R.*, 125 N. C., 370, the train was passing through a populous town of 2,500 or 3,000 inhabitants, and the engineer failed to give the signal at either of the two crossings or for the station, running 25 to 30 miles an hour; and in *Fulp v. R. R.*, 120 N. C., 525, the intestate was killed within 20 or 30 yards of a public crossing, at such point where the

engineer is required to give the warning signal (about which the evidence was conflicting) and keep a vigilant lookout, because of the mutual *right* of the public to *there* enter upon and cross defendant's track, and where the presence of people may be looked for and expected.

In *Cox v. R. R.*, 123 N. C., 604, the intestate was killed within 12 feet of a *public* footpath, habitually used, in a town and no signals given.

There being no evidence of negligence in inflicting the injury and none presumed by law, I can not see how the second cause of action can be maintained for not stopping and caring for a man whose injured condition was not known by defendant. Nor am I able to find any principle of law which requires a wrongdoer to care for the person whom he has wronged. The failure to do so, causing more direful results, aggravates the wrong *done*, which is covered in the measure of damages. The injury and damage being done *without fault*, to alleviate pain, suffering and death appeals to the feelings of humanity, for which the good Samaritan has always been revered and extolled to the shame and condemnation of the Priest and Levite who looked on and passed by without rendering succor to the sufferer; but history fails to show that a breach of the Levitical law could have been claimed; nor do I find it to be a cause of action existing under our jurisprudence. I have been unable to find Black Contributory Negligence (Ed. 1885), (236) to which our attention was called on the argument, but *R. R. v. State*, 29 Md., 420; 96 Am. Dec., 545, fails to sustain the contention of the plaintiff. In that case Price was injured at a depot where the train did not stop, and lodged upon the pilot of the engine in an unconscious state, apparently dead. In that condition the railroad company took him into its custody, assuming that he was dead, did not send for a physician to make an examination of the nature and extent of his injuries, nor notify his family or any person who would take an interest in him, but locked him up in a warehouse used for storing barrels and plunder, where he remained all night, notwithstanding that it was suggested at the time that the man ought to be examined, and that the place was unfit. Thus imprisoned by the company and excluded from the knowledge and aid of all persons, vital activity asserted itself, the blood began to flow, the restoration of consciousness ensued, and he was found dead next morning some distance from the place he had been put, his body being in a stooping posture, holding his right leg with his hand, having died from hemorrhage of the arteries of his right leg, which was crushed at and above

the knee. It was for and on account of this gross neglect *after* taking him into custody and depriving him of every opportunity of relief by others, that the Court held the railroad company liable—none of the elements of which exist in the case at bar. At no time did the defendant have the custody of intestate or assume for him any responsibility or liability. Nor does it appear that it ever knew of the existence of an injury done him.

I will not advert to the conduct of those who heard the cries of distress uttered by intestate during the night, and their failure to furnish him relief until nearly ten o'clock next
(237) day. Neither sympathy nor substance can now avail him. So I have confined my inquiry to the principles of law as applicable to the evidence, and, there being no evidence to prove negligence upon the part of defendant in inflicting the injury, I fail to find any error in the ruling of his Honor in nonsuiting the plaintiff.

PAINE v. FORNEY.

(Filed 14 May, 1901.)

WILLS—*Construction—Bequest to Charity.*

A provision in a will that a church is to be built from certain funds will not fail because there is not sufficient amount of the funds to build a church as large as directed by the testator.

DOUGLAS, J., dissenting.

ACTION by J. A. Paine, John Paine, Hester Paine, Laura Vann (wife of Jim Vann), Beckey Vann (wife of Wesley Vann), Jonas Paine, Mary Paine, Robert Paine, Dallas Jones, Ervin Jones, Manda (wife of Ervin Martin), Siss Meadows (wife of Vess Meadows), Laura Meadows (wife of Bege Meadows), John Paine, Joe Paine, Bill Paine, Sarah Ledford (wife of Van Ledford), Margaret Bradley (wife of Richard Bradley), Mary Wilson (wife of Dick Wilson), B. J. Norris, Nancy Norris, O. A. Norris, Mary Graves, Eliza Seeble (wife of M. W. Seeble), and others, against Mary Forney (executrix of H. A. Forney, deceased, and Isaac E. Paine, deceased), Robert A. Smith, John T. Puntch, J. P. Sifford, M. W. Robinson and V. P. Asbury (trustees of Martin M. E. Church, South), A. Lee Cherry (Worshipful Master), and William Little

(Secretary of Rock Spring Lodge, No. 341, A. F. and (238) A. M.), heard by Judge *E. W. Timberlake* at December (Special) Term, 1900, of LINCOLN. From a judgment for plaintiffs, defendants appealed.

Jones & Tillett, for the plaintiffs.
D. W. Robinson, for the defendants.

MONTGOMERY, J. The testator provided in his last will and testament that a large portion of his estate should be converted by his executors into money to constitute what he designated the "General Fund." Item 9 of the will is in these words:

"I will and devise that the general fund herein provided for in the several items of his will shall be applied as follows: To the building of a church and schoolhouse on the land belonging to the congregation at Marvin Church, of the Methodist Episcopal Church, South, on which my family vault and graves are situated. The building to be built out of stone, to be nicely dressed and pencilled, by some good architect and mechanic; but to be plain and substantial, and of convenient size, as the condition of the general fund in the hands of my executors may justify. The said building to be about sixty feet long by forty feet wide, two stories high, the first story to be about fourteen feet high, with four or five windows on each side, and two at the ends where the pulpit is located, with pulpit and good benches therein, and to be used for a church by the said congregation. The upper story to be about ten feet high and arched overhead on the rafters, the size of the windows and doors to correspond in architectural design to the size of the building. The said building to cost about two thousand dollars, and to be paid for out of the general fund in the hands of my executors, as heretofore provided, and my executors to contract for and receive the said building when the contract has been complied with by the contracting party or parties, (239) and pay for the same out of the fund aforesaid: *Provided,* the trustees of the congregation worshipping at Marvin Church, of the Methodist Episcopal Church, South, will give the site and allow the said building to be built."

In the tenth clause of the will the testator declared that the remainder of the general fund left after the payment of all the expenses of the building provided for in the ninth clause, should be kept by the executors and the interest thereon to be expended for the "use and benefit of the said congregation, in keeping up my family vault and graves and the graveyard in connection therewith, and the building erected for the use of

a church and school, and for the support of the Gospel of Christ so long as the said congregation exists." Provisos were added to the effect that if the congregation should become extinct or refuse the gift, then the general fund should be given to the Masonic Order, of which he was a member, under the same conditions and requirements as characterized the gift to the church.

It was admitted on all sides that the building contemplated and provided for in the ninth item of the will could not be built of stone if the entire estate of the testator should be used for that purpose; that a substantial church and schoolhouse of wood of the dimensions mentioned in the will would cost $1,350; that the cost of the same in brick would be $2,650; that the whole value of the estate available for, and constituting the general fund, was $4,000; and that there is, and was, at the testator's death, upon the site of the church a wooden edifice used for the purpose of worship.

The question for decision is, Is item 9 of the will inoperative by reason of the fact that the funds, set apart for the erection of the church and school building, as it is described in that item, are insufficient for that purpose?

The plaintiffs, who are the heirs-at-law and next of kin to the testator, bring this action against the executors and
(240) trustees of the church and the officers of the Masonic Lodge, alleging that sections 9 and 10 of the will are inoperative, and that they are therefore entitled to the possession of the property which constitutes the general fund. The contention of the plaintiffs is that, as it is admitted that it is impossible to erect and furnish such a building as is described in the will with the amount of $2,000 mentioned by the testator as the probable cost of the same, or even with the whole of the estate, the bequest for that purpose must fail, and that the amount of the general fund must therefore be paid over to the plaintiffs, as the testator's heirs-at-law, the testator having died intestate as to that fund.

The defendants' contention is that, while it is admitted that a church and schoolhouse of the size and material specified in the will can not be built with the amount given in the will for that purpose, or even with all the property of the estate, yet a good, substantial church of wood or brick of the size and dimensions mentioned in the will can be erected with the amount donated for that purpose, and that that should be done in order that the leading intent and prime object of the testator may be carried out.

It is to be observed, in passing, that the defendants, the trus-

tees of the church, in their answer do not manifest a very great desire to assume the responsibilities of the bequest. They do not tender to the executors the lot upon which the church might be built, or offer, for the church, to furnish such additional money as might, added to the amount of the bequest, be sufficient to build and furnish such a church building as the testator desired to have constructed. They did not, in so many words, decline the gift, and that is about all that can be said for the answer. It may be that they had the conviction that a structure of wood or brick could not be substituted for the one provided in the will—one of stone—and only made that as a suggestion in the answer that the court might de- (241) cide upon the rights and duties of all concerned.

It seems clear to us that the leading and primary intent of the testator was to build such a church and schoolhouse combined as would furnish a convenient place of worship for the congregation of Marvin Church and a convenient school for the neighborhood, the school to be under the control of the church, and to have the family cemetery protected and cared for. But at the same time the material of the building was intended by him to be hewn stone, and the manner in which the stone was to be worked, so particularly set out in the will, goes to show that no other character of building was in his mind; and we can not substitute therefor brick or wood. But the exact size and dimensions of the building were not absolutely determined by the testator. He said it must be "plain and substantial, and of convenient size, as the condition of the general fund in the hands of my executors may justify," to be "about sixty feet long by forty feet wide, two stories high," etc. Neither did the testator intend that the cost of the building should be limited to $2,000. He said it was to cost about $2,000, but in the opening words of the bequest he declared that the general fund was to be applied to the building of the church and school.

We think, therefore, that the whole of the general fund can be applied to the erection of a building of hewn stone, although the building may not be as large as sixty feet long by forty feet wide, provided such a building, when completed, would be of convenient size—that is, large enough to furnish sufficiency of room for the usual congregation of Marvin Church to worship in, and for such school purposes as the church government may adopt. There was no finding of any such fact (242) by the court below, nor was such a fact admitted by the parties. If there had been, our judgment in this case would have been as above intimated.

As the testator's intention is a laudable one, and private gifts for religious and educational purposes are to be encouraged by the courts in all cases where it is possible, we will remand this case to the end that it may be determined, either by the verdict of the jury or the findings of fact by the court by the consent of the parties, whether a church and school building can be constructed of hewn stone of sufficient size and dimensions and suitable as to finish, for the purposes of church worship and church school, with the amount of the general fund.

The defendants, the church trustees, should pay the costs of this appeal.

Remanded.

DOUGLAS, J., dissenting. I can not assent to the judgment of the Court that the church trustees should pay the costs of this appeal. In fact, they are about the last persons that should pay it. They were not the original actors. They have not brought any suit for the money in controversy, but were apparently made parties to an action originally brought by the heirs-at-law and next of kin against the executrix. The opinion of the Court intimates that these trustees do not want the money—"That they did not in so many words decline the gift, and that is about all that can be said for the answer." Suppose they had declined the gift; could we make them accept it? or impose any penalty for their refusing to do so? The defendants appealed, but whether these trustees or the executrix were the active appellants, I do not know. The result of the appeal is the remanding of the case to see if in some way the money can not be given to the trustees on such terms (243) as will carry out the intention of the testator. To this extent their appeal, if it is their appeal, has been successful. Then why should they pay the costs? The action has arisen over the impossibility of strictly carrying out the wishes of the testator, who stipulated for more than his money's worth. I think under all the circumstances that the costs should be paid out of the fund.

WOODCOCK v. BOSTIC.

(Filed 14 May, 1901.)

1. PLEADING—*Answer.*

An allegation in answer that defendant has no knowledge of facts alleged in a certain paragraph of the complaint is not sufficient to put such facts in issue.

2. PLEADING—*Answer.*

An allegation in an answer that the defendant has no information of facts alleged in a certain paragraph of the complaint, and that he demands proof thereof, is not sufficient to put such facts in issue.

3. AMENDMENT—*Pleading—Demurrer—Discretion—Practice.*

It is solely within the discretion of the trial judge to allow an amendment to a complaint after a demurrer thereto has been sustained, or to dismiss the action.

4. EVIDENCE—*Parol Evidence—Contract—Written Contract.*

Where the purchaser of mortgaged property entered into a written contract to indemnify the mortgagor and the mortgagee against loss, the mortgagee having assigned the notes and mortgages for value, evidence of a subsequent parol condition to the contract of indemnity between the purchaser and one of the parties indemnified is inadmissible.

5. LIMITATIONS OF ACTIONS—*Amendment—Demurrer.*

When a demurrer to a complaint is sustained but a motion to dismiss is refused and an amended complaint allowed to be filed—the amendment not stating a new cause of action—it is a continuation of the same action and the statute of limitations ceased to run at the beginning of the original action and not at the filing of the amendment.

6. LIMITATIONS OF ACTIONS—*Time of Commencing Actions—Reversal of Judgment—Nonsuit—The Code, Sec.* 166.

The Code, sec. 166, authorizes the commencement of a new action or the same cause of action within one year after reversal of judgment on appeal, though the first complaint was insufficient to state a cause of action.

(244)

ACTION by Julia E. Woodcock against J. B. Bostic, D. D. Suttle and J. M. Ray, heard by Judge *O. H. Allen,* at November Term, 1900, of BUNCOMBE. From a judgment for the plaintiff, the defendant J. M. Ray appealed.

A. S. Barnard, for the plaintiff.
J. W. Summers, for the defendant.

FURCHES, C. J. This case was here at February Term, 1896, and is reported in 118 N. C., 822, where a very full statement

of the facts may be seen. We therefore think it sufficient in this appeal to say that on 2 August, 1890, D. D. Suttle made and executed his note to J. B. Bostic for $5,500, which note was secured by a deed of trust on real estate; that before this note became due the defendant Bostic, for value received, endorsed it to the plaintiff, Julia E. Woodcock; that subsequent to this assignment to the plaintiff, the defendant James M. Ray purchased the land mortgaged as security for the $5,500 note so endorsed to plaintiff; and the defendant Ray, in consideration of the premises and ten dollars, entered into a written
(245) contract and agreement with Bostic and Suttle to assume and pay the $5,500 note then due to Mrs. Woodcock.

The lands named in the mortgage or deed of trust have been sold, and the proceeds applied subject to costs and expenses. But a large amount of said debt is still due the plaintiff, and Bostic and Suttle are insolvent; and the plaintiff is trying to collect the balance due her on said note out of the defendant Ray on his written assumption given to Bostic and Suttle, in which he agreed to pay the debt and hold them harmless.

The action, as originally brought, was an action at law to enforce payment out of the contract of Ray with Bostic and Suttle, in which he agreed to pay the debt and *hold them harmless.* The Court held that the plaintiff could not do so in that action, as then constituted. But in discussing the case, the Court suggested that she might have this right by way of subrogation in an equitable action.

When the action was brought, the defendant Ray demurred upon the ground that plaintiff had not cited a cause of action against defendant Ray, as she had failed to connect herself with the written assumption; that he was under no contract with her, but his contract was with Bostic and Suttle to hold them harmless. The Court below overruled this demurrer, and defendant appealed, and this Court overruled the judgment of the Court below and sustained the demurrer.

Upon the opinion and judgment of this Court being certified to the Superior Court of Buncombe County, the plaintiff took judgment by default against Bostic and Suttle. The case seems to have remained on the docket until August Term, 1898, when the defendant "moved to dismiss the case, and the plaintiff asked leave to file an amended complaint." The defendant's motion was refused, and the plaintiff's motion allowed.
(246) Whereupon, the plaintiff filed an amended complaint setting up her equities, and asked to be subrogated to the rights of Bostic and Suttle, and the defendant answered. The

defendant excepted to the refusal of the Court to dismiss the action and to the order of the Court allowing plaintiff to amend her complaint.

The defendant in his answer contends that the matter involved is *res judicata*, and that the contract of defendant Ray with defendants Bostic and Suttle did not contain the entire contract.

Defendant also alleges that it was agreed between him and Bostic *before the contract was signed*, that Bostic was to pay him $2,300 before he paid the plaintiff; that this agreement was left out by inadvertence, and that the plaintiff knew of this and acquiesced in it.

The defendant also (as it would seem) attempts to deny paragraph 2, under The Code. But he only alleges that "he has no knowledge of the facts" alleged in this paragraph. And he says that "he has no information" in regard to the truth of the allegation of paragraph 7 of the amended complaint, and demands proof of the same. He also pleads the statute of limitations.

The general rule is to dismiss the action upon the demurrer being sustained. But this is not always done. It seems to be a matter within the discretion of the Court. It may retain the case and allow the plaintiff to amend the complaint upon payment of *all the costs*. This puts the parties upon the same footing as if the action was dismissed and a new action brought. And it saves delay and expense in bringing a new action. *Netherton v. Candler*, 78 N. C., 88; *Proctor v. Ins. Co.*, 124 N. C., 265. In this case the Court required the plaintiff to pay *all the costs*, and the cases just cited are authority for allowing the amendment.

We do not think paragraph 2 is answered, nor paragraph 7. Indeed, there does not seem to be a seventh paragraph in the complaint.

As the plaintiff seeks to be subrogated to the rights of (247) Bostic and Suttle, she would be entitled to no rights that they would not be entitled to. This presents the question as to whether the defendant Ray could enforce the alleged parol part of the contract of indemnity. And we are of the opinion that he could not. The alleged part of the contract, not reduced to writing, was made *before* the written contract was entered into, and, if made, was a part of the contract of indemnity. This being so, it can not be enforced. It can not be added to and made a part of the written contract. *Quinn v. Sexton*, 125 N. C., 447. And a further reason why he could not insist upon the alleged parol contract, is that the written

contract is to indemnify and hold harmless Bostic and Suttle, when this alleged parol contract is only claimed to have been made with Bostic.

As a general rule, the plea of the statute of limitations is one of fact and law, and must be submitted to the jury—the burden being on the plaintiff. But in this case it is not contended but what the action was brought in time. This takes the case out of the general rule. But the defendant says that more than three years had elapsed from the time the note fell due and the filing of the amended complaint, and more than one year from the time the opinion of the Supreme Court was certified to the Superior Court before the amended complaint was filed. But it seems that the case was continued on the docket, and a case in court, until August, 1898, when the *defendant moved to dismiss* the same, and the plaintiff then moved for leave to file an amended complaint, which was allowed, and as a matter of fact the case never was dismissed. It would then seem that it was simply a question of whether the Court had the right to allow the amendment, and we think it did, but have discussed that question above.

But defendant says there is another question involved: That if plaintiff was allowed to amend her complaint, she was not allowed to allege a *new cause* of action; and if she did, (248) the original action was no protection to her as against the statute of limitations. We agree with the defendant's law, but do not think it applies to this case. The defendant, in order to apply this law to his case, alleges that the original complaint was a good statement of a bad cause of action, while it seems to us to have been a bad statement of a good cause of action. And he says that, as the Court held that plaintiff could not recover on the first complaint, the statute, section 166 of The Code, does not apply.

It would seem that if this construction be put on section 166, it would be of very little value. For, as a general thing, if the party could recover in the action as constituted, there would be no reason for taking a nonsuit, nor grounds for dismissing the action. But this very question has been decided against defendant's contention. *Webb v. Hicks,* 125 N. C., 201; *Straus v. Beardsley,* 79 N. C., 59; *Wharton v. Commissioners,* 82 N. C., 11.

The best we can do for the defendant is to treat the case as if it had been dismissed upon defendant's motion in August, 1898; and we find that the plaintiff obtained leave to file the amended complaint at the same term of Court, and filed the amended complaint soon thereafter.

We do not think *Mizzell v. Ruffin,* 118 N. C., 69; *Hester v. Mullen,* 107 N. C., 724, nor any other case the defendant cited, conflict with the views we have taken and the cases we have cited.

In cases where new and independent causes of action are brought in, the rule is as contended by defendant. But such cases are not like this, where no new cause of action has been brought in, but only a restatement of the same cause of action that was set up in the original complaint.

As we see no error, the judgment will be

Affirmed.

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(249)

SCHOOL DIRECTORS v. CITY OF ASHEVILLE.

(Filed 14 May, 1901.)

1. FINES AND PENALTIES—*Public Schools—The Constitution, Art. IX, Sec. 5—The Code, Sec.* 3820.

   Fines and penalties collected by municipal officers for violation of ordinances belong to the common school fund of the county.

2. LIMITATIONS OF ACTIONS—*Fines and Penalties—Public Schools —The Code, Sec.* 155, *Subsec.* 1.

   An action by a county board of school directors for fines and penalties collected by a city is barred within three years.

ACTION by the County Board of School Directors of Buncombe County against the City of Asheville, heard on demurrer by Judge *O. H. Allen,* at November Term, 1900, of BUNCOMBE. From a judgment overruling the demurrer, the defendant appealed.

Locke Craig, and *J. D. Murphy,* for the plaintiff.
Bourne & Parker, for the defendant.

MONTGOMERY, J. The demurrer to the plaintiff's fourth cause of action raises, again, the question whether Article IX, section 5, of the Constitution applies to and embraces all and the whole of *fines* which may be or have been collected by town or city authorities for violations of municipal ordinances in prosecutions for criminal offences under section 3820 of The Code, or, to particularize, does the whole of the fines which have been collected by the City of Asheville by its municipal officers in prosecutions in the nature of criminal offences under section 3820 of The Code for violation of the city ordinances

belong to the city or to the County Board of School Directors for Buncombe County?

The argument on the part of the counsel of defendant, (250) in its resistance to the plaintiff's claim, is that the same rule of construction must be employed as to the manner in which, and the purposes to which, *fines* are to be applied under Article IX, section 5, of the Constitution, as is used in connection with the words "penalties" and "forfeitures" in the same article and section, for that the formation and grammatical construction of the sentence—"also the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal or military laws of the State * * * shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State"—preclude a different rule to be employed in the treatment of fines from that used in reference to penalties and forfeitures; that the true meaning of the words "clear proceeds" is such of the fines, penalties and forfeitures as have not been appropriated by act of the Legislature to other purposes; that the expression of opinion by Justice MERRIMON in his dissenting opinion in *Hodge v. R. R.*, 108 N. C., 24, where he wrote, "Also the clear proceeds of all penalties and forfeitures of the clause in question refer to and embrace only such as by some statute are given to the county or the county school fund," applies to fines imposed in criminal actions as well as to penalties and forfeitures enforced by civil *ex contractu;* and that as the General Assembly has conferred upon the city of Asheville the power to appropriate fines and penalties to municipal purposes, there is no such thing as "clear proceeds" of such fines to which the plaintiff could be entitled.

We are not disposed to question the correctness of the position as to *forfeitures* and *penalties* as it is expressed in the dissenting opinion referred to. That view, not in the same words it may be, had been adopted by this Court in numerous cases before that of *Hodge v. R. R., supra,* was decided, and (251) in numerous cases since. But the Court, in the case of *Board of Education v. Henderson,* 126 N. C., 689, after an *advisari,* pointed out the difference between forfeitures and penalties and fines. And if there be, as the defendant argues, inconsistencies in the opinion of the Court, and a lack of unanimity among its members, as to whether the General Assembly can give the whole or a part of a penalty or a forfeiture to an informer, or to one aggrieved, there is nowhere anything said in any of the cases in conflict with what is said in *Board*

of Education v. Henderson, supra, as to the distinction between penalties and forfeitures and fines.

It is unnecessary to add anything further on the subject of this distinction than was said in that case. What was said there was the deliberate opinion of the Court on an important constitutional question, and it will not be disturbed by us. As to the proper application of fines, we there said: "It must, therefore, follow that all the fines the defendant has collected upon prosecutions for violations of the criminal law of the State, whether for violation of *its ordinances,* made criminal by section 3820 of The Code, or by other criminal statutes, such fines belong to the common school fund of the county. It is thus appropriated by the Constitution, and it can not be diverted or withheld from this fund without violating the Constitution. And that applies as well to fines enforced and collected by the proper officers of the city or town as well as those collected through the action of a Justice of the Peace in prosecutions for violations of town ordinances, made misdemeanors by section 3820 of The Code; and it applies also to "penalties," the collection of which is enforceable by proceedings before a Justice of the Peace or municipal officers empowered by law to enforce the collection of such penalty in a criminal action under section 3820 of The Code, for, in such cases, though the word "penalty" is used, it is really a "fine."

It may be well to state for the guidance of the parties in the trial to come that as the statute of limitations has been pleaded in bar of the plaintiff's first three causes of ac- (252) tion, a recovery can be had for no greater amount than may be found due to the plaintiff for the three years next preceding the commencement of the action.

The action is in the nature of one for money had and received, with none of the incidents of a fiduciary or trust relation, and section 155, subsection 1, of The Code applies.

It is to be presumed that the defendant in answering will set up against the fourth cause of action the statute of limitations, and, if so, the same statute will apply.

No error.

Cited: Bearden v. Fullam, 129 N. C., 479; *Board of Education v. Greenville,* 132 N. C., 6; *School Directors v. Asheville,* 137 N. C., 504.

COFFIN v. SMITH.

(Filed 14 May, 1901.)

1. ASSIGNMENT—*Married Women—Husband and Wife—Separate Property—Negotiable Instruments—The Constitution, Art. X, Sec. 6.*

The delivery of a note to the endorsee after it has been endorsed in blank by the wife, the owner and the husband, is a sufficient conveyance.

2. EVIDENCE—*Parol—Endorsement—Negotiable Instruments.*

The endorsement of a note may be explained as between the immediate parties.

ACTION by Ann M. and E. F. Coffin against O. H. Smith and H. W. Blanchard, trading as Smith & Blanchard, heard by Judge *O. H. Allen* at Fall Term, 1900, of SWAIN. From a judgment on report of referee in favor of defendants, the plaintiffs appealed.

Shepherd & Shepherd, for the plaintiffs.
Jones & Jones, for the defendants.

MONTGOMERY, J. Ann M. Coffin, the wife of E. G. Coffin, was, in 1891, the owner of six promissory notes, five of (253) which were in the sum of $500 and one in the sum of $250, executed by W. W. Clark to Ann M. Coffin, and secured by a mortgage upon real estate. E. G. Coffin, the husband, was at that time indebted to Smith & Blanchard in a large amount. Mrs. Coffin executed a certain paper writing (her husband not joining in it) to Smith & Blanchard in which she assigned or transferred the notes to secure the debt which her husband owed to them, and the notes were delivered under the transfer. A part of the assignment and transfer of the notes was in the following language: "This assignment is made as collateral security only to secure said indebtedness, and whatever balance may be due from E. G. Coffin to Smith & Blanchard on the final day of settlement of his account with them, and when said balance is paid, to be returned to her." The husband, together with his wife, wrote his name on the back of these notes. Afterwards Mrs. Coffin claimed that she executed the assignment of the notes through the fraud and intimidation of Blanchard, and the husband alleged that his endorsement of the notes was a qualified endorsement, that is, one made to secure only $500, which Smith & Blanchard advanced to him at the time of the endorsement.

Coffin and his wife brought an action against Smith & Blanchard for the recovery and possession of the notes, and Smith & Blanchard brought an action to have the mortgage foreclosed, and also to have a certain deed which had been executed by Mrs. Coffin to one Baker for the land described in the mortgage, and which had been sold by Mrs. Coffin under the mortgage from Clark to her, set aside and cancelled. (254) The two suits were consolidated at the Fall Term, 1894, of SWAIN, and an order of reference made to have an account stated between the parties, the referee "to pass upon all issues of law and fact arising in the pleadings in said action, and to report his findings of fact and conclusions of law to the Court."

The testimony before the referee, upon the questions of the nature of the assignment by Mrs. Coffin and of her and her husband's endorsement of the notes, was conflicting and contradictory. He found as a fact that E. G. Coffin endorsed the bonds, together with his wife, the day after the wife had executed the assignment of the bonds, and that the object was to secure the full amount of his indebtedness to Smith & Blanchard; that the wife executed the assignment of the note for the same purpose, and that no fraud or intimidation was used to procure the assignment. And as a conclusion of law, he held that the execution of the assignment by Mrs. Coffin, the endorsement of the notes by both husband and wife, and the delivery of the notes to Smith & Blanchard, amounted to an executed contract and passed the title to the notes to Smith & Blanchard as a security to the debt due to them by E. G. Coffin, and that the property described in the mortgage should be sold and the proceeds applied to the payment of E. G. Coffin's debt to Smith & Blanchard.

As we have said, the evidence was conflicting, but there was evidence to sustain the findings of fact, and those findings, with some immaterial exceptions, were sustained by his Honor, as also were his conclusions of law, and a judgment was rendered upon the report of the referee.

We see no error in the judgment. If the written assignment of the notes by Mrs. Coffin—the husband not having executed the same—be eliminated from the transaction, we are yet of the opinion that the endorsement of the notes by both the husband and wife, and the delivery of them to the (255) creditor, constituted such a conveyance of the notes by her as is required by section 6, Article X, of the Constitution. No formal conveyance is necessary under that requirement of the Constitution in the transfer of a note or bond. The delivery of the note or bond to the endorsee after it has been en-

dorsed in blank by the wife, the owner, and the husband, is a sufficient conveyance of the note or bond to satisfy the constitutional requirement.

The presumption is, nothing else appearing, that the endorsement in blank of a note by the payee constitutes a transfer of the note to the endorsee. But the endorsement is subject to explanation between the immediate parties, and in the case before us it was found by the referee upon evidence that the endorsement was one qualified in its nature and made for the purpose of securing the debt due by the husband to Smith & Blanchard. *Davis v. Morgan,* 64 N. C., 570.

No error.

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(256)

SAIN v. BAKER.

(Filed 14 May, 1901.)

1. WILLS—*Limitations—"Heirs"—"Children."*

   Where a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the word "heirs" is construed to mean "children."

2. WILLS—*Limitation—The Code, Sec.* 1327.

   A devise of land to a son with a limitation over to three daughters, provided the son dies before his wife and without heirs, is good, though the devisor dies before the son.

3. WILLS—*Life Estate.*

   When a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the son dying without children, can not by will give his wife a life estate with the remainder to a third party.

4. WILLS—*Residuary Legatee—Personal Property.*

   A person made residuary legatee as to all personal property does not take land which the testator fails to devise.

ACTION by S. A. Sain, D. L. Porter, W. A. Porter, J. D. Porter, Mary C. Walsh, J. L. Walsh, J. M. Benson, S. J. Benson, G. W. Law, M. A. Law, Israel Mosteller and wife Barbara, Barbara Beam and Mary A. Sain against M. J. Baker and Dora S. Baker, his wife, heard by Judge *E. W. Timberlake* and a jury, at December (Special) Term, 1900, of LINCOLN. From a judgment for the plaintiffs, the defendants appealed.

D. W. Robinson, for the plaintiffs.

A. L. Quickel, Osborne, Maxwell & Keerans and *Jones & Tillett,* for the defendants.

CLARK, J. The first exception (that the Court refused to permit a witness to be asked on cross-examination whether J. W. Leonhardt died intestate or left a will) (257) became immaterial and need not be considered, for the defendants afterwards introduced the said will. The defendants could not have introduced the will on cross-examination in evidence. *Olive v. Olive,* 95 N. C., 485. The second exception was abandoned.

Daniel Leonhardt died in 1860, and by his will, bearing date the same year, he devised the first three tracts mentioned in the complaint to his son, J. Wesley Leonhardt. It was admitted in open Court, and also in the pleadings, that Daniel Leonhardt at the time of his death had title to the same, and that the plaintiffs are the sole heirs of Daniel Leonhardt since the death of J. Wesley Leonhardt, who died leaving no children. It was also admitted that the title to the fourth and fifth tracts was in J. Wesley Leonhardt at his death, and that both plaintiffs and defendants claim title under him.

By the third item of the will of Daniel Leonhardt, he devised the first three tracts to his son Wesley Leonhardt aforesaid. But by the seventh item thereof he provides: "My will and desire is that all the lands and negro boy Samuel that I have willed to my son Wesley, provided he should die before his present wife and without any lawful heir or heirs, in that case the lands and said negro boy I direct to be sold and the proceeds thereof to be equally divided between my three daughters" (naming them). The plaintiffs are one of the three sisters and the children of the other two.

It was uncontradicted evidence that J. Wesley Leonhardt died before his wife (who was the only wife he ever had), and that he died without having had any issue. The entire will must be construed together.

Item 7 thereof, taken in connection with item 3, created (258) a contingent executory devise, after a fee conditional, for the benefit of plaintiffs, should Wesley Leonhardt die without leaving heir or heirs. *Kornegay v. Morris,* 122 N. C., 199; *Baird v. Winstead,* 123 N. C., 181; *Watson v. Smith,* 110 N. C., 6; *Fortescue v. Satterthwaite,* 23 N. C., 566.

From the context it is clear that the words "without any lawful heir or heirs" in Item 7 are used in the sense of dying "without *issue* or *children,*" otherwise the limitation over to Wesley's sisters, Daniel Leonhardt's daughters, would have been in vain. *Rollins v. Keel,* 115 N. C., 68. This limitation over is not void for remoteness, and took effect at the death of the devisee Wesley Leonhardt without issue, by virtue of the act

of 1827, now The Code, section 1327. *Buchanan v. Buchanan,* 99 N. C., 308. The defendants strenuously contend that the limitation over was void unless Wesley had died without issue during the life of the testator—relying upon cases cited by counsel, especially *Hilliard v. Kearney,* 45 N. C., 221; *Burton v. Conigland,* 82 N. C., 99. This would have been correct at common law and down to the enactment of the statute of 1827, just cited, which by its terms applies only to wills executed since 15 January, 1828. *Weeks v. Weeks,* 40 N. C., 111.

Prior to the statute of 1827, when there was a devise like this to one in fee, with a limitation over upon his death without issue, or without heirs, the courts held that this meant a dying without issue, or without heirs, during the lifetime of the testator. This was a strained construction, for the will speaks as of the time of the testator's death, and naturally would contemplate the death of the devisee, without issue, at a subsequent date. The reason given, however, was that if it was held to mean a dying after the testator's death, without heirs, or without issue, that would be by common law rules any future failure of heirs, and the devise would fail for remoteness. Hence it was held that if a devisee in such case was alive at the testator's death, the estate became inde-
(259) feasible and the limitation over was void. The statute put what would seem to us a common sense construction on these words (which, if it had been held, would have avoided either of above alternatives) by prescribing that these words of limitation should be held to mean a dying without issue, or without heirs, *"living at the time of devisee's death"* (or within ten months thereafter). Code, section 1327.

In *Hilliard v. Kearney,* 45 N. C., 222, the will construed was executed in 1775; in *Gibson v. Gibson,* 49 N. C., 425, the will bore date 1823; in *Hollowell v. Kornegay,* 29 N. C., 261, the will was of date 1786, and in *Brown v. Brown,* 25 N. C., 134, the testator died in 1801. In this last case, while applying the common law rule, the Court refers to the statute of 1827 and recognizes that wills executed subsequent thereto must be construed by its provisions. In both *Burton v. Conigland,* 82 N. C., 100, and *Murchison v. Whitted,* 87 N. C., 465, the will was dated since 1827, and the opinion is evidently inadvertent in laying down a *dictum* recognizing the old line of decisions, but what was said on that head was *obiter* and not necessary to the determination of either case. *Davis v. Parker,* 69 N. C., 271, ignored the statute of 1827, and was overruled in *Buchanan v. Buchanan, supra,* in which the purpose of the statute is discussed and clearly enunciated, and as it is also in *Kornegay v.*

Morris, supra, and any other construction would destroy the statute and defeat its object.

Therefore, as to the first three tracts named in the complaint, by the terms of Daniel Leonhardt's will they passed to the plaintiffs upon the death of J. Wesley Leonhardt in 1898 without issue.

In the second clause of the will of J. Wesley Leonhardt, he attempted to give the three tracts above referred to, which had been devised to him by his father, to his wife for life. This was beyond his power for the reasons already given; but as the wife died shortly after her husband and there is no limitation over said three tracts pass, in any view of the (260) case, to his heirs at law.

In the third clause of said will, J. Wesley Leonhardt gave a tract of 133 acres to his wife for life, with remainder at her death to the defendant Dora S. Baker, but there is no devise of the testator's two other tracts, which are numbered fourth and fifth in the complaint. In the fourth clause of his will he gives all his "personal effects of every kind and description" to his wife for life, and at her death "whatever is remaining of my personal property or effects to Dora S. Baker, wife of Michael Baker, her heirs and assigns forever." It was seriously argued to us that the rule that a testator is presumed not to die intestate as to any property, carried all five tracts of land named in the complaint to the defendant Dora S. Baker. But by the very terms of the fourth clause under which she claims, Dora S. Baker was residuary legatee of the personal estate only. By the second and third clauses only was the realty devised. For reasons above given, the first three tracts named in the complaint (and referred to in the second clause of Wesley's will) passed to plaintiffs. The fourth and fifth tracts named in the complaint are not devised; as to them, Wesley having died intestate, they likewise passed to plaintiffs, and his Honor correctly instructed the jury if they believed the evidence to answer the first issue "Yes."

There was no exception upon the second issue as to the damages for detention.

No error.

Cited: *Lockhart v. Covington,* 132 N. C., 472.

(261)

KILLIAN v. SOUTHERN RAILWAY CO.

(Filed 14 May, 1901.)

PARTIES—*Negligence—Death by Wrongful Act—Parent and Child—The Code, Secs.* 1498 *and* 1499.

A father can not maintain an action in his individual capacity for the death of his son by wrongful act.

ACTION by H. C. Killian against the Southern Railway Company, heard by Judge *W. B. Council,* at November Term, 1900, of CATAWBA. From a judgment of nonsuit, the plaintiff appealed.

E. B. Cline and *T. M. Hufham,* for the plaintiff.
George F. Bason, for the defendant.

CLARK, J. This is an action by a father for the negligent killing of his son. Upon the evidence the plaintiff was nonsuited and appealed, but in this Court the defendant interposed a preliminary plea *ore tenus* to dismiss the action because the complaint does not state facts sufficient to constitute a cause of action. Rule 27 of this Court; *Manning v. Railroad,* 122 N. C., 825.

The Code, section 1498, provides that whenever "the death of a person is caused by a wrongful act, neglect or default of another," an action therefor may be brought by "the executor, administrator or collector of the decedent." Section 1499 provides that "the plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death," and section 1500 provides for the application and distribution of such recovery.

At common law this action could not have been maintained. *Baker v. Bolton,* 1 Camp., 493, in which Lord Ellenborough tersely stated the doctrine of the common law to be:

(262) "In a civil suit, the death of a human being can not be complained of as an injury." Where the injury subsequently resulted in death the action abated—*actio personalis moritur cum persona.* Hence, though many courts doubted the soundness of the reasoning as applied to this class of cases, it was uniformly held in England and this country that the right of action ceased upon the death of the injured party. 8 Am. and Eng. Enc. (2 Ed.), 855, and a page of authorities there cited, especially *Cary v. R. R.,* 55 Mass., 475, 48 Am. Dec., 616; *Eden v. R. R.,* 53 Ky., 204; *Hyatt v. Adams,* 16 Mich.,

180. In *Insurance Co. v. Brame,* 95 U. S., at page 756, it is said: "The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found."

It is true the father was entitled to the services of his son, if he had lived, till his majority, but when the death of the son ensued, the cause of action abated. It is said in *Hyatt v. Adams,* 16 Mich., 180, upon a review of the English authorities (*Cooley,* J., concurring) that one case, and only one (*Baker v. Bolton, supra*), held that at common law the father could recover after the death of the child, even for the value of his services from the time of the injury to the date of the death, but as here the death was instantaneous, that case does not apply.

In England this rule of the common law was changed by Lord Campbell's Act, 9 and 10 Vict., which gave the right of action for injuries sustained by neglect or wrongful act of another, notwithstanding the death of the person injured. That act began by expressly reciting that at common law an action could not be maintained in such cases. This act has been copied, with many variations, in the States of the (263) Union, but in nearly every instance such acts give the right of action to the personal representative. It has been, as a consequence of what has been said above, held that the statute confers a new right of action which did not exist before, and must be strictly followed. 8 Am. and Eng. Enc., 858 (2 Ed.). Hence, where the right of action is given to the personal representative "the parent can not maintain it, even when the statute expressly provides that the recovery shall be for his or her benefit. In such cases only the executor or administrator can sue." 8 Am. and Eng. Enc. (2 Ed.), 891, and cases cited upon that and two following pages.

In this State the remedy was first given by statute 1854, chapter 39; Rev. Code, chap. 1, secs. 8, 9 and 10, which, with some modifications, are now sections 1498, 1499 and 1500 of The Code. By these, as already said, the action must be brought by the personal representative.

The plaintiff's counsel cited us to no case in this State, except *Russell v. Steamboat Co.,* 126 N. C., 961, in which the point does not arise and was not decided. The cases cited by them from other States are either recoveries for loss of service

after the death of the child and up to the death (8 Am. and Eng. Enc., 856), or where the statute confers the right of action upon the parent. 8 Am. and Eng. Enc., 895. In this State it has been held, as in all others, that the right of action did not exist at common law. *Collier v. Arrington,* 61 N. C., 356; *Howell v. Commissioners,* 121 N. C., 362; *Best v. Kinston,* 106 N. C., 205. The right conferred by statute is plainly given to the personal representative only. Let it be entered.

Action dismissed.

Cited: *Strauss v. Wilmington,* 129 N. C., 100; *Christian v. R. R.,* 136 N. C., 322; *Bolick v. R. R.,* 138 N. C., 371; *Kyle v. R. R.,* 147 N. C., 395.

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(264)

MARTIN v. HIGHLAND PARK MFG. CO.

(Filed 14 May, 1901.)

1. NEGLIGENCE—*Personal Injuries—Master and Servant—Employer and Employee—Damages.*

   Tools of ordinary and everyday use, which are simple in structure, requiring no skill in handling—such as hammers and axes—not obviously defective, do not impose a liability upon employer for injuries resulting from such defects.

2. NEGLIGENCE—*Employer and Employee—Personal Injuries—Damages.*

   An employer is not liable for injuries to an employee occurring upon work done outside of the scope of his employment at request of another employee who had no authority to make the request.

ACTION by J. E. Martin against the Highland Park Manufacturing Company, heard by Judge *W. S. O'B. Robinson,* at January Term, 1901, of MECKLENBURG. From a judgment for the defendant, the plaintiff appealed.

Osborne, Maxwell & Keerans, for the plaintiff.

Jones & Tillett, Burwell, Walker & Cansler, for the defendant.

COOK, J. We find no error in the ruling of his Honor in sustaining the motion of the defendant to dismiss the action, as in case of nonsuit, upon demurrer to plaintiff's evidence. The evidence does not show negligence by defendant or its agent. In endeavoring to put a new "key" in the shaft, in

place of the worn or defective one, Webb, the loomfixer, found it difficult to insert the new one without help. That it did not fit easily was hardly to be expected, from the fact that its proper use required a tight fit in order to do the work properly. The one taken out was working loosely, and (265) for that reason plaintiff called his attention to it. In inserting the new key, the loom fixer called upon plaintiff, a weaver whose loom had thus gotten out of fix, to hold the hammer upon the key while he, Webb, struck upon that hammer with another, in order to drive the key into the shaft, and while so striking a fragment of steel flew off and struck him in the eye, causing the injury for which he brings this action.

Plaintiff's expert witness testifies that the key *ought* to have been driven in by slight taps from the hammer, but it wasn't. The fact appears that it required *heavier* blows. But as plaintiff was not injured by the key, he can not maintain his contention that he was injured by its defective formation or excessive size. But he says he was injured by a piece of steel from the fame of the hammer. Well, then, if defendant furnished its employees with tools known to it to be defective, or by ordinary care and inspection could have known of such defects, and the injury was caused by reason of such defects, then there would have been evidence of negligence to be submitted to the jury.

But was there any apparent defect in the hammer? Or was there a defect known to the defendant or its agent? Or was the hammer used in a negligent, careless and unworkmanlike manner? If such state of facts existed, the plaintiff failed to offer any evidence to prove it.

There is no complication about a hammer; it is not a piece of machinery which requires any attention whatsoever to keep in order; it can not get "out of fix," unless the handle breaks; it requires neither art, science nor skill in its use; brawn and muscle do the work, and it is known to be one of the most harmless of all tools to the person using it. Should a flaw or other patent defect exist, it would more certainly appear to the person undertaking to work with it, whose duty it would be to make it known to his employer. Should a latent defect exist, it could not be known by the closest inspection either to employer or employee, and for injury on that (266) account legal responsibility would rest upon no one, and would be the misfortune of the sufferer. Whether properly tempered, can only be ascertained by its use, and not by inspection. Whether the dents were made by the use at the time of the injury, or resulted from long and violent service, does

not appear; nor do they seem to have been discovered until after the injury occurred.

Surely, it can not be seriously contended that every employer is responsible for injuries occurring from improperly tempered axes, hoes, scythes, trace chains, lap links, bridle bits, etc., the imperfections of which could not be known till used; or for defective whiffletrees, axe helves, hoe helves, hand spikes, plow lines, and such like (the defects of which would be first discovered by the party using them), unless the employer is shown to have had knowledge of such defects. If such be the rules of law, then the contentment of the farmer must give place to anxiety and dread lest injury, resulting to a servant from a splintered hoe helve or hand spike, defective bridle bit, whiffletree or plow line, *et id simile,* may at any time occur, and sweep from him his farm and belongings in compensation of the damage done. To the same experience would the contractor expect to be subjected, should a defective nail, while being driven by one of his carpenters, break and do injury. To which doctrine we can not subscribe.

Injuries, resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause or is an unusual effect of a known cause and therefore not expected, must be borne by the unfortunate sufferer, which seems to us to be the condition of the plaintiff in this case. For an injury caused by an inevitable or unavoidable accident while engaged in a lawful business, there is no legal liability. Black's Law and Practice in Accident Cases, section 8.

(267) In *Mulligan v. Crimmins,* 82 N. Y., 578, it is held, where a piece of metal (spicula) was forced from a chisel by a blow of a heavy sledge and struck plaintiff in the eye, putting it out, does not raise a presumption of negligence in the absence of proof that the chisel, before the blow was struck, was in a dangerous condition, still less that a reasonable examination would have disclosed the danger.

In *R. R. v. Melms,* 83 Ga., 70, where the injury was caused by the breaking of a hammer, it was held that the hammer appearing to be first-class, the plaintiff could not recover for injury caused by some latent defect. To the same effect is the case of *Carlton v. Phoenix Co.,* 132 N. Y., 273.

In *Wachsmuth v. Electric Co.,* 118 Mich., 275, where a chip from a snap hammer struck plaintiff and injured him, it is held that the duty of inspection by the master of appliances used by servants does not extend to small and common tools in everyday use, of the fitness of such for use the servants using

them may reasonably be supposed to be better judges than the master. To the same effect is *Hopkins v. Burnett;* 19 S. W., and other cases cited by defendant's counsel in their brief.

In the case at bar there is no evidence that any defect in the hammer was known to exist either by the plaintiff or defendant, nor is there any evidence to show that its condition was such as to incite an inquiry or suspicion.

No negligence in inflicting the injury appearing upon the part of the defendant, the defense of contributory negligence does not require our consideration. Contributory negligence presupposes negligence, and can exist only as a co-ordinate or counterpart. When the defendant has exercised every possible care and caution, negligence fails to exist, and an injury resulting, it must occur only by the negligence of the plaintiff, which can not be considered contributory but (268) original negligence. We then come to consider the third contention of the plaintiff—that his injury was caused by being ordered to do dangerous work outside of the scope of his employment. It appears that plaintiff was not employed by Webb, the loom fixer, but by the superintendent, whose duty it was to employ help and discharge it. The loom fixer's business was to fix looms when they got out of order and see that the weavers kept at work, and not to employ or discharge. Before calling upon plaintiff, Webb had secured the assistance of one Little, but he left and returned to his work; then plaintiff was called upon. To assist the loom fixer was not within the scope of his employment, and he knew that Webb had no authority to put him to doing any work other than that of weaving. Under this state of facts, as appears from plaintiff's testimony, Webb did not stand in the place of the master, but, if it had been otherwise, the defendant would not be liable unless the outside work was more dangerous and complicated for the plaintiff to perform than that in which he was engaged. "The liability upon the master in cases of injury to a servant received in a dangerous employment *outside* of that from which he is engaged, arises not from the direction of the master to the servant to depart from the one service and engage in the other more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years and unable to comprehend the danger." Bailey's Personal Injuries Relating to Master and Servant, volume 2, section 3462a; *Cole v. R. R.,* 71 Wis., 114; 5 Am. St., 201.

In the case at bar there is no evidence to show that there

was less risk and danger in weaving than in holding the hammer for Webb to strike; nor was there any evidence to show a latent defect in the hammer which was known to Webb
(269) or the master, or by reasonable diligence could have been discovered. There being no such evidence, his Honor properly sustained the demurrer and nonsuited the plaintiff.

No error.

Cited: *Patterson v. Lumber Co.*, 145 N. C., 45; *Lassiter v. R. R.*, 150 N. C., 486; *Dunn v. R. R.*, 151 N. C., 315.

KRAMER v. SOUTHERN RAILWAY CO.

(Filed 14 May, 1901.)

FORMER ADJUDICATION—*Res Judicata—Rehearing.*

It is not allowable to rehear a cause by raising on a second appeal the same points decided on a former appeal.

ACTION by Sarah Kramer, administratrix of Hugo Kramer, against the Southern Railway Company, heard by Judge *E. W. Timberlake* and a jury, at February Term, 1901, of McDOWELL. From a judgment for the plaintiff, the defendant appealed.

E. J. Justice, for the plaintiff.
George F. Bason, for the defendant.

PER CURIAM. The appellant begins his brief as follows: "It is admitted that the charge of the Court was correct and proper under the decision of this Court in this same case (*Kramer v. R. R.*, 127 N. C., 328), but it is respectfully submitted that there was error in that decision, and this case is brought back by appeal to this Court for the purpose of reviewing that decision." This is the sole point presented.

No Court can admit such practice. There must be an end to litigation. The point decided on the former appeal is *res judicata* in this case between these parties. It was the
(270) duty of the Judge below to follow our decision. It would have been judicial insubordination for him not to have done so. We can not adjudge that he was in error in obeying our mandate.

If there was error, the remedy was not in applying to the lower Court to disregard and overrule the decision of this Court, and appealing from his refusal to do so. The remedy was solely by application to this Court to correct its own errors, if any, by a rehearing. *Wright v. R. R., ante,* 77; *Shoaf v. Frost,* 127 N. C., 306; *Pretzfelder v. Ins. Co.,* 123 N. C., 164. In the present case there is, if possible, less defense for the appellant's action, because, in fact, there was a rehearing on the former appeal, and the opinion (127 N. C., 328) was the deliberate conclusion of the Court after a second hearing. This appeal, if admissible, would be in effect a second rehearing, and therefore a third hearing in this Court of the same point between the same parties.

The judgment below is

Affirmed.

Cited: *Perry v. R. R.*, 129 N. C., 334; *Jones v. R. R.*, 131 N. C., 135; *Holland v. R. R.*, 143 N. C., 437.

HEYER v. RIVENBARK.

(Filed 14 May, 1901.)

LIMITATION OF ACTIONS—*Pleading—Judgment—Execution—The Code, Sec.* 138.

An answer that "the defendant pleads the statute of limitations," to a motion for leave to issue execution, is insufficient as a plea of the statute of limitations.

APPLICATION of Margaret E. Heyer, administratrix (271) of Jno. C. Heyer, for leave to issue execution against D. W. Rivenbark, heard by Judge *E. W. Timberlake,* at March Term, 1899, of PENDER. From a judgment affirming an order denying the application, the complainant appealed.

Stevens, Beasley & Weeks, for the plaintiff.
J. T. Bland, for the defendant.

CLARK, J. This was a motion, 9 September, 1897, by an administratrix, before the Clerk, for leave to issue execution, upon notice served on defendant, based on an affidavit which sets out that on 23 December, 1885, plaintiff's intestate ob-

tained a judgment against defendant before a Justice of the Peace for $148.73 and costs, and on the same day caused the same to be docketed in the office of the Clerk of the Superior Court of Pender County, and that no part of said judgment has been paid, and that the whole thereof is still due. The record states the defendant "resisted the motion and pleaded the statute of limitations in bar of the motion." The Clerk found the allegations of the affidavit to be true, and added a further finding that at the date of docketing the judgment the defendant "was and is now the owner of real estate situate in Pender County of value not exceeding $1,000, and no homestead has ever been assigned defendant." The Clerk denied the motion, which judgment was affirmed by the Judge on appeal, and plaintiff appealed to this Court.

The Code, section 138, provides that the defense of the statute of limitations "can only be taken by answer." The record discloses no answer filed to the motion—which, therefore, should have been granted. But take it that an answer, and duly verified, in response to the plaintiff's affidavit had been filed in words as orally stated—"the defendant pleads the statute of limitations"—this is wholly insufficient and the plea should have been treated as a nullity. *Lassiter v. Ro-*
(272) *per,* 114 N. C., 17, and numerous cases there cited. Such plea gives neither the plaintiff nor the Court any information of the state of the facts which will be relied upon in defense. It does not, and could not appear by such plea, upon what statute the defendant is relying. If he is relying upon the ten-year statute, that would not be a defense to issuing execution, though the lien has expired, provided executions have been issued regularly every three years. *Williams v. Mullis,* 87 N. C., 159; *Berry v. Corpening,* 90 N. C., 395 (unless defendant was an executor or administrator); *Pipkin v. Adams,* 114 N. C., 202; *McCaskill v. McKinnon,* 121 N. C., 192. If execution is issued after the lapse of ten years, it is a lien only from the levy (except in cases where the statute does not run). *Spicer v. Gamble,* 93 N. C., 378; *Lytle v. Lytle,* 94 N. C., 683.

The lien of the justice's judgment, docketed in the Superior Court, continued for ten years (*Patterson v. Walton,* 119 N. C., 500), though action on such judgment would be barred by lapse of seven years (*Daniel v. Laughlin,* 87 N. C., 433, and other cases cited on both points; Clark's Code [3 Ed.], page 52). But neither point is here involved.

The additional finding of fact by the Clerk is not raised by the affidavit of plaintiff, nor by defendant, for there was no

answer filed by him. The finding has no pertinency and no bearing on this motion, which does not bring up the question of homestead or judgment lien, but is simply for leave to issue execution under section 440 of The Code. Upon the record it was error to refuse it. Whether the reversion of the homestead is subject to the lien can not now be presented—certainly not upon this motion merely to issue execution.

Error.

Cited: *Murray v. Barden*, 132 N. C., 144; *Evans v. Alridge*, 133 N. C., 380.

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SPENCE v. GOODWIN.

(Filed 14 May, 1901.)

1. HOMESTEAD—*Infants—Guardian ad Litem—Waiver.*

A guardian *ad litem* can not waive the homestead rights of infant heirs, especially when there is no consideration therefor.

2. HOMESTEAD—*Infants—The Constitution, Art. X, Sec.* 3.

The infant heirs are entitled to a homestead in the land of their father, though they own other real estate.

3. HOMESTEAD—*Guardian ad Litem—Estoppel.*

Where a guardian *ad litem* permits an order to be entered for sale of the homestead of the infant heirs, they may afterwards, and before sale, assert their rights.

ACTION by J. C. Spence, administrator of estate of Z. E. Goodwin, against Peter N. Goodwin and others, heard by Judge *A. L. Coble* and a jury, at Spring Term, 1900, of PASQUOTANK.

This was a special proceeding before the Clerk by the administrator to sell real estate to create assets, in which the infant defendants claimed a homestead in the lands of their father. The Clerk allowed the homestead and his judgment was affirmed in the Superior Court.

The case was heard upon the following facts agreed:

"1. That the plaintiff's intestate died on or about 1 June, 1898, and that the plaintiff qualified as his administrator on 10 January, 1900.

"2. That at the time of the death of said Z. E. Goodwin he was seized in fee simple of the tract of land described in the petition in this cause and that the same is worth $800, upon which the widow is entitled to dower, and that it was all the

(274) land the said Goodwin owned in fee simple at his death.

"3. That he left him surviving the three defendants who are under 21 years of age and also a widow, but the widow is not the mother of said children.

"4. That the said three defendants own a tract of land as tenants in common outside of any interest in said land described in the petition which they inherited from their mother, and is worth $400, said land situated in Chowan County.

"5. That the said intestate owed debts at the time of his death more than his personal property could pay.

"6. That all the defendants were properly served with summons and were properly before the Court and were represented by M. B. Culpepper, who looked after their interest. He, the said M. B. Culpepper, being duly appointed by the Court, as appears in the record.

"7. That on 25 January, 1900, plaintiff filed the petition in this cause, summons having issued on 23 January, 1900. That on 1 February, 1900, said guardian *ad litem* was appointed, as appears by the record, and he was duly served.

"8. That on 14 February, 1900, said defendants filed the answer set out in the petition by their guardian *ad litem*, which admits the allegations of complaint and prays the petition of plaintiff be granted.

"9. That on 17 February, 1900, said cause was continued until 22 February, 1900.

"10. That on 22 February, 1900, said cause was heard with all the parties before the Court and the order of sale was made to sell the lands described in the petition in the cause and no homestead was asked or prayed for by the defendant.

"11. That no notice of appeal was given from said judgment of the Clerk on said day, nor within ten days thereafter, nor at any time.

"12. That on said 22 February, 1900, the plaintiff, in pursuance of said decree, advertised the said lands to be
(275) sold, according to law, on 24 March, 1900, and nothing more was said till 21 March, 1900, when defendants filed the petition for homestead, as set out in the record, and it was then agreed the sale might be continued without prejudice to either party till the case was finally heard, as it would be expensive to procure an injunction to prevent sale.

"13. That plaintiff filed the answer to said petition for homestead on 22 March, 1900, and same was heard by the Clerk, who rendered the judgment in the record of 22 March, 1900.

"14. That said M. B. Culpepper was not an attorney-at-law and was not represented by an attorney in filing his answer, and was not at the time informed as to legal rights of defendants.

"That said M. B. Culpepper has acted in a great number of cases in the capacity of guardian *ad litem,* similar to this, in which petitions were filed for sale of land for assets when there were minors. That said M. B. Culpepper is insolvent."

From a judgment for the defendants, the plaintiff appealed.

G. W. Ward, for the plaintiff.

E. F. Aydlett, for the defendants.

DOUGLAS, J., after stating the facts: The plaintiff contends that the answer of the infant defendants by their guardian *ad litem* was a waiver of their homestead rights, if any existed; that if the Clerk's order of sale of 22 February, 1900, was erroneous, their only remedy was by appeal; and that in any event the land inherited from their mother should be included as a part of any homestead that may be allowed them, thus *pro tanto* exonerating the land owned by their (276) father. We do not think that any of such contentions can be sustained.

The duty of a guardian *ad litem,* and in fact the object of his appointment, is to *protect* the interest of his wards, and he has no power to waive any substantial right, especially when such waiver is entirely without consideration. It is true that his failure to assert their rights may in certain cases estop them from doing so, but only where such assertion would interfere with the rights of third parties subsequently acquired in good faith.

In the case before us the land has not been sold, and no rights whatever have been acquired by third parties. Therefore *Dickens v. Long,* 109 N. C., 165, and *Morrisett v. Ferebee,* 120 N. C., 6, have no present application.

The law does not favor the implied waiver of homestead exemptions, especially by infant defendants. The homestead is specifically exempted by the Constitution for reasons of public policy, and even an adult is not permitted to waive his general right of homestead. Where the homestead has not been laid off, he may sell any or all of his lands and thus divest himself of all homestead right in said lands; but even this *jus disponendi* is controlled by Article X, section 8, of the Constitution, where the homestead has been allotted. A right, around which so many protective provisions have been placed by the organic law, can not be lightly set aside on a mere presumption of waiver.

As to the second contention, while it would have been better for the guardian *ad litem* to have set up the homestead right of the infant defendants in his answer, we do not think that they have lost any right by his failure to do so. As the pleadings were constituted, there appears to have been no ground for appeal, as the allegations of the complaint are admitted to be true. The error of the guardian *ad litem* was not in failing to answer the complaint, but in omitting to set up an independent right of exemption existing in the infant defendants. In this (277) state of the case, we do not think that these defendants are in any worse condition than a judgment debtor; certainly not after their formal claim of exemption.

The plaintiff's third contention is directly opposed to the express letter of the Constitution, of which Article X, section 3, is as follows: "The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any one of them." The father, whose debts the administrator is now seeking to pay, had no interest in the lands descended from the mother. Such lands were not liable for his debts, nor could they have been allotted to him as part of his homestead. The homestead exemption is a condition attaching to certain lands belonging to the debtor, which prevents their sale under execution, and after his death this exemption continues during the minority of his children, without regard to any other property they may have acquired from other sources.

If the homestead claimant were the widow, the case would be essentially different, as there is a clear distinction between the right of the children as defined in section 3 of Article X, and the right of the widow as provided in section 5 of said Article, which is as follows: "If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, *unless she be the owner of a homestead in her own right.*" This provision in the latter section, which is entirely omitted in the former, emphasizes by direct implication the unconditional right of exemption given to the children by section 3.

We are of opinion that the infant defendants are entitled to the allotment of the homestead in accordance with the prayer of their petition, and the judgment of the Court below is therefore

Affirmed.

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CARROLL v. MONTGOMERY.

(Filed 14 May, 1901.)

1. INFANTS—*Next Friend—Abatement—Exceptions and Objections—Practice.*

   Objection that a next friend had not been regularly appointed must be taken by a plea in abatement.

2. INFANTS—*Next Friend—Exceptions and Objections—Trial Judge.*

   Defendant can not object to the next friend appointed by the trial judge.

3. DOWER—*Rents.*

   A widow who has taken dower in another State, has no interest in rents from the estate of deceased husband.

4. LIMITATION OF ACTIONS—*Agents—Trusts—Infants.*

   Where an agent collects rents for infants, the statute of limitations does not run against the trust.

5. ARREST AND BAIL—*Agent—The Code, Sec.* 291, *Subdivs.* 1 *and* 2.

   An insolvent defendant may be arrested in a civil action for money received and fraudulently misapplied.

6. EXECUTION—*Execution Against the Person—The Code, Secs.* 447 *and* 448, *Subdiv.* 3.

   An execution may issue against the person under The Code, secs. 447 and 448, subdiv. 3, after one against his property has been returned unsatisfied.

ACTION by Ellen Carroll, Lillian Carroll, Anson Carroll, Henry Carroll, the last three infants, by their next friend and mother, Ellen Carroll, against James Montgomery, heard by Judge *A. L. Coble* and a jury, at Fall Term, 1900, of WARREN. From a judgment for the plaintiffs, the defendant appealed.

T. T. Hicks and *H. A. Boyd,* for the plaintiffs. (279)
B. G. Green and *Pittman & Kerr,* for the defendant.

CLARK, J. The objection that the next friend had not been regularly appointed should have been taken by a plea in abatement, and not by a motion to nonsuit at the close of the evidence. *Hicks v. Beam,* 112 N. C., 642. The defendant had answered and thus waived objection. The action of the Judge in making an order at that juncture, appointing the next friend was in his discretion. His order was made after full inquiry in the mode prescribed by Rules 16 and 17 of the Superior Court, and his selection is not a matter from which the defendant could appeal. It did not con-

cern him. The mother, already a party to the action, had no interest hostile to her children which could prevent her appointment. Indeed, the Judge finds she had no interest. The judgment properly directs the payment of the recovery into Court, to await the appointment of a guardian to receive the fund.

It appearing that the *feme* plaintiff had taken her dower in the entire estate of her husband in another State, it was properly held that she had no interest in the rents sued for in this action. We do not see why the defendant should object, or how his interest is affected. She is a party to this action, and is the proper one to have raised objection to the exclusion of herself from a share in the recovery. The defendant is fully protected from a future action by her.

The defendant having collected the rents, acting as agent for the owners, though infants, the statute of limitations does not run against the trust. The insolvency of the defendant is alleged in the complaint and admitted in the answer. Arrest and bail lies in such case, Code, section 291 (1) and (280) (2), and an execution against the person issues, if one against the property of the defendant be returned unsatisfied. Code, sections 447, 448 (3); *Kinney v. Laughenour*, 97 N. C., 325. The Judge properly finds that a cause of arrest is set forth in the verified complaint. The defendant can be discharged only in one of the methods pointed out in *Fertilizer Co. v. Grubbs*, 114 N. C., 470. The other exceptions do not require discussion. We find

No error.

Cited: *Huntley v. Hasty*, 132 N. C., 281; *Houser v. Bonsal*, 149 N. C., 55.

GWYN HARPER MANUFACTURING CO v. CAROLINA CENTRAL RAILROAD.

(Filed 23 May, 1901.)

1. EVIDENCE—*Carriers—Reports of Officers.*

Where action is brought against a connecting carrier for the loss of goods, the official reports of officers of the other connecting carriers are admissible on behalf of the plaintiff.

2. EVIDENCE—*Carriers—Delivery of Goods—Loss of Goods.*

Evidence that goods were delivered to a carrier is admissible in an action against a connecting carrier for the loss of the goods.

3. CARRIERS—*Bill of Lading—Limitation—Contracts—Notice of Loss —Notice.*

A clause in a bill of lading that notice of loss or damage to goods must be given in writing to a carrier within 30 days after delivery thereof, or after due time for such delivery, is unreasonable and void.

4. CARRIERS—*Bill of Lading—Notice of Loss.*

Where a bill of lading requires that notice of loss shall be given at the point of delivery, an intermediate carrier can not object that it was not notified.

5. CARRIERS—*Loss of Goods—Burden of Proof—Presumption.*

Among connecting lines of railway, that one in whose hands goods are found damaged is presumed to have caused the damage and the burden is upon it to rebut the presumption.

6. CARRIERS—*Issues.*

The issue submitted in this case under the evidence was proper in an action against a carrier for the loss of goods.

7. VERDICT—*Directing Verdict—Trial.*

Where the answer denies all the allegations of the complaint, it is error to direct a verdict for the plaintiff.

ACTION by the Gwyn Harper Manufacturing Co. (281) against the Carolina Central Railroad Co., heard by Judge *E. W. Timberlake* and a jury, at December (Special) Term, 1900, of LINCOLN. From a judgment for the plaintiff, the defendant appealed.

S. G. Finley, for the plaintiff.
D. W. Robinson, for the defendant.

DOUGLAS, J. This is an action for the recovery of twenty bags of flour lost in transit. The plaintiff alleges in his complaint, which is apparently sustained by the evidence, that it is the assignee of the bill of lading for a large amount of flour shipped from Circleville, Ohio, to J. A. Durham & Co., Lenoir, N. C., all of which was delivered except the 20 bags said to have been lost. The answer denied every allegation of the complaint, either directly or for want of knowledge. As an additional defense, the answer alleged: "That no claim for loss or damage was made by plaintiff above named within thirty days after the delivery of the property, or within thirty days from the discovery of the loss, as set forth and required in the bill of lading and contract under which the said property and flour were shipped." The assignments of (282) error were to the admission of evidence, to the submission of issues, and the direction of the verdict in favor of the

plaintiff. The following is the statement in the record as to the issues: "The defendant tendered the following issues, which were refused by the Court, to-wit: 1. Were the goods of plaintiff lost while in the custody of defendant? 2. What is the value of the same? In place of the issues tendered by defendant the following issues, which his Honor answered—the issue and answer are, "Are the defendants indebted to the plaintiff? if so, how much? Ans.: $38.50."

We see no error in the admission of exhibits "A," "B," "C" and "D," which were properly identified, and appear to be part of the records of one or the other of the different companies composing the through freight line. Exhibits "A," "B" and "C" seem to be official reports of officers of the companies directly relating to the subject matter of the action; while Exhibit "D" is the claim of loss filed by the plaintiff as required by the bill of lading. The papers are certainly relevant and material, and we think are equally competent. The same may be said of the depositions of the witnesses Crites and Kyle. In an action for the value of goods lost in transit, it is sometimes difficult to comprehend how the testimony of the shipper that he actually delivered the goods to the common carrier can be considered "incompetent and *irrelevant.*" The defendant contends that the plaintiff is barred of any recovery on account of the following clause in the bill of lading, to-wit: "Claims for loss or damage must be made in writing to *the agent at point of delivery* promptly after arrival of the property, and if delayed for more than 30 days after the delivery of the property, *or after due time for the delivery thereof,* no carrier hereunder shall be liable *in any event.*"

It is now well settled that all such contracts of limitation, being in derogation of common law, are strictly con-
(283) strued, and never enforced unless shown to be reasonable. *Mitchell v. R. R.*, 124 N. C., 236; *Hinkle v. R. R.*, 126 N. C., 932, and cases therein cited. This Court has said in *Wood v. R. R.*, 118 N. C., 1056, that "Such stipulations, contained in a contract, are a part of the contract, but they do not contain any part of the obligation of the contract. They are conditions, in the nature of estoppels, and, when enforced, operate to prevent the enforcement of the obligations of the contracts. Such restrictions, when reasonable, will be sustained. But, as they are restrictions of common-law rights and common-law obligations of common carriers, they are not favored by the law."

We do not think the stipulation under consideration is reasonable, and therefore it can not be enforced. We deem it

proper to state that we are inclined to think that, in analogy to the ruling as to telegraph and express companies, a stipulation requiring a demand to be made within *sixty* days after notice of loss or damage would be reasonable. *Sherrill v. Tel. Co.*, 109 N. C., 527; *Lewis v. Tel. Co.*, 117 N. C., 436; *Cigar Co. v. Express Co.*, 120 N. C., 348; *Watch Case Co. v. Express Co.*, 120 N. C., 351. That this defense in the present instance is purely technical, is shown by the testimony of the witness Holland, formerly the defendant's agent at Lincolnton, who testified that he checked the flour short when delivered to Chester and Lenoir Railroad, and also by Exhibit "B." It would thus appear that the defendant knew of the loss before the consignee.

Again, the defendant complains that the notice was given to the Chester and Lenoir Railroad, and not to the defendant, who alone is sued. The bill of lading, in express terms, requires that such notice should be given "to the agent at point of delivery," which in this case was Lenoir. Where it is shown by its own waybills that the defendant had full knowledge of the loss before any part of the shipment reached (284) its destination, it is doubtful whether any formal notice should be required of the consignee; but that question it is not necessary for us now to decide.

This Court has repeatedly held that "among connecting lines of common carriers, that one in whose hands goods are found damaged, is presumed to have caused the damage, and the burden is upon it to rebut the presumption." *Mfg. Co. v. R. R.*, 121 N. C., 514; *Mitchell v. R. R.*, 124 N. C., 236; *Hinkle v. R. R.*, 126 N. C., 932.

We think that the same rule holds good where only a part of the shipment is lost, because that is the nature of the damage to the shipment, and the carrier in whose hands the remainder is found is fully as able to protect itself as it would be in the case of breakage or other damage. Whether this rule would apply where no part of the shipment is found in anybody's hands may be a different question. That is not now before us. While the plaintiff might have sued the Chester and Lenior road, which delivered to it the remainder of the shipment, we do not think that it is compelled to do so when its own testimony tends to prove that no part of the lost flour ever came into the possession of that road.

Under the circumstances, we do not think that the form of the issues was material. The evidence tended to show that the lost flour was received by the defendant and not delivered either to the plaintiff or the Chester and Lenoir Railroad. If

the jury believed the evidence, they would, in all probability, have found for the plaintiff under either set of issues.

This brings us to the direction of the verdict, the exception to which must be sustained. The defendant denied every allegation of the complaint, thus casting the burden of proof upon the plaintiff. Therefore there was error committed by his Honor in directing a verdict in favor of the plaintiff without at least leaving to the jury the credibility of the testi-
(285) mony. That the Court can not thus direct an affirmative finding of fact, is well settled. *Bank v. School Commissioners,* 121 N. C., 109; *White v. R. R.,* 121 N. C., 484, 489; *Wood v. Bartholomew,* 122 N. C., 177; *Crews v. Cantwell,* 125 N. C., 516, 519; *Porter v. White,* 127 N. C., 73; *Spruill v. Ins. Co.,* 120 N. C., 141; *Collins v. Swanson,* 121 N. C., 67; *Eller v. Church,* 121 N. C., 269; *Cable v. R. R.,* 122 N. C., 892; *Cox v. R. R.,* 123 N. C., 604.

It is simple justice to the Judge who tried the case in the Court below to say that we doubt whether he has not been inadvertently misquoted in the statement of the case. The statement says that "His Honor *answered*" the issues: but the defendant's third assignment of error says that "His Honor erred in *instructing* the jury, in holding and directing the answer to the issue submitted"; while the brief of the plaintiff's counsel says, "His Honor was warranted in instructing the jury that, *if they believed the evidence,* they would anwser the issue $38.50." However this may be, we are bound by the record, and must order a new trial for the error therein appearing.

Cited: *Bogan v. R. R.*, 129 N. C., 155; *Butts v. R. R.*, 133 N. C., 83; *Parker v. R. R., Ib.*, 342; *S. v. Godwin,* 145 N. C., 463; *Hawk v. Lumber Co.,* 149 N. C., 17.

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WILLIAMS v. SOUTHERN RAILWAY CO.

(Filed 23 May, 1901.)

1. RAILROADS—*Master and Servant—Fellow Servant—Personal Injuries—Jurisdiction—Presumption—Negligence.*

   It will not be presumed that the doctrine of nonliability for the acts of fellow servants obtains in another State.

2. RAILROADS—*Jurisdiction—Fellow Servants—Private Laws* 1897, *Ch.* 56.

   The fellow servant act of 1897 is applicable to the employee of "any railroad operating in this State," and is not limited to injuries received in this State.

ACTION by Robert Williams against the Southern Railway Company, heard by Judge *H. R. Starbuck* and a jury, at March Term, 1901, of CATAWBA. From a judgment for the plaintiff, the defendant appealed.

Self & Whitener and *T. M. Hufham,* for the plaintiff.
Geo. F. Bason, for the defendant.

FURCHES, J. Action for damages caused by the alleged negligence of the defendant. The plaintiff was an employee of the defendant, and while engaged with other employees in unloading iron rails from a gondola car, at a point near Bridgeport, Tennessee, one of the rails fell upon his foot and injured it seriously. The plaintiff contends, and so testified, that while he and five others were lifting a rail for the purpose of unloading it, the engine attached to the train backed, causing a sudden jerk, causing one of the rails in the car to turn over and fall on his foot and cause the injury. The defendant contends that the injury was caused by the rail turning over because the men who were unloading the car stepped on it, (287) and that the injury was purely accidental. To establish this view of the case, the defendant introduced the testimony of six witnesses, who testified that they were present and saw the transaction, and that it occurred as contended by defendant. The plaintiff alone testified to the facts he relied on for a verdict.

At the close of the evidence, the defendant moved to nonsuit the plaintiff for the reason that it appeared from all the evidence that plaintiff was injured in the State of Tennessee; "that plaintiff was injured by the negligence of a fellow servant, and defendant contended that at common law he could

not recover for an injury caused by the negligence of a fellow servant; that to enable him to recover, the burden was upon him to show the common law rule applicable to injuries at the hands of fellow servants had been abrogated in the State of Tennessee; that plaintiff had failed to show any statute of the State of Tennessee which abrogated the common law rule that one servant was not entitled to recover for injuries caused by the negligence of a fellow servant, and, because he had so failed, he is not entitled to recover in this action." This motion was refused, and defendant excepted.

This exception presents the only point in the case, as there is no exception to the evidence or to the charge of the Court.

We do not think this case depends upon the doctrine of presumption that the common law prevails in the State of Tennessee. That rule obtains as to the established common law of England at the time of our separation from that government. The doctrine of nonliability for the acts of fellow servants is not one of those established principles of common law at the date of our independence. This doctrine was not declared in England until 1837, in *Priestly v. Fowler,* 3 M. and W., 1. And about the same time it was declared by the Supreme Court of South Carolina in *Murray v. R. R.,* 1 McMillan, 387, 36 Am. Dec., 268.

(288) But soon after the decision of these cases, *Farwell v. R. R.,* 4 *Metc.,* 49, 38 Am. Dec., 339, presenting fully this question, came before the Supreme Court of Massachusetts, when Chief Justice *Shaw* delivered the well-considered opinion of the Court, which has since been regarded as the leading case on the subject. It is not, then, one of the doctrines of the common law that this Court could presume to exist in the State of Tennessee.

But we are of opinion that this case is governed by the law of this State, and that the Fellow Servant Act of 1897 applies to it. The act is not limited to injuries received in this State, who shall suffer injury to his person, etc. The Southern Railway Company operates its road in this State, and, according to the terms of this act, is liable to its provisions. Of course the courts of Tennessee would not be bound to observe this act, but the Courts of this State are.

Indeed, we do not see that the fact that the injury occurred in Tennessee has any bearing on the case. The plaintiff's action is not in *tort ex delicto,* but *ex contractu,* for breach of contract. For although a *tort* is alleged, it is based on contract. *Farwell v. R. R.,* 38 Am. Dec., 339 (4 Metc., 49). This being so, and defendant being a resident of this State, and it not

being shown where the contract was made, or what State should have jurisdiction of its enforcement, it seems to us it was altogether proper that the courts of this State should take jurisdiction, and enforce the contract by ascertaining damages for its breach.

As to whether the jury should have found a verdict for the plaintiff, upon the evidence in this case, was a matter for them and not for us.

Affirmed.

CLARK, J., concurs on the ground that, by the law obtaining in Tennessee, the place where the injury was sustained, the defendant would not be protected by the defense (289) that the plaintiff and engineer were fellow servants. *R. R. v. Carroll,* 6 Heiskell (53 Tenn.), 347, 362; *R. R. v. Collins,* 2 Duval (63 Ky.), 114, 87 Am. Dec., 486.

MONTGOMERY, J., concurs in concurring opinion of CLARK, J.

Cited: Miller v. R. R., 141 N. C., 448.

WISE v. LEONHARDT.

(Filed 23 May, 1901.)

1. WILLS—*Beneficiaries—Construction.*

   A devise of real property to the grandchildren of testator, to be divided at death of father of children, entitles only such as were living at death of testator.

2. WILLS—*Construction—Beneficiaries.*

   Where a testator devises real property to children of his son, to be divided after death of such son, only those children who were born at the time of the testator's death were entitled to take under the will, the title to the devisees passing immediately on death of testator.

ACTION by Sally Wise and others against D. P. Leonhardt and others, heard by Judge *E. W. Timberlake,* at December (Special) Term, 1900, of LINCOLN. From a judgment for the defendants, the plaintiffs appealed.

A. L. Quickel, and *L. C. Holland,* for the plaintiffs.
D. W. Robinson, and *C. E. Childs,* for the defendants.

MONTGOMERY, J. The construction of a clause in the will of Joseph Leonhardt is the matter before the Court. The item is as follows: "I give and devise to my son Lawrence's
(290) children the half of the tract of land where he now lives, to be divided equally among them after the death of my son Lawrence, to have and to hold to them and their heirs in fee simple forever."

At the death of the testator, his son Lawrence had three children, and afterwards—more than ten months after the death of the testator and in the lifetime of Lawrence—eight other children were born to him. The defendant's contention is, that as a time in the future, the death of Lawrence is fixed for the partition of the estate among the devisees, all of the children of Lawrence and the heirs of such as had died, and who were living at the death of Lawrence, were entitled to a share in the estate.

The general rule is conceded to be that where there is a devise or bequest to individuals, or to a class, those who answer the description at the testator's death will take, if there be nothing in the will to indicate a different intention on the part of the testator. But it is insisted also by the defendants that the postponing of the partition of the land until the death of Lawrence, the father of the devisees, makes applicable another rule, not inconsistent with the general one, viz: That as the Courts desire to extend the benefits of a will to as many individuals falling within a class, in cases of devises and legacies, as possible, where a future period beyond the death of the testator is fixed for the division of the property, the Courts will adopt such future period for ascertaining the beneficiaries, and will include all who fall within the designated class at the latest possible period for determining who compose the class. The principle does not apply to real estate unless there be an intermediate estate, for life or years, intervening between the death of the testator and the time in the future when the devisees in remainder come into the possession of their vested remainders.

It applies in cases of bequests of personal property
(291) where the possession of the same is to be held by trustees or executors to be delivered to the legatees at a future period. 2 Jarman Wills, 704; *Irvin v. Clark,* 98 N. C., 437; *Carroll v. Hancock,* 48 N. C., 471; *Sanderlin v. Deford,* 47 N. C., 74; *Meares v. Meares,* 26 N. C., 192; *Fleetwood,* 17 N. C., 222; *Vanhook v. Vanhook,* 21 N. C., 589.

But in the present case the title to and right of possession in and to the land devised passed to the devisees, as a class, immediately and directly upon the death of the testator.

Lawrence, the son of the testator, took no interest under the will. At the death of the testator the title devolved upon Lawrence's children, and their right of possession was immediate. The title to the land could not be in the clouds; it did not vest in Lawrence because he took nothing under the will; it had, by force of law, to vest in his children as a class, the devisees named in the will. The call for those who took as a class under the will was made at the death of the testator, and the children of Lawrence who were living at the death of the testator alone could answer the description. The owners of the land had to be ascertained at the time of the death of the testator, which would not have been a requisite if there had been an intermediate particular estate, because, in the last instance, there would have been no necessity for ascertaining the owners of the land until the time mentioned in the will for its partition. *Hawkins v. Everitt,* 58 N. C., 42; *Carroll v. Hancock, supra; Knight v. Knight,* 56 N. C., 167.

The children of Lawrence who were living at the death of the testator, therefore, alone were entitled to the land devised.

It seems that the plaintiffs claim that there were four children of Lawrence living at the time of the death of the testator—Mrs. Wise, Jacob, Cameron and Julius. On the trial the only witnesses who were examined as to the matter of the time of the birth of Julius, testified that they did not know whether he was born before or after the death of the (292) testator. And further, the plaintiffs claimed in their complaint that Jacob, who had gone to Texas to live, had not been heard from in fifteen years, and they alleged that on that account there was a presumption of law that he was dead. Under the view his Honor took of the case, it was not necessary in the trial below to have the date of Julius' death fixed. But error having been adjudged by this Court in the judgment of the Court below, it will become necessary to have the date of the death of Julius determined in the next trial. If he was born after the death of the testator, he takes nothing under the will of Joseph Leonhardt, but if he was born before the testator died, and died himself after the death of the testator, his share in the estate descended to all the children of Lawrence and the representatives of such as were dead as his heirs-at-law. There must have been no contention on the trial that Jacob was dead, for his Honor in the judgment gave him a share of the estate.

Error.

TAYLOR v. CAPEHART.

(Filed 23 May, 1901.)

VENDOR AND PURCHASER—*Purchase Money—Contract—Judgment Lien—Priority.*

Where a person conveys property, reserving title in himself until payment, a judgment creditor of the purchaser has no lien on the land as against that of a claimant under the vendor.

ACTION by S. J. Taylor, executor of Babel Taylor, against A. Capehart, Minnie M. Capehart and Leroy Capehart, executors of W. J. Capehart and W. T. Capehart, heard by (293) Judge *A. L. Coble* and a jury, at Fall Term, 1900, of BERTIE. From a judgment for the plaintiff, the defendants appealed.

Martin & Peebles, for the plaintiff.

Francis D. Winston, and *Shepherd & Shepherd,* for the defendants.

FURCHES, C. J. On 1 January, 1884, W. J. Capehart and his son W. T. Capehart entered into a contract of conditional sale, by the said W. J. Capehart to W. T. Capehart, of a tract of land known as the "Urquahart farm," in Bertie County, containing 1,175 acres, and various articles of personal property; for which the said W. T. Capehart executed to the said W. J. Capehart ten several notes payable at different periods thereafter, amounting to more than $10,000. But the title to all this property, real and personal, was expressly reserved by the said W. J. until all said notes were paid, and, upon default of payment of any one of said notes, they were all to become due, and the said W. J. had the right to sell the said land and personal property after ten days' advertisement, for cash, and to apply the proceeds of said sales to the payment of said notes. But if they were all paid, then the said W. J. was to make and execute to said W. T. Capehart a deed in fee simple to said land.

Under this contract, which was, soon after its execution, duly probated and registered, the said W. T. Capehart entered upon and took possession of said land and personal property, which he retained until 2 January, 1888, having in the meantime paid the two notes first falling due; and on the said 2 January, 1888, the said W. T. Capehart made and executed to the said W. J. Capehart the following paper writing:

"This is to certify that I have this day sold and sur- (294) rendered to W. J. Capehart all my interest in the farm upon which I now reside, known as the Urquahart plantation, lying in Bertie County, adjoining the lands of S. A. Norfleet, J. M. Jenkins, Richard Jenkins and Hiram Harrell and containing by estimation one thousand one hundred and seventy-five acres, more or less; also my interest in all personal property, to-wit, one ten horse power Tanner engine and fixtures, one gin and fixtures, one cotton press and fixtures, one wagon and all the horse carts and wheels on hand, all the plantation tools and implements, all the cotton seed from the crop of 1887, also all the corn and fodder on hand, and all household and kitchen furniture; and in consideration of the surrender of all the above-named property, the said W. J. Capehart agrees to surrender eight notes or bonds he holds against me, amounting in the aggregate to ten thousand seven hundred and fifty-two dollars and eighty-nine cents, said notes having been given by me to the said W. J. Capehart for the most of the property herein conveyed, some change having been made in some of the stock, etc. Given under my hand and seal this 2 January, 1888.

"W. T. CAPEHART. (Seal.)"

And the said W. J. at once entered upon and took possession of said land and property. But this instrument was not probated and registered until 1896; and it appears that in 1894 the said W. J. Capehart, claiming to act under the power of sale contained in the contract of 1 January, 1884, sold said land and personal property, which was bid off by the defendant Alanson Capehart and conveyed by him to his father W. J. Capehart.

On 2 January, 1888, the plaintiff had an action pending in the Superior Court of Bertie against W. T. Capehart, and on 30 May, 1888, recovered judgment for $4,702.08; and on this judgment this action is brought to hold the de- (295) fendants, who are the executors of W. J. Capehart, liable for plaintiff's judgment, and to have it declared a lien on said land.

There were three issues submitted:

"1. Did W. J. Capehart go into the open and notorious adverse possession of the Urquahart farm under the paper dated 2 January, 1888? And, if so, at what time? Answer: 'Yes; on 2 January, 1888.'

"2. Was the judgment mentioned in the pleadings duly docketed so as to create a lien to the claims of W. J. Capehart on the real property of W. T. Capehart situate in Bertie County? Answer: 'Yes.'

"3. Is the lien of the said judgment barred by the statute of limitations? Answer: 'No.'"

It was agreed that these issues were all questions of law arising upon the undisputed facts, and that the Court could direct the answer to each of them, which he did, as above shown. And upon these issues he entered judgment for the plaintiff, declaring it to be a *superior* lien on the Urquahart tract of land to the defendant's claim for the purchase money. The defendants excepted and appealed.

We have examined the record with care to see if we could ascertain the reasoning upon which his Honor put his judgment in directing the finding on the second issue, but we have been unable to do so; nor do we find any law to sustain his decision.

It is true that the case is not free from some complication, owing to the fact that W. J. Capehart undertook in 1894 to sell this land and personal property under the powers contained in the original contract of 1884. And the fact that the paper, dated 2 January, 1888, to W. J. Capehart by W. T. Capehart says, "This is to certify that I have this day sold and surrendered to W. J. Capehart all my interest in the farm, and the personal property thereon—some of the personal (296) property having been changed, and not being the same I bought of him"—this is claimed by plaintiff to be a sale, and not having been registered until the plaintiff got his judgment, was invalid under Laws 1895, chapter 147, and therefore his judgment was a lien. While defendants contend that it was not a sale, but a rescission of the contract of 1 January, 1884, and need not be registered.

It seems to us that it might be held to be a rescission of the contract of 1884 as to the land and a sale of the personal property on the farm, not conveyed to W. T. Capehart by that contract. But under the view we take of the case, it is not necessary to decide that question, and, as it is not directly presented, we do not do so, as there is manifest error whether that question be decided the one way or the other.

W. T. Capehart never had the legal title. At best, he had a right in equity to compel W. J. Capehart to convey the title to him upon his paying the purchase money (the notes). The *title* to the land was in W. J. Capehart, and held by express agreement in the contract of 1 January, 1884, as security for the payment of the purchase money (the notes). It is admitted that only two of them had been paid, leaving a balance of $8,000 or $10,000 unpaid. And how it is that the plaintiff can

have a *superior lien* on this land over the defendant's debt for the purchase money we are unable to see.

If the plaintiff's judgment is a lien at all (and that will depend upon the construction put on the paper executed 2 January, 1888), it is *inferior to the defendant's lien for the purchase money.*

It will be seen that we have not discussed the effect (if any) of the attempted sale to W. J. Capehart in 1894, because it was not made a point in the case and not necessary to be considered —taking the view of the case we do. Neither do we discuss the question of fraud alleged in the complaint, because the case on appeal does not present this question.

But there is error in holding and declaring that plaintiff's judgment is a *superior lien* on the Urquahart tract to the defendant's debt for the purchase money.

Error.

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(297)

HOOKER v. YELLOWLEY.

(Filed 23 May, 1901.)

1. SUCCESSION—*Descent—Distribution—Notice—The Code, Sec.* 1442.

   Real property conveyed by an heir after the lapse of two years from the death of the intestate is liable to payment of the debts of the intestate, provided the purchaser has notice of the debts.

2. ADMINISTRATOR—*Executors—Bond—Principal and Surety.*

   A mortgage given by an administrator to a surety on his bond to secure the latter against loss inures to the benefit of the creditors of the estate.

3. LIMITATION OF ACTIONS—*Foreclosure of Mortgages—Personal Liability—Administrator—Surety.*

   Property mortgaged by an administrator to a surety to secure him against loss may be subjected to payment of estate debts, though the personal liability of the surety is barred.

4. PRINCIPAL AND SURETY — *Succession — Administrator — Insolvency.*

   Estate creditors are entitled to have the real estate of intestate, conveyed after two years with notice to purchaser, subjected to satisfaction of their judgments, irrespective of the solvency or liability of the surety or bond of administrator.

ACTION by Elizabeth Hooker against J. B. Yellowley, administrator of E. C. Yellowley, J. B. Cherry, William Whitehead, J. B. Yellowley, individually and as executor

(298) of Harriet Yellowley, heard by Judge *H. R. Starbuck,* at December Term, 1900, of PITT. From a judgment for the plaintiff, the defendant J. B. Cherry appealed.

Skinner & Whedbee, for the plaintiff.
Jarvis & Blow, and *F. G. James,* for the defendant Cherry.

CLARK, J. This is an order for an injunction to the hearing, granted upon the complaint used as an affidavit. At the death of Edward C. Yellowley, intestate, in 1885, his property descended to his sister H. A. Yellowley, his nephew J. D. Yellowley, the son of a deceased brother, and six nieces, the daughters of another brother. J. B. Yellowley qualified as administrator, with the defendant J. B. Cherry as one of his sureties, wasted the personal estate, became insolvent, and has removed from the State. The plaintiff, who was a creditor by bond of E. C. Yellowley, presented her bond to the administrator for payment, and repeatedly thereafter, who always promised to pay, but finally action was brought and judgment obtained, June, 1891. The said administrator failing to pay the same, though having sufficient assets in hand, the plaintiff commenced an action to December Term, 1894, of the Superior Court against him and the sureties on the administration bond, among them the defendant, who, having pleaded the statute of limitations at the hearing of the same, April Term, 1896, the jury, under the instructions of the Court, found that said sureties were protected by the statute of limitations. No part of plaintiff's judgment has been paid, and it is still due.

The intestate left, among other property, five thousand acres of land, duly described in the complaint, one-third inter-
(299) est in which descended to J. B. Yellowley direct, and another third, under the will of Harriet A. Yellowley in 1890, and which he has not conveyed other than by a mortgage to the defendant, the surety on his administration bond, under which mortgage the defendant has advertised the land for sale. All the above allegations are admitted in the answer.

The complaint further alleges that in March, 1891, the defendant Cherry caused said J. B. Yellowley to execute to him the aforesaid mortgage, which embraces also a lot in Greenville owned by said Yellowley, to secure said Cherry from apprehended loss as surety on said administration bond, though at the time no loss had occurred and Yellowley was not indebted to him.

The answer avers that a few days after the execution of the mortgage the defendant did pay off a judgment for $1,575.00

taken against him as one of the sureties upon said administration bond. It is further averred and not denied, that J. B. Cherry obtained an indemnity bond from Harriet A. Yellowley in the sum of $3,000, by reason of his being surety upon the administration bond aforesaid, and has also taken a conveyance of the one-third interest of the six nieces in the estate and a release by them of all liability as surety upon said administration bond.

The plaintiff asks that the mortgage and bond be declared without consideration, fraudulent and void, and for its cancellation; that J. B. Cherry account for such securities as he has received from J. B. Yellowley, and such securities and moneys as he has received from the cosureties on the bond; that he be restrained from selling the realty under said mortgage, and that the land in question be sold by a commissioner, appointed in this cause, to pay the judgment in favor of the plaintiff, and such other (if any) debts of E. C. Yellowley remaining unpaid.

By virtue of The Code, section 1442, the real estate (300) of E. C. Yellowley in the hands of his heirs-at-law or in the hands of purchasers who took conveyances of the same, even after the lapse of two years, unless they are *bona fide* purchasers for value and without notice, is liable to payment of the debts of the intestate. If, instead of a mortgage to secure defendant from apprehended loss, the latter had taken a conveyance for full value paid down, this land would still be subject to plaintiff's debt, for defendant had the fullest notice that the debts of the intestate, and especially his identical debt, had not been paid, for he had been sued on it in an attempt to make the sureties on the administration bond pay it. The defendant does not deny the averment that he took this mortgage to secure himself against apprehended loss. So far from releasing the realty from liability to plaintiff, the mortgage would really inure to his benefit, even if it had been of other property of the administrator than that descended from E. C. Yellowley. *Cooper v. Middleton*, 94 N. C., 86; Brandt Suretyship, sections 324 and 325; Sheldon Subrogation, sections 154-156. And such property can be subjected even though the personal remedy against the surety is barred by the statute of limitations. *Long v. Miller*, 93 N. C., 227. The defendant, surety on the administration bond, seems to have gathered in, in one way or another, a very large part of the property of the estate, and he took the same with notice of the unpaid indebtedness of the estate. His defense in the argument, here, that he is solvent, and the administration bond as representing

the personalty must first be subjected before the realty, comes with poor grace when he and the other sureties thereon have in fact been sued and have protected themselvs by a plea and an adjudication thereon in their favor that they are sheltered from liability by the statute of limitations. The liability of
(301) the realty to plaintiff is so well and thoroughly discussed in *Badger v. Daniel,* 79 N. C., 372, that nothing further need be said. *Hinton v. Whitehurst,* 71 N. C., 66; *S. c.,* 73 N. C., 157, and 75 N. C., 178.

In continuing the injunction to the hearing there was no error. *Heilig v. Stokes,* 63 N. C., 612; *Jarman v. Saunders,* 64 N. C., 368.

No error.

ROWE v. CAPE FEAR LUMBER CO.

(Filed 23 May, 1901.)

BOUNDARIES—*Deeds—Construction—Riparian Rights—Water and Watercourses—Swamps—Trespass.*

Where a deed calls for points on bank of swamp and thence along the swamp, title of grantee extends no further than banks of swamp.

ACTION by John W. Rowe and M. V. Dosh against Cape Fear Lumber Company, heard by Judge *Fred. Moore* and a jury, at December Term, 1900, of PENDER. From a judgment for the defendant, the plaintiffs appealed.

H. L. Stevens, for the plaintiffs.
James O. Carr, for the defendant.

FURCHES, C. J. Action of trespass for cutting timber on Catskin Swamp. The plaintiff claims under a grant from the State dated 20 December, 1893, which is admitted to cover the swamp, the *locus in quo.* The defendant is the owner of three tracts of land, Nos. 1, 2 and 3, on the east side of said swamp, and one tract on the northwest side of said swamp. The calls in defendant's deed to tract No. 3 on the east side are to the "run" of the swamp, and thence with the "run" of the
(302) swamp. And plaintiff admits that this deed carries defendant's title to that tract to the *run* of the swamp. But the calls on the other two tracts on the east side are to points on the margin or banks of the swamp, and thence with the swamp, according to the evidence, commenced on a pine

standing on the edge or bank of the swamp about twenty-two rods from the thread or "run" of the swamp; thence various calls and distances to Bear Branch, which empties into Catskin Swamp near its head; thence down the swamp to the beginning corner.

The defendant contends that, being the owner of the land on both sides of the swamp, it is the owner of the entire swamp; that as the calls of its deeds are for the swamp, it is the riparian owner thereof; that its deeds on each side carry its title to the thread or "run" of the swamp, and the State, in 1893, did not own the land conveyed by the grant to plaintiff.

If this contention be correct, the defendant is the owner of the land, and plaintiff is not entitled to recover; while, on the other hand, if this contention of defendant is not correct, as the trespass is admitted, the plaintiff is entitled to recover.

The plaintiff, in substance, asked the Court to charge the jury that, defendant's deeds calling for the edge or banks of the swamp, the banks or edge of the swamp was the boundary of defendant's land; while, on the other hand, the defendant, in substance, asked the Court to charge that the defendant's lines extended to the "run" and did not stop at the edge of the swamp. In fact, the defendant's prayer asked the Court to charge that if they found that the defendant's calls were to the swamp and thence with the "run" of the swamp to the first station, they would find the "run," and not the banks of the swamp, to be the defendant's boundary line. This prayer was given, though none of defendant's deeds called for the *run* of the swamp, except those of No. 3 on the east side (303) of the swamp. And plaintiff admitted defendant's claim to that tract. The charge was erroneous on this account. But we prefer to put our judgment on the merits rather than this technical error.

While there may be some authorities found to the contrary, the general rule is that what are the boundaries is a question of law for the Court, and where the boundaries are is a question of fact for the jury. This is well-settled law in this State. *Scull v. Pruden,* 92 N. C., 168; *Burnett v. Thompson,* 35 N. C., 379; *Clarke v. Wagoner,* 70 N. C., 706. So, it was the duty of the Court to instruct the jury what were the defendant's boundaries—whether they were the banks of the swamp, or the center or "run" of the swamp. This the Court did, and told the jury that it was the "run."

It is the undoubted rule that where the calls in a deed are to and along the banks of a non-navigable river or creek, this takes the title to the middle of the stream. *S. v. Glenn,* 52 N.

C., 321; *Smith v. Ingram,* 29 N. C., 175; *Williams v. Buchanan,* 23 N. C., 535. But this is where a creek or river, or *stream of water,* is called for—where there is nothing but water, and the bed of the river or other stream is not susceptible of being put to any other use, except to confine or carry the water of the stream.

But does this fiction of the common law, that carries the riparian owner's title to the thread of the stream, obtain in cases like this, where the call is to a *swamp,* and thence *along the swamp?* We do not find authority for such construction; and it seems to us that the conditions are so different as not to justify such construction by analogy.

It is true that swamps have their banks which divide the swamp from dry land. But these are not the banks of the thread, which may be found in most of swamps, and, from the evidence, seem to have been found in this swamp. This (304) filum or thread (though it may be shallow) also has banks, which of itself shows that the banks of the swamp are not the banks of this "run." If the calls of the run of Catskin Swamp were the calls of the deeds, we think defendant's title would have gone to the middle, or to the "run." The swamp does not flow; it is only the run that flows.

But besides this reason, which, it seems to us, distinguishes the calls to a swamp from the calls to a river or other stream of water, it is capable of being domesticated. It is often valuable for pasturage, or for its timber, as it seems that this swamp is. And in many instances they may be drained, and in fact are drained, and put into a high state of cultivation. In many instances the swamps of Eastern North Carolina are more than a mile wide, and are becoming (for their timber and other purposes) the most valuable portion of the uncleared lands of that section of the State. And if the contention of the defendant is true, all a man has to do to become the owner of these valuable swamps is to acquire a slip of dry land on their borders, and take possession of the whole swamp. We do not think this can be so. And while we have not been able to find authorities directly in point, we think *Burnett v. Thompson, supra, Brooks v. Britt,* 15 N. C., 481, *Stapleford v. Brinson,* 24 N. C., 311, Angel on Watercourses, section 18, Gould on Waters, section 45, tend to sustain the views we have taken—that a call to a swamp, and along a swamp, *only goes to the swamp.*

But as defendant has no color of title, that is, its titles to the dry land, when there has been possession, not extending

to the swamp, the possession under the defendant's (305) deeds can avail it nothing.

And, outside of this possession, there has been in law no possession. The occasional getting boards and shingles in this swamp were no more than trespasses, and did not amount to possession.

There was error in the Court's instructing the jury that the "run" was defendant's boundary, when the jury should have been instructed that the *banks* of the swamp were defendant's boundaries. For this error there must be a

New trial.

Cited: *S. c.*, 129 N. C., 97; *S. c.*, 133 N. C., 439; *Wall v. Wall*, 142 N. C., 390.

MARTIN v. BUFFALOE.

(Filed 23 May, 1901.)

1. EXECUTION—*Indemnity Bond—Surety—Wrongful Levy—Sheriff—Process—Trespass.*

   Where a sheriff commits a trespass in seizing property not subject to his process, the claimant may elect to sue either on his official bond or the bond of indemnity.

2. EXECUTION—*Indemnity Bond—Surety—Trespass.*

   A sheriff can not relieve the sureties on an indemnity bond from liability to the endamaged party for the wrongful levy of an execution.

3. NOTICE—*Sheriffs—Indemnity Bond—Surety—The Code, Sec.* 597—*Trespass—Writing.*

   Notice to sureties on an indemnity bond that the sheriff has been sued for the wrongful levy of an execution need not be in writing.

4. JUDGMENT—*Estoppel—Res Judicata—Trespass.*

   An unsatisfied judgment against one trespasser is no bar to a suit against another for the same trespass.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS—*Schedule of Preferred Debts—Justices of the Peace—Oath—Affirmation—Trespass.*

   Where the schedule of preferred debts is affirmed to before a justice of the peace, who is one of the trustees in the deed of assignment, the assignment is void.

6. FORMER ADJUDICATION—*Res Judicata—Trespass.*

A point decided in a suit against one trespasser is not *res judicata* as to the same point in an action against a co-trespasser.

7. EVIDENCE—*Presumptions—Principal—Surety—The Code, sec. 1345—Sheriff.*

In an action in tort on an indemnity bond, a judgment against a sheriff for trespass is not presumptive evidence against the surety.

(306) ACTION by B. F. Martin and J. O. Flythe against W. H. Buffaloe, M. L. T. Davis, J. M. Flythe and E. P. Buxton, executors of S. N. Buxton, heard by Judge *W. A. Hoke* and a jury, at Spring Term, 1899, of NORTHAMPTON. From a judgment for the plaintiffs, the defendant appealed.

Day & Bell and *Alexander Stronach,* for the plaintiffs.
R. B. Peebles, for the defendants.

CLARK, J. The principle applying to actions against obligors upon indemnifying bonds is thus stated in Murfree on Sheriffs, section 634: "The general rule is that when a Sheriff has committed a trespass in seizing property not subject to his process, the claimant may proceed against him and (307) his sureties on his official bond, or against the obligors on his bond of indemnity, if he has taken one, the latter being regarded as a cumulative security and the plaintiff (in the execution) and his sureties having rendered themselves liable as cotrespassers by its execution * * * The claimant may, at his election, proceed against the Sheriff and his sureties on his official bond, or bring suit against him and the obligors in his indemnity bond, who can properly be made defendants, because by the execution of the bond they ratify the acts of the Sheriff and become joint wrongdoers with the officer. It is well settled that all persons who contribute to the commission of a trespass, or after the same has been committed for their benefit assent to it, are responsible as principals and each liable to the extent of the injury. Hence the obligor in an indemnity bond may be held a cotrespasser with the officer who acted under it." The authorities cited in the notes thereto sustain the proposition that the liability of the signers of the indemnity bond to the Sheriff is, by virtue of the contract of indemnity, but their liability to him whose property is wrongfully sold is in tort by reason of their being cotrespassers with the Sheriff. *Lesher v. Gatman,* 30 Minn., at page 328; *Davis v. Newkirk,* 5 Denio, 92; *Herring v. Hoppock,* 15 N. Y., 409; *Knight v. Nelson,* 117 Mass., 458; *Crews v. Watson,* 48 Ala.,

628; *Lewis v. Johns,* 34 Cal., 629; *Lovejoy v. Murray,* 70 U. S. (1 Wall.), 1; *Luebbering v. Oberkoetter,* 1 Mo. App., 393; *Allred v. Bray,* 41 Mo., 487, and there are many others.

The sureties on the indemnity bond being liable as co-trespassers, the Sheriff could not by a covenant not to sue exempt any one of them from liability to the plaintiffs. He could only release them from liability on their contract (308) of indemnity to himself.

The question of liability for personal property exemption does not arise, as the plaintiffs seek payment only for the goods actually sold.

"When a statute requires notice to be given, it must be in writing, etc., and served in the manner required by The Code, section 597." *Allen v. Strickland,* 100 N. C., 225; *Turner v. Holden,* 109 N. C., 182. But that has no application to the notification given by the Sheriff to the surety on the bond of indemnity that he (the Sheriff) has been sued. This is not a judicial notice required by any statute, and therefore required to be in writing and served by an officer, but it is a notification—a conveyance of information—which could be made orally, or by mail, or in any other method that would give to the surety the knowledge that the officer is sued. *Robbins v. Chicago,* 71 U. S. (4 Wall.), 657. This would be true even in an action by the Sheriff on the indemnity bond, and in any event it does not affect the plaintiffs, who, having sued one trespasser and recovered nothing by execution, are not estopped from suing the others because they might have had no notice of the first action. A judgment against one trespasser is no bar to a suit against another for the same trespass. Nothing short of the satisfaction of the judgment can have that effect. *Lovejoy v. Murray,* 70 U. S. (3 Wall.), 1; *Elliott v. Hayden,* 104 Mass., 180.

The defendants insist, however, that there was error in the instruction to the jury that if they believe the evidence to answer the issue "Yes," because it appears in evidence that the schedule of preferred debts was affirmed to before B. F. Martin, a Justice of the Peace, who was one of the trustees in the assignment. *Long v. Crews,* 113 N. C., 257; *Blanton v. Bostic,* 126 N. C., 418; *McAllister v. Purcell,* 124 N. C., 262. That being invalid, the assignment under which plaintiffs claim was void. *Bank v. Gilmer,* 116 N. C., 684; *S. c.,* 117 N. C., 416; *Cooper v. McKinnon,* 122 N. C., 447. This exception is well taken, for the schedule is an essential, and indeed (309) an indispensable part of the assignment. The plaintiffs insist, however, that this point was held otherwise in their

former action against Buffaloe, 121 N. C., 34, but a reference to the decision shows that the point was not passed on; and if it had been, it would not have been *res judicata* in this action against cotrespassers, but would have the weight only of a legal precedent.

The rule that the judgment against the principal in an official or fiduciary bond is presumptive evidence against the sureties (Code, section 1345; *Moore v. Alexander,* 96 N. C., 34; *McNeill v. Currie,* 117 N. C., 341) does not apply, as this is not an action on the bond, but in tort.

Error.

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(310)

GRIFFIN v. THOMAS.

(Filed 23 May, 1901.)

1. LIMITATION OF ACTIONS—*Remainders—Life Tenant—Estates—Wills.*

   Where a life tenant wrongfully conveys land in fee, limitations do not run against the remaindermen until the death of the life tenant.

2. WARRANTY—*Breach of Warranty—Action—Eviction of Grantee.*

   A cause of action for breach of warranty of title to real estate does not arise until after the eviction of grantee.

3. SETOFF AND COUNTERCLAIM—*The Code, Sec.* 244, *Subsecs.* 1 *and* 2.

   A counterclaim must exist at the commencement of the action and must be connected with the subject of the action or arise out of the transaction complained of.

4. REMAINDERS—*Life Tenant—Warranty.*

   Remaindermen are not chargeable with the breach of warranty in a fee simple deed wrongfully made by the life tenant.

5. DEED—*Life Tenant.*

   The deed set forth in the opinion conveys only a life estate.

ACTION by Willie G. Griffin, Susan E. Moser, E. L. Hudson, Amanda Hudson (his wife), Rebecca Alexander, David Alexander and Thomas Alexander (the last two infants under twenty-one years of age), by J. M. McKnight, their guardian, plaintiffs, against John T. Thomas, Phil. H. Thomas, Mary B. Thomas, Belle B. Thomas, Walter B. Thomas, W. Irving Thomas, James H. Thomas, Lillie Thomas, Hamilton Thomas, Geo. V. Thomas, James A. Boyd, Peter Wimbish, Sim. Tarry,

Mary Tarry (his wife), Henry Goode and Susan Goode (his wife), the said Hamilton Thomas represented herein by John T. Thomas as his guardian *ad litem*, defendants, (311) heard by Judge *H. R. Starbuck*, upon complaint and demurrer to counterclaim. From a judgment for plaintiffs, the defendants appealed.

T. T. Hicks, A. C. Zollicoffer and *Hicks & Minor*, for the plaintiffs.

W. B. Shaw, Royster & Hobgood, and *Shepherd & Shepherd*, for the defendants.

CLARK, J. The plaintiffs are the children and grandchildren of Thos. R. Eaton. They brought this action to recover 715 acres of land devised to them by the will of Susan Eaton, probated and recorded August, 1842, by the following clauses:

"Item 1. I give and bequeath to my son Thos. R. Eaton, the following negroes * * * I also give to him the tract of land whereon I now live, and which formerly belonged to my mother Mary Somerville, deceased, to have and to hold the said land and negroes unto him during his life, and after his death I give said land and negroes to his children. Should any child of his die leaving children, then they are to stand in his or her place at the death of my son, Thomas Eaton.

"Item 3. My son is to pay any balance of the purchase money which may be due for the land given him at my death."

The land was in possession of Mrs. Somerville for several years before her death in 1838, at which time possession passed to her daughter Susan. In September, 1838, a proceeding was begun in equity in the Superior Court of Granville County to sell it for partition, in which proceeding it was sold in 1839, Susan Eaton being the purchaser at the price of $4,690; the sale was confirmed and the Clerk and Master directed to collect the bond of Susan Eaton and make title, and she had paid nearly all the purchase money at her death in (312) 1842, at which time her devisee, Thomas R. Eaton, took possession; he interpleaded in the equity suit in 1844, alleging the terms of his mother's will, his compliance with the terms thereof, and asking that a deed be executed to him with the limitations and conditions prescribed in said will; at said September Term the Court ordered, and the order was duly recorded at that term, "that the Clerk and Master make a deed to the said Thomas R. Eaton as devisee aforesaid, and with the limitations and conditions as in said will set forth"; the Clerk did execute to said Thomas R. Eaton a deed for the

land, dated November, 1844, reciting the said proceeding referring to the will aforesaid, and in the deed the Clerk and Master twice recites the fact that it was to be made in accordance with the limitations and conditions in said will; the conveyance was, with these recitals, made to Thomas R. Eaton (which, as the law then stood, was a conveyance for life) but the *habendum* is to him and his heirs; this deed was duly recorded February Term, 1846; said Thomas R. Eaton, on 26 October, 1844, after the order recorded at September Term, 1844, for execution of a deed to him for life, and before the actual execution of said deed, conveyed said land in fee with warranty to his brother-in-law, George L. Bullock, for the recited consideration of $3,000, and removed from the State; in 26 August, 1853, Bullock, who had been in possession since his deed, conveyed, without warranty, to John T. Thomas, who held continuous possession till 1886, when he conveyed about half of it to Peter Wimbish and W. H. Boyd, in whom or their grantees possession thereof has been held to the present. The other half remained in possession of John T. Thomas until his death in 1888, when possession passed to his children, who still hold the same and are defendants herein. The other defend-

(313) ants are those above recited as holding through Wimbish and Boyd.

Thomas R. Eaton removed to Alabama in 1844, where he has ever since resided till his death in December, 1899. This action, as above stated, is brought by his children and those grandchildren who represent deceased children. Summons issued herein 4 May, 1900.

The defendants in their answer set up a counterclaim that "said Thomas R. Eaton left at his death an estate in lands and personal property worth at least $5,000, which descended to the plaintiffs as his heirs-at-law, and the defendants plead said covenant and warranty (to George L. Bullock), and claim damages thereon to the extent of $3,000 against the estate and plaintiffs, heirs of T. R. Eaton, deceased, and plead the same as an offset and counterclaim to any rights the plaintiffs may have to recover said land." The plaintiffs demurred upon nine different grounds.

Without intimating any opinion as to the other grounds, it is sufficient to support the Judge, in sustaining the demurrer, to cite the sixth ground: "A cause of action for breach of warranty of title to real estate does not arise until after eviction of the grantee (*Brittain v. Ruffin,* 120 N. C., page 89), which, as appears from the answer, has not yet occurred." This counterclaim, if it were in other respects valid and unobjection-

able, did not exist at the commencement of the action, and does not even yet exist, for defendants are still in possession. Code, section 244 (2); *Phipps v. Wilson,* 125 N. C., 106; *Kramer v. Light Co.,* 95 N. C., 277. It is not connected with the subject of the action, nor does it arise out of the transaction set forth in the complaint as the foundation of plaintiffs' claim. Code, section 244 (1); *Bank v. Wilson,* 124 N. C., 562. The subject of this action is the realty in question, and the foundation of plaintiffs' claim is the will of Susan Eaton and the decree of Court and deed made in conformity therewith, which vested the remainder in them subject to a life estate of Thomas R. Eaton. The cause of action set up as a (314) counterclaim is the subsequent wrongful act of the life tenant in warranting a fee simple to Bullock, and the damages sustained by the defendants by the breach of that covenant—an entirely separate and distinct transaction.

By the confirmation of the sale to Susan Eaton, the decree to make title to her on the payment of the purchase money, the devise by her of her land to her son for life, with remainder to his children, with requirement that he should pay the balance due on the purchase, his payment thereof, with the filing of a plea setting up the terms and conditions of the will and asking that title be made to him containing those conditions and limitations, the decree of the Court directing title to be made to him with the conditions and limitations set out in the will, the plaintiffs assert that their claim is made out. The defendants rest their defense upon the deed to Thomas R. Eaton; so we are narrowed down to the single inquiry as to the effect of that deed. If it conveyed a life estate only, no statute of limitations (though it is pleaded) bars the plaintiffs, for their cause of action did not accrue till the death of the life tenant in December, 1889, because his conveyance carried his life estate, and the possession of defendants was rightful till his death. *McLane v. Moore,* 51 N. C., 520, is a case where the grantees of a life tenant held 56 years, but the remainderman recovered.

This deed, introduced in evidence by the defendants, is as follows:

"This indenture, made 6 November, 1844, between Thomas B. Littlejohn, Clerk and Master of the Court of Equity for the county of Granville, of the one part, and Thomas R. Eaton, of the other part: Whereas, at September Term, 1838, of said Court the petition of James Somerville, William (315) A. Somerville, Willis L. Somerville, Thomas T. Somerville and Robert P. Somerville, infants, who sue by their

guardian, William A. Somerville, George T. Taylor and his wife Mary G. Taylor, and Nathaniel Green and his wife Catharine T. Green, against Susan Eaton, John Y. Taylor and his wife Mary B. Taylor, Markham and his wife Susan, Booker and his wife Ann, and William B. Somerville, was exhibited, setting forth that the said petitioners, being the heirs-at-law of John Somerville, deceased, late of Granville County, tenants in common of the premises mentioned and described in said petition, and that their interest would be promoted by a sale thereof, and praying the Court to order such sale; and the said ....., upon hearing the allegations of the said petitioners, and the proof adduced in support thereof, did, at March Term, 1839, order and direct that the said premises should be sold by the Clerk and Master at public (vendue) to the highest bidder on a credit of twelve months; and, whereas, in pursuance of said order, the said Clerk and Master, on 7 May, 1839, did expose to sale the premises hereinafter mentioned, being the premises in the said petition, mentioned and described, at public vendue on a credit of twelve months; and at the said sale Susan Eaton bid $4,690 and was the highest and the last bidder, and the premises were struck off to her; and, whereas, the said Thomas R. Eaton, at the September Term, 1844, of the said Court, exhibited his petition in the said cause, setting forth that Susan Eaton, the purchaser aforesaid, had departed this life, and by her last will and testament had devised the premises aforesaid to the said Thomas R. Eaton, with certain limitations and conditions in her said will mentioned, and that the said Thomas R. Eaton has paid the balance of the purchase money due for the sale of the said land,

and it was therefore ordered that the Clerk and Master
(316) should execute a deed of conveyance to the said Thomas R. Eaton as devised aforesaid, and according to the limitations and conditions in said will contained.

"Now, therefore, this indenture witnesseth: That for and in consideration of the premises and of the sum of $4,690, to him secured, to be paid before the sealing and delivering of these presents, which securities he acknowledges to have received, the said Thomas B. Littlejohn, Clerk and Master of Granville Court of Equity, hath bargained, sold and conveyed, and by these presents does bargain, sell and convey unto the said Thomas R. Eaton all that piece or parcel of land lying and being in Granville County, on the waters fo Nutbush Creek, adjoining the lands of Robert Eaton, Nancy Bullock, William A. Somerville, James H. Taylor and the said Susan Eaton, containing, by estimation, 670 acres, and all the right,

title, claim, interest and demand of the above-named petitioners in and to the same: To have and to hold the said premises to the said Thomas R. Eaton, his heirs and assigns, forever.

"In witness whereof, the said Thomas B. Littlejohn, Clerk and Master as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

"THOS. B. LITTLEJOHN, C. M. E. (Seal.)

"Sealed and delivered in the presence of

"C. H. WILEY."

This deed was proved in open Court, February Term, 1846, and duly registered. The references in the deed to the will and the equity proceedings incorporated them into and made them a part of the deed, and therefrom, it would be seen by any one examining the title, that the Clerk and Master was empowered and directed to convey a life estate to Thomas R. Eaton, and any words conveying a larger estate would have been in excess of his power to convey, as therein recited, and invalid. In fact, the words of conveyance are "bar- (317) gain, sell and convey unto said Thomas R. Eaton." These words, as the law then stood, conveyed only a life estate (being prior to Laws 1879, now Code, section 1280). The use of the word "heirs" in the *habendum* was doubtless mere inadvertence, and in the face of the recitals of the limitations upon the powers of the officer in the deed can not be construed to have conveyed an estate to Thomas R. Eaton in fee, in contradiction of the powers conferred to convey the same to him for life and remainder to his children as provided in the will. It was the will which carried the property to Thomas R. Eaton, for Susan Eaton had the equitable title. The decree and deed thereunder were merely executing to him and his children in remainder the conveyance which the Clerk and Master had theretofore been directed to execute to Susan Eaton upon payment of balance of purchase money. Thomas R. Eaton having paid said balance of the purchase money, got by the deed the title as provided in the will, for life, and the remainder passed to the children by the will.

It was suggested that there was no conveyance of the remainder in the deed. But upon perfecting the payment of the purchase money, the decree directed a conveyance, upon the terms and limitations in the will of Susan Eaton. The plaintiffs can recover upon this equitable title. *Cotton Mills v. Cotton Mills*, 116 N. C., at page 650; *Arrington v. Arrington*, 114 N. C.,

116; *Geer v. Geer,* 109 N. C., 679; *Taylor v. Eatman,* 92 N. C., 602; *Condry v. Cheshire,* 88 N. C., 375; *Farmer v. Daniel,* 82 N. C., 153; and the pleadings herein are sufficient for that purpose, *Geer v. Geer, supra.*

The contention that the rule in Shelley's case applies requires no discussion.

Affirmed.

Cited: *Smith v. French,* 141 N. C., 9.

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(318)

MILLHISER v. MARR.

(Filed 23 May, 1901.)

PAYMENT—*Attorney and Client—Contract.*

Where attorney of plaintiff came into possession of money belonging to defendant, and it was agreed by defendant and the attorney that the money should be paid to the plaintiff, agreement constituted payment to plaintiff.

ACTION by M. Millhiser, G. Millhiser, E. Millhiser, S. Hirsh, trading as M. Millhiser, against L. Lee Marr, W. T. Conley, M. E. Conley, trading as L. Lee Marr & Co., and R. L. Leatherwood, heard by Judge *O. H. Allen* and a jury, at Fall Term, 1900, of SWAIN.

This action was brought to recover the balance on an account alleged to be due plaintiffs by defendants. It was in evidence and uncontradicted that some time in 1896 a statement of the account against defendants and in favor of plaintiffs was sent to one R. L. Leatherwood, an attorney, for collection. It was further in evidence that W. T. Conley was the authorized agent of M. B. Conley & Co., who were the members of or successors to the firm of L. Lee Marr & Co. There was evidence tending to prove that, after receiving the account of Millhiser & Co., against Marr & Co., and while the same was in his hands for collection, the said Leatherwood was attorney for one W. W. Ladd, Jr., who was defendant in certain actions for the enforcement of certain liens filed against the property of said Ladd; and that under and by virtue of a certain agreement of compromise, entered into between the said Ladd and the lienors for the payment of the liens so filed, a certain sum of money,

to-wit, $1,000, was placed in bank to the credit of said Leatherwood for the purpose of carrying out the terms of said agreement. There was also evidence, uncontroverted, showing that certain of the liens so filed as above stated were as- (319) signed by the lienors to W. T. Conley.

W. T. Conley testified that Leatherwood came to him and asked him to release the lumber upon which were the liens assigned to him, stating that he, Leatherwood, would pay him, Conley, the amount of said liens, as he had the money deposited to his credit for that purpose. Witness further testified that he did allow the said Leatherwood to remove certain of the liens assigned to him, with the express understanding that the money due thereon should be applied to the payment of the Millhiser indebtedness. That that amount of liens so removed was in excess of said indebtedness to said Millhiser & Co. That witness, Conley, immediately thereafter went to the office of said attorney, Leatherwood, and requested payment for said liens, telling him, Leatherwood, at the same time, he wished to apply same to settle the Millhiser account, then in his, Leatherwood's, hands. Whereupon he, Conley, was told by Leatherwood that the money was in bank to his credit, and that, instead of giving him, Conley, a check and letting him endorse same back to him, that he, Leatherwood, would send his check to Millhiser & Co. in settlement of their account. Witness further states, that he accepted this proposition as satisfactory, and relying upon such statement as made to him, that the money was in the bank to the credit of Leatherwood, for the express purpose of paying off said liens, considered the matter settled.. Witness further testified, that he requested said Leatherwood to give him a receipt against the Millhiser claim, and, in reply, Leatherwood told witness that at that time he was busy, but would give him the receipt in a short time, and afterwards refused, because he said Ladd & Co. had drawn the money out of bank and Millhiser would be after him for the money.

There was other evidence tending to show the agreement of Conley and Leatherwood as to matters above set out. The debt of Millhiser & Co. was admitted to be due and unpaid unless the transaction above set forth is a pay- (320) ment.

His Honor charged the jury that the agreement between Conley and Leatherwood, as attorney for Ladd & Co., did not constitute a payment of money to the attorney for the plaintiffs under instructions.

From a judgment for the plaintiffs, the defendants appealed.

A. M. Fry, for the plaintiffs.
Bryson & Black, for the defendants.

COOK, J., after stating the case. In so charging the jury we think his Honor erred. Leatherwood was the attorney of plaintiffs, and had authority to receive payment of their debt due by defendants. He stood in their shoes and was the creditor for that purpose. A tender by the debtor and acceptance by the creditor completed the payment. In this case the plaintiff's attorney had in his possession money belonging to defendants immediately upon the execution of their agreement about the Ladd debt by the relinquishment of the liens the defendants held upon Ladd's property, which defendants had a right to have paid to them, *eo instanti;* for it did not belong to plaintiffs except upon the consent of defendants. *Dominium non acquisitur nisi corpore et animo.* But it was thereupon agreed between Leatherwood and Conley that he, Leatherwood, should appropriate that sum in settlement of plaintiff's debt. Defendants had then done all that was necessary upon their part, *"corpore et animo,"* in order to make a valid payment; the money to be paid was in his hands, and they intended, and so expressly stated, that it should be paid over to the plaintiffs in extinguishment of that debt, and the transaction became complete upon the agreement of Leatherwood to accept it as such. It is true that the money was not actually handed to Conley, but its physical control was not necessary. For
(321) Leatherwood to give a check and have Conley to draw the money out of the bank and bring it to him, and he then to place it back into bank and send his clients a check for it, would have been simply useless and idle—equivalent to swapping dollars, or taking money from one pocket and putting it into another. Having agreed as to the appropriation of the money to plaintiff's debt, Conley asked for a receipt, which he agreed to give, but was too busy just then to do so. It is clear that this completed the payment. Upon what principle of law could Conley have then recovered the money back from Leatherwood, should he have changed his mind?

In what way Ladd drew the money out of the bank does not appear; but does not concern defendants. Under their agreement with Leatherwood, who had it in bank to his credit, it had been appropriated for the payment of plaintiff's debt, and if by negligence or otherwise upon the part of the attorney or bank, Ladd got hold of the money, plaintiff must look to them and not to defendants. Plaintiffs were acting through their agent, having placed in him authority and trust, and are bound

by his acts in dealing with defendants. In no sense was he the agent of the defendants, and they lost all control over, right to, and responsibility for the money when he agreed to, and did accept it, in payment of his client's debt.

Error.

Cited: *S. c.*, 130 N. C., 512.

(322)

CITY NATIONAL BANK OF NORFOLK v. BRIDGERS.

(Filed 23 May, 1901.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—*Fraud—Preferred Creditors—Badge of Fraud.*

   The relationship of the parties, in an assignment for the benefit of creditors, while a circumstance to be considered, does not amount to a badge of fraud.

2. EVIDENCE—*Assignments for Benefit of Creditors—Declarations—Admissions.*

   In an action to set aside a deed of assignment, declarations of the assignor made after the execution of the deed of assignment, are not competent, unless a *prima facie* case of conspiracy between assignee and assignor is established.

ACTION by City National Bank of Norfolk against J. B. Bridgers and J. D. Bottoms, heard by Judge *W. L. Norwood*, at August Term, 1898, of NORTHAMPTON. From a judgment of nonsuit, the plaintiff appealed.

Day & Bell and *Alexander Stronach*, for the plaintiff.
R. B. Peebles, for the defendants.

FURCHES, C. J. The defendant J. B. Bridgers was indebted to the plaintiff bank, and on 24 June, 1893, made a deed of assignment of his real and personal property to the defendant John D. Bottoms to secure the debts therein named.

The plaintiff bank, though a large creditor of the assignor, was not named or secured, and this action is brought to set aside and vacate said assignment for fraud. The plaintiff, for the purpose of sustaining the allegation of fraud, offered in evidence an absolute deed from J. B. Bridgers to W. K. Bridgers, dated 22 June, 1893, for the same property (323) conveyed in the deed of assignment to defendant Bottoms on 24 June, 1893; and a deed dated 24 June, 1893, from

W. K. Bridgers conveying the same property back to J. B. Bridgers. The plaintiff then showed that J. B. Bridgers and W. K. Bridgers were brothers, and that John B. Bottoms was a brother-in-law of J. B. Bridgers.

The plaintiff then introduced John D. Bottoms, who testified that he was the trustee named in the deed of assignment of 24 June; that he did not have the deed registered; that it was registered before he knew anything about it; that he took possession of the goods in Northampton County on Tuesday after the assignment; that he did not take charge of the goods in Hertford County, for the reason that Mr. Peebles, defendants' attorney, told him that Winborne owed them, and that J. B. Bridgers' interest in them was worth nothing.

The plaintiff introduced A. E. Krise, president of plaintiff bank, and proposed to prove by him the following conversation with J. B. Bridgers in March, 1895: "He (J. B. Bridgers) came to the bank and asked witness to forgive him, and said that he intended to pay the bank every cent that he owed it; when he made the arrangement he expected his brother to pay the bank; that they had treated him (Bridgers) wrong, but he could not blame them after what he (Bridgers) had done; said he was going on the stand and tell the truth, but had rather settle it. Witness replied that the bank only wanted what was right. He then asked witness what he would take; he said he could not tell how much he could pay, as his brothers had all his property." This conversation was objected (324) to by defendants and excluded, and plaintiff excepted.

The plaintiff rested its case, and the defendants moved to nonsuit the plaintiff under the statute. The Court allowed this motion, rendered a judgment of nonsuit, and the plaintiff appealed.

This case was here in 1894, and is reported in 114 N. C., 383. And it is there held that the relationship of the defendants, while a circumstance proper to be considered, did not amount to a badge of fraud. The fact that the defendant J. B. Bridgers had made the deed of 22 June to W. K. Bridgers was also before the Court on that appeal, and, while that was a circumstance to be considered, it did not amount to a badge of fraud. The deed of W. K. Bridgers to J. B. Bridgers, of 24 June, reconveyed the property to J. B. Bridgers and put the parties in *statu quo*.

It is not a fraud in law for a debtor, by an assignment, to prefer one *bona fide* creditor to another. And it is not shown but what the debts secured in the assignment of 24 June to the defendant Bottom were actually due and *bona fide*.

This leaves but one question, and that is the competency of the evidence of A. E. Krise as to the declarations of J. B. Bridgers in March, 1895, and it seems that the authorities are against the plaintiff on this exception.

J. B. Bridgers had, nearly two years before that, parted with his interest in the property, and it had passed to the defendant Bottoms for the benefit of creditors. And what may have been said by J. B. Bridgers was hearsay as to the defendant Bottoms, in whom title had vested, and was incompetent. Declarations and admissions of the parties—assignor or assignee—made at the time of the assignment are competent as a part of the *res gestae*. And declarations of the assignor, made afterwards, are competent if a conspiracy or a combination has been entered into between the assignor and the assignee, to effect a fraud on the creditor. But this must *prima facie* appear, before such declarations are competent. Burrell Assignments (5 Ed.), pages 554 and 644; also *Blair v.* (325) *Brown,* 116 N. C., 631, though not so distinctly stated in this opinion as in Burrell Assignments, *supra.* But none of these reasons appear in this case for admitting these declarations.

This evidence being incompetent and properly excluded, it seems to us there was nothing left which should have been submitted to the jury.

Affirmed.

DITMORE v. GOINS.

(Filed 28 May, 1901.)

SERVICE OF PROCESS—*Summons—Warrant of Attachment—Judgment—Justices of the Peace—The Code, secs.* 214, 217, 218, 219, 350.

Where a justice issued a summons and warrant of attachment, and publication of the warrant was made, but the summons was not served, a judgment rendered thereon is void for insufficiency of service of summons.

CLARK, J., dissenting.

PETITION to rehear modified and dismissed. For former *per curiam* order, see 127 N. C., 581.

E. B. Norvell, F. P. Axley and *Shepherd & Shepherd,* for the petitioner.

Dillard & Bell and *Busbee & Busbee,* in opposition.

COOK, J. The summons and warrant of attachment were sued out, and issued by the Justice of the Peace on 6 December, 1898. The summons was returnable on 10 December, 1898, and the warrant on 5 January, 1899. On 10 December,
(326) the return day of the summons, the Sheriff returned the summons to the Justice, endorsing thereon "due search made and the defendant not found in my county." No alias summons was sued out, nor was there an order made by the Justice for the service of a summons by publication. The affidavit, as required, was made for obtaining the warrant, which was duly issued and served by levy upon personalty and realty. The publication of the warrant, which was signed by the plaintiff, was made for *four* weeks, as is required for the publication of the warrant by section 350 of The Code.

Upon the return day of the *warrant,* 5 January, 1899, the Justice proceeded to try the action upon the plaintiff's cause of action (the defendant not appearing), and rendered judgment in favor of the plaintiff against the defendant for the amount sued upon.

Thereafter, the defendant moved in the Justice's court to set aside and vacate the judgment. Upon the hearing of the motion, the Justice denied the same, and defendant appealed to the Superior Court. Upon the hearing before his Honor, he reversed the Justice and rendered judgment in favor of the defendant, vacating and setting aside the Justice's judgment, from which judgment the plaintiff appealed to this Court.

Under our system of practice, no party can be brought into Court except by a service of the summons upon him (unless he voluntarily appears). Service *must* be made upon him personally if he can be found in the State, or by publication, neither of which was done in this case (nor did the defendant voluntarily appear). The manner of service is plainly prescribed in sections 214, 217, 218 and 219 of The Code. It is well settled that any judgment rendered in an action without service of the summons is *absolutely void*—is a nullity—and will be so treated whenever and wherever introduced. *White v. Albertson,* 14 N. C., 241, 22 Am. Dec., 19; *Jennings v. Stafford,* 23 N.
(327) C., 404; *Stallings v. Gulley,* 48 N. C., 344; *Doyle v. Brown,* 72 N. C., 393; *McKee v. Angel,* 90 N. C., 60; *Harrison v. Harrison,* 106 N. C., 282, and other cases.

The *issuance* and *service* of a summons in an action are *indispensable* to a valid judgment. Before a court can render an order or judgment disposing of a person's property, it must give him such notice as is required by law, to the end that he may come into court and assert his rights; and the rules and

requirements regulating the issuance and service of such notice (by summons) must be strictly complied with. In actions within the jurisdiction of a Justice of the Peace, the summons must be *signed* by the Justice, run in the name of the State, directing the officer to summon the defendant at a time therein named, not exceeding thirty days from its date (Code, section 832); and in the event of service by publication, a notice must be published in any one or two *newspapers* most likely to give notice to the person to be served, not less than once a week for *six weeks,* giving the title, purpose, etc. (Code, sections 219 and 840, Rule 15), which must be under authority of an order made by the Justice, based upon an affidavit (Code, section 218). The publication of the warrant of attachment does not serve this purpose. But in attachment proceedings under section 352 of The Code, as amended by Laws 1893, chapter 363 (Clark's Code, page 415), when the warrant is taken out at the time of issuing the summons, and the *summons* is to be served by *publication,* the *order* shall direct that notice be given *in* the said *publication* to the defendant of the *issuing* of the attachment. Said publication shall state the names of the parties, the amount of the claims, and, in a brief way, the nature of the demand, and the time and place to which the warrant is returnable, and also provides that in attachment proceedings in a Justice's court, advertisement in a newspaper shall (328) not be necessary, but advertisement at the courthouse door and four other public places in the county for four successive weeks shall be sufficient publication, both as to the *summons* and *warrant* of attachment. This modification permits the incorporation of the *warrant* of attachment to be made in the *summons, not the summons* in the *warrant.* The summons in an *official* process, and *must* be *signed* and *issued* by the *Justice of the Peace,* whether its service is to be made personally or by publication, while the warrant, if not incorporated in the summons as above provided, is not official and may be signed by the plaintiff himself as above cited, and if not taken out at the time of issuing the summons, has to be served separately as provided in said section.

In this case the warrant of attachment was *signed* by the *plaintiff,* as was prescribed in the C. C. P., *before* the passage of the act of 1870-1, chapter 166, section 3 (which is now section 352 of The Code as amended by acts 1874-5, chapter 111, section 2, and acts 1893, chapter 363), and did not then serve as a process to bring the parties into Court, but was only intended to give notice that a warrant of attachment had issued in the cause.

An attachment is not the foundation of an independent action, but is an ancillary and auxiliary remedy collateral to the action. *Marsh v. Williams,* 63 N. C., 371; *Toms v. Warson,* 66 N. C., 417. Its function is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action if seized without proper cause. In no sense is it a process to bring the defendant into Court. It may be issued to accompany the summons, or at any time thereafter. Code, section 348. Notice of the same must be published within thirty days after its issuance for only *four* successive weeks, and at the *courthouse door* and four (329) other *public places* in the county (Code, section 350), and may be *signed* by the *plaintiff*. Code, section 909, Form 16.

In this case the summons was not served at all, which fully appeared thereon when returned to the Justice's court on the return day 10 December, 1898. No alias summons was sued out (Code, section 205), and the failure to do so worked a discontinuance of the action. *Fullbright v. Tritt,* 19 N. C., 491; *Webster v. Laws,* 86 N. C., 178.

The trial had on 5 January, 1899, was without authority of law, and the judgment rendered was absolutely void, and his Honor should have so held. With this modification, there is

No error, and petition dismissed.

CLARK, J., dissenting. It appears from the record evidence herein that on 6 December, 1898, the plaintiff caused a summons to be issued against the defendant by a Justice of the Peace, and on the same day filed an affidavit on proper allegations for an attachment of the property of the non-resident defendant, giving the bond required by statute. On the same day the Justice issued the warrant of attachment, which was returned in due form regularly levied upon the property of defendant, 7 December, 1898. Thereupon the plaintiff made publication for four weeks of the summons and warrant of attachment in the following form, as prescribed by The Code, section 909, Form 16:

"North Carolina—Cherokee County—Murphy Township—
"J. A. Ditmore v. N. A. Goins.

"Seventy-six dollars and twenty-five cents, due by note and duebill. Warrant of attachment returnable before J. M. Vaughan, a Justice of the Peace for Cherokee County, at his

office in Murphy in said county, this 5 January, 1899, (330) *when and where the defendant is required to appear and answer the complaint.* Dated this 7 December, 1898.

J. H. DITMORE, *Plaintiff.*

Not only is this publication of summons and warrant in the same publication a literal compliance with the form prescribed by the statute and therefore valid, but the joint publication is required by section 352, as follows: "When the warrant of attachment is taken out at the time of issuing the summons (which was the case here) and the *summons is to be served by publication* (here the affidavit alleged he was a non-resident), the order shall *direct* that notice be given *in said publication* to the defendant of the issuing of the attachment * * *, said publication shall state the names of the parties, the amount of the claims, and, in a brief way, the nature of the demand and time and place to which the warrant is returnable." If this publication was defective, it did not invalidate the jurisdiction, which was based upon the seizure into the custody of the law of the property. When the defendant appeared in the action, as she afterwards did, it was ground for a motion to reopen the judgment but not for a dismissal of the attachment and of the proceedings *ab initio.*

In a very respectable authority, *Cooper v. Reynolds,* 77 U. S. (10 Wall.), 309, it is said, "the seizure of the property of the defendant under the proper process of the Court is therefore the foundation of the Court's jurisdiction, and defective or irregular affidavits and publications of notice, though they might reverse a judgment in such case for error in departing from the directions of the statute, do not render such a judgment or the subsequent proceedings void." When there can be service on the person, service of summons is indispensable and the foundation of the proceeding. But where it is a proceeding *in rem* or *quasi in rem* (as is an attachment of (331) this kind), then the foundation is the seizure of the *rem,* and the publication of the summons if not properly made is an irregularity. If not regular, or for the proper time, the remedy is an order for republication, not a dismissal of the attachment.

There are two kinds of attachment: the one where the defendant is personally served with process and the attachment is an ancillary remedy given in cases prescribed by statute to secure the fruits of the judgment when it shall be obtained; the other is where the defendant can not be served with process; there, a publication of summons alone would be a nullity. *Pennoyer*

v. Neff, 95 U. S., 714; *Bernhart v. Brown,* 118 N. C., 700, 36 L. R. A., 402, in both of which cases the matter is fully discussed.

In *Cooper v. Reynolds, supra,* at page 319, that eminent authority, Mr. Justice *Miller,* says: "On what does the jurisdiction of the Court depend? It seems to us that the seizure of the property or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction. Without this the Court can proceed no further; with it the Court can proceed to subject the propery to the demand of the plaintiff." Then, after saying that proper affidavit is the preliminary to issuing an attachment, but if the attachment is levied, a defective affidavit would be ground of appeal, but would not invalidate the attachment, he adds: "So, also, of the publication of notice. It is the duty of the Court to order such publication and to see that it has been properly made, and undoubtedly if there has been no such publication a court of errors might reverse the judgment"—not hold it void, as stated in the opinion in this cause. In the present case the publication was made in the form required and prescribed by statute; but if it had been irregular, the remedy is not to dismiss the action which is validly based on (332) an attachment, but, retaining the cause, to set aside the judgment with a new trial, as in the case of any other error not going to the jurisdiction. Drake Attachment, sections 224, 437, 437a.

In *Bank v. Blossom,* 92 N. C., 695, the publication of summons and warrant of attachment in the same notice (as here) was held valid; but if made for less than six weeks it was held an irregularity as to the summons, and the Court could "retain the cause and order a sufficient publication." If that were still the law the judgment should, on defendant's motion, be set aside and republication of summons ordered, but it would be error to dismiss the action. Since that decision, however, the incongruity of requiring publication of summons for a longer period than is required for publication of the warrant, both being in the same notice, has been cured by chapter 363, Laws 1893 (incorporated in section 352, Clark's Code, 3 Ed.), which provides that when attachment proceedings are begun before a Justice of the Peace publication for four weeks shall be sufficient "both as to the summons and warrant of attachment." Hence, there has been no irregularity or defect in this case. The defendant being a free trader, judgment could be rendered against her in a suit before a Justice of the Peace. *Neville v. Pope,* 95 N. C., 346. The defendant does not set up

that it has a meritorious defense if the judgment is set aside (*LeDuc v. Slocomb,* 124 N. C., 347), and to set aside a judgment for irregularity in such case is erroneous. *Cui bono* go over the trial again without a meritorious defense.

I am of opinion that the judgment below reversing the Justice and setting aside his judgment should itself be reversed, and the Justice's judgment should be reinstated.

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(333)

COOK v. SOUTHERN RAILWAY CO.

(Filed 28 May, 1901.)

1. CARRIERS—*Negligence—Personal Injuries—Master and Servant—Trespassers.*

   A railroad company is responsible for an injury caused by the wrongful act of its employees, while acting in the general scope of his employment, whether such act is willful, wanton and malicious, or merely negligent.

2. CARRIERS—*Negligence—Personal Injuries—Master and Servant—Trespassers.*

   A carrier owes ordinary care to one stealing a ride on its train.

3. EVIDENCE—*Conflicting—Questions for Jury—Trial.*

   Where there is a conflict of evidence as to whether a person was injured by jumping from the train, the question should be submitted to the jury.

ACTION by J. W. Cook against the Southern Railway Company, heard by Judge *Thos. J. Shaw* and a jury, at April Term, 1900, of BURKE. From a judgment for the plaintiff, the defendant appealed.

Avery & Avery and *Avery & Erwin,* for the plaintiff.
Geo. F. Bason and *A. B. Andrews, Jr.,* for the defendant.

CLARK, J. This case is "on all fours" with *Pierce v. R. R.,* 124 N. C., 63. It was there humanely held that a "trespasser's wrongful act in getting on a car does not justify making him get off in a manner calculated to kill or cripple him." Also, that "a railroad company is responsible for injury caused by the wrongful act of its employee, while acting in general scope of his employment, whether such (334) act is wilful, wanton and malicious, or merely negligent." That case cites numerous authorities (pages 93 and 94), for

instance, where the carrier was held liable for a servant "employed to sweep up the car" kicking a boy off a moving train, the boy falling under the train and being killed; *R. R. v. Hack,* 66 Ill., 238; or a brakeman doing the same, *R. R. v. Kelly,* 36 Kan., 655; and similar cases. The principle underlying those cases is stated to be "the proximate cause of injury is not the trespasser's wrongfully getting on the cars, but the tortious manner in which the servant makes him get off." In that case (*Pierce v. R. R., supra*) the carrier was held liable because a brakeman, either by throwing a lump of coal which frightened or struck a boy who was stealing a ride on the train, or by merely ordering the boy off, made him get off a moving train so that he was killed. In the present case the plaintiff was likewise stealing a ride. Instead of stopping the train to make him get off, or waiting until the train got to a station, it was in evidence that while the train was going four or five miles an hour the flagman, a white man, and a colored brakeman, got off the train, cursed the plaintiff and told him to get off, the brakeman threw a rock and hit the rod under the car on which the plaintiff was resting, and the flagman said "give it to him." In consequence of this assault and the threats accompanying it the plaintiff was forced to get off while the car was moving, and in so doing caught his foot and was badly hurt.

The defendant offered evidence denying that the plaintiff was forced to get off by its servants. The testimony was also conflicting whether the plaintiff was injured or not. These matters were therefore properly submitted to the jury.

As to the second exception, the Court told the jury that as the plaintiff was stealing a ride the defendant owed to him only ordinary care, which it defined to be "such care as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances." That this (335) small degree of care must be used towards a trespasser has been often held. *Pickett v. R. R.,* 117 N. C., 616; *Baker v. R. R.,* 118 N. C., 1015; *Ellerbee v. R. R.,* 118 N. C., 1024. Such modicum of care was not exercised towards the plaintiff if, as the jury found, he was forced to get out from under a car running four or five miles an hour by the defendant's servants throwing rocks at him and cursing him. It can make no difference to him whether the chief in charge of the assault wore the epaulet of a conductor, the sergeant's chevron of a flagman, or the corporal's stripes of a brakeman, or, indeed, if the stone thrower had been a lesser servant, a private, perhaps, in the carrier hierarchy.

It was within the scope of the authority of a flagman or brakeman to eject or expel the plaintiff. Indeed, the flagman was asked by defendant's counsel what he did with tramps when he found them on the train. To which he replied that it "depended on where he found them." But independent of this, the flagman and brakeman were there in the service of the company, and if, as plaintiff testified, by assault and threats they made him get off a car moving four or five miles an hour, and the conductor did not restrain them, the company is liable for this wrongful act of its servant, if such wrongful act caused injury to the plaintiff. The conductor, by his standing orders and supervision of those under him, should have prevented the assault by them upon the plaintiff, even upon a trespasser.

The plaintiff could have been legally ejected by any employee, if done with no more force than was necessary and in a proper manner. It is the manner in which the plaintiff was ejected, and not the rank of the servant ejecting him, of which he has cause to complain and which makes the master liable. If the conductor had thrown the rocks at the plaintiff, it would in the same sense have been outside the scope of his employment, for the conductor had no more authority to assault the plaintiff than the flagman or brakeman had. (336) The defendant has misconceived the meaning of *Pierce v. R. R., supra,* and cases therein cited. If any servant "acting in the general scope of his employment wrongfully assaulted the plaintiff, and such wrongful assault caused the injury, the defendant is liable," that is to say, if the conductor *while acting as conductor,* or the flagman or brakeman while *on duty as flagman or brakeman,* wrongfully assaults one on the train, even though such person be a trespasser, and such wrongful assault is the proximate cause of the injury, the carrier is liable. "Acting within the general scope of his employment" means while on duty, and not that the servant was authorized to do such acts. Take the case of *Strother v. R. R.,* 123 N. C., 197, where the carrier was held liable for an insulting proposition by a conductor, but it was not in the general scope of his employment to make such propositions. This is the reasoning and the reading of the authorities. If this were not so, the carrier would never be liable, for it can not be within the authority of any officer or employee to wrongfully assault any one.

The other exceptions do not require discussion.

Affirmed.

Cited: *Lovick v. R. R.*, 129 N. C., 436; *Palmer v. R. R.*, 131 N. C., 252; *Lewis v. R. R.*, 132 N. C., 387; *McNeill v. R. R.*, *Ib.*, 511; *S. c.*, 135 N. C., 721; *Jackson v. Tel. Co.*, 139 N. C., 354; *Hayes v. R. R.*, 141 N. C., 198; *Stewart v. Lumber Co.*, 146 N. C., 60, 65, 88; *Jones v. R. R.*, 150 N. C., 481.

(337)

BOUTTEN v. WELLINGTON AND POWELLSVILLE RAILROAD CO.

(Filed 28 May, 1901.)

1. BURDEN OF PROOF—*Directing Verdict.*

   A verdict can not be directed in favor of one upon whom rests the burden of proof.

2. RELEASE—*Consideration—Fraud—Seal—Railroad—Negligence—Personal Injuries.*

   In an action against a railroad for injuries, evidence that a release by the plaintiff was without consideration and fraudulent, was sufficient to warrant the submission of the case to the jury.

3. RELEASE—*Consideration—Fraud—Seal—Railroads—Negligence—Personal Injuries—Burden of Proof—Presumption.*

   Where, in an action against a railroad for injuries, the defendant sets up an alleged release from the plaintiff, which recites no consideration, and the evidence in support of plaintiff's allegation of fraud and mistake in signing the release and want of consideration, was uncontradicted, the burden is upon the defendant to rebut the presumption of fraud arising from want of consideration.

4. PRESUMPTIONS—*Seal—Consideration.*

   The presumption of consideration from a seal is liable to rebuttal even where a consideration is recited in the deed.

MONTGOMERY, J., dissenting.

ACTION by Thomas Boutten against the Wellington and Powellsville Railroad Company, heard by Judge *H. R. Starbuck*, at Spring Term, 1900, of BERTIE.

Action for damages received on the track of the defendant. Plaintiff testified in his own behalf as follows: "Last year I was at Ahoskie, in the employ of the Norfolk and Car-
(338) olina Railroad Company. Had started to my work. Work carried me to this side of Stony Creek. I was walking along the Wellington and Powellsville Railroad track. Was getting $15 a month. I was taken sick while walking along, and laid down on the track. The first thing I knew the train was on me. I had been drinking. Drank half pint that

day. At this place the Norfolk and Carolina used the Wellington and Powellsville track (narrow gauge). Runs three miles along this track. I was lying across all three of the rails, my head on the crossties just outside of the Norfolk and Carolina rail. It was not customary to run a train on the Wellington and Powellsville on Sunday. Defendant's train struck my legs, and dragged and pushed me along the track about ten feet. I hallooed when it struck me. They stopped. It was in the day time. It was a straight stretch coming from Ahoskie where I was, two miles from Ahoskie. I was sick three months; hurt in my hip and legs; one of my toes mashed to pieces. I was asleep when the train struck me." On cross-examination: "I have never been paid anything on the release, which is as follows: 'Whereas, the undersigned was hurt and injured on the track of the Wellington and Powellsville Railroad Company on or about 19 February, 1899, and claims that the injury was the result of carelessness of said company in running its train, and which carelessness and liability the said company denies: Now, in consideration of —— dollars this day paid to him in full and final compromise settlement of all claims and rights of action against said company, the said .... does hereby acquit, discharge and release said Wellington and Powellsville Railroad Company and its officers, servants and agents from any and all liability to him on account of said injury, and does hereby satisfy and receipt to them in full of all demands on account thereof. Witness my hand and seal, this 10 April, 1899. Thos. (his X mark) Bowden. (Seal.)' I signed this paper before Mr. Copeland, and (339) made my mark to it. I can not read or write. I thought it was a paper that enabled Uncle Eli Williamson to get his money for waiting on me while I was laid up with the injury. This is all I understood about it. I signed it so he could get paid. Did not know the nature of the paper. Eli Williamson had told me before the paper came to me to be signed that that was the only way he could get his money. I was at his house during my sickness. Mr. Copeland, the postmaster, brought the paper to me. No money was paid to me. I was drunk—was drunk sick—when I laid down. Don't know how long I laid there before the train came along. I saw it coming towards me. The train was running pretty fast when it struck me. I think it was as much as half a mile from me when I first saw it. Don't know whether it was a mile. I saw it plain enough to tell that there was no headlight on it. It was just before sunset. I did not get off the track because I was not able. My feet were in middle of track. It was three

months after I was hurt when I signed the paper. I was sitting up. I wanted Eli to be paid, and I signed the paper so he could get his money. He had taken care of me and nursed me during my sickness. Dr. Mitchell attended me as a physician. Defendant's superintendent told me he was going to pay the physician also. I do not know whether he paid him. The paper was not read to me. Nobody was present when it was signed, except Copeland and Uncle Eli. Copeland is the postmaster. Eli is a colored man." (Plaintiff is a colored man.) Defendant moved to dismiss under the statute as in case of nonsuit. Motion allowed. Plaintiff excepted, and appealed from the judgment.

From a judgment for the defendant, the plaintiff appealed.

(340) *St. Leon Scull,* and *B. B. Winborne,* for the plaintiff.
Martin & Peebles, and *Francis D. Winston,* for the defendant.

CLARK, J. It was error to nonsuit the plaintiff and thereby take from him the right to have the jury pass upon the defense set up by the defendant. Under our system of procedure the tribunal for the trial of disputed allegations of fact is a jury, not a Judge. So important and sacred is the right that it is protected by provisions in both the State and Federal Constitutions. Section 19 of the Bill of Rights (now Art. I) of the State Constitution, says, "The ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

When a party upon whom rests the burden of proof fails to introduce any evidence, the Court can direct a verdict against him, or if he is the plaintiff, direct a nonsuit. But the Judge can not direct a verdict in favor of a party upon whom rests the burden of proof, for that would be a finding by the Judge that his evidence is true, which is expressly forbidden by the act of 1796 (now Code, 413)—"No Judge shall give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury." If there is no evidence to the contrary, all the Court can do is to say to the jury that "if they believe the evidence" to find the issue in his favor. *Spruill v. Ins. Co.,* 120 N. C., 141, with cases therein cited and a long line of cases since citing and approving it.

Here the plaintiff introduced evidence tending to show that though there was contributory negligence upon his part, the proximate cause of the injury was the subsequent negligence of the defendant, who had the "last clear chance." The plain-

tiff could not have been nonsuited upon that evidence, and it is not even contended that he could be. The defendant set up in defense an alleged release, to which the plaintiff filed a reply denying the same was signed by him for the purpose of a release, alleging fraud and mistake and that no con- (341) sideration was paid.

The defendant contends that the signing of the release being proven, the burden was upon the plaintiff to prove the matters to impeach it, and that there being no evidence to do this, a nonsuit was proper. But firstly, it is alleged, and the evidence is uncontradicted, that not a penny, nor any consideration whatever, was paid the plaintiff, and indeed the release itself appropriately leaves the consideration blank. It was therefore *nudum pactum*. But it is said that a seal imports a consideration. This, however, is only a presumption and liable to a rebuttal even where a consideration is recited in a deed solemnly executed and sealed. *Barbee v. Barbee,* 108 N. C., 581; *S. c.,* 109 N. C., 299; *Smith v. Arthur,* 110 N. C., 400; *Shaw v. Williams,* 100 N. C., 272. In this last case (at page 281) SMITH, C. J., says: "And so every release must be founded upon some consideration, otherwise fraud must be presumed. 2 Dan. Ch. Pr., 766; Story Eq. Pl., sections 796, 797."

Not only is fraud presumed from the absence of consideration, but it is alleged that the plaintiff was "misled and deceived." There is both allegation and proof that the plaintiff is ignorant and unlettered, unable to read or sign his name, that the paper was not read over to him, that he was in physical suffering from his wounds; that the man at whose house he was staying during his confinement from his wounds, told him the paper was to enable him to get his pay from the railroad company for his taking care of plaintiff while wounded, and that, under the impression it was a paper of that kind, he signed it, but he did not know that it was a release of his claim for damages against the company, and that no consideration was ever paid him to give such release. It seems the railroad company was to pay for the plaintiff's board and nursing while (342) wounded, and the doctor, too, for the witness says "the superintendent told me he was going to pay the physician also." It does not appear that even the board and nurse hire have been paid, but if they had been, such payments might be taken into consideration in adjusting a reasonable sum to be paid to plaintiff for his injuries if sustained by the negligence of defendant. Payment of the nurse's bill, had it been shown, would have been no recompense to plaintiff for injuries of the nature here in evidence, and which had then detained him in bed for

three months. This evidence tending to show the signature, made by crossmark, was procured by imposition or mistake, should have been submitted to a jury. The scroll, made, too, by other hands than the plaintiff's, following his crossmark, can not have the magical effect to shut off investigation by a jury of the allegation and proof offered to show that the release was not given fairly and knowingly by plaintiff, independently of the presumption of fraud which arises from the absence of any consideration given plaintiff for his injuries or for the release. That a release is procured from a man who can not read it, without its being read over to him or explained, is itself a suspicious circumstance. It may be that defendant can prove that it was read over to plaintiff, and also that a consideration was paid. An opportunity should be given it to do so.

This case differs from *Wright v. R. R.*, 125 N. C., 1, in that there the issue of fraud was submitted to the jury. The release recited the consideration and the evidence proved it, and there being no evidence of fraud, this Court held that there being not a scintilla of evidence of the affirmative, the Judge should have directed a verdict on that issue against the party alleging the fraud. Nor is this case like *Dellinger v. Gillespie,* 118 N. C., 737, which properly held that the negligence of a
(343) party to a written contract in voluntarily signing it, without reading it, will not permit him to contradict its terms by parol. In that case there was a consideration, the party could read but was too careless to do so, and there was absent all the circumstances here in evidence which tend to show imposition or mistake, trick or device. The Court in that case rests the case on this feature, "it is plain that no deceit was practiced." In the present case there was allegation to the contrary, and the proof offered in support was for the jury to pass upon, and not the Judge.

Error.

MONTGOMERY, J., dissenting. The plaintiff brought this action to recover from the defendant damages for personal injuries suffered by the plaintiff by being struck by one of defendant's locomotives. The defendant pleaded a release and settlement, and also contributory negligence on the part of the plaintiff.

The contributory negligence of the plaintiff and the last clear chance of the defendant by which the plaintiff's injury might have been avoided were matters not considered in the trial below.

The action was dismissed by his Honor upon the motion of the defendant after the plaintiff's evidence was in—his Honor holding that, upon the plaintiff's own testimony, he was not entitled to recover.

The release, which was under seal, recited the injury of the plaintiff by the defendant's train and the plaintiff's claim that he was hurt by defendant's negligence, and that for and in consideration of (blank) dollars the plaintiff acquired, discharged and released the defendant from all liability on account of the injury. If the release, being under seal, had mentioned no consideration, the law would have raised a conclusive presumption in the absence of fraud or mistake that a consideration had been received by the plaintiff. But it was undertaken in the release to set forth the consideration in dol- (344) lars and cents, and the amount was left in blank. The release was therefore of itself no more than a blank piece of paper. *Pepper v. Harris,* 73 N. C., 365. But when the plaintiff was cross-examined, the release was shown to him and he admitted that he had executed it, and mentioned the consideration for which he had done so. He said, "I thought it was a paper that enabled Uncle Eli Williamson to get his money for waiting on me while I was laid up with the injury. I signed it so he could get pay. Eli Williamson had told me, before the paper came to me to be signed, that that was the only way he could get his money. I was at his house during my sickness. I wanted Eli to be paid, and I signed the paper so he could get his money. He had taken care of me and nursed me during my sickness."

And plaintiff in his reply alleged that "he had been misled and deceived into signing the paper," without intimating by whom he was deceived or misled, and in what manner. If that could be, under our liberal system of pleading, considered as charging a fraud on the defendant in the procuring of the execution of the release, the plaintiff's own evidence disproved it. It is true that he said he could neither read nor write, and that the paper was not read to him; but, on the other hand, he did not ask to have it read to him. No trick or device was resorted to by the defendant to procure the execution of the release, and the plaintiff signed it without asking that it be read to him. If, under such circumstances the defendant practiced a fraud on the plaintiff, it was accomplished through the plaintiff's own negligence. *Gillespie v. Dellinger,* 118 N. C., 737.

The plaintiff's counsel in this Court insisted that the release set up in the defendant's defense was a plea in avoidance, and that the whole matter should have been submitted to the jury.

That the ruling of his Honor was equivalent to an affirmative finding of an issue, and could not be found by the
(345) Court. If there had been any conflict in the evidence, then the position taken by plaintiff's counsel would have been correct. But there was no doubt or conflict in the evidence. It was all given in by the plaintiff himself, and the defendant demurred to it; and, as was said by this Court in *Neal v. R. R.*, 126 N. C., 634, "This was an admission by the defendant that the evidence was true. The plaintiff, by offering the evidence, had vouched for its credit. He could not impeach its credit." That the evidence of the plaintiff in reference to the release was brought out on the cross-examination of the plaintiff, does not alter the principle involved. The cross-examination of a witness is as essential a part as the evidence in chief.

I think there was no error.

Cited: Carter v. Tel. Co., 141 N. C., 380.

MOORE v. COHEN.

(Filed 28 May, 1901.)

ATTORNEY AND CLIENT—*Liability of Client for Acts of Attorney.*

A client is not responsible for any illegal action taken or directed by his attorney, which the client did not advise, consent to, or participate in, and which was not justified by any authority the client had given.

ACTION by J. E. Moore against Charles Cohen, heard by Judge *H. R. Starbuck* and a jury, at March Term, 1900, of HALIFAX. From a judgment for the defendant, the plaintiff appealed.

(346) *Day & Bell, Thos. N. Hill,* and *T. C. Harris,* for the plaintiff.

R. B. Peebles, for the defendant.

CLARK, J. This is an action by the plaintiff for malicious prosecution by illegally causing the arrest of plaintiff in a former action in which the present defendant was one of the plaintiffs, and obtained judgment against the present plaintiff, who was one of the defendants.

It was admitted by both parties that the claim on which the judgment was rendered was sent by Cohen & Son, of which firm defendant is senior partner, to R. B. Peebles, attorney-at-law, for collection, with no specific instruction as to collection, and in the usual course of business for collection; that before sending it Cohen & Son had learned that the firm of J. S. & J. E. Moore had made an assignment; that the defendant had no knowledge of the arrest of J. E. Moore, or of the action before the justice of the peace, or of the order of arrest, or any other proceeding in said action, or of the acts of Messrs. Peebles and Harris (counsel in said action for Cohen & Son) until years thereafter when the present action was begun, and that the defendant never authorized or ratified said arrest unless the sending the claim to R. B. Peebles for collection as aforesaid amounted to authorization.

The plaintiff contended that the acts of the attorney were the acts of the defendant, though done without his knowledge or express authority, and that the defendant was responsible for them, and in writing asked the Court to instruct the jury, that upon the whole evidence, if believed, to answer the first issue "Yes." The Court declined this request, and held, as a matter of law, that upon the evidence the plaintiff was not entitled to recover, and that the issue should be answered "No," and directed a verdict accordingly.

It is true that a client is bound by the acts of his (347) counsel in the ordinary course of procedure and in matters pertaining to that action, such as judgments, decrees and orders therein, but "a plaintiff is not responsible for any illegal action taken or directed by the attorney which the plaintiff did not advise, consent to or participate in, and which was not justified by any authority he had given." Cooley on Torts, 131. This is fully sustained by the authorities cited in the note and other cases. *Fox v. Stone,* 8 N. Y., 355; *Fire Asso. v. Fleming,* 78 Ga., 733; *Brown v. Kendall,* 90 Mass. (8 Allen), 209; *Ferguson v. Terry,* 40 Ky. (1 B. Mon.), 96. The arrest of the plaintiff was not within the scope of the attorney's duty in prosecuting collection of the claim unless the client had advised, consented to or ratified the same. *Welsh v. Cochran,* 63 N. Y., 181; 20 Am. Rep., 519.

No error.

Cited: Lovick v. R. R., 129 N. C., 437; *Daniel v. R. R.,* 136 N. C., 727; *West v. Grocery Co.,* 138 N. C., 167; *Jackson v. Tel. Co.,* 159 N. C., 354.

KING v. COOPER.

(Filed 28 May, 1901.)

1. TAX TITLES—*Presumptions—Notice—Evidence—Laws* 1897, *Ch.* 169, *Secs.* 64, 65—*Ejectment.*

A tax deed is not presumptive evidence that the notice required of the purchaser under Laws 1897, ch. 169, secs. 64 and 65, was given.

2. APPEAL—*Review—Exceptions and Objections.*

Exceptions to the admission of evidence by one party will not be considered on appeal of the other party.

ACTION by R. W. King against A. Cooper, W. J. Crisp and Thos. J. Jarvis, heard by Judge *H. R. Starbuck* and a jury, at December Term, 1900, of PITT. From a judgment for (348) the defendants, the plaintiff appealed.

Fleming & Moore, for the plaintiff.

Shepherd & Shepherd, and *Gilliam & Gilliam,* for the defendants.

CLARK, J. There was a radical change in the system of sales of realty for nonpayment of taxes by the statute of 1887, chapter 137. That statute, which follows similar legislation, which under the pressure of the same necessity has been enacted in other States, has been fully and definitely construed by this Court in *Peebles v. Taylor,* 118 N. C., 165; *Sanders v. Earp, Id.,* 275; *Moore v. Byrd, Id.,* 688; *Powell v. Sikes,* 119 N. C., 231; *Lyman v. Hunter,* 123 N. C., 508, and many similar cases. We do not call in question what the Court has deliberately said and so often repeated in those cases. But the point here presented is an entirely different one.

In the original act of 1887, which is very nearly a copy from the reformed system prescribed for tax sales in Nebraska, there was a salutary provision (section 69) which required that the purchaser of lands at tax sales, or his assignee should, three months before the expiration of the time of redemption, serve a written or printed notice of his purchase on the person in actual possession of the land and also on the person in whose name the land was assessed. This provision was omitted in the acts regulating the sale of land for taxes in 1889, 1891, 1893 and 1895. Attention having been called to the omission by this Court in *Sanders v. Earp, supra,* this clause was reinserted by chapter 169 of Laws 1897, in which it constitutes sections 64 and 65. Section 64 provides: "Hereafter

no purchaser, etc., shall be entitled to a deed, etc., until" (349) the notice above prescribed shall have been served. Section 65 provides: "Every such purchaser, etc., before he shall be entitled to a deed shall make an affidavit of his haping complied with the conditions of the foregoing section, stating particularly the facts relied on as such compliance," and further requiring presentation of said affidavit and its filing and recording which "shall be *prima facie* evidence that such notice had been given," prescribing penalty for false swearing and fees for the register. Thus these matters are made conditions precedent, but in this case the plaintiff offered no proof thereof, not even the *prima facie* proof prescribed.

Laws 1897, chapter 169 (under which the land was sold for taxes), provides in section 69 that the deed made by the sheriff shall be presumptive evidence of certain things and conclusive evidence of certain others. In the former class is "(7) That notices had been served and due publication had before the time of redemption had expired."

The plaintiff contends that this section applies to the conditions precedent in sections 64 and 65, which had been just reinserted, but this clause, section 69 (7), had been in the previous acts, 1889 to 1895, inclusive, which did not contain any clauses corresponding to the new sections 64 and 65. For which reasons and from the context, we think the notices and publication presumed under section 69 (7) to have been given are those required of the sheriff by section 51 of said act, but the notices required with so much particularity to be given by the purchaser, under the new sections 64 and 65, must be proven by him. Why provide that the affidavit duly filed and recorded shall be *prima facie* evidence of the service of these notices by the purchaser if the deed is presumptive evidence of such fact? Till these last requirements the presentation of the tax deed in evidence, made out a *prima facie* case for the purchaser. By the above sections the General Assembly saw fit to require the conditions precedent therein named in addition (350) to the deed, which last, upon proof of compliance with the said conditions, becomes as before, evidence presumptive, or conclusive (as the case may be), of the various matters recited in section 69 of said act.

When the deed, after proof of compliance with said conditions precedent required by sections 64 and 65, is put in evidence, then before the defendant can defend he must show that the taxes had been paid by him before the sale, *Moore v. Byrd, supra,* and such deed would be good against a mortgage recorded before the sale. *Powell v. Sikes, supra.*

The General Assembly has remained absolutely satisfied of the necessity for the changed policy as to sales of land for taxes introduced by the act of 1887, for each General Assembly since has substantially re-enacted that act from 1887 down to the present. But the Legislature of 1897 evidently felt that the omission of the provision (which was in the act of 1887) prescribing that the above notices should be served by the purchaser had worked a hardship and left the owner of land (especially when the land was rented out) insufficiently protected. The above sections having been inserted must be given the effect so evidently intended.

Upon a reasonable and just construction of section 69 of said chapter 169, Laws 1897, the sheriff's deed for land sold for taxes is presumptive or conclusive evidence, as the case may be, that the duties required of public officers in such respect have been complied with, but it does not make the sheriff's deeds either presumptive or conclusive evidence that the purchaser at the tax sale, a private citizen, has performed the duties which the law required of him before he becomes entitled to such deed. The conditions precedent required by sections 64 and 65 must be proven outside of the deed and as the
(351) plaintiff offered no such evidence the court properly rendered judgment that the plaintiff, upon the evidence, could not recover.

The exception taken by defendant to the admission of testimony could not be considered, for the reason that the defendant did not appeal. *Howe v. Hall, ante,* 167.

Affirmed.

Cited: Tyson v. Barnes, 131 N. C., 826; *Stewart v. Pergusson,* 133 N. C., 285; *Gudger v. White,* 141 N. C., 520; *Mathews v. Fry, Ib.,* 585, 6; *Eames v. Armstrong,* 146 N. C., 6; *Warren v. Williford,* 148 N. C., 478.

BEST v. BRITISH AND AMERICAN MORTGAGE CO.

(Filed 28 May, 1901.)

1. ATTACHMENT—*Publication of Summons.*

Where, in attachment, it appears from the whole record that the statute has been substantially complied with, the action will not be dismissed, nor the attachment dissolved.

2. SERVICE OF PROCESS — *Process — Summons — Publication — The Code, Sec.* 218—*Attachment.*

The Code, sec. 218, does not require the issuance and return of summons not served as a basis for publication of summons.

3. ATTACHMENT—*Publication of Summons—Cure of Defects—Alias Order—Notice of Warrant of Attachment—The Code, Sec.* 352.

Where a publication of summons in attachment, begun 11 July, 1900, was defective in not containing notice also of the warrant of attachment, an alias order of publication, duly made prior to the November Term, cured the defect.

ACTION by B. J. Best, surviving partner of B. J. & R. E. Best, against the British and American Mortgage Company, heard by Judge *Fred. Moore,* at March (Special) Term, 1900, of GREENE. From a judgment dissolving attachment of plaintiff and dismissing the action, the plaintiff appealed.

(352)

Geo. M. Lindsay, for the plaintiff.

L. V. Morrill, and *Battle & Mordecai,* for the defendant.

CLARK, J. On 17 July, 1900, upon affidavit and undertaking of plaintiff, the Clerk of the Court issued an attachment against the property of the defendant, which was a nonresident of the State, and on the same day ordered that the summons and notice of attachment be served upon the defendant by publication. The complaint was filed the same day. The summons was published in a newspaper in the county for six weeks prior to August Term, 1900. On 11 August, the warrant of attachment was received by the sheriff, and it was served 13 August, 1900, by attaching $25.00 belonging to the defendant which was in the hands of the garnishee. After August Term, 1900, an alias order of attachment and publication was obtained from the Clerk of the Superior Court, returnable to November Term, 1900.

This was a proceeding begun in July, 1899, but that and everything that was done in it must be disregarded and go for naught, for there was a discontinuance by reason of failure to keep up an unbroken chain by issuing alias summons.

This proceeding must stand as if the first paper was issued 17 July, 1900, and upon the regularity of what was done that day or has been done since. As to that, it seems to us that, without reciting and discussing the numerous cases cited us, the proceedings since 17 July, 1900, as they stood corrected and amended at November Term, 1900, have been substantially in compliance with the statute, and that being so, the common

sense rule, and the one in conformity with The Code system, is stated by FAIRCLOTH, J., in *Grant v. Burgwyn,* 79 N. C., 513, as follows: "Where, in a proceeding by attachment, it appears from the *whole* record that the provisions of the statute have been substantially complied with, the action will not be (353) dismissed nor the attachment dissolved."

The Code, section 276, provides: "The Court and the Judge thereof shall, at every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party."

It can not be complained of that the summons was not issued 17 July, 1900, but only an order for publication of summons was then made. As the affidavit then filed set forth that the defendant was a nonresident, and that fact is not denied, it could have served no purpose to issue a summons merely to be returned with an endorsement of the fact of nonservice by reason of nonresidence of defendant. Besides, that had been done in July, 1899, and though by reason of the failure to keep up the chain of aliases that summons conferred no rights upon the plaintiff, still it was a fact of which the Court had notice. This is not a contest between creditors as to priority of lien against defendant.

Indeed, The Code, section 218, does not require the issuance and return of summons not served, as a basis for publication of summons. It provides merely: "Where the person on whom service of the summons is to be made can not, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the Court," etc., then an order for publication of summons may be made.

The publication of summons begun 17 July, 1900, was defective in not containing notice also of the warrant of attachment, as required by The Code, section 352, but that was cured by the alias order of publication (*Mullen v. Canal Co.,* 112 N. C., 109), which was made in due time and complied with prior to November Term, 1900. *Bank v. Blossom,* 92 N. C., 695; *Penniman v. Daniel,* 90 N. C., 154. At that term, all requirements had been complied with and the cause was regularly in (354) Court. The service of the amended warrant of attachment is sufficient to confer jurisdiction. *Winfree v. Bagley,* 102 N. C., 515; *Cooper v. Security Co.,* 122 N. C., at page 465.

The motion to dissolve the attachment and dismiss the action was made, it is true, at August Term, 1900, and continued without prejudice, but at the hearing, November Term, 1900, the defects complained of had been cured by the alias order

and publication thereunder of summons and affidavit. It was too late then to dissolve the attachment and dismiss the action.

Error.

Cited: S. c., 131 N. C., 70; *McClure v. Fellows, Ib.,* 512; *Grocery Co. v. Bag Co.,* 142 N. C., 180, 1, 2.

BRAGAW v. SUPREME LODGE KNIGHTS AND LADIES OF HONOR.

(Filed 28 May, 1901.)

1. INSURANCE—*Agency—Beneficial Associations—By-Laws.*

   A provision in the by-laws of a beneficial association that one shall become a member of it, subject to the power of the association to change its by-laws, does not authorize the association to change its contract with policyholders at will.

2. INSURANCE—*Financial Secretary—Local Lodge—Supervision—Effect—Agency.*

   The financial secretary of a local lodge of a beneficial association is the agent of the supreme lodge, and his failure to transmit money received for assessments does not forfeit a policy.

ACTION by John G. Bragaw against the Supreme Lodge Knights and Ladies of Honor, heard by Judge *A. L. Coble* and a jury, at February Term, 1901, of BEAUFORT. From a judgment for the plaintiff, the defendant appealed.

(355)

Small & McLean and *S. C. Bragaw,* for the plaintiff.

John L. Bridgers and *Chas. F. Warren,* for the defendant.

CLARK, J. The defendant was duly incorporated in Kentucky in 1878 as *"The Supreme Knights and Ladies of Honor."* It organized a subordinate lodge, Pamlico Lodge, 715, in Washington, N. C., in 1883 and in September of that year issued a policy for $1,000 to Annie C. Bragaw, in which policy her husband, the plaintiff, John C. Bragaw, was the beneficiary. The Relief Fund (or insurance) Department of the organization was a separate and distinct feature from its social and fraternal features. At the date the Bragaw policy was issued, September, 1883, the constitution and by-laws which had been adopted in 1881 were in force. They were amended in several material particulars in 1889, but it is not shown that notice of these amendments was given to the subordinate

lodges, nor to the assured or the beneficiary in this policy. It is not denied that the assured paid all the assessments which were demanded, or of which she had any notice, from the date of her policy or certificate down to the date of her death, and that the same were paid to the financial secretary of the subordinate lodge, who was admittedly the proper and only official to whom these payments could be made. His receipts for payments made by her up to her death in 1895, were in evidence. Notice of death was given as required. The defendant declined to pay the claim upon the ground that the assured had failed to pay assessments 256 and 257, and because the subordinate lodge had been suspended for nonpayment of these two particular assessments. There is no evidence that Annie C. Bragaw in any particular failed to comply with any law, rule or regulation of the order. The defense is that the subordinate lodge did not hold regular meetings, and that the secretary failed to remit collections, and was suspended.

The plaintiff testified that his wife paid all the assessments made on her from the date of the certificate or policy
(356) until her death. That these payments were made to the financial secretary of Pamlico Lodge, No. 715. These payments included the assessments Nos. 256 and 257, but the defendant excepted upon the ground that the true question was whether the assessments had been paid to the Supreme Lodge.

This presents the main point involved in this case, *i. e.*, whether the financial secretary, for the purpose of collecting money upon policies of insurance was the agent of the Supreme Lodge or of the assured, the individual members. There is another feature of this association, social and fraternal. In all matters of that kind, and in matters of purely local nature, the financial secretary, who was chosen by the subordinate lodge, was its agent. But in this matter of insurance there are only two parties to the contract. One is the insurer, the *Supreme Lodge,* which alone is incorporated, which receives the premium and contracts to pay the policy. The other is each individual insurer who pays his premiums to the financial secretary, whom the Supreme Lodge has designated as the proper person to whom to pay the premiums, and whose duty it is to forward the money thus received to the Supreme Lodge. The subordinate lodge cuts no figure in the insurance. It is not incorporated. It has no legal entity. It receives no money for insurance, and contracts to pay no policy. The fact that the Supreme Lodge designates to receive the money when paid by the assured one whom the subordinate lodge has

elected financial secretary, is purely a matter of convenience, but does not affect the legal proposition that such officer is thereby made the agent of the Supreme Lodge for the purpose of notifying the assured (who are called members) of the assessments when made from time to time, collecting the same and forwarding the money to the Supreme Lodge.

In their brief the learned counsel for defendants say, "the subordinate lodge is agent of the Supreme Lodge un- (357) less otherwise contracted; provisions of the by-laws of 1889 make it otherwise." The by-laws in force at the date of policy contained no words making it otherwise. In 1889 the following amendment to the by-laws was adopted: "Sec. 14. In receiving money from members in payment of Relief Fund Assessments, and in all acts performed in complying with the Relief Fund laws of the order, the subordinate lodge and its officers are the agents of the members and not the agents of the Supreme Lodge." It is not shown that the assured had any notice of or assented to this amendment. A provision that one should become a member subject to the power of the corporation to change its by-laws can not be construed into liberty to change at its will the contract of insurance it has made with each insurer. The company and the assured occupy two entirely different relations. In one it is a company and the other party one of its members. In that relation, the by-laws or constitution can be amended at will of the majority, if done in the legal and prescribed mode. The other relation is that of insurer and insured, and this contract relation can not be altered save by the consent of both parties, and the party alleging that the consent was given must show it. *Strauss v. Life Asso.*, 126 N. C., 971; *S. c., ante,* 64.

But passing that by, suppose the company had the power to enact the above by-law without the assent of the assured, it could not have the effect contended for by the plaintiff. The subject has been so recently and thoroughly discussed by the Supreme Court of the United States, and with such a wealth of authority from the Supreme Courts of New York, Pennsylvania, Illinois, Indiana, Iowa, Michigan, Kansas, Wisconsin, Texas and other States, that it is unnecessary to do more than refer to *Knights of Pythias v. Withers,* 177 U. S., 260, filed 9 April, 1900. It is there held in an unanimous (358) opinion of the Court, affirming both the Circuit Court and the Circuit Court of Appeals, 59 U. S. App., 177; 32 C. C. A., 182, with an able and exhaustive discussion of the above authorities by Mr. Justice *Brown,* as follows: "The failure of a secretary of a local subordinate lodge of

the Knights of Pythias to transmit to the general board of control, within the time specified by the general laws of the order, moneys paid to him in due time by a member, will not be ground for forfeiture of the policy of such member, since the secretary's negligence is not chargeable to the member, but is that of an agent of the order, notwithstanding a provision in the general laws of the order to the effect that he is to be regarded as the agent of the member and not of the order, where the general laws also require the member to pay his dues to such secretary only, and provide that he shall transmit at certain specified times all moneys collected by him, and that the local branch, or lodge, shall be responsible to the Supreme Lodge for all such moneys collected by the secretary." This will render futile or irrelevant all the other exceptions taken, for if the secretary of the subordinate lodge is the agent of the Supreme Lodge, as far as the contract of insurance goes (here called the Relief Fund Department), inasmuch as it is not controverted that Mrs. Bragaw paid every assessment to the date of her death to one who in law was the agent of the Supreme Lodge, it becomes immaterial whether the subordinate lodge was suspended or not, and whether notice of suspension was given, for as she was in no default, her contract with the defendant that the latter would pay her beneficiary (the plaintiff) $1,000 at her death can not be forfeited either by the misconduct of the secretary, as agent of the defendant, nor by failure of other members of the lodge (if any) who held like policies to pay their assessments. The suspension of the subordinate lodge could not affect her contract rights. The Supreme Lodge having
(359) sent her notice of the assessments through the secretary, with the unrevoked order to pay him, such payment is binding on the Supreme Lodge.

In the case above cited it is said, "To invest the secretary with the duties of an agent, and to deny his agency, is a mere juggling with words. Defendants can not thus play fast and loose with its own subordinates. Upon its theory the policyholders had absolutely no protection. They were bound to make their monthly payments to the secretary of the section (local lodge), who was bound to remit them to the board of control (Supreme Lodge), but they (the assured) could not compel him to remit, and were thus completely at his mercy. * * * The Reports are by no means barren of cases turning upon the proper construction of this so-called 'agency clause' under which the defendant seeks to shift its responsibility upon the insured for the neglect of the secretary to remit on

the proper day. In some jurisdictions it is held to be practically void and of no effect; in others it is looked upon as a species of wild animal, lying in wait and ready to spring upon the unwary policyholder, and in all it is eyed with suspicion and construed with great strictness. We think it should not be given effect when manifestly contrary to the facts of the case or opposed to the interests of justice. * * * The object of the clause is in most cases to transfer the responsibility for his acts from the party to whom it properly belongs to one who has no knowledge of its existence." As in this case, the Supreme Lodge knew at once whether the secretary remitted for assessments or not, but the assured, who, upon receipt of notices of assessment from the Supreme Lodge, paid them to the secretary as directed, had no means of knowing whether he forwarded the money to the Supreme Lodge or not.

The above decision has more recently been followed, with copious citations, in *Murphy v. Independent Order of Jacob,* 77 Miss., 830, in which it is held, "Under a by- (360) law of a beneficial association declaring that officers of subordinate lodges shall be agents of the body that elects them, and not of the Grand Lodge, the latter can not escape liability on a certificate of membership by reason of the failure of the subordinate lodge to do its duty in paying assessments to the Grand Lodge." Among the precedents cited in both of above cases is *Schunck v. The Gegenseitiger Wittwen und Waisen Fond,* 44 Wis., 375, in which under such a formidable nomenclature is found the following sound reasoning: "The subordinate lodge acts for and represents the defendant in making the contract with the member, unless we adopt as correct the idea that the member, by some one-sided arrangement, makes a contract with himself through his agent." In another case also there cited, *Young v. Grand Council,* 63 Minn., 506, it is said, "The assured did all she could. It can not be that a wilful failure of these officers (of the subordinate lodge) can cause a failure of appellant's rights, she not being in fault." On the same general line is our late decision in *Doggett v. Golden Cross,* 126 N. C., 477, where it is held "Where, according to the constitution and by-laws of the society, notice and proofs of death are to be furnished by officers of the subordinate lodge, of which the deceased was a member, they are the agents for that purpose of the Supreme Commandery, for whose action the beneficiary plaintiffs are not responsible."

"Demand having been made, the certificate shown, death of assured proved, a *prima facie* case was made out for the plain-

tiff." *Doggett v. Golden Cross, supra.* In addition, it has here been shown, without contradiction, that the assured, for twelve years, from the date of her policy in 1883 down to her death in 1895, paid to one who was the agent of the Supreme Lodge, every assessment laid upon her and called for by the defendant, said Supreme Lodge. There is no evidence in rebuttal of these facts. This renders it unnecessary, as (361) already said, to consider in detail the other exceptions, whose decision is either involved in what has been said, or they have been made irrelevant. There were some errors committed in favor of appellant, but these need not be discussed.

Affirmed.

Cited: *Cheek v. Lodge,* 129 N. C., 183; *Johnson v. Reformers,* 135 N. C., 387; *Brenizer v. Royal Arcanum,* 141 N. C., 424; *Brockenbrough v. Ins. Co.,* 145 N. C., 362, 364.

LAMB v. LITTMAN.

(Filed 28 May, 1901.)

1. MASTER AND SERVANT—*Employer and Employee—Overseer—Personal Injuries—Bosses.*

   It is the duty of the master not to employ incompetent overseers.

2. MASTER AND SERVANT—*Employer and Employee—Overseer—Personal Injuries.*

   Where owner of a mill employs an ill-tempered overseer, he will be liable for violent handling of a boy employed under overseer.

ACTION by W. T. Lamb, by his next friend, J. M. Lamb, against I. Littman, heard by Judge *H. R. Bryan* and a jury, at November Term, 1900, of ROWAN. From a judgment for the defendant, the plaintiff appealed.

R. Lee Wright and *B. B. Miller,* for the plaintiff.
Overman & Gregory, for the defendant.

COOK, J. From a careful review of the evidence, we find that it establishes a *prima facie* case, and his Honor (362) erred in sustaining the motion to dismiss, as in case of nonsuit, and in not submitting the issues to the jury. The evidence shows that defendant, in running his mill through

agents, had one general superintendent who hired and discharged hands, and also had spinning room superintendents, bosses or overseers, who controlled and directed the hands in the performance of their work, and also sometimes hired and, in case of disobedience, of which they were the judges, discharged the hands under them. Burrus was a spinning room superintendent or boss or overseer, and was in command of the department in which plaintiff, a ten-year-old boy, was a floor-sweeper. Burrus' reputation was bad among mill men; that is, he was mean to children and his help, and it was generally known—and had been so for years—at Albemarle, Concord, Salisbury, and elsewhere, where he had worked in mills. Notwithstanding this fact, which ought to have been known to defendant, he was employed in this mill and placed in control of others, including this boy of tender years. And herein lies the principle involved in this appeal.

In employing servants, the master is under obligation not to associate incompetent ones with the skilled and competent to their hurt and injury. So much the more, then, is it the duty of the master not to employ unskilled and incompetent bosses or overseers, who are to act in his place and stead over subordinates who are under their care and control and subject to their orders.

It does not appear that Burrus was unskilled, but his incompetency for the supervision of children and other like help is apparent and emphasized by his *bad* character for being *mean* to children and other help. We have no reason for judging that such character was not *actually* known to defendant; it was generally known among mill men, from whom he might have informed himself if he had inquired, and it was his duty to have been reasonably diligent in obtaining the information before entrusting such care and responsibility to him.

In the enlargement of our business and industrial en- (363)
terprises, made necessary by the rules of economy, it is frequently impossible for the master to give a personal supervision and direction to the business. "It is now universally held in American Courts that a master always *may* and sometimes *must* have a servant who acts as his representative or *alter ego* towards other servants, and that for the negligence of such representative, *while acting as such,* the master is responsible to the other servants, precisely as if it were his own." Shear. and Redf. Negligence (5 Ed.), section 226.

While he is responsible to fellow servants for a failure in duty in not using ordinary care in selecting competent servants, he is also under obligation to them to exercise due care

and caution in the selection of his representative or *alter ego,* who orders, commands, and controls those committed to his charge.

In the case now being considered, there is no evidence of the unskillfulness of the boss, Burrus, but the evidence shows that he was unfit and incompetent to perform the duties of supervising children and the help under him by reason of his cruel nature and high temper, demonstrated by his treatment of the plaintiff on the day before as well as on that of the injury, which had become so well known as to establish for him a general reputation extending back for six or more years in the divers mills and towns in which he had worked. It is clear that the master would have been responsible for injuries inflicted upon the servants by him, had he (the master) known of such traits of character; and it is equally as clear that he could have obtained the information had he seen fit to inquire; or, having inquired, knowingly and voluntarily assumed the responsibility in employing him and placing him in that responsible position. It is true that the burden of proof is
(364) upon the plaintiff to show negligence upon the part of the master, but in this case it is done and is not contradicted. Had the master committed the assault, his liability would not be questioned. Then why not be responsible for his representative whom he knew (or ought to have known) to have been of such nature and character that the like result would follow? Under the contractural relations existing between plaintiff and defendant, it was the duty of the plaintiff to render proper service and obey the commands and directions of his superiors in the service. It was likewise the duty of the defendant under these relations to appoint as his representative a fit and competent person—not one of a cruel and mean nature, who would use violent means in urging the performance of duty. We do not wish to be understood as holding that the master is generally an insurer of the good conduct of his representative, or an insurer against his violence resulting from his own malice or ill will, or sudden outburts of temper, although in charge of the master's business; but only when he puts in such representative as is by him known, or ought to have been known, to be violent and mean, and the injury is the natural result of such character. It was the duty of Burrus to keep the servants at work and superintend the same, but it was no part of his employment to inflict corporal punishment in behalf of the master.

In *Daniel v. R. R.,* 117 N. C., 592, in which Wood on Master and Servant, 592, is cited with approval, the master was a

common carrier who had the actual care and custody of plaintiff's intestate, and was an insurer of his safety against its own servants as well as copassengers and intruders. In the case at bar, defendant's relation with plaintiff was in no sense similar. Plaintiff was a servant and performing service, and it was his duty to look out for and protect himself, to obey and conform to the rules and requirements within the scope of his employment—quite different from that of a passenger who was
(365) paying for the protection and service being rendered to him.

Had the plaintiff been injured by dangerous or defective machinery used by the defendant in running his mill, *while in the performance of the work assigned him,* we would consider the contention upon that subject. But it appears that the injury received was caused by the violent handling of plaintiff by defendant's *alter ego* in urging him to the proper performance of his work. The obligation to furnish reasonably secure machinery and appliances is limited to the use of those in its employ, and not to provide against accidents to those who *might,* by violence not anticipated, or negligence, or those uninvited, come in contact with it. The injury inflicted by the shoving of plaintiff by Burrus might have been even more serious, had he fallen upon the floor, by the breaking of a limb, or still more serious by the falling down a stairs, or out of a door, or upon some pointed implement lying in the wayside.

There is error.

Cited: *S. c.,* 132 N. C., 979; *Shaw v. Mfg. Co.,* 146 N. C., 239.

(366)

BANK OF TARBORO v. FIDELITY AND DEPOSIT CO.

(Filed 28 May, 1901.)

1. EVIDENCE—*Fidelity and Guaranty Insurance—Bond—Principal and Surety—Surety Companies.*

   In an action by a bank upon the bond of its cashier, a memorandum of the examination of the cashier before the directors prior to the suit, is competent evidence.

2. PRINCIPAL AND SURETY—*Bond—Surety Company—Fidelity and Guaranty Insurance—Laws* 1899, *Ch.* 30, *Sec.* 5.

   Under Laws 1899, ch. 30, sec. 5, a surety company can be released from its liability on a bond only by getting off the bond.

3. FIDELITY AND GUARANTY INSURANCE—*Bond—Construction—Principal and Surety—Surety Company.*

A surety bond should be construed most strongly against the company and most favorably to its general intent and essential purpose.

4. FIDELITY AND GUARANTY INSURANCE—*Bond—Breach—Notice—Principal and Surety—Cashier.*

Where the plaintiff, in action on a surety bond, within a reasonable time and with due diligence, under the circumstances, gives notice of the default of its cashier, it is a sufficient compliance with the requirement of immediate notice.

5. FIDELITY AND GUARANTY INSURANCE—*Bond—Breach—Notice—Principal and Surety—Cashier.*

Where a surety company on bond of cashier is not notified immediately of default of the cashier, it does not suffer by the delay.

6. FIDELITY AND GUARANTY INSURANCE—*Insurance—Bond—Breach—Principal and Surety—Cashier—Instructions.*

In an action on surety bond, an instruction that the care and supervision required of officers of a bank was such as ordinarily prudent men would give, was correct.

(367) ACTION by the Bank of Tarboro against the Fidelity and Deposit Co. of Maryland, heard by Judge *A. L. Coble* and a jury at Fall Term, 1900, of EDGECOMBE. From a judgment for the plaintiff, the defendant appealed.

H. G. Connor & Son and *M. T. Fountain,* for the plaintiff.

John L. Bridgers, for the defendant.

DOUGLAS, J. This case has been here before, and is reported in 126 N. C., 320. As far as that decision goes, it will be considered as final in the determination of this case.

The following are the issues as submitted and answered:

"1. Did Mehegan, as cashier and while in the performance of the duties of his office, between 15 December, 1895, and 3 September, 1897, fraudulently take from the assets and money of plaintiff bank the sum of $5,000.00, and on 27 May, 1897, for the purpose of concealing his fraudulent conduct, charge said amount to the City National Bank of Norfolk on the books of the plaintiff bank?

"Ans. Yes.

"2. Did the defendant Mehegan, between 15 December, 1896, and 3 September, 1897, as cashier, fraudulently take from the assets of the plaintiff bank a sum of money by means of overdraft on said bank aggregating $1,000.00, and more?

"Ans. Yes.

"3. Did the defendant Mehegan, between 15 December, 1895, and 3 September, 1897, as cashier, fraudulently take from the assets and money of said bank the sum of $9,550.00, or other amount, and by false entries on the books of said bank conceal the same from the plaintiff bank?

"Ans. Yes.

"4. Did the defendant Mehegan, as cashier, between 12 May, 1897, and 6 August, 1897, fraudulently take from the money and assets of said bank the sum of $5,000.00, which he concealed by making false entries in the books of said bank? (368)

"Ans. Yes.

"5. Did the defendant Mehegan, between 15 December, 1895, and 3 September, 1897, as cashier, fraudulently take money and assets of the bank and convert the same to his own use?

"Ans. Yes.

"6. Did the defendant, from September, 1896, to 1 September, 1897, as cashier, fraudulently take from the money and assets of the said bank the sum of $452.21, which he applied to his own use?

"Ans. Yes.

"7. Did the defendant Mehegan, as cashier, on 3 August, 1897, fraudulently issue a cashier's check on the said bank to J. M. Norfleet to the amount of $600.00 for the purpose of paying an individual indebtedness of said Mehegan?

"Ans. Yes.

"8. Did the defendant Mehegan fraudulently discount notes and bills, and pay for the same with money of the bank without the knowledge and assent of the proper committees?

"Ans. Yes.

"9. Did the plaintiff notify the defendant Fidelity and Deposit Company of the alleged default of the said J. G. Mehegan as required by the bond?

"Ans. Yes.

"10. Did the plaintiff, after the execution of the surety contract, increase its capital stock?

"Ans. Yes. (This was answered by the jury, Yes, in April, 1896.)

"11. Were the representations in the certificate for the renewal of the surety bond as to the dealings and accounts of the said Mehegan, cashier, true and correct when they were made? (369)

"Ans. Yes.

"12. Were such representations as to the dealings and ac-

counts of the said Mehegan, cashier, on the said certificate false, to the knowledge of the plaintiff, at the time they were made?

"Ans. Yes.

"13. Did said representations constitute a material inducement of the defendant company to continue said bond from 15 December, 1896, to 15 December, 1897?

"Ans. Yes.

"14. Did the plaintiff cause to be observed due and customary supervision over said Mehegan, cashier, for prevention of default?

"Ans. Yes.

"15. Did the Fidelity and Deposit Company have notice of the increase of the capital stock before the extension of the bond?

"Ans. Yes."

The defendant assigns for error: "1. That the Court erred in admitting the written statement as excepted to. 2. For error in instructing the jury as set out in the charge to the jury. 3. In that the instructions are inconsistent, contradictory and misleading. 4. In the construction of the meaning of the words 'immediately notified.' 5. In instructing the jury that the same supervision and duty required of the officers of the plaintiff bank, over the management of the affairs of the bank, was such care, supervision and duty as the ordinarily prudent business man would give. 6. For refusing to instruct the jury as requested in the several prayers submitted by the defendant."

The first assignment of error can not be sustained. The admitted paper was a memorandum of the examination of the defendant Mehegan before a committee of the Board of Directors of the plaintiff bank, and taken down by the witness Davis, who testified as follows: "Mehegan was present (370) before the committee; he was examined; his examination was put in writing. I read every sentence to Mehegan, as Mr. Fountain propounded the questions; *then I wrote down Mehegan's answer.* I read the questions and answers as they were made, and he said that they were correct. *The entire paper is in my handwriting.* Then read the whole over to Mehegan. He never refused to sign, never was asked to sign it." Under such circumstances, we think the paper was admissible as part of the testimony of Davis, with whose credibility, of course, its own was involved. *Bryan v. Moring,* 94 N. C., 687; *S. v. Pierce,* 91 N. C., 606; *S. v. Jordan,* 110 N. C., 491, 495.

We do not think that either the second or third assignments can be sustained. The Judge's charge extends through 15 pages of printed record, and is full, clear and explicit, and, we think, free from substantial error. Many of the points raised by the defendant come under the principles decided when the case was first before us. We then said (126 N. C., 344): "The object of the contract was to secure the plaintiff against the fraudulent acts of its cashier. The complaint alleges the execution of the bond and its renewal, and sets out their substantial features, the alleged fraudulent acts of the cashier, and notice to the defendant company. These facts being proved would have made out the plaintiff's case. Nothing else appearing, the plaintiff would have been entitled to recover, and if the defendant company relied upon breaches of the contract on the part of the plaintiff to defeat a recovery, it should have specifically pleaded them. The burden of proving them would have rested upon the defendant. To require the plaintiff to set out each and all of the fifty conditions and stipulations in the bond and application, and then prove affirmatively that he had performed each one of them, would practically defeat any recovery, and would amount to a denial of justice."

That this is now the law of this case, and our opinion of its correctness has been confirmed by subsequent investigation and further reflection. The object of an indemni- (371) fying bond is to indemnify; and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose, and becomes worse than useless. It is worthless as an actual security, and misleading as a pretended one.

The defendant lays great stress upon section 5, chapter 300, Laws 1893, which is as follows: "Any company executing such bond, obligation or undertaking may be released from its liability as surety on the same terms as are or may be by law prescribed for the release of individuals upon any such bond, obligation or undertaking." It seems clear to us that the only object of that section was to enable such company to release its liability by *getting off* the bond whenever an individual could do so; but not to remain on the bond and limit its liability by such unreasonable restrictions as would practically amount to a release by tending to defeat a recovery. Moreover, that section says: "On the same terms as are or may be by law prescribed." Where are any such terms prescribed by law as those which appear in the bond before us, and which the defendant is so strenuously endeavoring to bring within the terms of that section? We are sure that act never

intended to authorize trustees, guardians or administrators to give bond with such stipulations, construed as the defendant is now asking us to construe them. The defendant again insists that it should have the same right to limit its liability as is possessed by an individual. That may be; but no member of this Court has ever seen or heard of a bond in such a form being tendered by a private surety. In its very form and essence, the bond before us resembles an insurance contract, and differs materially from the ordinary forms coming down to us by immemorial usage. Therefore, we must place such bonds in the general class of insurance policies, and construe them upon the same general principles; that is, most strongly
(372) against the company, and most favorably to their general intent and essential purpose. *Bank v. Fidelity Co.*, 126 N. C., 320, 325; *Am. Surety Co. v. Panly* (No. 1), 170 U. S., 133. In the latter case, Justice *Harlan,* speaking for a unanimous Court, says on page 144: "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the Court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance. *Bank v. Insurance Co.*, 95 U. S., 673; *Insurance Co. v. Cropper,* 32 Pa. St., 351, 355; *Reynolds v. Insurance Co.,* 47 N. Y., 597, 604; *Insurance Co. v. McConkey,* 127 U. S., 661, 666; *Fowkes v. Asso.,* 3 Best & Smith, 917, 925. As said by Lord St. Leonards, in *Anderson v. Fitzgerald,* 4 H. L. Cases, 484, 507, 'It (a life policy) is, of course, prepared by the company, and if, therefore, there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it.' There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank." To the same effect are *Insurance Co. v. Coos Co.*, 151 U. S., 452; *London Asso. v. Campania de Moagans do Bareiro,*

167 U. S., 149; *Horton v. Insurance Co.*, 122 N. C., 498; (373) *Grabbs v. Insurance Co.*, 125 N. C., 389, 398, and cases therein cited. The same principle of construction has been applied to the contracts of common carriers. *Wood v. R. R.*, 118 N. C., 1056, 1063; *Mitchell v. R. R.*, 124 N. C., 236; *Jeffreys v. R. R.*, 127 N. C., 377; *Hinkle v. R. R.*, 126 N. C., 932.

The defendant has voluntarily become by virtue of the statute what may be called a "common surety," not exactly in the nature of a common carrier like railroad and telegraph companies, but still one of those public agencies to which are given unusual powers and which have assumed the most sacred responsibilities. Permitted by law to act as sole sureties for trustees, guardians, administrators and other fiduciaries, they are held by the policy of the law to the full measure of the responsibility they have voluntarily assumed. They may make such reasonable regulations as are necessary for their own protection or the proper transaction of their business; but such stipulations will be most strongly construed against a forfeiture of the indemnity for which alone the bond is given, and in favor of a fair and equitable construction of the essential purposes of the contract.

The fourth exception is equally untenable. On that point his Honor charged as follows: "If you find from the testimony that the plaintiff bank, in a reasonable time and with due diligence under the circumstances as explained in these instructions, and in view of all the facts in evidence, gave notice of the default of the said Mehegan, you should answer the 9th issue 'Yes.' The plaintiff was not required by the terms of the bond to give notice to defendant company upon suspicion that Mehegan was guilty of fraudulent conduct. The plaintiff was not required to give notice to the defendant company until it had actual knowledge of such facts as would justify the charge of default, and it was entitled to a reasonable time to investigate the condition of said Mehegan's accounts before it was required to give such notice, if such investigation was necessary to ascertain the facts which (374) would justify the charge of fraud."

In this we see no error. The plaintiff was not required to act upon mere suspicion in preferring so grave a charge as fraud or embezzlement. Moreover, reasoning from analogy to the rights of a guarantor, the defendant does not appear to have suffered any material injury from such delay, even if the plaintiff had been responsible for the delay, which the jury found to the contrary. But the defendant contends "that if

the surety is 'immediately notified' of the defalcation, upon its discovery, the surety would have an opportunity to deal with the defaulter, and secure some part, if not all, of its loss; this case proves at once the wisdom and justice of such a provision, for by not notifying the surety 'immediately,' *the plaintiff was enabled to get all the security the defaulting principal, the cashier, could give, and the surety had no opportunity.*" The plaintiff had the right to resort to all the property of the defaulting cashier, whether he gave bond or not; and if the defendant means to contend that by signing the cashier's bond as surety it acquired a right of reimbursement superior to that of the bank, we can only say that it does not so appear to us either from the terms of the bond or the general principles of law.

The fifth assignment of error can not be sustained, as we think the charge of his Honor was correct. In fact no other rule justly capable of practical application suggests itself to us.

The sixth exception is equally untenable. The defendant submitted twelve special instructions, occupying five pages of the printed record. It is useless as well as impracticable to consider each in detail. All we need now say, in addition to what has already been said, is that they were all properly refused, either for intrinsic error or because sufficiently given in his Honor's charge. In the absence of substantial error the judgment of the Court below is

Affirmed.

Cited: *Ins. Co. v. Guaranty Co.*, 130 N. C., 132; *Trust Co. v. Benbow*, 135 N. C., 308; *R. R. v. Casualty Co.*, 145 N. C., 117.

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(375)

FISHER v. GREENSBORO WATER SUPPLY CO.

(Filed 28 May, 1901.)

ACTION—*Judgment—Tort—Negligence—Contract.*

Where an obligation to do a particular act exists and there is a breach of that obligation and a consequent damage, an action on the case, founded on tort, will lie, and a judgment thereon should be so entered.

ACTION by B. J. Fisher against the Greensboro Water Supply Company, heard by Judge *E. W. Timberlake* and a jury,

at January (Special) Term, 1901, of GUILFORD. From a judgment *ex contractu* for the plaintiff, the plaintiff appealed.

A. L. Brooks and *J. N. Staples,* for the plaintiff.
King & Kimball and *Bynum & Bynum,* for the defendant.

COOK, J. There is but one question presented: Was the plaintiff entitled to judgment *ex contractu* or *ex delicto,* which depends solely upon the nature of the action as brought, whether for a breach of contract or for negligent injuries?

The rule is that where the law, from a given statement of facts, raises an obligation to do a particular act, and there is a breach of that obligation and a consequent damage, an action on the case founded on the tort is the proper action. *Bond v. Hilton,* 44 N. C., 410; *Robinson v. Threadwell,* 35 N. C., 41; *Solomon v. Bates,* 118 N. C., 315.

The plaintiff alleges that defendant had obligated itself (among other things) to furnish to the city of Greensboro an ample supply of water and the necessary ma- (376) chinery, engines, appliances, etc., for protection against fire; that he, an inhabitant and taxpayer of said city, owned the Benbow House, a four-story hotel, there situate, which was burned in June, 1899, and "that the defendant company was culpably negligent and wilfully careless of its duty and obligations, both to the city of Greensboro and its inhabitants, under said contract, and by virtue also of the duties, obligations and responsibilities which it assumed when it undertook to supply water to the city of Greensboro and its inhabitants for a stipulated price, which was paid to it by the said city, and derived by said city from taxation on the inhabitants thereof, and particularly on the plaintiff, a property owner, as aforesaid, and a taxpayer in the said city of Greensboro, and by reason of the said wilful, tortious, culpable, reckless and gross negligence of the said defendant company, and by reason of its failure and omission to perform its contractual, as well as its public obligations and duties to the said city of Greensboro and its inhabitants, and especially toward the plaintiff in this action, in that it wholly failed and carelessly and negligently refused to furnish the said hydrants in and about the said hotel as hereinbefore set forth, with a sufficient pressure of water to extinguish the said fire before the same had greatly damaged and effectually destroyed and injured a greater part of the said building, and by reason of such tortious, negligent and careless conduct on the part of the said defendant com-

pany, the plaintiff was damaged in the sum of forty thousand dollars ($40,000.00).

"The plaintiff is advised, and so alleges, that the defendant company negligently failed to perform its obligations to the said city of Greensboro and its inhabitants and taxpayers, and especially toward the plaintiff in this action, by carelessly, wilfully and negligently failing to keep a sufficient
(377) quantity of water in its storage water tank in the said city of Greensboro, necessary for the purpose of extinguishing fire, together with the other uses to which it was applied.

"The plaintiff alleges that the defendant company negligently and carelessly failed to keep its pumping engine ready at all times, and particularly on the day of the fire, above referred to, to supply the needed fire pressure, in that it negligently failed to keep a suitable person at said engine or pumping house or near the same, for the purpose of responding to the demands for water for the extinguishment of fire, and especially did it fail so to do at the time the property of the plaintiff was burned.

"That there were sufficient hydrants in and near said hotel property to amply furnish a sufficient quantity of water to have extinguished the said fire if there had been a sufficient pressure upon the same, whereby the water could have been utilized by the fire department; but by reason of the lack of pressure, the said fire department, as hereinbefore stated, was wholly unable to arrest the flames in their ravages of the buildings and property of the plaintiff, but stood helpless and impotent to extinguish the said fire and save the said property of the plaintiff from the great damage and destruction which thereby ensued.

"That the omissions and failure of the said defendant company to perform its duty and obligations, as hereinbefore set out, and its gross negligence in failing to supply a sufficient water pressure to meet the exigencies and necessities of the occasion, which was its bounden duty to do, both under the contract as hereinbefore stated, as well as the benefits derived and enjoyed by it by the license and privileges granted to it by the said city of Greensboro and its inhabitants, the property of the plaintiff was almost wholly destroyed, greatly to his damage, in the sum of forty thousand dollars ($40,000).

"That it was through no fault of the plaintiff that the
(378) said fire occurred or that the same was not immediately extinguished; but that the negligence and omissions of duty, heretofore complained of on the part of the defend-

ant company, was the proximate cause of the destruction of his property, whereby the defendant company becomes liable therefor.

"Wherefore, the plaintiff demands judgment against the defendant, The Greensboro Water Supply Company, for the sum of forty thousand dollars damages, and the costs of this action, and for such other and further relief as in law or equity he may be entitled."

Which was denied and the following are the issues submitted to the jury and their findings, viz.:

1. At the time of the destruction of the plaintiff's property by fire, had the defendant undertaken to furnish the city of Greensboro a supply of water according to the plans and specifications contained in the agreement and contract, as set out and described in the complaint in the quantity and for the purposes set out? Answer. "Yes."

2. At such time, was said defendant company engaged in an effort to perform the stipulations in said agreement, and in the exercise and enjoyment of the privileges of the same during the year the plaintiff's loss occurred, and was it paid for said year the price stipulated in said agreement for furnishing water? Answer. "Yes."

3. Did the defendant company fail with its contract? Answer. "Yes."

4. Was the plaintiff injured by the negligence of the defendant? Answer. "Yes."

Upon said verdict the plaintiff moved for a judgment "for the tortious injury and damage done him by the negligence of the defendant," which was refused by his Honor, who entered judgment for damage as upon breach of contract, to which plaintiff excepted and appealed.

We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon (379) the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation and a consequential damage to the plaintiff. Although action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action, and the plaintiff *so declared.* He stated the facts out of which the legal obligation arose, fully, and also the obligation itself, and the breach of it and the damage resulting from that breach. 1 Chitty Pleading, 155; 5 Thompson Corporations, sec. 6340. *Coy v. Gas Co.,* 146 Ind., 655, 36 L. R. A., page 535, is to the same effect, and very similar in facts. In that case the defendant had obligated to supply the town of Haughville and

its inhabitants with natural gas. By reason of defendant's negligence and failure to supply the needed gas for fuel during severe winter weather, the plaintiff's child died, on account of which the action was brought. The Court here held that the failure to perform such obligation was in itself a tort and sustained the action.

While common law judgments do not contain any of the precedent facts or proceedings on which they are based and are comprised of those words only which explain the idea with utmost accuracy and brevity, yet, under our system of pleading and practice, courts are required to frame their judgments so as to determine all the rights of the parties, as well equitable as legal. *Hutchinson v. Smith,* 68 N. C., 354. And being a final determination, should contain every element of the action necessary to enable the successful party to obtain the fullness of his recovery.

The defendant in this action is an incorporated company and the plaintiff insists that under section 1255 of The Code, an execution issued upon a judgment founded on an action for tort, has superior advantages, in its enforcement, over
(380) executions issued upon judgments founded upon contracts. As to this, however, we do not express an opinion as that question is not before us.

Let the judgment of the Court below be entered according to this opinion.

Error.

Cited: Jones v. Water Co., 135 N. C., 554.

JAMES v. MARKHAM.

(Filed 30 May, 1901.)

1. JUDGMENT—*Assignment—Judgment Creditors—Insolvents—Junior Creditors.*

   A judgment creditor of an insolvent can not be compelled to assign his judgment to junior creditors who offer to pay the judgment debt.

2. EXECUTION—*Sale—Judgment—Mortgages—Junior Lienors—Senior Lienors—Marshaling Assets—Equity.*

   An execution sale of real property for less than its value should be set aside in equity at the instance of a subsequent mortgagee who had tendered the amount of the judgment.

JAMES *v.* MARKHAM.

ACTION by Mrs. R. V. James, guardian, G. W. Watts, W. H. Rowland and wife, and W. R. Cooper and wife, against F. D. Markham, sheriff, J. S. Carr, First National Bank, and Morehead Banking Company, heard by Judge *W. A. Hoke* and a jury, at October Term, 1900, of DURHAM. From the judgment of the Court, both parties appealed.

Winston & Fuller and *Graham & Graham,* for the plaintiffs.

Manning & Foushee and *Guthrie & Guthrie,* for the defendants.

DEFENDANTS' APPEAL. (381)

FURCHES, C. J. W. H. Rowland and W. R. Cooper were partners engaged in the tobacco business in the town of Durham. They were unsuccessful in their business, became embarrassed, and are now insolvent. As such partners, they became indebted to one W. O. Blacknall, for which they executed their firm note; upon this note Blacknall brought suit in the Superior Court of Durham County, and at March Term, 1897, recovered judgment thereon for about $2,000. This judgment was duly docketed and became a judgment lien on their real estate in said county.

This firm was also indebted to the plaintiff Watts, and on 26 August, 1897, Cooper and wife executed a mortgage to Watts on one-half interest of the Prize house and lot belonging to said firm, for the purpose of securing said debt due Watts. And on the same day the said Cooper and wife executed a mortgage to the plaintiff R. V. James, on a lot or parcel of land of about fifty acres to secure a debt due her by said firm. And on 24 September, 1897, the said W. H. Rowland and wife, and W. R. Cooper and wife executed a deed in trust to E. C. Murray for the purpose of securing various creditors of said firm, on three lots, two in North Durham and one on Main Street, on which W. R. Cooper's brick store house stood. This trust was to secure balance of unpaid taxes, for 1896, to pay the Blacknall judgment, a debt due defendant Carr of $835.50, the Morehead Banking Company, and the excess, if any, to go to the First National Bank, of Durham, N. C.; and that on 30 January, 1899, said Blacknall sold and assigned his said judgment to the defendant Carr, execution having been issued thereon.

The Blacknall judgment antedated both mortgages and (382) the deed of trust to Murray, and therefore the superior or prior lien upon all the property conveyed in said mortgages and deed of trust.

The judgment being under the control of the defendant Carr, he caused all said property to be advertised for sale on 6 March, 1899, and was threatening to sell the two lots so mortgaged to the plaintiffs, Watts and James, under said Blacknall judgment. To this the plaintiffs, Watts and James, objected and offered to pay Carr the Blacknall judgment if he would assign it to them. This he refused to do. They then applied to Judge Moore and obtained a temporary restraining order against said sale, returnable before Judge Bryan. This order being in force on 6 March, the day the sale was advertised to take place, it was postponed until 27 March, on which day Judge Bryan refused to grant an injunction against said sale, vacated the restraining order, and the sale was made of said property so mortgaged to plaintiffs, and the defendant Carr bid off said property at $1,053.25, alleged by plaintiffs to be worth much more than that sum, and has taken a deed therefor from the sheriff. The plaintiffs, Watts and James, were present at said sale, forbade the same, and told the purchaser he would buy a lawsuit.

Upon these facts, briefly stated, the plaintiffs, Watts, James, Cooper and Rowland, have brought this action against F. D. Markham, Sheriff, J. S. Carr, First National Bank of Durham, and the Morehead Banking Company, to have said sale set aside, the deed from the Sheriff to Carr annulled and cancelled, and to have the rights and liens of the parties declared, and the proceeds arising from a sale of said property, to be made under order of Court, applied according to the rights of the parties.

Since this action was commenced, the defendant Carr has commenced actions against E. C. Murray individually, and as trustee, against E. C. Murray and others, and R. V. James, guardian, against Mrs. R. V. James, guardian, against E. C. Murray and E. C. Murray, trustee, W. R. Cooper, W. H. Rowland, Geo. W. Watts, Mrs. R. V. James, guardian, and the Morehead Banking Company, and against W. H. Rowland and others. All of these actions appearing to the Court to involve in some manner the same transaction, were consolidated by the Court—J. S. Carr objecting to said consolidation.

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The Court submitted four issues to the jury. The first was as to whether the execution sale made by the Sheriff was irregular and contrary to the course of the Court; and, upon this issue, the jury were instructed if they believed the evidence to answer "No." The second issue: "Was said execution sale wrongful and contrary to the rights and equities of R. V.

James and Geo. W. Watts, and would the same, if allowed to stand, cause them irreparable damage?" On this issue, the Court instructed the jury that if they believed the evidence to answer "Yes." The other issues were as to the distribution of the fund arising from the sale of said property, and are answered in the judgment of the Court. These statements present the case for discussion.

The plaintiffs, Watts and James, and the defendants, Carr, the First National Bank of Durham, and the Morehead Banking Company, were all creditors of the firm of "Rowland & Cooper." The firm was insolvent, but each creditor had some security for its indebtedness. The Blacknall judgment, owned by defendant Carr, was secured by a statutory lien on all the real estate owned by Rowland & Cooper. This property was, after the docketing of said judgment, conveyed by mortgages or in trust by Rowland & Cooper to secure the plaintiffs, Watts and James, as above set forth, and also to secure the $835.50 debt due defendant Carr, the Blacknall judgment, the First National Bank, and the Morehead Banking Company, as above set forth.

It is conceded that the Blacknall judgment has the priority and must be first paid. And it is admitted that the defendant Carr, being the owner of this judgment, has a general control of its enforcement. But while the sheriff (384) is the officer of the law, he is to a certain extent the agent of the plaintiff in the execution, when he is specially directed to act. And what he does under the special direction of the plaintiff in the execution, and not necessary to be done for the enforcement of his execution and the collection of the debt, if hurtful to others, he is responsible for; and the fact that the Blacknall debt was secured by a judgment lien made no difference; it was the same, in effect, as if it had been secured by a prior mortgage on all the property. Sheldon Subrogation, sec. 77; 14 Am. & Eng. Enc. (1 Ed.), 711; *James v. Hubbard,* 1 Page (Chan.) 234. The plaintiffs, Watts and James, being junior lienors, were interested parties and had the right to have the superior lien (the judgment) so enforced as not to damage them, if this could be done without damage to the superior lienor. And plaintiffs say this could have been done by selling other property upon which they had no lien; and that in order that this might be done they offered to pay the defendant Carr the Blacknall judgment if he would assign it to them. This he was not bound to do. But it goes to show the good faith of the plaintiffs and to establish their equities. Sheldon, *supra,* sec. 12; *Arnold v. Green,* 116 N. Y., 572.

It then appears that the judgment lien, which has been declared by this Court to be in effect a statutory mortgage, is of no greater dignity than if it had been a mortgage of prior date; that the action of the sheriff, in selling the lots mortgaged to plaintiffs, under the advice and direction of defendant Carr, had no greater effect on the rights of the plaintiffs than if it had been made under the powers in a mortgage. And, if such a sale, made under the powers contained in a prior mortgage, would be set aside, the sheriff's sale of 27 March should be set aside. *Welch v. James,* 22 How. Prac., 474.

(385) That case is so much like the one under consideration, we take the liberty of quoting the headnote: "Where an assignee of a judgment, which was a lien upon separate parcels of land belonging to the judgment debtor, one of which parcels was subsequently conveyed to a *bona fide* purchaser, sold the latter premises on his judgment with a full knowledge that his judgment could be collected out of the other unincumbered property of the judgment debtor, and after a tender of the amount of the judgment had been made to him without objection, upon which sale the assignee became the purchaser; held, that the sale be set aside with costs of the motion, and perpetual stay respecting the land in question, until the remedy against the other property had been exhausted." And the Court in discussing the case says: "It is quite evident that both the assignee and the sheriff have been acting throughout with a view of favoring Titleworth at the expense of Dorr and Griswold. They persisted in selling the property in question after all the facts had been brought home to their knowledge, and in the face of Dorr's remonstrance and forbidding the sale, and the assignee even refused to take his money and assign the judgment."

It is true that in this case the other property of Rowland and Cooper was *not* unincumbered, for the plaintiffs, Watts and James, held junior mortgage liens upon it. But so far as the defendant Carr's judgment was concerned, it was unincumbered. And it is also true that Watts and James were not absolute unconditional purchasers; but they were *bona fide* purchasers for valuable consideration. *Potts v. Blackwell,* 56 N. C., 449; *Southerland v. Fremont,* 107 N. C., 565.

Holding as we do, that the sale of these lots, so mortgaged to the plaintiffs, Watts and James, was not necessary to protect the assignee Carr and to secure the payment and satisfaction of his judgment, and that said sale was prejudicial to the rights of the plaintiffs, Watts and James; that said assignee was the purchaser at said sale for much less than its value, and that

no vested rights of third persons have intervened; that (386) it is a proper case for equitable interference and that there was no error in the judgment of the Court below in setting aside said sale and ordering the cancellation of the sheriff's deed," etc.

This being done, the question is presented as to the application of the money arising from the sale of said property. And as it is agreed that there will not be a sufficient amount to pay all the debts named in the assignment to the defendant Murray; and as it seems that by some arrangement the property assigned to him has been sold and the proceeds are now deposited in bank subject to the order of E. C. Murray, trustee, he will proceed to pay the Blacknall judgment now belonging to the defendant Carr, and then the other debts named in said deed of trust in the order therein provided, leaving the plaintiffs, Watts and James, to look to the property mortgaged to them for the payment of their debts. This is made upon the understanding that there is a sufficient amount of property, conveyed in the assignment of 4 September, to pay off all debts, including the Blacknall judgment, having liens prior to 26 August, 1897, this being the date of plaintiff's mortgages. But if this is not so, then the defendant Carr may sell under his judgment the land conveyed to the plaintiffs, if said judgment be not satisfied. 2 Story Eq. Jur., sec. 1233; *Bank v. Creswell,* 100 U. S., 630; *Clowes v. Dickenson,* 5 Johns. Ch., star page 235. The judgment of the Court below is full and explicit in detail, and is

Affirmed.

PLAINTIFFS' APPEAL IN SAME CASE.

FURCHES, C. J. The matters involved in this appeal have been considered and disposed of in the defendants' appeal in the same case.

Affirmed.

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BRYAN v. SOUTHERN RAILWAY CO.

(Filed 30 May, 1901.)

1. NEGLIGENCE—*Master and Servant—Railroads—Personal Injuries —Evidence—Sufficiency.*

   The evidence in this case is not sufficient to be submitted to jury on the question of negligence.

2. NEGLIGENCE—*Master and Servant—Railroads—Personal Injuries —Assumption of Risk.*

   An employee of a railroad injured while loading timber on a car by a piece of timber falling on him, assumed the risk and is not entitled to recover therefor.

CLARK, J., dissenting.

ACTION by W. D. Bryan against the Southern Railway Company, heard by Judge *E. W. Timberlake* and a jury, at March Term, 1901, of CATAWBA. From a judgment for the plaintiff, the defendant appealed.

Self & Whitener, and *T. M. Hufham,* for the plaintiff.
Geo. F. Bason, for the defendant.

FURCHES, C. J. Action for damages. The plaintiff belonged to what he called a floating squad or gang of hands on the defendant's road. It seems that there were five of them belonging to this "gang," and one Whitley is designated by the plaintiff as "boss" of the gang. At the time of the injury complained of, this squad, consisting of said Whitley, the plaintiff and three others, were engaged in loading a car of a construction train with the timbers of an old bridge at Third Creek. Among this timber was an old sill or stringer, eight inches thick, sixteen inches wide and thirty feet long; and in attempting to
(388) put this piece of timber on the car the plaintiff was injured.

The plaintiff's account of the matter (and it is his testimony that is relied on to make out the case) is substantially as follows: That after having loaded other timbers, such as crossties, Whitley told them to put this heavy piece on the car; that they rolled it up the bank near the car and lifted one end on the car; that one of the men (Sigman) put a piece of scantling on the car under the sill and the other end of the scantling on his shoulder, to hold that end of the sill on the car, until the other end could be raised up and put on the car; but by some means, while they were attempting to raise the other end, Sig-

man's scantling slipped, the end of the sill on the car slipped off and fell upon plaintiff and injured him.

It is contended on behalf of plaintiff that Whitley was "boss" of the squad; that he ordered the hands under him to put this sill on the car; that it was too heavy to be handled with the force he had; that he should have known this, and it was negligence in him to order them to put it on the car, for which negligence the defendant company is liable.

The plaintiff also contends that at the time the injury occurred, Whitley was on the car, when he should have been on the ground helping to raise the sill, and in this he was guilty of negligence, for which the defendant company is liable.

It is also contended on the part of the plaintiff that he was unacquainted with such work; relied upon the judgment of Whitley, and for that reason was not guilty of contributory negligence; and that the Court properly instructed the jury that he was not.

In answer, as we think, to some of these positions, we (389) quote from the plaintiff's testimony as follows:

Questions, by plaintiff: "Describe exactly and correctly how it was that this thing happened?" Answer. "In raising the timber, Mr. Sigman, whenever he raised one end, would put the scantling under it for us to raise the other end. The other men lifted this end up, got away from it and fell back. I was the third man from the end. There were two men between me and the end of the timber."

Q. "How did you come to be working for the road?" A. "I hired to Mr. Whitley."

Q. "What position did he hold?" A. "He was boss of the floating gang of the Southern road."

Q. "Who had charge of the force that day?" A. "Mr. Whitley."

On cross-examination: Q. "You started to do it with the crowd you had; you saw the size of it, and you and four other men tried to put that piece of timber on the car?" A. "Yes, sir."

Q. "You thought you could put the timber up?" A. "Yes, sir; I went to work at it because Mr. Whitley told me to."

Q. "Didn't you think you could do it, too; don't put it all on Mr. Whitley because he is not here; didn't you think you could do it?" A. "Yes, sir; I thought we could put it up."

Q. "What has been your means for making your living?" A. "Carpenter work."

Q. "What wages were you able to command before receiving this injury?" A. "$1.75 to $2.25 a day."

Q. "I understand you to say that you got $1.75 to $2.25 a day?" A. "I have got it, but not with that force."

Q. "What were you getting on that force?" A. "One dollar a day."

(390) Defendant is not liable for negligence of Whitley as *alter ego* if he was guilty of negligence, as there is no evidence that he had a right to discharge the plaintiff. *Dobbin v. R. R.*, 81 N. C., 446; *Kirk v. R. R.*, 94 N. C., 625; *Mason v. R. R.*, 111 N. C., 482. If there was negligence in one, it seems to us there was negligence in all the gang and not in the defendant road. There is no evidence going to show but what five men were as many as were needed to do the ordinary work this gang had to do. If this piece of timber was too heavy to be handled by them, there is no evidence that the defendant knew it, or ought to have known it; nor did the defendant know that they would undertake to put it on the car. Besides, it was no piece of machinery, about which the plaintiff was not as good a judge as Whitley, or anyone else in the "gang." The plaintiff admits in his evidence that he *thought they could put it on the car*. And it seems they would have done so but for the fact that Sigman's scantling slipped, and the piece of timber they were trying to load fell.

We see no negligence in the matter, but, from plaintiff's evidence, regard it as one of those unfortunate *accidents* that happen, and will continue to happen, in the performance of any heavy work, and the plaintiff assumed the risk. And we are of the opinion that defendant's motion to dismiss, under the statute, should have been allowed, and there was error in refusing the same.

Error.

DOUGLAS, J., concurring. I concur in the opinion of the Court. Pure accidents can not be eliminated by law. All that the law has done is to say that the employer shall exercise reasonable care to prevent accidents, and the courts can hold him responsible only when he fails to exercise such care. The employer is not responsible for an accident simply because it happens, but only when he has contributed to it by some act or omission of duty. I see no evidence tending to prove that the force of hands called the "floating squad" was not sufficient for the ordinary work that it was expected to do. To (391) my mind, it makes no difference whether Whitley was a vice-principal or not, as I can not say that he was directly responsible for the accident. Four men were told to load a piece of timber which they thought they could lift, and

which it seems, they did lift, but in some way let slip back. This was the sole cause of the injury. If the beam had been thrown back by some movement of the train over which these four men had no control, the case would have been essentially different; but no other act of negligence, if there was any negligence at all, seems to have intervened between the lifting of the beam from the ground and the occurrence of the injury. The plaintiff was a carpenter, and must have known something by experience of the weight of timber and of his capacity to handle it. It is true he expressed some doubt, but this doubt was not sufficient to deter him from attempting it or to cause any earnest protest on his part.

In the entire transaction I see only one of those unfortunate accidents, which, however much we may deplore, we are unable to remedy.

CLARK, J., dissenting. The defendant, at the close of the plaintiff's evidence asked that he be nonsuited, and excepted to its refusal. The Judge thought there was sufficient evidence to submit the issue to the jury, and the jury thought the evidence justified a verdict, which they rendered for the plaintiff. For the purpose of the motion, the evidence must be taken as true and in the most favorable light for the plaintiff. *Brinkley v. R. R.*, 126 N. C., 91; *Powell v. R. R.*, 125 N. C., 370.

The plaintiff was hired by one Whitley on a force called the "floating gang" on defendant's road, over which he was "boss." He was the superior of plaintiff, whose orders plaintiff was bound to obey.

At the time of the injury, the plaintiff and four others were engaged under Whitley's control and supervision in loading timber on a gondola car at Third Creek. After (392) loading some lighter material, such as crossties and the like, Whitley ordered them to move and place on the car a piece of heavy timber eight inches thick, sixteen inches wide and thirty feet long. The plaintiff had not been accustomed to handle such timber. He says he doubted if the force at hand could put it on the car, but supposed that device or management would be used, or that more men would be called in. In fact, Whitley used only four of the five men in the squad, and at a critical moment, when extra force should have been used, the fifth man does not seem to have been called to aid, though he was on the car, and Whitley himself rendered no help. The timber was rolled up to the car. When one end of the timber had been placed on the car, one man with his handspike was left to hold it, and as the other end was moved round and being

lifted up, by its great weight it became uncontrollable, slipped down, and falling upon plaintiff, injured him in the manner complained of.

The defendant was bound to furnish a sufficient force to load the timber on the car, a duty which it failed to perform. Whitley, seeing that the timber was so heavy that it had to be rolled up to the car, if not negligent, would either have gotten more hands or at least should have called in the fifth hand, and have aided himself. But instead of that, he took the chances (or rather let plaintiff and three others take it), and gave orders to lift the timber. He ordered them into danger, but did not share it himself. He attempted to use four men, when himself and another were present and might have prevented the accident. The plaintiff testified that it occurred because the timber was too large for the four men to control it. Whitley does not contradict this, and no other witness. This was gross negligence. The plaintiff says he was not used to handling such timber, but thought it was so large that other help would (393) be given or advantage used. He was justified in so thinking, as Whitley and the other hand were there, and could have been used directly or for the "advantage" which the plaintiff thought might lay in the power of Whitley to apply more mechanical device. It was "an accident" of course, as injuries from negligence always are, because it was unintentional; but it was an accident which, according to above evidence, would not have happened if Whitley, who, by defendant's orders, was in charge of the gang, had used the six men he had, instead of putting only four on the work.

Under the Fellow Servant Act (1897, Private Laws, Ch. 58), if the plaintiff was injured by the negligence of Whitley, though he were merely a fellow servant, the plaintiff could recover. It is immaterial, therefore, on the issue as to defendant's negligence, whether Whitley had the power to discharge the plaintiff or not.

There is not the scintilla of any evidence shown or claimed as to contributory negligence by plaintiff, unless it be that he did not rely on his own judgment as to the timber instead of obeying the orders of Whitley, under whose orders the defendant placed him to work. If that was not contributory negligence, there was nothing to justify the submission of that issue to the jury, and there was no prejudice in refusing to submit it. It is only in that aspect that it is material that Whitley was the vice-principal, giving orders for and in behalf of the company. His having the further power to discharge could only have been material to determine whether he was a fellow

servant or not, prior to the Fellow Servant Act. It is immaterial here. The plaintiff testified that five men rolled the log to the car; that he and three others tried to put the log up; that the fifth man was somewhere on the car, but it does not appear where, and Whitley did not help. Then he says if Sigman had "held on to his scantling and had a man or so, we could have gotten it up." This, two men being (394) present and idle, was evidence of negligence (though Whitley was no more than a fellow servant) sufficient to go to the jury, and as above shown there was no evidence of contributory negligence.

In *Hinshaw v. R. R.*, 118 N. C., 1047, the plaintiff recovered for damages sustained in obeying instructions of a conductor because he was there to give instructions, though he had no power over Hinshaw. Here, the plaintiff was injured by obeying instructions of his "boss," who was there for that purpose, and it is equally immaterial whether the "boss" could discharge him or not. It was not contributory negligence to obey such instructions.

The order was not plainly dangerous to the plaintiff, and if he had not obeyed it, he would doubtless have lost his job. He was justified in trusting to the judgment and care of defendant's agent that he would not be subjected to unnecessary risk, and that he was so subjected the jury find was due to that agent's negligence. A hand, under such circumstances, when danger is not patent, is not called upon to dispute the orders of his superior and be put in the attitude either of assuming all responsibility for injury or losing his means of livelihood. The duty of care is upon the employer, who should have prudent and well-informed supervisors of their work, and if, in a case of this kind, the accident is caused by the carelessness or ignorance of the agent, who orders four men to lift a stick of timber and put it on a car, which rolls back and upon them because (as plaintiff testified) four men were insufficient to do the work, the fault is the miscalculation of the defendant's agent, and not in the miscalculation of the employee, who is not to be held to be wiser, at his peril, than the employer's agent and therefore guilty of the injury, because he did not at once throw up his employment.

Those who are in receipt of independent incomes are not always advertent to the compelling power of that necessity which makes other men work from sun to sun for (395) a bare pittance. Often, such men have wives and little ones dependent upon them. For a laborer to throw up employment, because in his estimate a stick of timber is too heavy for

four men, when the "boss" thinks it is not, would not only subject him to the probability of immediate lack of food and shelter, but if such a critical characteristic became known, it might render it difficult for him to get other similar employment. A laborer can not always afford such independence, even if he should possess the capacity to judge of the method of doing the work better than the employer's agent. He is not to be put to such election—certainly not, unless the danger was more palpable and certain than in this case. Even Shylock had the justice to observe (when it touched himself), "You do take my life, when you do take the means by which I do live." A day laborer can not afford to give up his work upon which he subsists, because he fears, or by calculation might know, that a too heavy burden is assigned to the squad in which he is working. The care of calculation is upon the employer, and the responsibility for the miscalculation and injury lies there.

There was no error in not submitting the second issue as to contributory negligence. If the response to the first issue had been that the defendant was not negligent, the case would have ended; and, upon the circumstances in this case, the contributory negligence of the plaintiff, if any, was necessarily considered in the inquiry whether the defendant was negligent. The sole inquiry was whether the proximate cause was the negligence of defendant or not. *Short v. Gill,* 126 N. C., 807. Besides, if there had been a second issue, the Court would have had to tell the jury there was no contributory negligence shown. *Haltom v. R. R.,* 127 N. C., 255.

Cited: Horton v. R. R., 145 N. C., 137; *Lassiter v. R. R.,* 150 N. C., 486.

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(396)

STRAIN v. FITZGERALD.

(Filed 30 May, 1901.)

DEEDS—*Seal—Presumptions—Evidence—Competency—Sheriff's Deeds —Tax Titles.*

Where a sheriff's deed has been lost and the copy on the registration books is offered in evidence but has no seal thereto, the law will not presume from the words "Given under my hand and seal," that the original bore a seal.

CLARK and MONTGOMERY, J.J., dissenting.

STRAIN *v.* FITZGERALD.

ACTION by William Strain, Annie Latta, Anderson Crutchfield, John Crutchfield, Marion Crutchfield (by John Crutchfield, next friend), Wayland Terry, Josie Terry, Julia Terry, Octavia Terry, Thomas Terry and Charles Terry (by Ransom Terry, their next friend), Pinckney Atwater and Lizzie Atwater, Jessie Bradshaw (by James Bradshaw, next friend) against R. B. Fitzgerald and S. A. W. Fitzgerald, heard by Judge *W. B. Council* and a jury, at January Term, 1901, of DURHAM. From a judgment for the plaintiffs, the defendants appealed.

Manning & Foushee, and *Graham & Graham,* for the plaintiffs.

Winston & Fuller, for the defendants.

FURCHES, C. J. This is an action of ejectment. The plaintiffs and defendants claim title under the same common source —the plaintiffs as devisees and the defendants under a sheriff's sale for taxes. It is admitted that the plaintiffs are the owners and entitled to recover, unless the defendants have acquired the title of the testator under whom plaintiffs claim, by reason of said sheriff's sale.

On the trial the defendants offered in evidence the (397) registration books of Durham County, which contained the form of a deed, signed by the sheriff, but without a seal. This evidence was objected to by the plaintiffs, excluded by the Court and the defendants excepted; and this is the point presented by the appeal.

The defendants allege as a reason for offering this copy or registry, that they had lost the original.

This is exactly the case of *Patterson v. Galliher,* 122 N. C., 511, except in that case the original was offered, and not a copy, or the registration books. The case would be settled by that case but for the fact that it is not the original deed that is offered. This fact, the defendants say, distinguishes this case from *Patterson v. Galliher,* and enables them to hold the land. The defendants contend that where the original is lost, and the copy on the registration books states that it was made "under the hand and seal" of the sheriff, it will be presumed that the original had a seal. And for this contention the defendants cite and rely on *Heath v. Cotton Mills,* 115 N. C., 202. But upon examination of that case it will be found that the original deed was offered in evidence on the trial, and it had a seal; and the only question presented by the appeal in that case was whether the seal being omitted on the registration books, the

registration was sufficient to give notice of the mortgage, and the Court held that it was. And whether that decision was right or not (and we do not say but what it was), we do not think it sustains the contention of the defendants in this case.

The defendants also cite and reply on *Quinnerly v. Quinnerly,* 114 N. C., 145. But the question presented in that case is as to whether the certificate of probate was sufficient to authorize the registration. Nothing was left out by the register in that case, and the question was as to its sufficiency to authorize the registration. So it does not seem to us that that case sustains the defendants' contention of presumption.

The defendants also cite *Aycock v. R. R.,* 89 N. C., 321, as authority for their contention. That was a case in
(398) which a copy of a grant from the State was offered in evidence, and it did not appear that the Great Seal of the State had been put on the registration books; nor was there any such scroll as indicated that it was on the grant. This grant was allowed in evidence. But its admission was put on special grounds and on special legislation, as the case will show. And the Court, while it apparently sustains the Court below upon the special grounds mentioned, states that it was immaterial whether it was admitted or not, as the case depended upon the question of possession. So it would hardly seem that that case was authority to sustain the contention of the defendants.

A deed is an instrument of *writing signed, sealed and delivered.* 2 Blk. Com., star page 395. The *seal* is what distinguishes it from a parol or simple contract. Land can only be conveyed by *deed,* that is, an instrument of writing signed, sealed and delivered. A paper, in form a deed, is *not a deed* without a *seal.* And to presume a *seal* is to presume the very matter at issue. There can be no presumption of a fact, unless other *facts* are proved or admitted, that form what is called in law a *chain,* that necessarily leads the mind from the *facts* proved or admitted to the *fact* to be proved—"a chain" of facts. One fact, if proved, does not form a "chain" of facts. In this case there is but one fact, as we understand it, that the defendants rely on to prove a seal that is to prove a deed, and that is, that the paper on the registration books says, "Given under my hand and seal." But for this, they would have nothing. And when it is considered that the paper they offer is in the exact words of the form prescribed by the Legislature for sheriff's deeds in sales for taxes, which has no seal, this one fact loses any force it might be supposed to have. The error was originally committed by the Legislature and then by the sheriff, in following the form prescribed by the Legislature. But

defendants want the Court to presume that the sheriff (399) of Durham County knew more than the Legislature. This, we think, may be called a *violent* presumption, in the sense that it violates the rule of presumptions and of common sense.

To adopt the reasoning of the defendants would lead us into the adoption of a logic that can not be sustained—that the inferior is greater than the superior, that a part is greater than the whole. We have said in *Patterson v. Galliher,* that the original is not good. Shall we say now that a copy is? We can not do so.

It is said for the defendants that the fact that defendants are purchasers at a tax sale makes no difference; they must stand before the court as all other persons do. This is true, so far as they are concerned, and they must have the same legal justice measured out to them that anyone else would have under the same or similar circumstances. But we do not admit that they stand before this Court in the same way that others might stand, in asking the Court to presume a seal. And we do not say the Court would be justifiable in doing so in any case. But it seems to us that this case might be distinguished from some other cases that might be presented, where it did not appear, as it does here, that the paper was drawn by a form that was defective, in the exact particular that this "deed" is fatally defective.

We find no error, and the judgment is

Affirmed.

CLARK, J., dissenting. The defendant asked the Court to charge: "The only apparent defect in the defendants' deed is the apparent lack of a seal to the deed dated 13 December, 1895, as registered in Book 15, page 197, and as the said record discloses that the attestation clause recites the presence of a seal, the jury will infer and presume a seal because of such recital, in the absence of the original deed." (400)

The exception for refusal so to charge should be sustained. It was in evidence that the original deed was lost and after due diligence could not be found. The attestation clause, as it appears upon the register's books recites:

"Witness my hand and seal. This 13 May, 1895."

"F. D. MARKHAM,
"Sheriff."

The legal presumption from this recital is, in the absence of production of the deed, that there was a scroll after the signa-

ture, as therein recited. *Aycock v. R. R.,* 89 N. C., 323; *Heath v. Cotton Mills,* 115 N. C., at page 208. It might affect the security of many titles if, notwithstanding such recital in the record of a deed upon the registration book, the omission of the register or of his clerks to make on the record the flourish of a pen, called in our State by courtesy a seal, should render invalid the registration. If, in fact, the instrument has neither a seal nor a scroll or pen flourish in lieu thereof after the signature of the grantor, it is invalid. But when there is a seal the grantee is not required to supervise the registration to see that the scroll, or something similar to it, is entered on the registration of the deed. The recital recorded, "Witness my hand and seal," is notice, and presumptive evidence, that there was a seal of some kind on the original. It need not and may not have been a scroll at all. It may in fact have been a seal attached by a ribbon or thread which could not have been copied. This is not probable, because with us a scroll is allowed by courtesy, and in ordinary usage in lieu of a seal, but this shows that the making of a scroll (which, if in the original deed is itself a mere make-believe and substitute for a seal) in registration of a deed, is not an indispensable matter, but
(401) the statement made in use of words "Witness my hand and seal" raises a presumption that there was a seal.

In *Aycock v. R. R., supra,* it is held that a copy of a grant from the register's office, containing therein the recital that it was issued under the Great Seal of the State, is admissible in evidence, though the registry does not show the impress of the seal or scroll to indicate it. The Court says: "As the purpose of requiring registration is to give notice of the terms of the deed, and this is fully accomplished in the registry, we can see no reason why some scroll or attempted imitation of the form of the seal should be required in addition to the words spoken in the grant." These words are quoted in *Heath v. Cotton Mills, supra,* with approval, where the Court further says: "Very respectable authorities which accord with our conception of the true principle, sustain the position that if the attestation clause recites that the deed was signed and sealed, it will be presumed that the original deed was sealed"—citing an extract from *Beardsley v. Day,* 52 Minn., 451, which itself cites many authorities to that effect, and 1 Jones on Mortgages, 403. Another case exactly in point with the present is *Dolan v. Trelevan,* 31 Wis., 147.

This case differs from *Patterson v. Galliher,* 122 N. C., 511, in that there the original deed was produced in evidence, and on inspection it rebutted the presumption of a seal raised by

the recital recorded in the registration. Here, the loss of the original was in evidence, and the Court excluded oral evidence offered to show, as was averred in the answer, that there was a scroll or seal to the original deed.

This is a tax deed, but the same principle applies to the registration of any other deed. This deed was made under the law then in force, 1893, ch. 297, sec. 65, which prescribes the form of deed, containing this conclusion: "Witness my hand and seal. ....., sheriff," without containing any word "seal," or any scroll. In *Patterson v. Galliher, supra,* it was held that this prescribed attestation fully indicated that there should be a seal or scroll, and in its absence (402) the instrument was invalid. By parity of reasoning, the appearance of the same recital in the registration of a deed indicates that there was a seal, unless the contrary is shown.

Error.

MONTGOMERY, J. I concur in the dissenting opinion.

Cited: *S. c.,* 130 N. C., 600; *Fisher v. Owens,* 132 N. C., 688.

GATTIS v. KILGO.

(Filed 30 May, 1901.)

1. LIBEL AND SLANDER—*Privileged Communications—Questions for Court.*

   Whether a speech by the president of a college, made during an investigation of charges against him, is a privileged communication, is a question of law.

2. LIBEL AND SLANDER—*Malice—Privileged Communications.*

   That one who publishes a privileged communication is indifferent to the consequences, does not show malice.

3. LIBEL AND SLANDER—*Qualified Privilege.*

   This case was properly tried as one of qualified privilege.

4. LIBEL AND SLANDER—*Malice—Qualified Privilege—Instructions —Privileged Communications.*

   The instruction in this case was correct as to malice in communications qualifiedly privileged.

5. LIBEL AND SLANDER—*Privileged Communications—Malice—Burden of Proof.*

   Where a qualifiedly privileged publication is admitted by defendant, the burden of proof is on the plaintiff to show malice in the publication.

6. LIBEL AND SLANDER—*Malice.*

It is not necessary that malice of defendant should be against the plaintiff personally, but malice will be inferred if the publication is not made in good faith.

7. LIBEL AND SLANDER—*Privileged Communications.*

Where charges are brought against a college president his defense of himself before the college trustees is a privileged communication.

8. LIBEL AND SLANDER—*Privileged Communications—Questions for Court.*

The facts being uncontroverted, it is a question for the Court whether a publication is privileged.

9. LIBEL AND SLANDER—*Privileged Communications—Questions for Court.*

Where a publication is privileged, or conditionally privileged, whether there is intrinsic or extrinsic evidence of malice, is a question of law for the Court.

10. LIBEL AND SLANDER—*Malice—Privileged Communications—Evidence.*

The alleged libelous statements herein set forth do not bear such clear evidence of malice on their face as to entitle them to be considered by the jury as evidence of malice.

11. LIBEL AND SLANDER—*Pleading—Complaint—Answer.*

The failure of defendant to deny the allegations of complaint of good character of plaintiff and his innocence of charges made does not amount to an admission that the publication complained of was false.

12. EVIDENCE—*Libel and Slander—Allegations—Surplusage.*

Allegations in complaint of good character and innocence of plaintiff are superfluous, and though not denied by the defendant, are incompetent as evidence.

13. DAMAGES—*Libel and Slander—Evidence.*

Before damages can be recovered by one by reason of words spoken or published of him in his profession or office, he must have been actually engaged in the work of his profession at the time the words were written or spoken.

(404) ACTION by T. J. Gattis against J. C. Kilgo, B. N. Duke and W. R. Odell, heard by Judge *W. A. Hoke* and a jury, at November Term, 1900, of GRANVILLE. From a judgment for the plaintiff, the defendants appealed.

Boone, Bryant & Biggs, Guthrie & Guthrie, Hicks & Minor, A. W. Graham and *S. M. Gattis,* for the plaintiff.

Winston & Fuller, Royster & Hobgood and *T. T. Hicks,* for the defendants.

MONTGOMERY, J. The publication of the pamphlet that contained the speech of the defendant Kilgo, which published speech is the foundation of the plaintiff's cause of action, was the result of an investigation held by the Board of Trustees of Trinity College, of which body the defendants Duke and Odell were members, of certain charges of incompetency and moral unfitness against the president of the college, the defendant Kilgo. There was also included in these charges a statement to the effect that the spirit of commercialism in its lowest and most dangerous form was being introduced into the student life, notwithstanding the claim of the school for patronage that the foundation and development of Christian character was one of its chief aims. The charges were made by one of the most distinguished and influential citizens of the State, accomplished in nearly every department of learning, and himself one of the Board of Trustees of the institution; and they were published far and wide, originally in a newspaper printed in Raleigh, and probably read by more people than any other paper circulated in the State. Investigation of the charge was a right of the defendant Kilgo, as they affected his personal and professional character; it was a matter of necessity so far as the future of the college was concerned. Without an investigation and a refutation of the charges, or the prompt removal of the president and the sinister influences which were alleged to be at work in the college, if the charges should be found true, the institution would necessarily suffer in its reputation with a (405) consequent decrease in its patronage.

Whether or not the speech of the defendant Kilgo, published by the defendants in pamphlet form and embodied with the whole of the proceedings in the matter of the investigation, was a privileged communication, was a question of law, there having been no dispute or uncertainty as to the circumstances attending the publication, and his Honor properly tried the case as one of qualified privilege. The college was in one sense a public institution. Its patronage was from several States, especially from North and South Carolina, and the investigation was therefore one of general public concern. Folkard's Starkie Slander and Libel, 223.

In vindication of the personal character of the defendant Kilgo, he had the right to publish a fair and honest account of the acts done in the course of the investigation, provided the publication was free from malice, and on this point his Honor, in response to a special prayer of the defendant's counsel in the following words: "That if the jury believed from the evidence that the defendant Kilgo had been subject to criticism

and adverse comments and attacks in the press (from another than the plaintiff), and he *bona fide* believed that the publication of the proceedings before the board of trustees was necessary in defense of his character and standing, and he published the speech as part of the proceedings in order that the whole investigation might be laid before the public that it might judge of the truth of the charges against him, then the jury should answer the third issue (as to malice), 'No,' as to said Kilgo," instructed the jury, after reading the prayer to them: "A man first assailed in public prints has a right to defend himself, and if facts stated in prayer are true and pub-
(406) lication was made by defendant Kilgo in good faith and solely for reasons given, there would be no malice as to him, and jury should by their verdict excuse defendant Kilgo on third issue." The defendants excepted to the word "solely."

We are sure that they got all that they were entitled to on that point of the case. The defendants Duke and Odell, as trustees of the college, were entrusted with the duty to have the charges inquired into by the board of trustees—the proper tribunal for that purpose—and they had the right to publish the proceedings for the purpose of giving to the public and to the patrons of the college all the information concerning the whole matter, which the investigation brought out, provided the publication should be made without malice; and his Honor therefore properly instructed the jury, "if, however, the defendants published in good faith for the reasons claimed by them, actuated solely by a desire to protect the college and give its patrons correct and full information of the entire proceedings, in such case there would be no malice and the jury should answer the third issue 'No,' and this, though the charges contained therein may have been both false and defamatory." And he said further, "if these defamatory statements were false and defendants published with a design and intent to injure the plaintiff, or because they were mad at him for testifying against the president of the college, if that was the motive, or one of the motives that induced the publication, it would be malicious, and you will answer the issue 'Yes.'"

And his Honor correctly instructed the jury that the publication being admitted and being a qualifiedly privileged one, it was incumbent on the plaintiff to prove by the greater weight of evidence, not only that the publication was false, but that it was also malicious. In his charge on the question of
(407) malice, his Honor was also correct in stating in substance that although the malice, which is a necessary ingredient in the constitution of a libel where the publication is

privileged, is actual or express malice—that which is popularly called malice—and not malice in law, yet that it was not necessary that the ill-will or malice of the defendant should have been against the plaintiff personally, and that if the publication was not in good faith for the reason claimed, but from a wrongful, indirect and ulterior motive and was false, the same would be malicious. The request, therefore, of the defendants' counsel to the Court for instruction that malice in fact means personal ill-will and a desire to injure the plaintiff was properly refused. *Ramsey v. Cheek,* 109 N. C., 270; Odgers Libel and Slander, 266, 267.

Our consideration of this case has been so far confined to a discussion of the most important principles of law involved in the question of malice, prefaced with a general but sufficiently explanatory statement of the nature of the action, both for the reasons that what we may have to say in the further consideration of the appeal may be more clearly understood, and that our own views on those principles of law may be known to those interested in the future of the case; for there are, in our opinion, errors, certainly in two important instructions given by his Honor to the jury at the request of the plaintiff, and further error in the admission of testimony offered by the plaintiff, and for which a new trial must be ordered.

The case was hotly contested in the trial below, continuing for several days, and his Honor, who presided with his usual painstaking and ability, was compelled to rule instantly upon many of the most difficult questions of law and perplexing rules of evidence, notice of all of which can not be reasonably expected of this Court.

We will now take up for consideration what we think are errors sufficiently grave to make necessary a new trial of this action.

His Honor, at the plaintiffs' request, instructed the jury: "If you find from the evidence that the defendant Kilgo recklessly used language towards the plaintiff, which (408) was uncalled for and in excess of the occasion, then this fact is evidence of malice, and if the defendants Duke and Odell assisted in publishing the said language, and were indifferent as to its consequences to the plaintiff, then this is evidence of malice against the defendants Duke and Odell." We are of the opinion that the speech of the defendant Kilgo was absolutely privileged. As we have said, the investigation was a duty of the trustees and a right of the defendant Kilgo and the tribunal, the board of trustees of the college was the proper forum for the hearing of the matters embraced in the charges

against the defendant Kilgo as president of the college, and of the other matters included in the charges. We can see no difference, and we believe none can be shown, between the position of the defendant Kilgo on trial before the tribunal of the board of trustees upon charges against his own personal character and against his competency and fitness for the presidency of the college, and what his position would be before a court of justice on trial for an offense against the laws of the land, or in the prosecution or defense of a civil right. In each place, he would have the right to present his case thoroughly, and if in the heat of argument violent or excessive towards his adversary, or to a witness, it would be, nevertheless, absolutely privileged, provided what he said was relevant and pertinent to the issue. It is settled in this State that upon a trial in a court of law a party would have complete immunity under such conditions. In *Shelfer v. Gooding,* 47 N. C., 175, the plaintiff, upon the trial of a slave of the defendant before two justices of the peace upon a charge of destroying the plaintiff's property, was examined as a witness. The defendant, after having been asked by the justice of the peace if he wished to be heard for his slave, addressed himself to the justices, saying:
(409) "I wish you gentlemen to understand that what Amos Shelfer, the plaintiff, has sworn, is a tissue of falsehood and a damned lie from beginning to end." In an action of slander brought by plaintiff against defendant for the use of the words, this Court (Judge BATTLE delivering the opinion), said: "After the plaintiff in this suit was sworn as a witness, it was undoubtedly competent for the defendant to insist before the magistrates in defense of his slave that what the plaintiff had sworn to was false; and we see no difference whether that was insisted on in an elaborate argument or in the short allegation which he thought proper to employ. What he said was certainly pertinent and material to the cause. The question then is, can an action of slander be maintained against him for the words which he uttered, considered either as counsel or party? We think that, upon principle, it ought not to be, and that the weight of authority is decidedly in favor of such principle." And in the same case, the Court, after discussing the questions at length and analyzing numerous decided cases, said: "We think that we have shown by abundant authority that a counsel, or party, is entirely protected against an action for slander for whatever he may choose to say relevant and pertinent to the matter before the Court, and that no inquiry into his motives will be permitted."

In *Nissen v. Cramer,* 104 N. C., 574, the Court cited with

approval the last-mentioned case, and said: "It was conceded on the argument, and at all events it is settled law, that one who appears in person in his own behalf, or on behalf of another, or counsel representing a party on the trial of an action may say in the progress of the trial anything in reference to the character or conduct of the opposing party, or witnesses, that is relevant and pertinent to the question or issue before the Court or jury, without incurring any liability whatever in an action of slander predicated upon the language used. The occasion gives ample protection if the utterances are (410) not irrelevant."

It may be said that the defendant Kilgo, in his own defense, not only confined himself to that which was pertinent and relevant, but kept himself within the bounds of fair inferences from the testimony adduced on the investigation—that of Mr. Gattis himself and Mr. Peacock. The language used by the defendant was strong and caustic, but no one can read the evidence and the speech and fail to come to the conclusion that the speaker felt that he had strong provocation. The spoken words of the defendant Kilgo, then, being entirely privileged, it follows that if there was actual malice in the publication of them by the other defendants, the occasion being a privileged one, as we have said, such malice must be shown by other means than by indifference as to its consequences to the plaintiff.

His Honor gave another instruction, at the plaintiff's request, in the following words: "On the question whether there was malice in the publication of the words complained of, you have a right to consider the words of the libel itself and the circumstances attending its publication." If the words of the libel are clearly malicious, that is, if they show clear evidence of actual malice on their face, they may be considered by the jury, as in *Ramsey v. Cheek,* 109 N. C., 270. There, the defendant wrote to the Superintendent of the Census about a public matter, an occasion of qualified privilege, and this Court sustained the ruling of the Court below in having submitted to the jury for their consideration the words of the libel itself, because the words were evidence of malice on their face. There, Cheek wrote of Ramsey "that Ramsey was the leader in defrauding me and Mr. Nichols out of our elections last fall."

Where fraud is charged, the libel itself may be sub- (411) mitted to the jury as evidence of malice. Odgers Libel and Slander, 225. There is no such evidence of malice in the language of the publication in the case before the Court,

and in that view the words of the libel ought not to have been submitted to the jury. The only other grounds upon which the words of the libel could have been considered by the jury was that the published speech was "much too violent for the occasion and circumstances to which it was applied," or "utterly beyond and disproportionate to the facts." In considering that view, a prior question is to be asked and answered, and that is, who is to determine whether the words of the libel are excessive and violent? Is it a question of law for the Court, or is it a question of fact for the jury? The answer is, it is a question for the Court to decide. And it reduces itself to the bare inquiry whether or not there is on the face of the words of the libel any evidence of malice that ought to go to the jury. In Townsend Slander and Libel, sec. 288, may be found these words: "The facts being uncontroverted, the Court is to determine whether or not the publication is absolutely privileged, that of course determines the action. If the Court decides the publication is conditionally privileged, then it is a matter of law for the Court to determine whether there is any intrinsic or extrinsic evidence of malice. If the Court decides this question in the negative, it directs a nonsuit or a verdict for the defendant without reference to the jury." But the prior question is always, Is there any evidence of malice to go to the jury? Odgers Libel and Slander, 279. "When the Judge rules that the occasion was privileged then if at the close of the plaintiff's case, there being no evidence of malice either on the face of the libel itself or extrinsically, it is the duty of the Judge to direct a nonsuit or a verdict for the defendant." Folkard's Starkie Slander and Libel, sec. 674. It may be a matter of difficulty, in some cases, for the Court to determine when the words of a libel should be submitted to the jury as evi-
(412) dence in themselves of malice. In Odgers Libel and Slander, page 280, the test is laid down in these words: "Take the facts as they appeared to the defendant's mind at the time of the publication: are the terms used such as the defendant might have honestly and *bona fide* employed under the circumstances? If so, there being no other evidence of malice, the Judge should stop the case." It is perfectly clear to us that if in all cases of privileged communications, the words of the published matter are to be submitted to the jury for their consideration as evidence of malice, then the privileged occasion would be no protection whatever. A privileged communication and one not privileged would stand on precisely the same footing if the words of the privileged one could be made evidence of malice in all cases. The tendency of the courts is

not to give the language of privileged communications too strict a scrutiny. "To hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications." Odgers Libel and Slander, 281. "But where a defamatory communication is published in self-defense, although there may be some expressions contained in it which go beyond what is necessary for self-defense, still it does not therefore follow that they afford evidence of malice which the plaintiff is entitled to have submitted to a jury. To submit the language of privileged communications to a strict scrutiny and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged communications." Quoted in Folkard's Starkie Libel and Slander, sec. 577, from the judgment delivered in *Laughton v. The Bishop of Sodor and Man,* 9 Mod. P. C. C. (N. S.), 337.

And now to conclude what we have to say on the question whether there was intrinsic malice (malice on the face of the libel), let us take the facts as they appeared in (413) the defendant's mind at the time of the publication: Are the terms such as the defendant might have honestly and *bona fide* employed under the circumstances? The parts of the published speech of the defendant Kilgo, and upon which the cause of action is founded, are these: "If you will take the whole situation and connect it with the testimony of Mr. Gattis, you will likely find the original slanderer." And, as to the testimony of Mr. Gattis, that he would not have testified for a hundred dollars, the defendant Kilgo said, "one hundred dollars is a high price for him, and means that an ordinary man would have given a high price for a like commodity. Behind a pious smile, a religious walk and a solemn twitch of the coat-tail, many men carry a spirit unworthy of them." Another expression was that the plaintiff gossiped too much in South Carolina. And in speaking of Gattis' wit at defendant's expense, the defendant said: "Poor wit over the suffering heart of his brother whom he has lacerated in the dark;" and he further said that the plaintiff's conduct had been vicious, and that "between a man's hiding himself by the highway and making a victim of an innocent traveller, and a man who, in the dark, assassinates character, send me to the woods with a revolver and let me murder any passerby rather than malign my fellowmen." And he further published that at the store of Mr. Gattis "he heard unchristian gossip, until decency demanded

that he keep out of such a crowd." He repeated that the plaintiff was the original gossip and maligner, that he had foully dealt with the defendant, that he talked too much, that the truth had small opportunity in his hands, and asked the board of trustees, "Is he worthy of your credence? Read his testimony and mark his dodging." All of the above language is, as we have said, strong and harsh. But under all the circumstances, was it "utterly beyond and disproportionate to
(414) the facts?" Might the defendant have used the language honestly and *bona fide* under all the conditions and surroundings? We can not tell whether his Honor submitted the words of the publication to the jury because he was of the opinion that it had to be done in all cases of qualified privilege, or whether he thought the language was violent and expressive. If from the latter view, it has to be admitted, as is said in Odgers Libel and Slander, that the "same piece of evidence may make different impressions on different Judges," and we are compelled to differ from his Honor in the premises.

The evidence of the plaintiff himself and that of the witness Peacock before the board of trustees make it clear to our minds that the language of the published speech, though strong and caustic, was, under all the surroundings and circumstances, not so excessive and violent in expression as to become thereby intrinsic evidence of malice. It may have been intemperate and exaggerated, and yet not so violent and excessive as to be itself evidence of malice. It is but just to all parties concerned to recite the whole of the evidence of the plaintiff and that of Mr. Peacock, as we had to set out the parts of the speech of the defendant Kilgo, which the plaintiff complained of. It is proper also to say that, on the investigation before the board of trustees, the defendant introduced depositions of fifteen witnesses, prominent in Church and State, who testified that his general character was of high order, and that in his ecclesiastical ways and life his methods were honorable, and always open and sincere. And the two witnesses from that State whose depositions were offered by the prosecution, while they said that the defendant Kilgo had the reputation of being a manipulator in Church and educational matters, both stated that his moral character was good. One of them said "His moral character is good, but some of the brethren did believe that he
was somewhat of a manipulator, that is, that he was not
(415) mean or low, but that he would use his influence to control things. I don't say that is the opinion of the majority, but it is the opinion of some." And the other one said, "I may have heard that he was a manipulator, but those words

are too strong; he likes to have his way, not that he was a trickster, but that he was a determined man, and liked to manage and have his way. He was not a negative man, but always a positive man, and so far as his character is concerned, if this was an attack on his veracity for manhood, general or moral character, it must not go in this State, for his character is first-class in every sense." Mr. Gattis had a number of most reputable witnesses to prove that his general character was good at the trial below.

MR. GATTIS'S EVIDENCE.

Mr. Gattis: Mr. President, may I be allowed to state my reason for being here now?

Mr. Southgate: I should think it would be in order for the question to be asked you by the prosecutor, however, if the defense has no objection, you may do so.

Mr. Gattis: I would like to make the explanation beforehand. I wish to say that perhaps a month ago I was requested to be here as a witness and declined positively to do so. The matter was pressed upon me. I still declined, and stated that under no circumstances would I testify for either party, unless my Conference and Bishops should require it at my hands. I was informed a day or two ago that if I declined my name would be used here, and friends advised me to be here and hear what would be said. I suppose that is sufficient.

Mr. Oglesby: What is your name?

Mr. Gattis: Thomas Jefferson Gattis.

Mr. O.: Where do you reside?

Mr. G. In the town of Durham. (416)

Mr. O. Did you ever live in South Carolina?

Mr. G. No, sir.

Mr. D. Do you know John C. Kilgo, President of Trinity College?

Mr. G. Yes, sir.

Mr. O. How long have you known him?

Mr. G. I think five years. I am not positive, perhaps a little longer than that. I formed his acquaintance at Asheville, possibly six or seven years ago, in 1891.

Mr. O. Do you know his general reputation in South Carolina?

Mr. G. I think so.

Dr. Kilgo: I wish you would answer that question positively, Mr. Gattis.

Mr. G. Well, I know it.

Mr. O. What is it?

Mr. G. With regard to what, sir?

Mr. O. I want to know his general character.
Mr. G. For what, truth?
Mr. O. For everything?
Mr. G. For some things it is good, for others it is bad.
Mr. O. He has been charged with being a wire puller of the ward type, is that true?
Mr. G. I have never heard that word "ward." Dr. Kilgo does have the reputation in South Carolina of being a wire puller.
Dr. Kilgo: You explained, Mr. Gattis, that you came here under pressure, pressure from what? Who pressed you?
Mr. G. The prosecution.
Dr. K. Mr. Oglesby?
Mr. G. No, sir; Judge Clark.
Dr. K. You state that you were advised that your name would be used; who advised you as to that?
Mr. G. Two or three parties.
(417) Dr. K. Well, I want to know them.
Mr. G. Judge Clark.
Dr. K. Who are the others?
Mr. G. I don't feel that I should give them.
Dr. K. Why, Mr. Gattis?
Mr. G. I don't think it proper or necessary.
Dr. K. Are they members of this board?
Mr. G. No, sir.
Dr. K. Do they live in Durham?
Mr. G. Yes, sir.
Dr. K. Have they anything to do with this court?
Mr. G. I decline to answer, Dr. Kilgo, any further questions in regard to that.
Dr. K. I asked you a simple question, for I wish to know whether outside parties have been working in this matter. This is an important question and I call the attention of the board to the fact that Mr. Gattis will not say whether they have any connection with this court or not. You will decline?
Mr. G. Yes, sir.
Dr. K. You say you never lived in South Carolina?
Mr. G. No, sir.
Dr. K. Have you any business in South Carolina?
Mr. G. I have.
Dr. K. What is it?
Mr. G. I am appointed by the South Carolina Conference as Colporteur. Have been for three years.
Dr. K. Did Dr. Kilgo go with you when you were appointed, and say something good to try to get you appointed?

Mr. G. He went with me before I was appointed.

Dr. K. But did he not try to help the brethren to understand you, and get you appointed to that position?

Mr. G. Dr. Kilgo was my friend, so far as I know. He said some good things for me on the Conference floor.

Dr. K. And you have known him from '91? (418)

Mr. G. Well, sir, I was introduced to him in '91, and have not known him except when he came to North Carolina.

Dr. K. When he came to North Carolina did he try to help you in your work?

Mr. G. I think so for a time.

Dr. K. Did he not tell you of books, and make speeches on the Conference floors for you?

Mr. G. Yes, sir.

Dr. K. Have you not talked a great deal about Dr. Kilgo in the last year or two?

Mr. G. Not when I could well help it.

Dr. K. Did you not say awhile ago that you understood that the Dukes were out with Dr. Kilgo?

Mr. G. I did not.

Dr. K. Did not say you had ever heard it?

Mr. G. Yes, sir, I think I said I heard it.

Dr. K. Did you say anything to Dr. Kilgo about it?

Mr. G. No, sir.

Dr. K. Have you not talked about him otherwise?

Mr. G. I do not remember, sir.

Dr. K. Have you never talked with Judge Clark about him?

Mr. G. I had one conversation with him about several matters, and Dr. Kilgo was mentioned.

Dr. K. Did you not tell Judge Clark about his bad reputation in South Carolina?

Mr. G. I think it very likely that something was said of that kind.

Dr. K. Now, Mr. Gattis, don't you *know* that you told Judge Clark that?

Mr. G. I told him that I had no recollection of a (417) single sentence that I expressed in regard to you.

Dr. K. But did you not tell Judge Clark about his South Carolina reputation being that of a wire pulling politician?

Mr. G. I am not able to answer that question. Whether I did or not, that certainly is his reputation.

Dr. K. I ask you whether you did not tell Judge Clark that?

Mr. G. I decline to answer.

Dr. K. But you say Judge Clark told you you must come here or he would use your name. Why did he tell you that?

Mr. G. I don't know, sir.

Dr. K. You were not coming without his putting that pressure upon you?

Mr. G. No, sir.

Dr. K. Though you had talked to him about Dr. Kilgo?

Mr. G. Yes, sir, I had a conversation with him.

Dr. K. Has not Dr. Kilgo quit going to your store?

Mr. G. I think he has.

Dr. K. Do you know why he quit?

Mr. G. Yes, sir, I think I do.

Dr. K. Have you talked with other people besides Judge Clark?

Mr. G. Yes, sir; you have been a general subject of conversation both in North and South Carolina. I have very frequently avoided conversations about you. You are not quite of so much importance as that I want to talk about you all the time?

Dr. K. Have you not the reputation of talking too much about your brethren?

Mr. G. I don't know, sir.,

Dr. K. Isn't it your habit to talk about your brethren?

Mr. G. I am not here to be questioned about these things; at least to answer them.

Dr. K. Haven't you frequently brought very kind (420) messages to Dr. Kilgo from South Carolina?

Mr. G. Occasionally, yes, sir.

Dr. K. Told him of his friends?

Mr. G. Yes, sir.

Dr. K. Did you ever tell him that was his reputation?

Mr. G. No, sir.

Dr. K. To the Presiding Elder?

Mr. G. No, sir.

Dr. K. To his pastor?

Mr. G. I don't remember.

Dr. K. So you have no recollection now of telling it to anybody but Judge Clark?

Mr. G. I decline to answer.

Dr. K. Do you suppose that Judge Clark would have ever made the statement that you made, unless you had had the conversation with him that you had?

Mr. G. I decline to answer.

Dr. K. Did Judge Clark go to see you the other day?

Mr. G. I decline to answer that.

Dr. K. Why do you decline?

Mr. G. Because I don't think you have any right to ask those questions.

Dr. K. Wasn't your son in Trinity awhile ago?

Mr. G. Yes, sir.

Dr. K. Did the college charge him any tuition?

Mr. G. No, sir.

Judge Clark: How long did you travel in South Carolina as Colporteur?

Mr. G. This is the third year.

Judge Clark: Did your business take you into all parts of the State?

Mr. G. In nearly all of the large towns.

Judge Clark: You know personally nearly all our ministers down there?

Mr. G. Nearly all of them. (421)

Judge Clark: Do you know the leading laymen?

Mr. G. A good many of them.

Judge Clark: I wish to ask Mr. Gattis one question. Do you know the reputation of Mr. T. C. Ligon, of the South Carolina Conference?

Mr. G. Yes, sir.

Judge Clark: Well, what is it?

Mr. G. Very good indeed, so far as I know.

DR. PEACOCK'S EVIDENCE.

Dr. Peacock was placed on the stand.

Dr. Kilgo: What is your name?

Ans. Dred Peacock.

Dr. K. Where do you reside?

Ans. Greensboro, N. C.

Dr. K. What is your occupation?

Ans. President of Greensboro Female College.

Dr. K. Did you ever have any talk with any one about the Laurens Conference of South Carolina, from which Dr. Kilgo was transferred to the North Carolina Conference?

Ans. Yes, sir. I don't remember as to Laurens Conference. I do not know where it was held. I have never been in South Carolina.

Dr. K. Who was that man?

Ans. Mr. T. J. Gattis.

Dr. K. What did he say to you about that?

Ans. I don't know that I could quote his words, but some time in the winter after the South Carolina Conference he and

I were talking; I think I was in his store. He said that he had been to the South Carolina Conference and that it was worth going there to see the reception that was given to you in your old State, and that it amounted to an ovation, and that you would need a pretty steady head if it did not turn you.

He was almost extravagant in his description of the re-
(422) ception given you. It seems to me that he said something about a water service given to you.

Dr. K. Have you ever heard him say anything that would indicate that he had a different opinion since that time?

Ans. Yes, sir.

Dr. K. Can you tell us anything about that?

Ans. Yes, sir. About a year ago we were on a train together and he brought it up himself and knowing his feelings on the matter I have avoided mentioning your name where he was, because we have always been friends and I never like to disagree with a man when I can help it if it will do no good, unless I think I can change him to my side, and as I had no hope of that I avoided your name. But he brought it up himself, and one thing he stated was that it seemed very strange to the people of South Carolina that the people of North Carolina were such fools over Kilgo. They could not understand it. That was the statement, and it impressed me at the time as being a little different from the other one.

But there is another reason why the published speech was not intrinsic evidence of malice. We have seen and have said that the speech itself, when it was delivered and before its publication, was entirely and absolutely privileged. It could not, therefore, have been used as evidence of malice in itself after its publication. It was not only not malicious when spoken, but it was privileged. The defendant's motive could not be inquired into. *Shelfer v. Gooding, supra.* In the method and manner of its publication and distribution and the facts connected therewith, malice in fact might be proved, but not by the communication itself.

The defendants' exceptions to the introduction and admission in evidence of the first and second allegations of the complaint and the defendants' answer, to show their failure to answer the same, we think is well taken. Those allegations concern the

plaintiff's good character and innocence of the charges
(423) imputed to him by the defendant Kilgo. The good character and innocence of the plaintiff were immaterial averments and need not to have been proved. Eaton's Forms, page 154. They may be rejected as surplusage. Folkard's

Starkie, *supra,* sec. 525. They are not traversable. "It is usual in all cases to commence the declaration with a statement of the plaintiff's good character and his innocence of the crime imputed to him by the defendant, but as these inducements are not traversable they may be omitted, and the declaration may commence with a statement of defendant's malicious intention to injure the plaintiff." 2 Sanders Pl. and Ev., 794. The usual introductory averment of the plaintiff's good name and reputation, etc., is altogether superfluous, his good character being presumed. 2 Greenleaf Ev., 406. The injury to the defendants in the receiving of this evidence by the Court became more serious, when his Honor's charge, in connection with it, is taken into consideration. He said, "Plaintiff contends that the defendants practically admitted that this charge against the plaintiff was untrue; that the first and second allegations of the complaint, in which they allege that the plaintiff was in good standing and enjoying the confidence of his fellowmen, and that in their answer, upon which they joined issue, they did not deny that this is true; that the first and second allegations are not denied; that it amounts to a practical admission that this man was not the kind of man that that speech of Dr. Kilgo's said he was." His Honor instructed the jury to consider that testimony with the other in the case as bearing upon the second issue—the falsity of the charge. The character and innocence of the plaintiff were not the matters at issue. They were not even material averments, as we have seen, and sec. 268 of The Code has no application. Whether or not the alleged defamatory matter was false and malicious, was the material issue in the case, and the defendants' failure to answer the first and second allegations of the complaint was in (424) no sense an admission that the publication was false.

The plaintiff was allowed, under objection of defendants, to give evidence on the subject of damages which he had sustained in his clerical calling. We think the evidence was incompetent. The plaintiff, it is true, was regularly ordained and set apart as a minister of the Methodist Episcopal Church, South, but he had had no charge for twelve years preceding the commencement of this action. He had for that time been engaged in other work than the Christian ministry.

Before damages can be recovered by one, by reason of words spoken or published of him in his profession or office, he must have been actually engaged in the work of his profession or in the possession of the office at the time the words were written or spoken. *McKee v. Wilson,* 87 N. C., 302; *Edwards v. Howell,* 32 N. C., 211; Abbott Trial Ev., 831; Townsend Slan-

der and Libel, sec. 189; Newell Slander and Libel, page 175; Folkard's Starkie, *supra,* sec. 99, where it is said: "The action extends to words spoken of men in their professions as barristers, attorneys, physicians, surgeons and clergymen. But words spoken of a clergyman as such, would not be actionable unless he had some benefice or preferment of which he might be deprived if the words were true. The reason usually given for supporting the action in such a case is that the imputation would be cause of deprivation."

For the reasons given there must be a new trial.

New trial.

CLARK, J., did not sit on the hearing of this appeal.

Cited: *Taylor v. Huff,* 130 N. C., 595; *Savage v. Davis,* 131 N. C., 162; *Gattis v. Kilgo,* 131 N. C., 199.

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(425)

VANN v. EDWARDS.

(Filed 30 May, 1901.)

1. HUSBAND AND WIFE—*Separate Property of Wife—Choses in Action—Promissory Note—Assignment—Endorsement.*

   The indorsement and transfer of her note by a married woman without the consent of her husband does not invest the title in the indorsee.*

2. NEGOTIABLE INSTRUMENTS—*Husband and Wife—Presumptions—Possession.*

   The possession of a note by an indorsee of a married woman is presumed to be lawful, the note having been in possession of husband after the indorsement.

ACTION by T. E. Vann, administrator of Darius Edwards, against D. K. Edwards, heard by Judge *T. A. McNeill* and a jury, at Fall Term, 1900, of HERTFORD. From a judgment for the plaintiff, the defendant appealed.

Winborne & Lawrence, for the plaintiff.
L. L. Smith and *S. J. Calvert,* for the defendant.

MONTGOMERY, J. The note, for the recovery of which this action was brought, was originally the sole and separate prop-

**Overruled. Vann v. Edwards,* 135 N. C., 677.

erty of the wife of the plaintiff's intestate, who was the mother of the defendant, and who died before her husband, the father of the defendant. The note was executed by the defendant to his mother and by her was endorsed and transferred to the defendant without her husband's knowledge or consent. If that was the defendant's only claim to the note it would avail him nothing (*Walton v. Bristol,* 125 N. C., 419), and it would have passed to the husband as his property upon the death of his wife, subject to the payment of her debts. But there (426) was evidence tending to show that the note had been in the possession of the plaintiff's intestate after the death of his wife; that it was afterwards seen in the hands of the defendant, and was in his hands at the time of the plaintiff's intestate's death. It is to be observed in passing, however, that there was no attempt made by the defendant to show how he got possession from his father. Anyway, the defendant asked the Court to instruct the jury that, "If the jury find that the note in controversy was in possession of Darius Edwards at any time after the death of Sarah F. Edwards, and prior to October, 1896, and that afterwards it was in possession of the defendant, from October, 1896, until the commencement of this action, the law presumes that such possession was lawful and that he is the owner thereof, and the burden is upon the plaintiff to satisfy the jury upon preponderance of the testimony, that such possession is not lawful, and unless the plaintiff so satisfies the jury, you must answer the first issue 'No.' "

The prayer was refused and therein there was error. *Jackson v. Love,* 82 N. C., 405; *Causey v. Snow,* 120 N. C., 279.

New trial.

DOUGLAS, J., concurs in result.

CLARK, J., concurring in result. I dissent from that part of the opinion which says that "if" the defense had rested upon the assignment of the note by the wife, who owned it, being proceeds of sale of her land, it would not have availed, citing *Walton v. Bristol,* 125 N. C., 419. An appeal here is to review rulings of the Judge below upon exceptions duly taken. There was no ruling below upon this point, no exception thereon, and the ruling which does come before us is upon an entirely different state of facts. The *obiter* in *Walton v. Bristol* can only become authority if approved upon a state of facts and upon an exception which calls it in question, and not by an *obiter* upon an "if."

(427) *Walton v. Bristol* is not authority for the proposition that a married woman can not endorse and assign a bond belonging to her. In that case the assignment was called in question on ground that it *"lacked the assent of the wife;"* here, the hypothetical case presented, for it is not before us on exception, is that the assignment by the wife of a bond, her own property, *lacks the assent of the husband.* What was said in the Walton case in reference to assignment of bonds by a wife without assent of her husband was not pertinent to the facts and was entirely *obiter.* This, therefore, is *obiter* upon an *obiter.* If, however, the proposition that the assent of the husband is necessary to the assignment by the wife of her choses in action is to be decided without facts or rulings or exceptions raising the point, it is my duty to give my reasons for dissenting, for no question of greater importance or of more far-reaching consequences is likely to come before us. Married women daily assign and transfer notes, checks and other personal property, or hypothecate them as security for loans, and the assignees take them relying upon the provisions of the Constitution. If the title to personal property does not pass without the husband's written consent, and he or his administrator can recover it back, it will cause great litigation and widespread alarm in business circles. There is no rule which can hold that a married woman's assignment of a bond or promissory note is a "conveyance" and therefore invalid without the written assent of her husband, which would not apply equally to her endorsement of a check, payable to her, or her assignment of the whole or part of a fund by her check payable to another, or her sale, transfer or other disposition of any other personal property.

In a barbarous age, woman was a slave, a chattel, and hence her property, and especially her chattels, passed to her master upon marriage, and with it the right to chastise her. (428) Fizt. Nat. Brev., 80; Litt., sec. 669, 670, which idea still survived to a late day; 1 Blk., 444; *Joyner v. Joyner,* 59 N. C., at page 326; *S. v. Black,* 60 N. C., 262, and though in *S. v. Oliver,* 70 N. C., 60, SETTLE, J., says at last "the courts have advanced from that barbarism;" it has been held as lately as *S. v. Edens,* 95 N. C., 693, that a man can commit the foulest libel upon his wife with impunity because she is his wife. Just in proportion as civilization has progressed, we have gotten away from a legal classification, which placed in the same category "infants, idiots, lunatics, convicts and married women." The Constitution of 1868 took married women out of that class, except as to the statute of limitations, and recent legislation has removed even the stigma of that "sur-

vival" of the ideas of an age which deemed a married woman *"non sui juris."*

The Constitution of 1868, Art. X, sec. 6, placed North Carolina nearly abreast of the legislation in England and our sister States by providing, "The real and personal property of any female in this State," after marriage, "shall be *and remain* the sole and separate estate and property of such female, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." The meaning of these words, never doubtful, were placed beyond controversy by the history of the movement for the emancipation of married women as to their property rights, and the uniform decisions in England and our sister States upon similar legislation or constitutional provisions.

The clearly expressed meaning is that a married woman, as to the control of her property, shall *"remain"* as if a *feme sole* with liberty to devise or bequeath it, sell or dispose of it, except that as to property which can only pass by "conveyance" *i. e.*, by deed or mortgage, the written assent of her husband is necessary. The general rule is that as to her "property, real and personal," her control is not changed by marriage. (429) The sole restriction is that as to "conveyances" the husband's written assent is needed. To construe "conveyances" to mean ordinary dispositions of personal property, which are rarely made by "conveyances," is to put a forced meaning upon that word and to veto the free control given a married woman in the first clause by making the restriction as broad as the liberty. It is to say, in effect, that a married woman is to have as full control of all her property, real and personal, as if she remained single, except that she is to have control of none of it, real or personal, without the written assent of her husband!

Carrying out this idea, the courts invented the doctrine of "charges in equity" without a line in any statute to support it, and thereby restricted a woman's rights over her property into narrower limits than she possessed before the adoption of the guarantee of emancipation given her by the Constitution, though this charging in equity doctrine has since been virtually overruled. *Brinkley v. Ballance,* 126 N. C., 396. If a woman could, as provided by the Constitution, control her property, as if single, save as to alienation by deed, it follows that of course she can make contracts, as if single, whose enforcement might affect it. In New York, with the identical clause as to woman's control over property (for our Convention copied it), and in all other States with similar provisions, a married woman's right to contract is untrammeled. *Bank v. Howell,* 118 N. C.,

at page 273. But some of our decisions in later years have negatived the constitutional provision by holding that if a married woman can contract without written consent of her husband, thereby she will subject her property to the payment of her liability and therefore the courts will not allow her to sell, transfer or assign her personal property without written consent of her husband, because her power to contract in some respects is restrained by The Code, sec. 1826. If the
(430) restriction upon "contracting" by that statute restrains the free control given by the Constitution, then the statute and not the constitutional provision is null. But it seems to have been forgotten that the statute of frauds for two centuries and a half had made oral contracts and agreements for sale of any interest in lands void without any court ever conceiving that it was possible to hold that all verbal contracts were voidable, because realty could be sold to enforce the liability thereby created, and that hence a party could thus "do indirectly what he was forbidden to do directly."

Having left the broad plain highway of the Constitution every step since has taken us further and further into the wilderness. The construction that a married woman's personal earnings are still the property of her husband belongs to the age when she was her husband's chattel. It has no other support. There is no statute to that effect. It is true it was reannounced some fifteen years ago by one of our ablest and most accomplished Judges, who doubtless remembered that he had read it at law school in books hundreds of years old, but who forgot that he had read the decree of equality of woman's property rights in the Constitution of 1868. And so on from step to step we have gone into the wilderness away from the plain guarantee of the Constitution—that a married woman's rights over her property shall remain as if she were single, except that in deeds and mortgages the husband must give his written assent 'just as he has like control over his own property save that she must assent to the conveyance of his realty.' Instead of holding to this plain, unmistakable provision, we have a multiplicity of judicial interpretations, reservations, restrictions and conditions, till no one can say absolutely what are the rights of a married woman over her own property, except that they do *not* remain as if she were still single.

An able and painstaking lawyer, Professor Samuel F.
(431) Mordecai, has tried to elicit something like orderly method as to a woman's rights over her property and her power to affect it by her contracts, for the instruction of his

law class at Wake Forest College, and has thus summed up the confusing and somewhat conflicting results:

ANALYSIS OF CONTRACTS OF MARRIED WOMEN, WHO ARE NOT FREETRADERS, ETC.

SUCH CONTRACTS ARE:

1. EXECUTED—
   1. Which require husband's written consent, whether real or personal estate conveyed (1).
   2. Which also require private examination of wife and other statutory forms, etc., if really conveyed or mortgaged (2).
2. EXECUTORY—WHICH, AS AFFECTING—
   1. REAL ESTATE OF THE WIFE, MUST—
      1. Be written (3)—under seal—with private examination of wife; (4)
      2. Have written consent of husband; (5)
      3. Be charged expressly on specific real estate; (6) but the
      4. Consideration need not be beneficial; (7) and the
      5. Homestead will not be defeated (8) unless in case of a
      6. Mechanic's and Laborer's Lien duly filed and prosecuted; (9) or
      7. By contract which is in effect a conveyance (10).
   2. PERSONAL PROPERTY OF THE WIFE—

(1) 125 N. C., bot. p. 423; 120 N. C., 51; 126 N. C., 48; 122 N. C., page 176; 126 N. C., middle page 374; 125 N. C., middle page 425; 126 N. C., page 51.
(2) The Code, sec. 1834; Laws 1899, chapter 235.
(3) 112 N. C., 622; 122 N. C., 571.
(4) 122 N. C., 572; 106 N. C., 289–359; 108 N. C., middle page 337; 117 N. C., at page 98; 119 N. C., top page 327; 119 N. C., at middle page 432; 131 N. C., bottom page 387.
(5) 122 N. C., 571.
(6) 122 N. C., 571.
(7) 122 N. C., 571.
(8) 122 N. C., 571; 112 N. C., 54.
(9) Constitution, Article X, sec. 4; 95 N. C., 85; 106 N. C., bottom page 300; 117 N. C., middle page 98.
(10) 113 N. C., 349.

1. NEED NOT HAVE THE HUSBAND'S (WRITTEN) CONSENT IF AMONG—

Those excepted by The Code, Section 1326, to-wit: (11)
1. For her necessary personal expenses.
2. For the support of the family.
3. To pay her antenuptial debts.

[The husband is primarily liable for her support and that of the family (11a), and what comes within these exceptions depends upon the circumstances and surroundings of each case (11b). They are confined to goods bought for direct benefit of herself and family, such as food, clothes and other necessaries (12), and do not embrace supplies for a boarding-house, hotel, etc., by which the family is supported (13), or goods for a store which she runs (14), or a cook stove *per se* (15), agricultural supplies (16), except where husband of no account (17), money borrowed to pay a lawyer (18), land bought (19), building a house (20), hiring an overseer (21)].

(a). All such contracts she may charge expressly upon her separate personal estate by herself or by her agent (22).
(b). But whether they must be expressly charged is not clear. It seems not (23).
(c). Her separate personalty—but not her realty—may be subjected to satisfy such contracts (24), but
(d). She will be entitled to her personal property exemption (25). The creditor has no specific lien (26).
(e). A personal judgment may be rendered against her on such contracts (27).

2. MUST HAVE THE HUSBAND'S CONSENT TO—

All contracts not excepted by Section 1826 (28), (though there is a dictum that it is unnecessary if the consideration is for the benefit of her separate estate) (29), of which contracts the following are the important elements to be considered—

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(11) The Code, Sec. 1826; 119 N. C., at page 326, paragraph 1, citing 103 N. C., 296; 121 N. C., at page 388, citing 110 N. C., 70; 119 N. C., 323; 121 N. C., 59; 106 N. C., bottom page 295 and near top 298; 126 N. C., bottom page 273 and top page 274.
(11a) 122 N. C., at page 567; 102 N. C., at page 528; 106 N. C., bottom page 296.
(11b) 102 N. C., 525.
(12) 98 N. C., 421; 122 N. C., 4.
(13) 98 N. C., 421; 122 N. C., 4.
(14) 117 N. C., 94; 126 N. C., 393.
(15) 102 N. C., 525; 106 N. C., bottom page 296.
(16) 106 N. C., bottom page 296, approving 102 N. C., 525.
(17) 126 N. C., 313, re-affirming 121 N. C., 59.
(18) 116 N. C., 708.
(19) 116 N. C., 144.
(20) 121 N. C., 387.
(21) 122 N. C., 1.
(22) 121 N. C., at top page 388, citing 110 N. C., 70; 119 N. C., 323; 121 N. C., 59; 106 N. C., bottom page 295 and near top page 298; 126 N. C., top page 274.
(23) See note 35, post, and cases there cited.
(24) 124 N. C., 410; 124 N. C., at middle page 614, citing 119 N. C., 323; 105 N. C., 301; 106 N. C., 289; 102 N. C., 236; 76 N. C., 468; 74 N. C., 348; 126 N. C., top page 274.
(25) 126 N. C., at page 274.
(26) 126 N. C., at page 274.
(27) 122 N. C., at page 715, modifying the language used in 116 N. C., 144.
(28) The Code, Sec. 1826; 122 N. C., middle page 3.
(29) 108 N. C., 334, facts in the case and middle page 337, but see 94 N. C., at page 249; 106 N. C., bottom page 295; 106 N. C., at page 513; 125 N. C., at bottom page 425; 122 N. C., at page 3.

1. *The consideration—which*
   (a). Is not imported by a seal (30); but will be investigated, in all cases, where material, by the Court (31).
   (b). Need not be beneficial to the wife if her separate estate is expressly charged (32), which charge must be express (33), but need not be specific (34).
   (c). If beneficial to her personally or to her separate estate, this may dispense with the necessity for an express charge (35).

2. *The form and essential contents of the contract—which*
   (a). Must be in writing, it seems; (36)
   (b). Must have the written consent of the husband; (37)
   (c). Must contain an express charge on her separate estate (38), unless, perhaps, when the consideration is beneficial to her personally or to her estate (39)— or an intent to charge expressly must appear from the context of the instruction (40)—which charge, however, need not be specific (40); but in 122 N. C., at bottom page 574 and top page 575, and in 126 N. C., at bottom page 396, are dicta which indicate that no "charging" is essential.

3. *The written consent of her husband—*
   (a). Which is essential to all contracts not excepted by Section 1826 (42), (except where consideration beneficial?) (43)
   (b). Which is sufficiently manifested—
      (1). If set out in the body of the instrument—need not be by separate paper (44).
      (2). By joining with the wife in executing the contract—signing it with her (45).
      (3). By signing as subscribing witness to the wife's signature (46).
      (4). By a separate paper of later date guaranteeing the payment of her contract (47), certainly if he also write and sign the contract as agent for the wife (48).
   (c). Which written consent does not give validity to all her contracts, but simply to such as before the Acts of 1871-'2 (The Code, Section 1826) she might have made without his consent (49). Nor does it enable the wife to make a contract at all—but simply to enter into an agreement in the nature of an executory contract (50).

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(30) 103 N. C., middle page 313.
(31) 103 N. C., middle page 313.
(32) 106 N. C., 357; 106 N. C., at page 397; 103 N. C., at top page 313, and at page 311; 114 N. C., at page 616; 122 N. C., middle page 714; 118 N. C., at page 273.
(33) Cases at notes 32 and 34.
(34) 103 N. C., bottom page 312; 113 N. C., middle page 354; 114 N. C., at page 616; 119 N. C., bottom page 326.
(35) 94 N. C., middle page 249; 106 N. C., at page 296; 108 N. C., middle page 337; 106 N. C., at page 710; 118 N. C., at page 274; 122 N. C., top page 575; 126 N. C., bottom page 396—all dicta which seem to justify this conclusion. But see 117 N. C., 94, and 125 N. C., bottom page 425, which lay stress on the fact that the husband gave his written consent to a contract of this character.
(36) 112 N. C., 622.
(37) The Code, Sec. 1826.
(38) 118 N. C., at page 273; 119 N. C., bottom page 326; see cases also at notes 32 and 33.
(39) See note 35.
(40) 119 N. C., bottom page 326; 114 N. C., top page 616; 117 N. C., middle page 99.
(41) 103 N. C., bottom page 312; 113 N. C., middle page 354; 114 N. C., page 616; 119 N. C., bottom page 326.
(42) 122 N. C., at middle page 3; 112 N. C., 622.
(43) See note 29.
(44) 114 N. C., at page 616; 126 N. C., at page 51; 126 N. C., top page 397.
(45) 122 N. C., at page 574; 94 N. C., at page 249; 144 N. C., at page 616; 126 N. C., at page 551; 126 N. C., top page 397.
(46) 126 N. C., 47.
(47) 117 N. C., 94; 126 N. C., bottom page 51.
(48) 117 N. C., 94; 126 N. C., bottom page 51; 126 N. C., 393.
(49) 122 N. C., middle page 3.
(50) 119 N. C., bottom page 326, citing 116 N. C., 78, and 118 N. C., 271.

4. The Legal Effect—

The legal effect of those of her contracts, to which the written consent of her husband is required, is not that of a contract at all, but of an agreement, which will be enforced in equity against her separate personal estate (51), not only that which she had when contract was made, but that acquired afterwards (52). No judgment *in personam* can be rendered upon such contracts or *quasi* contracts (53). Being enforceable only in equity, a Justice o Peace has no jurisdiction (54).

It must be remembered that a Justice has jurisdiction of an action in which a mechanic's lien in involved (55), and that a judgment *in personam* can be rendered by the Superior Court on contracts excepted by Section 1826, but such judgments can be satisfied only out of the personalty (56).

Unless there is a mortgage, pledge, deed of trust, etc., or a mechanic's lien, the contract does not debar her of her personal property exemption in her personalty (57). The contract charging her separate estate does not give the creditor a lien (58), nor a right to seize her property under claim and delivery proceedings (59). He can only proceed by judgment and execution (60), which last must set out particularly the personalty to be subjected (61), but perhaps can be levied on that and any other personalty she owns (62). She may be subjected to supplemental proceedings, and her personalty, or some of it, subjected thereby to her debts (63). A receiver may be appointed in a proper case (64). The cases require more to be in the execution than the statute requires (65).

It is impossible for anyone to say whether or not he is right in every particular, notwithstanding his great and most
(434) careful research, and that his citations of authority sustain him. If we are now to add, by any *obiter,* upon facts not raising the point, that a married woman can not endorse or sign a bond without her husband's consent, his table already needs further amendment.

Professor Mordecai, however, omitted to note that the doctrine of "charging" the wife's property is held to be without warrant in the Constitution or statutes. *Brinkley v. Ballance,* 126 N. C., at page 396, FAIRCLOTH, C. J., alone dissenting.

The remedy is to get out of this wilderness, which becomes more and more tangled as we proceed, with the under-
(435) brush more and more confusing, and return to the straight and unmistakable highway marked out by the organic law, which is beautiful by its simplicity and clearness,

(51) 119 N. C., bottom page 326; 88 N. C., 300; 122 N. C., at pages 713, bottom 714, below middle page 715.
(52) 117 N. C., middle page 100.
(53) 88 N. C., 300; 122 N. C., at page 713, bottom page 714, below middle page 715.
(54) 122 N. C., at page 713, bottom page 714, and below middle 715.
(55) 95 N. C., 85; 106 N. C., bottom page 300; 117 N. C., middle page 98.
(56) 122 N. C., at page 715, modifying 116 N. C., 144.
(57) 103 N. C., at page 313; 117 N. C., at page 101; 126 N. C., at page 273.
(58) 117 N. C., at page 100.
(59) 126 N. C., at page 273.
(60) 126 N. C., at page 273.
(61) 117 N. C., bottom page 100.
(62) 117 N. C., middle page 100 and bottom page 100.
(63) 117 N. C., at page 101.
(64) 114 N. C., at middle page 617; 116 N. C., middle page 54; The Code, Section 379 (2), and see 111 N. C., 625.
(65) The Code, Section 443; 117 N. C., at page 100.

and to plant our feet once more upon the rock of the Constitution.

Instead of the "codeless myriad of precedent," cited by Professor Mordecai, the Constitution has but one rule which no one should misunderstand or misapply, which is that a married woman remains as absolute owner of her property as if she stayed single, except only that in "conveyances" (*i. e.* of realty), the husband must give his written assent, which is exactly the case as to the husband's property, over which he retains the same control as if single, save that by statute in deeds for his realty the wife must join.

Cited: *S. c.*, 130 N. C., 70; *Smith v. Ingram,* 132 N. C., 967; *S. v. Jones, Ib.*, 1094; *Harvey v. Johnson,* 133 N. C., 364; *Vann v. Edwards,* 135 N. C., 676; *S. v. Robinson,* 143 N. C., 630.

SKINNER v. WILMINGTON AND WELDON RAILROAD CO.

(Filed 30 May, 1901.)

NEGLIGENCE—*Railroads—Personal Injuries—Passengers—Evidence.*

The evidence in this case is insufficient to show negligence on part of a railroad for injuries to a passenger.

ACTION by Emily Skinner, administratrix, against the Wilmington and Weldon Railroad Company, heard by Judge *J. W. Bowman,* at February Term, 1900, of WILSON. From a judgment dismissing the action, the plaintiff appealed.

Deans & Cantwell and *J. H. Pou,* for the plaintiff.
Aycock & Daniels, for the defendant.

MONTGOMERY, J. The plaintiff's intestate was a passenger on one of the defendant's trains and upon its reaching Wilson he got up to disembark. The train was stopped a little before the baggage car was placed against the baggage (436) to be taken on. At this time the intestate was seen standing on the platform of a passenger car supporting himself by having his hand in position on the door facing. The train was then moved up a little forward, gently and without jerking and stopped. At this juncture the door of the coach shut itself and the intestate's hand was caught in the jam and badly injured. The following is the whole of the evidence offered by the plaintiff in the case:

David Barnes, for the plaintiff, testified: "I was porter at the hotel. Met train No. 48, 14 June, 1898, at the depot in Wilson. When the train arrived it stopped a little before it got the baggage car against the baggage. Mr. Skinner was standing on the platform supporting himself by his hand between the door face. Train moved forward a little and at the second stop the door came shut and his fingers were caught in the jamb of the door and injured. When I first saw Mr. Skinner he was in his seat. This was before the train stopped the first time, and just about the time it was coming to a stop I saw Mr. Skinner get up and walk forward. When I next saw him he was standing on the platform with his hand on the door jamb as before stated."

On cross-examination this witness testified that "it was not always possible to stop a train exactly against the baggage and it was not unusual for it to move up a little ways after it first stopped in order to get the baggage. When the train moved up to the baggage it moved up in an ordinary way and stopped as it ordinarily stopped, without jerking."

Frank Pierce testified for the plaintiff as follows: "I was working for the Express Company on 14 June, 1898, when the accident occurred. When the train stopped I boarded the express car to unload and load express. The train
(437) moved up a little. I called to the hand to pull truck off. Train moved up and stopped. After it stopped I saw a man getting off with his hand hurt. I did not know the man at the time, but afterwards found it was the intestate of the plaintiff. Train did not move but a little ways and moved up and stopped gently."

We can not see the least negligence in the management of the defendant's train, and there was no testimony of any fault in the condition or construction of the coach door. The occasion was purely an accident. Nothing short of stationing a man at both doors in each coach at every stopping place to watch the doors to prevent injury to passengers could prevent just such accidents, and such a requirement would be most unreasonable under present conditions. There is no analogy between this case and that of *Nance v. R. R.*, 94 N. C., 623. There the train had been brought to near a standstill at a station, and the passenger was in the act of alighting when the engineer caused a motion of the train, violent and sudden.

His Honor was right in granting the defendant's motion to dismiss the action.

No error.

(438)

FAISON v. GRANDY.

(Filed 1 June, 1901.)

1. INTEREST—*Lex Loci Contractus—Lex Loci Solutionis—Conflict of Laws.*

   Money loaned in Virginia on real estate in North Carolina is governed by the rate of interest in North Carolina.

2. USURY—*Interest—Negotiable Instruments—Purchaser Without Notice.*

   A note embracing usurious interest is void in the hands of a purchaser before maturity and without notice.

3. APPEAL—*Review—Assignment of Error—Rehearing—Exceptions and Objections.*

   Where no exception is taken in trial court to a ruling, and no error is assigned upon rehearing, the Supreme Court will not review the ruling.

4. USURY—*Negotiable Instruments—Personal Defense.*

   The plea of usury being a personal plea, can be taken advantage of only by the borrower or debtor or other person directly connected with the transaction, upon whom the burden of the usury falls.

5. ESTOPPEL—*Judgment.*

   A judgment which provides that issues relating to usury are reserved by consent to be passed on by referee does not estop the raising of the question of usury before a referee.

6. ESTOPPEL—*Judgments—Representations—Statements.*

   Representations and statements not relied or acted on by the party to whom made do not work an estoppel.

ON REHEARING this case was modified and remanded. For former opinion, see 126 N. C., 827.

Day & Bell, R. B. Peebles and *D. L. Russell,* for the (439) plaintiff.

T. N. Hill, Pruden & Pruden, Shepherd & Shepherd, for the defendants.

COOK, J. This action is now reheard upon the petitions of both plaintiff and defendants. It was heard at February Term, 1900 (126 N. C., 827), upon appeal by plaintiff from the judgment rendered by his Honor, Judge *Brown,* upon exceptions thereto taken.

The plaintiff now assigns as grounds for rehearing:

1. For that the Court overlooked the fact that the record showed that items of usurious interest other than the $638.93 mentioned in the opinion of the Court, entered into the consideration of the $10,000.00 bond, and two drafts aggregating,

$4,400, to-wit: On page 173 of printed record, $119.71; on page 174, $132.81, $933.38, $575; on page 175, $120.63, $62.12, $711.07, $97.34—all of these sums were interest at the rate of 9 per cent per annum charged in the account on page 175, which amounted to $14,421.74 up to 1 January, 1876, and which was settled by the $10,000.00 bond and two drafts. All of said sums were charged against plaintiff by the referee and Court below, upon the ground that the plea of usury was not open to plaintiff. The referee found as a fact that there was in said account $638.93 charged against Faison as a bonus, and for which Faison received nothing. This sum was separate and apart from the interest charged in said account at 9 per cent. In said account, The Farmers and Merchants Loan and Trust Company credited Faison with certain items of interest at 9 per cent, to-wit: On page 174, $138.99, $54.82, $190.43, $178.32. These items of course should be deducted from the items above mentioned as having been charged against said Faison.

2. For that the Court overlooked a clerical error of $208.71 made by the referee. This error occurred in this way,
(440) to-wit: In the account, amounting to $14,421.74, interest was calculated up to 1 January, 1876, and when the bond and drafts were given to close it, they drew interest from that date. In making out the account mentioned in finding 14, page 79, the referee overlooked that fact, and brought his account down to 2 March, 1876, and included interest up to that time, and still his account fell short of the account closed by bond and drafts $638.93. If he had stopped at 1 January, 1876, his account would have been two months interest smaller, to-wit: $208.71, and hence the difference would have been $845.67 instead of $638.93.

3. That the Court overlooked the fact that the "improper charges" did *not* consist of interest in excess of legal rates. Said sum was made up as follows: Out of the $9,500 note due 2 June, 1873, came $495.20. This note was charged to Faison at $9,500, page 174. The referee charged it at $9,004.80, making a difference of $495.20 of principal, not interest, because the referee found that Faison got for said note only $9,004.80. Referee disallowed item of $78.75, page 175, 14 October, 1875, was not allowed against Faison. Item of $48.25 (charged twice) was allowed once only. Item of $82.71, page 172, was allowed at $80.00, making $495.20, $78.75, $48.25, $625.91. The balance of $16.73 must have arisen from error in calculation. Excepting the above items, the record will show that the referee allowed against Faison every item contained in ac-

counts on pages 170 to 176 with interest at nine per cent per annum (see pages 89 to 93), except the following, which appeared both on the debit and credit sides of the account, to-wit: $2,373.00 and $1,267.55 charged on page 173, and credited on page 174 and page 176, and item $3,390, charged on page 175, credited on page 176, and $2,935.45 charged on page 174, and credited on page 173.

His Honor, Judge Brown, held that the referee was in error in his first conclusion of law—"that the said Trust Company, notwithstanding its charter, is subject to the gen- (441) eral interest and usury laws of Virginia, and consequently that the note for $9,500, dated 1 March, 1873, bearing 9 per cent interest on its face is usurious." From this ruling defendant did not appeal, and plaintiff not having assigned the same as error upon rehearing, it must so stand. While we agree with his Honor in his conclusion that the transaction was usurious, we differ from him in the reasoning. The record shows that the money was loaned upon real estate security situate in this State, the security being the basis of the loan; the rate of interest is governed by the interest laws of this State, notwithstanding that the loan was made in the State of Virginia—the reasons for which fully appear in *Meroney v. Loan Asso.*, 116 N. C., 882 (and in *Jackson v. Mortgage Co.*, a Georgia case therein cited). Interest therefore should have been charged at the rate of 6 per cent—not nine.

It therefore follows that those items of interest which are charged at nine per cent are usurious, and the items of account to which errors are assigned upon the rehearing must be restated with interest calculated at six per cent, both upon the debit and credit sides, and the errors pointed out in plaintiff's third assignment must be corrected—excepting, however, from the restatement of the account the interest on the $9,500 note, to which usury is not pleaded and to which no exception is taken upon appeal. For in plaintiff's complaint, allegation 67, he says: "This does not apply to the $9,500 note of 1 March, 1873, on which plaintiff admits nine per cent interest was properly charged;" and in exception 56 he says: "He should have held that said company had the right to charge nine per cent on the $9,500 note." The second assignment of plaintiff is a patent error and must be corrected. The record shows that the referee added interest on the sum *total* from 1 January, 1876, to 2 March (two months and two days—$208.71); and when the note and draft were executed in (442) May, 1876, for that sum, they bear interest from 1 January, 1876, thus charging interest twice for two months and two days during the same time.

Defendants' petition for rehearing is based upon errors assigned:

1. That the note was assigned to Mrs. Grandy and Wm. Selden in 1881, instead of 2 February, 1878, as stated by the Court.

2. That the item of $638.93 was not usurious as held by the Court.

4. That it was error in holding that the plaintiff was not precluded from setting up the plea of usury against the $10,000 note, and was not estopped from pleading usury.

5. That plaintiff was not entitled to a credit of the $638.93 item.

6. That they should not have been taxed with the costs in this Court.

A careful review of the ruling of this Court upon the item of $638.93, pointed out in the second and fifth assignments by defendants failed to discover any error in its former decision, and the same is reaffirmed.

In considering the defendants' other assignments upon petition to rehear, the record reveals the fact that the transfer of notes by the Loan and Trust Company was, as claimed, made on 2 February, 1878, instead of 1881, as reported by the referee, and adopted by this Court (at February Term, 1900), as correct; but this does not alter the status of the parties, except in so far is it shows that the note was transferred to William Selden and Mrs. Grandy *before* maturity, which is not material, since it is the well-settled law of this State that a note embracing usurious interest is void in the hands of a purchaser before maturity and without notice. *Ward v. Sugg,* 113 (443) N. C., 489, and cases there cited, wherein *Coor v. Spicer,* 65 N. C., 401, is disapproved.

This brings us to the consideration of the assignment taken to the ruling of this Court in holding that his Honor, Judge *Brown,* was in error in adjudging that the plaintiff was precluded from setting up the plea of usury against the bond, it being the *third* finding in his judgment.

It is contended by defendants that the plea of usury is *personal* and can be interposed *only* by the maker of the note; that the note was executed by *John* Faison, not Frank, who has interposed it in this action. "It is a well-established rule that the defense of usury is personal to the debtor or borrower and his privies by law or contract." Webb Usury, sec. 365; *Davis v. Garr,* 6 N. Y., 124; 55 Am. Dec., 398. And it is true that it is a personal defense, and the right of affirmative relief is likewise personal; but it is personal in the sense that it is to

the exclusion of strangers, or parties disconnected with the immediate transaction. It is limited to the borrower or debtor upon whom the burden falls whether he be the *maker* of the note (the evidence of the debt) or not, or otherwise has an interest in the transaction which can be injuriously affected by the usury. In this case the plaintiff was the original debtor; the debt was secured by *his* "Urquhart" and "Round Pond" tracts of land, the legal title to which was shifted to John, accompanied with his (plaintiff's) debt. But plaintiff did not cease to be a debtor; he continued in possession, and occupied, managed and controlled on his own account both of said tracts, and made payments upon said debts. It was not upon the credit of John W. Faison, who is alleged in defendant's answer to have been insolvent (paragraph 35), that the money was advanced in taking up the note, but upon the value of the land which had by common consent been taken out of the name of plaintiff and put into that of John. The bidding in of a $22,000 tract of land encumbered with only $4,680.81 (444) of purchase money for $1,000, and the Round Pond tract for $2,500 by the Loan and Trust Company, for which they took deed, and then conveying same land to plaintiff's brother, John, and taking a security upon said land for the $10,000 note, and upon a tract of John's land to secure the two drafts which covered the indebtedness due by plaintiff in which the usury was embraced, was well known to the parties to the transaction, coupled with the further agreement that plaintiff should pay off that indebtedness and John would reconvey the land to him, *was all on paper,* leaving the actual relations of the parties unchanged so far as otherwise could appear. John exercised no control over the land or the use or profits of it. Should the Urquhart and Round Pond tracts have been sold under the trust, it would have been no loss to John, but to plaintiff whom John was helping. Therefore it was to *plaintiff's interest* that the debt should be paid, to the end that the title be reconveyed to him, in the payment of which, or any part thereof, the plaintiff was directly interested, just as much as if the papers had been signed by himself instead of John. He being the substantial debtor had a right to set up a personal plea in his behalf to protect his interest involved in the transactions with the other parties, out of which this litigation has grown.

The defendants further insist that the plaintiff is estopped by the judgment rendered by Judge Boykin from claiming that the sum owing by him was less than $14,000 and interest. But in what way we are not able to see. The judgment expressly

provides that "all the issues relating to the questions of usury have been reserved, by consent, to be hereafter passed on by any referee who may be appointd to state an account in this action," and W. R. Allen was appointed referee and ordered "to pass upon the issues raised by the plea of usury and report his findings and rulings," etc., which he has done, and his report is here on appeal by plaintiff from the judgment ren-
(445) dered thereon by Judge *Brown* confirming the same.

Nor are we able to see the force of defendant's contention of an estoppel *in pais* precluding plaintiff from pleading the statute of usury. Defendants cite the testimony of plaintiff, wherein he says that, having failed to get the account settled by arbitration with the Loan and Trust Company, and failing to get it correctly adjusted, he accepted the statement of the Trust Company because he could not raise the money to take up the liens, and got Grandy & Sons to give the drafts and take up the note. But defendants, Grandy & Sons, not only do not set up such defense, but aver in their answer that they took up the debts "in order to befriend John W. Faison and prevent a sale of said property and a probable sacrifice thereof," which was threatened by the administrator (paragraph 27 of answer); also in paragraph 7 of their answer, they aver that "sometime after the execution of said note for $10,000 and deed of trust, the said John W. Faison apprehending * * * applied to defendants, C. W. Grandy & Sons, to assist him. * * * The said C. W. Grandy & Sons, believing said note to be well secured and good, interested themselves in the matter and induced Dr. William Selden and Mrs. Ann D. Grandy, executrix of C. W. Grandy, Sr., to purchase, * * * and this was done. The defendants, C. W. Grandy & Sons, * * * were actuated in making the arrangements solely by motives of friendship for him." From plaintiff's testimony it seems that he thought defendants were favoring him, while they *deny* the same by saying that they were actuated *solely* by motives of befriending *John W. Faison.* Surely defendants can not be prejudiced by representations or statements, which they did not act or rely upon; nor can they now claim that they were misled, in contradiction of their own *positive* averment. Had they been misled by the representations and statements of plaintiff, and in consequence of such had acted to their injury, then he would have been estopped; otherwise not. As the case is retained for fur-
(446) ther directions in the Court below, no judgment will be entered in this Court, and proceedings will there be had in accordance with this opinion.

Error, and petition allowed.

FRIEDENWALD CO. v. SPARGER.

(Filed 4 June, 1901.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—*Justices of the Peace—Seal.*

   The seal of a justice of the peace is not essential to the validity of an assignment for the benefit of creditors.

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—*Fraud—Misstatements—Exaggerations.*

   Willful misstatements and exaggerations by an assignor as to the value of his property, in the absence of other evidence, does not vitiate a deed of assignment for the benefit of creditors.

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS—*Schedule of Preferred Debts.*

   The schedule of preferred debts in a deed of assignment must give the names of the creditors and the amounts, dates and nature of the debts.

4. ASSIGNMENTS FOR BENEFIT OF CREDITORS—*Registration—Evidence—Fraud.*

   The fact that a deed of assignment was prepared and kept to be registered in the event of proceedings against the assignor is not evidence of fraud.

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS—*Presumptions—Preferences—Relatives—Fraud.*

   Debts preferred in an assignment for the benefit of near relatives raises no presumption of fraud, nothing else appearing to show fraud.

ACTION by The Friedenwald Company against Sparger (447) Bros. and others, heard by Judge *E. W. Timberlake,* at November Term, 1900, of SURRY. From a judgment for the defendants, the plaintiff appealed.

Jones & Patterson, for the plaintiff.
Glenn & Manly, and *Watson, Buxton & Watson,* and *Burwell, Walker & Cansler,* for the defendants.

MONTGOMERY, J. James H. and B. F. Sparger, in November, 1897, being partners in trade and finding themselves unable to pay their debts in full, made a voluntary assignment of all their property, real and personal, to T. B. McCargo and R. L. Haymore, for the benefit of their creditors, with preferences. In the body of the deed it was recited that the grantors, as partners, under the firm name of Sparger Bros. and James H. Sparger in his individual capacity, in consideration of the

premises, etc., conveyed the partnership property and also the individual property, real and personal, of James H. Sparger—the partnership property and the individual property of James H. Sparger being particularly described. The deed was signed:

"JAMES H. SPARGER. (Seal.)
"B. F. SPARGER. (Seal.)
"SPARGER BROS. (Seal.)"

The following is the form of the probate: "Surry County. Personally appeared before me this day James H. Sparger and B. F. Sparger, who compose the firm of Sparger Bros., the makers and signers of the foregoing deed of assignment, and acknowledge the due execution thereof. Witness my hand and private seal. This 6 November, 1897.

SAMUEL G. PACE,
(448) *"Justice of the Peace."*

The action was brought by the plaintiffs, who are judgment creditors, to have the deed declared void for fraud, and set aside. On the trial, exception was made to the manner of the signing of the deed by the grantors, and to the probate of the deed on the ground that the justice of the peace did not affix his private seal at the end of his signature.

The plaintiffs also alleged that certain of the preferred debts were not described with such particularly as to amount and consideration, as is required by the Act of 1893, chapter 453.

The first two matters complained of on the trial by the plaintiffs were not alluded to by their counsel in his brief in this Court, and on the oral argument, while not abandoned, were not insisted on.

We see no fault in the ruling of his Honor on either matter.

The deed was signed by both individuals composing the firm; the indebtedness was recited, and also the intent to convey both the property of the firm and that of James H. Sparger. It is usual for justices of the peace who act in probate matters to attach their private seals to their names at the end of the probate, but that act is not essential to the validity of the probate, and there being no dispute as to the fact that the person who took the probate was a justice of the peace at the time, we think that the statute is substantially complied with.

As to the alleged failure on the part of the defendants to properly describe the preferred debts, that matter was passed upon in *Brown v. Nimocks,* 124 N. C., 417, and we do not feel disposed to overrule that decision.

On the question of fraud we have scrutinized the evidence closely, and we think that his Honor was correct in ruling that there was none sufficient to be submitted to the jury. There were letters and statements of the defendants tending to show an exaggeration of the value of their property or a wilful misstatement about that matter. But there is no evidence that in the execution of the assignment there was any (449) fraud on account of these misrepresentations; nor can we see anything in the subsequent conduct of the defendants going to throw any suspicion on the motive of the parties in making the assignment. There was no evidence that the defendants bought or sold in any unusual manner, especially on credit, before the assignment, or that their business was conducted out of the usual way. Their preferences were permissible under the law at that time, and the fact that the deed of assignment was prepared and kept to be registered in case of proceedings against them by creditors is no evidence of fraud. *Guggenheimer v. Brookfield,* 90 N. C., 232.

An honest preference was allowable at that time. There were some small debts, probably amounting to one-fortieth of the value of the assets, preferred for the benefit of near relatives of the defendants. We are of the opinion that such a preference in the general assignment for creditors raises no presumption sufficient to compel the plaintiffs to show the consideration of the debts, nothing else appearing to show fraud. In *Hawkins v. Alston,* 39 N. C., 137, the debtor conveyed to his brother the whole of his property. In *Jordan v. Newsome,* 126 N. C., 553, the debtor preferred his mother-in-law, who lived in the same house with him and to an amount of more than one-half of the debtor's property.

We see no error in the ruling of his Honor dismissing the action on the motion for nonsuit, made by the defendants.

No error.

Cited: Sutton v. Bessent, 133 N. C., 563.

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MESSICK v. FRIES.

(Filed 4 June, 1901.)

FRAUDULENT CONVEYANCES—*Mortgages—Subsequent Creditors—Prior Mortgagees—Evidence—Fraud.*

The facts in this case are insufficient to be submitted to the jury on the question as to whether a mortgage was fraudulent as to subsequent creditors.

MESSICK *v.* FRIES.

ACTION by A. F. Messick and others against H. W. Fries and H. A. Giersh, heard by Judge *E. W. Timberlake,* at November Term, 1900, of FORSYTH. From a judgment of nonsuit, the plaintiffs appealed.

Jones & Patterson, Swink & Swink, and *D. H. Blair,* for the plaintiffs.

Watson, Buxton & Watson, for the defendants.

MONTGOMERY, J. The defendant Giersh in 1892 was indebted to the other defendant Fries in the sum of about $14,000, evidenced by three promissory notes, two of which were executed in 1887, and the other in the sum of $8,600, the consideration of the last mentioned one being the purchase money agreed to be paid to Fries for the interest of Fries in the stock of goods and merchandise belonging to a partnership of which the defendants were members, the purchase having been made on the day of the execution of the note for the purchase money, 15 July, 1892. To secure all three of the notes, Giersh executed a mortgage to Fries on 15 July, 1892, on the entire stock of goods, his own interest and that purchased by
(451) him from Fries, in Fries' storehouse in Salem, and all book accounts, notes and other evidences of debt due to late firm of Fries, Giersh & Senseman. It was stipulated in mortgage that monthly payments were to be made by Giersh to Fries on the indebtedness, and a calculation shows that several years would have elapsed before the indebtedness could have been paid if the payments agreed upon should be promptly met. There was a further provision in the mortgage by which the possession of the goods was to be left in Giersh, it being contemplated that Giersh was to continue the business in his own name and for his own account. The following is the language of the mortgage on that point: "This mortgage is also to cover all goods hereafter bought to keep up the stock, and such goods when bought are to be substituted for their sales as long as anything remains due to H. W. Fries and secured by this mortgage."

The plaintiffs are judgment creditors of Giersh, the indebtedness, however, having arisen since the execution of the mortgage and the consideration of which being for goods and merchandise sold to Giersh to replenish and keep up his stock, and they have brought this action to have the mortgage declared fraudulent and void. If the plaintiffs had been creditors of Giersh at the time of the execution of the mortgage, a strong presumption would have been raised as to its fraudulency; and

if the deed had shown on its face that there were other creditors of Giersh, and that all of his property was embraced, the fraudulent intent would be irrebuttable—the deed would be void on its face. *Cheatham v. Hawkins,* 76 N. C., 335. The decision in the last mentioned case is greatly shaken, if not overruled, by the case of *Kreth v. Rogers,* 101 N. C., 263, but it is not necessary to the decision of the present case to undertake a reconciliation between those two cases, for they concerned existing creditors, while in the matter now before us the creditors are subsequent ones to the execution of the mortgage. We find inconsistencies on the same subject in the opinions of the Supreme Court of the United States. In *Robinson v. Elliott,* 89 U. S., 758, in reference to exist- (452) ing creditors, it was decided (1874) that a mortgage of a stock of goods to two of several creditors, in which the possession of the goods was left with the mortgagor to sell and supply the place of those goods sold with other goods purchased, the substituted goods to be subject to the lien of the mortgage, was void on its face and was so declared by the Court, and that, notwithstanding the mortgage had been duly registered. On the last point the Court said: "Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods and enjoying all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit for what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard." In the later cases in the same Court, *Bank v. Bates,* 120 U. S., 556, and *Etheridge v. Sperry,* 139 U. S., 266, the doctrine held in *Robinson v. Elliott, supra,* is overruled, though not expressly so. In the last mentioned case, the mortgagor was left in possession of the stock of goods with a verbal agreement that he might use the proceeds of his daily sales for the support of himself and to keep up the stock, the whole of the surplus to be applied to the payment of the debt; and the Court held that the matter of alleged fraud in the execution of the mortgage was a matter of fact and not one of law. The Court said: "Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor in payment of a debt. If an absolute sale, why not a conditional sale with such conditions as he and his creditor agree upon? As between the parties, no Court would question this right or refuse to enforce the conditions. The interest of

(453) the general public is not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement by which the mortgagor can continue in business, for in ninety-nine cases out of a hundred the taking of possession by a creditor results in closing the business and turning the debtor out of employment. The only parties who can claim to be injuriously affected are unsecured creditors. But they are notified by the record of the exact relations between the mortgagor and mortgagee; and surely subsequent creditors have no right to complain, if they deal with the mortgagor with full knowledge of such relations. Existing creditors may, of course, challenge the good faith of the transaction, but if they can not disturb an absolute sale when made in good faith, why should they be permitted to challenge a conditional sale, if made in good faith? The fact that fraudulent relations are possible is hardly a sufficient reason for denouncing transactions which are not fraudulent."

But the plaintiffs were not creditors of Giersh at the time of the execution of the mortgage, their debts having been contracted by Giersh since its execution. Is the mortgage presumptively fraudulent as to subsequent creditors, the plaintiffs? The same rules can not apply to the rights of these two classes of creditors. The character of the evidence must vary, and so must the measure of relief. In voluntary conveyances, where subsequent creditors are concerned the touchstone of fraud is the intent with which they are made; and that is not a matter of law, but is to be passed upon by the jury. *Clement v. Cozart,* 109 N. C., 173; *Cook v. Johnson,* 12 N. J. Eq., 54; 72 Am. Dec., 381; *Payne v. Stanton,* 59 Mo., 159; Wait Fraudulent Conveyances, 201.

It was decided in *Etheridge v. Sperry, supra,* that in case of a mortgage to secure a debt, an instrument that can not be called a voluntary conveyance, subsequent creditors have no right to complain if they deal with a mortgagor with full
(454) knowledge (by constructive knowledge from registration of mortgage) of such facts as were set out in the mortgage. Inclining to the correctness of the view of the Court in that case, nevertheless, if the mortgage in the present case be treated, for the sake of argument, as a voluntary conveyance (which it is not), the question of fraud would be a question of fact and not of law. There was no evidence in this case that there was any fraud in the execution of the mortgage at or before the time of its execution. But the subsequent acts of the parties may be submitted to the jury, as they "may reflect light back upon the original intent," and help to characterize

and discern it more correctly. Wait on Fraudulent Conveyances, *supra.* Fraud must be proved to be in the inception of the matter, but the after conduct of the parties is evidence going to explain the motives which controlled the actions in the beginning, and give point to the original purpose.

Upon a most careful review of the evidence, we find none that ought to have been submitted to the jury to show fraud in the transaction. The debts secured were admitted to be *bona fide;* no attempt was made to keep secret the mortgage; it was on the registration books. The debt of $8,600 had been paid; no act of the mortgagor or mortgagee was brought out in the evidence in the least calculated to show a fraudulent purpose in the execution of the mortgage. That the bank of which the mortgagee was a director tried to help the debtor in his financial difficulties is not evidence of fraud. They misled no creditor. No misapplication of the proceeds of sale with the consent and knowledge of the mortgagee was shown; neither was there any evidence that the mortgagor was using the profits of the business for his own case and advantage in fraud of his creditors, and with the knowledge of the mortgagee.

The other exceptions of the plaintiff are without merit (455) and do not justify a discussion.

His Honor was right in holding that there was no fit evidence to be submitted to the jury to prove fraud, and he properly dismissed the action upon the motion to nonsuit the plaintiffs.

No error.

MOORE v. CHARLOTTE ELECTRIC STREET RAILWAY CO.

(Filed 4 June, 1901.)

1. NONSUIT—*Dismissal—Evidence—Construction—Trial—Acts* 1897, *Ch.* 109—*Acts* 1899, *Ch.* 131—*Street Railways.*

   On a motion for nonsuit the evidence must be construed in the light most favorable to the plaintiff, both as to effect and credibility.

2. EVIDENCE—*Sufficiency—Nonsuit—Street Railways—Negligence—Personal Injuries.*

   Evidence in this case as to damages resulting from a collision of a street car with a vehicle should have been submitted to the jury.

ACTION by Walter Moore against The Charlotte Electric Street Railway Company, heard by Judge *W. S. O'B. Robin-*

son, at March Term, 1901, of MECKLENBURG. From a judgment of nonsuit, the plaintiff appealed.

Osborne, Maxwell & Keerans, for the plaintiff.
Burwell, Walker & Cansler, for the defendant.

DOUGLAS, J. This was an action brought by the plaintiff to recover damages for injuries alleged to have been caused by the negligence of the defendant.

Walter Moore, the plaintiff, testified:

(456) "On the night of 26 March, 1900, at about 8 o'clock, I was driving a one-horse surrey on West Trade Street near the old court house, and had started to drive across the track of the defendant to water my horse at a fountain near the old courthouse. I looked and saw the car some distance from me. When the horse was about halfway across the rail I found the car near me and drew the horse's head around so as to get out of the way of the car that was coming, to prevent being struck. The car struck the surrey and broke both wheels in front and the top of same. I was thrown out between the dash board and the shaft, and was injured in my right side and hip, which disabled me for two weeks or more. It cost me $4.00 to have the top of the hack fixed, and about one month thereafter I had to quit business. When I started across the street I looked and saw the car about 30 or 40 feet beyond Church Street crossing. I had a light on the front of my carriage and the car also had a light on. The motorman could have seen some distance ahead that I was going to cross the track. When I first saw the car it appeared from the distance it was from me that I had plenty of time to cross over, but the motorman was running at such rapid speed that he struck me. He did not ring any gong until after I was struck, and did not stop the car until he had run a length ahead of me, and then came and asked if I was hurt. It appeared to be running about fifteen miles an hour. I was on this side of Church Street crossing when the car struck me and the motorman did not ring any gong at Church Street crossing. It appeared to be running very rapidly when the car struck me. The length of the car was about twenty-four feet. It was only about one-half a block from the public square where I was stricken, and the street on which I was was one of the principal streets of the city, and on which many vehicles and passengers

(457) pass and cross. I started across, but did not look for the car until my horse's feet were on the track. As I pulled the curtain and looked, it was then about forty feet from

me and appeared to be coming at about fifteen miles an hour. I did my best to get out of the way."

At the close of the plaintiff's evidence the defendant demurred to same under Act 1897 as amended by the Act of 1899, and the Court sustained the demurrer and dismissed the action. The plaintiff insists that the case should have been submitted to the jury and that there was more than a mere scintilla of evidence.

It is well settled in this State that on a motion for nonsuit the evidence must be construed in the light most favorable to the plaintiff, both as to effect and credibility. This rule is clearly laid down by FURCHES, J., in delivering the opinion of the Court in *Johnson v. R. R.*, 122 N. C., 955, in the following words: "In cases of demurrer and motions to dismiss under the Act of 1897 the evidence must be taken most strongly against the defendant. Every fact that it reasonably tends to prove must be taken as proved, as the jury might so find." To the same effect are the following cases: *Collins v. Swanson,* 121 N. C., 67; *Cable v. R. R.,* 122 N. C., 892; *Cox v. R. R.,* 123 N. C., 604; *Cogdell v. R. R.,* 124 N. C., 302; *Gates v. Max,* 125 N. C., 139; *Printing Co. v. Raleigh,* 126 N. C., 516. Construing the evidence in the light of these decisions, we are of opinion that there was certainly more than a scintilla of evidence tending to prove the negligence of the defendant, and that the case ought to have been submitted to the jury.

In case of nonsuit, it is neither necessary nor practicable to discuss as fully in detail points that may arise, as it is in cases that have been tried where the alleged errors are specifically pointed out by exception, and we will therefore confine ourselves to a discussion of the general principle governing such cases.

As our State has few cities of even moderate size, and consequently but few street railways, we find but little help from our own Reports. In fact, neither of the learned (458) counsel, who so ably argued the case, cited us to a single decision in this State which can be taken as an authority. In *Doster v. R. R.,* 117 N. C., 651, there was no collision whatever, the damage being caused entirely by the mule, which took fright at the noise of the street car while running, as the plaintiff himself testified, "in the usual and ordinary way." The destructive proclivities and capabilities of a mule, whether frightened or not, are of common knowledge and furnish but slight analogy for any other kind of accident. In the absence of home authorities, we must examine those where street railways have longest been in most general use.

The following extract from the opinion of the Court in *Cooke v. Traction Company,* 80 Md., 551, 554, very clearly expresses our own views: "There is, to begin with, no possible analogy between a case growing out of an injury caused by a street railway car to a person rightfully upon the public thoroughfare, and a case involving an injury inflicted by a steam railroad train on a trespasser wrongfully upon the latter company's right of way. And this is so because the citizen has the same privilege to use the street for travel that the street railway company has for propelling its cars thereon; and the railway company has "apart from its franchise to lay its rails, no right to the use of the street as a highway superior in any degree to that possessed by the humblest individual. The franchise to lay its rails upon the bed of the public street gives to the company no right to the exclusive use of that street, and in no respect exempts it from an imperative obligation to exercise due and proper care to avoid injuring persons who have an equal right to use the same thoroughfare. It is bound to take notice of, recognize and respect the rights of every pedestrian or other traveller, and if by adopting a motive power which has increased the speed of its cars, it has thereby increased, as common (459) observation demonstrates, the risks and hazards of accidents to others, it must, as a reciprocal duty, enlarge to a commensurate extent the degree of vigilance and care necessary to avoid injuries which its own appliances have made more imminent."

In *Thatcher v. Traction Co.,* 166 Pa. St., 66, 67, the Court says: "It is not our duty now, nor was it that of the Court below, to pass on the credibility of plaintiff's witnesses as to the rate of speed, and the absence of efforts to stop the car when the danger was manifest. That was for the jury. If the gripman recklessly ran on at a high rate of speed, when the probable consequence was a collision, that was negligence for which defendant was answerable. As is held in *Ehrisman v. East Harrisburg Co.,* 159 Pa., 180, 'It is not negligence *per se* for a citizen to be anywhere upon such tracks (railways or streets). So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not at the moment be able to get out of the way of a passing car.' Or, as is said in *Gilmore v. R. R.,* 153 Pa., 31, 'Street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks.' The

right of the wagon, in certain particulars, is subordinate to that of the railway; the street car has, because of the convenience and exigencies of that greater public which patronizes it, the right of way; whether going in the same direction ahead of the car, or in an opposite one to meet it, the driver of the wagon must yield the track promptly on sight or notice of the approaching car; but he is not a trespasser because upon the track; he only becomes one if, after notice, he negligently remains there."

In *Robbins v. R. R.*, 165 Mass., 30, 36, it is said: (460) "The decisions of this Court show that a distinction has been taken with respect to the duty to look and listen when crossing the tracks of a steam railroad where a railroad train has the exclusive right of way, and when crossing the tracks of a street railway company in a public street, where the cars have not an exclusive right of way, but are run in the street in common with other vehicles and with travelers. The fact that the power used by the street railway company is electricity, instead of that of horses, has not been deemed by the Court sufficient to make the rule of law which has been laid down concerning the crossing of the track of a steam railroad exactly applicable to a street railway."

In *R. R. v. Black*, 55 N. J. Law, 605, it is held that:

"2. The rule requiring one exercising his lawful rights in a place where the exercise of lawful rights by others may put him in peril to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances, is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, but his observation need not extend beyond the distance within which vehicles moving at lawful speed would endanger him.

"3. Street cars propelled by electricity and running along land burdened only with the easement of a public highway, can not be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety." In this case we quote from syllabi.

In *Kennedy v. R. R.*, 52 N. Y. Sup., 551, the appellate division of the Supreme Court says: "The cable car had no absolute right to the exclusive use of the street. Pedestrians and vehicles have some rights which even cable cars are bound to respect. They have a right to cross the street even (461) though a cable car may be in sight. If not, then the city would be divided into as many zones as there are lines of

power cars running the length of the island, and nobody could ever get across. It was not incumbent upon the driver of this vehicle to wait until no cable car was in sight before he attempted to cross. He had a right to cross the track when there was a reasonable opportunity to do so, even though it required the cable car to slacken its speed in order that it might not upset his vehicle. The rights of drivers of vehicles and of cable cars are reciprocal, and the gripman of a cable car is bound to use as much diligence to avoid running into a vehicle which is crossing its track, as the driver of a vehicle is to avoid running into a cable car which may be crossing its path. It seems to be assumed upon the part of the defendant that, unless a vehicle can certainly entirely clear a cable car approaching at a high rate of speed, its driver has no right to attempt to cross, and that the car is in no case bound to slacken its speed. We know of no such rule of the road." This case is approved and applied in *Blate v. R. R.*, 60 N. Y. Sup., 732, in an opinion delivered on 10 November, 1899.

In *McClain v. R. R.*, 116 N. Y., 459, it was held that: "A mere error of judgment does not necessarily amount to carelessness. If the plaintiff took reasonable care and then made a mistake as to the safest course to pursue in crossing the street, he was not guilty of contributory negligence for that reason." And again: "That the place was a public street and plaintiff had a right to go where he chose; that no matter how many cars were in the street he had a right to select any point to go across, but was bound to exercise care."

We freely admit that the company has the superior right to the use of its own tracks, as otherwise it could not use them at all. If a wagon and a car meet going in opposite direc-
(462) tions, the wagon must turn out, because the car can not. If going in the same direction, the wagon must also get off the track, because the car can not go around the wagon, and the public convenience requires a car to travel at a greater speed than the ordinary vehicle. But this superior right is not exclusive, and will not justify the company in needlessly interfering with the convenience of the public, or excuse it from the consequences of its own negligence.

Where the wagon and car meet at right angles, either can stop long enough for the other to pass without serious inconvenience; and as the wagon must cross the track in order to proceed, it is said that under such circumstances the rights of the wagon are somewhat greater than between crossings, with a corresponding obligation resting upon the railway company to exercise greater care on account of the greater probability of

meeting vehicles and pedestrians, with the increased risk of accidents. But this rule can not be extended to interfere with the right of the public to cross the track with reasonable care at any point that their convenience may suggest. Booth Street Railways, secs. 303, 304 and 305; Elliott Roads and Streets, secs. 761, 765, 767, 810, 811 and 812.

Numerous other cases might be cited, but we think that the view we have taken is sustained by the practical consensus of judicial opinion, and certainly by the overwhelming weight of authority.

The judgment of nonsuit will be set aside, and the action tried upon its merits.

Error.

Cited: *Thomas v. R. R.*, 129 N. C., 394; *Cogdell v. R. R., Ib.*, 400; *Coley v. R. R., Ib.*, 413; *Lea v. R. R., Ib.*, 467; *Smith v. R. R.*, 130 N. C., 310; *Mfg. Co. v. Bank, Ib.*, 608; *House v. R. R.*, 131 N. C., 104; *Hopkins v. R. R., Ib.*, 464; *Henderson v. Traction Co.*, 132 N. C., 788; *Lewis v. Steamship Co., Ib.*, 920; *Kyle v. R. R.*, 147 N. C., 396.

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HILL v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

(Filed 4 June, 1901.)

INSURANCE—*Proxy—Estoppel—Vested Rights.*

A resolution passed at a meeting of a mutual benefit association depriving a member of vested rights under his insurance contract, does not bind him by reason of his proxy being sent to the meeting.

MONTGOMERY, J., dissenting.

PETITION to rehear dismissed. For former opinion, see 126 N. C., 977.

W. W. Clark, for the plaintiff.

Hinsdale & Lawrence, Shepherd & Shepherd and *Sewell Tyng*, for the defendant.

DOUGLAS, J. For the reasons stated in *Strauss v. Life Association, post*, 465, the defendant's petition to rehear is denied. In this case it appears that the plaintiff was present by proxy at the meeting of the defendant association at which the objec-

tionable resolution was passed. We said in our former opinion in this case, 126 N. C., 977: "It is quite common for members of an association to send their proxies by request to the secretary or president in order to permit a meeting to be held; but we can not suppose that, by any such formal act, they intend to waive their vested rights, or to release the association from its contractual obligations."

Judges can not entirely divest themselves of the knowledge acquired as practicing attorneys, and those who have had experience in corporate management know that when a corporation is doing well, and no material changes are contemplated in its business, but few of the individual stockholders take any active part in its management, or even in the election (464) of its officers. Frequently there would be no quorum even at its annual meetings if it were not for the proxies of absent stockholders. This is especially true where there are a large proportion of nonresident stockholders. The secretary usually encloses a blank proxy in his notice of the meeting sent to each stockholder, which the stockholder, if he does not intend personally to attend the meeting, usually signs in blank and returns to the secretary, or other officer from whom he received it. In this way the officers of a corporation usually control its meetings. Even those stockholders that attend are generally willing to let well enough alone. The officers, after consulting with the controlling stockholders who are usually themselves directors, make up a list of names to be voted for as directors, and hand it to some stockholder whose name is not on it, and whose character and influence are guarantees of good faith. He then places the names in nomination and moves that the secretary be instructed to cast for them the aggregate ballot of the meeting. If there is no objection, this is done, and they are declared duly elected.

That the system of proxies, although necessarily permitted by custom as well as by law, is liable to grave abuse, can not be denied. In the meetings of National banks its operation is expressly limited by sec. 5144 of the Revised Statutes, U. S., which reads as follows: "In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but *no officer, clerk, teller or bookkeeper of such association shall act as proxy;* and no shareholder whose liability is past due and unpaid shall be allowed to vote."

We do not mean to say that in the absence of legal prohibition, there is any controlling reason why an officer of a cor-

poration should not act as proxy, provided he acts in entire good faith; but he must not abuse his trust. In the absence of evidence intrinsic or *aliunde,* we must assume (465) that such proxy was intended simply for the ordinary purposes of the meeting, and not waive any vested rights belonging to the stockholder as an individual. These principles are especially applicable to cases like the present, where an association has a large number of stockholders, perhaps a majority, living in other States, who are neither willing nor able to incur the expense of going to a distant city simply to be present at a stockholders' meeting in which their individual votes would practically amount to nothing.

Petition dismissed.

Cited: *Johnson v. Reformers,* 135 N. C., 387.

STRAUSS v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

(Filed 4 June, 1901.)

1. INSURANCE — *Contract — Mutual Benefit Association — Vested Rights.*

   A mere general consent by a member of a mutual benefit association to the amendment of its by-laws and constitution does not authorize such a change as will destroy his vested rights.

2. INSURANCE—*Vested Rights—Recovery of Premiums—Remedy.*

   Where a mutual benefit association violates its contract, the most practical remedy of a member is to bring action for the premiums paid, with interest thereon.

PETITION to rehear this case dismissed. For former opinion, see 126 N. C., 97.

(466)

W. W. Clark, for the plaintiff.

Hinsdale & Lawrence, Shepherd & Shepherd and *Sewell Tyng,* for the defendant.

DOUGLAS, J. This case is before us on a rehearing, being originally reported in 126 N. C., 971. We have again given it careful consideration, and have been forced to the same conclusions announced in our former opinion. It seems useless to again discuss the principles involved, as they

are few and simple as the case is viewed by us. The plaintiff had a contract of insurance with the defendant, which the latter seems to have violated in its most essential features with the result of having destroyed its value to the plaintiff. But it is said that the plaintiff made such contract of insurance with a mutual insurance association of which he was a member, and by virtue of such membership; and that he is therefore bound by all such rules and regulations as may be thereafter lawfully adopted. "Lawful adoption" may mean much or little. Rules may be adopted under the forms of law that might nevertheless be so unreasonable and inequitable as to be clearly beyond any possible contemplation of law. In any event such rules can never have any greater force than the law that authorizes their adoption, and if this has the effect of impairing the obligation of a contract, it is void by constitutional inhibition.

But it is said that the plaintiff upon entering the association agreed, expressly or impliedly, that changes might be made in its constitution and by-laws, and is bound thereby. We have no evidence that he agreed that such changes might be made as were made; and we have no idea that he ever intended to place it within the power of the association to break his contract at pleasure, or render it utterly valueless by subsequent stipulations or regulations adopted without his consent. A mere general consent that the constitution and by-laws may be amended, applies only to such *reasonable* regulations (467) as may be within the scope of its original design. We must again repeat what we said in our former opinion: "Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights."

It is urged by the defendant that if the plaintiff is entitled to any relief, it is not by recovery of the premiums he has paid, but by mandamus for reinstatement. This remedy is not demanded by the plaintiff, nor does it seem practicable to us. It is true we might issue the mandamus to a foreign corporation having its general offices in New York, but how to make such a mandamus effective is a different question, the solution of which is not at all clear to us. Moreover, in the present instance the plaintiff, Strauss, is now dead. Much stress has been laid upon the fact that the Supreme Court of Minnesota, in *Ebert v. Life Asso.* (*this defendant*) 83 N. W. R., 506, while agreeing with us upon the main question of the right of recovery, differs with us as to the measure of damage. We are much impressed with the views of the Court upon that point,

which have much to commend them as theoretical propositions; but we are equally impressed with the frank admission of the Court as to the difficulty of their practical application.

Our own rule, even in our own minds, falls short of theoretical perfection, but after most careful consideration we are unable to find a better. The impaired health of the insured, or his having passed the insurable age, would present complications practically insurmountable in the actual trial of an action. Moreover, the defendant claims that the plaintiff's insurance has cost more than he has paid in, and therefore his recovery would be nothing. The plaintiff would have no means of disproving the alleged cost of his past insurance, the proof of which would be exclusively in the possession of the defendant. He might cross-examine the defendant's wit- (468) nesses or demand its books and papers; but if he got them, what could he do with them? It seems to have taken the defendant several years to find out that the plaintiff's insurance was costing more than his premiums, and this it did only with the assistance of the Insurance Commissioner of New York and expert actuaries. With or without such assistance, what chance would the average juror have of mentally digesting five hundred pages of insurance statistics?

All actions must be capable of a practical determination, with a reasonable certainty of substantial justice; and rules of law must be adjusted to that end, even if in exceptional cases they fall short of the full measure of ideal right. A distinguished jurist has said: "Indeed one of the remarkable tendencies of the English Common Law upon all subjects of a general nature is, to aim at practical good rather than at theoretical perfection; and to seek less to administer justice in all possible cases, than to furnish rules which shall secure it in the common course of human business." Story Eq. Jur., page 115. The rule we have followed is not new. It was laid down by Chief Justice PEARSON in *Braswell v. Insurance Co.*, 75 N. C., 8, and has been uniformly followed in this State for the past twenty-five years.

But it is said this rule was intended to apply to "old line" companies and not to mutual associations. Where is the essential difference in principle or in its practical result? Both companies pay back only what they have received with legal interest thereon, and neither company is permitted to retain anything for the cost of past insurance. If the mutual association receives less, it pays back less. If the "old line" company collects more than the actual cost of insurance, it pays back that much more, and loses its surplus as well as its cost of insurance.

As we see no reason to change our former judgment, the petition to rehear is denied.

Petition dismissed.

Cited: *Makely v. Legion of Honor,* 133 N. C., 370; *Johnson v. Reformers,* 135 N. C., 387; *Brockenbrough v. Ins. Co.,* 145 N. C., 364.

(469)

SIMMONS v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

(Filed 4 June, 1901.)

1. INSURANCE — *Contract — Mutual Benefit Associations — Vested Rights.*

   A mere general consent by a member of a mutual benefit association to the amendment of its by-laws and constitution does not authorize such a change as will destroy his vested rights.

2. INSURANCE—*Vested Rights—Recovery of Premiums—Remedy.*

   Where a mutual benefit association violates its contract, the most practical remedy of a member is to bring action for the premiums paid, with interest thereon.

W. W. Clark, T. B. Womack and *Simmons & Ward,* for the plaintiff.

Hinsdale & Lawrence and *Shepherd & Shepherd,* for the defendant.

DOUGLAS, J. This is an action brought to recover the assessments which the plaintiff, F. G. Simmons, has paid the defendant on a contract of insurance which the plaintiffs allege has been unlawfully cancelled by the defendant. Viewed in the light of the original contract, the facts of this case seem to bring it within the principles decided in *Strauss v. Life Association,* 126 N. C., 971, and on rehearing *ante* 465. It seems that the plaintiffs on 10 November, 1895, commenced an action based on the alleged breach of the original contract, which terminated in a compromise agreement dated 31 October,
(470) 1896. What might have been the proper construction of that compromise, or its legal effect, is not before us, as it seems to have been repudiated by both parties. This being so, the parties are relegated to their former contract. Even if the second contract were otherwise in force, it has been admittedly violated by the defendant, who can not be allowed to "approbate and reprobate" the same instrument in the same

breath. Such being the case, we see no error in the judgment of the Court below.

Affirmed.

Cited: Makeley v. Legion of Honor, 133 N. C., 370; *Johnson v. Reformers,* 135 N. C., 387; *Green v. Ins. Co.,* 139 N. C., 313; *Brockenbrough v. Ins. Co.,* 145 N. C., 355.

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(471)

PERRY v. WESTERN NORTH CAROLINA RAILROAD CO.

(Filed 5 June, 1901.)

1. RAILROADS—*Lessor—Lessee—Negligence.*

   The lessor of a railroad is liable for the negligence of the lessee in the operation of the road.

2. RAILROADS—*Negligence—Trespasser.*

   It is not error to refuse to charge that a railroad owes no duty to a trespasser except not to injure him wantonly or willfully.

3. ARGUMENTS OF COUNSEL—*New Trial—Improper Remarks of Counsel—Trial.*

   The improper remarks of counsel in this case constitute ground for a new trial.

ACTION by J. A. Perry, administrator of Pink Perry, against the Western North Carolina Railroad, heard by Judge *W. B. Councill* and a jury, at January (Special) Term, 1901, of BURKE. From a judgment for the plaintiff, the defendant appealed.

Avery & *Avery* and *Avery* & *Ervin,* for the plaintiff.
Geo. F. Bason, for the defendant.

DOUGLAS, J. This is a civil action brought by the administrator of Pink Perry, deceased, for damages for the alleged negligent killing of his intestate. The following are the issues as submitted and answered:

1. Was the injury resulting in the death of the plaintiff's intestate caused by the negligence of the Southern Railway Company as alleged in the complaint? Ans. Yes.

2. Did intestate by his own negligence contribute to (472) the injury resulting in his death? Ans. Yes.

3. Notwithstanding such negligence on the part of the said

intestate, could the Southern Railway Company by the exercise of due care and prudence have prevented the killing? Ans. Yes.

4. Is the defendant answerable for the negligence of the Southern Railway Company in causing the death of the plaintiff's intestate? Ans. Yes.

5. What damage has the plaintiff sustained? Ans. $7,000.

The following are the defendant's assignments of error:

1. The defendant assigns for error such parts of the charge of the Court as are embraced by exceptions 1, 2, 3 and 4.

2. To the refusal of the Court to give the instruction numbered 13, which was prayed for by defendant.

3. To the refusal of the Court to sustain defendant's objection to the remarks of counsel as set out in its sixth exception.

4. To the finding of the Court of the fourth issue in the affirmative.

5. To the refusal of the Court to grant a new trial.

The first assignment can not be sustained. His Honor's charge was full, occupying 13 pages of the printed record, and, we think, fairly presented the case. The defendant's exceptions to the charge are somewhat "broadside" in their nature, one of them including nearly two pages of the printed charge in a single exception. We have, however, examined the charge, and think it should be sustained upon its merits. As the questions involved have been so recently and so elaborately discussed by this Court, and as a new trial must be granted upon the third exception, we do not think it necessary to further comment upon the charge.

The second assignment can not be sustained. We suppose it refers to the sixth exception, although the prayer itself is not numbered in the records. This exception could not have been given, as it is against the uniform current of our decisions.

The fourth assignment is without merit, as the question involved has been directly decided in *James v. R. R.*, 121
(473) N. C., 523. Why it should have been put in the form of an issue in the case at bar does not clearly appear to us. As a common carrier, chartered by the State, assumes certain obligations to the public of which it can not absolve itself by its own act alone, it is primarily liable for all injuries caused by the negligent management of its road. In any event, the burden rests upon it of showing such facts as will release it from its *prima facie*, and we might almost say, its inherent liability. No such evidence appearing, there was no error in the direction of his Honor.

The matter seems to have been presented as a pure question

of law. It is true counsel agreed in the Court below that all evidence bearing upon this question, whether record, documentary or oral, that had been offered in *James v. R. R.*, 121 N. C., 523, 530, should "be considered as introduced" in the present case. No such evidence appears in this record, and we do not feel called upon to review the James case. That a railroad company leasing its road is liable for the negligence of its lessee in the operation of the road, is well settled in this State. *Aycock v. R. R.*, 89 N. C., 321, 330; *Logan v. R. R.*, 116 N. C., 940; *Norton v. R. R.*, 122 N. C., 910, 937. The third assignment of error has given us considerable difficulty, but we are forced to the conclusion that it must be sustained. The following statement is taken from the record: "During the course of the argument by one of the plaintiff's counsel, he took occasion to compliment R. E. Simpson, conductor of a material train, and to state that he was a man of good character; had been known to him all of his life; that he had no intention to attack him and that he believed that Mr. Simpson intended to tell the facts correctly as far as they came under his observation. He said further, however, that he regretted that he could not say so much for the witnesses Black and Hendricks, and it was transparent to every one who heard the examination that they were not fair and im- (474) partial witnesses, but were influenced by the fact that they were employees of defendant. He further stated that he had once thought that a man could take employment from this railroad company and yet feel free to tell the whole truth upon the witness stand, but that his observation within the last few years in the courthouse had taught him that men who held their place at the will of a railroad company were, as a rule, subjected to great temptations which most of them could not withstand. He then said: 'I will give you an instance without mentioning any names. I was trying a case against the same defendant when an engineer was placed upon the witness stand whom I had known for 25 years, and whose character I would have sworn to upon the stand, was good. This man had been discharged for carelessness by this company and re-employed two or three months before the trial. He was introduced for the company, and on his cross-examination in chief so stated the facts bearing upon the question of negligence, in the case then on trial, as to acquit the defendant of all blame. On the cross-examination, counsel who appeared with me handed him a printed statement purporting to have been theretofore made by him giving a full account of the facts which he had just professed to narrate, and which printed

statement, signed by him, was utterly contradictory of his evidence as just delivered, and that thereupon he broke down and begged with tears in his eyes that the paper should not be shown to him. Counsel further stated that he didn't then abuse that witness, for he felt he had perjured himself to put bread in the mouths of his children. He then said that he wished the jury in passing upon the testimony of employees Black and Hendricks to recollect that their bread and meat depended upon the managers of the Southern Railway Company. During the course of this argument the defendant, through their counsel, arose and objected to such argument being (475) made. The Court overruled the objection, and one of the counsel for defendant, S. J. Ervin, stated to his associate, G. F. Bason, the leading counsel in the case, in a tone audible to the Court, "Why don't you except?" and in reply Mr. Bason said, "I do not have to except now." ' Defendant's counsel upon the statement of this case upon appeal insisted that his language was intended to convey the idea that he did except to the language, whereupon the Court allows such exception."

The exception does not appear to have been taken in a very regular manner; but as his Honor has allowed it, evidently for the purpose of giving the defendant the fullest opportunity of appeal, we will examine it in the spirit in which it was allowed.

This Court has said in *McLamb v. R. R.*, 122 N. C., 862, 872: "Much allowance must be made for the zeal of counsel in a hotly contested case, especially where the colloquy is mutual; and indeed much latitude is necessarily given in the argument of a case where there is conflicting evidence; but counsel should be careful not to abuse their high prerogative, and where the remarks are improper in themselves, or are not warranted by the evidence, and are calculated to mislead or prejudice the jury, it is the duty of the court to interfere." The same remarks will apply to the case at bar. If the witness had misbehaved in any way upon the stand, either in words or manner, or showed any bias either of fear or favor, their testimony would be the proper subject of comment by counsel. In cases where the direct testimony of witnesses is diametrically opposite, some of the witnesses must be testifying improperly, either to that which they know is not true or to that of which they have no knowledge. In such circumstances it is natural that the counsel should attribute such false testimony to the opposing witnesses. Whether he exceeds his privilege in (476) doing so must necessarily be left largely to the discretion of the Judge trying the case, who, hearing the testimony and seeing the behavior of the witnesses can judge far

better than any one else of the propriety of his comments. If that were all, we would hesitate to interfere; but counsel went far beyond any testimony in the case, and, over the objection of the defendant, related facts within his personal knowledge, not of common information, and which were not in evidence. These facts were essentially damaging in their nature, and, coming from so high a source, were capable of producing the most dangerous prejudice. That the counsel intended no impropriety, which we cheerfully admit, does not alter the case. The fact remains that such statements, coming from one of his high character and exalted position in his profession, became only the more dangerous when addressed to jurors whose confidence he justly possessed. Such statements were not in evidence, and were not properly admissible in the argument of counsel.

For the failure of his Honor to interfere at the request of opposing counsel, a new trial must be ordered.

New trial.

MONTGOMERY, J., concurs in the conclusion reached in the opinion of the Court that a new trial must be had and for the reason assigned. He thinks, however, that his Honor should have given No. 13 of the defendant's special prayers for instruction, which was in the following language: "If the jury find from the evidence that intestate went to defendant's depot for the purpose of beating a ride on one of defendant's trains, then intestate was a trespasser from the moment he entered defendant's premises and the defendant owed him no duty except not to injure him wantonly or wilfully or with such carelessness as amounts to a reckless disregard of consequences." And it follows, therefore, if that view is correct, that that part of his Honor's charge which laid down the law (477) governing the defendant's duty toward the intestate and its liability for the injury inflicted on him as that which would be applicable to one who had a right to be at the depot—excepted to by the defendant in 1, 2, 3 and 4 of its exceptions—was erroneous. The witness Brittain testified that the intestate told him a short time before he was killed that he intended beating his way on the train to Hickory from Morganton.

COOK, J., concurs in above.

Cited: S. c., 129 N. C., 334; *Harden v. R. R., Ib.*, 359; *Brown v. R. R.*, 131 N. C., 458; *S. v. Tuten, Ib.*, 703; *Hopkins v. Hopkins*, 132 N. C., 27; *S. v. Tyson*, 133 N. C., 696.

CUTLER v. ROANOKE RAILROAD AND LUMBER CO.

(Filed 5 June, 1901.)

1. CANCELLATION OF INSTRUMENTS—*Fraud—Deed—Sufficiency of Evidence—Fraud in Treaty—Fraud in Factum—Contract.*

Evidence in this case as to fraud in making a deed was sufficient to submit to the jury.

2. EVIDENCE—*Competency—Parol Evidence—Deeds—Fraud.*

Evidence to vary and contradict the terms of a deed is competent upon the question whether there was fraud in making the deed.

ACTION by J. M. and J. A. Cutler against the Roanoke Railroad and Lumber Company, heard by Judge *T. A. McNeill* and a jury, at Fall Term, 1900, of WASHINGTON. From a judgment for the plaintiffs, the defendant appealed.

(478) *H. S. Ward,* for the plaintiffs.
A. O. Gaylord, for the defendant.

FURCHES, C. J. This is an action to recover damages for trespass by defendant on the land of the plaintiff, for timber cut and removed from said land and to vacate a deed dated 17 March, 1899, or to have it corrected.

It appeared on the trial and was admitted by all parties, that the plaintiff had conveyed all the timber on the land embraced in the deed of 17 March, 1899, to the defendant, by deed dated 28 February, 1887, of a size above 13 inches diameter at the stump; and that the time in which defendant was to cut and remove said timber had not expired by some months. The allegation of the plaintiff is that on 17 March, 1899, one Freeman, agent of the defendant, came to him in the store of one Bowen, and stated to him that since the date of the first deed, 28 February, 1887, other timber on the land had grown to thirteen inches and proposed to buy that growth; or, in other words, to buy all the timber on said land above 13 inches; that defendant did not want any further time in which to get said timber off the land—said that it would all be taken off by June, which was within the time named in the original deed. The original deed of February, 1887, authorized the defendant to put such tramroads on said land as might be necessary to remove the timber therefrom.

The plaintiff alleges that the contract was to sell defendant the growth of the timber since the date of the first deed, to 13

inches, for $25.00, and that this was the only contract that was made. The case rests on the plaintiff's testimony, which is as follows:

"The bargain between me and Mr. Freeman, the defendant's agent, for the sale of the timber under the deed of 17 March, 1899, was made at Horace Bowen's store. Freeman said that the company would cut the timber I had sold to it by deed of 13 June, 1887 (which was same sold in last deed (479) before the time went out on 13 June, 1899), and that the company didn't want any more time, but that there was a lot of timber on the land that had grown up over thirteen inches at stump since that deed was executed, that they could not cut under that deed, and that the company wanted to buy the growth that had grown up since 13 June, 1887. I thought they would break it to pieces in cutting the other, so I agreed to sell it. I told him I would not sell him any more time on the other timber because he wouldn't offer me as much as he was offering others in the neighborhood. He said all right he didn't want anything but the growth, as he already had the balance. When we bargained, I went home to get my wife to sign the deed. It was about one-half or three-fourths of a mile. He went along with me to where the log was across the path, where we could not pass. He was in a buggy. I walked. I left him at the log to write the deed while I went to the house for my wife. When I got back he had the deed written. It was late in the evening, the sun was about an hour high. His horse was so restless he wouldn't be still a minute. He said to me, 'Make haste and sign it; it is late and I am in a great hurry. I've got to go to Washington tonight. This horse hasn't got sense enough to stand still.' My son was off some distance cutting wood. He handed me the deed to sign and asked me if I wanted to read it. I told him that if it was like the bargain he made it was all right. He said it was just as the bargain was. That he would have all the timber cut off by June and before. I thought he was telling me the truth, and I trusted to his honesty. He paid me only $25.00 for the timber passed in this deed and didn't read it. I can not read good. I didn't have my glasses and when I tried to read without them the lines ran together. I can read print better (480) than writing. The timber is described in the printed part of the deed. I can read the words of the printed part of the deed as the counsel moves his pencil to them, but the lines at once run together when he stops (counsel here took the deed, pointing with his pencil to portion of it and witness's state-

ments were in reference to the principal portions of the paper). Freeman was notary and took my acknowledgment and examination of wife. I thought when I signed the deed it did not convey all my timber, and was misled and induced to sign it by the statement of Freeman that it was as we bargained."

The Court thought this testimony sufficient evidence of fraud to submit the question to the jury, and this is the question presented by the appeal.

Frauds affecting the validity of deeds are of two kinds—fraud in the factum, and fraud in the treaty. This distinction, though not as material now as formerly, is still material in some cases. *Medlin v. Buford,* 115 N. C., 260. Besides the importance of the distinction pointed out in *Medlin v. Buford,* it was important before the junction of legal and equitable jurisdiction in the same Court, to determine the jurisdiction, as courts of law had jurisdiction of frauds in the factum, but not of frauds in the treaty which were cognizable alone in courts of equity. This made it important to determine, before commencing the action, whether it was fraud in the factum or fraud in the treaty, as the proper Court in which to bring the action depended on this distinction. And while the distinction is important, it is not of that importance that it formerly was, as one is sure now to get into the right Court, if there is fraud whether in the factum or in the treaty. In this case, while there may be some slight evidence of fraud in the factum—such as the unsuitable place where the deed was executed, the apparent haste with which it was done, the remarks of defendant's

(481) agent to hurry and sign the deed—that his horse did not have sense enough to stand; that it was then late and he had to go to Washington that night, a distance of 18 miles. Besides, it seems to us that Freeman was doing a little too much. He was agent of the defendant company and an officer of the law. When the deed was signed he moved "the previous question" and by taking the acknowledgment and privy examination, undertook to "lay the matter on the table." We do not say that he could not in law take this acknowledgment and privy examination, but these things, taken in connection with the fact that the deed was not read to the parties making it, is some evidence we think of fraud in the factum.

But leaving out of the case these suspicious circumstances we have just stated, it seems to us to be a case that should have gone to the jury upon the evidence of fraud in the *treaty.* In *McArthur v. Johnson,* 61 N. C., 317, the Court held that plaintiff could not recover, and that was a case very much like this, except there was no question in that case but what the plaintiff

could read. In this case the evidence leaves the question whether plaintiff could read in doubt. And if this was a material question in the case it should have been left to the jury. The case of *McArthur v. Johnson* was brought in the Superior Court of *law* before it had equitable jurisdiction, and the Court held that it was not a case of fraud in the *factum*, and the plaintiff could not recover. But in the discussion of the case the Court lays down the distinction between fraud in the factum and fraud in the treaty; and while the Court did not decide that that case was a case of fraud in the treaty it seems to us that the definition given in the discussion of the case shows that it was. And the same doctrine is held in *Gant v. Hunsucker*, 34 N. C., 254; 55 Am. Dec., 408, while the more recent case of *Medlin v. Buford*, 115 N. C., 260, which seems to be put largely on *McArthur v. Johnson*, clearly shows (482) that this case is one of fraud in the treaty, if plaintiff's evidence is to be believed; and we have nothing to do with that, as it is purely a question for the jury.

In *Medlin v. Buford*, the plaintiff signed a paper upon the representation of Davis that it was a power of attorney authorizing him to raise $1,000, to invest for her benefit, at a profit of $25 per month. The plaintiff in that case could read, but did not read the deed; was imposed upon by the false representation of Davis as to the *contents* of the deed, and the Court held that this was not a fraud in the *factum*, and as third parties who were innocent of the fraud had become interested, the plaintiff could not recover. But it is distinctly held that it was a fraud in the *treaty*, and would be declared void as to Davis, and also as to Mrs. Buford, if she or her attorney (Mr. Cutler) *had knowledge of the fraud.*

The distinction between fraud in the factum and fraud in the treaty seems to be very narrow, but still it exists and it seems still important that it should be observed as in the case of *Medlin v. Buford.*

While it is important to observe these ancient landmarks and to give force and validity to the doctrine of fraud as applied to executed contracts—to deeds—it should not be lightly done. Misrepresentations in the treaty as to location, boundaries, quality, value, etc., of which the other party had notice, or might have had knowledge by reasonable diligence, will not be heard by courts of law or equity to invalidate deeds. If this were so, it would seem that no man's title would be safe. Parties entering into solemn contracts, such as deeds, must use ordinary prudence—must examine matters open to them at the

time of executing their deeds, or they will not be heard to complain. *Lytle v. Bird,* 48 N. C., 222; *Saunders v. Hatterman,* 24 N. C., 32; 37 Am. Dec., 404.

In this case it appears from the deed of 28 February, 1887, that plaintiff sold and conveyed to defendant all the
(483) timber on a certain tract of land containing ninety acres, above 13 inches at the stump, with the privilege of establishing tramroad across said land to be used in removing said timber. In the deed of 17 March, 1899, he conveys all the timber above 12 inches at the stump and conveys the fee simple in all the land covered by these roads. And extends the time to remove the timber to one year from 17 March, which would have been out at an earlier period.

If the plaintiff's statement of the contract of 17 March, 1899, be true, the changes contained in the deed as drawn by Freeman and signed by plaintiff are materially different; and as this deed was not read by plaintiff (as he says) because he could not read it without his spectacles, which he did not have, but was signed by him, relying on the statements of Freeman "that it was drawn just as the contract was," was a fraud in the treaty upon the plaintiff and should have been submitted to the jury.

If the plaintiff had required it to be read and Freeman had read it falsely it would have been a fraud in the factum. *McArthur v. Johnson, Medlin v. Buford, supra.*

There were objections to the plaintiff's evidence as to the terms of the contract, upon the ground that they tended to vary and contradict the deed. This would have been so if the deed had been established as the deed of the plaintiff. But when that was the very question at issue, and when it was necessary to do so to establish the alleged fraud, it was competent for that purpose. And after a careful examination, we find no substantial error, and the judgment is

Affirmed.

DOUGLAS, J., concurring. I can not concur in the contention of the defendant, that because two men are at arm's length, as all men generally are, unless they occupy some
(484) fiduciary relation to each other, one can safely perpetrate a fraud upon the other. This rather novel doctrine seems to be based upon the idea of contributory negligence on the part of the plaintiff, which, concurring with that of the defendant, becomes the approximate cause of the fraudulent result. This application of the doctrine of contributory negligence is new to me; but even if it were admissible, it could not be a defense

in the present action, because actual fraud is always wilful. Even in actions sounding in damages the defense of contributory negligence is never available against wilful injury. Then why should it be a defense against wilful fraud? I will readily admit that if the negligence of the plaintiff had enabled the defendant to perpetrate a fraud upon a third party who was himself innocent of fraud or negligence, he could not recover from such innocent party. Such a case is far different from the one presented to us in the opinion of the Court.

A man might be negligent in walking in the middle of the street on a dark night, and such negligence might excuse the driver of a wagon for unintentionally running into him, but it would be no excuse for robbery. The doctrine that mere negligence puts a man beyond the pale of the law, can never receive my assent.

The defendant relies upon *Dellinger v. Gillespie,* 118 N. C., 737, the essential point in which was the fact that the defendant discovered the alleged fraud *before the work was commenced,* and yet permitted the plaintiff to proceed and put up the lightning rods without objection. The Court said that such conduct was a waiver of the alleged fraud if it ever existed; and that equity would not permit a man to accept work performed after he had full knowledge of all the facts, and then refuse to pay for it.

It is true in that case the Court also said that the defendant was guilty of negligence, and cited *Boyden v. Clark,* 109 N. C., 664, 669, a case which, I respectfully submit, fur- (485) nishes no foundation whatever for the contention of the defendant in the case at bar. Some isolated sentences in the opinion, considered without regard to the essential facts of the case, might offer some show of authority; but the case itself, taken as a whole, fails to do so. The defendant, Clark, bought the equitable interest of one Sherrill, who held a bond for title from James Harper. Clark subsequently paid Harper the remainder of the purchase money, and took a deed from him. The plaintiff, Boyden, who had bought an adjoining tract, sought to hold Clarke responsible for alleged representations of Sherrill, although Clark was an innocent purchaser, for a valuable consideration, without notice, and held title under Harper, and not under Sherrill. The Court says (109 N. C., page 667): "It would be giving very great latitude to the doctrine of estoppel *in pais* if the mistake or fraudulent statements of a vendee, occupying land under a contract of sale, were allowed to have the effect of establishing title by estoppel, as against the original vendor and the assignee of the original vendee, after the

vendor had performed his contract by conveying to the assignee, *both grantor and grantee being ignorant of the fact that any misrepresentation had been made.*"

That case as thus stated in the opinion itself furnishes no authority for the doctrine now contended for by the defendant, that, as between the original parties, mere negligence is a defense for wilful fraud.

To the contrary may be cited a practically unbroken line of authorities. Fetter Equity, sec. 87, page 136, says: "But no obligation rests on him to investigate or verify the representations, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith. In a court of equity no man can complain that another has too implicitly relied on the truth of what he himself has (486) stated."

Beach Mod. Eq. Jur., sec. 95, says: "A false representation of one of the parties to a contract does not put the other on inquiry as to its truth. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."

Story Eq. Jur., sec. 154, says: "The danger of setting aside the solemn engagements of parties when reduced to writing, by the introduction of parol evidence, substituting other material terms and stipulations, is sufficiently obvious. But what shall be said where those terms and stipulations are suppressed or omitted by fraud or imposition? Shall the guilty party be allowed to avail himself of such a triumph over innocence and credulity to accomplish his own base designs? That would be to allow a rule introduced to suppress fraud to be the most effectual promotion and encouragement of it. And hence courts of equity have not hesitated to entertain jurisdiction to reform all contracts where a fraudulent suppression, omission, or insertion of a material stipulation exists, notwithstanding to some extent it breaks in upon the uniformity of the rule as to the exclusion of parol evidence to vary or control contracts; wisely deeming such cases to be a proper exception to the rule, and proving its general soundness."

Bispham Eq., sec. 202, says: "There is, indeed, a distinction between deeds and other instruments which a man intends to execute, though his intention may be brought about by fraudu-

lent means, and those which he has no intention to execute, but executes under the impression that the instrument is of a different character from what it actually is, or, in (487) other words, executes the wrong paper. In the latter case the instrument is absolutely void, and the law above stated in relation to voidable instruments would, in general, not apply."

Again the learned author says, in section 207: "A man who is dealing with another has a right to rest upon an assertion of a *fact* made by the latter; but he has no right to rely upon the latter's opinion, unless, indeed, he is an expert, in which case the parties do not deal upon equal terms, and the ordinary rule does not apply."

Neither space nor time will permit an examination of the numerous authorities cited by these different authors. I will quote but two:

In *Redgrave v. Hurd,* 20 Ch. Div. 1, the celebrated Sir George Jessel, Master of the Rolls, says: "Nothing can be plainer, I take it, on the authorities in equity, than that the effect of false representation is not got rid of on the ground that the person to whom it was made was guilty of negligence."

In *Sutton v. Morgan,* 158 Pa. St., 204, 218; 38 Am. St., 841, 844, the Court says: "It is said that Williams should have inquired for himself, and that his opportunities of obtaining information were just as good as those of Morgan. This may be. Prudence should have led him and his 'financial man' Sutton to test the truth of the glowing statements made by Morgan and Gloss, but it did not. They fell easily into the trap which was set, with some skill and some effrontery, for them; but their neglect, or want of prudence, can not justify the falsehood or fraud of those who practiced upon their credulity. The doctrine of contributory negligence can not be invoked by the defendants to save them from liability for misleading their victim. They must stand or fall on the truth, and good faith, of the representations that led to the sale." This opinion is particularly striking on account of its conclusion. While granting the prayer of the plaintiff for the rescission of the contract, the return of the money (488) paid and the cancellation of the mortgage, it concludes as follows: "For his gross carelessness the plaintiff ought to lose his costs. No bill of costs will be taxed for the plaintiff."

There is an essential difference between actual misrepresentation and the mere concealment of material facts of which

both parties had equal opportunities of information; but the latter principle I am not now discussing. A common instance of correcting a written instrument which both parties might have read, is where a deed absolute in form is construed to be a mortgage.

It seems to me that every principle of equity that would grant relief from fraud in the treaty, would apply with even greater force to fraud in the *factum.*

Whether there was sufficient *evidence of fraud,* in the case at bar to go to the jury, is an entirely different question; but even on that I concur with the Court.

CLARK, J., concurring in result. The charge here is fraud in the *factum,* in the execution of the deed after grantor consented to sign it, and not in the preliminary representations or treaty. The complaint alleges that the plaintiff agreed with one Freeman, agent of the defendant, to sell a part of the timber, whereupon the said agent of the defendant company drew the deed while plaintiff went off to get his wife; that on his return the deed was already drawn up, but plaintiff having left his spectacles, was unable to read it; that he asked Freeman the contents of it, and was assured that it was a conveyance only of the specified timber, and plaintiff, relying upon the truth of such, signed and delivered the deed, whereas, the timber actually conveyed was all the timber on the land, (489) and the price paid ($25.00) was not one-twentieth in value of the timber conveyed; wherefore, plaintiff charges that the execution of the deed was procured by fraud, and asks that the deed be reformed so as to convey only the timber agreed to be sold, and for recovery of $400, the value of timber already cut, outside of the kind it was agreed the plaintiff was to convey.

The plaintiff introduced evidence in full support of above contention, and, as a further circumstance in corroboration of the charge of fraud, evidence, which was admitted without objection; that when he got back, not having his spectacles, Freeman said to him, "Make haste and sign it; it is late and I am in a great hurry. I've got to get to Washington tonight. This horse hasn't got sense enough to stand still." The plaintiff contends that this, together with the gross inadequacy of price, $500, for $25, and difference between the deed as written, and as it was agreed to be written and the fact that Freeman told plaintiff the deed was written as agreed, and knew plaintiff could not read without his glasses, was evidence to go to the jury to show imposition and fraud by trick and device. As the de-

fendant's exception is for refusal to tell the jury that there was no evidence, this evidence of the plaintiff must be taken as true and in the most favorable aspect for the plaintiff.

Taken as true, no court of equity could refuse the relief asked. The jury found that it was true. The following issues were submitted without objection:

1. Was the deed from J. M. Cutler and wife to the defendant, dated 17 March, 1899, obtained by fraud? Ans. Yes.

2. If so, what was the value of the timber? Ans. $243. The latter evidently meaning from complaint and judgment, the value of timber cut in excess of what was agreed to be paid.

The defendant asked the following special instructions, which were given with the modification below recited:

1. That if the jury find from the testimony that the (490) plaintiff, J. M. Cutler, when he executed the deed to defendant, on 17 March, 1899, could have read it, if he had so desired, and failed to do so, then he is bound by it and can not be heard to say that a fraud was practiced upon him by defendant's agent, S. F. Freeman, by inserting in said deed more timber than said Cutler thought was therein, and more than said Freeman told him was conveyed by it. And if he could by reasonable diligence have ascertained the contents of said deed, it was his duty to do so; and if you find that he failed to do so, by not reading it, you will answer the first issue "No."

2. That from all the evidence, if believed, the plaintiff, J. M. Cutler, could have read the deed of 17 March, 1899, before signing it, and could have ascertained thereby what timber it conveyed and his failure to do so, if he did fail, does not relieve him from the operation of said deed, and you will answer the first issue "No."

3. That the deed of 13 June, 1887, conveyed all the timber on the land described in the complaint down to 13 inches on the stump to the defendant in fee simple, and the deed of 17 March, 1899, by the plaintiff's admission, conveys the timber on said land down to 12 inches, which had grown to that size since 13 June, 1887, and the legal effect of these deeds is to convey all the timber on said land to defendant, and to give defendant the right to enter and cut and remove the same, and you will answer the second issue "Nothing."

These charges were given with this modification to each: "Unless you shall find from the evidence that the company, by its agents, made a false representation as to the contents of the deed, and in reliance on this statement or representation, the

agent knowing it to be false, he (plaintiff) signed the deed, and was defrauded thereby in the respect complained
(491) of."

(To this modification the defendant excepts).

Those instructions were asked by defendant and were the strongest possible presentation of defendant's case. The modification was eminently proper to be submitted to the jury in view of the uncontradicted evidence that plaintiff could not read without his glasses; that Freeman was urging to hurry him up and sign, that his horse would not stand, etc., the evidence tending to show gross inadequacy in price, and that the deed was written differently from agreement, and Freeman's misrepresentation that it was written as agreed. Without holding it illegal, it is proper to say that for the defendant's agent who procured the execution of the deed to take the acknowledgment of the grantor, and the privy examination of his wife, is a practice to be avoided, not followed.

Dellinger v. Gillespie, 118 N. C., 737, was correctly decided. It holds that where a grantor negligently fails to read a deed, *no fraud or deceit being shown,* he can not be allowed to contradict its terms by parol evidence by showing that he intended something else.

But here the very gravamen of the complaint is fraud in the factum, the taking advantage of plaintiff's inability to read, the writing it differently from the way it was agreed to be written, the urging plaintiff to hurry up and sign it, knowing he could not read it without going to his house a half-mile off on foot to get his spectacles.

While every presumption is in favor of the "written word," no deed is proof against fraud. Whether this evidence proved fraud was a matter which only a jury could pass upon. In submitting it to that tribunal, which the Constitution says is "one of the best securities of the rights of the people and ought to remain *sacred and inviolable,*" his Honor did only his duty.

There being disputed matters of fact, the plaintiff had
(492) an inalienable right to have the truth of the evidence passed upon by a jury of his peers. The misrepresentations here are not as to matters in the treaty, as to which both parties had equal opportunity for examination, but as to the contents of a deed drawn by one of them, which the other could not read without his glasses, and who at the same time was urged to sign at once without going for his glasses. It was exactly as if the same advantage had been taken of a blind man, if plaintiff's evidence is to be believed, and whether it was to be believed or not, no one could decide save a jury, to whom therefore the Court properly submitted it.

Juries may sometimes be prejudiced, but knowing that Judges are "men of like passions," the wisdom of the ages has properly provided that disputed facts shall be passed upon by twelve impartial men drawn from the body of the people, and at once returning to them, with unlimited challenge for favor and a reasonable number of challenges without cause assigned. Besides, if the verdict shows bias, or mistake, or is upon insufficient evidence, the Judge can set it aside without assigning cause. *Hardy v. Hardy, ante,* 178. There is thus every protection. But if the Judges take to deciding the facts, there is no protection against bias, or negligence, or incompetence, and no power to set aside their verdict. Every consideration therefore demands that the evidence should be submitted to the jury, unless it is clear that there is not a *scintilla* in favor of him upon whom rests the burden, and that upon the evidence only one conclusion (and that adverse to the plaintiff) can be drawn. The Judge below had power to set the verdict aside if he doubted the sufficiency of the evidence, and submit the issue to another jury. That is the proper remedy. It is not for this Court upon this evidence, to adjudge that the evidence was not sufficient to prove fraud, and thus deprive the plaintiff altogether of a right to trial by jury.

MONTGOMERY, J., dissenting. The plaintiff and his wife in 1899 executed to the defendant a deed, on the face of which there is conveyed all the timber on the land de- (493) scribed in the deed. This action is brought to have the deed set aside and declared void, except as to the growth of timber to a certain size since 1887, on the ground of fraud; and also for the recovery of $400, the alleged value of timber, which the defendant is alleged to have wrongfully cut and removed from the land by virtue of the provisions of the deed. The fraud alleged is set out in allegation 3 of the complaint, and is as follows:

"3. That the defendant company, as this plaintiff is informed and believes and avers, claimed the right to go upon said land and remove said timber, by virtue of a deed executed to the said defendant by J. M. Cutler, registered in Book 41, page 236, which deed the plaintiff alleges was obtained by the defendant company by fraud, in the manner and method as follows: The said company, through its agent, S. F. Freeman, on 17 March, 1899, proposed to the said J. M. Cutler to buy the timber on said land which had grown to merchantable size since June, 1887, and expressly stated that he did not want to buy any other, and for said timber offered to said J. M. Cutler

the sum of $25, which offer said Cutler accepted and authorized said Freeman to draw deed for said timber, which had grown up since 1887, as aforesaid, and no other, and left the said Freeman alone to write said deed, and on his return found the deed filled out and ready for signing. That the said J. M. Cutler was unable to read the said deed at that time and did not read it, but asked the said Freeman as to the contents of it, and he, the said Freeman, expressly stated that the deed conveyed only the timber that had grown up since 1887, and did not convey any other, nor any rights to any other, and the said Freeman so read the deed to said Cutler, from which it appeared that no interest passed except as above stated, and
(494) relying upon that representation and reading and statement of said Freeman, said Cutler signed and delivered said deed."

The allegation of fraud is both in the *factum* and in the inducement or treaty. In *McArthur v. Johnson,* 61 N. C., 317, it was said by the Court: "Another instance (fraud in the factum) is afforded by the case of a deed executed by a blind or illiterate person, where it has been read falsely to him upon his request to have it read." Upon the trial, however, the plaintiff's own testimony disproved the allegation of fraud in the *factum,* and in the argument before this Court the plaintiff's counsel abandoned that view of the case and relied entirely upon fraud in the treaty.

I will now consider that aspect of the case. The evidence of the plaintiff consisted of his own testimony alone, which was as follows:

"The bargain between me and Mr. Freeman, the defendant's agent, for the sale of the timber under the deed of 17 March, 1899, was made at Horace Bowen's store. Mr. Freeman said that the company would cut the timber I had sold to it by the deed of 13 June, 1887 (which was same sold in last deed before the time went out on 13 June, 1899), and that the company didn't want any more time, but that there was a lot of timber on the land that had grown up over 13 inches at stump since that deed was executed; that they could not cut under that deed, and that the company wanted to buy the growth that had grown up since 13 June, 1887. I thought they would break it to pieces in cutting the other, so I agreed to sell it. I told him I would not sell him any more time on the other timber, because he wouldn't offer me as much as he was offering others in the neighborhood. He said all right, he didn't want anything but the growth, as he already had the balance. When we bargained, I went home to get my wife to sign the

deed. It was about one-half or three-fourths of a mile. He went along with me to where a log was across the path, where he could not pass. He was in buggy. I walked. (495) I left him at log to write the deed while I went to house for my wife. When I got back he had the deed written. It was late in the evening, sun about an hour high. His horse was so restless he wouldn't be still a minute. He said to me, 'Make haste and sign it; it is late and I am in a great hurry. I've got to go to Washington tonight. This horse hasn't got sense enough to stand still.' My son was off some distance cutting wood. He handed me the deed to sign and asked me if I wanted to read it. I told him that if it was like the bargain we made, it was all right. He said it is just as the bargain was. I will have all the timber cut off by June and before. I thought he was telling me the truth, and I trusted to his honesty. He paid me only $25 for the timber, passed in this deed and didn't read it. I can not read good. I didn't have my glasses, and when I tried to read without them the lines run together. I can read print better than writing. The timber is described in the printed part of the deed. I can read the words of the printed part of the deed as the counsel moves his pencil to them, but the lines at once run together when he stops. (Counsel here took the deed, pointing with his pencil to portions of it and witness' statements were in reference to the principal portions of the paper). Freeman was notary, and took my acknowledgment and examinations of wife. I thought when I signed deed it did not convey all my timber, and was misled and induced to sign it by the statement of Freeman that it was as we bargained."

Freeman, as a witness for the defendant, testified, that the deed was drawn according to the agreement; and Jordan, another witness for the defendant, said that the plaintiff told him that "Freeman offered to read the deed, or to let him (plaintiff) read it; that he did neither, and did not know its contents." But the evidence of the defendant is of no consequence in this appeal, and is only referred to in fairness to (496) the defendant. The admission of the plaintiff's evidence in reference to the treaty leading up to the sale, in plain contradiction of the terms of the deed, and the further admission of the plaintiff's evidence that he was induced to sign the deed upon the statement and representation of Freeman, that only the growth of timber since 1887 was conveyed in the deed, and the charge of his Honor upon that evidence, are before us for consideration.

The transaction was between parties who were dealing as

strangers, there being no relation of confidence between them. The deed was drawn by the grantee's agent and handed to the grantor for his signature and that of his wife. The grantor, the plaintiff and his wife could both read and write, and they signed the deed without reading it, or without asking that it be read to them. If a fraud was perpetrated by Freeman, the agent of the defendant, as is alleged in the complaint, the plaintiff can not have relief because his execution of the deed under the facts of this case was negligence on his part. *Dellinger v. Gillespie,* 118 N. C., 737. He should have read the deed, or have had Freeman to do so. The deed was before him; he had every opportunity to read it, and there was not only no trick or device practiced on him to procure his signature, but there was none charged in the complaint. The plaintiff himself testified: "I thought when I signed the deed it did not convey all my timber, and was misled and induced to sign it by the statement of Freeman that it was as we bargained." By his own evidence, the plaintiff executed this deed, relying as to its contents upon the statement made by one with whom he was dealing as a stranger, and not as with one in whose statements he had in law the right to confide. If the plaintiff has been cheated it was his own fault, and the fraud, if there has been fraud, was perpetrated successfully through the plaintiff's own negligence in failing to read the deed.

It was argued here by the plaintiff's counsel that the request made by Freeman to the plaintiff when he handed him
(497) the deed—"make haste and sign it; it is late and I am in a great hurry; I have got to go to Washington tonight; this horse has not got sense enough to stand still"—was some evidence tending to prove a trick or contrivance on the part of Freeman to procure the plaintiff's signature to the deed without reading it. In my opinion, it was not sufficient to be submitted to the jury as evidence; and certainly from the plaintiff's own testimony it made no impression upon him, for in his complaint he does not set up that matter as a trick or device to get his signature to the deed, or any other trick or device as we have already seen.

I think there was error.

Cited: *Dorsett v. Mfg. Co.*, 131 N. C., 259; *Hayes v. R. R.*, 143 N. C., 129.

(498)

VANDERBILT v. BROWN.

(Filed 5 June, 1901.)

1. JUDICIAL SALES—*Commissioners—Confirmation—Title—Ejectment.*

A purchaser at a judicial sale acquires no right before confirmation of the sale.

2. EVIDENCE—*Burden of Proof—Ejectment.*

Plaintiff in ejectment does not admit the validity of a worthless bond for title, introduced by him in evidence for the purpose of shifting to the defendant the burden of showing the better title.

3. EJECTMENT—*Estoppel—Partition—Commissioners—Common Source of Title.*

Plaintiff in ejectment is not estopped to set up a title derived from a person as heir who had formerly, as commissioner to make partition sale, given bond to convey to defendant.

4. EJECTMENT—*Estoppel.*

That defendant in ejectment owns an interest in the land in controversy does not bar recovery of plaintiff.

5. HUSBAND AND WIFE—*Married Women—Estoppel—Judicial Sales.*

Married women have no power to agree to an irregular sale of land by commissioners so as to estop them from claiming against title under the sale.

6. INSTRUCTIONS—*Part Erroneous—Part not Erroneous—Trial.*

Where part of a requested instruction is erroneous, the court may refuse to give the instruction.

7. ISSUES—*Instructions—Trial.*

A general instruction that plaintiff "can not recover" is improper in this State, as a case is submitted on special issues.

(499)

ACTION by G. W. Vanderbilt against Butler Brown, Wm. Sizemore, Andrew Sizemore and T. L. Jenkins, heard by Judge *O. H. Allen* and a jury, at Fall Term, 1900, of TRANSYLVANIA. From a judgment for the plaintiff, the defendants appealed.

Merrimon & Merrimon, for the plaintiff.
Geo. A. Shuford, for the defendants.

CLARK, J. The exceptions by defendants to the introduction of deeds are without merit and it is unnecessary to discuss them. The appellee says in his brief, "When plaintiff rested his case, defendant made the usual motion to nonsuit and the Court made the usual ruling upon it, and defendant made the

usual exception." The plaintiff made out a *prima facie* case upon the record as usual and the motion was properly refused.

The issues submitted were the usual ones in ejectment and enabled the defendants to present every phase of the controversy. It was not therefore error to refuse the issue tendered by defendant. *Pretzfelder v. Insurance Co.*, 123 N. C., 164; *Kendrick v. Insurance Co.*, 124 N. C., 315; *Bradley v. R. R.*, 126 N. C., 735.

The plaintiff claims under conveyances, *mesne* or direct, from each of the heirs-at-law of Geo. W. Candler, conveying their respective interests. It was in evidence that in 1867, the heirs of Candler filed a petition for sale for partition, and a decree of sale was made appointing four commissioners, but no further action thereon was had in Court. In 1875 one of the commissioners, T. J. Candler, made a sale of the land in dispute to Lyda and Rabb, giving bond to make title. Rabb assigned to another Lyda. Both Lydas having died, in 1892, said T. J. Candler, "as commissioner," executed a deed to their heirs-at-law. The bond to make title by one commissioner and the deed by him in 1892 were executed without author-
(500) ity of law and were of no legal effect. On its face, in fact, the deed imports to convey only the interest of the grantor "as commissioner," and not the land itself nor his interest therein. Even if such deed were color of title, there could be no possession under it till its date, 12 April, 1892, and this action was begun 26 August, 1896. The defendants acquired no rights by either paper, nor by the alleged sale. In *Attorney General v. Navigation Co.*, 86 N. C., 411, it is said: "The doctrine has been settled in this State, that the bidder at a judicial sale acquired no *right* before the confirmation of the report of the commissioner who made the sale under the order of the Court." *In re Dickerson*, 111 N. C., 114, holds: "The sale then, not having been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. While a formal direction to make title is not always necessary, a confirmation of the sale can not be dispensed with." If this is true when a sole commissioner, or a majority of them, act *a fortiori* it is true when such act is that of only one commissioner out of four.

Here, there was no report of sale, no confirmation, and no order of Court of any kind subsequent to the order appointing four commissioners. The action of one commissioner was not an obedience to the decree directing sale by four commissioners. The purchasers were bound to take notice of that fact. At the utmost, it was a bond for title for T. J. Candler's in-

terest in 1875, and his conveyance to Lusk, 1879, conveyed the title to another. The plaintiff introduced the bond to make title and the deed executed by T. J. Candler, as commissioner, to show that the defendants claimed title under the same source, and to throw upon them the burden of showing that they had acquired any other title.

The defendants asked eleven prayers for instruction, all of which were refused by the Court, and the defendants excepted. (501)

The plaintiff having introduced the above bond to make title to show that the defendants claim under the same source of title, the first prayer was to instruct the jury that plaintiff is bound by it himself. That is, if we comprehend aright, that when a paper writing is introduced by plaintiff for such purpose, he thereby admits its validity. We do not so understand the law.

There was evidence that the plaintiff had also taken a conveyance of one-half interest claimed under the University. The second and third prayers were for an instruction that in any event the defendants were not estopped as to that half, and that the plaintiff is estopped to deny that the University owned that half. The purchase by plaintiff of the outstanding claim of the University can have neither of these results.

The fourth prayer is that as plaintiff claimed under deeds from the heirs of Candler, made at a time when Lyda and Rabb were in possession under a bond to make title from T. J. Candler, the plaintiff is estopped as to the interest derived by plaintiff by *mesne* conveyance from T. J. Candler. But no adverse possession is shown in Lyda or Rabb's assignee till 1892, and the mere bond to make title from one commissioner, and without order of court, conferred no title upon them.

The fifth prayer was that if the jury find that the defendant's own any interest, the "plaintiff can not recover," for the possession of a cotenant is not unlawful. The prayer "can not recover" is not applicable to our system of submitting a case upon issues. *Witsell v. R. R.*, 120 N. C., 557; *Bottoms v. R. R.*, 109 N. C., 72. Besides, if the defendants were cotenants, that would not defeat a recovery, but merely affect the form of the judgment which would let the plaintiff into possession with defendants.

The sixth prayer was to like purport with the first, (502) that to estop the defendants the bond to Lyda and Rabb must be valid. But it was only offered to show that the defendants claimed under it, and thus place upon them the burden of showing any other title.

The seventh prayer is based on the assumption that Lyda and Rabb entered into possession under the bond for title from T. J. Candler, but there is no evidence to that effect.

The eighth prayer is that if there was an agreement between the commissioners, acquiesced in by the heirs-at-law of G. W. Candler, that each commissioner could sell the land separately, then the sale and bond to make title to Lyda and Rabb by T. J. Candler would be an equitable estoppel upon all the heirs-at-law. As several of the heirs-at-law were married women the prayer was properly refused as asked, and being faulty in part, it was unnecessary for the Judge to dissect it and say what part, if any, was correct. *S. v. Neal,* 120 N. C., 613; *Hampton v. R. R., Ibid.,* 534; 35 L. R. A., 808.

The ninth prayer was properly refused, for though McNamee is admitted to have been the agent of plaintiff, the information given him was not sufficient to have the legal effect claimed in the prayer.

The tenth prayer was properly refused, for the evidence negatives any adverse possession prior to 1892.

The eleventh general prayer, that upon the evidence the plaintiff "can not recover," was properly refused, and the instruction to the jury, excepted to by defendants, that if they believed the evidence to answer the first two issues "Yes," and the third issue, "One penny," was correct.

Affirmed.

DOUGLAS, J., concurring. While concurring in the judgment of the Court, and substantially in its opinion, I doubt whether a plaintiff can, in an action of ejectment, set up a
(503) worthless bond for title purporting to have been made to some one under whom the defendant is supposed to claim, and thus shift the burden on the defendant of proving his title. It is not even color of title for the defendant, and is not inconsistent with a better title from a different source. If the defendant admits that he holds under the bond, of course he must abide by its legal effect; but if he repudiates it, the burden should remain upon the plaintiff.

It is a well settled principle that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of the title of the party in possession.

Cited: Foy v. Winston, 135 N. C., 440; *Joyner v. Futrell,* 136 N. C., 304.

BRINKLEY v. BRINKLEY.

(Filed 5 June, 1901.)

1. MARRIAGE SETTLEMENTS—*Husband and Wife—Fraudulent Conveyances—Deed—Promise in Consideration of Marriage—Marital Rights—Parol Contract.*

Where a man deeds land to his children without consideration, after having promised to convey the same to a woman in consideration of marriage, the deed, although registered before marriage, is void.

2. FRAUDS, STATUTE OF—*Contracts—Executed—Executory.*

The statute of frauds applies to executory contracts, but not to executed contracts.

CLARK, J., dissenting.

ACTION by Ellen J. Brinkley against J. H. Brinkley, N. W. Spruill and wife Mary C. Spruill, Hester V. Brinkley, A. J. Pierce and wife, Annie J. Pierce, and Luther Brinkley, by his guardian, N. W. Spruill, heard by Judge *T. A.* (504) *McNeill* and a jury, at Fall Term, 1900, of WASHINGTON. From a judgment for the defendants, the plaintiff appealed.

W. M. Bond, for the plaintiff.
A. O. Gaylord, for the defendants.

COOK, J. Upon the trial in the Superior Court, judgment as in case of nonsuit was rendered against the plaintiff, upon motion of defendants, under ch. 109, Laws 1897, as amended by ch. 131, Laws 1899, and plaintiff excepted and appealed.

The plaintiff contends that by reason of the promise of Joseph H. Brinkley to convey to her the interest in the land as stated, she became a creditor of his and that the voluntary deed executed by Joseph H. Brinkley to his minor children (all of whom are now defendants, except one), *after* a contract of marriage had been entered into between herself and said Joseph H. Brinkley, and without her knowledge and consent, was a fraud upon her marital and contracts rights and void as to her; and that she is entitled to recover the interest in the land conveyed to her by reason of the deed executed to her in April, 1900, pursuant to the promise made her by said Joseph when she consented to marry him in June, 1884.

The defendants (other than Joseph H. Brinkley) claim title under the voluntary deed executed to them in July, 1884, and while denying the parol promise, alleged by the plaintiff, con-

tend that it was void under the statute of frauds; that the deed executed to the plaintiff in April, 1900, conveyed no interest to her—was voluntary and without valuable consideration; that she had actual knowledge at the time and long before its execution, and insist that she has no title to the land and is not entitled to recover.

It appears from the case on appeal that defendants introduced evidence contradicting the plaintiff's, but none ap-
(505) pears in the record; and the motion of defendants having been made "upon the whole of the testimony," the case must be considered by this Court only upon that which appears in the record, which, for the sake of the motion, must be accepted as true.

While the contention of the plaintiff, as to being a creditor of Joseph H. Brinkley, by reason of the parol promise to convey the land, is without merit, yet her contention that the voluntary conveyance of the land to his children was a fraud upon her marital rights, presents a very serious question. The contract of marriage entered into between the plaintiff and Joseph H. Brinkley in June, 1884, was based upon a *valuable* consideration. She had not only a right to expect the benefits to be derived from the marriage in her suitor's property to be cast upon her by operation of the law, but also had his express verbal promise to convey to her one-half undivided interest in his tract of land (which was substantially all the property that he then owned) immediately after their marriage. Relying upon these rights and his promise, and after many years sharing with him the toils of life, nurturing, caring for and raising his minor children by his former wife, bearing children to him and being a true and faithful wife, she suddenly finds herself, her husband and several children of tender age, ousted of her home, to which she was carried when a bride, and *then* informed that her marital rights and contracts had been supplanted by a *voluntary* deed, executed by a man whom she had consented to, and had married, and that his promise not being in writing, was void and of no effect.

But his parol promise to convey land was not void, only voidable, and between the parties could have been enforced unless the statute of frauds were pleaded (*Hemmings v. Doss*, 125 N. C., 400; *Williams v. Lumber Co.*, 118 N. C.,
(506) 928; *Loughran v. Giles*, 110 N. C., 423), which can not be material in this action, since the deed was, before the institution of this action, duly executed, with full recitals of the original promise—that statute applying to executory and not to executed contracts. *Hall v. Fisher*, 126 N. C., 205; *Mc-*

Manus v. Tarleton, 126 N. C., 790; *Choat v. Wright,* 13 N. C., 289. And while it has the effect of a post-nuptial settlement, yet it is valid except as to creditors and purchasers for value and without notice. Rogers Domestic Relations, sec. 255, page 217. The defendants (other than Joseph) claim title by reason of this voluntary deed executed to them by their father *after* he had induced the plaintiff to consent to become his wife, and without her knowledge or consent. For what purpose was this deed *then* executed? If for the love and affection he had for his children, why did he wait until *after* the courtship and engagement? Why did he hold it as a basis of credit, and after securing a promise for his prize, place it as he thought beyond the reach of the woman whose consent he had obtained to share with him the vicissitudes of life for weal or for woe? If he had changed his mind and concluded not to convey to her the interest in the land, as he had promised her to do, then why did he not so inform her to the end that she might exercise the privilege of changing her mind as to the marriage?

He admits in his answer (which was put in evidence) the agreement as stated in the complaint, to be true. It is admitted for the sake of the motion, by defendants, that the plaintiff did not know of the *voluntary* deed until many years after the marriage, that it was executed without her knowledge or consent. While it is true that a man or woman, before marriage, is at liberty to dispose of his or her property at will and pleasure, yet it must not be done with an improper motive. If it be done to deceive the person who is then in treaty of marriage, it is a fraud. The courts have uniformly held that a voluntary deed made by a woman in contem- (507) plation of marriage, afterwards consummated, and without the existence of the deed being made known to the intended husband, is in law a fraud upon him. *Strong v. Menzies,* 41 N. C., 544; *Baker v. Jordan,* 73 N. C., 145; 1 Roper Husband and Wife, 163, 164; *Poston v. Gillespie,* 58 N. C., 258; 75 Am. Dec., 427. Then why should not the same rule apply to the intended husband, who gave to his children his property without the knowledge or consent of his fiancee? She, under our laws, acquires valuable interests and rights in his property, while on the one hand the husband in addition to the personal services and earnings of the wife, acquires the right of a courtesy estate, absolutely owns all of the personalty in case of intestacy, etc.; on the other hand the wife obtains a security in respect to her future support, and has the rights of dower, homestead, year's support at the death of the husband (which can not be defeated by his will or creditors), a distributive

share of his personalty, etc. Schouler Domestic Relations (3 Ed.), sec. 181.

Nor can the constructive notice of registration avail the defendants. In *Spencer v. Spencer,* 56 N. C., 404, in which case the intended wife had, previously to marriage and after engagement, made a voluntary deed to her property, it is held: "But if, after the courtship begins, the court of equity recognizes an inchoate right in the intended husband at all, it follows that it can not be disposed of by the intended wife without his direct knowledge and acquiescence. In a case like the present, there is no place for a constructive notice. That is always resorted to for the purpose of preventing the person who has it from doing an act to the injury of another. Here, the husband can injure no other person. He has rights which the rule protects by preventing another person from injur-
(508) ing him."

In *Taylor v. Rickman,* 45 N. C., 278, the husband actually signed the contract, but it was avoided upon the ground of surprise, because the paper was presented to him after the parties had met together for the purpose of being married.

And in *Poston v. Gillespie, supra,* it was held that, after the contract of marriage is made, neither can give away his or her property without the consent of the other, and *notice* before the marriage of such a gift does not hinder the party injured from insisting upon its invalidity.

True it is, from the testimony in the case, that the defendants were minors and innocent, but that can not avail them now. "Though not a party to any imposition, whoever receives anything by means of it, must take it, tainted with the imposition, let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." *Tisdale v. Bailey,* 41 N. C., 358.

Upon all the evidence submitted, it is clear to the Court that the execution of the deed, under which the defendants (other than Joseph) claim was fraudulent and void as to the plaintiff's marital rights, and there is

Error.

DOUGLAS, J., *dubitante.*

FURCHES, C. J., concurring in the opinion of Justice COOK. I state the following reasons for my concurrence:

If the plaintiff is entitled to recover it is by reason of the *fraud* committed upon her marital rights. The statute of frauds has nothing to do with the case for the reason that the

deed has been executed, and the statute of frauds does not apply to executed contracts. *Hall v. Fisher,* 126 N. C., 205, and other cases cited in the opinion. Nor does the statute of frauds prevent a party from carrying out his contract, unless it affects creditors or purchasers for a full price, and (509) without notice. *Triplett v. Witherspoon,* 70 N. C., 589. In this case there are no creditors of the grantor, unless plaintiff be treated as such, and the defendant children are not purchasers for a *full* price. Indeed it appears that they paid nothing for their deed.

If the plaintiff was not strictly a creditor, her claim was in the nature of that of a creditor. After her contract with the grantor (W. H. Brinkley), in June, 1884, it was a *fraud upon* her marital rights for her intended husband to give away his property, and in this case it seems to have been all the property he had. In *Poston v. Gillespie,* 58 N. C., 258, 75 Am. Dec., 427, it is said: "After the courtship or negotiations about and concerning the marriage, is concluded and the parties bind themselves by a contract to marry, *neither can give away his or her property,* without the consent of the other, and the matter does not then rest upon a mere question of deceit, which may be repelled by proof of notice, but involves a question of *fraud* on a right vested by force of a contract, for a breach of which an action will lie at law." So if this case states the law, the action is given to *either* party; it rests on contract and *vested rights,* and is not to be defeated by notice. If this be the law, it is claimed that plaintiff's right of action was not defeated by the registration of defendant's deed and that contention of defendants must fail.

But defendants claim that since the constitution of 1868 the wife has no marital rights, except the inchoate right of dower, which is not due until his death, and that the husband has no marital rights in the wife's estate. If these contentions are true there ceases to be such a thing as *fraud on marital rights* in North Carolina. While the husband may not have the same rights over the estate of the wife that he had before the Constitution of 1868, I do not admit that the wife has not now the same rights in her husband's estate that she had before the Constitution of 1868, and the same she had in 1859, when *Poston v. Gillespie* was decided by this Court—in (510) which it is held, "that after the engagement to marry, *neither party has the right* to give away his or her property." But this very question—*fraud on marital rights* since the Constitution of 1868—has been before the Court and it was held that the Constitution of 1868 worked no such wonders, and

that the doctrine of fraud upon marital rights still exists in North Carolina. *Brinkley v. Jordan,* 73 N. C., 145.

Upon these authorities I must hold that the doctrine of fraud on marital rights still exists in this State; that the defendant, W. H. Brinkley, having disposed of his land by gift to the other defendants after he and the plaintiff were engaged to be married, was a fraud upon her marital rights, and the deed must be set aside. My opinion is put upon the *fraud,* and not upon his *promise to convey.* But when defendant's deed is set aside *for fraud,* there is nothing to prevent the plaintiff's deed of 1900 from becoming effective, and the plaintiff is entitled to be admitted to the possession of one undivided half of said land, as tenant in common with her husband.

We have had it impressed upon us that the first wife's father gave this land to the defendant, W. H. Brinkley, and his first wife. This may be a reason for making the deed of July, 1884, to the defendant children; but it could not constitute a legal consideration, and we are trying to dispose of the case according to the law. Under the laws of this State, upon the death of the wife, the land becomes the property of the husband, and as such was liable to his contracts and creditors to the same extent as if he had bought the same with dollars. I must, therefore, concur in the opinion that there was

Error.

(511) MONTGOMERY, J., concurs in the opinion of the Chief Justice.

CLARK, J., dissenting. The plaintiff alleges and testifies that in June, 1884, the defendant, J. H. Brinkley, promised her orally that if she would marry him he would convey to her one-half interest in the land in controversy as soon as the marriage had taken place, and relying upon such promise, she agreed to marry him. On 12 July, 1884, the defendant, J. H. Brinkley, conveyed the entire tract of land by warranty deed to his children by a former marriage—who are his codefendants in this action. Said land had been conveyed by their grandfather, to their mother and himself. This deed of July, 1884, was registered 1 August, 1884. Thereafter, on 30 October, 1884, the plaintiff and the defendant, J. H. Brinkley, were married. On 23 April, 1900 (16 years later), the defendant, J. H. Brinkley, executed a deed to the plaintiff, which was recorded 26 April, 1900. On 25 April, 1900, she instituted this action, alleging in her complaint that the defendants (other than Joseph H. Brinkley, her husband) wrongfully withheld possession of the

premises, and asking that she be let into possession as tenant in common of one-half interest therein.

There are several insuperable reasons why the plaintiff can not recover:

1. If the action is on the deed, that to the defendants from her husband, executed 12 July, 1884, and recorded 1 August, 1884, takes precedence of that from her husband to herself, executed when he was out of possession, 23 April, 1900, and registered after this action was begun.

2. If the action is on the parol promise in June, 1884, it is void under the statute of frauds, and though the husband, of course, does not set it up, the other defendants do plead it. Though third parties, if strangers, can not plead the statute of frauds, it is otherwise as to privies, as are the defendants, the grantees in the deed of 1884. Browne Statute (512) of Frauds, sec. 135; *Best v. Davis,* 44 Ill. App., 624.

3. The grantees received from their father a conveyance of this land, which came from their mother's father. There was a good moral, indeed a meritorious, consideration. Such a conveyance would not be a fraud, even though concealed from the intended wife. *Green v. Goodall,* 41 Tenn. (1 Cold.), 404; Kerr Fraud and Mistake, 218. If the father had immediately after the second marriage conveyed to the plaintiff, she would not have been a purchaser for value. 12 Am. and Eng. Enc. (2 Ed.), 472, n. 8, and cases there cited, which hold such to be voluntary deed. The deed to the children of the first marriage having been recorded 1 August, 1884, she was fixed with notice thereof at least as much as a purchaser for value would have been. It was her misfortune that ninety days after such registration she entered the marriage, after it had become impossible for her husband to convey to her any part of the land.

But put it in the strongest possible light for the plaintiff: Suppose the marriage, 30 October, 1884, was *ipso facto* a conveyance for value of a half interest in the land to the plaintiff, and further that the deed to the children of the former marriage was not for a meritorious consideration and was without any consideration, the deed recorded on 1 August, 1884, though voluntary, would take precedence of a deed to a subsequent purchaser for value. This is settled by many decisions. "In the United States, the authorities are almost unanimous in holding that a voluntary conveyance, if made *bona fide,* is valid against a subsequent purchaser with notice of the conveyance." 14 Am. and Eng. Enc. (2 Ed.), 466. In this State, since the adoption of chapter 28, Laws 1840, one who purchases with notice of a prior voluntary conveyance will not be protected

(513) against it. *Triplett v. Witherspoon,* 70 N. C., 589; *Clement v. Cozart,* 112 N. C., at page 421. Registration of a prior voluntary deed is notice to a subsequent purchaser. *Taylor v. Eatman,* 92 N. C., 602.

Viewed, aside from the fact that the legal title has been in the children of the first wife since July, 1884, and the alleged promise to plaintiff to convey was in parol and a secret promise, there is no evidence to explain why the plaintiff, nor her husband, took any steps after the marriage to execute any conveyance to her, nor why the plaintiff acquiesced in the nonexecution of the secret parol agreement for nearly sixteen years. No evidence was offered that she at any time, during all these years, had called upon her husband to execute the promised conveyance, nor made any complaint in regard to the matter. It is not an explanation of this fact that during all that time, up to January, 1900, the plaintiff and her husband lived on the land together with the children of the first marriage. There was no reservation for the benefit of the husband in his deed of 12 July, 1884, and his remaining on the land was probably by reason of the nonage of said children or some of them, and permissive thereafter as to those who became of age. His possession was at no time adverse. Why Joseph H. Brinkley is made a defendant does not appear. He is not in possession and he is not resisting the plaintiff's claim, but is siding with her.

Even if this action had been for dower, the plaintiff could not recover, unless the deed was made with intent to defraud her dower rights, for at no time during coverture has her husband been seized of the premises. *Barnes v. Raper,* 90 N. C., 189. If by his death, dower therein would not accrue to his wife, certainly if living he can not convey to her. The Court properly held that upon the testimony the plaintiff could not recover. Her husband could not have recovered, no matter when he brought suit, nor what his motive in making the deed. *York v. Merritt,* 80 N. C., 285; *McManus v. Tarleton,* 126 N. C., 790. The plaintiff not being a creditor at the date of the deed has no greater rights than the husband would have (514) had. *Hiatt v. Wade,* 30 N. C., 340; *Taylor v. Eatman,* 92 N. C., at page 606; *Clement v. Cozart,* 112 N. C., at page 421.

It must not be overlooked that the question here presented is not whether by the engagement to marry in June, 1884, the wife became invested with an inchoate right of dower (the only interest she could acquire by the marriage itself), which could not be divested by the deed in July, 1884, to the children of the first marriage. The wife's position is certainly not stronger

by virtue of her engagement than after marriage, and if this deed to the children had been made after marriage, instead of before, they would have gotten a good title, subject only to the widow's contingent right of dower if she survived her husband. *Scott v. Lane,* 109 N. C., 154. Here, he is still living, and as she could not maintain this action of ejectment against one taking under a deed after marriage, she certainly can not recover dower by virtue of her marital rights against grantees taking long before marriage. Her right to dower can not now arise.

This case rests upon the single proposition whether one who takes a verbal agreement to convey realty, upon a consideration thereafter to be paid, can recover the same sixteen years there after against those who took a conveyance of the same land for a meritorious consideration, without participation in the fraud, if any, perpetrated upon the intended wife, and without any legal notice thereof (being minors), and when the deed to them was registered three months before the marriage, when therefore the purchaser by oral contract had the fullest legal notice before payment of the promised consideration.

The cases cited in the opinion which protect the rights of an intending husband in his wife's property have no application to this case, where the plaintiff claims *not as a widow,* but by virtue of a *secret oral contract to convey* in con- (515) sideration of marriage, and the defendants are purchasers for a meritorious consideration and without notice. If the plaintiff can sustain her claim founded solely on a secret verbal agreement, then no other purchaser from a single man, without notice of a secret agreement with an intending wife, can hold the land against her, though, as here, sixteen years may have passed without the husband and wife remembering to execute the promised deed and making known the ante-nuptial agreement. The plaintiff's claim is not based upon a fraud upon her marital rights. She is not suing for dower, but upon defeat of an oral promise to convey realty by a deed made to another upon a meritorious consideration without notice of her oral agreement, and duly registered before she pays the promised consideration. She relies upon a verbal contract and stands like any other. Her marriage is purely incidental and does not add to her contractual rights.

In *Poston v. Gillespie,* 58 N. C., 258; 75 Am. Dec., 427, it was the husband who was complaining that his contracted wife had in fraud conveyed away all her property. As the law then stood, at the moment of marriage, he became entitled to all her personal property and tenant by the curtesy initiate of her

realty. For deprivation thereof, by undue influence of her father, he had an immediate cause of action. Here, the wife could acquire by virtue of the marriage nothing except a right to dower if she survived her husband, and has as yet not suffered, and may never suffer anything by virtue of the deed to the defendants. And even in that case, the decision is largely rested upon the ground that the deed by the wife was made by duress and undue influence exerted by her father. That is in no particular an authority for this case.

In *Taylor v. Rickman,* 45 N. C., 278, the deed was set aside for surprise, the marriage contract not being mentioned
(516) till the husband stood up to be married; and besides, it was never registered as required by law. The husband was thus deprived as above stated of an immediate absolute right to the personalty, and, on account of the surprise, the deed was declared void. The same is true of *Tisdale v. Bailey,* 41 N. C., 358, and *Spencer v. Spencer,* 56 N. C., 404, in both of which cases the deed was made by the wife secretly and with the intent to defraud her husband (which is not found in the present case) just before the marriage and kept secret, not recorded. Unlike the wife in this case, the husband was in those cases thereby deprived of an immediate right of property.

In every case cited for the plaintiff, the husband was the plaintiff and was deprived of an immediate right of property by the deed. None of those actions could now be maintained as the law now stands as to the property rights of women whose personalty remains their own property. Certainly they can not be authority for one who claims, not marital rights, but by virtue of an oral contract to convey lands which were conveyed and legal notice thereof given her by registration three months before the marriage, and who is attempting to set up a stale claim under such oral contract (if ever made) after sixteen years acquiescence.

The plaintiff sues to recover a fee simple in half the land. A woman's "marital rights" in her husband's property are derived solely from statute, and no statute gives her a half interest in fee of her husband's land, and that too before his death. She has therefore no support in the claim that she has been deprived of her marital rights by fraud or otherwise, for she has not been. Her sole claim is that she made an oral contract for conveyance of land and three months before the consideration was paid the land was conveyed to another for
(517) a meritorious consideration, without notice of her claim and the deed duly recorded which was notice to her, and the grantees plead the statute of frauds, as they have a right

to do. That the consideration promised was marriage, makes it a valuable consideration, but no more so than if money had been promised and paid after the registration of the deed to another, for meritorious consideration, and who took without notice. That marriage was to be the consideration does not involve "marital rights" in this matter, nor take this verbal contract out of the statute of frauds, nor affect the fact that the defendant's deed was registered sixteen years ago and plaintiff's deed from her husband only since action brought. The plaintiff's claim is contractual, not marital, and there is no exception in the statute of frauds in her favor and the Court can not *create* one.

Cited: Brinkley v. Spruill, 130 N. C., 47, 49, 51.

STEWART v. SOUTHERN RAILWAY CO.

(Filed 5 June, 1901.)

EVIDENCE—*Sufficiency—Railroads—Personal Injuries—Contributory Negligence.*

Evidence in this case as to contributory negligence of an employee was sufficient to preclude a recovery and the plaintiff was properly nonsuited.

DOUGLAS, J., dissenting.

ACTION by J. J. Stewart, administrator of Julius Hargrove, against the Southern Railway Company, heard by Judge *H. R. Bryan,* at September Term, 1900, of DAVIDSON. From a judgment of nonsuit, the plaintiff appealed.

(518)

Lee S. Overman, for the plaintiff.
Glenn & Manly, for the defendant.

PER CURIAM. We adopt the following opinion in this case prepared by the late Chief Justice FAIRCLOTH:

This is an action to recover damages for killing Julius Hargrove. The plaintiff's intestate was a flagman, or brakeman, on defendant's work train, and was an old railroad man and knew the rules of railroads as to the passing of trains. The conductor of the work train stationed plaintiff's intestate at a

point between Elmwood and the work train, to hear the freight train blow and to signal the work train out of the way of the freight train. The signal was given, and as the work train went out the conductor said to him, "Stay here until I return; will follow 74 (freight train) right back." The intestate knew and expected that train 74 would come by as soon as the work train was out of the way. He was then awake, sober and in his right mind. Three hundred yards above the place where the intestate was injured, the freight train stopped to "fix a log" and could be seen that distance. The intestate was sitting on a crosstie asleep within a few inches of the iron rail. As the engineer of train 74 approached and saw a person sitting on the crosstie, he assumed that he would get off, but, on nearer approach, seeing that the person did not move, he gave the alarm signal by sounding the whistle, ringing the bell, and applying the brakes. The intestate was struck by the freight train, injured, and died soon afterwards.

When the conductor saw that the intestate did not move, it was too late to stop before passing the intestate.

The defendant introduced no evidence, and when the plaintiff closed, his Honor intimated that the plaintiff could not recover, and a nonsuit and appeal were taken.

In this and like cases the plaintiff's evidence is taken as true. The rule on this subject has been so frequently and
(519) recently expressed by this Court that repetition seems to be superfluous work. However, in *Norwood v. R. R.*, 111 N. C., 240, the Court said: "When he placed himself in a position where he was liable to be stricken by a passing engine, it was his duty to keep a sharp lookout, and if he carelessly, recklessly and in a drunken stupor remained on the track when the engine was approaching, and till it came in contact with him, he was negligent. * * * If it were conceded that the engineer saw the deceased walking along the track, or sitting upright on the end of a crosstie, in time to have stopped the train without peril or difficulty, he was justified in believing, up to the last moment, in the absence of knowledge or information, that he was insane or deaf, that the intestate would take reasonable precaution for his own safety by moving out of the way"—citing other decisions to the same effect, which decisions have been followed ever since.

In *Wycoff v. R. R.*, 126 N. C., 1152, the facts were not identical, but were similar and presented the same question. The plaintiff testified that he, being wearied, stepped off and sat on the end of a crosstie to rest a few minutes, and while sitting there he dropped off to sleep and was knocked senseless by a

passing train. The Court affirmed *per curiam* the nonsuit on the authority of Norwood's case, *supra.*

Affirmed.

DOUGLAS, J., dissenting. I can not concur in the opinion of the Court. The answer alleges that "the said plaintiff's intestate, deliberately, with a reckless disregard of his own safety, sat down upon the railroad track and *fell asleep,*" and "that the engineer of said locomotive, when he saw a person sitting on the crossties, supposed that he would get off and thus escape injury. As he approached *quite close,* and seeing that the person did not move, he gave signals of alarm by blowing the whistle and ringing the bell of the locomotive, thus (520) endeavoring to warn the said person of the danger, and then seeing that he did not move, the engineer applied the brakes and did everything in his power to stop the engine, *but it was too late.*" The fireman testified as follows: "Bob James was engineer. He blew whistle twice, and made one application of brakes, and came over on my side and asked if he hit that man. We had done passed." This clearly shows what was practically admitted upon the argument, that the engineer neither blew the whistle nor gave any signal whatever until he was too close to the deceased to do any good. In the fateful words of the answer, "it was too late."

The opinion of the Court seems to be based exclusively on the cases of Norwood and of Wycoff, as those are the only cases cited. As the latter case was decided by a mere *per curiam* judgment, without setting forth either the facts or the law, it is a just precedent for neither.

The facts in Norwood's case were essentially different from those in the case at bar. In the former case, it appeared from the evidence that the engineer kept a constant lookout; that neither he nor the fireman saw the deceased at any time, and that owing to a curve in the track, it would have been impossible for the engineer to have seen him in time to have prevented the accident by stopping his train. There are in the opinion some unguarded expressions in the nature of *dicta,* that have been construed to mean that the engineer had a right to presume, up to the last moment, that the deceased would get off the track, and that therefore there was no duty resting upon the engineer to give any warning whatever until the last moment, when, of course, it would have been too late. The mere statement of the proposition exposes its inherent falsity. That it was a mere *dictum* is shown by the fact that the engineer never saw the deceased, and therefore had no occasion for any presumption of any kind.

If this was ever the meaning of Norwood's case, it has been clearly overruled in *Fulp v. R. R.*, 120 N. C., 525, where Justice FURCHES, speaking for a unanimous Court, says: "But the great error of the charge is that it is in violation of that great principle in favor of human life, so thoroughly settled in this State and in every jurisdiction, that the jury shall pass upon the acts of the defendant where negligence is alleged, and upon the contributory negligence of the intestate, if that is alleged. This has not been done in this trial. We have shown that it has not been done as to *sounding the whistle* in a sufficiently intelligible way to be understood whether it was passed on or not." As it was necessary for the jury to pass upon the fact whether or not the whistle was sounded, there surely must have been some recognized obligation upon that defendant to sound the whistle. It is true the whistle should have been sounded at the crossing, but it is equally true that Fulp's intestate was on the track 30 or 40 yards away from the crossing, and was never seen by the engineer, who did not know that he had struck him until the next day. If the defendant was liable for failure to blow at a crossing because it might have aroused a man lying 40 yards down the track, of whose existence it had no knowledge, how much greater would seem to be its negligence when the deceased was in full sight of the engineer.

(521)

I do not mean to say that in the case at bar the engineer should have stopped his train as soon as he saw the deceased sitting on the ends of the crossties; but I do say that he should have given him timely warning by bell or whistle, one or both, as might be necessary. It would have taken but little trouble to have sounded the whistle, and would not have interfered in the slightest degree with the running of the train. Surely a human life is still worth something—the pulling of a bellcord, the opening of a whistle. Where a human life is at stake that may be saved by the sound of a whistle, then it is *gross* negligence—call this an expletive if you will—not to blow the whistle.

(522)

Against the *dictum* in the Norwood case, I would respectfully invite the attention of the Court to the following authorities:

In *Finlayson v. R. R.*, 1 Dillon (U. S. C. C.), 579, 582, Federal Cas., No. 4,793, the Court says: "In this case the uncontradicted evidence on both sides is that the man who was killed was walking on the track of the defendant corporation along the same course the train was going that struck and killed him, and the question arises, what degree of precaution or care a railroad company or its servants are bound to take to guard against

injuring a man under such circumstances. * * * I instruct you that the agents of the railroad company had a right to suppose he was such a man, of sound mind and sound hearing, and that he would take reasonable care to protect himself in case of danger. Under that view of the case, I further say to you that these agents or officers of the company *were bound to give a reasonable and fair notice of their approach,* when they found that the man was not taking steps to get out of the way—such a notice as would reach a man under ordinary circumstances of good hearing, and who had his attention alive to his situation. If then, you believe that the bell was rung and that the whistle was sounded, in time to enable this man to get off the track, these parties are guiltless, and the company is not liable. If, on the other hand, you believe they delayed making any signal at all until it was entirely too late for him to get off the track, that they being aware of his presence, delayed to ring the bell or sound the whistle, until he could not have stepped aside and saved himself—*in that case there was negligence on the part of these employees, for which the railroad company is responsible.*"

This able opinion was written by Justice *Miller,* of the U. S. Supreme Court, and concurred in by Judge *Dillon.* Their names are a sufficient guarantee of the value of the opinion. The italics in this opinion are my own. (523)

The same rule was laid down by the Supreme Court of Pennsylvania as far back as 1864, in *R. R. v. Spearen,* 47 Pa. St., 300, 304, as follows: "The principle may be illustrated thus: If the engineer saw the adult in time to stop his train, but the train being in full view, and nothing to indicate to him a want of consciousness of its approach, he would not be bound to stop his train. Having the right to a clear track, he would be entitled to the presumption that the trespasser would remove from it in time to avoid the danger, or, if he thought the person did not notice the approaching train, *it would be sufficient to whistle* to attract his attention without stopping. But if, instead of the adult, it were a little child upon the track, it would be the duty of the engineer to stop his train upon seeing it."

These are the words of a court of recognized ability and one that has certainly never been inclined to hamper railroad management by useless restrictions.

In *R. R. v. Morlay,* 86 Fed., 240, 242, the U. S. Circuit Court of Appeals, three Circuit Judges concurring therein, says: "The testimony shows that when from 200 to 300 feet away from the man, the danger of his situation was recognized by the engineer and fireman, and that from that moment to the instant of the injury they attempted, by blasts of the whistle and by

shouts, to warn him; but the testimony of other witnesses and the fact that the man's attention was not awakened tend to show that the warnings were not given. Whether they were given, and whether an earlier effort to stop or reduce the speed of the train should have been made, were, therefore, questions for the jury." Citing *Coasting Co. v. Tolson,* 139 U. S., 551.

The following headnotes are taken from the case of *R. R. v. Tinkham,* 44 S. W. (Ky.), 439: "Where the trainmen
(524) see a trespasser on the track in front of the train, *it is their duty to give timely warning of the danger,* and if necessary and practicable, to slacken speed and stop the train.

"2. Where an engineer saw a trespasser on the track 600 yards ahead of the engine, and neither gave the usual signal nor made any effort to stop the train until within 100 yards, the question of negligence was for the jury."

The following headnotes are from *R. R. v. Hocker,* 55 S. W. (Ky.), 438: "Whether the servants in charge of the train gave *timely warning* of the approach of the train after discovering the presence of a trespasser on the track, was properly left to the jury.

"2. While the servants in charge of a train are not bound to stop the train upon discovering a trespasser upon the track, they should *warn* him by *sounding the whistle or ringing the bell,* having the right to presume, *when such warning has been given,* that he will get off the track in time to prevent injury."

In the recent case of *R. R. v. Harvin,* decided in December, 1899, 54 S. W., 629, the Court of Civil Appeals of Texas lays down the rule in the following explicit terms: "The instruction sought, that the persons operating the engine 'are authorized to presume that a person seen on the track will leave such track in time to avoid injury and are authorized to act upon such presumption,' should have been qualified so as to show that such presumption *would not arise unless some warning is given* of the approach of the train. *R. R. v. Smith,* 62 Tex., 254. Without this qualification, the Court was not required to give the instruction."

The rule is thus laid down in 2 Shearman and Redfield on Negligence, sec. 483: "Thus a locomotive engineer or motorman, after becoming aware of the presence of any person on,
or dangerously near the track, *however imprudently or*
(525) *wrongfully,* is bound to use as much care to avoid injury to him as he ought to use in favor of one lawfully and properly upon the track, that is to say, ordinary care with respect to anticipating injury, before it becomes imminent, and the utmost care and diligence of which he is personally capable,

after he knows that it is imminent. He *must promptly use all the usual signals to warn the trespasser of danger, and he must also check the speed of his train,* and even bring it to a full stop, if necessary, unless the circumstances are such as to justify him, acting prudently, in believing that the traveler sees or hears the train and will step off the track in ample time to avoid all danger, without any diminution of the speed of the train." Numerous authorities are cited by the learned authors.

In Patterson's Railway Accident Law, the author says, in sec. 204, page 197: * * * "When they (engineers) do see a trespasser on the line, apparently of adult years and of average capacity, *they are bound to warn him by signal of his danger,* and that having done so, they may assume that he will get off the line, and that they are only bound to stop the train when the circumstances of the locality are such (for instance on a bridge or in a narrow cutting) that the trespasser does not have an opportunity to escape, or when the trespasser does not apparently hear or heed or comprehend the warning of his danger."

In 2 Wood Railways, the author says, on page 1461: "If, after becoming aware of the trespasser's presence, the engineer *fails to exert every effort possible to prevent the injury,* the company must be held liable." Again, on page 1463, he says: "Therefore, where an adult person appears on the track, the company has a right to presume that *he will heed the warnings* of approaching danger and protect himself, and is not bound either to stop the train or to slacken its speed." Again, on page 1470, he says: "Of course this rule requires the (526) company, where there is reason to apprehend that a person seen upon the track *will not heed the signals of danger,* and take himself out of the way of the train, to use reasonable diligence to stop the train and avert the serious consequences likely to ensue from failure to do so; but this condition as we have seen does not apply, as a rule, except where it is observable that the person is not in possession of his faculties, or is so young that it can not be reasonably expected that he will avoid the threatened danger."

All these quotations are in the same section, 320, and apply to the same subject. They tend to show that, even where the author does not say in so many words that the signals must be given, he proceeds upon the assumption that they are given.

The cases of McAdoo and Meredith are not cited by the Court, perhaps because the facts therein are so different from those before us; and yet both opinions contain expressions in the nature of *dicta* that would seem to support the opinion of

the Court. Neither case is an authority. Meredith stepped in front of a train that was *backing,* and there seems to be no evidence that the engneer either saw him or could have seen him. Therefore, there was no room for presumption. In McAdoo's case the opinion says, on page 153: "The plaintiff 'would not swear' that the bell was not rung, while the engineer and firemen both testified that it was rung." Therefore, it seems that the warning was given, and again the presumption was excluded. The error in these *dicta* arises from the singular misapprehension of the Court as to the legal effect of the presumption, which simply relieves the engineer from the obligation of stopping his train, but *not* from the duty of giving *timely warning.* The McAdoo case is a marked instance of those numerous cases in which appellate courts fail to apprehend the real point (527) attempted to be presented. Both McAdoo and the engineer swore that McAdoo was walking between four and five miles an hour, and the engineer swore that the train was not going over four miles an hour, the speed limited by city ordinance. If this were so, it would have been a physical impossibility for the train to have overtaken McAdoo. And yet this Court gravely says, on page 154: "If it was running at five miles an hour (and the only testimony is that it was running four or five), it is manifest that a reduction of the speed to one mile less an hour would not have prevented the injury by enabling the plaintiff to see with his face turned in the opposite direction." Of course not, but it would have prevented the injury by preventing the train from ever overtaking him. Moreover, the warning by bell or whistle is addressed to the sense of hearing, and not to the sense of sight. The duty of giving warning to a man walking with his back to the engine is imposed to enable him to exercise the only sense which the laws of nature permit him to use under such circumstances. Is not this common sense, even if opposed to the speculative *dicta* of Judges of acknowledged ability and learning?

It would be needless to deny that I regret the decision of this Court, because it seems to me a retrogression. It happened that the decision of the Greenlee case, governing also that of Troxler, depended upon my individual vote, and that vote I gave for what will ever be to me the sacred cause of humanity. The same principle impels me now to file this dissent. We then held that it was negligence in a railroad company not to have automatic couplers, because a prudent man, having due regard for human life, would have all such safety appliances as were in common use and within his reach. But we did not say, and we could not say, that the railroads must have such couplers;

but we did say that the failure to have them would be (528) such continuing negligence as would render them liable for any resulting injury. We thus placed upon them practically the burden of obtaining such couplers. Is it any greater, or as great, a burden, to require them to ring a bell or blow a whistle when a human life is at stake? The trespasser may be sick, or even drunk, but he is a human being, and why not give him a chance for his life when it will not interfere in the slightest degree with the running of the train? Conditions have changed in recent years. In former times the railroad train, with its long, loose coupling, alternately taking up and letting out the slack, and with rails loosely set in chairs and rattling at every joint, made noise enough to be heard a mile away; and as it took three or four minutes to travel that mile, the trespasser on the track had time enough to collect his senses. Now the vestibuled train, with its close coupling and patent buffers, makes but little noise on a track that the fishbar has practically made into one continuous rail; while its terrific speed gives but a few seconds for thought or action after it comes within hearing. As our decisions have professed to meet other progressive emergencies, why not do so in the present case, when its object can be attained without imposing any additional burden upon the railroad company? But it may be said we have held to the contrary. Suppose we have, no rule of property is involved, and if we are wrong, who can correct our errors except ourselves? As has been well said by the great Chief Justice of Georgia, this Court is supreme in the majesty of duty. as well as in the majesty of power. In view of the foregoing authorities, so thoroughly consistent with the highest principles of public policy and the enlightened humanity of a Christian age, I most respectfully dissent from the opinion of the Court.

Cited: McArver v. R. R., 129 N. C., 386; *Lea v. R. R., Ib.*, 464; *Bessent v. R. R.*, 132 N. C., 941; *Beach v. R. R.*, 148 N. C., 160.

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BROADFOOT v. CITY OF FAYETTEVILLE.

(Filed 7 June, 1901.)

1. MUNICIPAL CORPORATIONS—*Bonds—Interest—The Constitution, Art. VII, Sec. 7.*

Where the commissioners of the town are authorized to fund its bonded indebtedness at a higher rate of interest than the original bonds bore, the portion of the act authorizing the increased rate of interest without a vote of the electors is void as contrary to Article VII, section 7, of the Constitution, and only the principal of the bonds and interest from maturity of bonds can be recovered.

2. STATUTES—*Constitution—Constitutional Law.*

A part of an act may be constitutional and a part unconstitutional.

ACTION by C. W. Broadfoot against the City of Fayetteville, heard by Judge *Fred. Moore,* at February Term, 1901, of CUMBERLAND. From a judgment for plaintiff for the amount of the bonds and interest at the rate of 7 per cent, both parties appealed.

Geo. M. Rose, and *Hinsdale & Lawrence,* for the plaintiff.
Busbee & Busbee, and *D. T. Oates,* for the defendant.

MONTGOMERY, J. The General Assembly, on 22 March, 1875, enacted a law enabling the proper authorities of the town of Fayetteville to fund the then bonded indebtedness of the town contracted for subscription to stock of the Western Railroad Company, and to execute and deliver new bonds for like amounts in payment of and in exchange for the outstanding bonds, which had been issued under an act of the General Assembly, in December, 1852, for the payment of the stock of the Western Railroad Company. The rate of interest named
(530) in the bonds issued under the Act of 1852 was six per cent, and the rate provided for by the Act of 1875 was to be not more than eight per cent. The proper officers of the town of Fayetteville under the authority of the Act of 1875, issued to the plaintiff on the first day of January, 1876, the bonds which are the subject of this action, bearing 7 per cent interest, and the plaintiff surrendered to the mayor and commissioners a like number of bonds and for like amount of principal, which had been issued under the Act of 1852. No election was held in the town of Fayetteville upon the question of authorizing the issue of the bonds which were to be issued under the Act of 1875.

The question for decision, as we see it, is whether or not the loss of the entire interest follows the action of the mayor and commissioners under the Act of 1875 on account of a failure to submit the question of the increase in the rate of interest to the qualified voters of the town, under Art. VII, sec. 7, of the Constitution. The contention of the plaintiff is that the debt has not been changed; that the principal amounts of the bonds are of *like sums* (the words of the Act) as the principal in the bonds issued in 1852; that interest is a mere incident of a debt, and that a change in the rate of interest is, therefore, no change in the debt, and as a consequence that it was not necessary to have submitted that increase to a popular vote.

The defendant insists that interest is an integral part of a debt; that an increase in the rate of interest is an increase in the debt itself, and, therefore, that the increase in the debt not having been submitted to a vote of the people, under Art. VII, sec. 7, of the Constitution, the whole issue of the bonds, principal and interest, is void.

There is no doubt that in cases where interest is contracted for, the interest is an integral part of the debt. In cases where it is recoverable as damages for breach of contract to pay money, or where it is allowed in recoveries in tort, it is a mere incident of debt, the meaning of which is, that (531) if, on a contract for payment of money in which interest is provided for, the debtor should make a payment of the principal sum, the interest would yet be afterwards collectible as a part of the debt; while the other rule would prevail if the contract made no provision for the payment of interest. *King v. Phillips,* 95 N. C., 245; *Davis v. Harrington,* 160 Mass., 278. Notwithstanding that interest is an integral part of the debt in the sense in which it is described in the cases just cited, yet interest is still a separate thing from the principal sum and is always distinguished from the principal in the decisions and in the text-books.

In the case before us the interest was provided for in the face of the bonds; it was a part of the debt, but to be distinguished still from the principal of the debt. That part of Ch. 248, Laws 1874-'5, as to the principal amount of the bonds, was not contrary to the requirement of Art. VII, sec. 7, of the Constitution. The General Assembly, however, undertook to give the town authorities of Fayetteville the power to increase the rate of interest from 6 per cent to as much as 8 per cent in their discretion. That much of the Act, the power to increase the rate of interest, was repugnant to the feature of the Constitution which we have cited. A part of an Act of the General As-

sembly can be constitutional and a part unconstitutional. *McCless v. Meekins,* 117 N. C., 34. What then is the effect of the unconstitutional part of the Act? Does the whole interest fail, or only the difference between 6 per cent, the amount provided for in the original bond, or the 7 per cent allowed in the new bonds? We think the whole interest fails for the one and simple reason that, as the rate agreed on was in its effect contrary to the provision of the Constitution which we have pointed out, we can not by judicial decree fix upon either 6 per cent or any other rate. We can not make a contract for the parties.

(532) That part of the judgment below is erroneous in so far as 6 per cent interest is allowed on the bonds, as only the principal sum of the bonds can be collected, with interest from the time of the maturity of the bonds. The judgment below is modified as in this opinion set out, and affirmed except as to the modification.

Modified and affirmed.

PLAINTIFF'S APPEAL.

MONTGOMERY, J. There was no error against the plaintiff in the ruling and judgment of the Court below.

No error.

Cited: Jones v. Comrs., 130 N. C., 455.

FLEMING v. GREENLEAF-JOHNSON LUMBER CO.

(Filed 7 June, 1901.)

EVIDENCE—*Sufficiency—Nonsuit—Negligence—Personal Injuries—Railroads—Master and Servant—Questions for Jury.*

Evidence in this case on the question of negligence should have been submitted to the jury.

ACTION by Mahala Fleming, administratrix of Daniel Fleming, against the Greenleaf-Johnson Lumber Co., heard by Judge *J. W. Bowman,* at March Term, 1900, of PITT.

Plaintiff's evidence showed that her intestate was killed by a log rolling from a logging train operated by defendant, and on which deceased was going to his work. Deceased was employed by his brother-in-law in cutting logs at a distance of three to four miles from the logging camp, and he and other employees were accustomed to go to and from their work on the train,

though they were not employed thereon. The brother-in-law of deceased testified that he employed the latter, but that he was paid by the company, who had the right to dis- (533) charge the men, and that they were really employed by the defendant company. The accident occurred while the train was going on a down grade, and the train was not stopped thereafter, though deceased was riding in plain view of the engine. There were no brakes on the train, except on the engine; and the car on which deceased was riding did not have standards, though the logs were held in place by four-inch shoulders, but other cars on the train had standards. All of plaintiff's witnesses testified that they had not received notice not to ride on the train, or that it was dangerous, but testified that they knew that it was dangerous to ride thereon, but preferred to take the chances rather than walk.

From a judgment of nonsuit, the plaintiff appealed.

Skinner & Whedbee, for the plaintiff.
J. L. Fleming, for the defendant.

PER CURIAM. Upon the evidence, the issue should have been submitted to the jury.

New trial.

Cited: Hemphill v. Lumber Co., 141 N. C., 490.

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COLEY v. NORTH CAROLINA RAILROAD CO.

(Filed 7 June, 1901.)

1. NEGLIGENCE—*Master and Servant—Railroads—Assumption of Risk—Private Laws* 1897, *Ch.* 56.

   Private Laws 1897, Ch. 56, renders inapplicable the doctrine of assumption of risk in the case of an engineer injured by defective appliances, the defects being known to him.

2. CONTRIBUTORY NEGLIGENCE—*Prudence—Questions for Jury.*

   Whether an engineer was guilty of contributory negligence in using drainpipe as a grabiron, in trying to get upon an engine, is a question for the jury.

3. DAMAGES—*Measure of—Mental and Physical Suffering.*

   The measure of damages for injury of a person is the present cash value of his injury, taking into consideration pain and mental suffering.

MONTGOMERY and COOK, J.J., dissenting.

COLEY *v.* R. R.

ACTION by Samuel S. Coley against the North Carolina Railroad Company, heard by Judge *W. A. Hoke* and a jury, at February Term, 1900, of WAKE. From a judgment for the plaintiff, the defendant appealed.

T. M. Argo, and *W. H. Day,* for the plaintiff.
F. H. Busbee, and *A. B. Andrews, Jr.,* for the defendant.

FURCHES, C. J. This is an action for injuries by the defendant road. In the case it is stated that the defendant, North Carolina Railroad, had been leased to the Southern before the injury complained of was received, and that the Southern was in possession and operating the same at that time. But (535) as no point was made as to this fact on the trial of the case, nor on appeal, we will give it no further attention.

The plaintiff was an experienced railroad man, having been engaged in railroad work for more than twenty years, and had been in the employ of the defendant for the last four years. And on 14 June, 1898, while in the employment of the defendant as conductor of the shifting engine, at Goldsboro, he received the injury complained of; that prior, and until 20 May, 1898, he had used a regular shifting engine with sloping or turtle-top tender; but on that day the defendant took this engine and tender from Goldsboro and replaced it with an old road engine and tender, unsuited for use as a shifting engine and tender; that his work as switch engineer necessitated his riding on the rear end of the tender much of his time; that he could not successfully do the work of switch conductor without so riding; that besides the tender of the last engine furnished being unsuited for his work, it had no handholds, or grabirons to enable him to raise himself upon its platform with safety, which it was necessary for him to do to enable him to signal the engineer; that he saw and knew this tender had no handholds or grabirons when he received it on 20 May, and he knew that it was dangerous to use it without them, but that he used it and continued to use it without such grabirons, until 14 June, when he received the injury complained of; that to supply the place of the grabirons, or rather because there were no grabirons, he used the drainpipes from the top of the tender—these were tubes or hollow cylinders, leading from the top of the tender, to take off the overflowing water, and were never intended to be used as handholds. The plaintiff says that he had frequently used them as handholds before the day of the injury, though he had used the one on the other side of the tender most; that on the day of the injury he had driven

down to some lumber cars and attached the shifting en- (536) gine to them, and gave the signal to the engineer to move out. To do this, the engine would have to move backwards, and when he gave the signal to move, he undertook to get on the platform of the tender, and for the want of grabirons he took hold of the drainpipe, which gave way (pulled out or broke off), and he fell to the ground and was run over by one of the wheels of the tender; his arm was crushed so badly that it was necessary to amputate it, and he was badly injured otherwise. And he contends that it was no fault of his that he was injured, but that it was caused by the fault and negligence of the defendant in not furnishing him a tender with grabirons, with which to do his work.

While on the other hand the defendant does not deny but what it was guilty of negligence in not furnishing a tender with grabirons; it contends that this was a patent defect, seen and known by the plaintiff on 20 May, when he received this engine and tender; and by his continuing to use the same from that time to the time of the injury, that was a waiver of any objection on that account, and an "assumption of the risk" of any damage that might result from such defect.

The defendant also contends that the plaintiff was guilty of negligence which contributed to, and was the proximate cause of his injury, and that he can not recover on that account. The defendant also contends that there are errors in the Judge's charge to the jury, in charging what he should not have charged, and by refusing to give special requests of the defendant that he should have given. The defendant also contends that the Judge erred in his instructions to the jury as to the measure of damages, as pointed out in its assignment of errors, as that was the earliest oportunity it had of doing so.

While this case was ably and carefully tried, it is apparent from the record, the prayers for instruction and (537) the argument of counsel on both sides, that the main contention below, as it was in this Court, was as to whether the plaintiff had "assumed the risk" of the defective tender in not having the grabirons. And this question has given us a great deal of trouble, as we had such a line of cases, commencing at least as far back as *Crutchfield v. R. R.*, 78 N. C., 300; *Johnson v. R. R.*, 81 N. C., 454; *Cowles v. R. R.*, 84 N. C., 312; *Hudson v. R. R.*, 104 N. C., 501; *Pleasants v. R. R.*, 95 N. C., 195, and other cases in our own Reports, besides many cases from other courts, that seem to sustain the contention of the defendant; while there are more recent decisions in our own court, though not directly in point, that seem to sustain a different

rule—such as *Greenlee v. R. R.*, 122 N. C., 977; 41 L. R. A., 399; *Troxler v. R. R.*, 124 N. C., 189; 44 L. R. A., 313, and *Lloyd v. Hanes*, 126 N. C., 361.

But after all, it seems that this important contention as to the "assumption of risk" is disposed of by chapter 56, "Private" Laws of 1897, which was not called to our attention in the arguments or briefs, and which reads as follows:

"SECTION 1. That any servant or employee of any railroad company operating in this State, who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death, in the course of his service or employment with said company, by the negligence, carelessness or incompetency of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.

"SEC. 2. That any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section, shall be null and void."

(538) Commencing with the often cited case of *Priestly v. Fowler*, 3 M. and W., 1, what is known as the Fellow Servant Law had been developed, until it seems to have become to be a hardship on the employees of railroads, where there were so many employees whose rights depend on the action of some other employee. And the Act of 1897, ch. 56, was passed to relieve such employees from what appeared to be a hardship, and oppressive upon them.

And while there had not been uniformity in the different jurisdictions as to what is called the "assumption of risk," it seemed to be well settled by the decisions of this Court (see cases cited above) that where an employee entered into the service of a railroad company using defective machinery, knowing of such defects, or, where he continued in the employment after having such knowledge, without notifying his superior, and protesting against its continuance, such employee would have been held to have waived such objection, and to have assumed the risk arising from the use of such defective machinery.

This, it seems, was considered by the Legislature a hardship, and oppressive, as the competition was so great for such employment that employees were deterred from making such complaints, lest they might lose their places. So it seems that the Legislature undertook to relieve the employees of this trouble, as it deemed it to be a hardship. So the Legislature, after providing relief against acts of "fellow servants," enacted as follows, "or by any defect in the machinery, ways or appliances

of the company, *shall be entitled to maintain an action against said company.*" And by the second section of said act it is provided, "That any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section, shall be null and void." The Court has construed this Act, holding it to be constitutional, and giving effect to it so far as it applied to fellow servants. *Hancock v. R. R.*, 124 N. C., 222; and we see no reason (539) why we should not do so as to the "assumption of risk."

It is agreed that assumption of risk is contractual, either by express terms or by implication; and disputes usually were as to whether the plaintiff contracted by implication or assumption for dangers not existing at the date of employment. And it would seem by this act that the Legislature intended to put an end to such contentions, by saying in the first section that he shall have a right of action for injuries caused by such defective machinery, and by providing in the second section that he can not waive this right by contract, expressed or implied.

This legislation (Laws 1897, ch. 56) seems to be in the same spirit and in harmony with the Acts of Congress of 1893, ch. 195, Statutes-at-Large, U. S. In that statute it is enacted in section 4 that railroad companies engaged in interstate commerce shall have grabirons upon all freight cars; and in section 8, the right of action is given to any employee injured for the want of any of the appliances mentioned in said Act—grabirons being one of those mentioned. And then, said section provides that no employee, by remaining in the employment of such company, shall be deemed to have assumed such risk by remaining in the employment of such railroad company. This is the statute upon which Greenlee's and Troxler's cases are based. And while we do not base our opinion in this case upon this legislation of Congress, but on the Statute of 1897, still we think that this legislation of our State and the construction we are placing upon it, are supported and strengthened by the Act of Congress and the construction put upon it by this and other courts.

In 1880 the English Parliament passed what is called the "Employer's Act," in which the doctrine of fellow servants theretofore existing in England was very much the same as in this State, and was disposed of very much as it was here by the Act of 1897. The English act contains a section (540) which provides that an employee shall not maintain an action against his master for injuries received from defective machinery, "ways," etc., unless he gives notice of such defects to the master or some one superior to him, unless the master

already knows of the defect. In *Thomas v. Quartermain,* 18 Q. B. D., 685, it was shown that the plaintiff was injured by reason of defects known to the master, and it was contended by reason of these negative expressions, used in the statute, they absolved the plaintiff from the doctrine of assumption of risk. And one member of the Court (Lord Asher) held with this contention of the plaintiff, though the other two members of the Court overruled him in this view of the case. But the same question was again presented in *Smith v. Baker,* Appeal Cases, Law Reports, House of Lords, 1891, page 325, where the Court was again divided, but where a majority of the Lords, who put their opinion upon the Statute of 1880, agreed with Lord Asher, that the statute did destroy or do away with the implied assumption of risk. We refer to the English statute, and those cases from the English courts, for the purpose of showing that, while the English courts may not have expressly decided that the English statute did away with the doctrine of assumption of risk, there was a strong tendency of the courts to hold that way. And in *Smith v. Baker,* a majority of the Lords who put their opinions upon that statute, so held; and if there could be reason for such a construction upon a statute which did not in terms declare such object, but where the legislative will to that effect had to be found in the negative expressions of the statute, how could we escape such a construction where the legislative intent is manifested in express terms, and in the most emphatic manner?

We are, therefore, of the opinion that whatever might have been the proper rule in this State as to whether the plain-
(541) tiff assumed the risk of operating this defective tender, by remaining in the employment of the defendant, the Statute of 1897, ch. 56, has solved that question, and relieved the plaintiff from the burden of assuming the risk of such defect, if it was on him before.

In putting this construction upon the Act of 1897, it must be understood that the plaintiff is relieved by this Act, or the construction we have put upon it, from the responsibility of his own negligence. But, as we have said, the principal "battle" in this case was as to the assumption of risk, and it was ably conducted on both sides—barring the Statute of 1897—and was ably conducted by the learned Judge who presided at the trial.

The greater part of the record, consisting of prayers for instruction and the Judge's charge, is predicated upon the first issue, the assumption of risk, which are eliminated by the view we have taken of the case. This being so, there is but little

more for us to do. The prayers of the defendant, mainly, if not all of them, are addressed to the assumption of risk, and it is not necessary for us to discuss them, after taking this view of the Act of 1897.

The defendant's fifth prayer for instructions was addressed to the plaintiff's using the drainpipe as a grabiron. This prayer, it seems, the Court gave, but added the following: "The drainpipe was not put there for a grabiron, and there is no negligence imputable to the defendant by reason of the weak condition of the drainpipe, but the question is left for the jury to say, upon the second issue, whether or not the plaintiff was negligent in taking hold of it, and whether he acted as a prudent man in taking hold of it. That question is left with the jury upon the second issue." This addition is assigned as error, but we see none. The prayer must have been addressed to the second issue, though it does not so state, and we see no error in referring the question to the jury.

As we understand, the question of prudence, and the (542) ideal prudent man, are always a matter for the jury,
This seems to have been the ground of the exception, that the Court did not decide the question instead of referring it to the jury.

There is one other exception that we think necessary to notice, and that is the measure of damages. As to this, it seems to us that it would have been proper for the Court to have explained more fully the rule as to the measure of damages, or the manner of ascertaining them; especially as it seems to us that an improper rule had been insisted upon in the closing argument of the plaintiff's counsel. But we see no intrinsic error in what the Court did charge—that the jury should give the plaintiff "the present cash value" of his injury, taking into consideration pain and mental suffering—not allowing anything as a punishment, or punitive damages. The defendant cites but one authority to sustain its assignment of error as to instructions upon the question of damages—*Pickett v. R. R.*, 117 N. C., 616; 30 L. R. A., 257—and we do not think it sustains the defendant's contention. That case is as to a prayer which the Court held to be erroneous, but in passing upon the prayer the Court suggest almost the exact language used by the Court in this case as a proper instruction. It was contended before us in the argument that the jury found their verdict upon the erroneous rule laid down by defendant's counsel, but we have no means, as a court, of knowing that this contention is true, the plaintiff is still living. The verdict does not show that the jury were so governed in finding their verdict. It is far more than

the simple calculation of time of expectancy, by the plaintiff's yearly earnings. But they were instructed that they might give the plaintiff damages for pain, suffering, etc. This was not error, and we have no means of knowing how much they allowed for this, and how much they allowed for his earnings.

There may have been error in the manner in which the
(543) jury estimated the damages. But if there is, we can not know it, nor does the record, to which we are confined, disclose the error.

Upon the view of the case we have taken, the judgment must be

Affirmed.

MONTGOMERY, J., dissenting. I can not concur in the opinion of the Court. It seems that the General Assembly in Private Laws 1897, ch. 56, has deprived the defendant of its plea of assumption of risk. As is said in the opinion of the Court the effect of that legislation in respect to assumption of risk had not been called to the attention of counsel in the cause or to that of the Court; but nevertheless we find upon an examination of the statute that to be its plain construction. But the issue on the "assumption of risk" being eliminated does not prevent the operation of the principle of contributory negligence, and it seems to me that the evidence of the plaintiff himself furnishes such clear and convincing proof that his own negligent act was the direct and proximate cause of his injury, that his Honor should have told the jury that upon his evidence they should respond "Yes" to the second issue. *Neal v. R. R.*, 126 N. C., 634.

There was a by-law of the company in the following words: "'S.' Every employee must exercise the utmost caution to avoid injury to himself or to his fellows, especially in the switching of cars and in all movements of trains, in which work each employee must look after and be responsible for his own safety. Jumping on or off trains or engines in motion, getting between cars in motion to couple or uncouple them, and all similar imprudences are dangerous and in violation of duty. All employees are warned that if they commit these imprudences it will be at their own peril and risk." The plaintiff knew of that

by-law, and with a full knowledge of what he said him-
(544) self was an obvious defect in the construction of the tender, to-wit, the lack of a grabiron, got up on the tender while it and the engine were in motion and undertook to lift himself from the cross step up to a higher platform by grasping a drainpipe, which, he says himself, he had never ex-

amined, and that too with the engine and tender moving backwards, his injury being certain if the pipe should give way.

A prayer for instruction by defendant on the point of the plaintiff's using the grabiron for the purpose which he did, was directed to the first issue, and refused on that account. But his Honor undertook to charge the jury in respect to the contributory negligence of the plaintiff and failed to call their attention to the plaintiff's neglect to examine the grabiron, which, in my opinion, was the most important point in the negligent course and conduct of the plaintiff. Especially is that failure on the part of his Honor an error, when it can be seen from the record that his Honor in speaking to the jury about the time and the circumstances of the seizing of the drainpipe by the plaintiff, misconceived entirely the evidence of the plaintiff on an important and vital point, and as a consequence failed to instruct the jury properly as to those conditions. His Honor said: "In regard to a violation of a known rule of the company, his (plaintiff's) statement was that the rule was that he should not get on the engine in motion. He says that the engine had not started, but did start after he got up, and he contends that the injury did not result from that, but from his taking hold of the drainpipe, and that that was the natural thing for him to do, and he asked the jury to so find." The plaintiff had testified that the engine and tender were in motion when he got upon the step; that it was going at about a mile an hour when he got on and about two or three miles an hour when he fell.

There is an exception by the defendant to this misrecital of the evidence and its effect. Certainly if the injury was caused from the plaintiff's taking hold of the drainpipe (545) that was the proximate cause of the injury, and as his Honor had told the jury that the drainpipe was not made to be taken hold of by the plaintiff, and that they should not consider the drainpipe in any aspect whatever as connected with the defendant's negligence, the plaintiff's use of it for the purpose with which he did use it was an act of negligence so gross that his Honor should have instructed them to find the second issue "Yes."

In reference to the rule laid down by his Honor as to the measure of damages, I think that it was not sufficiently definite, taken in connection with the rule which counsel of the plaintiff argued to the jury. I know that a trial Judge is not expected to controvert every erroneous argument made by counsel in the course of the trial, but after that part of the argument referred to in this case, his Honor should have in

some way have explained more fully what he meant by the words "the present net money value of such loss incident to his injury."

I think there was error.

COOK, J., dissents.

Cited: S. c., 129 N. C., 407, 421; *Ausley v. Tob. Co.*, 130 N. C., 36, 39; *Mott v. R. R.*, 131 N. C., 235; *Fleming v. R. R., Ib.*, 485; *Harris v. Quarry Co., Ib.*, 558; *Elmore v. R. R., Ib.*, 582; *Fleming v. R. R.*, 132 N. C., 720; *Bessent v. R. R., Ib.*, 943; *Lassiter v. R. R.*, 137 N. C., 152; *Pressly v. Yarn Mills*, 138 N. C., 423; *Nicholson v. R. R., Ib.*, 517; *Biles v. R. R.*, 139 N. C., 531; *S. c.*, 143 N. C., 82; *Boney v. R. R.*, 145 N. C., 249; *Smith v. R. R.*, 147 N. C., 610; *Dermid v. R. R.*, 148 N. C., 195.

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(546)

LAYDEN v. ENDOWMENT RANK, KNIGHTS OF PYTHIAS OF THE WORLD.

(Filed 7 June, 1901.)

1. CORPORATIONS—*Foreign Corporations—Domestic Corporations—Insurance Companies—"Craig Act"—Laws* 1899, *Ch.* 62.

   A fraternal insurance company, incorporated under act of Congress, for the District of Columbia, becomes a domestic corporation by complying with Laws 1899, Ch. 62.

2. REMOVAL OF CAUSES—*Foreign Corporations—Domestic Corporations—Laws* 1899, *Ch.* 62.

   A corporation chartered under act of Congress, for the District of Columbia, having domesticated under Laws 1899, ch. 62, can not remove a cause from the State courts to the Federal courts, when sued by a citizen of the State as a domestic corporation and no Federal question is disclosed.

ACTION by Minnie C. Layden against the Endowment Rank of the Knights of Pythias of the World, heard by Judge *H. R. Bryan*, at September Term, 1900, of DAVIDSON.

From an order refusing to remove this cause to the (550) Federal Court, the defendant appealed.

S. E. Williams, for the plaintiff.
Walser & Walser, for the defendant.

DOUGLAS, J. The point directly presented to us is whether a corporation originally organized under the laws of the United

States, but which has become a domestic corporation of this State, under the provisions of ch. 62, Laws 1899, can remove a cause into the Circuit Court of the United States when expressly sued as a domestic corporation. That such a corporation, originally organized under the laws of another State, can not do so, is settled in the recent case of *Debnam v. Telephone Company,* 126 N. C., 831, which is adopted as a part of this opinion. Whether the present defendant comes within the operation of that decision, is the question before us. We think it does.

We are not prepared to say that the United States are on a level in all respects with the States, which are considered as foreign jurisdictions. The National Government, while a distinct sovereignty, is not a foreign State, because it is composed of all the States, and is equally at home in all of them. The line of demarkation between State and Federal authority does not depend upon territorial limits, but entirely upon the subject matter of legislation or judicial construction as defined by the Constitution of the United States. This doctrine applies to the Federal Government only in its relation to the States, as it is controlled by principles essentially different when dealing with the District of Columbia, or other territories (551) of the United States. Congress is the Supreme law-making power of all territories, certainly unrestrained by any local authority, and it would seem but indefinitely so even by the Federal Constitution. In such cases it seems to us that Congress acts, not in its national capacity, but as a local Legislature, and its acts, unless otherwise clearly expressed, are confined in their binding operation to the jurisdictions for which they were originally intended. We therefore think that corporations, chartered primarily to do business in the District of Columbia, have no right, beyond that of comity, to operate in any of the States, unless expressly authorized by their charters. They therefore stand on the same footing as corporations of other States so far as the Act of 1899 is concerned. By that act the right of comity was withdrawn from them in common with all other *foreign* corporations, and they were forbidden to exercise their corporate powers within this State, unless they became domestic corporations. It is admitted that the defendant domesticated under that act, and as we have held that the legal effect of the act *"was to charter, and not to license,"* we are compelled to hold that the defendant has no right to remove the case at bar into the Federal Court.

We can find no provision in the Constitution of the United States directly authorizing the formation of corporations by the

Federal Government. That it has the implied authority to do so whenever necessary and proper for carrying into effect its express powers, was finally settled by the case of *McCulloch v. Maryland,* 4 Wheat, 316, but it is interesting to note the limitations placed upon such authority in the opinion of the Court. Chief Justice *Marshall,* speaking for the Court, says, on page 411: "The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else.

No sufficient reason is therefore perceived, why it may
(552) not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them."

And again, on page 421, alluding to the fact that the Constitution gave to Congress no express authority to create corporations, he says: "Had it been intended to grant this power (of creating corporations), as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it."

Again, the great Chief Justice, speaking for the Court, in *Osborn v. Bank,* 9 Wheat, 738, 860, says: "The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the Court, in *McCulloch v. Maryland,* is founded on and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'"

These questions become important in construing the opinion *in R. R. v. Myers,* 115 U. S., 1, wherein the Court says: "We are of opinion that corporations of the United States, created by and organized under Acts of Congress, *like the plaintiffs in error in these cases,* are entitled as such to remove into the Cir-

cuit Court of the United States suits brought against
(553) them in the State courts, under and by virtue of the Act of 3 March, 1875, on the ground that such suits are suits 'arising under the laws of the United States.' We do not propose to go into a lengthy argument on the subject; we think

that the question has been substantially decided long ago by this Court. The exhaustive argument by Chief Justice *Marshall* in *Osborn v. Bank,* 9 Wheat, 817, 828, delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States."

The words "like the plaintiffs in error," which we have italicised, taken in connection with the limitations in the cited opinion of *Osborn v. Bank,* would indicate that there might be other classes of corporations organized under the authority of Congress that would not have the inherent power of removal in all cases. Such, for instance, would be the corporations authorized by Congress under its special powers of legislation for territories directly under its control, and not intended to be used in any way as governmental agencies or in furtherance of interstate commerce. The petitioner at bar, whether viewed as a life insurance company or as a fraternal organization, is in no sense a governmental agency, and we do not think that life or fire insurance can be brought within the definition of interstate commerce. We think that the petitioner was incorporated by Congress to operate primarily in the District of Columbia, with only such incidental powers outside of said District as it might have by the law of comity. Therefore, we think that it comes within the *principle* of the decision in *R. R. v. Skottowe,* 162 U. S., 490, in which the Court says, on page 497: "But even if the Court were obliged, under the allegations of the plaintiff's complaint, to take judicial notice of the defendant company's charter, no act of Congress was pointed out under which it was acting when operating (554) the railroad in the State of Oregon. So far as appears, the defendant company existed and was doing business in the State of Oregon solely under the authority of that State whether express or permissive. The two Acts of Congress referred to do not disclose any intention on the part of Congress to confer powers or right to be exercised outside of the territories named therein." Such a principle relating to railroads, which are admittedly instruments of interstate commerce, would apply with even greater force to a corporation having no such character.

An examination of the acts under which the petitioner was incorporated will clearly show its local character. It was originally incorporated, as shown by its petition, under ch. 80 of 18 U. S. Statutes-at-Large, entitled "An act to provide for the creation of corporations in the District of Columbia by general

law," approved 5 May, 1870. It was again incorporated by special act, approved 29 June, 1894, 28 U. S. Statutes-at-Large, ch. 119. The first section of this act reads as follows: "That George B. Shaw (and others), officers and members of the Supreme Lodge Knights of Pythias, and their successors, be and they are hereby incorporated and made a body politic and corporate, in the *District of Columbia,* by the name of 'The Supreme Lodge Knights Pythias,' and by that name it may sue and be sued, plead and be impleaded in any court of law or equity, and may have and use a common seal, and change the same at pleasure, and be entitled to use and exercise all the powers, rights and privileges incidental to fraternal and benevolent corporations *within the District of Columbia.*" Neither of these acts give any authority, either express or implied, to the petitioner to exercise any of its corporate powers outside of the District of Columbia. We are not now dealing with the right of comity, for that has been expressly withdrawn by (555) the State of North Carolina by the Act of 10 February, 1899. Nor do we mean to treat petitioner as a *citizen* of District of Columbia, but as a Federal corporation, created for local and not for national purposes. As such, it has no inherent right to do business in this State in violation of our statute.

It seems to have recognized this fact, and took advantage of the provisions of the statute to become a "domestic corporation," as therein provided. Its status as such is settled by the decision of this Court in *Debnam v. Telephone Co., supra.* Acting, therefore, as a domestic corporation, the only capacity in which it could then lawfully act, at the time this cause of action accrued, and sued only as a domestic corporation, we see no legal grounds for removal.

We are not inadvertent to *Knights of Pythias v. Hill,* 76 Fed., 468, and *Knights of Pythias v. England,* 94 Fed., 369, in which it is held this petitioner has right of removal to the Federal Courts; nor to the case of *Knights of Pythias v. Kalinski,* 163 U. S., 289, in which the Court entertained the appeal. In the last case the question of jurisdiction does not seem to have been raised, nor do any of the cases refer to the petition in its relation as a domestic corporation, the essential question in the case at bar.

We have considered the line of cases holding the doctrine that, in all cases of removal, the jurisdiction of the subject matter of the action must appear on the face of the complaint as filed by the plaintiff, and can not be injected into the record by the defendant in making out his case for removal. *Metcalf*

v. Watertown, 128 U. S., 586; *Tennessee v. Bank,* 152 U. S., 454; *Chappell v. Waterworth,* 155 U. S., 102; *Land Co. v. Brown,* 155 U. S., 488; *R. R. v. Skottowe,* 162 U. S., 490; *R. R. v. Texas,* 170 U. S., 226; *R. R. v. Texas,* 177 U. S., 66. As we have some doubt of the application of these cases to that at bar as precluding an inquiry as to the origin (556) of its incorporation, in view of the decision in *R. R. v. Cody,* 166 U. S., 606, and as a determination of the point is not necessary to our decision, we prefer to rest our opinion on the grounds already stated.

As we said in Debnam's case, we must say now: We are of the opinion that as the defendant has become a domestic corporation of the State of North Carolina, and in contemplation of law a citizen thereof, and as the plaintiff has sued the defendant as a North Carolina corporation, upon a cause of action which discloses no Federal question whatever, the case can not be removed into the Circuit Court of the United States, therefore, the judgment of the Court below is

Affirmed.

Cited: Allison v. R. R., 129 N. C., 337; *Beach v. R. R.,* 131 N. C., 400.

VANDERBILT v. PICKELSIMER.

(Filed 7 June, 1901.)

NEW TRIAL—*Unintelligible Record—Appeal—Supreme Court.*

Where, in the case on appeal as made up by the trial judge, there is confusion in the arrangement of the evidence, several deeds and papers of importance lacking, and some inconsistency in the rulings of the court, a new trial will be ordered.

ACTION by G. W. Vanderbilt and others against R. J. Pickelsimer and others, heard by Judge *O. H. Allen* and a jury, at Fall Term, 1900, of TRANSYLVANIA. From a judgment for the plaintiffs, the defendants appealed.

(557)

Merrimon & Merrimon, for the plaintiffs.
George A. Shuford, for the defendants.

MONTGOMERY, J. The plaintiff undertook to show title in himself to the tract of land described in the complaint, not by proving title out of the State by grant and *mesne* conveyance to himself, but by showing that he and the defendant each claimed the land from a common source. Owing to the con-

fusion in the arrangement of the evidence, the absence of several deeds and papers which are of importance, and some inconsistency in his Honor's rulings, we are not prepared to say that the plaintiff made out his claim, and we think the case ought to go back for a new trial.

It must be said that his Honor, in making up the case on appeal (counsel having disagreed), was without his notes of the trial, or other papers, and without the assistance of counsel, who were notified of the time and place, but did not attend. Without fault on his part, months elapsed after the trial and before the case was made up. He states all these matters and concludes by saying: "I have, after the lapse of so long a time, after the hearing of the case under the circumstances, labored under much difficulty in preparing a statement which is not satisfactory."

New trial.

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(558)

COMMISSIONERS OF BEAUFORT COUNTY v. OLD DOMINION STEAMSHIP CO.

(Filed 7 June, 1901.)

1. TAXATION—*Foreign Corporations—Capital Stock—Assessment.*

   A nonresident corporation is liable for taxation for such proportion of its capital stock as the value of its tangible property within the State bears to the value of all its tangible property.

2. TAXATION—*Assessment—County Commissioners—Corporation Commissioners—Stock—Corporation—Laws* 1899, *Ch.* 15, *Sec.* 39—*Capital Stock.*

   Under Laws 1899, ch. 15, sec. 39, assessment of taxes on the capital stock of a steamboat company must be made by the Corporation Commission, and not by the county commissioners.

3. APPEAL—*Supreme Court—Appellate Court—Exceptions and Objections—Ex Mero Motu.*

   The Supreme Court will, on appeal, take notice *ex mero motu* of the failure of the Corporation Commission to assess taxes as required by law, though they had been assessed by the county commissioners.

ACTION by the Commissioners of Beaufort County against the Old Dominion Steamship Company, heard by Judge *T. A. McNeill,* at December Term, 1900, of BEAUFORT. From a judgment for the defendant, the plaintiffs appealed.

W. B. Rodman, for the plaintiff.

Gilliam & Gilliam, for the defendant.

CLARK, J. The defendant having "domesticated" under the Craig Law, the question here presented is, how much of its capital stock should be taxed in this State? Upon the facts agreed, the capital stock of $1,250,000 is all listed for taxation in Delaware. The defendant does business in (559) several States, and the value of its tangible property in this State, steamers, warehouses, etc., is $62,000, all of which is listed for taxation. It has no separate capital stock as a domesticated corporation, its business and property here being part of the general corporation, chartered and doing business in several States.

In *Commissioners v. Tobacco Co.,* 116 N. C., 441, it is held that "capital stock" is a distinct subject of taxation from "shares" of capital stock, the former belonging to the corporation, and the latter to the individual stockholders. It was held, following the uniform decisions here and elsewhere which are cited, that it was "within the legislative power, in respect to corporations, to levy any two or more of the following taxes simultaneously: (1) On the franchise (including dividends); (2) on the capital stock; (3) on the tangible property of the corporation, and (4) on the shares of the capital stock in the hands of the stockholders—taxation on the last two being imperative under the Constitution.

Under sec. 39, ch. 15, Laws 1899, the assessed value of the real and personal property of the corporation is directed to be deducted from the aggregate value of the shares of stock, and the difference, if any, to be listed for taxation, the object being evidently to avoid double taxation (though the Legislature could authorize it, *Commissioners v. Tobacco Co., supra*). The defendant having no separate capital stock, as a North Carolina corporation, contends that it can not be taxed here because it is a nonresident corporation. It is settled that it is a domestic corporation (*Debnam v. Telephone Co.,* 126 N. C., 831), so far as jurisdiction is concerned.

As to matters affecting taxation, it makes no difference whether it is a North Carolina corporation or not. Whether domesticated here or not, the business and operations here are practically a part of the larger corporation doing business in several States (2 Morawetz Corp., secs. 994, 996), (560) and, therefore, as repeatedly held in the United States Supreme Court, whenever a tax upon the capital stock of corporations is laid "such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of its lines anywhere" can be taxed as capital stock in this State. *Telegraph Co. v. Taggart,* 163 U. S., 1. As our

Statute directs the value of its tangible property to be deducted, the sum of $62,000, the value of the defendant's tangible property in this State should be deducted from the proportion of the valuation of the whole capital stock, which, by above rule, should be proportioned to this State and the difference should be taxed in this State as capital stock. The above rule was reaffirmed in *Express Company v. Ohio,* 165 U. S., 194, and *Same v. Kentucky,* 166 U. S., 171. Upon a rehearing of the former case *Express Company v. Ohio,* 166 U. S., 185, the point was most elaborately and ably argued, as may be seen from the briefs, and the above doctrine again repeated and conclusively in an opinion in an unanimous Court by Mr. Justice *Brewer.* In that case it is held, "whatever property is worth for the purpose of income and sale, it is worth for the purpose of taxation, and when, as in the case of the express company, the tangible property of the corporation is scattered through different States by means of which its business is transacted in each, the *situs* of this intangible property is not simply where its home office is, but is distributed wherever its tangible property is located and its work is done." It was also held that "no fine spun theories about *situs* should interfere to enable those large corporations, whose business is of necessity carried on through many States, from bearing in each State such burden of taxation as a fair distribution of the actual value of the property among those States requires." Hence, in the Ohio case a tax on $533,095.85 of capital stock (561) was sustained, though the corporation had only $42,065 of real and personal property in that State. In the Kentucky case a tax on $1,463,040 as the fair proportion of its capital stock, taxable in the State, was sustained, though the corporation had only $36,614.53 of tangible property within that State. 166 U. S., bottom of page 172. Where the Legislature arbitrarily fixed the proportion of the capital stock of a corporation operating in several States, which should pay taxes in that State, it was upheld. *Minot v. R. R.,* 85 U. S., 206.

Under our statute, the assessment of the capital stock should be made by the Corporation Commissioners, and not by the County Commissioners. This objection is not made by exception below nor by motion here, but it is a defect of which we can take notice *ex mero motu.* While, therefore, we must dismiss the action we have passed upon the point, as the party interested desires us to do so by not having objected, and it is a matter of public interest. *Milling Company v. Finlay,* 110 N. C., 411; *S. v. Wylde, Id.,* 500.

Action dismissed.

DOUGLAS, J., concurring in result. I concur in the conclusion of the Court, and I am inclined to think that the method of taxation indicated in its opinion would be correct if imposed by the proper authority; but I can not concur, as now advised, in the statement founded upon *Commissioners v. Tobacco Co.*, 116 N. C., 441, that it is "within the legislative power, in respect to corporations, to levy any two or more of the (four) following taxes *simultaneously.*" I think that a corporation should be taxed once on all its tangible and intangible property. This would include not only what is generally known as property, but also its franchise, and, in fact, whatever goes to make up the actual or market value of its stocks and bonds. I also think that its shares of stock may prop- (562) erly be taxed in the hands of its shareholders, because it then assumes a new form as personal property following the domicile of its owner. If I have not fully paid for my house, I am still assessed on its full value, while my note is assessed as a solvent credit in the hands of him who holds it. This is in one sense double taxation, inasmuch as it is based upon the same piece of tangible property, but the same individual is not doubly taxed. I am referring now only to *ad valorem* taxation, and not to license taxes, which are entirely different in their nature. It seems to me that, as far as circumstances will permit, the same rule should be applied to the corporation and to the individual, both of whom should be made to bear their just proportion of the burdens of government, without favoritism upon the one hand or oppression upon the other. So far as lies within my power, I shall hold corporations to the fullest measure of responsibility, but they must be given an equal measure of justice.

I have given much consideration to the matter of corporate taxation, and shall continue to do so, as it is a question which I fear will ultimately tax to the utmost the powers of the legislative, and perhaps of the judicial departments of the government; but I am not prepared, nor would it be proper to express any opinion as to the extent or limitation of those powers. All I wish to do at present is to withhold my assent from a former opinion of this Court, in which I took no part, and which, I regret to say, as I am now advised, enunciates a proposition in which neither my judgment of the law nor my sense of justice will permit me to concur.

(563)

COLLINS v. ASHEVILLE LAND CO.

(Filed 7 June, 1901.)

1. DEDICATION—*Irrevocable Dedication of Streets—Plats—Land Companies.*

Where lots are sold by reference to a plat representing a division of a large tract of land into subdivisions of streets and lots, the purchaser of a lot acquires the right to have all and each of the streets kept open.

2. DEEDS—*Map—Plat—Registration—Dedication.*

A map or plat referred to in a deed becomes a part of the deed and need not be registered.

ACTION by H. T. Collins, T. F. Reeves, John M. McDowell, J. H. Wood and wife Carrie Wood, A. D. Cooper and R. U. Garrett, against The Asheville Land Company, heard by Judge *O. H. Allen,* at August Term, 1900, of BUNCOMBE. From a judgment for the plaintiffs, the defendant appeals.

Bourne & Parker, for the plaintiffs.
Zebulon Weaver, for the defendant.

MONTGOMERY, J. The Southern Improvement Company, a duly organized corporation, received a deed in February, 1886, from J. M. Tierman to a certain piece of land, adjoining the city of Asheville, and at once executed a mortgage upon the land to The Central Trust Company, of New York, as security for certain bonds. A sale was provided for in the mortgage in case of default in the payment of interest or principal of the bonds; and it was further provided, that, until default, The Southern Improvement Company should have the full right to contract for the sale or lease, subject to the lien of the mort-

(564) gage, of any of the lands at such prices, and upon such terms, as that company might deem fair and reasonable, and upon such sales The Central Trust Company would sufficiently convey by deed or deeds of release the lands so sold from the operation of the mortgage, so that the purchaser might get a title free from encumbrance, the proceeds of the sale to be paid to The Trust Company and to be used in purchasing the bonds at par with the accrued interest and to retire the same.

After the execution of the mortgage, and in the same year, The Improvement Company had the land laid off into city lots

(numbered) and streets, and a plat thereof made, upon which certain portions were platted and distinguished as streets, and others as lots.

Afterwards The Improvement Company offered the lots, exhibiting the plat at the same time, for sale, and did sell to various persons lots marked and numbered on the plat, and in the deeds the grantors made special reference to the plat, and the lots were described as abutting on certain named streets, and as being of certain numbers corresponding with the plat. The Trust Company, according to the agreement in the mortgage, executed releases to The Improvement Company for the lots so sold with recitals in each as to the mortgage, the agreement to release, and describing the lots in the releases in the same words as those in the deeds from The Improvement Company.

In 1892, The Improvement Company executed a second mortgage upon the unsold part of the same land to George S. Scott and Harris C. Fahnestock for the security of certain bonds, and in 1896, in a consolidated suit (The Trust Company and Scott and Fahnestock joining as plaintiffs) a decree of foreclosure was entered for the sale of the property, except those parts which had been sold off, the lots which had been sold to the plaintiffs in this action being among those excepted in the decree. Fahnestock, who was a director of The Improvement Company, purchased at the foreclosure (565) sale, and the sale was confirmed by the Court.

Fahnestock, after selling some of the lots represented on the plat and described as abutting on streets named on the plat, sold and conveyed to T. L. Durham all the property except the lots which had been sold off, and excepting also certain streets shown on the plat which he had made at the time of the sale to Durham.

Durham afterwards conveyed the property to its present owners, The Asheville Land Company, defendant in this suit. Durham and The Asheville Land Company knew at the time of their purchases of the existence of the plat made by The Southern Improvement Company and of the sales made thereunder.

The principle of law involved in this case is, we think, the same as that in *Conrad v. Hotel Co.*, 126 N. C., 776. The inconvenience and loss which may arise here from the enforcement of that principle of law will be greater than it was in that case, but that argument would not be allowed to influence us in our decision. The courts of the State, in which the question before us has been presented and decided are divided. In some jurisdictions it has been held that where lots have been sold by

reference to a plat representing a division of a large tract of land into subdivisions of streets and lots, like the one before us, the purchaser of a lot does not acquire a right of way over every street laid down upon the plat. *Pearson v. Allen,* 151 Mass., 79. There, the Court said, in support of its position: "In *Regan v. Light Co.,* it was held that the defendant could close a whole series of streets on the plat, leaving open the private ways adjoining the plaintiff's lots to the highway in one direction, and to the next side street in the other." In other courts it is held that a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein,
(566) and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat, or map, kept open. This view is so well and clearly stated in Elliott on Roads, sec. 120, that we quote it: "It is not only those who buy lands or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of a street or road, but where streets and roads are marked on a plat, and lots are bought and sold with reference to the map or plat, all who buy with reference to the general plan or scheme disclosed by the plat or map, acquire a right to all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity and it is presumed, as well it may be, that all the public ways add value to all the lots embraced in the general plan or scheme. Certainly, as every one knows, lots with convenient cross streets are of more value than those without, and it is fair to presume that the original owner would not have donated land to public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication."

In *Conrad v. Land Co., supra,* this Court adopted the view that the purchaser had a right of way over all the streets designated on the plat, and that each and all of such streets must be kept open, and cited a case from each of the States of New Jersey and Oregon, in which the same principle had been adopted. We are not disposed, after careful consideration, to alter the decision made in that case. The matter of registration of the plat in *Conrad v. Land Co.* was mentioned, but we are satisfied that registration of the plat is not essential. Regis-
(567) tration is only a means of publication of the plan or scheme, and is not such an instrument as is required to be registered by laws of this State. It is the offer of sale by the

plat and the sale in accordance therewith that is the material thing which determines the rights of the parties. The defendant, The Asheville Land Company, had actual notice of the plat and sales thereunder made by The Improvement Company, and is, therefore, fixed with notice of the dedication of the streets. Besides, it had notice from the registration of the deeds from The Improvement Company to purchasers.

There is no error in the judgment of the Court below, and the same is

Affirmed.

DOUGLAS, J., dissenting. I can not concur in the opinion of the Court upon any principle of settled law or public policy. I readily agree that if a person lays out a tract of land into lots and streets and sells lots upon the faith of the plat, he can not close up any of the streets if it works a substantial injury to such a purchaser. But the opinion of the Court does not stop here. It lays down the broad doctrine that if the owner of land divides it into lots and streets on *paper* and sells a single lot by the foot, he can never close a single street, even if it has never been opened, is never used by the purchaser of the lot, and does not affect in any way the value of his property. In other words, if a man owning two or three thousand acres of land, in a moment of public craze, such as we have recently had, makes a plat of it showing a hundred streets that have never had, and never will have, any actual or potential existence outside of the fertile imagination of a land boomer, and, sells a single quarter acre lot to a man to whom he happened to show the plat, he can never close a single one of the hundred paper streets, it makes no difference that the lot sold is on the extreme corner of the plat and is not affected in value in the slightest degree by the opening or closing of back (568) streets miles away from it; and that its purchaser has no use for the streets which can never be used by him or anyone else for any practical purpose. In spite of these facts, all these hundred streets must be kept open forever, not to subserve his convenience, for they add nothing to that, but simply to gratify his whim or to enable him to force the vendor to buy his peace at any price he may ask. It is said there is a legal presumption of injury, but in this I can not concur in the face of adverse facts.

The boomer may fail, as he usually does, and some innocent purchaser may buy the land under mortgage or execution sale. What right would he acquire? Suppose he should build a large factory and inadvertently locate it in the middle of Pennsyl-

vania Avenue or Broadway, whose existence neither he nor anyone else had suspected—could the purchaser of that solitary lot compel him to tear down his building? It may be said that this is *reductio ad absurdum*. Even so, it is a result that *may* follow from the opinion of the Court. We know that during the recent boom, thousands of acres of old fields were platted into lots and streets which, by the inexorable logic of events, have long since been turned back into old fields. I know one tract of about a thousand acres, the quiet enjoyment of which may be seriously endangered by the opinion of the Court. We know that it may result in great hardship. If it does no good, then why risk the danger of so much harm? I readily admit that the purchaser is entitled to the use of all such streets as are necessary to the reasonable enjoyment of the lot he has purchased; and I do not think that anything more was ever contemplated by either party to the contract.

It may be that the opinion of the Court is not intended to go as far as I apprehend; but if so, it should be made to say so. If we do not place the line of demarkation at the point where the purchaser ceases to suffer any substantial in-
(569) jury, where will we stop?

The opinion is founded upon the case of *Conrad v. Land Co.*, 126 N. C., 776, and yet it goes far beyond it. In Conrad's case the opinion states that: "Afterwards, the plaintiffs each purchased from the defendant company one of the lots so laid off, lying along the southern edge of Fourth Street *as it ran along Grace Court.*" That is, I suppose, that the lots purchased were opposite to Grace Court on the same street. Again, that opinion says: "This action was brought for a perpetual injunction restraining the defendant, Hotel and Land Co., from disposing of the court or any part thereof for private purposes, or from otherwise depriving the plaintiffs of their enjoyment of the court as a public open ground, and from narrowing or closing up *the streets surrounding the same.*" Surely, that does not support the opinion in the case at bar, nor do the cases cited in Conrad's case. In *Meier v. R. R.*, 16 Oregon, 500, the plaintiff was seeking to recover a street along which a street car line was in actual operation. Then certainly some one would have been damaged. In *Grogan v. Haywood*, 4 Fed., 164, the plaintiff was suing the town, also seeking to recover a street apparently in common use. In *Church v. Portland*, 6 L. R. A., 259 (erroneously cited as 659), the plaintiff was seeking to prevent the erection of a public building in a public square.

In *Price v. Plainfield*, 40 N. J. L., 608, the bone of contention was a public square.

In *S. v. Fisher,* 117 N. C., 733, this Court thus lays down the rule, on page 740: "When the defendant opened up the street, then outside of the confines of the city of Greensboro, if * * * he had sold a single one of the lots *abutting* on this apparent extension of North Elm Street, he and those claiming under him would have been estopped from denying the right of such purchaser and those in privity with him to use *the street,* as laid down in the plat, and called for as his boundary line in the deed conveying it to him." There is no suggestion that the purchaser would have been entitled to (570) the use of any other street laid out by Fisher.

I regret that the extreme pressure of work incident to the closing days of the term prevents me from giving this case the attention it deserves, or the research necessary to properly present it. I will cite but one case—*Pearson v. Allen,* 151 Mass., 79, also cited by the Court.

But suppose that the plaintiff should have some theoretical right to the use of streets that he never expects to use, how can he enforce it? This infringement would be *injuria sine damno,* which the law will not seek to redress. It is well settled that all such implied dedications operate by way of estoppel *in pais,* and it seems equally well settled that there can be no estoppel where there is no actual injury. Neither is he entitled to injunction, for equity will grant an injunction only to prevent irreparable injury that can not be compensated in damages.

In what I have said, I have not referred so much to the facts of the case as to the scope of the opinion, from which I must respectfully dissent.

Cited: Davis v. Morris, 132 N. C., 436; *Hughes v. Clark,* 134 N. C., 461; *Milliken v. Denny,* 135 N. C., 22; *Rivenbark v. Teachey,* 150 N. C., 292; *Bailliere v. Shingle Co., Ib.,* 637.

(571)

STATE v. HEWLIN.

(Filed 26 February, 1901.)

1. SLANDER—*Incontinency—Innocent Woman—Bestiality—Indictment —Quashal—The Code, Sec.* 1113.

Charging a woman with having had sexual intercourse with a male dog amounts to a charge of incontinency.

2. INDICTMENT—*Quashal—Discharge of Prisoner.*

Where an indictment of one against whom there is a well-grounded suspicion of crime is quashed, it is proper for the court to refuse his motion for discharge.

INDICTMENT against George Lee Hewlin, heard by Judge *Thos. A. McNeill* and a jury, at November Term, 1900, of BEAUFORT. From an order quashing the indictment the State appealed, and from a refusal of the Court to then discharge the defendant, he appealed.

Robert D. Gilmer, Attorney-General, and *Small & McLean,* for the State.

No counsel for defendant.

COOK, J. The prisoner was indicted under sec. 1113 of The Code, charging him with having, in a wanton and malicious manner, attempted to destroy the reputation of one Maggie Waters, an innocent and virtuous woman, by words spoken and declared "that she, the said Maggie Waters, had had sexual intercourse with a male dog, and that he, the said George Lee Hewlin, saw the said intercourse, thereby intending to charge the said Maggie Waters with being an incontinent woman." The prisoner's counsel moved to quash the bill of indictment upon the grounds that it stated no violation of the criminal law of North Carolina. The Court granted the motion
(572) to quash and the State excepted and appealed. Thereupon prisoner's counsel moved for his discharge. Motion denied and prisoner excepted.

The bill of indictment fails to show any defect upon its face. It follows the statute and contains each and every averment material to the offense. It charges that the attempt to destroy the reputation of an innocent woman was made wantonly and maliciously by words spoken, which amount to incontinency. It recites the language charged to have been used, to-wit, that the prosecutrix "had had sexual intercourse with a male dog, and that he saw the intercourse."

It can not be successfully maintained that the bill is defective in that the intercourse was charged to have been had with a dog—bestiality—for that, "incontinency" is the actual illicit sexual intercourse. *S. v. Brown,* 100 N. C., 519; *S. v. Moody,* 98 N. C., 971. And it matters not with whom or whatsoever male it may have been accomplished. The simple fact that it occurred is within the purview of the statute, and would forever blast and ruin the reputation of the woman. And it does not lie in the mouth of the prisoner to say that the language used charged an impossible act, and an impossible fact, and thus carry upon its face its own refutation after having said, as charged in the bill, that he saw the intercourse. The charge therein made is of the highest, grossest and most vile character, and is fully covered by the statute.

The indictment should not have been quashed. The exception to the order of the Court in overruling the motion for the prisoner's discharge is not sustained. *S. v. Griffice,* 74 N. C., 316.

Error.

(573)

STATE v. WILLIAMS.

(Filed 26 February, 1901.)

1. RAPE—*Fraud—Personating Husband—The Code, Sec.* 1103.

   A person who, by his *acts* or *conduct*, induces a woman to believe he is her husband and has intercourse with her, is guilty of a felony. *S. v. Matthews,* 121 N. C., 604.

2. EVIDENCE—*Sufficiency—Rape—The Code, Sec.* 1103.

   The facts in this case held sufficient to submit to jury as to guilt of defendant.

THIS WAS AN INDICTMENT against C. M. Williams, heard by Judge *T. A. McNeill* and a jury, at November Term, 1900, of BEAUFORT. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *Chas. F. Warren,* and *W. B. Rodman,* for the State.
Small & McLean, for the defendant.

CLARK, J. The multiplication of law reports makes it desirable that the courts should refrain from filing opinions which state no new points or new application of settled principles.

Many courts now act upon that principle, and the Supreme Court of Tennessee (and possibly others) have formulated a rule of court to that effect. For the same reason when an opinion is filed it is not necessary to do more than decide, without discussing in the opinion, the exceptions which present only matters which have been heretofore well settled.

This is an indictment under The Code, sec. 1103, for carnal knowledge of a married woman by fraud in personating her husband. After a careful examination of each and every exception we find no error. We will consider the only ex-
(574) ception which can possibly present a hitherto undecided aspect. The prayer (the refusal of which is set out as exception 13), that "upon all the evidence, if believed, the defendant could not be convicted of fraudulently personating the husband under the act upon which the indictment was drawn," could not be sustained unless the act required that there should be fraudulent representations by words. In a transaction of this nature, that would hardly be possible. The "fraudulent personation" must also necessarily be done by "acts and conduct" of defendant. This indeed is recognized by defendant's tenth prayer for instruction. If the prosecutrix's evidence is believed, there was such evidence sufficient to go to the jury. The wife was visiting her mother, who was ill; the defendant was there that evening and saw her. She was expecting her husband that night. During the night the defendant entered the room where prosecutrix was sleeping on a pallet, laid down and squeezed her hand and pulled her towards him; she asked, "Who is that?" Not distinguishing any answer, she said in a whisper, "When did you come?" supposing he was her husband. The defendant replied in a whisper, "A little while ago," so low that she did not suspect that it was not her husband's voice. He continued to pull her hard and she got over nearer to him, so that he accomplished his purpose; the prosecutrix was much worn out with nursing and want of sleep; her grandmother was at the other edge of the pallet.

Without going into further details, it was evident to the jury, if the jury believed this testimony, that the defendant laid down in the night time by a sleeping woman who could not see him when she awoke, and to whom he made known that he sought her embrace by squeezing her hand and pulling her to him, and that when she asked "When did you come?" he knew that she thought he was her husband whom she was ex-
(575) pecting, and not himself whom she had already seen and whose time of arrival was already known to her. His reply, "A little while ago," spoken in a whisper so low as to

disguise his voice, could have been intended only to prolong the impression that it was her husband, and to deceive her into yielding her body to his embraces; certainly it was sufficient evidence, even without the further evidence of his confession that the prosecutrix was fooled and thought he was her husband, to submit to the jury. He knew he was not the woman's husband; he knew she thought he was; he so acted as to keep up the delusion until he accomplished his purpose. It is not essential whether he went to the room for that purpose or not, nor whether he originally created the delusion or not. Even if he laid down on the pallet by mistake and finding a woman there, intended by squeezing and pulling her hand to solicit her consent to illicit intercourse, or if according to his own evidence she threw her arm and leg over him and thus aroused his passions, still when he found by her whispered query, "When did you come?" that he was mistaken for her husband, and continued the delusion by speaking so as to disguise his voice and thus obtained the gratification of his passions, he knew that he was obtaining his end by fraud in personating her husband. "The voice was the voice of Jacob, but the hand was the hand of Esau," is the story of an ever-memorable fraud, but here neither hand nor voice created a suspicion in the mind of the betrayed.

No error.

(576)

STATE v. ROGERS.

(Filed 12 March, 1901.)

ELECTIONS—*Intimidation of Voters—Expulsion from Church—The Code, Sec.* 2715.

Under The Code, sec. 2715, the expulsion of a person from a church because he voted the Democratic ticket is not punishable.

INDICTMENT against George Rogers and others, heard by Judge *H. R. Starbuck,* at October Term, 1900, of VANCE. From a quashal of the indictment, the Solicitor for the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
T. T. Hicks, for the defendant.

COOK, J. The defendants were indicted under sec. 2715 of The Code. Upon motion of defendant's counsel, the Court quashed the bill of indictment and the State appealed.

The statute is as follows: "Any person who shall discharge from employment, withdraw patronage from, or otherwise injure, threaten, oppress or attempt to intimidate any qualified voters of the State, because of the vote such voter may or may not have cast in any election, shall be guilty of a misdemeanor."

The indictment charges the defendants with having injured, threatened, oppressed and attempted to intimidate the prosecutor, a duly qualified voter, by expelling him from the church of which he and they were members, on account of his having voted the Democratic ticket at the election held in August, 1900.

The statute being penal, must be construed strictly, not by implication or otherwise than by its strict words and plain signification.

The object of the statute is to secure to the voter the (577) exercise of the elective franchise free from pecuniary loss, personal injury or physical restraint—neither element of which is embraced in his expulsion from the church. The injury or oppression, if any, done to the voter, was not of a physical nature. While he may have felt mortified or humiliated in being excluded from the fellowship of his associates in the exercise of the rites of that body of Christian believers, hold the same creed and acknowledging the same ecclesiastical authority, and to that extent injured and oppressed, yet he suffered no loss of property or gain; nor was he in any way restrained of his liberty or otherwise controlled in the exercise of his personal conduct.

CLARK, C. J., concurring. If the expulsion is *damnum,* it is *absque injuria* and does not come within the statute.

No error.

STATE v. HARTNESS.

(Filed 26 March, 1901.)

INSTRUCTIONS—*Homicide—Excusable Homicide—Request of Jury for Instructions.*

Failure of the court to define excusable homicide on request of jury is error, although the court had previously instructed the jury as to excusable homicide.

INDICTMENT against George Hartness for murder, heard by Judge *T. A. McNeill* and a jury, at May Term, 1900, of CHEROKEE.

Robert D. Gilmer, Attorney-General, for the State.
Dillard & Bell, and *E. B. Norvell,* for the defendant.

COOK, J. The prisoner was indicted and tried for murder —was convicted of murder in the second degree. He mainly relied upon the plea of self-defense.

From the uncontradicted evidence, as stated in the (578) case, it appears that the deceased was shot in the evening, about, or a little after, sunset, in the yard of the prisoner, who had been absent from home during the afternoon. Unfriendly relations had sprung up between prisoner and deceased, growing out of the marriage of Julia James, a girl about fourteen years old, and prisoner, beginning shortly before the marriage, with the declaration by deceased, "that George (meaning the prisoner) and Julia James were going to be married, and if they did he would have her if he had to sink him into hell;" and immediately after the marriage, deceased armed himself with a Winchester rifle and pistol (which he carried constantly), and "followed after" prisoner, making threats, and saying "his purpose was to annoy him until he provoked him into saying something, and then kill him;" that he was "running after" prisoner's wife, causing "talk" about her in the community. Prisoner, knowing these facts, and his character for violence, notified him, through a friend, to stay away from his home, to which he replied "he would go when he got ready." On the day of the shooting the prisoner had left home about noon, returning a little after sunset. When he approached his house, and being very near, he saw deceased in his yard, having just come out of his house in company with his wife and several others. It was then that prisoner shot him. As to the circumstances of the shooting, the evidence is conflicting, prisoner testifying to having been in the road, near the house and heard him say, as he sprang out of the house into the yard (in reply to a suggestion that he had better leave, as George—the prisoner—might come), "God damn him, let him come" (having his rifle resting on his foot and pistol in his pocket), and apprehending that deceased was about to kill him or do him great bodily harm, and under such apprehension shot him; while one witness, a boy about twelve years old, testified that the shooting was done from behind a chimney by the prisoner, whom he recognized; that the gun (a (579) rifle) kicked him down and he got up and ran off. This testimony was discredited by witnesses who knew the *locus*, and said that the witness could not have seen a man at that place from the place where he said he was sitting.

After the jury had been charged by the Court as to murder, murder in the second degree, manslaughter and excusable homicide, and "after remaining out in their room some time, came

into Court and announced their failure to agree, and requested the Judge to define the four degrees of homicide." "In response to this request (the case states) the Judge defined murder in the first degree, murder in the second degree and manslaughter, and then said: 'If, upon the whole case, the prisoner ought to be acquitted, this is excusable homicide.'" To this the prisoner excepted. We think his Honor erred in not *"defining"* excusable homicide as the jury had requested. To render a just verdict the jury must not be in doubt as to the law which they apply to the facts. This they can not do unless the Judge states clearly the particular issues arising on the evidence, and plainly and fully instructs them as to the law applicable. It further appears from the record that "after again returning (to their room) and after having remained out some hours, the jury came into Court and asked the presiding Judge 'whether at the time the fatal shot was fired the fact that prisoner was entering his own yard made any difference?'"

From this inquiry it appears that the jury had failed to understand what was meant by excusable homicide, as before defined by the Court; they wanted to know whether the prisoner had more rights there in his own yard than elsewhere; whether he had a right to go into his yard, notwithstanding the menacing presence of deceased, or should he have deserted his premises and fled; or whether he had a right to take life in driving him away, if it could not be accomplished with less force. (580) And to this inquiry, as appears from the case, the Judge made no response, further than to read again his former charge, which was not directly responsive, and is as follows: "If the jury shall find from the evidence that the prisoner had been warned only recently before the killing that deceased had declared his purpose to annoy him until prisoner was provoked into saying something, and then kill him, and had made other threats, and prisoner knew the character of deceased for violence, and that as prisoner entered his yard, or was about to do so, prisoner heard deceased say, as he saw him spring out into the yard, in reply to a suggestion that he had better leave, as George (the prisoner) might come, "God damn him, let him come," and deceased was armed with a Winchester rifle, and the prisoner reasonably apprehended that the deceased was about to kill him or to do him great bodily harm, and under such apprehension the prisoner shot and killed the deceased, the jury should acquit the prisoner; but of the reasonableness of this apprehension the jury are the judges, and not the prisoner, upon the whole circumstances at the time of the shooting." To which prisoner excepted.

We think his Honor erred in failing to instruct them specifically upon the question submitted. They should not have been left in doubt as to the duties and rights of the prisoner in entering upon and defending the sacredness of his home against a violent trespasser, and protecting the virtue of his young wife from the designs of a man who had threatened her ruin.

As a new trial must be had, it is deemed unnecessary to pass upon the other exceptions, as they may not again arise.

Venire de novo.

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(581)

STATE v. CREWS.

(Filed 9 April, 1901.)

1. ABORTION—*Indictment—Sufficiency—The Code, Sec.* 976.

   An indictment under The Code, sec. 976, denouncing, advising and procuring a woman to take a drug to produce a miscarriage, need not charge the overt acts committed.

2. ABORTION—*Indictment—Intent—The Code, Sec.* 975.

   Intent being the chief ingredient in the offence of abortion, the word noxious need not be used in the indictment.

3. ABORTION—*Indictment—The Code, Sec.* 975.

   Under The Code, sec. 975, it is not necessary to charge or prove that the accused procured the drug.

4. INSTRUCTIONS—*Abortion.*

   The court need not give a charge in the very words asked.

INDICTMENT against J. C. Crews, heard by Judge *E. W. Timberlake* and a jury, at November Term, 1900, of FORSYTH. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Swink & Swink, and *W. O. Cox,* for the defendant.

CLARK, J. The motion to quash was properly overruled. The indictment, exclusive of the merely formal parts, charges that the defendant "did unlawfully, wilfully and feloniously advise and procure a certain woman, called Florence Kiger, to take a certain noxious drug, called spirits of turpentine, with intent thereby to procure the miscarriage of her, the said Florence Kiger, she being at the time pregnant." This substantially follows the language of The Code, sec. 976. This

(582) is not an attempt to commit another crime in which case the overt act must be charged, which might result in such crime (*S. v. Colvin*, 90 N. C., 717), but here the act charged is the offense itself, which is denounced by the statute.

The demurrer to the evidence was properly overruled. It was not in evidence that defendant procured the drug for the woman, nor was it necessary to so charge. The words "advise and procure" the woman to take the drug means that he not merely "advised" her to take it (which standing alone is not made indictable in this section, though it is in section 975), but that he also "procured her," *i. e.*, prevailed upon her, induced her, to act upon such advice, "with intent to procure her miscarriage."

There was also evidence sufficient to go to the jury that spirits of turpentine was noxious, when used internally for this purpose, but if it had not been, the word "noxious," though used in indictments for this offense at common law (*S. v. Slagle*, 82 N. C., 653), is omitted in the statute which substitutes "intent" as the chief ingredient in the offense. Hence, the word "noxious" was mere surplusage, and like the description of the weapon and of the wound and other matter used formerly in indictments for murder, but which, if now inserted in an indictment for homicide, need not be proven.

The first prayer for instruction was substantially given in the charge as sent up. The Court need not give the prayer in the very words asked. Clark's Code (3 Ed.), page 539, and cases cited.

Nor was there any error in charging the jury "if they believed that the defendant advised and procured Florence Kiger to take turpentine with intent thereby to procure her miscarriage, it made no difference whether it would procure abortion or not, he would be guilty; that is, it made no difference whether turpentine was a noxious drug or not, if the defendant
(583) advised the prosecutrix to take turpentine with intent thereby to procure her miscarriage he would be guilty." As already pointed out, at common law, the noxious nature of the drug was essential, but under the statute the essential ingredient is the intent with which the "medicine, drug or other thing whatsoever," is used. The nature of the drug or article is material only as throwing light upon the intent. It is no defense even if defendant could show that the drug would not in fact cause a miscarriage. *S. v. Fitzgerald*, 19 Iowa, 260; *Dougherty v. People*, 1 Colo., 514; 2 McLain Cr. Law, Sec. 1148, note 10; 1 Bish. New Cr. Law, 769 (4). The law deems no experiments in an effort to procure abortion innocent, when

the jury is convinced that the drug or other article was used with the criminal intent to procure such attempted abortion.

No error was committed by Judge *Timberlake* in the Superior Court in overruling the exceptions taken at the trial in the Criminal Court.

No error.

Cited: S. v. Hefner, 129 N. C., 549.

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(589)

STATE v. HUNT.

(Filed 16 April, 1901.)

1. JURY—*Peremptory Challenges—Homicide—Special Venire—Trial—The Code, Sec.* 1199.

   Where, upon the trial of an indictment for murder, the solicitor states that he should ask only for a verdict of manslaughter, no special *venire* was necessary, and the defendant is not entitled to more than four peremptory challenges.

2. EVIDENCE—*Malice—Homicide—Declarations.*

   On a trial for murder the declaration of the defendant that he intended to go to a party and "raise some hell" is competent to show malice, where the deceased was at the party.

3. INSTRUCTIONS—*Erroneous—Exceptions and Objections.*

   The defendant can not complain of instructions, although erroneous, if more favorable to him than the law justifies or those asked.

INDICTMENT against Raymond Hunt, heard by Judge *E. W. Timberlake* and a jury, at Spring Term, 1901, of CATAWBA. From a verdict of guilty and judgment thereon, the defendant appealed.

Brown Shepherd and *T. M. Hufham* represented the Attorney-General for the State.

E. B. Cline and *Self & Whitner,* for the defendant.

CLARK, J. The defendant was indicted for murder in the usual form under Laws 1887, ch. 58. When the case was reached for trial on Tuesday of Court, the attorneys for the defendant being present and not objecting, the Solicitor stated that no special venire was necessary, as he should only ask for a verdict of murder in the second degree, or manslaughter, and

(585) no special venire was ordered. On Wednesday both sides announced their readiness for trial and the trial commenced. The defendant offered to challenge more than four jurors peremptorily. The State objected. The Court sustained the objection, stating at the time that the Solicitor did not ask for a verdict for a capital felony, in which case only the defendant was entitled to more than four peremptory challenges. The defendant excepted to the refusal of the Court to allow him to challenge the fifth peremptorily.

The jury was sworn and empaneled. The Solicitor read the bill of indictment and stated to the jury that he should not ask for a verdict of murder in the first degree, but only for murder in the second degree, or manslaughter, and the Court, in both the opening and concluding parts of the charge, stated to the jury that they must not render a verdict for any higher offense than murder in the second degree.

We do not see how the defendant has been prejudiced or deprived of his rights in any way. He was not exposed to trial for a capital felony before the petit jury. It is only when a person is *"on trial* for his life" (Code, sec. 1199) that he may challenge peremptorily 23 jurors, and the defendant was not on trial for his life. The Solicitor gave notice beforehand, and again in beginning the trial, that a capital verdict was not asked for, and the Court instructed the jury that they could not return a verdict for murder in the first degree, the defendant being on trial for a lesser offense.

Laws 1893, ch. 85, prescribes the same form of indictment for murder in the first degree and murder in the second degree, and this Court has held in *S. v. Ewing,* 127 N. C., 555, that the grand jury can not endorse on such bill that it is a true bill for murder in the second degree, but must return it simply as "a true bill" or "not a true bill." But the statute does prescribe two distinct offenses—murder in the first degree, which is punishable with death, and murder in the second

(586) degree, which is not. As the State can not indicate that it intends to put the defendant on trial for the lesser of these offenses by indicating it in the form of the bill or by the indorsement of the grand jury, the Solicitor must be allowed to do so at the earliest moment possible, to-wit, when the case is called and at the time when, if the defendant is to be put "on trial for his life," a special venire would be asked and ordered. If this could not be done, the public would be put in every instance to the inconvenience of summoning a large body of citizens needlessly from their usual avocations, and in many counties now to the useless expense of paying them per diem

and mileage for the trial of a case in which the representative of the State does not think the evidence would sustain a charge for a capital offense, and has declined to put him on trial therefor. This inconvenience and expense should be borne if the statute so required, or justice to the defendant, but such is not the case. The language of the statute does not entitle one *"indicted* for a capital felony" to 23 peremptory challenges, but only one who is *"on trial* for his life," and the defendant never was. The indictment on its face being for either offense, the State made it clear when the case was called that it elected to go to trial for the lesser. The defendant did not, and could not, object.

Under an indictment for murder the defendant may be convicted either of murder in the first degree, murder in the second degree, or manslaughter, and even of assault with a deadly weapon, or simple assault "if the evidence shall warrant such finding" when he is not acquitted entirely. Laws 1885, ch. 68. It is as if all these counts were separately set out in the bill (for it includes all of them), *S. v. Gilchrist,* 113 N. C., 673; and the Solicitor can *nol pros.* any count, and a *nol pros.* in such case is in effect a verdict of acquittal as to that. *S. v. Taylor,* 84 N. C., 773; *S. v. Sorrell,* 98 N. C., 738. (587) His action here was at least equal to a *nol pros.* as to the count for murder in first degree. It may be it would be better form to enter such renunciation on the record formally. Certainly it should have been done if the defendant had requested it. But it does not appear here that it was not done, nor that the defendant asked that it should be done, and, if it was not done, the defendant has not excepted on that ground, and certainly has suffered no prejudice from such failure, for the verdict is only for manslaughter, and the sentence is three years in the State's Prison.

The declaration of the defendant that he intended to get some whiskey and go down to the party that night and "raise some hell," was competent to show malice, which was an element in the charge of murder in the second degree upon which he was on trial. It was not necessary to show special malice as to the deceased, since he was one of the persons at the party and embraced within the declaration of the defendant. Foster's Crown Law,. . . . . ; *S. v. Mills,* 91 N. C., at page 596.

In lieu of special instructions asked, the Court told the jury that it did not matter what had taken place between the parties before the killing—whether the defendant entered into the fight willingly or not—if at that time it was necessary for the defendant to kill the deceased in order to save himself from

great bodily harm or death, he would be excusable and their verdict should be "not guilty." This charge was more favorable to the defendant than the instructions asked, and indeed was erroneous in that it was more favorable to him than the law justified. *S. v. Medlin,* 126 N. C., 1127; *S. v. Gentry,* 125 N. C., 733; *S. v. Kennedy,* 91 N. C., top of page 578; but the defendant can not complain of that.

Affirmed.

Cited: S. v. Caldwell, 129 N. C., 683; *Coward v. Com'rs.,* 137 N. C., 300; *S. v. Exum,* 138 N. C., 605; *S. v. Matthews,* 142 N. C., 624; *S. v. Walker,* 145 N. C., 569.

(588)

STATE v. SHUFORD.

(Filed 1 May, 1901.)

PUBLIC OFFICERS—*Appointment to an Office Not Yet in Existence, Invalid—Courts—Larceny.*

Appointment of a Judge of Superior Court prior to date when the act creating the judicial district takes effect, is invalid, and a motion in arrest of judgment by a person convicted of larceny, on the ground that the court was illegally constituted, should have been allowed.

INDICTMENT against Walter Shuford, heard by Judge *George A. Jones* and a jury, at April Term, 1901, of BUNCOMBE. After verdict of guilty, the defendant moved in arrest of judgment, and excepted to refusal of said motion. From judgment, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.

No counsel for the defendant.

CLARK, J. The General Assembly, by an "Act to provide for the division of the State into Judicial Districts and for holding the Courts therein," ratified 11 March, 1901, increased the number of Judicial Districts to 16, and prescribed the counties comprised in each, the time for holding Courts therein, and for the rotation of the judges, and specifying in which districts the additional judges and solicitors shall be appointed by the Governor to fill the original vacancies created by the Act, till the next general election. Section 10 thereof provides that the Act shall take effect and be in force from 30 June, 1901, "except that as to the Fifteenth District this act shall take effect from and after the twenty-fifth day of March, 1901, and after

that date Courts shall be held in said Fifteenth District (589) at the time herein provided, and said Courts shall be presided over by the Judge of the Sixteenth District, who shall be appointed by the Governor on or prior to 25 April, 1901." A supplementary act, ratified 4 April, 1901, enacted that the Governor was authorized to appoint the additional judges and solicitors provided for in above act at any time after 11 March, 1901, and ratified all appointments made since that date.

On 15 April, 1901, the Governor issued a commission to George A. Jones, Esq., as "Judge of the Superior Court for the Sixteenth Judicial District," who appeared and opened Court for Buncombe County on Thursday, 25 April—Court being adjourned from day to day till then—during the first week of a term prescribed by aforesaid act to be held in said county as a part of the now Fifteenth District. Proceedings were had in the ordinary course, and a grand jury returned into Court an indictment for larceny against the defendant "a true bill." The defendant moved the Court to quash the bill of indictment for that the Court was not legally constituted and had no jurisdiction; also on the same grounds he prayed the Court that he might not be compelled to answer said indictment. Both motions were overruled, and defendant excepted. After verdict of "guilty," the defendant moved in arrest of judgment upon the same grounds, and excepted to the refusal of said motion. Sentence was passed, and defendant appealed.

The Constitution (Art. IV, secs. 10 and 11) provides that there shall be a judge for each Superior Court district, that each judge shall reside in his district, and that the judges shall hold the Courts of the several districts in rotation. From these provisions it is clear that there can be no judge of the Superior Court in North Carolina unless there is a district to which he belongs. Section 10 of said Article IV, empowers the General Assembly to "reduce or increase the number of districts." But the act increasing the number of districts, provides (590) that (except as to the Fifteenth District) the act should not take effect till 30 June, 1901. There can, therefore, be no Sixteenth District till 30 June, and consequently till that date there can be no such office in existence as "Judge of the Sixteenth Judicial District." The implication from the words in the act that the courts of the Fifteenth District "shall be held by the Judge of the Sixteenth District," and the direct authority conferred on the Governor in the supplemental act to appoint and commission the new officers provided by the first act, can have no other authority, at the most, than to empower him to

nominate and issue commissions to the appointees. Certainly such commissions could not become *effective* so as to clothe the appointees with the power to exercise the duties of the office or enjoy its emoluments, until the new districts shall come into existence.

It is very questionable whether the provision, putting the Fifteenth District into existence 25 March, 1901, is valid, seeing that under that temporary thirteenth district arrangement (to last till 30 June) the Judge of the Twelfth District, who, as such, is holding under an unrepealed statute the courts of the Seventh District, is thus made a resident of the Fifteenth District; and the Judge of the Fifth District, under the unrepealed statute, is holding the courts of the Twelfth District, in which assignment of duty is a two-weeks term for Buncombe, beginning 29 April. It presents this and other complications, but it is not now necessary to discuss and pass upon the validity of that provision. Any possible difficulty could be avoided, if thought proper, by authority issued to Judge Shaw to hold a special term in Buncombe. What is plain, is that as there will be no Sixteenth Judicial District till 30 June, 1901, the General Assembly could not authorize the creation of the office of Judge of the Sixteenth District to begin and take effect before the district existed.

In *Cook v. Meares,* 116 N. C., 582, it was held that
(591) the General Assembly could not elect one to fill an office till an act creating the office was ratified. It is true, this case differs in that, here, the act providing for the office has been ratified, but it prescribes that it shall begin existence *in futuro,* for when it says the Sixteenth District shall not be in existence till 30 June, the Constitution steps in and says, till there is a district there can be no judge for the district. Were it otherwise, there would be no constitutional inhibition upon the number of unassigned or unattached judges—"judges in waiting," so to speak. If there could be one, there could be a dozen.

The attempt to create a judge with the powers of a Superior Court Judge, without a Superior Court District assigned him, was held invalid as to Judge Ewart, in *Rhyne v. Lipscombe,* 122 N. C., 650, even though in that case he was given a different title.

It was earnestly insisted that the presiding officer here was at least a *de facto* judge, because he had a commission issued by the Executive under authority of an act of the Legislature. But the indispensable basis of being a *de facto* officer is that there is such an office. Meacham Public Offices, sec. 324, and numer-

ous cases there cited. Then, if one with color of right—not a mere usurper—is exercising the functions of the office, his title thereto and the validity of his judgments can not be called in question, except by a direct proceeding in *quo warranto.* "There can be no officer, either *de jure* or *de facto,* if there be no office to fill." *Carleton v. People,* 10 Mich., 250. "While there may be *de facto* officers, there can be no *de facto* office in a constitutional government," says the United States Supreme Court (*Field,* J.) in *Norton v. Shelby County,* 118 U. S., at pages 441-449, "for the existence of a *de facto* officer, there must be an office *de jure.*" In *Ex Parte Snyder,* 64 Mo., 58, it was held that a *de facto* officer presupposes a *de jure* office, and where the office of judge did not legally exist, the acts of (592) one acting under a commission as judge were null and void. "There can be no *de facto* officer when there is no office *de jure,*" was held in *In Re Hinkle,* 31 Kan., 712, and accordingly one held in custody by the judgment of one, thus acting as a judicial officer, was discharged on *habeas corpus.*

Here, as already shown, there was no such officer as "Judge of the Sixteenth Judicial District," and will be none till a future date specified in the act. The provision that the "Judge of the Sixteenth District" should hold the courts of the Fifteenth District after 25 March, if it created the Fifteenth District did not purport to create the "Judge of the Sixteenth District," nor did the act authorize the Governor to appoint and commission the new judges and solicitors after 11 March purport to create those offices.

It is unnecessary that we should pass upon or deny the validity of the act authorizing the Governor to appoint and commission his selections for these offices before they came into existence—to nominate and commission one to a vacancy (whether original or otherwise) before the vacancy exists. As an abstract proposition, not involved here, a curious question might arise whether such commission would not be revokable at any time before the day the office begins, should the Executive change his mind and appoint another, or if the General Assembly should change the composition of the districts before the date when the office is to become existent.

But this is merely speculative. What we feel compelled to hold is that there is not, and can not be, any office of "Judge of the Sixteenth Judicial District," till 30 June, 1901, when that district is to begin its existence, and that one attempting to perform the duties of such alleged office is neither a *de facto* nor a *de jure* officer, and his acts are null and void. In *S. v. Lewis,* 107 N. C., 967, the judge was one of the Superior

(593) Court Judges of the State. The only question was as to the legality of his assignment to hold that term. It was held that he was a *de facto* officer, and his acts could not be questioned by a motion in arrest of judgment.

There is, it is true, no express power given the Courts by the letter of the Constitution to declare an Act of the General Assembly unconstitutional, but it has been exercised in this State, without ever being denied (in a proper case), since it was first held in *Bayard v. Singleton,* 1 N. C., 42. The principle upon which the doctrine rests, is that when there is a provision in the Constitution and a conflicting provision in a statute, the Courts must recognize the former as paramount authority. The limitation upon the power is stated in many cases and repeated in *Sutton v. Phillips,* 116 N. C., at page 504—"the Courts will not declare that the co-ordinate branch of the government has exceeded the powers vested in it, unless it is plainly and clearly the case." The statute here in question is plainly and clearly in conflict with the constitutional provision, in attempting to create a judge of the Superior Court without a district. The office which he offered to exercise was not in existence, and his acts were not those of a *de facto* officer, and hence must be treated as null and void. In view of the statute, he doubtless felt that he ought not to refuse to attempt to exercise the duties of the office, and that the proper course was to submit the unconstitutionality of the act to this Court.

Judgment arrested.

Cited: St. George v. Hardie, 147 N. C., 93.

(594)

STATE v. McCOURRY.

(Filed 14 May, 1901.)

1. EVIDENCE—*Declarations—Res Gestæ—Homicide.*

   Declarations in the immediate presence of a prisoner, at the instant the fatal blow is given, charging him with having given it, are part of the *res gestæ* and therefore competent evidence.

2. ARGUMENT OF COUNSEL—*Questions for Jury—Evidence.*

   Statement by trial judge that he did not remember evidence commented on by the State Solicitor was a proper ruling on an objection to such argument.

3. EVIDENCE—*Sufficiency—Homicide—Excusable Homicide—Self-Defense.*

   Charge of trial judge in this case, that there was no evidence of excusable homicide in self-defense, was correct.

STATE *v.* MCCOURRY.

4. EVIDENCE—*Murder—First Degree—Second Degree—Instructions.*

A refusal to charge that in no view of the evidence can the jury find a verdict of guilty of murder in the first degree, will not be reviewed when the prisoner was found guilty only of murder in the second degree.

5. EVIDENCE—*Manslaughter—Instructions.*

Charge that if deceased only took a rock from his pocket without attempting to throw it, or without prisoner seeing him draw it, would not reduce the killing to manslaughter, was proper.

6. MURDER—*Presumption—Malice—Express Malice—Deadly Weapon.*

The requested instruction in this case on the doctrine of express malice arising from the use of a deadly weapon was properly modified by the court.

(595)

INDICTMENT agains Elijah McCourry, heard by Judge *W. B. Council,* at Fall Term, 1900, of YANCEY, on appeal from the Western Criminal District Court. From a judgment sustaining the judgment of the Criminal District Court, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
C. M. Busbee, for the defendant.

CLARK, J. The appellant was convicted of murder in the second degree in the Western Criminal District Court. On appeal, his exceptions were overruled in the Superior Court, and thence he appealed to this Court.

Melvin Ray testified: "Elijah McCourry (the prisoner) stepped where Bob Ray (the deceased) and I were standing and said, 'What made you tear down the house over my children for?' Bob said, 'I never done it.' Elijah said, 'You or some of your folks did.' Bob said, 'Well, I didn't.' Bob stepped off, walking down the road some five or six steps and stopped with Charles Edwards, then Elijah threw a rock and I heard something strike. * * * Bob's left side was turned to Elijah, talking to Charles Edwards when the rock was thrown. I was in about two steps of prisoner when he threw the rock. I saw the rock in his hand and saw him throw it; it as a long rock, seven or eight inches long, and weighed a pound and a half or two pounds."

Will Edwards, testifying to same conversation between prisoner and deceased, says, that after the deceased went on and was talking to Charles Edwards, he turned and "heard a lick. Melvin Ray was two steps from Elijah at the time; don't know whether McCourry heard it; Melvin Ray talked as loud as I am talking. I asked Melvin Ray what that was, and he said, 'Elijah

McCourry hit Bob Ray with a rock.' As quick as I turned I spoke. Bob Ray turned and slapped his hand to the left
(596) side of his head and walked down the road."

Charles Edwards testified to same conversation between prisoner and deceased, and adds: "Bob walked down the road just a little below me. Bob was on the right hand and I was on the left hand, as you go down. Bob was three or four steps from me. Bob turned around and said, 'Take him away from here, or I'll hurt him.' Bob pulled something out of his pocket as he said that to me—looked like a rock. I heard something hit about that time. I thought it hit at Bob. Will Edwards said, 'What was that?' and Melvin said, 'Elijah McCourry threw a rock.' Couldn't tell which was nearest me; *Elijah was nearer to Melvin than I was.* When I heard the lick Bob threw his hand to his head and walked off down the road." After that he heard Elijah say he was "the man that hit Bob Ray," but that directly afterwards he denied that he had hit him. It was in evidence that the deceased was killed by that blow on the left side of his head, by whomsoever it was inflicted.

The exception principally relied on was the testimony of Will Edwards that as he "heard lick, Melvin Ray was two steps from Elijah McCourry at the time. I asked Melvin Ray 'what that was' (referring to the lick), and Melvin said (prisoner objecting, because witness said he did not know that prisoner heard it) 'Elijah McCourry hit Bob Ray with a rock.'"

The Court did not limit the effect of this testimony to a corroboration of Melvin Ray, but admitted it as part of the *res gestæ.*

It is true the witness did not say that the prisoner heard Melvin Ray's statement that he had struck Bob Ray with a rock, but he says that prisoner was in two steps of Melvin when he made the statement. The declaration thus made in the presence of the prisoner charging him with the crime was com-
petent to go to the jury for what it was worth. The
(597) witness could not say, of course, that prisoner heard the charge against him made by Melvin Ray; he could only state the circumstances and leave to the jury to draw the inference that he heard it, and the effect to be given, if any, as a *quasi* admission of guilt from his failure to deny the charge if he did hear it. That he did hear it, is almost a necessary inference, if the testimony of the above witnesses is to be believed, which was, of course, a matter for the jury. Charles Edwards testifies he heard Melvin Ray say that prisoner threw the rock, and the evidence is that he was five or six steps from Melvin Ray at the time, and the prisoner was only two steps

from him. The inquiry and reply were immediately upon the throwing of the rock. The lick was heard. "What was that?" is asked. Melvin, who says he saw prisoner throw the rock, and who was in two steps of prisoner, replies, "Elijah McCourry hit Bob Ray," and is heard by Charles Edwards, who was five or six steps from Melvin. If Elijah had not thrown the rock, it is reasonable to suppose he would have denied it. That, at least, was a reasonable inference, sufficient with the other circumstances, to make it competent evidence to be left to the jury in their search for the truth. There was conflicting evidence given by the prisoner and the witnesses for him, but that can not make incompetent the evidence that he was charged instantly with giving the mortal wound by one in two steps of him, who says also he saw the stone thrown, and that witnesses much further away heard the charge.

What was thus said, in immediate presence of the prisoner, at the instant the fatal blow was given and charging him with having given it, is a part of the *res gestæ,* fully as much as the altercation and doings and remarks of others in his presence up to that time. It is a part of the *res gestæ,* so much so that any declaration made by him at that time negativing his giving the fatal blow, would even be competent for him, (598) contrary to the general rule that while admissions and statements of a party are competent against him, his declarations in his own interest are not.

The fact that the prisoner was charged with the crime to his face, with the absence of any proof of denial of the charge, would have been competent, not only if made at the time, but at any date thereafter. In this, it differs from the admissions of an agent, which are only competent against the principal, if made at the time of the transaction. *Summerrow v. Baruch, ante,* 202.

"Evidence of the entire transaction is admissible, and of the surroundings. It is competent to give evidence of what happened after or before the homicide if it is connected therewith." 1 McLain Crim. Law, sec. 411. Declarations and exclamations made by bystanders have been held admissible as a part of the transaction. *Ibid,* sec. 412, citing *Flanagan v. State,* 64 Ga., 52; *McRae v. State,* 71 Ga., 96; *S. v. Duncan,* 116 Mo., 288; *S. v. Kaiser,* 124 Mo., 651, and other cases. For a stronger reason, the evidence here is competent, not only as a part of the circumstances at the time of the killing, but as a charge made against the prisoner by one standing close to the prisoner, who says he saw him throw the rock and heard it hit the deceased, and whose declaration immediately on hearing the blow

that the prisoner threw the rock was heard by others three times as far off as the prisoner.

"The exclamations of persons who were present at a fracas in which a homicide occurred, showing the means and mode of killing, are admissible for or against the accused, because of their unpremeditated character and their connection with the event by which the attention of the speaker was engrossed." Underhill Crim. Ev., sec. 101, citing, among others, *Appleton v. State,* 61 Ark., 590; *S. v. Biggerstaff,* 17 Mont., 510;
(599) *Walker v. State,* 78 Mo., 380. In the last named case, the moment after the fatal shot was fired a bystander exclaimed, "Don't strike him, for you have shot him now." This was held admissible as part of the *res gestæ,* citing numerous cases from different States.

In *S. v. Duncan,* 116 Mo., 288, a remark immediately after the homicide by a bystander to an officer—"there is the man who did it"—was held competent as part of the *res gestæ* on the trial of the person so designated for murder, citing 1 Bishop Cr. Prac., sec. 1085; 1 Wharton Ev., sec. 259, and precedents. In *S. v. Kaiser,* 124 Mo., 651, the exclamation of an eyewitness of a murder was held admissible as part of the *res gestæ.*

Melvin Ray, having testified on the stand, that he saw the prisoner throw at and hit the deceased, evidence of his statement at the time to that effect was further competent in corroboration.

The prisoner further excepts (1) because on objecting to a statement as to evidence, made by the Solicitor in his argument, the Court merely remarked that he did not remember any such evidence. The jury were judges of what the evidence was, and the Court could do no more; (2) that the Court charged that there was no evidence to support a verdict of excusable homicide in self-defense, and (3) refused to charge that in no view of the evidence can the jury find a verdict of guilty of murder in the first degree. There was no error in either respect. As the verdict was guilty of murder in the second degree, the last exception could not arise on this record, even if there had been ground to ask such charge.

The prisoner further excepted because (4) the Court told the jury, "If you find that Bob Ray only took a rock from his pocket, without attempting to throw it, or without prisoner seeing him draw it, that would not reduce the killing to man-
slaughter; (5) because the prisoner asked the Court to
(600) charge, 'If the jury find that the prisoner killed the deceased with a deadly weapon, then the general rule is that malice is presumed from the use of a deadly weapon, and

ordinarily, nothing else appearing, you would return a verdict of murder in the second degree; but unless you find that the weapon had been prepared for the purpose, its use was not necessarily evidence of malice.'" The Court gave this instruction, but added that it would be sufficient to constitute murder in the second degree, but not express malice. The Court charged correctly as to murder in the first and second degrees, and manslaughter; arrayed the contention of the parties and applied the law, to all of which there was no exception other than above stated. We find nothing of which the prisoner can justly complain.

Affirmed.

Cited: Chemical Co. v. Kirven, 130 N. C., 163; *Bumgardner v. R. R.,* 132 N. C., 442; *Seawell v. R. R.,* 133 N. C., 519; *S. v. Fisher,* 149 N. C., 558; *S. v. Hinson,* 150 N. C., 830; *S. v. Spivey,* 151 N. C., 681.

STATE v. BAUM.

(Filed 23 May, 1901.)

1. WATER AND WATERCOURSES—*Navigable Waters—Indictment—Obstructing Watercourses—The Code, Sec.* 1123.

   An indictment charging a person with unlawfully obstructing a navigable stream can be maintained at common law, but can not be maintained under The Code, sec. 1123.

2. WATER AND WATERCOURSES—*Evidence—Sufficiency—Navigable Waters.*

   Charge of court that if the jury believed the evidence, the stream was navigable and the defendant guilty of unlawfully obstructing it, was proper, under the evidence in this case.

(601)

INDICTMENT against Arthur Baum, heard by Judge *O. H. Allen* and a jury, at March Term, 1900, of CURRITUCK. From a verdict of guilty and judgment thereon, the defendant appealed.

This is a criminal action on indictment, charging the defendant with unlawfully obstructing the navigation of a part of Currituck Sound, known as North Sand Cove. One Hampton, a witness for the State, testified as follows: "I know North Sand Cove, which begins on the eastern side of Currituck Sound and runs through the marsh for about one-half to one mile, and

runs into the sound again. It has four mouths or openings into said sound. I have measured the water at the western mouth, and at high tide it is two to two and a half feet, and at low tide about one and a half feet in depth. I measured it at middle tide, and it was two feet, and about the same at its other openings into said sound. The mouths are from 140 to 230 feet wide, but it is wider after you get in, and in some places 200 to 300 yards, and about the same depth all through as at the mouths. North Sand Cove, before it was stopped up, was used by citizens of Currituck County for passing and repassing in their boats, when boating, fishing and hunting, from one part of the sound to the other; *the distance was shortened and in rough weather it was safer to navigate.* Boats from 18 to 20 feet long passed through this cove frequently, and I have carried myself on one of them, my nets and 700 to 800 pounds of fish. *It was used by all the people.* The mouths were stopped by posts put across them, driven securely down 18 inches apart and measuring from 4 to 5 inches in diameter—97 of these in one place and 152 in another, and stopped all use of this watercourse by boats. I have heard defendant say he put them there." Another witness for the State testified to the same effect. The defendant introduced no testimony.

The defendant asked the Court to direct a verdict of (602) not guilty. This the Court refused and charged as follows: "That if they believed all of the evidence in this case and find from the evidence beyond a reasonable doubt that the North Sand Cove is a navigable stream, and further find that the defendant obstructed the stream by wilfully placing posts in same, as testified, then the defendant is guilty, and you should so find."

There was a verdict of guilty and from the judgment pronounced thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.

No counsel for the defendant.

DOUGLAS, J., after stating the facts: We find no error in his Honor's refusal to charge, or in his charge, though the latter is somewhat meager. But as there are no requests for special instructions, we presume that it was intended to present to us the simple question whether such a watercourse as is described in the uncontradicted testimony, is a navigable stream. We are of opinion that it is, and that the defendant was properly convicted if the jury believed the evidence, the credibility of which was left to them.

This case is very similar to that of *S. v. Club,* 100 N. C., 477, except that the defendant does not claim any individual ownership in the bed of the cove. For the reasons stated in that opinion, we do not think that this action can be maintained under section 1123 of The Code, but that it can be sustained as charging a common law offense. That case comes nearer settling the case at bar than any other we can find in the books, and we think is controlling.

There is a vast amount of learning upon the subject of navigable waters, much of which is inconsistent and the greater part of which is totally inapplicable to the physical conditions of our country. Under the common law of England, whence came the doctrine, the ebb and flow of the tide (603) was the test of a navigable stream. Such streams were said to be *publici juris,* but the right of navigation might be *acquired* above tidewater. This rule operated very well in England, whose small size and low elevation confined actual navigation practically to the theoretical limits fixed by law. Few, if any, of its streams are actually navigable for any practical purpose beyond the flow of the tide.

For a time our courts adhered to the definition of the common law, and found little difficulty in doing so, as this country was then thinly settled, with no towns of any importance above tidewater. At that time the navigability of a stream depended more upon the temper of the Indians living along its banks than upon its natural features. As, however, the settlements went inland and important towns were built where tides were unknown, the courts soon found that it was impossible to measure rivers, like the Hudson and the Mississippi, by the rule of the Thames. The rule was then modified so as to include among navigable streams all rivers as far up as they afforded a free passage for sea-going vessels; and about the same time its practical application was greatly extended by the development of steam power, which enabled vessels to ascend rivers, the swiftness of whose currents had hitherto been a practical bar to navigation.

This rule seems to have been followed for many years in determining the limits of Federal jurisdiction; but it in turn was found insufficient to meet the demands of industrial and commercial growth. In fact, it did not reach to the Great Lakes, which have but recently come to be regarded in their true light as inland seas, having a law unto themselves. In contemplation of law, they are for all practical purposes regarded as the "high seas."

An interesting discussion of this subject is given by Chief

(604) Justice *Taney,* in the case of the Genesee Chief, 12 How., 443, and by Justice *Bradley,* in *Barney v. Keokuk,* 94 U. S., 324. See also *U. S. v. Rogers,* 150 U. S., 249. The Admiralty rule as now generally recognized, is thus stated in Gould on Waters (3 Ed.), sec. 67: "The ebb and flow of the tide does not now constitute the test of the navigability of American waters, and those rivers are public and navigable in law which are navigable in fact. If, in their ordinary condition, by themselves or by uniting with other waters, they form a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water, they are 'navigable waters of the United States' within the meaning of the Acts of Congress in which that phrase is employed." The different States were of necessity compelled to extend this rule to a greater or less extent to their inland streams, and to such coastal waters as are not within Federal jurisdiction. The rule now most generally adopted, and that which seems best fitted to our own domestic conditions, is that all watercourses are regarded as navigable in law that are navigable in fact. That is, that the public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use. The navigability of a watercourse is therefore largely a question of fact for the jury, and its best test is the extent to which it has been so used by the public when unrestrained. And yet it would seem that there must be some element of a public highway, and that its navigation must be in some degree required by the necessity or convenience of the public. It should not depend entirely upon the personal whim of an individual. We are not prepared to say that a land owner would be liable to criminal prosecution because he happened to put a watergate across a creek up which otherwise an idle hunter might be able to pole a canoe;

(605) nor are we now dealing with any right except that of simple navigation.

It appears from the evidence that the public were in the habit of passing through North Sand Cove before it was stopped up, and that by its use the distance from one part of the sound to another was shortened and navigation rendered safer in rough weather. These conditions constitute simple evidence of a navigable stream. Gould Watercourses, secs. 42, 43, 54, 57, 60, 86; Angell Watercourses, secs. 537, 541, 550; Wood Nuisances, secs. 451, 452, 453, 455, 456; *Wilson v. Forbes,* 13 N. C., 30; *Collins v. Benbury,* 25 N. C., 277; *S. c.,* 27

N. C., 118; *Fagan v. Armistead,* 33 N. C., 433; *Lewis v. Keeling,* 46 N. C., 299; *S. v. Glen,* 52 N. C., 321; *S. v. Parrott,* 71 N. C., 311; *Brodnax v. Baker,* 94 N. C., 675; *S. v. Club,* 100 N. C., 477; *Hodges v. Williams,* 95 N. C., 331; *McLaughlin v. Mfg. Co.,* 103 N. C., 100, 108; *S. v. Eason,* 114 N. C., 787; *Commissioners v. Lumber Co.,* 116 N. C., 731; *Mfg. Co. v. R. R.,* 117 N. C., 579; *Staton v. Wimberly,* 122 N. C., 107, 110.

Many of these cases do not involve directly the right of navigation, as they relate principally to other matters, such as the right of entry or fishing, but they all tend more or less accurately to show the distinction in this State between navigable and non-navigable watercourses.

That the obstruction of a navigable stream is a public nuisance is well settled by reason and authority. *S. v. Dibble,* 49 N. C., 107; *S. v. Parrott,* 71 N. C., 311; *S. v. Club, supra;* Wood Nuisances, secs. 478, 483, 484; Gould Waters, secs. 91, 92, 93, 94, 140; Angell Watercourses, sec. 554.

As no error appears in the trial of the action, the judgment of the Court below is

Affirmed.

Cited: Holley v. Smith, 130 N. C., 87; *Hopkins v. R. R.,* 131 N. C., 465; *S. v. Twiford,* 136 N. C., 607.

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(606)

STATE v. STANCILL.

(Filed 28 May, 1901.)

1. HOMICIDE—*Manslaughter—Evidence—Sufficiency—Officer.*

   The charge of the trial judge in this case that, if the jury believed the evidence of the defendant, he was guilty of manslaughter, is correct.

2. ARREST—*Without Warrant—Officer—The Code, Sec.* 1126.

   The superintendent of a convict gang is not such an officer as contemplated by The Code, sec. 1126.

3. ARREST—*Homicide—Arrest Without Warrant.*

   The superintendent of a convict gang, not known to be an officer, has no right to shoot or kill one who, having committed petty larceny and having escaped from prison, is running away to avoid arrest.

CLARK and COOK, J.J., dissenting.

INDICTMENT against W. S. Stancill, heard by Judge *Thos. J. Shaw,* and a jury, at September Term, 1900, of GASTON. From a verdict of guilty of manslaughter, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Clarkson & Duls, Osborne, Maxwell & Keerans, and *Burwell, Walker & Cansler,* for the defendant.

FURCHES, C. J. The prisoner was indicted for the murder of one Frank Rozzell, who had been convicted of the larceny of one peck of corn, growing in the field, in the Criminal Court of Mecklenburg County, in December, 1888, and sentenced to twelve months' imprisonment in jail, with leave to the Commissioners to hire him out. And under this sentence he was placed on the chain gang for that county, and on 14 Jan-
(607) uary, 1889, he escaped. F. W. Sossaman was the superintendent at that time. The prisoner had been superintendent of the camp for two years or more before he killed Rozzell. The homicide occurred in Gaston County, and it was in evidence that the deceased had been living in that county for nine or ten years.

There were several witnesses introduced for the State, among them William Black, whose character was proved to be good; and among other things he testified: "I asked Stancill if he caught his man, and he said the first time he shot he did not shoot to hit him; but the second time, if he missed him, it was not his fault, for he aimed right at his back. He said he could have caught the durned rascal, but he did not want to."

But as the Court put its charge on the prisoner's evidence, we give that in full:

Wm. S. Stancill, the prisoner: "I was superintendent of convict camp for Mecklenburg County for two years or more prior to the shooting. It is the duty of the superintendent to capture escaped convicts. I heard of Frank Rozzell being in Gaston County. Griffin spotted escapes. He located and reported and I went to capture him. I had no warrant or other proof for Rozzell when I shot him. I met his wife at the door, and she said her husband had gone off. I saw him standing at the window. I went to the window. He had stepped about down inside of the house, and I said: 'Hold up; you are my prisoner.' He did not give me time to tell him who I was. Scott was coming around to meet me, and deceased made for the door. He got out and ran, and I after him. He fell first, and I got close to him, and I fell, and he gained distance on me. I was hallooing 'Halt' every jump. I had my pistol in my hand. I ran him a

piece of the way. I got up and shot, and had no inten- (608) tion to hit him the first time, nor second time. I ran him until I gave out at branch, and he got out of sight. I did not know he was hit till Saturday night afterwards, and this was on Wednesday morning. I turned back, and met Mr. Black, and he asked me if I was after him for that old grudge, and I told him I was; and he said they were getting a petition to have him pardoned; and I told him if I had known that I would not have bothered him. I think I told Mr. Black if I did not catch him it was not my fault. I did not tell him I did not try to catch him. I made both shots in the cotton patch, and he jumped the fence after he was shot. I told Sheriff Love and Chief of Police of Charlotte that I shot to frighten him, and did not intend to hit him, and did not know until they arrested me that I had hit him. I had no badge of office on."

Cross-examined: "I won't swear that I did not state to Mr. Black that I aimed to hit. Don't remember having told Rufus Johnston that I shot to kill him. I did not notify the deceased that I was an officer or that I was connected with the convict camp in Mecklenburg County."

The Court charged the jury that if they believed the evidence of the prisoner he was guilty of manslaughter, upon his own evidence. Prisoner excepted and, upon judgment being pronounced, appealed to this Court.

The prisoner puts his defense upon the ground that he had the right to arrest Rossell, under section 1126 of The Code; and if this is so, he had the right to arrest Rossell, who was an escaped convict, as the superintendent of the convict camp. And, finally, that Rossell, being an escaped felon, he had the right, as a private citizen, to arrest him; and, having this right, he had the right to shoot and kill him if necessary.

We do not think the prisoner had the right to arrest, under section 1126 of The Code. He was not a "sheriff, coroner, constable or officer of police, or other peace officer, entrusted with the care and preservation of the public peace," within the meaning of that statute. Nor do we think the fact that the prisoner was the superintendent of the convict camp in (609) Mecklenburg County gave him any authority to make the arrest, under the facts in this case. And in saying this, we will not be understood to say that we do not think the superintendent of a convict camp would not, ordinarily, have the right to arrest an escaped convict. This, we think he would have, where the convict knew that he was such superintendent. And he would have this right in such case without making known the fact that he was such superintendent, as this would be use-

less if the escaped prisoner knew the fact. Nor do we think that, in such a case, it would be necessary for such superintendent to procure any other authority to do so. In fact, we know of no one who would be authorized to give him any other authority.

But, in this case, it had been ten years since Rossell escaped, and when he did so, one Sossaman was the superintendent. The prisoner did not know Rossell, and had him pointed out; and there is not the slightest evidence that Rossell knew him, or knew that he was superintendent of convicts in Mecklenburg County. This being so, we are of the opinion that the prisoner had no more right to make the arrest than any private citizen would have had.

The case then comes down to be discussed upon the right a private citizen would have had to make the arrest, and the duties developing upon him, and rights and liabilities in making such arrest.

A private citizen has the right to arrest a felon, whether he is present when the felony is committed or not. When he is not present, it devolves on him to show that the felony, for which he arrested, had been committed. *Neal v. Joyner,* 89 N. C., 289. He has the same right in cases of an escaped felon. 2 Am. and Eng. Enc., 887, and note 1.

(610) Where a *known* officer is attempting to make an arrest for an assault and battery, and the defendant knows what he is wanted for, the officer need not show his warrant. But it is otherwise if the officer is not known to the defendant, and, in such case, he would have to show the warrant. *S. v. Garrett,* 60 N. C., 144.

A private citizen, attempting to arrest a felon without warrant, must make his purpose known, and for what offense. And unless he does so, the party attempted to be arrested has the right to resist the arrest. *Neal v. Joyner,* and *S. v. Garrett, supra; S. v. Belk,* 76 N. C., 10; *S. v. McNinch,* 90 N. C., 695.

Where a private person undertakes to arrest a felon or an escaped felon, and has made his purpose and reason for the arrest known, he must then proceed in a peaceable manner to make the arrest, and if he is resisted he may use such force as is necessary to overcome the resistance, if used for that purpose alone. 2 Am. and Eng. Enc., 906, note 2. But this is put upon the ground that the party attempting to make the arrest becomes personally involved, and he has the right to defend himself. *S. v. Bryant,* 65 N. C., 327. But where the attempted arrest is for a petty larceny, as in this case, and the

party runs off, the party attempting the arrest has no right to shoot and kill him. *S. v. Bryant, supra.*

In this case the prisoner did not make himself known to the deceased, nor the reason for the arrest. Nor did the deceased *resist* the arrest, but ran as for his life and the prisoner ran after him and shot and killed him. This he had no right to do.

In *S. v. Roane,* 13 N. C., 58, a case in some respects similar to this, Judge HENDERSON commenced his opinion by saying: "If the facts stated are true, the defendant has no cause to complain of the verdict." And it seems to us that if the evidence in this case is true, the prisoner has no cause to complain of the charge of the Judge, the verdict of the jury, or the sentence of the Court.

No error appearing to us, the judgment is (611)

Affirmed.

COOK, J., dissenting. It is with hesitancy that I dissent from the decision of the Court; but my views differ so widely that I feel it my duty to do so. Had deceased been an *accused* person, the reasoning expressed by the Chief Justice would be applicable and forceful. Every person is presumed to be innocent of crime until legally tried and convicted. Therefore the law protects its citizens in the enjoyment of liberty, and prescribes the mode and manner by which they may be arrested and brought to trial, entrusting the execution of the same to its officers, who are required to take a solemn oath in the performance of their duties.

Arrests can be made by no one for alleged offenses, unless upon a warrant based upon an affidavit issued by a judicial officer, except those enumerated in sections 1124, 1125, 1126 and 1129 of The Code, in which cases the alleged offenders must be taken immediately before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as prescribed by law. In authorizing the arrest of one who is in the legal enjoyment of his liberty, the law, presuming his innocence, protects him from imposition of those not known to be officers, by requiring such to make known their legal authority before he is obliged to surrender.

In *S. v. Garrett,* 60 N. C., 144, at page 150, it is held: "One who is not a known officer ought to show his warrant and read it if required, but it would seem that this duty is not so imperative as that a neglect of it will make him a trespasser *ab initio,* where there is proof that the party, subject to be arrested, had notice of the warrant and was fully aware of its contents," etc.

So careful is the law to protect those who have not

(612) been tried and convicted, that the "outlaws" are entitled to be "called upon and warned to surrender" before they are allowed to be slain. Code 1131. But they belong to the same class—*"accused"*—with those to whom the authorities cited in the opinion of the Court refer, and relate to the conduct and power of officers in making the arrest *in limine*. After an arrest has been made, it is the duty of the officer to *hold* him, even if it becomes necessary to take his life in doing so. In *S. v. Sigman,* 106 N. C., 732, it is held that "after an accused person has been arrested, an officer is justified in using the amount of force necessary to detain him in custody, and he may kill his prisoner to prevent his escape, provided it becomes necessary, whether he be charged with a felony or misdemeanor." 1 Bishop Cr. Pr., sec. 618. Why should the *escaped* convict be entitled to any more protection than while escaping? He can not fall within the protection of those sections of The Code which are made for the benefit of those having a legal right to control their time and conduct before a conviction. No machinery of the law is provided for the capture of an escaped felon under sentence. Warrants are provided for the arrest of the accused, to the end that the truth may be inquired into—not for the convicted. After conviction and sentence, the felon has no liberty. By his own wilful conduct he has forfeited it, and it has been so adjudged. Having escaped the prison to which he was consigned, the law owes him no protection. None owe him succor or comfort. He is the prisoner of the State, and should be captured wherever and by whomsoever found. While the law imposes no obligation upon citizens generally to capture him, yet they are forbidden to receive, relieve, comfort or assist him. Yet it is the legal duty of those officers, who were encharged with the custody of such convict, to go and take him wherever he is known to be; for his personal liberty is not within the pale of any jurisdiction. He has no
(613) right to question the authority of his captor, or to require the reading of a warrant or capias, for the law has made no such provision in his behalf.

When the deceased undertook to make his escape, he well knew, or ought to have known, that it was the duty of his custodians to stop his flight, by taking his life, if it could not be accomplished otherwise. Code, sec. 3443. Having gotten beyond their reach, his liberty still belonged to the State, to which he had forfeited it, and a duty rested upon those charged with his confinement to reduce him to their custody again, and in doing so he was entitled to no duty other than humane treatment after being reduced to custody, and not to be wantonly

or wilfully killed, if his capture could otherwise be accomplished. The length of time intervening had not made him oblivious to the fact that the custody of his body belonged to the prison whence he had fled, and upon the sight of the strangers and hearing the words, "Hold up," "You are my prisoner," he recognized the presence of legal authority for his capture, and resumed the same risk which he took when he first made his escape. What else could the officer have done? Should he have been required to use only those means necessary to arrest an unconvicted citizen, which, if insufficient to arrest, to allow him to escape, or should he have used those means required to prevent the original escape? It appears to me that the officer did all in his power to capture him without taking his life. He gave him the same warning that the law allows to an unconvicted "outlaw." First, he ordered him to stop, and told him that he was his prisoner, then pursued, hallooing "Halt" at every jump, then firing his pistol to warn, and lastly, firing to hit. To have done less would not have been the utmost effort of the officer. (614)

In retaking him, the same force was permissible that was allowable in keeping and detaining in custody an "accused" person after arrest.

Considering the law, as I view it in this case, the prisoner was justified and ought to have been acquitted.

CLARK, J., concurs in the dissenting opinion.

Cited: Sossamon v. Cruse, 138 N. C., 474.

MEMORANDA OF CASES DISPOSED OF WITHOUT OPINION.

Appeals disposed of by PER CURIAM order:

IN RE PENDLETON, from PASQUOTANK; *E. F. Aydlett,* for petitioner. Affirmed.

KILBY *v.* CEDAR WORKS; *Bond, Smith* and *Skinner & Whedbee,* for plaintiff; *Aydlett,* and *Shepherd & Shepherd,* for defendant. Affirmed.

STATE *v.* NEWSOME; *Attorney-General,* for the State; *R. B. Peebles,* for defendant. Affirmed.

BRADLEY *v.* JOHNSTON. Settled by the parties.

WILLIAMS *v.* NORFOLK AND CAROLINA RAILROAD CO.; *F. D. Winston* and *Alex. Lassiter* for plaintiff; *Geo. Cowper,* for defendant. Affirmed.

FLEMING *v.* LUMBER CO.; *Skinner & Whedbee,* for plaintiff; *J. L. Fleming,* for defendant. New trial.

GEE *v.* HILL; *C. M. Cooke,* for plaintiff; *Bickett & Spruill,* for defendant. Affirmed.

HICKS *v.* BURROUGHS. Dismissed under Rule 17.

EATMAN *v.* LAMB. Dismissed under Rule 17.

ABERNATHY *v.* WILKINS. Dismissed under Rule 17.

STATE *v.* WHITAKER; *Attorney-General,* for State; *J. C. L. Harris,* for defendant. Affirmed.

STATE *v.* WILDER; *Attorney-General,* for State; *B. C. Beckwith,* for defendant. Affirmed.

MARSHBURN *v.* LASHLIE; *Battle & Mordecai,* and *H. E. Norris,* for plaintiff; *Argo & Snow,* for defendant. Affirmed.

PIPKIN *v.* WILMINGTON AND WELDON RAILROAD CO.; *Allen & Dortch,* and *T. B. Womack,* for plaintiff; *F. A. Daniels,* for defendant. Affirmed.

IN RE JOHNSTON; *Baylus Cade,* for petitioner; *Busbee & Busbee,* and *Argo & Snow,* for respondent.

DEBNAM *v.* TELEPHONE CO. Settled by the parties.

EDWARDS *v.* PATE; *L. V. Morrill* and *Swift Galloway,* for plaintiff; *G. M. Lindsay,* for defendant. Affirmed.

FAISON *v.* HICKS; *H. E. Faison,* for plaintiff; *Stevens & Beasley,* for defendant. Motion to retax costs denied.

STATE *v.* FORT; *Brown Shepherd* and *Geo. Rose,* for State; *T. H. Sutton,* for defendant. Affirmed.

STATE *v.* COUNCIL; *Brown Shepherd, N. A. Sinclair,* by brief, with the *Attorney-General,* for the State; *T. H. Sutton,*

for defendant. Motion for new trial denied. Judgment affirmed.

IN RE DILLARD'S WILL. Dismissed under Rule 17.

KRAMER *v.* SOUTHERN RAILWAY CO.; *E. J. Justice,* for plaintiff; *G. F. Bason,* for defendant. Affirmed.

DICKSON *v.* ALEXANDER; *S. J. Ervin,* for plaintiff. Affirmed.

COCHRAN *v.* IMPROVEMENT CO.; *Davidson & Jones,* and *Bourne & Parker,* for plaintiff; *Chas. A. Moore* and *Geo. A. Shuford,* for defendant. Motion of defendant to have amount of printing recovered under the rule in this Court, applied to the judgment in favor of defendant, in McDowell Superior Court, allowed.

ANDERSON *v.* ANDERSON; *W. A. Smith,* for plaintiff; *Merrimon & Merrimon,* for defendant. Affirmed.

KEENER *v.* MOTZ; *L. D. Wetmore* and *A. L. Quickel,* for plaintiff; *D. W. Robinson,* for defendant. Affirmed.

BESSEMER CITY COTTON MILLS *v.* ODELL. Dismissed under Rule 17.

WILLIAMS *v.* WEST ASHEVILLE AND SULPHUR SPRINGS RY. CO. Settled by the parties.

WILLIAMS *v.* TATHAM; *Bourne & Parker,* for plaintiff; *Dillard & Bell,* and *Busbee & Busbee,* for defendont. Affirmed.

MINING CO. *v.* ENLOE, et al. (two cases); *C. C. Cowan, C. A. Moore,* and *Shepherd & Shepherd,* for plaintiff; *Ferguson & Son, J. J. Hooker,* and *Merrimon & Merrimon,* for defendant. Affirmed.

N. C. MINING CO. *v.* O'DONNELL, et al. (two cases). Same counsel as above. Affirmed.

CHASTAIN *v.* PLATT; *Shepherd & Shepherd,* for plaintiff; *Busbee & Busbee,* and *Dillard & Bell,* for defendant. Affirmed.

PALMER *v.* BARNARD, et al. Dismissed for failure to print record.

STREET *v.* MUTUAL RESERVE LIFE INSURANCE ASSOCIATION; *Hinsdale & Lawrence, Shepherd & Shepherd,* and *Sewell Tyng,* for defendant petitioner; *W. W. Clark,* for the plaintiff.

For reasons stated in the cause of STRAUSS *v.* LIFE ASSOCIATION, *ante* 465, the defendant's petition to rehear is denied. Petition dismissed.

APPENDIX A.

(619)

JOHN P. MALLETT AND C. B. MEHEGAN, PLAINTIFFS IN ERROR, v. STATE OF NORTH CAROLINA.

(In the United States Supreme Court, October Term, 1900.)

Error to the Supreme Court of North Carolina.
No. 189. Argued 8 April, 1901. Decided 20 May, 1901.

CRIMINAL LAW—*Appeal by State—Ex Post Facto Law—Equal Protection of the Laws.*

1. Federal questions raised by petition for rehearing after a State court has filed its opinion, before that has been certified down, and when that court entertains the petition and proceeds to discuss and decide those questions, are not raised too late for the purpose of a writ of error from the Supreme Court of the United States.
2. The provision for an appeal by the State in a criminal case from the grant of a new trial, which was enacted by the North Carolina act of 6 March, 1899, is not *ex post facto* in violation of U. S. Const., Art. I, sec. 10, as applied to cases in which the trial had been had, though the new trial had not been granted, before the statute was passed.
3. The allowance of an appeal to the State from the court of one district, but not from another district, of the State in case of the grant of a new trial to an accused person, is not a denial of the equal protection of the laws guaranteed by the U. S. Const., Fourteenth Amendment.
4. A Federal question in respect to admission of evidence can not be passed upon by the Supreme Court of the United States on writ of error to a State court, when the question as to the evidence was not dealt with by the State court as a Federal question.

IN ERROR to the Supreme Court of North Carolina, to review a decision reversing a judgment in a criminal case. *Affirmed.* For the same case in the North Carolina Reports, see 125 N. C., 718.

Statement by Mr. Justice *Shiras:* (620)

In September, 1898, John P. Mallett and Charles B. Mehegan were indicted and tried in the Criminal Court of the county of Edgecombe, North Carolina, for conspiracy to defraud. They were convicted and sentenced to two years' imprisonment in the common jail. They appealed to the Superior Court. The record was certified up by the Clerk of the Criminal Court on 1 April, 1899. The Superior Court reversed the verdict and judgment, and granted a new trial. From this judgment of the Superior Court the State appealed, on 7 July, 1899, to the Supreme Court, which reversed the judgment of the Superior Court, and remanded the cause to the Criminal Court, with directions that the sentence imposed by that Court should be carried into execution.

At the time of the commission of the offense, and at the time of the trial in the Criminal Court of Edgecombe County the State of North Carolina was not entitled to appeal to the Supreme Court of the State from the judgment of the Superior Court granting the defendants a new trial. There are two district criminal courts in the State—the Eastern and the Western. In the Eastern District, in which the county of Edgecombe is situated, the State, since 6 March, 1899, by legislation of that date, is allowed to appeal to the Supreme Court from a judgment of the Superior Court granting a defendant a new trial, but such right of appeal is not allowed to the State from judgments of the Superior Court in cases on appeal from the Western District Criminal Court. It thus appears that the right of appeal from the Superior Court to the Supreme Court was conferred upon the State after the commission of the offense and the trial in the Criminal and before Superior Court had granted a new trial.

From the judgment of the Supreme Court of the State a writ of error was allowed to this Court.

(621) *F. H. Busbee* and *R. O. Burton,* for the plaintiffs in error.

Zeb. V. Walser, Attorney-General of North Carolina, *J. C. L. Harris, B. G. Green,* and *C. A. Cook,* for the defendant in error.

Mr. Justice *Shiras* delivered the opinion of the Court:

Before considering the errors assigned by the plaintiffs in error to the judgment of the Supreme Court of North Carolina, it is proper that we should dispose of the motion made by the counsel for the State to dismiss the writ of error, on the alleged ground that the record does not disclose that any Federal question was raised in either of the courts in which the case was heard, and that no such question was raised.

It is, of course, obvious that there was no opportunity for the defense to raise in the Criminal Court the question as to the validity, as against the defendants, of the legislation allowing an appeal to the Supreme Court, because that legislation was not enacted till after the trial had been concluded.

It would also seem that the question of the validity of that legislation, in its Federal aspect, was not raised or considered in the Superior Court. It is true that in that Court error was alleged to the action of the Criminal Court in permitting evidence of certain statements in the books of the defendants, and which books had been seized by the sheriff under an attachment against the property of the defendants, to be used on the trial against the defendants and over their objection; and that contention was sustained by the Superior Court, and the

new trial was granted for that and other reasons. But it does not appear that the Superior Court was formally called upon to consider any Federal question.

But we are of opinion that questions arising under the Constitution and laws of the United States were presented in the Supreme Court of the State, and were by that Court considered and decided against the party invoking their protection.

It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that Court, or, at all events, were not treated (622) as Federal questions, but as questions arising under State laws. But the record discloses that, after that opinion had been filed, but before it had been certified down, the defendants filed a petition for reargument, and presented the Federal question, on which they rely. The Supreme Court entertained the petition, and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss, numerous decisions of this Court are cited to the effect that it is too late to raise a Federal question by a petition for a rehearing in the Supreme Court of a State after that Court has pronounced its final decision. *Loeber v. Schroeder,* 149 U. S., 580; *Sayward v. Denny,* 158 U. S., 183; *Pim v. St. Louis,* 165 U. S., 273.

But those were cases in which the Supreme Court of the State refused the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. *S. v. Mallett,* 125 N. C., 718. Had that Court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action.

The first contention we encounter in the assignments of error is that, as the statute which provides for an appeal from the Superior Court to the Supreme Court in criminal cases was not passed until after the commission of the offense charged and the trial in the Criminal Court, it was, as against the plaintiffs in error, *ex post facto* and in violation of Art. I, sec. 10, of the Constitution of the United States.

The opinion of the Supreme Court stating the facts and disposing of this question is brief, and may be properly quoted:

"The next exception in the petition is that at the time of the offense the statute allowed no appeal to the State (623) from the ruling of the Superior Court Judge. But the defendants had no 'vested rights' in the remedies and methods of procedure in trials for crime. They can not be said to have

committed this crime relying upon the fact that there was no appeal given the State in such cases. If they had considered that matter they must have known that the State had as much power to amend section 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the State from these intermediate courts. At any rate, their complaint is of errors in the trial court, and when they appealed to the Superior Court they did so by virtue of an act which provided that the rulings of that Court upon their case could be reviewed, at the instance of the State, in a still higher Court. The appeal was certified up to the Superior Court 1 April, 1899, and on 7 July, 1899, the appeal was taken to this Court. The statute regulating appeals from the Eastern District Criminal Court (chapter 471, Laws 1899), was ratified 6 March, 1899."

The subject has been several times considered by this Court. The first case was that of *Calder v. Bull,* 3 Dall., 386, where the important decision was made that the provision prohibiting *ex post facto* laws had no application to legislation concerning civil rights. But the opinion, delivered by Mr. Justice *Chase,* contains a classification of the criminal cases in which the provision is applicable:

"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates the crime or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the
(624) time of the commission of the offense in order to convict the offender."

In *Cummings v. Missouri,* 4 Wall., 277, and *Ex parte Garland,* 4 *Wall,* 333, a law which excluded a minister of the gospel from the exercise of his clerical functions, and a lawyer from practice in the courts, unless each would take an oath that they had not engaged in or encouraged armed hostilities against the government of the United States, was held to be an *ex post facto law,* because it punished, in a manner not before prescribed by law, offenses committed before its passage, and because it instituted a new rule of evidence in aid of conviction.

In *Kring v. Missouri,* 107 U. S., 221, will be found an elaborate review of the history of the *ex post facto* clause of the Constitution, and of its construction by the Federal and the State courts. Kring was convicted of murder in the first de-

gree, and the judgment of condemnation was affirmed by the Supreme Court of Missouri. A previous sentence pronounced on his plea of murder in the second degree, and subjecting him to an imprisonment for twenty-five years, had, on his appeal, been reversed and set aside. By the law of Missouri in force when the homicide was committed this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that, by the force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime; and it was held, four of the Justices dissenting, that, as to this case, the new law was an *ex post facto* law, and that he could not again be tried for murder in the first degree.

In *Hopt v. Utah,* 110 U. S., 574, one of the questions presented was whether a law which made it competent for witnesses to testify to the commission of a crime who were incompetent to so testify at the time the crime was so committed was an *ex post facto* law, and it was unanimously held otherwise, *Kring v. Missouri* was cited and relied on by the plaintiff in error, and was disposed of by the Court, per Mr. Justice (625) *Harlan,* in the following observations:

"That decision proceeded upon the ground that the State Constitution deprived the accused of a substantial right which the law gave him when the offense was committed, and therefore, in its application to that offense and its consequences, altered the situation of the party to his disadvantage. By the law as established when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas, by the abrogation of that law by the constitutional provision, subsequently adopted, he could thereafter be tried and convicted of murder in the first degree. * * * Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed.

"But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or

measure, of the proof which was made necessary to conviction when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or de-
(626) gree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but, leaving untouched the nature of the crime and the amount or degree of proof essential to conviction, only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."

In *Gibson v. Mississippi,* 162 U. S., 656, it was held that the Mississippi Code, in force when the indictment was found, did not affect in any degree the substantial rights of those who had committed crime prior to its going into effect; it did not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict a greater punishment than the law annexed to such crime at the time of its commission, nor alter the legal rules of evidence in order to convict the offender; that the inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed; that the mode of trial is always under legislative control, subject only to the condition that the Legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.

In *Thompson v. Missouri,* 171 U. S., 380, it was held that an act of the Legislature of Missouri, providing that comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to
(627) be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise

of the writing in dispute, is not *ex post facto,* under the Constitution of the United States, when applied to prosecutions for crimes committed prior to its passage. In the opinion in this case the previous decisions were again reviewed, and the following passage from Cooley's Treatise on Constitutional Limitations was quoted with approval:

"So far as mere modes of procedure are concerned a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it can not lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." Chap. 9, page 272 (5 Ed.). See likewise *Duncan v. Missouri,* 152 U. S., 377.

Applying the principles established by these cases to the facts of the present case, we think it may be concluded that the legislation of North Carolina in question did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offense; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense (628) charged.

It must not be overlooked that, when the plaintiffs in error perfected their appeal from the Criminal Court, by procuring its certification, on 1 April, 1899, to the Superior Court, the new law, ratified on 6 March, 1899, provided that the State could have the decision of that Court reviewed by the Supreme Court.

Upon the whole, therefore, we agree with the Supreme Court of North Carolina in holding that the law granting the right of appeal to the State from the Superior to the Supreme Court of the State was not an *ex post facto* law within the meaning of the Constitution of the United States.

The further contention, that the plaintiffs in error were denied the equal protection of the laws because the State was allowed an appeal from the Superior Court of the Eastern, and not from the Western, District of the State, is not well founded.

In *Missouri v. Lewis,* 101 U. S., 23, *sub nom. Bowman v. Lewis,* 25 L. Ed., 989, it was held that, by the 14th Amendment of the Constitution of the United States, a State is not prohibited from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject matter, amount, or finality of their respective judgments or decrees; and that where, by the Constitution and laws of Missouri, the St. Louis Court of Appeals has exclusive jurisdiction in certain cases of all appeals from the Circuit Courts in St. Louis and some adjoining counties, and the Supreme Court has jurisdiction of appeals in like cases from the Circuit Courts of the remaining counties of the State, such an adjustment of appellate jurisdiction is not forbidden by anything contained in the 14th Amendment. It was said by Mr. Justice *Bradley,* giving the opinion of the Court:

"Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their (629) local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto. * * * If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of the line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States can not be essential as regards different parts of a State, provided, that in each and all there is no infraction of the constitutional provision."

The principles of this case have been approved and applied in several subsequent cases. *Hallinger v. Davis,* 146 U. S., 314, 322; *Hodyson v. Vermont,* 168 U. S., 272; *Holden v. Hardy,* 169 U. S., 384; *Brown v. New Jersey,* 175 U. (630) S., 172.

We therefore see no error in the action of the Supreme Court of North Carolina in holding that the State has control of its own legislation as to the cases in which it will premit appeals in its own behalf in its courts.

There remains to consider the contention that, in the trial in the Criminal Court, by the use of certain books of account belonging to them, the plaintiffs in error were thereby made to be witnesses against themselves, and thus their privileges and immunities as citizens of the United States have been abridged, and they are deprived of their liberty without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

In the petition for a rehearing in the Supreme Court, which, as we have seen, is the only part of the record on which the plaintiffs in error can rely as raising Federal questions, the point was thus presented:

"That prior to the beginning of this action an attachment against the property of the defendants was issued at the instance of J. M. Baker, administrator of M. L. Woolard and of Solomon Woolard, who is the chief prosecuting witness in the case. By virtue of said attachment the sheriff of Edgecombe County seized the ledger and counter book of the defendants and has kept possession of them up to this time. At the trial of the present indictment the said books so wrongfully taken from the defendants were offered in evidence. The defendants objected; the objection was overruled, and the defendants excepted. In this the defendants submit there was error. For it is, in effect, making the defendants give evidence against themselves under the principles laid down in *Boyd v. United States,* 116 U. S., 616. At the argument of this case at this term counsel had not found this authority, and their argument did not go upon this ground. Since said hearing they found said case, and they are advised that the principle and (631) the authority are decisive, and would at once satisfy the Court of the defendants' right to a new trial, if the matter could be brought to its attention."

The only ground of objection shown by the record to have been taken by defendants' counsel to the admission of this evidence was "because the testimony now offered was subsequent to the examination in the supplementary proceedings."

Nothing seems to have been claimed, either in the Criminal

Court or in the Superior Court, as to the inadmissibility of the books as evidence on the ground of any provision of the Federal Constitution. The Supreme Court thus treated the subject:

"We will consider now the only exception which the petition to reargue insists the Judge of the Superior Court should have passed upon and held in favor of the defendants, *i. e.*, that the sheriff, by attachment, having seized the ledger and counter book of the defendants, they were put in evidence against them. There was certainly no error in using the defendants' own entries against them. The shoes of a party charged with crime can be taken and fitted to tracks as evidence, and in one case, when a party charged with crime was made to put his foot into the tracks, the fact that it fitted was held competent. *S. v. Graham,* 74 N. C., 648, 21 Am. Rep., 493. Nor has it ever been suspected that if, upon a search warrant, stolen goods are found in the possession of the prisoner, that fact can not be used against him. Here the books came legally into the possession of another, and the tell-tale entries were competent against the parties making them in the course of their business."

It therefore appears by the statement of the plaintiffs in error in their petition for a reargument that no Federal question was raised or considered in the Criminal Court or in the Superior Court, in respect to the admission of the evidence, so that there was no basis on which to claim error in this
(632) respect in these courts. Nor did the Supreme Court, in passing upon the contention, deal with it as a Federal question, but as a mere question arising under the administration of the criminal law of the State, and there is, therefore, nothing in its action for us to review.

But we do not wish to be understood as implying that, even if this question had been duly presented in the State courts as a Federal question, there was error in admitting the evidence complained of.

The judgment of the Supreme Court of North Carolina is affirmed.

RULES OF PRACTICE

IN THE SUPREME COURT

REVISED AND ADOPTED

AT FEBRUARY TERM, 1901.

Applicants for License.

1. *When Examined.*

Applicants for license to practice law will be examined on the first Monday of each term, and at no other time. All examinations will be in writing.

2. *Requirements and Course of Study.*

Each applicant must have attained the age of twenty-one years, and must have studied:

Ewell's Essentials, 3 volumes.
Clark on Corporations.
Clark's Code of Civil Procedure.
Schouler on Executors.
Bispham's Equity.
Code of North Carolina, volume 1.
Sharswood's Legal Ethics.

Each applicant must have read law for two years at least, and shall file with the Clerk a certificate of good moral character, signed by two members of the bar who are practicing attorneys of this Court.

3. *Deposit.*

Each applicant shall deposit with the Clerk a sum of money sufficient to pay the license fee before he shall be examined; and if, upon his examination, he shall fail to entitle himself to receive a license, the money shall be returned to him.

Appeals—When Heard.

4. *Docketing.*

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal actions shall be placed at the head of the docket of each district. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the Clerk.

5. *When Heard.*

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term seven days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order. The transcript of the record on appeal from a Court in a county in which the Court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed seven days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless, by consent, it is submitted upon printed argument under Rule 10; but appeals in criminal actions shall each be heard at the term at which it is docketed, unless for cause or by consent it is continued: *Provided, however,* That a cause from the First, Second and Third Districts, which is tried between January 1 and the first Monday in February, and between August 1 and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

6. *Appeals in Criminal Actions.*

Appeals in criminal cases, docketed seven days before the call of the docket for their district, shall be heard before the appeals in civil cases from said district. Criminal appeals docketed after the time above stated, shall be called immediately at the close of argument of appeals from the Sixteenth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

7. *Call of Each Judicial District.*

Causes from each of the districts will be called on Tuesday of the week for said district, as follows:

From the 1st District, on Tuesday of the first week.
From the 2d District, on Tuesday of the second week.
From the 3d District, on Tuesday of the third week.
From the 4th District, on Tuesday of the fourth week.
From the 5th District, on Tuesday of the fifth week.
From the 6th District, on Tuesday of the sixth week.
From the 7th District, on Tuesday of the seventh week.
From the 8th District, on Tuesday of the eighth week.
From the 9th District, on Tuesday of the ninth week.
From the 10th District, on Tuesday of the tenth week.
From the 11th District, on Tuesday of the eleventh week.

From the 12th District, on Tuesday of the twelfth week.
From the 13th District, on Tuesday of the thirteenth week.
From the 14th District, on Tuesday of the fourteenth week.
From the 15th District, on Tuesday of the fifteenth week.
From the 16th District, on Tuesday of the sixteenth week.

8. *End of Docket.*

The call of causes not reached and disposed of during the period allotted to each district, and those put to the foot of the docket, shall begin at the close of argument of appeals from the Sixteenth District, and each cause, in its order, tried or continued, subject to Rule 6.

9. *Call of the Docket.*

Each appeal shall be called in its proper order; if any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. The appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. *Submission on Printed Argument.*

When, by consent of counsel, it is desired to submit a case without oral argument, the Court will receive printed arguments, without regard to the number of the case on docket, or date of docketing appeal. Such consent must be signed by counsel of both parties and filed, and the Clerk shall make a note thereof on the docket, but the Court, notwithstanding, can direct an oral argument to be made, if it shall deem best.

11. *If Orally Argued.*

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open Court, after notice to opposing counsel.

12. *If Brief Filed by Either Party.*

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were an appearance by counsel. When a printed brief is filed, a copy thereof shall be served on the opposite counsel, if any is in attendance on the Court, at least twenty-four hours before the cause is called for argument, and if default is made herein, the costs of printing shall not be taxed in favor of the defaulting party, though he should be successful in the action.

13. *Cases Heard Out of Their Order.*

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place in the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of the party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the Court to discharge him, may make the like assignment in respect to it.

14. *Cases Heard Together.*

Two or more cases involving the same question may, by leave of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagrees, the course of the argument.

WHEN DISMISSED.

15. *If Appeal Not Prosecuted.*

Cases not prosecuted for two terms shall, when reached in order after the second term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

16. *Motion to Dismiss.*

A motion to dismiss an appeal for non-compliance with the requirements of the statute in perfecting an appeal, must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear there-

in, or such compliance is dispensed with by a writing, signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

17. *Dismissed by Appellee.*

If the appellant in a civil action shall fail to bring up and file a transcript of the record seven days before the Court begins the call of causes from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee, on exhibiting the certificate of the Clerk of the Court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, and filing said certificate or certified transcript of the record in this Court, may have the appeal docketed and dismissed at appellant's cost, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

18. *When Appeal Dismissed.*

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid, or offered to pay, the costs of the appellee in procuring the transcript of the record, or proper certificate, and in causing the same to be docketed.

TRANSCRIPTS.

19. *Transcript of Record.*

(1) THE RECORD.—In every record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable.

(2) PAGES NUMBERED.—The pages of the record shall be numbered, and there shall be written on the margin of each a brief statement of the subject matter contained therein.

(3) INDEX.—On some paper attached to the record, there shall be an index thereto, in the following or some equivalent form:

20. *Insufficient Transcript.*

If any cause shall be brought on for argument, and the above regulations shall not have been complied with, the case shall be dismissed or put to the end of the district, or the end of the docket, or continued, as may be proper. If not dismissed, it shall be referred to the Clerk, or some other person, to put the record in the prescribed shape, for which an allowance of five dollars will be made to him, to be paid in each case by the appellant, and execution therefor may immediately issue.

21. *Marginal References.*

A case will not be heard until there shall be put in the margin of the record, as required in Rule 19 (2), brief references to such parts of the text as are necessary to be considered in a decision of a case.

22. *Unnecessary Records.*

The cost of copies of unnecessary and irrelevant testimony, or of irrelevant matter about the appeal not needed to explain the exceptions or errors assigned, and not constituting a part of the record of the action of the Court taken during the progress of the cause, shall, in all cases, be charged to the appellant, unless it appears that they were sent up by the appellee, in which case the cost shall be taxed against him.

PLEADINGS.

23. *Memoranda of.*

Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

24. *Assigning Two or More Causes of Action.*

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. *When Scandalous.*

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from

the record, or reformed, and for this purpose the Court may refer it to the Clerk, or some member of the bar, to examine and report the character of the same.

26. *Amendments.*

The Court may "amend any process, pleading or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe." *The Code,* sec. 965.

EXCEPTIONS.

27. *How Assigned.*

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the Court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the Court at chambers and not in term time, within ten days after notice thereof, appellant shall file the said exceptions in the Clerk's office. No exception not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions in the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment.

PRINTING RECORDS.

28. *What to be Printed.*

Fifteen copies of the entire transcript sent up in each action shall be printed, except in pauper appeals. In these latter, the Clerk of the Court shall make five typewritten copies of such parts of the record as present the exceptions. Should the appellant gain the appeal, the cost of such typewritten copies shall be taxed against the appellee as part of the costs on appeal. The printed transcript shall be in the order required by Rule 19 (1), and shall contain the marginal references and index required by Rule 19 (2) and 19 (3). Though, for economy, the marginal references in the manuscript may be printed as sub-heads in the body of the record, and not on the margin. The transcript shall be printed immediately after docketing the same, unless it is sent up ready printed, and one copy of the printed transcript (or of the typewritten copies in pauper appeals) and a copy of each printed brief shall be sent to each

member of the Court by the Clerk of this Court at least twenty-four hours before each case is called for argument.

29. *How Printed.*

The transcript on appeal shall be printed under the direction of the Clerk of this Court, and in the same type and style, and pages of same size, as the Reports of this Court, unless it is printed below in the required style and manner. If it is to be printed here, the party sending up an appeal shall send therewith a deposit in cash, for that purpose, to the Clerk of this Court, of sixty cents (which includes ten cents for the Clerk) for each printed page—said cash deposit to be estimated at 50 cents for each page of the transcript of the record.

30. *If Not Printed.*

If the transcript on appeal (except in pauper appeals) shall not be printed as required by the Rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days' notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rule as to printing is not complied with, other than pauper appeals.

31. *Costs of Printing.*

The actual cost of printing the transcript on appeal shall be allowed to the successful party, not to exceed, however, fifty cents per page of one copy of the printed transcript, and not exceeding fifty pages of the above specified size and type, unless otherwise specially ordered by the Court; and the Clerk of this Court shall be allowed ten cents additional for each such page for making copy for the printer, unless the appellant shall send up a duplicate manuscript or typewritten copy for that purpose, or shall have the copies printed below.

Judges and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that such unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of print-

ing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motion for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

32. *Printing Briefs.*

While briefs are not yet required to be printed, they are desirable in all cases which can be deemed of sufficient importance to be brought to this Court. Such briefs may be printed under supervision of counsel or of the Clerk of this Court, but must be of the size and style prescribed by Rule 29 for the transcript on appeal. It to be printed here, the deposit therefor must be made as specified in Rule 29.

ARGUMENT.

33. *Oral Arguments.*

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) The counsel for the appellant may be heard for one hour, including the opening argument and reply.

(3) The counsel for the appellee may be heard for one hour.

(4) The time occupied in reading the record before the argument begins shall not be counted as part of the time allowed for the argument; but this shall not embrace such parts of the record as may be read pending the argument.

(5) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(6) Any number of counsel may be heard on either side within the limit of the time above specified; but, if several counsel shall be heard, each must confine himself to a part or parts of the subject matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

34. *Printed Argument or Briefs.*

When the cause is submitted on printed argument under Rule 10, or a brief is filed, whether counsel appear or not, such brief or argument, if of appellant, shall set forth a brief statement of the case, embracing so much and such parts of the record

as may be necessary to understand the case; the several grounds of exceptions and assignments of error relied upon by the appellant; the authorities relied upon classified under each assignment, and if statutes are material, the same shall be cited by the book, chapter and section; but this shall not be understood to prevent a citation of other authorities in the argument.

35. *Copies of Brief to be Furnished.*

Fifteen copies shall be delivered to the Clerk of the Court, one of which shall be filed with the transcript of the record, one handed to each of the Justices at the time the argument shall begin, one to the reporter, and one to the opposing counsel.

36. *Brief of Appellee.*

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner.

37. *Cost of Briefs.*

The actual cost of printing his brief, not exceeding fifty (50) cents per page of the size of the pages in the North Carolina Reports, and not exceeding ten pages, shall be allowed to the successful party, to be taxed in the bill of costs.

38. *Reargument.*

The Court will, of its own motion, direct a reargument before deciding any case, if, in its judgment, it is desirable.

39. *Agreement of Counsel.*

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

40. *Entry of Appearance.*

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the Clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

CERTIORARI AND SUPERSEDEAS.

41. *When Applied For.*

Generally the writ of *Certiorari*, as a substitute for an appeal, must be applied for at the term of this Court to which the

appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

42. *How Applied For.*

The writs of *Certiorari* and *Supersedeas* shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of *Certiorari* may be allowed, upon motion in writing. In all other cases, the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit and such other evidence as may be pertinent.

43. *Notice Of.*

No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

ADDITIONAL ISSUES.

44. *If Other Issues Necessary.*

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court, and certified to the Superior Court for trial, and the case will be retained for that purpose.

MOTIONS.

45. *In Writing.*

All motions made to the Court shall be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motion, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the session of the Court.

ABATEMENT AND REVIVOR.

46. *Death of Party.*

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may volun-

tarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes, and, if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

47. *When Appeal Abates.*

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

OPINIONS.

48. *When Certified Down.*

"The Clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the Clerks of the Superior Courts, certificates of the decisions of the Supreme Court, which shall have been on file ten days, in cases sent from said Court." *Acts* 1887, ch. 41.

THE JUDGMENT DOCKET.

49. *How Kept.*

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom each judgment was entered. On this docket the Clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money —stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the Clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

EXECUTIONS.

50. *Teste of Executions.*

When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

51. *Issuing and Return of.*

Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the Clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and, when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

PETITION TO REHEAR.

52. *When Filed.*

A petition to rehear may be filed at the same term, or during the vacation succeeding the term of the Court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term. If such petition is ordered to be docketed by the Justice to whom it is submitted under Rule 53, such Justice may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said Court, or until the petition to rehear shall have been determined.

53. *What to Contain.*

The petition must assign the alleged error of the law complained of; or the matter overlooked; or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject matter, and have never been of counsel for either party to the suit, that they have carefully examined the case and the law bearing upon the same, and the authorities cited in the opinion, and that in their opinion the decision is erroneous, and in what respect it is erroneous. The

petition shall be sent to the Clerk of this Court, who shall endorse thereon the time when it was received, and deliver the same to the Justice designated by the petitioner, who shall be a Justice who did not dissent from the opinion; but the opinion shall not be docketed unless such Justice shall endorse thereon that the case is a proper one to be reheard; and notice of the action had shall be given to the petitioner by the Clerk of this Court, and if docketed, to the opposite party also.

The rehearing may be granted as to the whole case, or restricted to specified points, as may be directed by the Justice who grants the application.

54. *Notice Of.*

Before applying for an order to restrain the issuing of an execution, or the collection and payment of the same, written notice must be given the adverse party of the intended motion, as prescribed by law, and also of the proposed application for a rehearing of the cause, with a copy of the petition therefor. The Court may, however, grant a temporary restraining order without notice.

CLERK AND COMMISSIONERS.

55. *Report of Funds in Hands Of.*

The Clerk and every Commissioner of this Court who, by virtue or under color of any order, judgment or decree of the Supreme Court, in any action or matter pending therein, has received, or shall receive, any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the Clerk or such Commissioner professes to act was made; the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund, and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

56. *Report Recorded.*

The reports required by the preceding paragraph shall be examined by the Court, or some member thereof, and their or his approval endorsed shall be recorded in a well-bound book, kept for the purpose, in the office of the Clerk of the Supreme Court, entitled *Record of Funds*, and the cost of recording the same shall be allowed by the Court and paid out of the fund.

The report shall be filed among the papers of the action or matter to which the fund belongs.

BOOKS.

57. *Books Taken Out.*

No book belonging to the Supreme Court Library shall be taken therefrom except into the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a Judge of a Superior Court holding Court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairmen of the several committees of the General Assembly; and in such cases the marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

CLERK.

58. *Minute Book.*

The Clerk shall keep a *Permanent Minute Book,* containing a brief summary of the proceedings of this Court in each appeal disposed of.

59. *Clerk to Have Opinions Typewritten and Sent to Judges.*

After the Court has decided a cause, the Judge assigned to write it shall hand the opinion, when written, to the Clerk, who shall cause five typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully examined, and the bearing of the authorities cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

LIBRARIAN.

60. *Reports by Him.*

The Librarian shall keep a correct *Catalog* of all books, periodicals and pamphlets in the library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year, what books have been added during the next year preceding his report to the Library, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

61. *Sittings of the Court.*

The Court will sit daily, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The Court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law.

62. *Citation of Reports.*

Inasmuch as many volumes of Reports prior to the 63d have been reprinted by the State, with the number of the Reports instead of the name of the Reporter, and all the other volumes will be reprinted and numbered in like manner, counsel will cite the volumes prior to the 63d as follows:

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

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

RULES OF PRACTICE

IN THE SUPERIOR COURTS

REVISED AND ADOPTED BY

THE JUSTICES OF THE SUPREME COURT,

BY VIRTUE OF THE CODE, SECTION 961.

RULES.

1. *Entries on Records.*

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the Clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. *Surety on Prosecution Bond and Bail.*

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a Justice of the Peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the Clerks of the several Superior Courts to state, on the docket for the Court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a Justice of the Peace.

3. *Opening and Conclusion.*

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. *Examination of Witnesses.*

When several counsel are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel; but the counsel may change with each successive witness, or with leave of the Court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the

competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the Court.

5. *Motion for Continuance.*

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the Court.

(*The above rules substantially prescribed by the Supreme Court at January Term,* 1815.)

6. *Decision of Right to Conclude not Appealable.*

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, the Court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

7. *Issues.*

Issues shall be made up as provided and directed in The Code, secs. 395 and 396.

8. *Judgments.*

Judgments shall be docketed as provided and directed in The Code, sec. 433.

9. *Transcript of Judgment.*

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket, to be docketed in another county, until after the expiration of the term of the Court at which such judgments were rendered.

10. *Docketing Magistrates' Judgments.*

Judgments rendered by a Justice of the Peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and, if delivered to the Clerk of such Court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said Clerk.

11. *Transcripts to Supreme Court.*

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the Clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject matter, opposite to the same.

On some paper attached to the transcript of the record, there shall be an index to the record in the following or some equivalent form:

Summons—date .....page 1
Complaint—First cause of action .....page 2
Complaint—Second cause of action .....page 3
Affidavit of Attachment .....page 4

and so on to the end.

12. *Transcript on Appeal—When Sent Up.*

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the Judge, is filed in office of Clerk of the Superior Court. Code, sec. 551.

13. *Reports of Clerks and Commissioners.*

Every Clerk of the Superior Court, and every Commissioner appointed by such Court, who, by virtue or under color of any order, judgment or decree of the Court in any action or proceedings pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such Court held on or next after the first day of January in each year, report to the Judge a statement of said fund, setting forth the title and number of the action, and the term of the Court at which the order or orders under which the officer professes to act, were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The reports required by the next preceding paragraph shall be made to the Judge of the Superior Court holding the first term of the Court in each and every year, who shall examine, or cause the same to be examined, and, if found corrct, and so certified by him, shall be entered by the Clerk upon his book of accounts of guardians and other fiduciaries.

14. *Recordari.*

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *Supersedeas,* if prayed for as required by *The Code,* sec. 545. In such case, the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days' notice in writing of the filing of the petition shall be given to the adverse party before the term of the Court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The Court shall hear the application at the return term thereof—unless for good cause shown the hearing shall be continued—upon the petition, answer, affidavits and such evidence as the Court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the Court may grant the writ of *Certiorari* in like manner, except that in case of the suggestion of a diminution of the record if it shall manifestly appear that the record is imperfect, the Court may grant the writ upon motion in the cause.

15. *Judgment—When to Require Bonds to Be Filed.*

In no case shall the Court make or sign any order, decree or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. *Next Friend—How Appointed.*

In all cases where it is proposed that infants shall sue by their next friend, the Court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen, and the Court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. *Guardian Ad Litem—How Appointed.*

All motions for a guardian *ad litem* shall be made in writing, and the Court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. *Cases Put at Foot of Docket.*

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the Court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. *When Opinion is Certified.*

When the opinion of the Supreme Court in any cause which has been appealed to that Court has been certified to the Superior Court, such cause shall stand on docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. *Acts* 1887, ch. 192, sec. 3.

20. *Calendar.*

When a calendar of civil actions shall be made under the supervision of the Court, or by a committee of attorneys under the order of the Court, or by consent of the Court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continud by consent, if such actions have been at issue for two years.

21. *Cases Set for a Day Certain.*

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain,

unless by order of the Court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the Court will not be kept open for the trial of such action except for some special reason apparent to the Judge; but this rule will not apply when a calendar has been adopted by the Court.

22. *Calendar Under Control of Court.*

The Court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. *Non-Jury Cases.*

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the Judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. *Appeals from Justices of the Peace.*

Appeals from Justices of the Peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. *On Consent Continuance—Judgment for Costs.*

When civil actions shall be continued by consent of parties, the Court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. *Time to File Pleadings—How Computed.*

When time to file pleadings is allowed, it shall be computed from the adjournment of the Court.

27. *Counsel Not Sent For.*

Except for some unusual reason, connected with the business of the Court, attorneys will not be sent for when their cases are called in their regular order.

28. *Criminal Dockets.*

Clerks of the Courts will be required, upon the criminal dockets prepared for the Court and Solicitor, to state and number the criminal business of the Court in the following order.

First—All criminal causes at issue. Second—All warrants upon which parties have been held to answer at that term. Third—All presentments made at preceding terms, undisposed of. Fourth—All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. *Civil and Criminal Dockets—What to Contain.*

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First—The names of the parties. Second—The nature of the action. Third—A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein. Fourth—A blank space for the entries of the term.

30. *Books.*

The Clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding Judge whether any and what volumes have been lost or damaged since the last preceding term.

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