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NORTH CAROLINA REPORTS.

VOL. 129.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

AUGUST TERM, 1901.

BY

ZEB V. WALSER,

STATE REPORTER.

(VOL. III.)

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1902.

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Rule 62 of the Supreme Court is as follows:

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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	"
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OF THE

SUPREME COURT OF NORTH CAROLINA,

AUGUST TERM, 1901.

CHIEF JUSTICE:

DAVID M. FURCHES.

ASSOCIATE JUSTICES:

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WALTER A. MONTGOMERY, CHARLES A. COOK.

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THOMAS S. KENAN.

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* Appointed Nov. 30, 1901, to fill vacancy occasioned by the death of Hon. Colin McLean, Nov. 28, 1901.

† Appointed Dec. 26, 1901, to fill vacancy occasioned by death of Hon. Wiley Rush, Dec. 15, 1901.

LICENSED ATTORNEYS.

AUGUST TERM, 1901.

BERNARD, SILAS G ..... Buncombe County.
BOLTON, JOHN W ..... Cumberland County.
COCKE, WILLIAM J ..... Buncombe County.
COWPER, GEORGE V ..... Hertford County.
DICKINSON, METUS T ..... Wayne County.
DICKINSON, OSCAR P ..... Nash County.
DINGELHOEF, OTTO F ..... New Hanover County.
FOLGER, JOHN H ..... Surry County.
GLIDEWELL, POWELL W ..... Stokes County.
HAMRICK, FREDERICK D ..... Cleveland County.
HASTEN, GIDEON H ..... Forsyth County.
JUSTICE, ALFRED B ..... Hertford County.
LAND, EDWARD MAYO ..... Halifax County.
LEMMOND, REUBEN W ..... Union County.
LITTLE, JAMES C ..... Union County.
MITCHELL, JAMES R ..... Hertford County.
PETREE, NATHANIEL O ..... Stokes County.
PITTILLO, ROBERT A ..... Buncombe County.
RODMAN, WILEY CROOM ..... Beaufort County.
SAPP, CHARLES W ..... Forsyth County.
SMITH, ARCHIBALD STUART HALL ..... Halifax County.
SMITH, DAVID B ..... Guilford County.
SMITH, WALTER D ..... Harnett County.
STRINGFIELD, DAVID M ..... Pender County.
THOMPSON, CHARLES E ..... Pasquotank County.
VARSER, LYCURGUS R ..... Gates County.
WINSTEAD, MARCUS C ..... Person County.
WORRELL, JAMES A ..... Northampton County

CALENDAR OF COURTS

TO BE HELD IN

North Carolina During the Spring and Fall of 1902.

SUPREME COURT.

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination for applicants for license to practice law, to be conducted in writing, takes place on the first Monday of each Term, and at no other time. The Docket for the hearing of cases from the First Judicial District will be called on the Tuesday next succeeding the meeting of the Court, and from the other Districts on Tuesday of each succeeding week in numerical order, until all the Districts have been called.

SUPERIOR COURTS.

Spring Terms date from January 1 to June 30.
Fall Terms date from July 1 to December 31.

(The parenthesis numeral following the date of a Term indicates the number of weeks during which the Court may hold.)

FIRST JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge G. A. Jones.
FALL TERM, 1902—Judge Fred. Moore.

Beaufort—Feb. 10 (2); †Apr. 14 (1); *May 12 (1); † Oct. 13 (2); † Dec. 1 (3).
Currituck—Feb. 24 (1); Sept. 1 (1).
Camden—Mar. 3 (1); Sept. 8 (1).
Pasquotank—March 10 (2); † May 26 (2); Sept. 15 (1); Nov. 17 (1).
Perquimans—March 24 (1); Sept. 22 (1).
Chowan—Mar. 31 (1); Sept. 29 (1)
Gates—April 7 (1); Oct. 6 (1).
Washington—April 21 (1); Oct. 27 (1).
Tyrrell—April 28 (1); Nov. 3 (1).
Hyde—May 5 (1); Nov. 24 (1).
Dare—May 19 (1); Nov. 10 (1).

SECOND JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge G. H. Brown, Jr.
FALL TERM, 1902—Judge G. A. Jones, Jr.

Halifax—Jan. 20 (2); April 7 (2); Aug. 18 (2); Nov. 24 (2).
Northampton—‡ Feb. 3 (1); Mar. 24 (2); ‡Sept. 1 (1); Oct. 27 (2).
Warren—Feb. 10 (1); May 12 (1); Sept. 15 (2).
Bertie—‡ Feb. 17 (1); April 28 (2); ‡ Sept. 8 (1); Nov. 10 (2).
Hertford—*Feb. 24 (1); April 21 (1); *Aug. 11 (1); Oct. 20 (1).

THIRD JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge F. D. Winston.
FALL TERM, 1902—Judge G. H. Brown, Jr.

Pitt—Jan. 13 (2); †Mar. 17 (2); April 21 (2); Sept. 1 (2); † Oct. 13 (2).
Craven—† Feb. 10 (1); * April 7 (1); † May 5 (2); * Aug. 18 (1); † Sept. 15 (2); * Nov. 10 (1); † Nov. 17 (1).
Greene—Feb. 24 (1); Aug. 25 (1); Dec. 1 (2).
Carteret—Mar. 10 (1); Sept. 29 (1).
Jones—Mar. 31 (1); Nov. 3 (1)
Pamlico—Apr. 14 (1); Oct. 6 (1).

FOURTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge H. R. Bryan.
FALL TERM, 1902—Judge F. D. Winston.

Franklin—‡ Jan. 20 (2); April 13 (2); Oct. 13 (2).
Wilson—† Feb. 3 (2); † May 12 (1); * Sept. 1 (1); † Nov. 10 (2); *Dec. 8 (1).
Vance—Feb. 17 (2); May 19 (1); Sept. 29 (2).
Edgecombe—Mar. 3 (1); † Mar. 31 (2); Sept. 8 (1); † Oct. 27 (2).
Nash—Mar. 10 (1); April 28 (2) Aug. 25 (1); Nov. 24 (2).
Martin—March 17 (2); Sept. 15 (2).

FIFTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge E. W. Timberlake.
FALL TERM, 1902—Judge H. R. Bryan.

New Hanover—* Jan. 6 (2); † Jan. 27 (2); * Mar. 24 (1); † Apr. 7 (2); * May 26 (1); * July 7 (1); * Aug. 11 (1); † Oct. 6 (2); * Nov. 3 (1); * Nov. 24 (1).
Onslow—Jan 20 (1); ‡ July 14 (1); Oct. 20 (2).
Duplin—Feb. 10 (1); May 5 (1); Aug. 25 (1); Dec 1 (2).
Sampson—Feb. 17 (2); May 12 (2); Sept. 22 (2).
Pender—Mar. 3 (1); Sept. 1 (1); Dec. 15 (1).
Lenoir—Mar. 10 (2); April 28 (1); Nov. 10 (2).

SIXTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge Oliver H. Allen.
FALL TERM, 1902—Judge E. W. Timberlake.

Wake—*Jan. 6 (2); †Feb. 24 (2); * March 24 (2); † Apr. 21 (2); * July 7 (2); *Sept. 22 (2); † Oct. 20 (3).
Wayne—Jan. 20 (2); April 14 (1); Sept. 8 (2); Nov. 24 (1).
Harnett—Feb. 10 (2); Aug. 25 (1); ‡Nov. 10 (2).
Johnston—March 10 (2); Sept. 1 (1); Dec. 1 (2)

SEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge W. S. O'B. Robinson
FALL TERM, 1902—Judge Oliver H. Allen.

Cumberland—* Jan. 13 (1); † Feb. 17 (1); †Mar. 24 (1); * April 28 (1); † May 5 (2); * Aug. 25 (1); † Oct. 20 (2); *Nov. 17 (1).
Robeson—* Feb. 3 (2); † Mar. 31 (2); †May 19 (1); * July 21 (1); † Sept. 8 (2); * Nov. 3 (2); † Dec. 1 (1).
Columbus—Feb. 24 (1); April 14 (1); Sept. 1 (1); Nov. 24 (1).
Bladen—March 3 (2); Oct. 6 (2).
Brunswick—Mar. 17 (1); Sept. 22 (1).

EIGHTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge Thomas A. McNeill.
FALL TERM, 1902—Judge W. S. O'B. Robinson.

Moore—† Jan. 20 (2); * Apr. 21 (1); † May 12 (2); * Aug. 11 (1); † Sept. 15 (1); * Dec. 1 (1).
Chatham—Feb. 3 (1); May 5 (1); † Aug. 4 (1); Nov. 10 (1).
Anson—* Feb 10 (1); †Apr. 14 (1); * Sept. 8 (1); † Oct. 6 (1).
Union—*Feb. 17 (2); † Mar. 17 (2); Aug. 18 (2); †Oct. 13 (2); * Nov. 24 (1).
Richmond—*March 3 (1); † March 31 (2); * Sept. 1 (1); Sept. 22 (2).
Scotland—† March 10 (1); * April 28 (1); † Oct. 27 (1); * Nov. 17 (1).

NINTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge Walter H. Neal.
FALL TERM, 1902—Judge Thomas A. McNeill.

Durham—* Jan. 6 (1); † Jan. 20 (2); † Mar. 17 (2); * May 12 (1); * Aug. 25 (1); † Sept 29 (2); * Dec 1 (1).
Guilford—*Jan. 13 (1); †Feb. 10 (2); †Apr 14 (1); * May 5 (1); † June 9 (2); * Aug 18 (1); † Sept 15 (2); * Oct. 20 (1); † Oct. 27 (1); † Dec. 8 (2).
Granville—Feb. 3 (1); April 21 (2); July 28 (1); Nov. 17 (2).
Alamance—Feb. 24 (2); †May 26 (1); †Sep. 1 (2); * Nov 3 (1).
Orange—Mar. 10 (1); †May 19 (1); Aug. 4 (1); Oct. 13 (1).
Person—Apr. 7 (1); Aug. 11 (1); Nov. 10 (1).

TENTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge Thos. J. Shaw.
FALL TERM, 1902—Judge Walter H. Neal.

Montgomery—*Jan. 20 (1); †April 14 (1); Sept. 22 (2).
Iredell—Jan. 27 (2); May 19 (2); Aug. 4 (2); Nov. 3 (2).
Rowan—Feb. 10 (2); May 5 (2); Sept. 1 (2); Nov. 17 (2).
Davidson—Feb. 24 (2); †Apr. 21 (1); Aug. 18 (2).
Stanly—* Mar. 10 (1); † July 14 (1); *Sept. 15 (1); † Dec. 15 (1).
Randolph—Mar. 17 (2); July 21 (2); Dec. 1 (2).
Davie—March 31 (2); Oct. 6 (2).
Yadkin—April 28 (1); Oct. 20 (2).

ELEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge Albert L. Coble
FALL TERM, 1902—Judge Thos. J. Shaw.

Wilkes—Jan. 27 (2); Aug. 4 (2); † Oct. 20 (2).
Forsyth—*Feb 10 (2); †Mar. 10 (2); †May 19 (2); *July 21 (1); †Sept. 8 (2); *Oct. 6 (1); †Dec. 1 (2).
Rockingham—Feb 24 (2); July 28 (1); Nov. 3 (2).
Alleghany—Mar. 24 (1); Aug 18 (1).
Caswell—April 14 (1); Oct. 13 (1).
Surry—April 21 (2); † Aug. 25 (2); Nov. 17 (2).
Stokes—May 5 (2); Sept. 22 (2).

TWELFTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge Henry R. Starbuck.
FALL TERM, 1902—Judge Albert L. Coble.

Mecklenburg—† Jan. 13 (2); * Feb. 10 (2); † March 10 (2); * April 21 (2); * June 2 (2); † July 14 (2); † Aug. 11 (2); * Sept. 22 (2); † Oct 6 (2); *Nov. 24 (2).
Cabarrus—Jan. 27 (2); May 5 (2); Aug. 25 (1); Oct 20 (2).
Gaston—Feb. 24 (2); May 19 (1); Sept. 8 (2); Nov. 17 (1).
Cleveland—Mar. 24 (2); July 28 (2); Nov. 3 (2).
Lincoln—Apr. 7 (2); Sept. 1 (1); Dec. 8 (1).

THIRTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge Wm. A. Hoke.
FALL TERM, 1902—Judge H. R. Starbuck.

Catawba—Feb. 3 (2); † May 5 (2); July 7 (2); Oct. 27 (2).
Alexander—Feb. 17 (1); Sept. 29 (1).
Caldwell—Feb. 24 (2); *Sept. 15 (2); †Nov. 24 (2).
Mitchell—Mar. 10 (2); †May 19 (2); Sept. 1 (2); Nov. 10 (2).
Watauga—Mar. 24 (2); June 2 (1); Aug. 4 (2).
Ashe—Apr. 21 (2); July 21 (2); Oct. 13 (2).

FOURTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge W. B. Council.
FALL TERM, 1902—Judge Wm A Hoke.

McDowell—Feb 17 (2); Aug 4 (2); Oct. 20 (2).
Henderson—*March 3 (1); ‡ May 12 (2); *Sept. 15 (2); ‡Nov. 3 (2).
Rutherford—March 10 (2); Sept. 1 (2); Nov 17 (2).
Polk—March 24 (2); Sept. 29 (1).
Burke—April 7 (2); ‡ June 2 (2); ‡ Aug. 18 (2); Oct 6 (2).
Yancey—April 21 (3); Dec. 1 (2).

FIFTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge M. H. Justice.
FALL TERM, 1902—Judge W. B. Council.

Buncombe—*Feb. 3 (3); †March 10 (4); *April 21 (2); †May 26 (4); *July 28 (2); †Sept. 8 (6); *Nov. 10 (2); †Dec. 1 (2).
Madison—*Feb.24 (2); ‡ May 5 (3); †Aug. 11 (2); *Oct. 20 (3).
Transylvania—April 7 (2); Aug. 25 (2); Nov. 24 (1).

SIXTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1902—Judge Fred. Moore
FALL TERM, 1902—Judge M. H. Justice.

Haywood—Feb.3 (2); May 5 (2); Sep. 22 (2)
Jackson—Feb. 17 (2); May 19 (2); Oct. 6 (2).
Swain—Mar. 3 (2); †July 21 (2); Oct. 20 (2).
Graham—Mar. 17 (2); Sept. 1 (2).
Cherokee—March 31 (2); Aug. 4 (2); Nov. 3 (2).
Clay—April 14 (1); Sept. 15 (1).
Macon—April 21 (2); Aug. 18 (2); †Nov. 17 (2).

UNITED STATES COURTS FOR NORTH CAROLINA.

CIRCUIT COURT.

CHARLES H. SIMONTON, Judge, Charleston, S. C.

DISTRICT COURTS.

EASTERN DISTRICT, Thomas R. Purnell, Judge, Raleigh.
WESTERN DISTRICT, James E. Boyd, Judge, Greensboro.

UNITED STATES CIRCUIT COURT.

Terms.—Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT.

Terms.—Elizabeth City, third Monday in April and October.
New Bern, fourth Monday in April and October.
Wilmington, first Monday after fourth Monday in April and October.
Raleigh, fourth Monday in May and first Monday in December.

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N. J. Riddick, Clerk Circuit Court at Raleigh and Wilmington.
H. L. Grant, Clerk United States District Court for the Eastern District of North Carolina, Goldsboro.

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George L. Tonnoffski, Raleigh.
W. H. Shaw, Deputy Clerk for both Circuit and District Courts, Wilmington.
George Green, New Bern.
John P. Overman, Elizabeth City.

WESTERN DISTRICT.

Terms.—Circuit and District terms are held at same time and place, as follows:
Greensboro, first Monday in April and October, Samuel L. Trogden, Clerk.
Statesville, third Monday in April and October, H. C. Cowles, Clerk.
Asheville, first Monday in May and November, Charles McKesson, Clerk.
Charlotte, second Monday in June and December, H. C. Cowles, Clerk.

A. E. Holton, United States District Attorney, Winston.
A. H. Price, Assistant United States District Attorney, Salisbury.
J. M. Milliken, United States Marshal, Greensboro.

*For criminal cases only. †For civil cases only. ‡For civil cases and jail cases. (1) one week; (2) two weeks; (3) three weeks.

CASES REPORTED IN THIS VOLUME.

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CASES CITED BY THE COURT.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

AUGUST TERM, 1901.

SHIELDS v. NORFOLK AND CAROLINA RAILROAD COMPANY.

(Filed September 10, 1901.)

1. EMINENT DOMAIN—*Easements—Railroads—The Code, Sec. 1946 —Right-of-Way.*

   A railroad company by condemnation proceedings acquires only an easement in the land and a house located on the right-of-way does not become the property of the company.

2. RAILROADS—*Negligence—Damages—Right-of-Way—Fires.*

   A railroad company negligently setting fire to house of another on its right-of-way is liable for destruction of house and contents thereof.

ACTION by M. A. and F. P. Shields, executors of Jas. G. Shields, against the Norfolk and Carolina Railroad Co., heard by Judge *T. A. McNeill,* at June Term, 1901, of HALIFAX County Superior Court. From a judgment for the plaintiffs, the defendant appealed.

W. A. Dunn, for the plaintiffs.
George Cowper, for the defendant.

FURCHES, C. J. This is an action for damages against defendant for burning a house and a lot of peanuts belonging to plaintiff. The case comes to us upon the appeal of defendant, upon the following facts agreed, and judgment thereon for the plaintiffs:

The following facts are admitted:

1. That James G. Shields, the testator of the plaintiffs, at the time of the condemnation of the right-of-way of the defendant, was the owner of a large farm over which the right-of-way aforesaid was located, and the plaintiffs now own the same under the provisions of his will.

2. That at the time of the condemnation of the right-of-way, there was located thereon a common tenant-house which was then used by the testator as such, and which has since been used and occupied by the plaintiffs for the purpose of their farm until the time of the fire hereinafter mentioned.

3. That a short time before said fire the plaintiff had said house repaired at a cost of $25, which was without the knowledge or consent of the defendant, and had stored therein picked peanuts of the value of eighty dollars ($80).

4. That said house was wholly on the right-of-way.

5. That the right-of-way was acquired by the defendant by regular condemnation proceedings.

6. That in the month of December, 1898, a fire originated on the right-of-way at a point 200 yards from said house from sparks from one of its engines, and the said house and peanuts were entirely consumed.

7. That the defendant's engine was equipped with an approved and modern spark arrester which was in actual use at the time of the fire, and the engine was carefully and skillfully managed by a competent engineer.

8. That the defendant permitted dry grass and broom-straw to accumulate on its right-of-way, which was ignited by sparks from its engine by which the fire was communicated to said house.

9. That the use and occupation of said house was without the knowledge or consent of the defendant, but the defendant has never notified the plaintiffs to vacate said house or to discontinue its use.

10. That the value of the house at the time of the fire was $40.

11. That the value of the peanuts in the house at the time of the fire in December, 1898, was $80.

12. That at the time of the fire there was dry grass and broomstraw on defendant's right-of-way between its road-bed and the house, and plaintiffs did not remove any dry grass or broomstraw from the right-of-way, though they could have done so.

And it seems to us that upon the facts agreed the judgment of the Court below must be affirmed.

The defendant contends that it being agreed that the house was on defendant's right-of-way, it was defendant's house, and it should not be made to pay for burning its own house, and, as the house belonged to defendant, plaintiff had no right to use it, and if he put peanuts in the house of defendant, and they were burnt, the defendant is not liable for their loss. For this position the defendant cites section 1946 of The Code, which provides that all persons, parties to proceedings to condemn land for railroad purposes, such persons "shall be divested and barred of all right, estate and interest in such real estate, during the corporate existence of the company aforesaid." This act seems to have been passed in 1871, and it must be admitted that it uses very strong language. But it can not be supposed that it has been entirely overlooked by the profession and the courts for thirty years. And this Court has so often, since its enactment, held that a railroad only acquired an easement upon the land under condemnation proceedings, that we must take it to have put that construction upon the Act of 1871. *Railroad v. Sturgeon,* 120 N. C., 225; *Beech v. Railroad,* 120 N. C., 498;

Lassiter v. Railroad, 126 N. C., 509; *Geer v. Water Co.,* 127 N. C., 349; *Blue v. Railroad,* 117 N. C., 644.

In the case of *Blue v. Railroad,* this language is used by the Court:

"The right of railway companies is, by judgment of condemnation, made subject to occupation, where, and only where, the corporation finds it necessary to take actual possession in furtherance of the ends for which the company was created The damages are not assessed upon the idea of a proposed actual dominion, occupation and perception of the profits of the whole right-of-way by the corporation, but the calculation is based upon the principle that possession and exclusive control will be asserted only over so much of the condemned territory as may be necessary for corporate purposes, such as additional tracks, ditches and houses to be used for station-houses and section hands. Unless the land is needed for some such use, the occupation and cultivation by the owner of the servient tenement will be disturbed only when it becomes necessary for the company to enter, in order to remove something which endangers the safety of its passengers, or which might, if undisturbed, subject the owner to liability for injury to adjacent lands or property. *Ward v. Railroad,* 113 N. C., 566, and same case, 109 N. C., 358. The defendant company was liable if grass and other inflammable material, negligently left upon its right-of-way, was ignited by sparks from its engine, for any damage to adjacent landowners caused by the spreading of the fire. 8 Am. and Eng. Enc., 14; *Black v. Railroad,* 115 N. C., 667."

This quotation from Blue's case was approved by the Court and quoted in the opinion in *Railroad v. Sturgeon,* 120 N. C., 225.

It therefore seems to be the settled law in this State, so far as judicial construction can settle a question, that a railroad company by condemnation proceedings only acquires an easement upon the land condemned, with the right to actual

possession of so much only thereof as is necessary for the operation of its road, and to protect it against contingent damages. It also seems to be settled by these and numerous other decisions of this Court, that it is negligence in a railroad company to allow dry grass and broomstraw to accumulate and remain on its right-of-way; and that such companies are liable to the damage resulting from fires caused by sparks from their engines, setting such dry grass and broomstraw one fire.

The facts agreed admit that dry grass and broomstraw were allowed to accumulate and remain on defendant's right-of-way, in December; that the fire which destroyed the house and peanuts was caused by a spark from defendant's engine, lighting upon and igniting said dry grass and broomstraw at a point 200 yards from the house. This made the defendant liable for the house, and, we think, for the peanuts. If the plaintiff had the right to use and occupy the house, as it seems he had, and his property rightfully in the house was destroyed by the negligence of the defendant, we see no reason why defendant is not also liable for the peanuts. We are not able to distinguish the liability for the one from the other.

If the plaintiff had placed combustible matter on defendant's right-of-way and the fire had originated in that, and destroyed the plaintiff's house and peanuts, it would seem that, in that case, he could not recover; and defendant cited authorities tending to show that he could not. But this question is not presented by the facts agreed and we do not pass upon it.

The defendant's principal contention is that the condemnation proceedings put the absolute title to the land condemned in the defendant, and it being admitted that the house was on the right-of-way, that is, on the land condemned to defendant's use, that the house was defendant's property, the same as if defendant

had bought the land on which it stood, paid for it, and had obtained a deed in fee-simple therefor. All the authorities the defendant cites to sustain this position are decisions of other States, or text-books, except *Railroad v. McCaskill,* 94 N. C., 746. But it does not seem to us that any of the cases sustain defendant's contention. Probably McCaskill's case comes nearer doing so than any authority cited, and we do not think it goes to that extent. But if it ever could have been considered authority for the position contended for by defendant, it has not been so considered since the case of *Blue v. Railroad, supra,* as that case expressly holds to the contrary and overrules McCaskill's case if it announced any such doctrine as that. And Blue's case has been expressly approved and followed by this Court since its first announcement. *Railroad v. Sturgeon,* 120 N. C., 225. The doctrine that the railroad has acquired and paid for the land and the buildings on the same by condemnation proceedings, is fully discussed in Blue's case and Sturgeon's case, where it is expressly held that this is not so; that these assessments were never intended, and, in fact, did not include the freehold value of the property condemned; that it was never expected that the roads would claim the actual possession and enjoyment of any more of said lands than were necessary for their operation and for their protection. If this is true, as we have every reason to believe it is, it would be monstrous to allow them under such titles to assume and take actual possession, and occupy all the houses within 100 feet of their road-bed and turn the occupants out. If this were so, what would become of Salisbury, through which the North Carolina Railroad runs, where many of its valuable houses stand within less than 50 feet of its road-bed, and were there many years before the road was located? Were they paid for? And are they to be occupied by the railroad and its lessees and tenants, and the owners turned out of possession? If this were so, what would become of Hickory?

What of Marshall, where there is hardly a house in the town but would belong to the railroad, including the courthouse and public jail? Have these been assessed and paid for by the railroad?

The question seems to have been settled by the decisions of this Court that the railroad only acquired an easement to be used for the benefit and protection of the road in its being operated, and not as a means of acquiring property for the benefit of the corporation. And as it seems to us that it has been settled in accordance with justice, we have no disposition to disturb what has been done. The judgment will be

Affirmed.

LUTON v. BADHAM.

(Filed September 10, 1901.)

WITNESSES—*The Code, Sec. 590—Transactions With Decedents.*

In an action by an administratrix to recover for improvements put on lot of defendant under parol contract to convey it to intestate, the defendant can not testify as to such contract, she not having been a witness, nor having offered the evidence of her intestate.

ACTION by Margaret Luton, administratrix of A. Badham, against Hannibal Badham, heard by Judge *O. H. Allen* and a jury, at Spring Term, 1901, of CHOWAN County Superior Court. From a judgment for the defendant, the plaintiff appealed.

W. J. Leary, Sr., and *Busbee & Busbee,* for the plaintiff.

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

FURCHES, C. J. The only question involved in this appeal is the admission of evidence of the defendant under section 590 of The Code.

The action is by the administratrix of Alexander Badham, to recover the value of improvements put upon a lot belonging to the defendant, under a parol promise to convey the same to her intestate. For the purpose of establishing the parol promise, the plaintiff had introduced several witnesses, but had not been a witness herself, nor had she offered the evidence of her intestate.

The defendant was then introduced in his own behalf and "was asked if he, at any time during the life of Alex. Badham (intestate), promised him to convey the land described in the complaint, if he would go on it and improve it. Plaintiff objected. The Court sustained the objection, but permitted the witness to be asked concerning any promise made to his deceased son, as testified to under objection of defendant by plaintiff's witnesses.

"The witness Hannibal Badham (defendant) then testified that he had never made any such statements or promises to his son as was testified to by the plaintiff's witnesses. To the admission of this evidence the plaintiff excepted."

We are of the opinion that there was error in admitting the evidence objected to, and sustain the plaintiff's exception. *Sumner v. Candler,* 92 N. C., 634; *Bunn v. Todd,* 107 N. C., 266.

The case of *Gilmore v. Gilmore,* 86 N. C., 301, principally relied upon by defendant, does not involve section 590 of The Code, and is not in point.

New trial.

RUMBO v. GAY MANUFACTURING CO.

(Filed September 10, 1901.)

TITLE—*Quieting Title—Dismissal of Action—Judgment—Acts 1893, Chap. 6*

Under Acts 1893, Chap. 6, where, in an action to determine conflicting claims to real property, plaintiff being in possession, the court finds the claim of defendant to be invalid, the action should not be dismissed.

ACTION by J. Rumbo against the Gay Manufacturing Co., heard by Judge *O. H. Allen,* at Spring Term, 1901, of the Superior Court of CHOWAN County. From a judgment refusing defendant the relief it demanded and dismissing the action, both parties appealed.

W. M. Bond and *C. S. Vann,* for the plaintiff.

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

CLARK, J. The complaint alleges ownership and possession of a tract of land; that defendant claims, without legal right, an interest in the timber standing thereon by virtue of an alleged contract, and asks the judgment of the Court that such contract be declared null and void. The defendant answers, admitting the complaint, except the allegations as to the contract, which, it asserts, is valid, and asks judgment declaring it a valid lien upon the timber interest in said land. The Court below adjudged that the defendant was not entitled to the relief it demanded, and then dismissed the action. Both parties appealed.

As the defendant did not prosecute the appeal, that part of the case is determined. Besides, it was justified by *Manufacturing Co. v. Hobbs,* 128 N. C., 46, which held an exactly

similar contract given this same defendant invalid. It seeks, however, to justify the dismissal of the action on the ground that its claim having been adjudged invalid, there was no cloud to remove and no equity could be invoked. If the claim had been valid, the Court could not remove it. It is only when there is an invalid claim that a decree removing the cloud can be made. The Court below should not have dismissed the action, but should have entered its decree adjudging the defendant's contract invalid as a lien on the timber.

The defendant strenuously argued the equitable doctrines formerly applicable, but we need not discuss their application here, for this is not an equitable proceeding. It is an action given by statute. Laws 1893, Chap. 6. It was because the General Assembly thought the equitable doctrines (as laid down in *Busbee v. Macey,* 85 N. C., 329, and *Busbee v. Lewis, Ibid,* 332, and like cases) inconvenient or unjust that the above Act of 1893 was passed. If defendant had, as permitted under section 2 of said Act, disclaimed any interest in the property, judgment could not have gone against him for costs. But having asserted his claim and lost, he can not now plead the invalidity of his own claim as ground to dismiss the action.

Error.

MAKELY v. BOOTHE CO.

(Filed September 10, 1901.)

VENUE—*Trover and Conversion—Oysters—The Code, Sec. 190, Subd. 1.*

In an action for the wrongful conversion of oysters taken from oyster bed of plaintiff, the defendant is not entitled to a change of venue to the county in which the beds are situated.

ACTION by M. Makely and W. O. Montgomery against A. Boothe Company and A. S. Fulford, heard by Judge *O. H. Allen,* at Spring Term, 1901, of the Superior Court of CHOWAN County. From an order denying a change of venue, the defendants appealed.

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

Chas. F. Warren and *W. M. Bond,* for the defendants.

MONTGOMERY, J. The plaintiffs in their complaint alleged that the defendants received from John M. Flowers and others certain quantities of oysters, which Flowers and others had wrongfully and unlawfully taken from the plaintiffs' oyster grounds, situated in Hyde County, with full knowledge that the oysters had been wrongfully and unlawfully taken from the plaintiffs' oyster grounds, and that the defendants converted the oysters to their use. The oysters were alleged to be worth $2,000, and the action was brought against the defendants for the conversion of the same (trover) and for damages. The defendants denied the main allegations of the complaint, and prayed for a change of venue under subdivision 1 of section 190 of The Code, insisting that the action was in reality one for trespass upon,

and injury to, land in Hyde County—the oysters being regarded as a part of the real estate. The Court refused to remove the action to Hyde County for trial, and the defendants excepted and appealed.

Whatever might be the nature of the property in the oysters while they were in the oyster grounds, they became personal property upon being removed from their beds. The oysters could have been recovered as personal property, or, if not to be found, an action for the conversion of personal property could have been maintained against anyone—the original wrong-doer or any subsequent one. *Lee v. McKay,* 25 N. C., 29. It could not be that the owner of personal property, such as oysters taken from their beds, or timber cut from the land, would have to go to the county in which the land was situated and bring an action in trespass for injury to real estate for redress. There was no error in the ruling of his Honor.

No error.

COMMISSIONERS OF CURRITUCK CO. v. COMMISSIONERS OF DARE CO.

(Filed September 10, 1901.)

JUDGMENTS—*Motions—Actions—Practice—Procedure.*

From the facts in this case, a motion in the cause, and not a new action, was the proper procedure.

ACTION by the Commissioners of Currituck County against the Commissioners of Dare County, heard by Judge *O. H. Allen,* at May Term, 1901, of DARE County Superior Court. From a judgment for defendant, the plaintiff appealed.

W. B. Shaw and *W. M. Bond,* for the plaintiff.
E. F. Aydlett, for the defendant.

MONTGOMERY, J. In an action commenced by the Commissioners of Currituck County against the Commissioners of Dare County, the object of which having been to have determined and collected whatever part of the debt of Currituck, the county of Dare was liable for, at the time of its formation as a county, a judgment (known as the Cannon judgment) was entered at the Spring Term, 1877, of DARE Superior Court, wherein it was decreed that Dare's part of such debt was 15 and 11-20 per cent. At the time of the Cannon judgment, a part of the debt against Currituck was already in the form of judgments and there was other known indebtedness not yet reduced to judgments; and the Cannon judgment arranged that the plaintiffs should have the right to take judgment against the defendants for 15 and 11-20 per cent of any judgments that in the future might be obtained against the plaintiffs, upon a notice of ten days to the defendants. The fourth section of the Cannon judgment was in the following words:

"It is considered that the plaintiffs shall account to the defendants for 15 and 11-20 per cent of all taxes levied and received, and hereafter levied and received upon the value of the franchise and property of the Albemarle and Chesapeake Canal, lying within Currituck County, and that the same shall be accounted for in the settlement of the judgments hereby rendered and authorized to be rendered. This right to a proportion of said tax to cease after the final settlement of said outstanding debt for which plaintiffs and defendants are liable."

In the sixth section of the judgment it was ordered that the action be kept open on the docket for further orders. In April, 1900, in the original action, the defendants, served a notice on the plaintiffs to the effect that at the next term

of DARE Superior Court, before his Honor Judge *Coble*, they would move for judgment against the plaintiffs, under the fourth section of the Cannon judgment. The plaintiffs made no appearance, and his Honor, seeing that a long account was involved, referred the matter for a statement of that account. Both parties appeared before the referee, and a report was made to the next term of the Court. In the meantime the plaintiffs had a notice served on the defendants returnable to the Fall Term, 1900, of DARE Superior Court, to have the judgment of *Coble*, J., set aside for irregularity.

The contention of the plaintiffs is that a motion in the original cause was not the proper method of procedure, and that a new action was necessary, and that the same had to be commenced by summons. The line of argument of defendant's counsel on this point was that a final judgment had been entered in the original action by his Honor Judge *Hoke*, at the Fall Term, 1892. The last-mentioned judgment, however, is not a final judgment. It was rendered upon a notice in the original action, and, as provided for in the original action, for judgment for the amounts which had been collected by the plaintiffs in the shape of revenues from the Albemarle and Chesapeake Canal. The record shows that such a proceeding had been resorted to on two or three occasions. It is true that in the Hoke judgment the costs of the *action* were taxed against the plaintiffs, but certainly the word "action" was inadvertently used for *motion*, for the costs in the original action were, in the Cannon judgment, taxed against the defendants. And it is also true that it was recited in the Hoke judgment that the matter which was referred was that of having stated by a referee "the whole account of matter of indebtedness between the two counties, growing out of the old indebtedness due by Currituck;" but that language, as will be plainly seen from the entire record, refers to that indebtedness against Currituck,

which had been discovered and reduced to judgment at the time of the Hoke judgment. In a former report made, the referee had made a partial statement of the judgments against Currituck, and which, not being satisfactory, the matter was re-referred to have a full statement of the judgments which had been procured against Currituck from the date of the Cannon judgment.

There is nothing in the Hoke judgment which, either in express terms or by fair inference, impairs or destroys the force of the Cannon judgment, and we therefore think that a motion in the cause was the proper method of procedure.

It is not necessary to discuss the other matters raised by the record and in the argument of plaintiff's counsel in this Court.

No error.

ROBINSON v. LAMB.

(Filed September 10, 1901.)

1. FERRIES—*County Commissioners—Orders.*

An order of the commissioners of a county to lay out a ferry amounts to the establishment thereof.

2. APPEAL—*Vested Right—Ferry.*

An order of the commissioners of a county establishing a ferry gives a vested right and is not vacated by an appeal to the Superior Court.

3. STATUTES—*Licenses—Revocation—Vested Rights—Ferries.*

Where a statute prohibits the establishment of a ferry within certain limits, it does not affect a license for a ferry already granted.

4. FERRIES—*Dismissal of Petition—Private Laws 1901, Chap. 72.*

Where, on motion to dismiss a petition to operate a ferry, the owner of the established ferry failed to show that he had provided ample facilities for the public travel, as required by Chap. 72, Private Laws 1901, the petition should not have been dismissed.

ACTION by C. H. Robinson and others against E. F. Lamb, heard by Judge *O. H. Allen*, at Spring Term, 1901, of CAMDEN County Superior Court. From a judgment for the defendant, the plaintiffs appealed.

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

Busbee & Busbee, for the defendant.

DOUGLAS, J. This is practically the same case as *Robinson v. Lamb*, reported in 126 N. C., 492, as it relates to the Camden end of the ferry. The principal facts stated in the

former case will equally apply to that at bar. The main difference is that after the Board of Commissioners of Camden County had made an order establishing the ferry asked by the plaintiff, and pending an appeal to the Superior Court, the General Assembly passed an act, ratified on the 5th day of February, 1901, being Chapter 72 of the Private Laws of 1901, entitled "An act to repeal Chapter 103, Private Laws of 1897." This act is as follows:

"*The General Assembly of North Carolina do enact:*

"Section 1. That Chapter one hundred and three, Private Laws of 1897, entitled 'An act to amend Chapter 27, Private Laws of 1873 and 1874,' be and the same is hereby repealed: *Provided,* the owners of the established ferry shall provide ample facilities for the convenience of public travel.

"Section 2. This act shall be in force from and after its ratification."

The defendant pleaded this act in bar of any further proceeding in the Superior Court, and on his motion the petition of the plaintiff was dismissed.

In such dismissal there was error. The Act of 1873-'74, which provided that, "No other bridge, boat or ferry *shall be established* within three miles of the one allowed by said act," was amended by the Act of 1897, by striking out the word "three" and inserting the word "two," thus changing the limit of exclusion to two instead of three miles.

While the statute was in this condition, the plaintiff petitioner filed his petition in due form before the Boards of Commissioners of Pasquotank and Camden counties for the establishment of a ferry across Pasquotank River, between said counties. Before the passage of the Act of 1901, the proceedings in Pasquotank County were finally adjudicated by the decision of this Court in *Robinson v. Lamb, supra,* and

the Commissioners of Camden County had made and entered the following order:

"This cause coming on to be heard before the Board of Commissioners of Camden County, on the 5th day of May, 1899, upon the petition of the petitioners to settle, lay out and establish a ferry across Pasquotank River, between the western end of Goat Island, in Camden County, and thence a straight line across Pasquotank River to a point between the north line of William Pailin's Ship Yard and the south line of Main Street, in Elizabeth City, in Pasquotank County, at its nearest point, and it appearing to the board from the examination of the evidence that the said ferry is not within two miles of any other ferry, and it further appearing that the settling, laying out, and establishing of the said ferry prayed for by the petitioners, is necessary for the good and convenience of the public:

"It is therefore ordered, adjudged and decreed by the board that the said ferry prayed for by the petitioners is not within two miles of any other ferry, and that it is necessary for the good and convenience of the public; and it is further ordered by the board that a ferry be settled, laid out and established across Pasquotank River at the points above named, and the same is hereby settled, laid out and established across said Pasquotank River, between the western end of Goat Island, in Camden County, and thence running a straight course across Pasquotank River to a point between the north line of William Pailin's Ship Yard and the south line of Main Street, in Elizabeth City, in Pasquotank County, at its nearest point; and it is further ordered by the board that the petitioners, Chas. H. Robinson, J. B. Flora, W. J. Woodley, Dr. O. McMullan, G. W. Ward, H. T. Greenleaf, J. W. Sharber, D. B. Bradford and John L. Sawyer, and their assigns, be allowed and are hereby allowed and vested with the rights and privileges of building and operating the said ferry; and it is further ordered by the board that the said petitioners aforesaid, Chas. H. Robinson and others,

shall pay all the expenses and cost in establishing and maintaining the said ferry, and be allowed as a compensation therefor to charge for passing over the said ferry the sum of ten cents, and no more, for a cart, buggy, carriage or wagon going either way. This the 5th day of May, 1899.

"G. C. BARCO,

"Chairman Board of Com. of Camden Co., N. C.

"C. B. GARRETT,

"Clerk of Board of Com. of Camden Co., N. C."

This, we think, was in contemplation of law the *establishment* of the ferry. It has long been settled that when the County Court ordered the laying out of a public road, such order amounted to the establishment of the road, and, unless appealed from, could not thereafter be questioned. *Anders v. Anders*, 49 N. C., 243; *Minor v. Harris*, 61 N. C., 322, 325. We, therefore, have the ferry in question properly established by lawful authority before the passage of the Act of 1901.

It is true the proceeding in Camden County was under appeal to the Superior Court, but such an appeal from a tribunal of exclusive original jurisdiction did not have the effect of vacating the original order, which remained in force, even if suspended in its operation, until reversed or modified by the Superior Court. To that extent we think it analogous to the judgment of a Justice of the Peace. *Dunham v. Anders*, 128 N. C., 207.

However, we do not mean to say that the plaintiff had acquired such a vested right as was free from legislative interference. That question was practically settled in *Robinson v. Lamb*. We concede the power of the Legislature to revoke or limit the plaintiff's franchise; but it does not appear to us to have done so, either expressly or by implication. The repealing Act of 1901 operated as an amendment to the Act of 1873-'74, and as such amendment, took effect from its passage only. Code, sec. 3766. Neither the amendment

nor the original act contains any provisions which are retrospective in their nature. Speaking as of February 5, 1901, it says, in substance, that no other ferry shall be *established* within three miles of Lamb's Ferry; but it does not profess to revoke or limit any license already granted. If it had provided that no such ferry should be "operated or maintained" the plaintiff's license might have been revoked by implication, but no such words appear. It may be that the defendant intended to revoke the plaintiff's license when he introduced his bill, but it is the intent of the law-making power and not of the draftsman that we must seek; and such intent must be found in the statute itself. Upon the face of the statute we must hold that the Legislature did not intend to revoke any existing license.

There is another fatal ground of error in the dismissal of the petition. The Act of 1901 extended the limit to three miles upon the express condition that "the owners of the present ferry (Lamb) shall provide ample facilities for the convenience of public travel." In moving to dismiss the plaintiff's petition, the defendant neither showed nor offered to show that he had furnished such facilities, in spite of the fact that he was confronted with a finding of fact to the contrary by the Board of Commissioners. Considering the nature of the proviso and its relation to the essential purposes of the act, we think that a strict compliance therewith is necessary for the operation of the act. In other words, the Act of 1901 does not go into effect until ample facilities are provided for the public travel.

Conceding, therefore, to the Act of 1901 its fullest possible operation, and if it be admitted that it revoked by implication the plaintiff's franchise, it was error in his Honor to dismiss the petition before it was found as a fact that the public wants had been fully met For the reasons herein stated, a new trial must be ordered.

Error.

MIDGETT v. MIDGETT.

(Filed September 10, 1901.)

1. PROCESSIONING—*Title—Boundaries—Acts 1893, Ch. 22.*

Title to land can not be tried under Acts 1893, Ch. 22, it applying only to the establishment of boundary lines.

2. EVIDENCE—*Grant—Processioning—Possession—Title.*

In an action to procession land, the petitioner not being in possession, he may offer a grant from the state to show title, but title being out of the state at time grant was issued, the grant conveyed no title.

ACTION by W. W. Midgett against J. D. Midgett, heard by Judge *Thos. A. McNeill* and a jury, at Fall Term, 1900, of DARE County Superior Court. From a judgment for the plaintiff, the defendant appealed.

W. M. Bond and *B. G. Crisp,* for the plaintiff.
E. F. Aydlett and *F. H. Busbee,* for the defendant.

FURCHES, C. J. This is a proceeding commenced before the Clerk of DARE Superior Court, under Chapter 22, Laws 1893. This act seems to have been intended as a substitute for the old processioning act, and it has been so many times held by this Court that it settles nothing as to title, that we are somewhat surprised to see that it should have been used in this proceeding instead of a civil action. *Vandyke v. Farris,* 126 N. C., 744; *Williams v. Hughes,* 124 N. C., 3; *Wilson v. Alleghany Co.,* 124 N. C., 7.

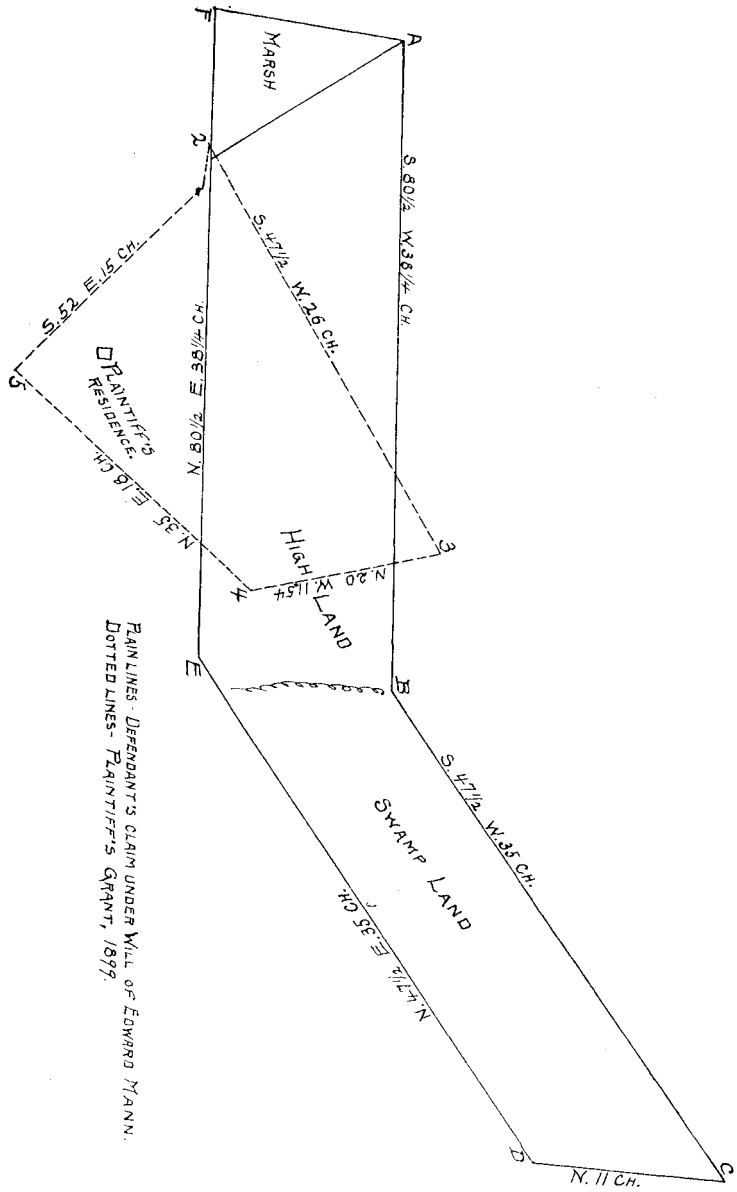
But besides this, it appears to us from the case on appeal, the map exhibited (which the reporter will insert) and the argument of the case, that Chapter 22, Laws of 1893, has nothing to do with it. If the plaintiff has any right under

his grant of 1899, it is in ejectment. There is no evidence tending to show that the plaintiff was the owner of the land he claimed or that he was in possession, except the grant of 1899. It was flatly denied by defendant that the plaintiff was the owner, or that he was in possession, and yet the Court refused to submit an issue as to title, or possession, or to charge the jury as to the same; but charged the jury: "That it was purely a question of fact for them to say where the lines were and after weighing all the evidence, both for the plaintiff and defendant, and giving due weight to the same, it was for them to say how it was and to answer the issues accordingly." This was error.

But this appears to us to be a remarkable case. In 1858 Edward Mann made a will in which he devised this land to his four sons, as tenants in common, to be equally divided among them "share and share alike," designating the order in which they should take, commencing at Caroon's line. This will was probated in 1861, and the plaintiff is the purchaser from one of the four devisees.

The defendant claims under a deed from Thomas R. Mann, for his interest under the will of Edward Mann, dated in April, 1884. The plaintiff claims the interest of W. K. Mann, under a deed from T. M. Gard, dated April, 1892, stating that it conveys W. K. Mann's interest, under the will of Edward Mann, and calls for the line of the defendant as one of its boundaries.

After the plaintiff obtained his deed from Gard for W. K. Mann's interest in the Edward Mann lands, he commenced a proceeding in the Superior Court of Dare County before the Clerk, alleging that he was a tenant in common with the other devisees of Edward Mann, and demanded a partition of the same—the defendant, John D. Midgett, being one of the defendants in that proceeding, 117 N. C., 8, and 120 N. C., 4. In that proceeding the defendants admitted that the plaintiff was the owner of W. K. Mann's interest in the


MARSH
S. 80½ W. 38¼ CH.
S. 47½ W. 26 CH.
S. 52 E. 15 CH.
N. 80½ E. 38¼ CH.
PLAINTIFF'S RESIDENCE.
N. 35 E. 16 CH.
N. 20 W. 154 LINKS
HIGH LAND
SWAMP LAND
S. 47½ W. 35 CH.
N. 47½ E. 35 CH.
N. 11 CH.
PLAIN LINES - DEFENDANT'S CLAIM UNDER WILL OF EDWARD MANN.
DOTTED LINES - PLAINTIFF'S GRANT, 1899.

Edward Mann lands, devised to W. K. Mann, but denied that they were tenants in common with him. And upon the final hearing it was held that the plaintiff was sole seized and that the defendants were not tenants in common with him, 120 N. C., 4.

The plaintiff then brought an action of trespass, but afterwards withdrew that action. He then obtains his grant of 1899, and commences this proceeding under Chapter 22 of the Laws of 1893.

We do not see how this proceeding can be sustained. The contention of the plaintiff as shown by the map fails to show a disputed dividing line between the plaintiff and defendants; but only a dispute of title—if it shows anything. This can not be tried under the Act of 1893.

There was no error in allowing the plaintiff to offer his grant in evidence, but if the title to the land it covered was out of the State at the time it was issued (as it seems to have been), it conveyed no title, and it was the duty of the Court to so have instructed the jury. We do not see how the plaintiff can proceed—certainly he can not as the case is now presented to us.

Error.

ROUNTREE v. BLOUNT.

(Filed September 18, 1901.)

1. VENDOR AND PURCHASER—*Mortgages—Religious Societies——Trustees—Ultra Vires.*

A congregation taking possession of a church can not contest the validity of a mortgage given by the trustees for the purchase-money on the ground that it was *ultra vires.*

2. VENDOR AND PURCHASER—*Contracts.*

A party who enters land under a deed can not, by repudiating the deed, hold possession and deny the title of the vendor.

3. AMENDMENTS—*Pleading—Practice.*

Where, in an action for possession of realty, the defendants set up a mortgage to plaintiffs and ask its cancellation, plaintiffs may amend by asking a foreclosure of the mortgage.

ACTION by C. D. and Annie A. Rountree against Caesar Blount and others, Trustees of Hickory Hill Baptist Church, heard by Judge *W. A. Hoke* and a jury, at May (Special) Term of the Superior Court of PITT County. From a judgment for the plaintiffs, the defendants appealed.

Jarvis & Blow, for the plaintiffs.
J. M. Moore, for the defendants.

DOUGLAS, J. This is an action to foreclose a mortgage given by the defendant Trustees upon the church property in their charge. The essential facts appear to be as follows: Sometime about the year 1877 the Hickory Hill Colored Baptist Church, of which the defendants are Trustees, bought the lot in controversy from Charles Rountree, father of the present plaintiff, for the sum of $350, payable in instalments, and erected a church thereon. The defendants

claim that the purchase-money has been fully paid and that they are therefore the owners of the land. The plaintiffs deny that the defendants ever paid for the land. It is admitted that the defendants never received any deed from Charles Rountree, and that the only deed they have to the land is that executed by the plaintiffs. This they seek to repudiate, with the resulting mortgage, on the ground that their Trustees had no authority to purchase; that at the time of said alleged purchase they were the equitable owners of said land, and that upon their re-entry thereon they were remitted to their former rights. We do not think that their contentions can be sustained.

It appears from the apparently uncontradicted evidence that on the 12th day of February, 1889, the plaintiffs were in possession of said property, which had been abandoned by the congregation of said church upon being notified of the plaintiff's claim of ownership; that on said day T. A. Wilkes, C. H. Henheran and Simon Harris, as Trustees of said church, purchased the said property from plaintiffs for the sum of $450, payable in eighteen instalments of $25 each, becoming due every three months; received a deed therefor, and executed back to the plaintiffs the mortgage in question to secure the purchase-money; that immediately after said purchase, and in consequence thereof, the congregation moved back into said church and still remain in possession, and that only one of said last-named instalments has been paid.

The defendant, Cæsar Blount, referring to the abandonment of the property, testified as follows: "The congregation said that before they would pay any more (having paid it once) they would leave the property, and did go away and take the bell." Again, on cross-examination, he said: "We moved out because the plaintiff claimed it, and moved back because he told us we could. The entire congregation moved

out when the present Mr. Rountree claimed the property, and moved back because he told us we could. After the notes and mortgages were executed, the entire congregation went back into the possession of the church under the contract made by the Trustees with plaintiff, to-wit, the deed from present plaintiff and the mortgage and notes now sued on."

We agree with his Honor that the congregation, by resuming possession and control of the church, under the purchase made by their Trustees, ratified such purchase, and can not now be heard to contest the validity of the mortgage on the sole ground that it was *ultra vires*. The learned counsel for the defendants admits that they can not repudiate the mortgage and hold the deed, but contends that they can repudiate the entire transaction and hold under their first contract of purchase. Whatever may have been their original rights under that contract, which does not appear ever to have been in writing, and which did not pretend to convey the legal title, we do not think that they are now available. At the plaintiffs' demand they voluntarily surrendered possession and subsequently re-entered as their vendees. Even if they could now repudiate the deed, which we think they fully ratified, they certainly could not retain possession and deny the title of him under whom they entered. We think this question is settled by the decision of this Court in *Farmer v. Pickens,* 83 N. C., 549.

We do not mean to say that a party in possession admits the title of another by taking merely a quit-claim deed, nor even when out of possession, if he does not enter under such deed.

The Statute of Limitations was not available on account of the admitted break in the defendants' possession.

Neither was there error in permitting the plaintiffs to amend their complaint so as to ask for a foreclosure of the mortgage, as no injustice appears to have been done to the

defendants. In fact, the defendants in their original answer themselves set up the fact of the mortgage and ask to have it cancelled.

The judgment of the Court below is

Affirmed.

IVES v. MUTUAL LIFE INSURANCE COMPANY.

(Filed September 18, 1901.)

PARTIES—*Insurance—Personal Representatives.*

The personal representative of a beneficiary is the only party who can maintain an action on a life insurance policy.

ACTION by J. F. Ives, administrator of Mary E. Ives, against the Mutual Life Insurance Co. of New York, heard by Judge *Thomas A. McNeill,* at Spring Term, 1901, of the Superior Court of CRAVEN County. From a judgment for the defendant, the plaintiff appealed.

O. H. Guion, for the plaintiff.

Simmons & Ward, for the defendant.

CLARK, J. David Brinson, in 1845, insured his life in defendant company for the benefit of his wife, Elizabeth, with the following clause added, "And in case of the death of said wife before the decease of the assured, the amount of the said insurance shall be payable after her death to her children, or their guardian, if under age, within 60 days after due notice and proof of the death of said David Brinson." There were six children born of said marriage. The wife of the assured died in 1881; one of her daughters,

Mary, predeceased her, leaving two children, one of whom has since died, after marrying the plaintiff, who brings this action as her administrator. The assured died in 1899, another of his daughters having died after the death of his wife, but before his death.

The defendant company paid the amount of the policy to the four children, who survived him, and the personal representative of his daughter, who died after her mother.

The plaintiff contends that the daughter, Mary, who predeceased her mother, was entitled to share in the proceeds of said policy, and that her two children should have been paid one-sixth thereof, and therefore as administrator of his wife, one of said children, he demands judgment for one-twelfth of said policy.

Whether Mary Brinson, who predeceased her mother, had a vested interest in the policy which could not be defeated by her death, is an interesting question that could only be determined in an action brought by Mary Brinson's personal representative. Certainly her children, or this plaintiff administrator of one of them, could only be entitled as distributees of Mary Brinson to any fund collected by her personal representatives. It would be *obiter dicta* to pass upon the point here attempted to be raised when the only person authorized to recover the fund (if anyone) is not a party to the action. The complaint not having stated a cause of action, the Court below might have dismissed the action, or this Court might do so *ex mero motu*. In adjudging that plaintiff could not recover there was

No error.

FRAZIER v. FRAZIER.

(Filed September 18, 1901.)

DEEDS—*Mortgages—Redemption.*

To convert a deed absolute on its face into a mortgage, it must appear that the clause of redemption was omitted through ignorance, mistake, fraud or undue influence.

ACTION by D. B. Frazier against Penina Frazier and others, heard by Judge *Frederick Moore* and a jury, at November Term, 1900, of the Superior Court of GREENE County. From a judgment for the defendants, the plaintiff appealed.

T. B. Womack, for the plaintiff.
H. G. Connor & Son, for the defendants.

CLARK, J. To convert a deed absolute on its face into a mortgage, it must appear:

That the clause of redemption was omitted through ignorance, mistake, fraud or undue influence. There is no evidence of this; on the contrary the plaintiff's testimony is that he declined to execute a mortgage.

To cause a deed to be decreed in trust, there must be strong evidence of such agreement, and proof of such intention must be made not by simple admission of the parties thereafter, but there must be proof of facts and circumstances *dehors* the deed inconsistent with the idea of absolute purchase, otherwise the solemnity of deeds would always be subject to "the slippery memory of witnesses." *Kelly v. Bryan,* 41 N. C., 283; *Porter v. White,* 128 N. C., 42. If the transaction is a sale with power to repurchase, there is no equity to interfere. Adam's Eq., 111, and cases there cited.

Here, such circumstances are wholly lacking. On the contrary, the grantee went into possession at the end of the year, it being already rented out, and put up buildings, and cleared one-half of the land for cultivation, and he and his devisees have been in undisturbed possession since 1883.

There is an allegation that the grantee made a cotemporaneous parol agreement to reconvey upon repayment of the purchase-money, but there is no evidence of such repayment. The plaintiff relies upon an allegation that the rents and profits should be applied to repayment of the purchase-money, but there is no proof whatever of such agreement.

In sustaining a demurrer to the evidence there was

No error.

MOORE v. MUTUAL RESERVE FUND LIFE ASSOCIATION.

(Filed September 18, 1901.)

1. POWER OF ATTORNEY—*Irrevocable—Insurance—Acts 1899, Chap. 54, Sec. 62, Subd. 3.*

   A power of attorney conferred on the insurance commissioner by an insurance company in conformity with Acts 1899, Chap. 54, Sec. 62, Subd. 3, is irrevocable so long as the company has liabilities in this State remaining unsatisfied.

2. SERVICE OF PROCESS—*Process—Insurance.*

   Service of process on State Insurance Commissioner made in conformity with Acts 1899, Chap. 54,Sec. 62,Subd. 3, is valid, although the insurance company has not domesticated under Acts 1899, Chap. 62.

ACTION by L. J. Moore and others against the Mutual Reserve Fund Life Association, heard by Judge A. L. Coble, at Spring Term, 1901, of the Superior Court of CRAVEN

County. From a judgment for the defendant, the plaintiffs appealed.

Simmons & Ward, and *W. W. Clark,* for the plaintiffs.

Hinsdale & Lawrence, Shepherd & Shepherd, and *T. B. Womack,* for the defendant.

FURCHES, C. J. This appeal involves identically the same question, and no more, than was decided by this Court at its last term, in *Biggs v. Life Association,* 128 N. C., 5, and we are bound to reverse the judgment appealed from in this case, or to reverse the judgment of this Court made at its last term. There is no question of the importance of this, that may not be sustained by arguments on either side.

While the defendant stands before this Court just as any other foreign corporation would stand, it does not stand just as an individual would stand. The Legislature would have no power to prescribe terms to an individual as to whether he should be allowed to do business in this State. He would have the natural and constitutional right to do business here, without the permission or comity of the State. That is not so with the defendant. It had no right to do business here without the permission of the State. This being so, the State had the right to prescribe the terms upon which the defendant might carry on its business here. The State having this right, prescribed the terms and the defendant accepted them and proceeded with its business. The defendant being permitted, proceeded to make contracts with citizens of the State, and became liable to them under these contracts. One of the provisions upon which defendant was allowed to do business here was that James R. Young, Insurance Commissioner, and his successors in office should be constituted its agent, upon whom service of process might be made, and that said agency should continue so long as the

defendant had any *liabilities remaining unsatisfied* in this State arising from or out of its said business of insurance. The plaintiff alleges that the defendant is liable to him for a breach of its contract of insurance—a *liability* of the defendant *remaining unsatisfied.* If plaintiff's contentions are true, there is still a *remaining liability* of the defendant *unsatisfied.* The object of this action is to try that very question, Is the defendant liable to the plaintiff upon a breach of its contract of insurance?

But the defendant comes into Court, makes a special appearance, and in the face of the agreement upon which it was allowed to do business here, denies that it has violated its contract with the plaintiff; and therefore plaintiff has no such claim against it, as plaintiff alleges, and for that reason (that is, because the defendant says it is not liable to the plaintiff for anything) the action must stop. We can not adopt such arguments. It was the duty of the State to protect its citizens against such practices as it seems to us is attempted in this case. It seems to us that the defendant is improperly attempting to evade a liability it has incurred with one of its patrons it had induced to deal with it.

We do not feel called upon to discuss the question of revocability of this power to Young, further than to say that the time fixed in the act of the Legislature and in the power itself has not yet been reached, as the defendant admits that it still has outstanding liabilities in this State. It is conceded that, as a general rule, a principal has the right to revoke a power of attorney at any time, whether it is in terms irrevocable or not. But to this general rule there are well-established exceptions, as where it is coupled with an interest, or where it is contractual in its nature, given for a consideration and for the protection of some one, or some interest. In our opinion, this power falls under this exception to the general rule. It was contractual in its nature;

was given upon consideration that defendant should have the right to carry on its business in this State, and for the protection of those who should deal with the defendant.

We have not cited authorities, as we find them cited in the case of *Biggs v. this defendant,* 128 N. C., 5.

There is error, and the judgment of the Court below is reversed.

The cases of *Taylor v. Life Association, St. John's Lodge v. Life Association, Hancock v. Life Association, Pope v. Life Association, Moore and Wife v. Life Association, Foy v. Life Association, Barnum v. Life Association, Tisdale and Wife v. Life Association, Tisdale and Hackburn v. Life Association,* all involve the same point as that involved in *Moore v. Life Association,* and were argued together. And upon the ruling of the Court in the first case (*Moore v. Life Association*) the judgment of the Court below is reversed in all of them.

Reversed.

BRITE v. MANUFACTURING COMPANY.

(Filed September 18, 1901.)

CONTRACT—*Questions for Court.*

Where, in an action for breach of contract, the correspondence between the parties, offered in evidence, shows the contract, its construction is a matter of law.

ACTION by C. E. Brite against the Mount Airy Manufacturing Co., heard by Judge *T. A. McNeill* and a jury, at Fall Term, 1900, of the Superior Court of PAMLICO County. From a judgment for the plaintiff, the defendant appealed.

Simmons & Ward, for the plaintiff.

W. D. McIver, for the defendant.

MONTGOMERY, J. The original contract between the plaintiff and the defendant, under which the plaintiff was made the agent of the defendant to sell fertilizers on commission, and for an alleged breach of which, by the defendant, the plaintiff has brought this action, is in writing with the exception of the quantity of fertilizers to be sold. Upon the trial the plaintiff introduced a batch of letters from the defendant to prove that the quantity of fertilizers was afterwards agreed to be one hundred tons, and he also testified that on December 20, 1895, he wrote to the defendants ordering one hundred tons. In one of the letters referred to, of date December 8, 1895, the defendant wrote: "We will ship you the 100 tons of goods as follows," and then follows the manner and terms on which the agent was to sell to his customers. On the 23d of December, 1895, the defendant, in one of the letters, said: "We are thinking of sending you the 100 tons * * * ." In another of the letters, dated December 31, 1895, the defendant wrote (as the plaintiff testified on the trial, in answer to his letter of the 29th, of the same month): "All right, but we want to ship the goods in one lot from here, as we made prices on a basis of one dollar freight from Baltimore, and we have to ship in lots of 70 to 100 tons to get the rate." On the cross-examination the plaintiff admitted that he wrote to the defendant on January 3 following, a letter in these words: "Yours of the 31st received, and contents noted. Will say you can ship me 65 tons of cotton, corn, etc., and five tons of dissolved bone phosphate goods. You can ship them to New Bern and deliver them to the Eastern Dispatch Line, and then I can take charge of them and have them shipped where I want them. I have made arrangements to get them shipped from New Bern to where I want them to go, and enclosed find $5 for which give me credit on my note. Hoping this will be all right. Let me hear from you soon; you can ship any time, but try and ship by the 20th."

Amongst other instructions asked by defendant's counsel was one that the jury be told that "there was no evidence that defendant contracted for a larger number of tons than 75 tons shipped." The case was made up by his Honor, counsel having disagreed, and his Honor states that the instruction was modified and given in the general charge. We have examined very carefully the charge, and we find no allusion to the instruction directly or as a matter of inference. We think it ought to have been given as requested. The entire correspondence, undisputed and admitted, shows what the contract was; and that being so, its construction was a matter of law. The defendant's letter of December 31st and the plaintiff's letter of January 3d, were the termination of the correspondence concerning the quantity to be delivered under the contract, and settled that matter.

The defendant's second and third prayers for instruction were properly refused and he got the benefit of the fifth in the general charge.

New trial.

BOWERS v. WORTH.

(Filed September 18, 1901.)

CONTRACTS—*Delivery—Shipment—Sales.*

Where a person sells a certain number of bags of peanuts and delivers them to a carrier according to contract, and before the shipment thereof by the carrier the seller opened the car and placed some additional bags therein—not delaying thereby the shipment—the placing of the additional bags in the car does not affect the right of the seller to pay for the bags delivered according to the contract.

MONTGOMERY, J., dissenting.

BOWERS *v.* WORTH.

ACTION by J. E. Bowers & Co. against J. B. Worth & Co., heard by Judge *T. A. McNeill,* at Spring Term, 1901, of the Superior Court of HALIFAX County. From a judgment for the plaintiff, the defendant appealed.

Claude Kitchen, for the plaintiff.
W. A. Dunn, for the defendant.

FURCHES, C. J. This is an action for breach of contract in the sale of a car-load of peanuts, growing out of the following contract and agreed state of facts; that on 13th of October, 1899, plaintiff and defendant made following contract: "Messrs. Bowers & Co: We are in the market for a car of Spanish, and if you have anything to offer, would be glad to hear from you at the lowest possible price. Of course, offer must be for immediate shipment. Truly yours, J. B. Worth Co. Better wire if you can offer anything."

To which Bowers & Co. replied by telegram on October 17th: "Can buy car of Spanish at 75 cents. Ship on Saturday."

To which telegram defendant replied on same day as follows: "Accept car; must be clean, dry goods; shipment not later than Saturday."

2. That on the Saturday referred to, being October 21st, the plaintiff did deliver at the warehouse of the W. and W. Railroad Co., in Scotland Neck, N. C., (223) two hundred and twenty-three bags of Spanish peanuts, and took B. L. for the same, which were consigned to the defendants.

3. That on the 23d day of October the plaintiffs, by permission of the agent of the railroad company, opened the car in which the 223 bags of peanuts had been put, and placed therein thirty-three bags more of Spanish peanuts, and the B. L. was changed to correspond with the number of bags actually in the car.

4. That said change was without the knowledge or consent of the defendant.

5. The peanuts were tendered to the defendant in Petersburg, Va., and the defendant refused to accept the same.

6. It is admitted that 223 bags is a car of peanuts, and that 256 bags is a car of peanuts.

7. That a delivery of a car of peanuts at any time on Saturday, the 21st day of October, to the railroad company, and taking B. L. therefor, would be a shipment within the meaning of said contract, and that they complied with this contract, provided the facts hereinbefore recited do not constitute a breach of said contract.

8. That the plaintiffs are entitled to recover the sum of ninety-eight dollars, with interest thereon from the 21st day of October, 1899, if they have complied with said contract.

9. That the said peanuts left on the first freight train leaving Scotland Neck after Saturday, October 21st, for defendant at Petersburg.

It will be seen that the contract was to ship the peanuts by the following Saturday, which was the 21st day of October, 1899, the contract being made on the 13th of October.

It is agreed that 223 bags of peanuts is a car-load; and it is agreed that the plaintiff delivered to the railroad agent, at Scotland Neck, for shipment to the defendant, 223 bags of peanuts on Saturday, 21st October, which was in time, and a compliance with the terms of the contract.

If nothing more had been done, it is admitted that plaintiff would have been entitled to recover and to the judgment in this case. But it is admitted that on Monday, the 23d of October, and after the 223 bags of peanuts had been placed in the car for shipment, the plaintiff took 33 bags of peanuts to said depot, and, with the consent of the depot agent, put them in the car with those delivered on Saturday, and the bill of lading was then changed so as to include the 33 bags

delivered on Monday. It is also agreed that this did not delay the shipment of the peanuts delivered on Saturday. It was admitted and stated on the argument that plaintiff could not recover for the 33 bags delivered on Monday, and that they were not included in the judgment appealed from. Upon the peanuts reaching Petersburg the defendants refused to receive them.

So the case comes down to this: Did the placing of the 33 bags on Monday in the car with the 223 bags prevent the plaintiff from recovering for the 223 bags delivered on Saturday?

The delivery of the 223 bags on Saturday was a compliance with the contract, and the peanuts at once became the property of the defendant, and he had the right to sue for and recover them in claim and delivery proceedings. And the plaintiff had no more right to them than any stranger would have had. The right he might have had, over that of a stranger to the transaction, was the right of stoppage *in transitu;* and this he only had in case of insolvency, which is not alleged, and this right has nothing to do with the case before us.

Suppose the 223 bags delivered on Saturday had not been put in the car on Monday when plaintiff delivered the 33 additional bags? Those delivered on Saturday would have been defendant's peanuts, just as much as they were when put in the car; but the 33 bags delivered on Monday would not have been, because defendant had not bought them. The defendant could not have recovered them by action, nor would he have been liable for them until he accepted them. This, we think, is clearly so, and was substantially admitted on the argument.

What difference it makes that the plaintiff, with the consent of the depot agent, was allowed to put them in the car with the 223 bags delivered on Saturday, we are not able to

see. If it be contended that the depot agent at Scotland Neck was the agent of the defendant, it might be contended that he accepted the 33 bags and defendant was liable for them. But if this were so, we do not see how it would affect the right of the plaintiff to pay for the 223 bags delivered on Saturday.

While it is true that the officers of the railroad company are the agents of the consignee after the goods are delivered, this agency only extends to goods rightfully shipped, and which belonged to the consignee when shipped or delivered for shipment. They can not be the agent of a party who does not own the goods and has no interest in them. So, whatever the depot agent may have done, does not affect the case.

The judgment should be

Affirmed.

MONTGOMERY, J., dissenting. The plaintiff agreed to sell to the defendants a car-load of peanuts, the same to be shipped not later than the following Saturday from Scotland Neck, N. C., to Petersburg, Va. On the last-mentioned day the goods were delivered to the agent of the Wilmington and Weldon Railroad Co., at Scotland Neck, the car-load consisting of 223 bags. The bill of lading called for 223 bags and the consignees were the defendants.

On the Monday following, and before the first freight train left the station for Petersburg, the plaintiffs, by permission of and with the consent of the freight agent, and without the defendant's knowledge or consent, opened the car, placed therein 33 bags of peanuts in addition to the quantity delivered on Saturday, and the bill of lading was altered so as to conform to the addition to the car-load of the 33 bags.

Amongst the other facts admitted, it was agreed that 223

bags of peanuts is a car-load, and also that 256 bags is a car-load.

Upon the arrival of the peanuts at their destination, the car-load of 256 bags was tendered to the defendants and they refused to receive the same. This action was brought by the plaintiffs in a court of a Justice of the Peace, to recover damages for an alleged breach by the defendants of the contract of sale and purchase. The defendants admit their liability, if as a matter of law the plaintiff's act in opening the car and placing therein the additional 33 bags of peanuts, and the tender of the 256 bags to the defendants, was not a breach of the contract on the part of the plaintiffs. It does not appear from the agreed and admitted facts whether the defendants knew of the change made by the plaintiffs in the original shipment, but as no reason is given why the defendants refused the same, we must take it that the refusal was because of the act of the plaintiffs in opening the car and putting in the additional 33 bags, and the tender to the plaintiffs through the railroad company of the car-load of 256 bags, instead of the original shipment of 223 bags.

The contract for the purchase of the peanuts was completed when the plaintiffs on Saturday placed in the car the 223 bags, and the right of property therein passed to the defendants; but when the plaintiffs, with the consent of the carrier, took possession of the car on Monday and placed therein the 33 additional bags, and the bill of lading altered to meet the added quantity, and the carrier tendered to the defendant the car-load lot of 256 bags, the defendants had the right to refuse the car-load as tendered. The contract, as we have seen, was completed on Saturday when the 223 bags were delivered to the carrier, and if the defendants had received the car-load of 256 bags with a knowledge of the facts, they would have been bound to the plaintiffs for the price of the whole. And this view is in no way inconsistent

with the legal effect of the delivery of the 223 bags on Saturday—the completion of the contract and the passing of the property to the defendants. The plaintiffs and the carrier's agent, by their interference with the car on Monday, and the tender to deliver the 256 bags in Petersburg, prevented the delivery of the true quantity bought under the contract, and the defendants were not compelled to go into a lawsuit with the carrier to get possession of the 223 bags, a part of the goods embraced in the bill of lading, and which part was not offered to be delivered. And the plaintiffs therefore can not recover any damages against the defendants for doing what they had a right to do under the circumstances.

HUGHES v. PRITCHARD.

(Filed September 18, 1901.)

1. BONDS—*Penalty—Surety.*

Where a defendant, to secure a continuance, is required to give a bond to cover such damages as may be recovered for rents and profits, and the recovery is for more than the penalty, judgment should be given against the surety for the amount of the penalty.

2. APPEAL—*Premature.*

Where a judgment is given against a surety on a bond, and execution is stayed until the amount of betterments due defendant is ascertained, an appeal by the surety before such an amount is ascertained, is premature.

DOUGLAS, J., dissenting.

ACTION by Mary E. Hughes and Mary E. Hughes, Jr., against D. T. Pritchard, heard by Judge *O. H. Allen,* at

Spring Term, 1901, of the Superior Court of CAMDEN County. From judgment for the plaintiffs, the defendant, Isaac Burnham, appealed.

E. F. Aydlett and *John H. Small,* for the plaintiffs.
J. H. Sawyer, for the defendant.

CLARK, J. If this were an action of ejectment and the bond in question had been that required by Code, sec. 237, the surety thereon would be liable only for rents and profits pending litigation and subsequent to filing the bond. But such is not the case.

The appellant, surety on the bond, correctly states the purport of the litigation as follows in his answer to the motion for judgment on the bond: "The plaintiffs brought this action against the defendant to have him declared trustee for them of two-thirds of the property described in their complaint, and to recover damages for rents and profits during his occupancy of the same." The complaint set out that such wrongful reception of rents and profits had continued since the 8th of March, 1886, and amounted to $10,000. The prayer for relief is to recover the accrued rents and profits thus taken by the defendant as trustee, and for a reference to ascertain amount of same, and for a decree that defendant was trustee as to two-thirds of the realty and should convey same to plaintiff. Complaint, answer and replication were filed at Spring Term Superior Court, 1896. At trial term in Fall, 1896, the defendant asked and was allowed a continuance, but was required to file a bond in the sum of $500, which he did, with the appellant as surety, which bond is conditioned to pay plaintiffs "such damages as they may recover against defendants on account of rents and profits *received* by him from the land in controversy." The complaint alleged the receipt of same by defendant as

trustee for ten years and the recovery thereof was one of the substantive reliefs demanded.

At Fall Term, 1897, the cause was tried, when the jury found all the issues in favor of plaintiffs, and that the rents and profits taken by defendant as trustee had averaged $400 per annum, from January, 1886. Judgment was rendered that defendant was trustee as alleged in complaint, that he should convey two-thirds interest in the realty to plaintiffs, that they recover the rents as above stated, and that after applying a bond for $2,500, held by defendant against one of plaintiffs (set up by defendant in the answer), the balance due by defendant for rents and profits wrongfully appropriated by him, was $1,046. The defendant then set up a plea for betterments, and plaintiffs moved for judgment on the bond given with appellant as surety at Fall Term,1896, when a continuance had been granted the defendant. The Court gave judgment thereon, but stayed execution until the amount of allowance, if any, to defendant by way of betterments should be determined.

The bond given by defendant with appellant as surety at Fall Term, 1896, was not the defence bond (under Code, sec. 237) required as a condition precedent to filing an answer in ejectment, and which would only cover the rents and profits pending litigation. But it was evidently given (and the appellant so avers in his brief) in compliance with the terms imposed on defendant for a continuance at that term, which terms rested in the sound discretion of the Judge. The wording of the bond indicates that it was partial security for the rents and profits sued for in the complaint alleged to have been converted by defendant in breach of trust—the bond says, "Rents and profits received by said Pritchard"—evidently meaning those already received as alleged, and sued for.

The future rents and profits, up to the trial, were soon

thereafter secured by the appointment of a receiver. It seems to us that the bond given by the appellant was additional security for the personal liability already incurred by defendant, and its execution was a condition imposed by the Court to balance the favor extended to defendant of not being forced to trial at that term.

The balance of recovery against defendant by reason of rents and profits wrongfully converted by him being adjudged more than the penalty of the bond executed by appellant as surety, the Court did not err in giving judgment for full amount of same against surety. His rights are fully safeguarded by the further order staying execution till the amount, if any, found to be due to the defendant on his plea of betterments, etc. (which matter by consent is under reference), shall have been credited on the balance of $1,046 adjudged due by him.

As on such reference it is possible the credits allowed defendant for betterments, etc., may exceed the $1,046, balance adjudged due by him, this appeal by the surety may prove to be entirely unnecessary and is therefore premature. He should have noted his exceptions and could appeal only from the final judgment.

Appeal dismissed.

DOUGLAS, J., dissents.

WAINWRIGHT v. MASSENBURG.

(Filed September 24, 1901.)

POWER OF ATTORNEY—*Coupled With an Interest—Principal and Agent.*

A power of attorney to sue for property, the attorney to receive part of property in case of recovery, is not a power coupled with an interest and the death of the principal terminates the agency.

PETITION by B. B. Massenburg, interpleader, to rehear Wainwright against Bobbitt, 127 N. C., 274. Petition refused.

F. S. Spruill and *B. B. Massenburg,* for the petitioner.

W. M. Person and *W. H. Yarborough, Jr.*, in opposition to petition.

FURCHES, C. J. This is a petition to rehear as to the interpleader, B. B. Massenburg, attorney (127 N. C., 274). It was decided at September Term, 1900, that the plaintiff was the owner and entitled to the possession of the land in controversy. This decision is not affected by the petition to rehear, as the rehearing was only granted as to Massenburg, therein called "defendant." We do not propose to discuss the plaintiff's rights in this opinion further than is necessary to present the facts that are necessary to discuss the rights of the petitioner, Massenburg.

It appears from the record that Jeremiah Ingram, on the 26th of March, 1826, made a will, which was probated in March, 1827, in which he willed and devised the lands in controversy to his widow, Nancy, and to his four children, Samuel, Joseph, Joshua and Presley. But the wife, Nancy, at the longest time was to have only a life-estate therein, which was further restricted to the coming of age of any one

of his children, with the further restriction and limitation that if his widow, Nancy, should marry, she was then to cease to have any interest whatever in said land. She afterwards did intermarry with Willis P. Ingram, but the date of this marriage is not stated. But it does appear from the record that W. P. Ingram and his wife, Nancy, were living upon this land as far back as any of the witnesses could remember—certainly for the last sixty years—and that Willis was using it and claiming it as his own, until 1870, when it was sold under execution by the Sheriff of Franklin County, when the plaintiff became the purchaser, took a deed from the Sheriff and went into possession. There are several reasons why the petition to rehear should not be granted.

The learned counsel for the petitioner contended that, as this was an action of ejectment, the plaintiff must recover upon the strength of his own title and not on the weakness of defendant's title. This is a correct proposition of law, which was observed on the trial of this case, and the plaintiff recovered. And the opinion of this Court affirming that judgment is allowed to stand as a correct ruling and judgment as to all the defendants, except the intervenors, and must stand as to them unless they show that it is erroneous. This, we think, they have failed to show. The intervenors have failed to show any title to the land or to connect themselves with the *estate* of Willis Ingram or the plaintiff. The interpleaders have introduced a deed from Joseph Ingram to T. J. Judkins, dated the 9th of December, 1844, for his interest in the land willed by his grandfather to his father, Jeremiah Ingram. But they do not show that W. P. Ingram held, or claimed to hold, said land under the will of Benjamin Ingram or Jeremiah Ingram. It was not willed to him by either of them. And while Willis Ingram married the widow of Jeremiah Ingram, the will itself shows that she had no interest in the land after her marriage.

The petition to rehear says that Willis, and Nancy the widow of Jeremiah Ingram, intermarried a few years before *his death,* which was about 1880. But the intervenor offers no evidence to sustain this allegation, and it would be most remarkable if it were true, as she was old enough in 1827 to be the mother of four children, Samuel, Joseph, Joshua and Presley, named in his will. But it can not be true, as it is shown, that the Bobbitts are the grandchildren of Willis and Nancy, and the plaintiff is the daughter of Willis and Nancy, and that she was a married woman in 1870 when she bought the land in controversy.

These children and grandchildren, the result of the marriage of Willis and Nancy, show that the marriage must have taken place more than "a few years before the death of Willis Ingram."

We have seen that Nancy had no interest in this land after her marriage with Willis, which was long enough ago to have a married daughter (the plaintiff) in 1870 and grown grandchildren (the defendants Bobbitt) before this action was commenced. And Joseph Ingram, the grantor of Judkins, must have been of age in 1844, when he made his deed to Judkin, which was more than fifty years before the commencement of this action. And if he or Judkins ever had any right to the land in controversy, they have lost it by sleeping on their rights for more than fifty years, when there was nothing to prevent them from suing for it.

But there are other reasons why this petition to rehear should not be granted. The deed offered in evidence is from Joseph Ingram to T. J. Judkins, and the power of attorney is from *Mrs. Rachael Judkins,* who alleges that she is the heir-at-law of T. J. Judkins. But it is not stated in the interplea how she is related to T. J. Judkins, and the Court can not know whether she is or not, and there is no evidence offered to show her relation to him. It was stated during the

argument that she was his widow, and, if so, she would not be the heir-at-law of T. J. Judkins, unless she is made so by statute—and no such statute was called to our attention. But she is dead, and was so before the commencement of this action, and the interplea is made in behalf of *her heirs.* Who are they? The Court has no means of knowing, and would be at a loss to render a judgment if they were entitled to one. But Mr. Massenburg claims that, under the power of attorney from Mrs. Judkins to him, he is personally interested; *that he is to have "one-half of what he recovers."* But Mrs. Judkins is dead and was so several years before this action was commenced; and upon her death, all the power of Mr. Massenburg had from her died. This is the general rule, and the exception to this rule is where the power is coupled with an interest. But an *interest in the recovery is not an interest coupled with the power,* that prevents death from terminating the agency. 1 Am. and Eng. Enc. 1217, 1218 and 1222.

The petition says that. in the opinion of the Court, it is said that plaintiffs and defendants are tenants in common. This expression may not have been well guarded. But the defendants claimed to be tenants in common with the plaintiff, and the Court was commenting upon the case, upon defendant's contention. But let that be as it may, it in no way affects the rights of the interpleader in this petition to rehear. They have failed to connect themselves with this estate, or to show any title to the same. For the reasons stated the petition must be

Dismissed.

CLARK, J., did not sit on the hearing of this case.

CONNOR v. DILLARD.

(Filed September 24, 1901.)

1. VENUE—*Removal of Causes—Foreclosure of Mortgages—The Code, Sec. 190, Subd. 3.*

An action for the foreclosure of a mortgage must be tried in the county in which the land is situate.

2. APPEAL—*Premature—Venue—The Code, Sec. 190, Subd. 3.*

An appeal from an order refusing to remove a cause for trial to another county, under The Code, Sec. 190, is not premature.

ACTION by H. G. Connor, executor of William Barnes, against Ed. Dillard, heard by Judge *A. L. Coble,* at May Term, 1901, of the Superior Court of WILSON County. From an order refusing to remove the case to another county, the defendant appealed.

H. G. Connor & Son, for the plaintiff.
Jacob Battle and *B. H. Bunn,* for the defendant.

CLARK, J. This is an action brought in Wilson County to enforce payment of a bond given for part purchase-money of the Floyd tract of land, lying in Nash County, with an allegation in the complaint and an agreement of record in this action, that it was stipulated in the contract of sale that payment should not be coerced out of any other property of the defendant, and the complaint asks only that judgment be "enforced by execution against said Floyd tract." The bond is one of a series secured by mortgage, though the complaint is not in form for the foreclosure thereof.

The defendant moved to remove to Nash County, under section 190 (3) of The Code. The motion should have been

granted, because the action is "substantially for the foreclosure of a mortgage" (*Fraley v. March,* 68 N. C., 160), and the judgment could be enforced only by subjecting a particular tract of real estate in another county. The enforcement of the judgment against that land is the sole object of the action. *Manufacturing Co. v. Brower,* 105 N. C., 440. If the action had been for a mere personal judgment, though on a mortgage note, it could have been brought where plaintiff resides, and docketing the judgment would not convey to plaintiff any estate in debtor's land. *Gammon v. Johnson,* 126 N. C., 64; *McLean v. Shaw,* 125 N. C., 491.

In *Baruch v. Long,* 117 N. C., 509, the motion to remove was made under subsection 1 of this section 190, and it was held that the lien of a docketed judgment was not such "estate or interest" in realty as entitled the defendant to remove the action to the county where such judgment was docketed. That action was a creditor's bill to set aside as fraudulent certain judgments suffered by defendant and certain transfers of property by him. The proceeding was not, as here, to enforce collection under the judgment lien (which is in the nature of a statutory mortgage, *Gambrill Mfg. Co. v. Wilcox,* 111 N C., 42), but was calling in question the *bona fides* of the judgments and transfers. This in nowise affected the enforcement of the lien, nor required the examination of title to realty, but was a personal action against the defendant, calling only for the investigation of his conduct in suffering such judgment—not its lien and effect, if valid. This appeal was not premature. *Roberts v. Connor,* 125 N. C., 45. In refusing to remove there was

Error.

RICKS v. POPE.

(Filed September 24, 1901.)

1. DEEDS—*Limitations—Alienation.*

A clause in a fee-simple deed against liability for the debts of the grantee is void.

2. DEEDS—*Limitations—Lien.*

A clause in a fee-simple deed that the grantee shall make annual payments to grantor during life of grantor, does not constitute a lien on the land.

3. TENANCY IN COMMON—*Joint Tenants—Ejectment—Action.*

A tenant in common may recover in an action of ejectment against a co-tenant.

4. TENANCY IN COMMON—*Joint Tenants—Co-tenants.*

Co-tenancy does not exist between two grantees of a tract of land conveyed in separate tracts by separate deeds.

5. BOUNDARIES—*Description—Course—Distance—Deeds.*

Where a description in a deed contains neither a beginning point, nor course and distance, but the land may be located by adjacent boundaries named in the deed, the description is sufficient.

ACTION by John Ricks against Carter Pope and W. Y. Taylor, heard by Judge *T. A. McNeill,* at Spring Term, 1901, of the Superior Court of EDGECOMBE County. At close of evidence for plaintiff, the defendants moved to dismiss the action, for that plaintiff was not entitled to recover upon his evidence. From an order dismissing the action, the plaintiff appealed.

G. M. T. Fountain, for the plaintiff.
John L. Bridgers, for the defendant.

FURCHES, C. J. This is an action of ejectment, in which the plaintiff undertakes to establish his title to the land in controversy, by a deed from E. A. Johnson to Isaac Pope; a mortgage from Isaac Pope and wife, and E. A. Johnson, to F. M. Rawlings, with power of sale, and a deed from Rawlings, mortgagee to plaintiff. And it is admitted that E. A. Johnson was the owner of the land at the date of the deed from her to Isaac Pope; that the mortgage from Pope and wife, and E. A. Johnson covered and conveyed the land, if Pope and his wife had the right to convey the same; and that the plaintiff has the title if the mortgage to Rawlings conveyed the title to him.

But the defendant contends that the deed from E. A. Johnson to Isaac Pope did not convey the title to said land, or, if it did, there were conditions in said deed that prevented Isaac from being able to mortgage the land, and that although E. A. Johnson joined in the mortgage of Pope and wife to Rawlings, it is ineffectual as to her, for the reason that it was never probated, or was not properly probated, as to her. And defendant also insists that if the plaintiff has become the owner of said land, he is a tenant in common with him, and that as this is an action of ejectment, it can not be maintained that plaintiff's proper remedy would have been a proceeding before the Clerk for partition.

We do not think either of the contentions of the defendant can be sustained.

The deed from E. A. Johnson to Isaac Pope is as follows: "Witnesseth, that the said Elizabeth A. Johnson, for and in consideration of the sum of twenty dollars per year, said amount to be paid annually by said Isaac Pope to said Elizabeth A. Johnson, so long as she shall live, and the first annual payment of the sum of twenty dollars being this day acknowledged, hath agreed, and by these presents do bargain and sell, transfer and convey to the said Isaac Pope, his heirs and as-

signs, one-half of my right to, and interest in, a certain tract of land, known as the Rose place, and purchased of James W. Gardner, by said Elizabeth A. Johnson, said to contain eighty-two acres, and lying in the county of Edgecombe and State of North Carolina. The one-half conveyed to Isaac Pope in this deed by Elizabeth A. Johnson, being bounded as follows: On the north by the lands of R. H. Gorham, on the east by the lands of Carter Pope, on the south by the county road leading from Battleboro, on the west by the lands of J. M. Cutchin. The western half of said tract of land, or the part conveyed in the deed, being said to contain forty-one acres, more or less. It is furthermore understood and agreed that this deed is made in consideration that the said land conveyed in this deed be exempt inviolate against all debts now against Isaac Pope, or may be thereafter contracted by him, but should said Isaac Pope at any time desire to sell or to convey said tract or parcel of land, that he shall have absolute power to do so.

"In witness whereof, I have hereunto set my hand and seal, the day and date above written.

"ELIZABETH A. JOHNSON. (Seal.)"

This deed was probated and registered in Edgecombe County, on the 13th of December, 1886. The mortgage from Pope and wife was properly probated and registered as to Pope and wife, but not as to E. A. Johnson. But if the deed from E. A. Johnson to Isaac Pope conveyed the land to him in fee-simple, it was not necessary that E. A. Johnson should have joined in making the mortgage of Pope and wife to Rawlings. And if it was not necessary for her to have joined in the mortgage, the want of a proper probate as to her did not affect the validity of the mortgage to Rawlings, and he got a good title.

The only reason that has been suggested why Isaac Pope

and wife could not make the mortgage to Rawlings is, that the deed from E. A. Johnson to him did not convey a fee-simple estate, or if it did, it was incumbered with the payment of $20 per annum to E. A. Johnson for her life. But we do not agree to the proposition of defendant that the following language has the effect to defeat the plain and express intention to convey the fee-simple, to-wit: "It is furthermore understood and agreed that this deed is made in consideration that said land conveyed in this deed be exempted inviolate against all debts now against Isaac Pope, or may hereafter be contracted by him, but should Isaac Pope at any time desire to sell or to convey said tract or parcel of land, that he shall have absolute power to do so"—this taken in connection with the contractual part of the deed, which is as follows: "For and in consideration of the sum of twenty dollars per year, said amount to be paid annually by said Isaac Pope to said Elizabeth A. Johnson, so long as she lives, and first annual payment of the sum of twenty dollars being this day acknowledged, hath agreed and by these presents do bargain and sell, transfer and convey to the said Isaac Pope, his heirs and assigns, etc."

These quotations from the deed from E. A. Johnson to Isaac Pope, in our opinion, undoubtedly conveyed the fee-simple estate to Isaac. And the clause against liability for the debts of Isaac is incompatible with, and repugnant to, the grant of the fee-simple estate, and is void. *Dick v. Pitchford,* 21 N. C., 480; *Twitty v. Camp,* 62 N. C., 61; *School Committee v. Kesler,* 67 N. C., 443; *Blount v. Harvey,* 51 N. C., 186; *Hardy v. Galloway,* 111 N. C., 519.

Nor do they constitute a lien or incumbrance on the land. *Taylor v. Lanier,* 7 N. C., 98; *Gray v. West,* 93 N. C., 442.

One tenant in common may recover in an action of ejectment against a co-tenant. The difference in an action of ejectment against a co-tenant and a stranger is, that in the case of

co-tenancy the judgment is to be let into possession with the co-tenant; whereas, in cases against strangers the judgment is to oust the defendant and put the plaintiff in possession. This learning is too elementary to require citation of authority to support it. But the application of this doctrine is not necessary in this case, as there is no tenancy in common between the plaintiff and defendant, and there was none between Isaac Pope and the defendant.

It seems that Elizabeth A. Johnson owned a tract of land containing about eighty-two acres. This she wished to divide between Isaac Pope and the defendant, Carter Pope. She first conveyed the eastern half to the defendant, Carter, and then she proceeded to convey the western half to Isaac, "bounded as follows: On the north by the lands of R. H. Gorham, on the east by lands of *Carter Pope,* on the south by county road leading from Battleboro, on the west by the lands of J. M. Cutchin. The western half of said tract of land, or the part conveyed in this deed, being said to contain 41 acres, more or less." This deed does not contain a beginning point, nor course and distance; and yet it may easily be located. It lies in Edgecombe County, North Carolina, known as the Rose place, and purchased of James Gardner, said to contain 82 acres, more or less, and being the western half of said tract, bounded as follows: "On the north by the lands of R. H. Gorham, on the east by lands of Carter Pope, on the south by county road leading from Battleboro, on the west by lands of J. M. Cutchin. The western half of said tract of land, or the part conveyed in this deed, being said to contain 41 acres, more or less." All that a surveyor would have to do to locate it, would be to find the adjacent boundaries called for in the deed, and the land conveyed would be located. And one of the adjacent lines necessary to be located would be that of the defendant, Carter Pope. This dividing line severs his land from that conveyed to Isaac Pope so they are not tenants in common. *Midgett v. Twiford,* 120 N. C., 4.

Therefore, as we are of opinion that the deed from Elizabeth A. Johnson to Isaac Pope conveyed the fee-simple estate, it was not necessary for E. A. Johnson to join in the mortgage to Rawlings. And the fact that the mortgage to Rawlings was not properly probated as to E. A. Johnson, did not vitiate the mortgage as to Isaac Pope and wife.

And, as the payments to be made by Isaac Pope to Johnson are not liens or incumbrances on the land, there is error in the judgment of nonsuit, which must be

Reversed.

PENDER v. PENDER.

(Filed September 24, 1901.)

REMAINDERS—*Contingent Remainders—Estates.*

Where a person conveys land to A for life, and at death of A, to the children of A, and if children of A die before A, then to grandchildren of A, it does not create a contingent remainder in the grandchildren, and A and her children may convey the land in fee-simple.

ACTION by Mary C. Pender and others against James Pender, heard by Judge *T. A. McNeill*, at April Term, 1901, of the Superior Court of EDGECOMBE County. From a judgment for the plaintiffs, the defendant appealed.

John L. Bridgers and *G. M. T. Fountain*, for the plaintiffs.

No counsel for the defendant.

CLARK, J. The lot in question was conveyed to a trustee, first, for payment of a debt (which has been long since

paid), "then to convey said land to Mary Pender, wife of David Pender, during her life, and at her death to hold it as a residence of David Pender so long as he resides thereon; and as soon as he ceases to reside thereon, to convey the said lot to the children of said David and said Mary; and if any of the children aforesaid shall die, leaving children surviving them, such child or children shall stand in the place of the deceased parent or parents, to have and to hold to the said children as aforesaid, to them and their heirs aforesaid." The debt having been paid, the trustee thereupon conveyed a life estate to Mary Pender. David Pender died in 1897, having ceased to use said lot as a residence many years prior thereto. David and Mary Pender had issue, three children, one of whom died intestate and without issue. The trustee has conveyed to the surviving children the fee subject to the life estate of their mother. They have, in pursuance of a contract of sale heretofore made, united with their mother in a deed, regular in all its parts, which they have tendered to the defendant, who contracted to purchase the land, but who now declines to accept the deed upon the ground that under aforesaid trust deed they can not make him a good and indefeasible title.

This presents the sole question in controversy, which comes up on an agreed state of facts, "upon an action submitted without controversy," duly verified, as required by section 567 of The Code.

His Honor correctly held that the deed tendered by the plaintiff conveyed "a good and indefeasible title and estate in fee-simple, free and clear from all claims, contingent or otherwise," and adjudged that the defendant should accept said deed and pay the purchase price agreed upon.

There is here no contingent remainder to "such children as shall be living" at the death of Mary Pender, or at cessation of the occupation of premises by David Pender. The trust is (after payment of the debt) to Mary Pender for life with

remainder to the children of Mary and David Pender (subject to the latter's right of occupation for a residence). The direction is to convey the land subject to Mary Pender's life estate to the children of herself and David, when he ceases to occupy the lot as a residence. His death fulfilled that condition and the trustee thereupon properly executed such deed to the children. The condition that "if any of the children as aforesaid shall die, leaving children surviving them, such child or children shall stand in the place of the deceased parent or parents," speaks of the date when the conveyance subject to the mother's life estate should be made, *i. e.,* on the cessation of David Pender's occupation of the premises. The deed then made to the two surviving children, the other having died intestate and without issue, was an exact and faithful compliance with the terms of the trust. The provision that if any of the children should die, leaving children, such children shall represent their parents, has no application here (for there were none such), and could not, even if the date of the conveyance had been still in the future, have turned this limitation into one to "such children as shall then be living." It is not a contingent remainder to those then living, but is a provision that the share of those deceased shall go to their children. The case falls under the class of cases represented by *Irvin v. Clark,* 98 N. C., 437, and has no analogy to the line of cases of which *Williams v. Hassell,* 73 N. C., 174, is an exponent.

No error.

BARDEN v. PUGH.

(Filed October 1, 1901.)

APPEAL—*Notice of Appeal—Judgment—Trial.*

Where an action is brought on a note by the payee to the use of an assignee of the payee, and judgment is rendered for the assignee, notice of appeal must be served on the assignee.

ACTION by W. E. Barden, to the use of Annie O. Smith, wife of R. B. Smith, and her husband, R. B. Smith, against W. J. Pugh, administrator of J. E. Barden, heard by Judge *Fred. Moore* and a jury, at October Term, 1900, of the Superior Court of SAMPSON County. From a judgment for Annie O. Smith, the defendant appealed.

T. B. Womack and *E. C. Smith*, for the plaintiffs.
J. L. Stewart and *J. D. Kerr*, for the defendant.

MONTGOMERY, J. The summons was issued in the style of W. E. Barden, to the use of Nannie Smith and her husband, R. B. Smith, against W. J. Pugh, administrator of J. E. Barden, deceased, and there was inserted a notice, that if the defendant failed to answer the complaint within the time required by law, the plaintiff, Mrs. Nannie O. Smith, would apply to the Court for the relief demanded in the complaint. The complaint was entitled, as to the parties, in conformity to the summons; but in the complaint the cause of action was alleged to be entirely in favor of Mrs. Smith, and judgment for the amount of the note declared on in the complaint was demanded in her name and for her benefit.

The defendant, not demurring to the complaint for the irregularity in the manner in which the suit was brought, an-

swered the allegations, which alleged the ownership of the note (the subject of the action), in Mrs. Smith, and also set up a counter-claim against W. E. Barden. The counter-claim was denied by replication. An issue was submitted to the jury, without exception, by the defendant, as to whether the note was the property of Mrs. Smith, and the same was answered in the affirmative. The jury also found that the whole amount was due on the note, less the two endorsed credits; that it was not barred by the statute of limitations, and not executed in fraud. A judgment was rendered upon the verdict of the jury in favor of Mrs. Smith in her own name, and for the amount due on the note and costs. The verdict was delivered and the judgment rendered on the night of October 19 (Friday), 1900, the last day of the term of Court. No appeal was taken from the judgment, and no notice of appeal was given at the term at which the action was tried. After the term of the Court had expired, the defendant caused to be entered the following words on the judgment docket: "From this judgment the defendant takes an appeal to the Supreme Court, and causes said appeal to be docketed here this October 25, 1900, and also files with the Clerk of this Court a statement of the case on appeal." On the 26th of the same month, the defendant caused a notice of appeal, addressed to the plaintiffs, to be served on W. E. Barden, and on the same day a statement of the case on appeal was served on Barden. No notice of appeal, nor any statement of a case on appeal was ever served upon Mrs. Smith.

Upon these facts being found by his Honor, who tried the case, the matter of the appeal being afterwards heard by his Honor, counsel for both parties being present, he made an order as follows: "The Court being of the opinion that the defendant has appealed from the judgment only in so far as the same affects the rights of W. E. Barden, but is entitled to have a case on appeal settled as to the plaintiff, W. E. Bar-

den, overrules the objections of counsel for the plaintiffs to the settlement of case on appeal as to the plaintiff, W. E. Barden, and sustains said objection as to the plaintiffs, Nannie O. Smith and R. B. Smith, her husband."

From the summons and the pleadings and the evidence in the case, it is perfectly clear that the defendant was not misled as to who was the true party plaintiff. The subject of the action was a note executed by the intestate of the defendant to W. E. Barden, and which note had been assigned and transferred to Mrs. Smith. Why the action should have been commenced in the name of Barden to the use of Mrs. Smith in the face of section 177 of The Code, we do not understand; but it was not demurred to by the defendant, and he made his defence against the collection of the note as if Mrs. Smith was the sole and absolute owner of the same.

As we have said, the verdict was in favor of Mrs. Smith on an issue as to whether she was the owner of the note, and the judgment was in her name—the name of W. E. Barden not appearing in it.

To make the notice of appeal effectual as to Mrs. Smith, of course the notice should have been served on her, and that not having been done, there was no error in the ruling of his Honor on that point. But we think his Honor was in error in holding that the notices which were served on W. E. Barden constituted an appeal. Nothing was embraced in the judgment which gave any benefit or advantage to W. E. Barden; in fact, as we have said, his name did not appear in the judgment, nor was any right of the defendant affected, so far as W. E. Barden was concerned. Nothing appears in the record as to what became of the counter-claim set up by the defendant against W. E. Barden. No instructions were given by the Court, nor were any asked by the defendant on that part of the case; and there is no evidence concerning the same in the statement of the case on appeal. There was nothing

in the judgment from which the defendant ever had any right of appeal, so far as W. E. Barden was concerned, and he did not serve any notice of appeal on Mrs. Smith, who made the recovery on the note against him, so that it is unnecessary to consider the questions raised in the case which his Honor made up.

Appeal dismissed.

MITCHELL v. BAKER.

(Filed October 1, 1901.)

1. CERTIORARI—*Laches—Practice—Supreme Court—Writ.*

Where an appeal is docketed and printed before the call of a district at a term of the Supreme Court, a motion for a writ of *certiorari* must be made at least at the call of the district at that term.

2. EXCEPTIONS AND OBJECTIONS—*Instructions—Appeal—The Code, Sec. 550.*

An exception to the "charge as given" will be disregarded on appeal, except where the charge involves but one proposition of law.

ACTION by A. Mitchell against J. F. Baker and wife, heard by Judge *O. H. Allen* and a jury, at December (Special) Term, 1900, of the Superior Court of LENOIR County. From a judgment for the defendants, the plaintiff appealed.

Shepherd & Shepherd, for the plaintiff.
N. J. Rouse and *J. H. Pou,* for the defendants.

CLARK, J. The appellant moves for a writ of *certiorari* for an amendment in the case on appeal upon a statement

from the trial Judge that he is willing to make it. The motion comes too late. The appeal was docketed and printed before the call of the district at last term, and with proper diligence the motion should have been made in time to have the case heard at last term, or at least at the call of the district at that term. It is *laches* to wait till this term, with the result that if allowed there would be another delay of six months. He who seeks a *certiorari* must negative *laches*. *State v. Griffis,* 117 N. C., 709; *Peebles v. Braswell,* 107 N. C., 68.

The sole exception in the case on appeal is "to the charge as given." That this is too general and must be disregarded is apparent upon the face of the statute. (The Code, sec. 550), which requires that exceptions shall be specifically stated, and the point has been ruled in over fifty cases, many of which are collected in Clark's Code (3d Ed.), pages 513, 514 and 773.

The only exception to this rule is, when there is only one proposition of law in the charge, but that is not the case here.

There being no exceptions in the case on appeal, and no errors upon the face of the record proper, the judgment below is

Affirmed.

LANE v. RANEY.

(Filed October 1, 1901.)

CONTRACTS—*Insurance—General Agents—Local Agents—Evidence.*

A local insurance agent can not bind his principal, a general agent, by a promise to another local agent in reference to a division of commissions between the local agents, where the rules of the general agent agreed to by the local agents require written notice of a claim for division of commissions to be filed with the application for insurance, and evidence of such promise is incompetent.

LANE *v.* RANEY.

ACTION by S. H. Lane against R. B. Raney, heard by Judge *T. A. McNeill* and a jury, at May Term, 1901, of the Superior Court of CRAVEN County. From a judgment for the plaintiff, the defendant appealed.

W. D. McIver, for the plaintiff.
Battle & Mordecai, for the defendant.

MONTGOMERY, J. The defendant is now and was at the time of the matters set out in the pleadings, the general agent of North Carolina of the Penn Mutual Life Insurance Co., of Philadelphia, and the plaintiff was at that time one of the local agents of the defendant at New Bern. It appears from all the testimony on that point in the case that the policy (the commission on the first premium of which being the subject-matter in dispute) was procured by the joint services of the plaintiff and another agent (H. C. Martin) of the defendant. In the contract concerning the agency between the plaintiff and the defendant, the plaintiff agreed to abide by and follow the rules of the defendant's office, one of the rules being on the subject of the division of commissions on first premiums on policies procured by the joint services of two or more of the special or local agents of the defendant. The defendant in his testimony said that the rule required that the agreement should be in writing and filed with the application for insurance, when the application was sent into his office. The plaintiff testified that he knew there was a rule on the subject, and had complied with it, as he understood it, in every instance, except the present one; and that his understanding of the rule was, that the agreement in writing was to be sent in "when the payment was collected upon the delivery of the policy."

Under either view of the agreement and rule the required notice was not given to the defendant by the plaintiff. The

plaintiff knew on the sixth of June that all the preliminaries had been arranged, and that the application for the insurance was to be sent on to the defendant by Martin. It was sent off on the last-mentioned date to the defendant's office and was unaccompanied by the agreement for division of commissions, as the rule required. No notice was afterwards given to the defendant until long after the premium had been paid and the commissions accounted for to the other agent, Martin. If it had been in contemplation that a note was to be given by the insured for the premium instead of money, as the plaintiff testified, was the understanding, the effect would be the same under the rule. The notice should have been given to Raney concerning the alleged claim of the defendant to his part of the commissions when the application was sent in. Raney would have been entitled to the notice in order that he might reserve for the plaintiff out of the collection of the note whenever paid, whether before, at or after its maturity, his part of the commissions. But the plaintiff contends that he was relieved of the duty to send forward the written agreement at the time of the receipt of the application of insurance at the office of the defendant, on the ground that Martin, who was authorized by the defendant to discontinue and to create agency, was instructed by the defendant to discontinue the agency of the plaintiff, and in so doing, said to the plaintiff: "You are entitled to your commissions on that (the premium on the policy) anyway, so if that is all, you can give the papers over to me now." That conversation was on the 6th of June, the application for insurance being then in the possession of Martin to be forwarded to the defendant, and that fact known to the plaintiff.

That contention might be successful if Martin had been authorized by Raney to have made the statement; but the defendant had given him no such power. Martin was only authorized "to discontinue and to create agencies," and he

could not bind Raney by his promise or agreement for a pecuniary obligation disconnected with the discontinuance or creation of an agency. His Honor admitted the testimony of the plaintiff as to that conversation with Martin over the objection and exception of the defendant, and we think in so doing he committed

Error.

SATTERTHWAITE v. ELLIS.

(Filed October 1, 1901.)

1. CHATTEL MORTGAGES—*Claim and Delivery—Replevin—Possession—Assignments.*

The assignee of a chattel mortgage is entitled to the possession of the property before the mortgage becomes due.

2. COUNTER-CLAIM—*Claim and Delivery—Damages.*

A counter-claim does not arise in an action for possession of mortgaged chattels by reason of the wrongful seizure of the property.

3. DEMAND—*Chattel Mortgages—Claim and Delivery.*

Where it is obvious from the defense set up that a demand would have been futile before instituting claim and delivery for mortgaged chattels, demand was unnecessary.

4. CHATTEL MORTGAGES—*Possession—Assignment—Notice.*

Where an assignee of a chattel mortgage acquires the note for value before maturity, he is not, in the absence of notice thereof, bound by an agreement between the mortgagor and mortgagee that the former is to retain possession until the note is due.

ACTION by L. M. Satterthwaite and others against W. S. Ellis, heard by Judge *A. L. Coble* and a jury, at Fall Term,

1900, of the Superior Court of CRAVEN County. From a judgment for the plaintiffs, the defendant appealed.

No counsel for the plaintiffs.
W. D. McIver, for the defendant.

MONTGOMERY, J. The plaintiff, who is the assignee of a note and mortgage made by the defendant, brought this action to recover possession of the personal property conveyed in the mortgage before the maturity of the debt, and at the time of the issuing of the summons seized the property under a proceeding in claim and delivery. The defendant, in his answer, resisted the plaintiff's claim, averring that there was a verbal agreement between the mortgagee and himself, at the time of the execution of the mortgage, that he should be allowed to remain in possession of the property until the note should fall due, and also set up a counter-claim and prayed for judgment for a return of the property and for damages for the wrongful taking and detaining the same. Amongst the issues submitted was one (the fifth in number) as to whether demand was made under the mortgage and note on the defendant for possession of the property before the action was commenced, and another (9th) as to the value of the use and possession of the property seized from the date of its seizure to the trial—both issues submitted under the plaintiff's objection. The jury responded "No" to the fifth issue, and "$110" to the ninth. His Honor, notwithstanding the finding of the jury on the two issues, gave judgment that the plaintiff recover the property absolutely, the jury having found in response to the first issue that the plaintiff was entitled to the property.

His Honor instructed the jury, amongst other matters, that, "If the jury should find that the plaintiff purchased the note and mortgage from Mitchell (the mortgagee) for value

and before it was due, unless they should find that the plaintiff had had notice of the agreement between Mitchell and Ellis (the defendant), that Ellis should retain possession of the property (if they should find there was such an agreement), the plaintiff would not be bound by the agreement, and that the jury should find that the plaintiff was the owner and entitled to the possession of the property, and answer 'Yes' to the first issue; and that the fact that the defendant was then in possession of the property was not notice of such an agreement."

The defendant excepted to the charge, and the contention of his counsel here was, that the plaintiff as assignee of the mortgagee had no authority or right to have possession of the property, that being the privilege of the mortgagee only, and that that right belonged to the mortgagee, because, and only because, of the legal title being in the mortgagee—the legal title drawing the right of possession. But it seems to us that the better view is that the assignee was entitled to possession of the property. Under numerous decisions of this Court it is held that the assignee of a note secured by a mortgage is entitled to all the rights and privileges which the mortgagee had, except to sell the property under the mortgage, and in Jones on Chattel Mortgages, section 501, it is said: "The legal effect of the assignment is to transfer the entire interest of the mortgagee in the property to the assignee, who thereupon, in place of the mortgagee, becomes the general owner. If the mortgagee was entitled to the possession of the property, the legal effect of his assignment is the same as if he had been in the possession of the property, and had sold and delivered it to the assignee. His assignee may recover possession in the same manner that the mortgagee himself might have recovered it." And so also it is said in Jones on Chattel Mortgages, section 506: "An assignment by a mortgagee not in possession has the same legal

effect as an assignment by a mortgagee in possession. It passes his entire interest in the property, and the assignee becomes entitled to all the rights of the mortgagee. If the latter is entitled to possession, his assignee in like manner is entitled to possession."

The defendant also excepted to the judgment, first, because it was for the absolute possession of the property; second, because the defendant was not allowed the amount found by the jury under the ninth issue; and also because the jury found that no demand had been made by the plaintiff on the defendant for the property before the action was commenced.

We think the judgment is correct. The action was not for the debt and foreclosure of the mortgage, but simply for the possession of the property. The debt was not due. If the action had been for foreclosure and there had been a verdict of the jury ascertaining the debt, and it had appeared that the property was largely in excess of the debt, the Court might have rendered a judgment for the recovery of the property with a *proviso* that the same should have been relieved of the lien and liability to seizure and sale by the payment of the sum actually due with interest and costs. *Taylor v. Hodges,* 105 N. C., 344.

But as we have said, the action was for the possession of the property itself and the plaintiff had the right to that, notwithstanding the debt was not due. *Hinson v. Smith,* 118 N. C., 503; *Jackson v. Hall,* 84 N. C., 489.

As to the second exception of the defendant to the judgment, it may be said that if the demand for such damages as are embraced in the ninth issue could be considered as a counter-claim (the same not having been set out in the answer, but only in the demands for judgment), it ought not to have been allowed in the judgment. It did not exist at the time of the commencement of the action, nor did it arise out of the same cause of action. It grew out of an alleged wrong-

ful procedure in the present action—the seizure of the property by claim and delivery—and not out of the cause of the action. *Kramer v. Electric Light Co.,* 95 N. C., 277; *Snow v. Commissioners,* 112 N. C., 335; *Phipps v. Wilson,* 125 N. C., 106.

In respect to the third exception to the judgment, it is sufficient to say that no demand was necessary for the possession of the property before the action was commenced. The answer shows, as we have pointed out, that the demand would have been useless. The defendant intended to resist the claim of the plaintiff. *Buffkin v. Eason,* 112 N. C., 162; *Moore v. Hurtt,* 124 N. C., 27. In the last-mentioned case it is said: "The sole purpose in requiring a demand before action is that the defendant shall not be taxed with costs when the plaintiff could have obtained the object of his action by simply making demand. When, therefore, the defendant set up a defence to the action, it appearing that a demand would have been futile, the courts do not hold that the omission to make demand is fatal."

Affirmed.

DOUGLAS, J., concurring. While concurring generally in the opinion, I can not agree with that part of it which holds that the so-called damages embraced in the ninth issue did not arise out of the same cause of action, but out of an alleged wrongful procedure in the action. Whatever terms may have been used by the parties, the sum found due is, in fact, not damages arising out of a wrongful act, but the net value of the use of the property in the plaintiff's possession. It is well settled that while a mortgagee may, in the absence of any stipulation to the contrary, take possession of mortgaged property, he can not sell such property before default. If he sees fit to take the property before the debt is due, he must account to the mortgagor for the value of any reasonable use

to which the property is or could have been put. The reason of the rule is thus given in *Jackson v. Hall,* 84 N. C., 489: "While the defendant invaded no right of the mortgagor in taking and keeping possession until the day of default, whether the property was or was not in danger of being lost or injured, yet he was, meanwhile, acting as trustee, bound to exercise that diligence and care expected of one in the preservation and management of his own property, and to account not only for profits actually received, but for the value of any reasonable and prudent use to which it could have been put without detriment to the property itself, since he has, as the verdict finds, needlessly deprived the plaintiff of its use." Such a claim is rather in the nature of recoupment, and being "connected with the subject of the action," clearly comes under the first class of counter-claims mentioned in section 244 of The Code. *Electric Co. v. Williams,* 123 N. C., 51. If this were a suit for the foreclosure of the mortgage, which it appears to have been considered through every stage of its proceeding, up to the judgment, I do not see why the defendant could not maintain his counter-claim for the reasonable hire of the property taken before default.

WEEKS v. McPHAIL.

(Filed October 1, 1901.)

1. JUDGMENT—*Decree—Nonsuit.*

A decree in partition proceedings reciting that it was rendered on the merits, will not be construed to be a judgment of nonsuit because it orders that the petition be dismissed.

2. ESTOPPEL—*Former Adjudication—Erroneous Judgment—Evidence.*

A party to a subsequent proceeding, who introduces a will which had been erroneously construed in the former proceeding, for the purpose of showing that the matter at issue had been adjudicated, does not thereby lessen the effect of the former proceedings as an estoppel.

3. ESTOPPEL—*Former Adjudication—Partition.*

All parties to a partition proceeding, it being equitable in its nature, are estopped by a decree therein.

4. ESTOPPEL—*Ejectment—Pleading.*

Estoppel need not be pleaded in actions of ejectment.

PETITION for rehearing in this case overruled. For former opinion, see 128 N. C., 130.

J. L. Stewart, Allen & Dortch, J. D. Kerr, and *Battle & Mordecai,* for the petitioners.

F. R. Cooper, and *Geo. E. Butler,* in opposition.

FURCHES, C. J. This is a petition to rehear this case, decided at the last term of the Court, and reported in 128 N. C., 130. There are five grounds assigned in the petition in which error is alleged in the opinion of the Court when this case was here before. And while the argument before us

was principally upon the first assignment, none of them were abandoned, and it will be necessary that we shall examine and pass upon all of them.

The first assignment is as follows: "That the decree of 1854, dismissing the petition, was in substance a nonsuit," and cites *Strauss v. Beardsley,* 79 N. C., 59. This case, in our opinion does not sustain the contention of the petitioners, and is not authority for holding that the "decree" in the Courts of Sampson, in 1854, was "in effect a nonsuit." That case shows that the judgment in that case, which the Court says was "in substance a nonsuit," was a judgment dismissing the action for the reason that the Court had *no jurisdiction* to try the case. And this being so, it shows it was not disposed of upon its merits—could not have been; and this being so, if the Court has proceeded to try the case and enter up a formal judgment, it would have been a nullity, and would have been no estoppel; while it was not disputed, and can not be disputed, that the Court of Pleas and Quarter Sessions of Sampson County had jurisdiction of this proceeding for partition, and the Superior Court upon appeal.

Originally, the Courts of law and equity had concurrent jurisdiction of matters of partition. But in 1787 the Legislature gave jurisdiction in matters of partition "to the Justices of the County Courts of Pleas and Quarter Sessions," as well as to the Superior Courts, and prescribed the mode and manner in which it should be done; that it should be done by filing a petition as was done in this case. Rev. Stat., Vol. I., Chap. 85, sec. 1.

The Legislature did not only give the county Courts jurisdiction in cases of partition, but it prescribed the manner of procedure; which was substantially the equity practice in such cases. There were the best of reasons for prescribing the equity practice, because matters of partition involved equitable jurisdiction. The judgments of the law Courts

were *in solido,* yea, yea, or nay, nay; while the *decrees* in Courts of equity could be shaped and modified to meet the facts and requirements of the case. They could not only grant the order for partition, but direct the assignment in owelty, and require the same to be reported back to the Court, subject to exceptions, to be passed upon by the Court before a final decree was rendered. This is the reason the final order in matters of partition was called the "decree" of the Court. So this case is distinguished from *Strauss v. Beardsley,* in that the county Courts of Sampson had jurisdiction, and the Superior Court had on appeal; while in *Strauss v. Beardsley* it did not. And it is not denied but what Hester Weeks and all her children were parties to the proceeding for partition. It is distingushed from Strauss's case by the fact that judgment of dismissal in that case was for the want of jurisdiction—the merits were not passed upon; while in the case of *Raynor v. Weeks* the merits of the case are discussed and expressly passed upon. And it would seem strange if we should say, forty years afterwards, that the Court did not consider and pass upon the merits of that case, although it expressly said it did, because it was said inadvertently, as we must think, that the "petition be dismissed," instead of saying that the petitioner will take nothing by his petition.

The petitioner also cites *Campbell v. Potts,* 119 N. C., 530. But that case is also put upon the want of jurisdiction, and the further fact that it appeared that it was not made upon a consideration of the merits of the case.

The petitioner also cites the case of *Bond v. McNider,* 25 N. C., 440. But this is also put upon the ground that the Court had no jurisdiction.

The petitioner also cites *Homer v. Brown,* 57 U. S., 354. But the opinion in that case seems to hinge upon the ground that the Court was called to pass upon an agreed state of facts, in which it *was agreed* that, if the opinion of the Court

was adverse to the plaintiff, a judgment of nonsuit should be entered. This, we think, is no more than we see in almost every-day practice, where the Court intimates an opinion adverse to the plaintiff, he takes a nonsuit. There was no such thing as this in the case of *Raynor v. Weeks* in the Courts of Sampson. In *Raynor v. Weeks* it appears that the defendant answered and the case was heard upon the petition and answer, and the decree entered thereon, from which there was no appeal. We can not sustain the petitioner on the first assignment.

The second assignment of error is "that the Court overlooked, or did not give the fact the attention it deserved, the fact that the plaintiff on the trial introduced in evidence the will of Richard Warren, which showed that Hester and her children were tenants in common under said will, and that this set the matter of estoppel at large." We do not think so. The will of Warren is not pleaded by the plaintiff so as to make it a part of the record, and we do not think the plaintiff was estopped by introducing this will in evidence. It seems to us that the will was introduced for the purpose of showing what was before the Court in 1854, when the judgment was rendered, and for the purpose of showing that the same matter was passed upon then that is involved in this action. For that purpose (and that is the only purpose we see that it was offered for) we think it was proper and did not estop the plaintiff.

The third assignment of error is disposed of by what we have said as to the second assignment.

The fourth assignment of error is that the Court overlooked the fact that only one of the children of Hester Weeks was a plaintiff, and that estoppels only operate as between adverse parties. It is seen that a proceeding to partition land is equitable in its nature; and in equity all parties, whether plaintiffs or defendants, are bound—estopped by the judg-

ment or decree. This, it seems to us, is a sufficient answer to the assignment. And while the judgment of 1854 was adverse to the interests of all the children (all defendants except Hester) they had the right to be heard and were heard, and the right to appeal, and as they did not do so, they are bound by the judgment of the Court. We can not hold that defendants in partition proceedings are not bound by the judgment of the Court; to do so would destroy the title to thousands of tracts of land in this State—and to sustain this assignment of the petitioner would be to do so.

The fifth assignment can not be sustained. If we understand it, it has been disposed of by what we have already said.

The sixth assignment is "That the Court overlooked the fact that no estoppel is pleaded," and cites *Wilkins v. Suttle,* 114 N. C., 556, as authority for the assignment. We do not think this case sustains the assignment. It seems to be authority for holding that, in actions of ejectment and for possession of land, it need not be pleaded. Neither do we think *Bogart v. Blades,* 117 N. C., 221, cited by petitioner, sustains his contention. It holds that if a party has had the right to be heard and to assert his rights, he is bound by the judgment. And it appears that all the parties interested in this land under the will of Richard Warren were properly before the Court, had the opportunity to be heard and were heard.

After giving a careful examination of all the errors assigned in the petition, we do not think it should be allowed.

Petition dismissed.

EDWARDS v. ATLANTIC COAST LINE RAILROAD CO.

(Filed October 1, 1901.)

1. EVIDENCE—*Sufficiency—Negligence—Railroad Crossing.*

The testimony of a witness that he did not hear either the whistle or bell at a railroad crossing, he being in hearing distance, is sufficient for the consideration of the jury.

2. INSTRUCTIONS—*Conflicting—New Trial—Trial.*

Where there are conflicting instructions upon a material point, a new trial must be granted.

3. EVIDENCE—*Incompetent—Railroad Crossing—Railroads.*

Evidence that a railroad crossing is more dangerous since the construction of the railroad than prior thereto, is not competent on the question of negligence of railroad for killing a person at the crossing.

4. NEGLIGENCE—*Violation of Ordinances—Speed of Running—Railroads.*

The running of a train at a rate of speed greater than that allowed by law is always evidence of negligence.

5. NEGLIGENCE—*Instructions—Railroads.*

Where a railroad company is guilty of negligence on account of fast running, it is error to allow the question of negligence to depend upon the failure to give signals.

ACTION by J. W. Edwards, administrator of W. B. Edwards, against the Atlantic Coast Line Railroad Company, heard by Judge *A. L. Coble* and a jury, at May Term, 1901, of the Superior Court of WILSON County. From a judgment for the defendant, the plaintiff appealed.

Woodard & Mewborn, for the plaintiff.

H. G. Connor, George B. Elliott, and *F. A. Daniels,* for the defendant.

DOUGLAS, *J.* This is an action brought by the administrator to recover damages for the death of his intestate, alleged to have been caused by the negligence of the defendant.

It is admitted that the intestate was killed by the defendant's engine about 2 o'clock in the day time, at a street-crossing within the corporate limits of the city of Wilson; and that there was an ordinance of said city reading as follows: "That any engineer of a railroad company who shall run any train in the city at a speed exceeding ten miles an hour, or who shall fail to ring the bell while in the city, shall be subject to a fine," etc.

There was conflicting evidence as to the speed at which the train was running, and as to whether the whistle was sounded or the bell rung.

We think that the testimony of a witness that he did not hear either the whistle or the bell, although in a position where he might reasonably have heard either, is sufficient evidence for the consideration of the jury. It *tends* to prove that neither the whistle nor the bell was sounded; but whether it *does* prove it, is for them alone to decide. The plaintiff asked the witness this question: "If the public highway had remained as it was before the construction of the railroad, if a person driving along the highway could not have observed the approach of the train more readily than a person traveling along the same highway since the construction of the crossing made by the defendant railroad?" This question, upon objection, was properly ruled out by the Court. We are not clear what was meant by the question, but in any view of it we fail to see its relevancy. If the plaintiff had wished to show that the crossing was negligently constructed, he had the right to do so. By negligent construction, we mean such an improper construction of the crossing, whether arising from negligence, indifference or motives of economy as *unnecessarily* increases the danger of using the public high-

way. *Raper v. Railroad,* 126 N. C., 563. But the mere fact that a crossing is dangerous does not necessarily impute negligence to the railroad company. All railroad crossings are more or less dangerous, and the mere presence of a railroad near a public highway is necessarily a disturbing element, but the company is not responsible for such inherent danger unless it unnecessarily causes or increases it by some unlawful act, or wilful or negligent omission of duty. It is true that a railroad company might, by a proper construction of its road, render a public highway so dangerous as to demand more than ordinary care in the running of its trains, and it may be that to show this was the plaintiff's object; but even in that view the question was too general.

The plantiff's second exception presents a graver question, and we think must be sustained.

It is well settled that where there are conflicting instructions upon a material point, a new trial must be granted, as "the jury are not supposed to be capable of determining when the Judge states the law correctly and when incorrectly." *Tillett v. Railroad,* 115 N. C., 662; *State v. Fuller,* 114 N. C., 885; *Williams v. Haig,* 118 N. C., 481; *Bragaw v. Supreme Lodge,* 124 N. C., 154. This rule applies where there is actual repugnancy, and where, consequently, one part of the charge is necessarily erroneous, but not to cases where parts of the charge are explained and amplified by other parts thereof, or where an error therein is afterwards corrected in so clear and unmistakable a manner as to leave no possibility of misconstruction by the jury. *Everett v. Spencer,* 122 N. C., 1010.

His Honor charged in part as follows: "If the jury find that the train, at the time it reached the crossing in question, was running at a greater speed than that prescribed by the town ordinance, that the injury would not have occurred, that is, find that but for such rate of speed the injury would

not have happened, then the jury are instructed that this was negligence, and they will answer the first issue 'Yes.' " This charge is correct in so far as it correctly assumes the two requisites for an affirmative finding of the first issue, namely, that the defendant must be guilty of negligence, and that such negligence must have contributed to the injury. In another view it is not correct, because it restricts the consideration of the excessive speed to the actual point of the injury. The negligence consists in running at an unlawful rate of speed within the corporate limits. If a train were running within such limits at an unlawful rate of speed, and in consequence of such excessive speed could not be stopped in time to prevent injury at the crossing after coming within sight thereof, the company could not free itself from liability simply by showing that the train was running less than ten miles an hour when it reached the crossing. The object in limiting the speed where accidents are liable to occur, is to keep the train within the control of the engineer, so as to enable him to stop in time to prevent such accidents after he discovers the danger.

His Honor had previously charged as follows: "If the jury find that the defendant's train approached the crossing in question without sounding the whistle and without ringing the bell, and struck and killed the plaintiff's intestate, then the jury are instructed that the defendant was guilty of negligence, and you will answer the first issue 'Yes.' " This instruction was erroneous because, the killing being admitted, it made the answer to the first issue depend entirely upon the failure to sound the whistle or ring the bell. If the issue had been simply as to the negligence of the defendant, this instruction would have been correct, but such was not the issue. It was as follows: "Was the plaintiff's intestate killed by the negligence of defendant?" This issue involved two

propositions, first, the existence of such negligence; and, secondly, its relation to the injury. The negligence of the defendant, no matter how great, would not of itself have rendered it liable in damages unless it had contributed to the death of the plaintiff's intestate; while, on the other hand, the mere killing would not have been actionable unless caused by some unlawful act, or the negligent or wilful omission of some legal duty on the part of the defendant. This instruction, being favorable to the appellant, is not excepted to; but we deem it proper to discuss it in view of our comments on the general effects of the entire charge.

Again, his Honor charges that "the rate of speed at which the train was running would not be negligence or *evidence of negligence,* unless the jury find that if the train had been running within the limits prescribed by the town ordinance, to-wit, not more than ten miles an hour, the injury would not have occurred." This instruction is in conflict with those quoted above, and is clearly erroneous as well as prejudicial to the plaintiff. If the excessive speed was not even evidence of negligence, it would make no difference if it did cause the death of the intestate. A train may, without negligence, kill a man simply because, owing to its high speed, the engineer was unable to stop in time after discovering the danger; and yet the company would not be liable unless such speed were negligent or unlawful.

A rate of speed greater than that allowed by law is always at least evidence of negligence, and, under certain circumstances may become negligence *per se*. *Norton v. Railroad,* 122 N. C., 910, 927. In *Railway v. Ives,* 144 U. S., the Court says on page 418: "Indeed, it has been held in many cases that the running of railroad trains, within the limits of a city, at a rate of speed greater than is allowed by an ordinance of such city, is negligence *per se* (citing authorities). But perhaps the better and more generally accepted rule is

that such an act on the part of the railroad company is *always* to be considered by the jury as at least a circumstance from which negligence may be inferred, in determining whether the company was or was not guilty of negligence." In the same case the Court says on page 417: "What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence."

The defendant urges in support of this instruction that it was copied from one given by the Court below in *Norton v. Railroad, supra.* This appears to be true, but it does not appear that it was approved by this Court. As it was favorable to the then appellant, it was not under exception, and was therefore not material. In that case this Court says, on page 933: "They (the defendant's prayers) were given to a large extent in the charge, fully as much so as the defendant could rightfully ask. In fact, it is questionable whether some parts that were given could stand the test of exception, but that is not now before us."

The relative rights, duties and responsibilities of a railroad company and a traveller crossing its track on the highway, are fully discussed in *Norton v. Railroad, supra,* and *Continental Improvement Co. v. Stead,* 95 U. S., 161.

There were some other exceptions as to the Court's singling out a certain witness, but it is unnecessary to discuss them, as it may not occur upon a new trial, and is not material now.

For error in the charge, there must be a

New trial.

STRICKLAND v. STRICKLAND.

(Filed October 1, 1901.)

1. PARTIES—*Creditors—Personal Representatives—Executors—Sale of Land to Make Assets.*

Creditors will not be permitted to become parties plaintiff with the personal representative in a proceeding to sell land to make assets

2. JUDGMENT—*Irregular—Parties.*

Proceedings for sale of land to make assets, in which a creditor is erroneously allowed to make himself a party plaintiff, are not validated by the rendition of a consent judgment confirming the sale.

3. JUDGMENTS—*Irregular—Vacating—Motion in the Cause.*

An irregular judgment can be set aside by a motion in the cause if made within a reasonable time.

ACTION by Mary J. Strickland, executrix of Allison Strickland, and N. B. Finch, intervenor, against A. A. Strickland and others, heirs-at-law of Allison Strickland, heard by Judge *A. L. Coble,* on motion, at Henderson, N. C., March 1, 1901. From a judgment as set out in the opinion, all the parties appealed.

T. T. Hicks, and *W. M. Person,* for the petitioners.
Jacob Battle, and *F. S. Spruill,* for the intervenor.

MONTGOMERY, J. On the 29th of August, 1892, the Clerk of the Superior Court of Nash County, in a special proceeding begun by Mary J. Strickland, executrix of Allison Strickland, and also in her own right against the devisees and heirs-at-law of the testator (he dying partially intestate), for the purpose of selling certain real estate of the testator

to make assets for the payment of his debts, made a decree for a sale of a part of the land, to-wit, a tract of 84 acres, the same to be sold by the petitioner, a commissioner appointed by the Court. In February, 1895, an order was made, on the motion of a creditor, N. B. Finch, that the plaintiff and defendants appear before the Court (the Clerk) on the 2d of March following and "show cause why some other commissioner shall not be appointed and ordered to make sale of all the real estate aforesaid for the purpose of paying said indebtedness and costs."

On the last-mentioned day, notice of the order having been served, the Clerk, on motion of N. B. Finch, "relieved the former commissioner, Mary J. Strickland, of the duty heretofore imposed on her as commissioner," and appointed B. H. Sorsby commissioner in her place to sell the land; and Sorsby was ordered to sell not only the 84-acre tract, but to sell the whole of the real estate of the testator, in case the proceeds from the sale of the 84-acre tract should not be sufficient to pay the debts.

On the same day, on motion of N. B. Finch, additional parties (infant children who were interested) were ordered to be made, and Finch was allowed to intervene in the action and required to file a formal petition in the cause, all the parties, infants and adults, plaintiffs and defendants, being allowed until the 4th day of May to file an answer to the petition.

The petition was filed by Finch. In it he alleged the death of the testator, the probate of the will, the former order appointing Mary J. Strickland commissioner to sell the land, and her failure to do so, the debt due to him from the estate, and prayed for an order of sale of all the real estate of the testator "in order that said indebtedness may be paid and the estate closed." The infants, through their *guardian ad litem,* filed an answer, in which it was said that the guar-

dian had "looked into the matters alleged in said petition and could see no defense to the same on behalf of the said wards, and he therefore admits each allegation of said petition, and asked the Court to protect the interest of his said wards." The other parties did not answer. Sorsby was ordered to sell, the sale took place and was confirmed, and Finch became the purchaser of the 84-acre tract at $75, and of the other real estate (352 acres) at $377.64. The decree of confirmation was a consent one, that is, it was signed by all the parties to the proceeding, and was declared to be a final decree. The following is a part of the decree: "It is now, on motion of the petitioner, and with the consent of the other parties interested, ordered, adjudged and decreed that the said widow, Mary J. Strickland, shall hold during her lifetime, in lieu of dower, the Susan A. C. Sutton tract, or Lot No. 5, containing 50 acres, more or less, together with a portion of the 84-acre tract adjacent to Lot No. 5, to be cut off by an east and west line, so as to make an area of 15 acres to be added to the 50-acre lot." The commissioner was ordered to make a fee-simple deed to the purchaser to the lands bought by him other than the 65 acres, and, as to that, he should convey the reversion in fee to the purchaser.

On December 19, 1900, a motion was heard by the Clerk in the said special proceeding to set aside all judgments which had been rendered therein. The motion was at the instance of the parties to the special proceeding, and directed to N. B. Finch—notice of which had been properly served on him. On the 28th of January following, the Clerk found the facts and rendered judgment thereon in law. The parties who made the motion filed numerous exceptions, both to the Clerk's finding of fact and of law, and appealed to the Superior Court in term. Upon the hearing of the matter by his Honor, and judgment being rendered, the plaintiff and

defendants in the special proceeding, and also N. B. Finch, filed exceptions and appealed to this Court.

APPEAL BY MARY J. STRICKLAND AND OTHERS.

From our view of the case, it is necessary to consider only one of the exceptions of the movers. That exception was to the ruling of his Honor that the orders and decrees made in the special proceeding after and including the one allowing N. B. Finch, the creditor, to intervene, were valid and binding on the movers other than Mary J. Strickland. That ruling of his Honor was erroneous, unless the signing of the judgment of confirmation of the sale of date July 22, 1895, made the proceedings and decree legal and proper. In *Dickey v. Dickey,* 118 N. C., 956, the facts were like those in the case before us, except that the decree was not a final one, and the decree was not signed by the parties. In that case the Court said: "These proceedings, from the time of their commencement at the issuing of the notice by Johnson (creditor) before the Clerk to the last order of the Court, can not be sustained. They are altogether irregular. Creditors can not be permitted to become parties plaintiff with the personal representative in proceedings of this kind. (Petitions by personal representatives to make real estate assets.) All sorts of confusion and delay might and would be the result thereof. The representative might be embarrassed in every step he took to close up his administration." That decision we still think a correct declaration of the law. Probably it might need some modification in a case where the purchaser of the land might be a stranger. Does the fact, then, that the judgment was a correct one affect the ruling in *Dickey v. Dickey, supra?* We think it does not. This Court would not and could not affirm a judgment by consent in a case where the Superior Court had no jurisdiction of the sub-

ject-matter in dispute; neither will it do so where, although the Court below might have jurisdiction, the evils that might be reasonably apprehended are patent, and where the proceedings are violative of a sound legal policy and of all rules of practice.

In the case before us, one creditor of a decedent's estate intervenes in a proceeding, such as the law furnishes to the personal representative alone, completely sets aside the personal representative, is the author of every motion, and the beneficiary of every decree made in the cause, and finally concludes the matter by a decree which makes him the owner of more than 400 acres of land for the price of less than $500. It is true that his Honor found as a fact that "from the affidavits before the Court," the land brought a fair price. It is also true that in 1891, 1892, 1893 and in 1894, the land was listed at $4.50 per acre, and at the time of the decree for its sale, at $5.00 per acre. Administration of the estates of decedents must be made through the personal representative. A creditor or creditors can not be allowed to displace the personal representative and take charge of the administration. It is not a question of whether a wrong has been or may be done in a particular case, but it is a question as to whether the personal representative shall administer, or a creditor. It is unnecessary to discuss the ruling of his Honor as to the effect of the decree on Mary J. Strickland, for, from what we have said, the decree as to all will be set aside, and for the reasons given.

We have not failed to notice the other question which was the subject of the appeal on the part of these appellants--the alleged appearance of counsel in the original proceeding—but a consideration of the same is rendered unnecessary by our conclusion on the matter discussed in the appeal.

Error.

APPEAL OF N. B. FINCH.

The counsel for N. B. Finch insisted in his argument here that his Honor should have held that the consent decree of July 22, 1895, could not be set aside as to Mary J. Strickland in the present proceeding—a motion in the original cause—and that her remedy, if any, was by another and an independent action.

We think his Honor was not in error on that point. An irregular judgment can be set aside, within a reasonable time, by a motion in the cause. *Harrison v. Hargrove,* 120 N. C., 96; *Morehead Banking Co. v. Duke,* 121 N. C., 110; *Everett v. Reynolds,* 114 N. C., 366.

It is not necessary to consider the other exception of N. B. Finch, for, in the other appeal, we have said that the decrees in the special proceeding should be set aside as to all the parties, and that decision carries with it the exceptions of Finch, except the one just above discussed, and as to that we have said there is no error.

No Error.

STATE HOSPITAL v. FOUNTAIN.

(Filed October 1, 1901.)

1. HOSPITALS AND ASYLUMS—*Indigent Insane—Compensation—States—Contracts—Officers.*

The superintendent of a State hospital can not bind the State by agreeing not to charge an insane person able to pay expenses.

2. FORMER ADJUDICATION—*Appeal.*

A question decided on a prior appeal is *res judicata* and will not be reviewed on a second appeal.

3. LIMITATIONS OF ACTIONS—*Hospitals and Asylums.*

The superintendent of the State hospital can not recover compensation against guardian of insane person for the maintenance of his ward for more than three years preceding the bringing of the action.

4. LIMITATIONS OF ACTIONS—*Insane Persons—Guardian and Ward—Pleading.*

Where an insane person is a party to an action, such insane person shall be deemed to have pleaded the statute of limitation.

ACTION by 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 the Superior Court of EDGECOMBE County. From a judgment for the plaintiff, the defendant appealed.

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

COOK, J. This action was before us at Spring Term, 1901, as appears in 128 N. C., 23, wherein the Court only

passed upon the question of liability of defendant's ward, as it was agreed that the reasonable expenses of maintaining and treating her were $200 per year—leaving the computation of time for which she was liable to be adjudged by the Court below. And when it was again heard in the Superior Court of Edgecombe County, his Honor, upon motion of plaintiff, rendered judgment against defendant for the sum of $2,191.50, being the full amount claimed against defendant's ward from the time she first became a patient in plaintiff Hospital to the time of the hearing, except two intervals during which she was discharged. To which judgment defendant excepted and appealed.

The case on appeal shows that defendant's ward, Mrs. Nancy L. Hargrove, was an inmate of the Hospital from November 21, 1887, till the institution of this action, and still is (excepting from September 15, 1892, to January 31, 1895, and from February 8 till June 8, 1895); that at the time of her admission she was the wife of Gray L. Hargrove, a citizen worth at least $35,000, who died in 1894; that up to the time of her husband's death, said Nancy had no estate of her own, but from his estate received as distributee $2,255.60 of personalty, and was endowed of 202 acres of land from which she received a rental of 7,200 pounds of lint cotton per annum for five years, and which thereafter did did not amount to more than 5,200 pounds of lint cotton per annum; and that afterwards (November 14, 1899) defendant collected, after long litigation and much expense, for his said ward as one of the heirs of J. J. Drew, deceased in the State of Alabama, the gross sum of $3,240.

Defendant contends, first, that his ward's estate is not liable for any sum whatsoever for the reason that, upon his qualification as guardian, March 29, 1895, he applied to the Superintendent of the plaintiff to know if any charge was made for patients who were able to pay, and was informed

that no charge was made for any person, and thereupon his ward was allowed to remain in the plaintiff institution; second, that if her estate is liable at all, plaintiff can only recover for such liability as accrued within three years prior to the beginning of this action.

The first contention can not be sustained, as it is too well settled that its agents or officers can not bind the State by any contract they may make, when not so authorized to do—especially in violation of the express statute (Code, sec. 2278), which allows the admission into the institution of *others than indigent insane persons upon payment of proper compensation,* and for the further reason that that question was adjudicated in the former decision (128 N. C., 23), and can not now be reviewed in this appeal.

We think the second contention is well founded and must be sustained. In no event could her estate have been liable during the lifetime of her husband, for it appears that he was possessed of sufficient means to provide for himself and family, and no liability could have attached to her estate till after his death. But as he died more than three years prior to the institution of this action, and the Statute of Limitations is interposed by law, that fact is not material in this decision.

It is provided by Acts 1889, Chap. 89, that "On the trial of any action or special proceeding, to which an insane person has been made a party, such insane person shall be deemed to have pleaded specially any defense, and shall have on the trial the benefit of any defense, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of Title Three of The Code of Civil Procedure, section one hundred and thirty-six to section one hundred and seventy-six of The Code of North Carolina, both inclusive." By which statute the plea of the Statute of Limitations is specially interposed and pleaded

in behalf of the defendant, against which the State can not avail itself on account of its sovereignty, since by section 159 of The Code it has prescribed that "the limitations prescribed in this chapter shall apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by and for the benefit of private parties."

His Honor erred in rendering judgment for a sum in excess of the liability incurred within three years next preceding the institution of this action.

As the exact amount for which her estate is liable is not ascertained, this action is remanded to the Superior Court for the same to be inquired into and determined according to the practice of the Court and the due course of law.

There is Error.

MIZELL v. McGOWAN.

(Filed October 1, 1901.)

1. WATERS AND WATERCOURSES—*Diversion—Acceleration—Increase—Damages—Drains.*

   Water can not be diverted from its natural course so as to damage another, but it may be increased and accelerated.

2. WATERS AND WATERCOURSES—*Damming or Draining Lowlands—The Code, Vol. I, Chap. 30.*

   Chapter 30, Vol. I, of The Code, applies only to artificial outlets made over the land of another to reach a natural watercourse.

ACTION by W. G. Mizell against G. A. McGowan and others, heard by Judge *W. A. Hoke* and a jury, at May (Special) Term, 1901, of the Superior Court of PITT

County. From a judgment for the defendants, the plaintiff appealed.

A. M. Moore, for the plaintiff.

Skinner & Whedbee, and *Jarvis & Blow,* for the defendants.

DOUGLAS, J. This is an action for damages to the plaintiff's land from flooding alleged to have been caused by the improper and unlawful construction of ditches by the defendant.

This is the third time that it has been before this Court, being reported in 120 N. C., 134, and 125 N. C., 439.

The following are the issues and answers thereto: "1. Is the plaintiff the owner and in possession of the lands described in the complaint? Ans. 'Yes.' 2. Did Mrs. Laura A. McGowan wrongfuly and unlawfully divert any water from its natural channel and discharge it upon the lands of plaintiff, causing damage to same? Ans. 'No.' 3. What damage, if any, has plaintiff sustained by reason of the wrongful diversion of said water? Ans. 'Nothing.'"

We think these were the proper issues, and covered every contention left open to the plaintiff in view of the opinions already rendered by this Court in this case. We see no reason to depart from the rule we have laid down, and which may now be considered settled, that "neither a corporation nor an individual can divert water from its natural course so as to damage another. *They may increase and accelerate, but not divert." Hocutt v. Railroad,* 124 N. C., 214; *Mizell v. McGowan,* 125 N. C., 439; *Lassiter v. Railroad,* 126 N. C., 509. The question of diversion was all that was left to the plaintiff, and that was submitted to the jury under instructions that appear to us without error.

We are aware that great hardship may sometimes occur

from the unlimited right of increase and acceleration, and that there are some authorities limiting it to the capacity of the natural outlet; but we must adhere to the rule as the result of our deliberate judgment. However short it may fall as a theoretical definition of ideal right, we can frame none better that is capable of practical application.

Its limits are clearly defined by the natural landmark of the water-shed, which, seen of all men, renders it easy of application and capable of definite proof. Any other rule would prevent the drainage of large bodies of swamp lands of great natural fertility and capable of the highest degree of improvement, but now worse than useless. They will eventually be needed to support an ever-increasing population, and to shut them up indefinitely as the mere homes of disease is repugnant to the highest principles of public policy and of private right. Suppose the natural capacity of the water-course was made the test of the rule, it would be so extremely difficult of application as practically to destroy its value. What is the natural capacity of a stream? Is it measured at low water or at high water Almost any stream can carry off whatever water may be made to flow into it in dry weather, or perhaps even in ordinary times. On the contrary, the clearing up of our lands is having the double effect of greatly accelerating the flow of water and at the same filling up our streams with sand, so that very few of them can now carry the water naturally flowing into them after heavy rains.

Again, suppose the upper tenant were compelled to regard the natural capacity of the stream, how far down would this limitation extend? Naturally, many others would drain into the same stream, so that the landowner near its mouth would get the accumulated waters of all those above him. In case of injury, how would he apportion his damages, and where would the liability of each *tort-feasor* begin and end? These

questions, it seems to us, would severely tax the utmost ingenuity of the Courts, and leave the jury in such a state of perplexity as to seriously endanger their intelligent determination of the issues.

It is contended by the defendant that Chapter 30 of The Code should be taken as determining this case. We do not think so. Those sections by their very terms apply to artificial outlets, such as ditches and canals, and not to natural watercourses. A man can dig ditches wherever he pleases upon his own land, provided he runs them into a natural watercourse before leaving his own land, subject only to the limitation against diversion. But if he can not reach a natural watercourse without going into the lands of another, he must proceed under Chapter 30 of The Code. The scope of this chapter is indicated in section 1297, which is in part as follows: "Any person owning pocosin, swamp or flat lands, or owning low lands subject to inundation, which can not be conveniently drained or embanked so as to drain off or dam out the water from such lands, except by cutting a canal or ditch, or erecting a dam *through or upon the lands of other persons,* may, by petition, apply to the Superior Court of the county," etc.

In the case at bar the defendant has not cut any ditch upon the lands of the plaintiff, nor does she wish to do so. She has simply, by means of her own ditches, turned into a natural watercourse upon her own land increased and accelerated but undiverted waters. The rules governing natural and artificial watercourses as outlets through the lands of another, are essentially different—this opinion dealing exclusively with the former.

The judgment is

Affirmed.

ROWE v. CAPE FEAR LUMBER CO.

(Filed October 15, 1901.)

TRESPASS—*Grant.*

Where a deed takes title to land out of the State, the plaintiff can not recover against defendant under a subsequent grant from the State.

PETITION to rehear. Modified. For former opinion see 128 N. C., 301.

Rountree & Carr, for the petitioner.
Stevens, Beasley & Weeks, in opposition.

FURCHES, C. J. This case was before us at the last term of the Court (reported in 128 N. C., 301), and is here again on a petition to rehear.

Upon the argument, the defendant abandoned its claims to a rehearing as to the two tracts on the southeast side of Catskin Swamp, and the only question now before us is as to whether the defendant is entitled to a rehearing as to the tract lying on the north side of Catskin, and we think it is.

It was not contended in the petition, nor in the argument, that there were errors in the principles or statements of law contained in the former opinion. But it was contended that a deed from Alexander Casteen to Ezekiel Chadwick, dated December 1, 1859, had been overlooked, which would have changed the judgment of the Court as to the tract on the north side of the swamp; and this is so.

This deed calls for the *run* of the swamp, while the deed from Chadwick to the defendant does not. These deeds are not set out in full in the record, but simply by dates and boundaries, preceded and followed by much oral evidence—

the deed to the plaintiff being on the eighteenth page, and the deed from Casteen to Chadwick being on the twenty-fourth page of the record. In this way the last-mentioned deed was overlooked by the Court. This deed does not put the title to the land in the defendant, but it takes the title out of the State. And the State having no title to this land in 1893, at the date of plaintiff's grant, he got no title; and as the plaintiff had to recover upon the strength of his own title and not on the weakness of the defendant's title, he must fail as to the tract north of the *run*.

Therefore, without changing or modifying any principle of law enunciated in our opinion at the last term of Court, the judgment then rendered is modified, on account of the oversight of the deed from Casteen to Chadwick, to the extent of declaring error as to that part of the land sued for on the north side of the swamp. And the petition to rehear is allowed as to the tract on the north side of the swamp, but not as to the other tracts. Costs of rehearing to be divided equally between plaintiff and defendant.

STRAUSS v. CITY OF WILMINGTON.

(Filed October 15, 1901.)

1. JUDGMENT—*Verdict—Negligence.*

A finding that intestate of plaintiff was injured by negligence of defendant will not sustain a judgment for damages for killing decedent.

2. ISSUES—*Trial Judge—Pleadings.*

It is the duty of the trial judge to submit such issues as are necessary to settle the material controversies arising on the pleadings.

3. APPEAL—*Exceptions and Objections—Judgment—Verdict—Record.*

The insufficiency of the verdict to support the judgment is a defect on the face of the record proper and is reviewable, the appeal being of itself an exception to the judgment.

ACTION by Jessie R. Strauss, executrix of W. H. Strauss, against the city of Wilmington, heard by Judge *W. A. Hoke* and a jury, at January Term, 1901, of the Superior Court of NEW HANOVER County. From a judgment for the plaintiff, the defendant appealed.

Bellamy & Bellamy, and *A. J. Marshall,* for the plaintiff.
E. K. Bryan, and *Rountree & Carr,* for the defendant.

CLARK, J. This is an action for damages for injuries sustained by plaintiff's testator, which, it is alleged, resulted some months later in his death. The answer denies that the injury was caused by the negligence of the defendant, and also that it caused his death. The issue thus raised has not been passed upon by the jury. The issue submitted and found affirmatively—"Was the plaintiff's testator *injured* by the negligence of the defendant?"—does not find that

such injury caused the death, but by implication at least finds that it did not. If the injury caused the death, this action is maintainable by virtue of The Code, sec. 1498, which changed the common law in such cases, *Killian v. Railroad,* 128 N. C., 261. If, however, nothing more appears than that the testator was injured by defendant (as found by the jury), and has since died (as appears by admission of administration), the action is not maintainable. The Code, sec. 1491 (2); *Harper v. Commissioners,* 123 N. C., 118.

With that material allegation denied by the answer and not passed upon by the jury, no judgment can be entered. It is true, that if all the points raised can be presented to the jury upon the issues submitted, they will be deemed sufficient, but such is not the case when, as here, the verdict is not a sufficient basis for a judgment. *Redmond v. Chandley,* 119 N. C., 575; *Tucker v. Satterthwaite,* 120 N. C., 118. and cases cited. By the addition made to the case on appeal by the Judge it appears that the issues were not seen by him, having been agreed upon by counsel at a previous term. This shows that there was mere inadvertence by his Honor, who did not himself frame the issues, but this does not cure the defect. Usually it is not appealable error when additional or proper issues are not asked. That is true as to errors on the trial, which can not be considered unless set out in the case on appeal and duly excepted to. But the insufficiency of the verdict, "the facts found," to support the judgment is a defect upon the face of the record proper, which is presented for review, since the appeal is of itself an exception to the judgment. The omission of a vital issue is not cured by the charge of the Court, for there is no finding by the jury. This renders it unnecessary to consider the other exceptions, since they may not arise on another trial.

New trial.

PORTER v. ARMSTRONG.

(Filed October 15, 1901.)

1. WATERS AND WATERCOURSES—*Draining Lowlands—Acts 1899, Ch. 255—Canal—Ditches.*

Where a person enlarges a canal on the lands of another, under a void proceeding, he is a trespasser, and can not claim credit for money spent thereon.

2. WATERS AND WATERCOURSES — *Draining Lowlands — Acts 1899, Ch. 255—Canals—Ditches—Swamps.*

Acts 1899, ch. 255, for reclaiming swamp or low lands, applies only where all the parties contribute *under a valid agreement* to the lawful digging of a ditch or canal.

3. PARTIES—*Waters and Watercourses—Drains.*

That a servant owner witnesses the enlarging of a drainage ditch by the dominant owner under a statutory proceeding does not make the former a party to such proceeding.

ACTION by Elisha Porter against T. J. Armstrong, Sarah E. Durham and W. W. Miller, heard by Judge *W. A. Hoke,* at March Term, 1901, of the Superior Court of PENDER County. From a judgment of nonsuit, the plaintiff appealed.

Stevens, Beasley & Weeks, for the plaintiff.
J. T. Bland, and *Frank McNeill,* for the defendants.

DOUGLAS, J. This is a proceeding begun by the plaintiff under Chapter 255 of the Public Laws of 1899. It appears that the plaintiff owns 200 acres of land known as the Pigford farm, while the defendants own about 450 acres of land known as the Durham or Stanley lands, and lying between

the plaintiff and Mill Creek. From time immemorial the owner of the Durham lands has maintained through said lands a ditch, called Strawberry Canal, draining them into Mill Creek. About the year 1859 or 1860, Lane, the then owner of the Durham lands, gave permission to Berry, then owner of the Pigford farm, to connect with Strawberry Canal so as to drain a *part* of the Pigford farm into said canal. The remainder of said farm seems then to have been drained, if drained at all, in some other direction, but whether into Clayton Creek or through some other channel into Mill Creek, does not clearly appear.

The petitioner does not appear to rely upon this permission, which seems to have been a mere license. Even if it amounted to an easement, it would extend only to the drainage of the "five or six acres of land on the south side of the Pigford farm next to the Durham land," for which it was originally granted, if granted at all. It can not be extended by implication to the entire farm, and certainly not to the waters of Jones' Swamp.

Moreover, the said permission was for only a "four-feet ditch." In *Porter v. Durham*, 74 N. C., 767, this Court says on page 779: "The defendants alleged that there is an ancient ditch running from Branch No. 1 nearly in the direction of the one recently cut by them, and hence claim, as we suppose, a prescriptive right to their ditch. But when the right to an easement is claimed by long enjoyment from which a grant is presumed, the grant presumed is for the precise right which has been enjoyed, and long enjoyment of one ditch can raise no presumption of a grant of a right to a ditch differing in any appreciable degree from that enjoyed, in locality or dimensions." The petitioner, who, in the meantime, purchased the Pigford farm, testifies that in the year 1874 he filed a petition before the Commissioners to open and enlarge Strawberry Canal, as "Durham, the an-

cestor of the defendants, had filled in his Strawberry Canal with logs so as to dam the water back on the plaintiff's land and keep his own ditch open below." What became of said petition we do not know, unless it is one of the petitions referred to in *Porter v. Durham,* 98 N. C., 320, 321. Again, the plaintiff testified as follows: "The defendant Armstrong also filled this ditch in with logs in June, 1896, and backed the water up on witness's farm. Under the advice of counsel, witness removed the logs and wrote the defendant a letter about it. About this time the witness applied to the Board of Commissioners for the privilege of enlarging said canal, and under an order from the Board, witness did enlarge the canal on the defendant's land to a depth and width of nine feet; the ditch was originally four feet before witness thus contributed to its enlargement. The said improvement cost this plaintiff $225.00; that Durham was there when plaintiff cut and widened this canal, and did not object to it. This proceeding under which plaintiff enlarged the canal was dismissed as being irregular and contrary to law." We presume that the date "1896" in the above quotation should be "1886," as the case appears to have been determined in this Court at its September Term, 1887.

The drainage of these lands has been a fruitful source of litigation, as this is the fourth time it has been before this Court in one form or another—*Porter v. Durham,* 74 N. C., 767; same parties, 79 N. C., 596; same parties, 98 N. C., 320.

The last-named case seems to settle the one at bar, inasmuch as it decided that the defendant Durham was not a party to the proceeding of 1874, which was therefore void as to him even when collaterally attacked. The Court well says that in a summary and special proceeding which results in appropriating one man's property to the use of another without the assent of the former, the provisions of the statute

must be strictly followed even in its minute and particular directions, and that the presence of the owner does not make him a party or affect the result. This Court says further, on page 232, 98 N. C.; "We do not think all these safeguards thus thrown around the exercise of this special power can be thus disregarded and a legal result reached in so doing."

It seems to us to follow conclusively that when the plaintiff enlarged Strawberry Canal under a proceeding that was absolutely void, he was a mere trespasser, and can not now claim credit directly or indirectly for money spent in the commission of an unlawful act. And yet this would be the result if his petition were sustained.

The act of 1899 clearly applies solely to those canals or ditches in which the petitioner has acquired an interest either by agreement with the owner or by due process of law. It could have no other constitutional application, as it is well settled that private property can not be taken for public use without just compensation, and never for purposes which are purely private. At one time the constitutionality of our drainage laws was seriously questioned, but was finally settled in the case of *Norfleet v. Cromwell*, 70 N. C., 634; 16 Am. Rep., 787. The Court there says, on page 638, 16 Am. Rep., 787: "The defendant takes higher ground, and contends that the act of 1795 was unconstitutional, because it took his property *for a mere private purpose*. It is admitted that that can not be lawfully done, and the only question on this point is as to the character of the purpose—whether it was to the benefit of one or of a limited number of individuals only, or of such general and public utility as justifies a State in the exercise of its power of eminent domain. It is well known that in the Atlantic section of this State there are hundreds of thousands of acres of what are called swamp lands, which, from the flatness of their surface and the filling up of the natural courses of

drainage, if any ever existed, can not be relieved of the water which ordinarily covers them, and made fit for human habitation and cultivation, except by cutting artificial canals from them into some convenient creek or river, which must necessarily pass through the intervening lands of the riparian proprietors. If these canals can be cut only by permission of the owners of the banks of the necessary outlets, this vast area of fertile land must remain for ages an uncultivated and unpopulated wilderness, and it will be entirely valueless to those who bought it from the State on the faith of its laws. An act which aims to remedy so great an evil, affecting so many persons now living and so many more in the future, must be deemed one of general and public utility." The Court again says, on page 640: "The canal is the private property of the petitioners, but all may acquire a right to drain into it on just terms, and their reciprocal duties may be regulated from time to time by the Courts."

By saying that "the canal is the *private property* of the petitioners," we understand the Court to mean that, as in that case, the petitioners had acquired the easement and constructed the canal entirely at their own expense, they were entitled to its exclusive use as against those who contributed nothing thereto. A stranger could acquire the right to drain into the canal without the consent of its owners, even as they themselves had acquired the easement, but only upon payment of his just proportion of its entire cost, including the easement, together with its construction and future maintenance, and such enlargement as might be rendered necessary by the increased volume of water thus turned into it. Of course, as all such easements arise *ex necessitate*, such right can be acquired only in favor of those lands which can not be conveniently drained in any other way.

We think these principles are clearly recognized both in The Code and in the Act of 1899. In our opinion, the in-

tire scope of the latter act is embodied in its first section, and that it applies only where all the parties have contributed *under a valid agreement* to the lawful digging of a ditch or canal. Such agreement need not be in writing, but it must have existed, and is an essential condition to the contribution contemplated by the Act.

The petitioner at bar has contributed to the cutting of Strawberry Canal only in the performance of an unlawful act, which in contemplation of law is no contribution at all. He does not claim to have contributed in any other manner, and there is no evidence, not even a scintilla, tending to prove that he did so.

Hence, there was no error in the direction of a nonsuit, as the burden rested upon the petitioner of proving every material fact necessary to the granting of this petition.

This brings the case clearly within the rule laid down in *Spruill v. Insurance Company*, 120 N. C., 141, which is relied on by the petitioner.

Much stress seems to be laid upon the fact that the natural drainway of the Pigford farm was through Strawberry Canal. This may be so in the sense that it is the most convenient way to drain the said farm, but that fact does not make the canal a *natural* watercourse. A watercourse consists of bed, banks and water. Angell on Watercourses, sec. 4; Gould on Waters, sec. 41. A *natural* watercourse has such characteristics while in a state of nature and without artificial construction. Natural watercourses are such as rivers, creeks and branches. A canal can never come under such a designation, unless it is a mere enlargement of a natural watercourse. It does not appear that the water from Pigford farm, at least in its concentrated form, ever got into the Strawberry Canal until it was carried there by a ditch, which is itself fed by "lateral ditches running in both directions."

Hence, this case does not come within the principle affirmed in *Mizell v. McGowan,* at this term, and the cases therein cited. In that case the defendant's ditches emptied into a *natural* watercourse before it left the defendant's land. Here, the petitioner is seeking to open a ditch on another man's land.

While the question is not now before us, we see no reason, as at present advised, why the petitioner can not proceed under Chapter 30 of The Code. In that event it would seem that he would be compelled to pay, not only his just proportion of the cost of construction, maintenance and repair of the canal, but also the value of the easement.

All that we now decide is that the petitioner, having in contemplation of law contributed nothing to the digging of Strawberry Canal, can not proceed under Chapter 255 of the Laws of 1899, which, in our opinion, applies only where the petitioner has a vested interest.

No Error.

HERRING v. SUTTON.

(Filed October 15, 1901.)

INSURANCE—*Life Insurance—Vested Rights—Guardian and Ward—Trusts—Beneficiary—Policy.*

Where a father who is the guardian of his children insures his life for their benefit, and his sureties are influenced to sign his guardian bond by the promise that the policy was for the protection of his wards and sureties, the policy vests in the wards and a trust is not raised for the benefit of the sureties.

COOK, J., dissenting.

ACTION by Edward Herring, as guardian of John H. and

Annie L. Sutton, against Mary F. Sutton, executrix of B. F. Sutton, Jr., and others, heard by Judge *O. H. Allen,* at December (Special) Term, 1900, of the Superior Court of LENOIR County. From a judgment for the plaintiff, the defendants appealed.

N. J. Rouse, for the plaintiff.
Shepherd & Shepherd, for the defendants.

FURCHES, C. J. This is an action on a guardian bond given by B. F. Sutton, Jr., in the sum of $2,600 as guardian of his two minor children, J. H. Sutton and Annie L. Sutton, with Junius E. Sutton, Thomas Sutton and Flavius Allen as his sureties. The guardian is dead, and Mary F. Sutton is his executrix.

The case was referred to Mr. Ormond to find the facts, declare the law and report the same to the Court, which he did. Besides finding the amount due on said guardianship, he further found as follows: "That B. F. Sutton, deceased, had no insurance for any of his other children or widow, and at the time of taking out said insurance policy, in the name of his said wards, John Hardy Sutton and Annie Laura Sutton, it was his purpose, and he so declared it to be, to protect said wards and his bondsmen against any loss which might occur to the estate of said wards."

He also found: "That when the defendant Junius E. Sutton signed the guardian bond of said B. F. Sutton, Jr., he was influenced to do so by the promise of said B. F. Sutton to have his life insured for the protection of his wards and sureties."

The referee then declares as a matter of law that these facts did not constitute the said John H. and Annie L. Sutton trustees of the insurance policy, or the money collected thereon. The defendants excepted to the facts and the law

as found and declared by the referee. But upon the hearing of the report before the Judge, the same in all things was confirmed, and judgment given for the plaintiff, from which defendants appealed.

Upon B. F. Sutton's taking out this policy of insurance, naming his two children, J. H. and Annie L. Sutton, the beneficiaries therein, it became theirs. They had a vested right of property therein, of which they could not be divested without their consent. *Burton v. Farinholt,* 86 N. C., 260; *Bank of Washington v. Hume,* 128 U. S., 195. This is so, unless they took and held it in trust as contended by defendants. And this contention seems to be settled against them by the case of *Wood v. Cherry,* 73 N. C., 110. We quote with approval the introduction of Chief Justice PEARSON's opinion in that case as especially applicable to this case: "According to *justice,* using the word in its broadest sense, as distinguished from law or equity, the defendant ought not to be disturbed in her occupation of the premises during her lifetime or widowhood, and we have considered the case in every point of view to see if we could sustain the decision of his Honor in her favor. But we can find no ground on which to do so."

The Court then says: "The *promise* of Wood can not be enforced on the ground of its creating a trust, for the trust can only be created in one of four ways:

"1. By *transmission of the legal estate,* when a simple declaration will raise the use or trust.

"2. A contract, based upon *valuable consideration* to stand seized to the use or in trust for another.

"3. A covenant to stand seized to the use or in trust for another upon *good consideration.*

"4. When the Court, by its decree, *converts a party into a trustee* on the ground of fraud."

The allegation of the defendants in this case is that John

H. Sutton and Annie L. Sutton are trustees of the $2,000 collected upon this policy of insurance out of the insurance company, for the benefit of the defendants. And if they are, it is because they fall within one of the four reasons stated above.

It can not be that they are trustees under the first ground, as there is no *transmission* of a legal estate. The policy of insurance is only a chose—a promise to pay the defendants $2,000 upon certain conditions and contingencies, which might be defeated by B. F. Sutton's not paying the premiums, and by the company's cancelling the policy.

It can not be under the second ground, as there is no contract on the part of John and Laura to stand seized to the use of the defendants.

It can not be under the third ground, as there is no *covenant* on the part of John and Annie to stand seized to the use of, or in trust for, the defendants.

It can not be under the fourth ground, as it is not alleged that there is any fraud in the transaction on the part of B. F. Sutton, John H. Sutton, or Annie L. Sutton.

It therefore seems plain to us that neither John H. nor Annie L. Sutton, nor their guardian, are trustees for the benefit of the defendant of the money collected from the insurance company, and the judgment below must be affirmed.

Affirmed.

COOK, J., dissenting: I do not concur with the Court in its opinion in this case. The report of the referee shows a clear and distinct agreement between the obligor of the bond, B. F. Sutton, Jr., and Junius E. Sutton, one of his sureties on behalf of himself and co-sureties. He signed the same and assumed the liability upon the inducement and promise that he, the guardian, would insure his life for the protection of his wards and bondsmen. In compliance with this agree-

ment, he did take out a life-policy for the sum of $2,000 with the declared purpose of protecting said wards and bondsmen against any loss which might occur to the estate of said wards. The indemnity was required because the guardian was not a man of means. The policy was issued in the names of John and Laura. The guardian died after having squandered the wards' funds, and the present plaintiffs qualified as their guardians, collected the amount of the insurance policy, and now sue upon breach of the bond for the penalty, to be discharged upon payment of about $1,500, the amount of default.

Defendants contend that John and Laura became trustees of the insurance policy for the benefit primarily of defendants, and that the fund when collected should be applied first to discharge the liabilities of the sureties upon the guardian bond. This contention seems to me to be sound in law and equity. In giving effect to it, the guardian fund is protected and made whole, and a great wrong and hardship to the sureties averted.

There was a contract entered into between the guardian and sureties based upon a valuable consideration, viz, the assumption of an obligation to pay money for him, which became executed when the policy was taken out. The legal title to the policy was placed in John and Laura, but the record shows that it was done with the expressed intention and purpose of the assured to create a fund in compliance with his agreement with Junius E. Sutton, to secure the money due said wards and protect his said sureties. The language and acts of the parties were unequivocal, and there can be no doubt about the intention of the parties that the policy should be held in trust, which they had a right to create by parol. Adams Eq., 28; Beach on Mod. Eq. Jur., sec. 161. And there can be no question as to the right of an obligor to in-

sure his life for the protection of a surety upon an official bond. *Scott v. Dickson*, 108 Pa. St., 6, 56 Am. Rep., 192.

In creating this trust by parol, it was not material whether the trustees accepted or declined—in fact, they were infants and incapable of accepting, declining or acting—for a court of equity will not allow a trust to fail for want of a trustee, nor be vitiated by reason of the incapacity of the trustee named, on account of infancy, lunacy or otherwise; any defect of this character would be supplied by the Court.

The plaintiff further contends that the funds arising from the policy belong to his wards, John and Laura, because they were the children of the assured, and that the father is entitled by law (Constitution, Art. X, sec. 7) to insure his life for the benefit of his (wife and) children, and the amount thus insured shall be paid over "free from all claims of his representatives or any of his creditors." This contention would be sound if the insurance had been effected *solely* for their benefit. But the record shows that it was not so effected. The assured had four children besides John and Laura, two of whom were still younger—and for neither of these was any benefit provided by the policy. John and Laura were his creditors, and the insurance was obtained for them as his wards, who, as such wards and creditors, had an insurable interest in his life, independent of the relationship, which clearly appears to have been the sole motive prompting the parties in taking out this insurance.

The Constitution (Art. X, sec. 7) does not impose any obligation upon the father to insure his life for the sole use of his children (and wife), but simply *licenses* him to do so. "The husband may insure his own life for the sole use and benefit of his wife and children, and in case of the death of the husband the amount thus insured shall be paid over to the wife and children, or to the guardian, if under age, for her or their own use, free from all the claims of the repre-

sentatives of her husband, or any of his creditors." He *may* so insure his life, or otherwise, as he may deem fit. He *may* insure it for the benefit of creditors, or in part for creditors and in part for wife and children. *Am., etc., Insurance Co. v. Robertshaw*, 26 Pa. St., 189. In effecting the insurance, he has the right to do so for the benefit of *any* one who may have an insurable interest in his life. The only guarantee given him by our Constitution is that, having insured for the benefit of his wife and children, the amount thus insured shall be their property and no part of his estate; or he may insure it for his own benefit so as to make it assets in the hands of his personal representative.

It is true a presumption of law arises when a father takes title to property in the name of a child, that he intended to make a provision for the child and not to create a trust, which presumption becomes still stronger when the child is an infant and legally incapable of acting as a trustee for the father. But in this case it was not the intention or purpose that the beneficiaries named should have an absolute estate and interest in the policy, which is clearly shown by the facts found and rebuts the presumption of law raised in their favor. The fact that it was placed in the names of John and Laura gives them no greater right or interest than was intended by the party creating the trust. They paid nothing for the policy, and obtained only such title as was intended by the creator of the trust—being infants, they did not and could not consent or act. It became their property charged with such incumbrance as their father had seen fit to place upon it; and, in this instance, it was a proper and honest charge, and the contention of the plaintiff ought not to prevail. All that the plaintiff could in good conscience expect and require from the sureties on the bond of his wards' father, was the full amount of their money which they had obligated to secure

and make good to them, and this they have received, for it was at the instance of Junius E. Sutton that the policy was taken out, and the condition upon which he signed the bond and became liable, and it has enured to the full benefit of his wards, for which they should be content.

After receiving every dollar of their money from the source provided for that purpose by Junius on behalf of himself and co-sureties, it would be unconscionable as well as gross injustice for the plaintiff to recover the amount again out of the property of the sureties. I therefore think that the proceeds of the policy ought to be applied, first, to the discharge of the liability of the sureties upon the bond.

BURNETT v. SLEDGE.

(Filed October 15, 1901.)

1. EVIDENCE—*Sufficiency—Principal and Surety—Payments.*
   The evidence in this case justifies the finding of the referee that certain notes represent money paid by the holder as surety.

2. PAYMENTS—*Application of payments—Principal and Surety.*
   Payments to a creditor having several debts against a debtor may be applied by the creditor as he chooses, unless otherwise instructed by the debtor before the credits are entered.

3. PRINCIPAL AND SURETY—*Indemnity Contracts—Mortgages—Negotiable Instruments—Assignment.*
   A surety on notes—being indemnified by a mortgage—who pays the notes, need not have the notes assigned to a trustee to preserve his security.

ACTION by Wesley Burnett and wife against J. H. and J.

W. Sledge, executors of Sherrod Sledge, heard by Judge *A. L. Coble,* at January Term, 1901, of FRANKLIN County Superior Court. From a judgment for the defendants, the plaintiffs appealed.

F. S. Spruill, and *W. H. Ruffin,* for the plaintiffs.

T. W. Bickett, and *W. H. Yarborough, Jr.,* for the defendants.

COOK, J. The questions involved in this appeal arise upon exceptions taken by plaintiff to the rulings of his Honor in confirming the report of the referee, to whom the cause was referred to state an account of the sum remaining due to defendants by plaintiff upon the mortgage debt, and also the sum which may be due on an unsecured indebtedness, and to take the testimony and report the same with his findings of fact and law. The exceptions raise three issues:

1. Whether there was any evidence to sustain the referee in finding that the $615 note and the $300 note represented (or were in evidence of) moneys paid by defendants' testator as surety for plaintiff.

2. Whether there was any evidence to sustain his findings as to the application of certain payments made by plaintiffs to the defendants; and,

3. Whether the payment and cancellation by the testator of the notes, to which he was surety, operated as a release of the security and indemnity which had been conveyed to him under mortgage "B," set out in the record.

It appears from the facts stated that the plaintiff was indebted to Ford & Egerton in about the sum of $700, to Green & Yarborough in about the sum of $300, and to Pretzfelder, Kline & Co. in the sum of $357.50, which were evidenced by his notes with Sherrod Sledge as surety; and also to Sherrod Sledge in about the sum of $440. And to secure the said

debt due to Sherwood Sledge, and to hold him harmless, and to indemnify him against loss on account of his suretyship, plaintiff, on the 16th day of December, 1889, executed to him a mortgage upon real and personal property, with power of sale in case of default. Said Sledge died about the year 1896, and his executors undertook to sell the securities contained in the mortgage to satisfy the amount due to their testator on account of the individual indebtedness, and also the amount which they claimed that he had been compelled to pay in satisfaction of those notes upon which he was surety. Plaintiff claimed that he had paid a part of said secured indebtedness himself,and had also made payments to the testator to such amount that there was little, if anything, due, and that the testator did not cause to be assigned to a trustee for his benefit such note or notes as he may have paid off for plaintiff, whereby, upon payment, the same were cancelled, and thus became a simple liability upon assumpsit, and exempt from the operation of the mortgage; and applied for and obtained an order of Court restraining defendants from making sale of the property, and asking that an account be taken to ascertain his true and legal indebtedness, if any.

The matters in dispute were referred to a referee, who reported his findings of fact and conclusions of law, accompanied by the evidence, to the Court, upon the hearing of which his Honor overruled exceptions taken by plaintiff and rendered judgment in favor of defendants, to which plaintiff excepted and appealed.

The evidence shows that among the papers of the testator the executors found the following, concerning the dealings between the plaintiff and the testator:

(1) Note of $286.26, dated December 10, 1889, executed to Green & Yarborough, due December 10, 1890, with interest at 8 per cent, signed by Wesley Burnett and Sherrod Sledge, with divers credits of interest endorsed.

(2) Note for $443, dated February 14, 1889, due on December 31, after date, payable to order of Sherrod Sledge, bearing 8 per cent interest (with credits of interest endorsed), signed by Wesley Burnett.

(3) Note dated January 17, 1894, due at one year, for $615, with interest at 8 per cent, payable to the order of Sherrod Sledge, signed by Wesley Burnett, with credits of interest endorsed.

(4) Note dated December 6, 1890, due one day after date, for $300, with interest at 8 per cent, payable to the order of Sherrod Sledge, signed by Wesley Burnett, with divers credits of interest endorsed.

(5) Note dated December 10, 1889, for $107, payable December 10, 1890, to order of F. N. Egerton, with interest at 8 per cent, signed by Wesley Burnett and Sherrod Sledge, with divers credits of interest endorsed.

The referee found as facts, and so stated in his report, that the $615 note represented a part of the indebtedness due Ford & Egerton which was paid off by Sherrod Sledge, who accepted it in evidence thereof; and that the $300 note represents the money furnished by Sledge to Burnett to pay off the Pretzfelder, Kline & Co. note, and was given in evidence of the same. His Honor sustained said findings, to which plaintiff excepted upon the ground that there was no evidence to support the findings—being exceptions Nos. 1, 2, 3 and 4. In considering these exceptions, a careful search of the record fails to discover any error in the rulings of his Honor in sustaining the findings of the referee. From the evidence of F. N. Egerton, it appears, without contradiction, that Sherrod Sledge paid the debt due Ford & Egerton, which was secured in the mortgage, Exhibit "B." And from the evidence of T. W. Bickett, it appears that he had in his hands for collection, as attorney of the executors, all of the evidences of indebtedness against the plaintiff, of which he

notified Burnett; that Burnett came to see him, and he went over all the papers with Burnett, and insisted that the property conveyed in the mortgages was inadequate security for the debts, and that he would have to reduce the amount. He went over the property in mortgage "B" with him, and at no time did Burnett suggest that any of the notes were unsecured, but contended that upon a fair sale the security was sufficient to pay all the notes. He afterwards made a proposition to Burnett that if he would make a new paper covering all the notes, and would convey the 63- and 35-acre tracts, which were mentioned in mortgage "A," together with all the property in mortgage "B," the executors would agree to accept 6 per cent interest from the time the 6-per-cent interest law went into effect. Burnett accepted the proposition, and in pursuance thereof he drew the paper marked Exhibit "D," dated January 17, 1896, and read it over to Burnett, and he agreed to what was in it, and agreed to execute it, and carried it home for the purpose of having his wife execute it. In Exhibit "D" (which was a mortgage drawn for Burnett and his wife to execute to complete the proposition made and accepted, conveying as security the lands proposed), there is recited the indebtedness of Burnett to Sherrod Sledge which was intended to be secured, viz: "Note of December 10, 1889, executed to F. N. Egerton and transferred to said Sledge for $107; note of December 10, 1889, executed to Green & Yarborough, and duly transferred to said Sledge, for $286.26; note of February 14, 1889, for $443; note of January 31, 1888, for $600; note of December 6, 1890, for $300; note of January 17, 1894, for $615—*all* of which notes are past due and bear interest at 8 per cent per annum, and are *secured* by two several mortgages recorded (being mortgages 'A' and 'B') ....."; and it further states that "the said Wesley Burnett desires, without in any way destroying, altering or abridging the *existing se-*

curities to said debt, it being expressly understood that the same shall stand, to give to the said Sherrod Sledge *still other and further security to save him harmless* from all loss, and to that end," etc. (The italics being ours.) To all of which Burnett then assented, but afterwards refused to execute the paper. But at no time did he ever suggest, during their negotiations, that any of those notes were unsecured. This, we think, was clearly some evidence to establish the facts, as found by the referee, that the $615 note and the $300 note represented money paid by Sledge for Burnett on account of his suretyship, specified and secured in Exhibit "B," and was properly considered by him. The $300 note was executed by Burnett about one year after the execution of mortgage "B" (and just about the time of the maturity of the Pretzfelder, Kline & Co. note); the $615 note was executed by Burnett to Sledge a little over four years thereafter, upon each of which Burnett annually paid the interest, and admitted to the witness Bickett that they were secured in mortgage "B," by acknowledging that the debts and recitals therein were correct; which is further supported by the evidence of F. N. Egerton, who said that the debt due to Ford & Egerton was paid by Sledge. It is true, as counsel insist, that Burnett testified positively that he paid the Pretzfelder, Kline & Co. note himself, and did not get the money from Sledge. But there being evidence to the contrary, and the referee being the trier of the facts, personally observing the manner, conduct and bearing of the witnesses, and the proper judge of the weight to which the evidence was entitled, we think his Honor properly sustained his findings as to them.

Nor do we find any error in his sustaining the report and findings as to the application of the payments (being exceptions 5 and 7) made under the arrangement between them, whereby, upon payment of a certain part of the indebtedness within a given time, the residue would be indulged. Plain-

tiff failed to pay the amount agreed upon, and gave no instructions as to the application of the amount paid until *after* the credits had been entered by the creditor, who was justified in law in applying it to such debts as he saw fit. *Jenkins v. Beal,* 70 N. C., 440; *Lester v. Houston,* 101 N. C., 605.

The last contention to be considered (being exceptions 6 and 8) was pressed with great force by learned counsel for plaintiff, but we can not agree with him, and must sustain his Honor in overruling those exceptions. It is based upon the principle that if a surety desires to preserve for his benefit an *existing* security for the debt which he is called upon to discharge, the debt and security (which follows the debt) must be assigned to a trustee, otherwise the payment will be in satisfaction and cancellation of the debt and a release of the security, leaving the surety a simple contract creditor. *Sherwood v. Collier,* 14 N. C., 380, 24 Am. Dec., 264; *Briley v. Sugg,* 21 N. C., 366, 30 Am. Dec., 172; *Tiddy v. Harris,* 101 N. C., 589; *Browning v. Porter,* 116 N. C., 62. But in this the debts for which the testator was security were not themselves secured; they were simple contract debts, and made good to the creditor solely by the liability of Sledge, the surety. Sledge, the surety, was secured and indemnified against loss by reason of his suretyship, by mortgage "B," wherein the plaintiff conveyed certain lands and personalty for that purpose—having declared and recited therein, "Whereas, the said Sherrod Sledge has become surety on said notes to their payment when due, and the said Wesley Burnett desires to hold him harmless and to indemnify him against any and all possible loss on their account * * *; if the said Wesley Burnett shall fail to pay the amounts due on the therein several notes above described when they shall become due, and by such failure and default the said Sledge is compelled, as surety, to pay the same, or either of the same, or any part of either, * * *" From

the expressed terms of the instrument, it clearly appears that it was not intended to secure the notes to the creditor, but to secure to the surety such amount as he might be compelled to pay by reason of his liability assumed for Burnett in the extinguishment and cancellation of said notes. The intervention of a trustee could in no event have been a benefit to Sledge, for his redress against Burnett under the terms of mortgage "B" was for the recovery of such amount as he would have to pay in extinguishing said notes, or any part thereof. The liability of Burnett, therefore, under his said mortgage is for such amount as Sledge may have had to pay, which amount has been ascertained by the referee, and there being no error in the rulings of his Honor, the judgment must be

Affirmed.

BLACK v. COMMISSIONERS.

(Filed October 22, 1901.)

1. COUNTIES — *County Commissioners — Necessary Expenses — Courts—Municipal Corporations—Taxation.*

The courts have a right to say what are necessary expenses of a county, but they can not control the judgment of the county commissioners in incurring necessary expenses.

2. COUNTIES—*Necessary Expenses—Court-house—Taxation.*

Building a court-house is a necessary county expense, and the county commissioners may contract for building a court-house without special legislative authority if a sufficient amount of money can be raised by taxation within the constitutional limitation.

3. COUNTIES—*Taxation—Necessary Expenses—The Constitution, Art. II., Sec. 14, Art. VII., Sec. 7—Act 1901, Chap. 598.*

An act authorizing the issuance of county bonds for a necessary county expense need not be submitted to the people for ratification unless the act itself provides therefor.

4. STATUTES—*Enactment—Ratification—Presumptions—Conclusive—The Constitution, Art. II., Sec. 14.*

The ratification of an act by the General Assembly is conclusive evidence that it passed three several readings.

5. STATUTES—*Enactment—Ratification—Yeas and Nays—The Constitution, Art. II., Sec. 14.*

It is not necessary to enter the yeas and nays on an act to raise revenue for a necessary county expense.

6. COUNTIES—*Statutes—Necessary Expenses.*

Where an act authorizing the issuance of county bonds to erect a court-house provides for a building committee, such provision, though authorizing an extravagance, does not affect the validity of the act.

7. PRESUMPTIONS—*Necessary Expenses—Counties—County Commissioners.*

It will not be presumed that expenses incurred by county commissioners are necessary where the pleadings make such question an issue.

8. PUBLIC OFFICERS—*Breach of Trust—County Board of Education—County Commissioners—School Funds.*

The board of education, in lending its fund to the county commissioners, is liable in a civil action, if not to criminal prosecution.

ACTION by W. P. Black and E. B. Atkinson against the Board of Commissioners of Buncombe County, heard by Judge *Frederick Moore,* at Chambers, in Asheville, on the

28th day of December, 1901. From an order dissolving a temporary restraining order, the plaintiff appealed.

H. B. Carter, for the plaintiff.
Chas. A. Webb, and *Locke Craig,* for the defendants.

FURCHES, C. J. The Commissioners of Buncombe County having managed their financial matters so that the county indebtedness for *current necessary expenses of the county* on the 1st day of January, 1901, was $59,037.13, and the court-house not being suited to the wishes of the people and the business of the county, they wished to dispose of the old court-house and build a new one; and having taxed the people and property as high as they could, under the constitutional restriction, the Legislature, on the 11th March, 1901, passed and ratified an act (Acts 1901, Chap. 598) intended to enable the Commissioners to issue $100,000 coupon bonds, and to levy a *special tax* to pay the same. Fifty thousand dollars of these bonds were to be used in building a new court-house, and fifty thousand in paying said indebtedness of Buncombe County. Before the $50,000 bonds could be issued to build a new court-house, the question of "Court-house" or "No Court-house" had to be submitted to a vote of the county and approved by a majority of those voting thereon. This has been done, and a decided majority of the votes cast were for the new court-house, though a majority of all the qualified voters of the county did not vote for the new court-house.

Under this act, Chapter 598, and the vote of the people thus cast, the Commissioners believed they were authorized to issue $50,000 bonds for the new court-house and $50,000 for county indebtedness, called "the floating debt of the county." And so believing, the Commissioners undertook to ascertain, itemize and declare what was the outstanding

"floating indebtedness of the county"; and among the list set out by them are such debts as $17,200 due by notes to the Battery Park Bank, $4,000 due Mrs. Featherston by notes, *County Board of Education for borrowed money, due by note,* $9,931.40, and a number of other notes said to be due by the county. The Board, after so ascertaining the indebtedness of the county, proceeded to adopt resolutions providing for the issuance of said bonds—$50,000 for the court-house and $50,000 to pay the "floating indebtedness of the county," and to levy a special tax for the payment of the interest thereon as provided in said act. The plaintiff, believing that the defendant was not authorized to issue said bonds, nor to levy said tax, brought this action to restrain and enjoin the defendant from issuing said bonds or levying or collecting said tax; and plaintiff prayed for an injunction, which being disallowed and the order of injunction refused, plaintiff appealed to this Court. The plaintiff puts his prayer for injunction against issuing the court-house bonds upon the ground that the act, Chapter 598, was not passed according to the Constitutional requirement; that it did not pass three times in each House of the General Assembly; and, to be more specific, that it did not pass its first reading. He further objects to the validity of said act, for the reason that it did not authorize the court-house bonds to be issued until it should be approved by a vote of the people; and he also objects for the reason that it did not require a majority of the *qualified voters* of the county, and that a *majority* of the qualified voters of the county did not vote for the new court-house. He bases his objection to the issuance of the $50,000 bonds to pay "the floating debt" upon the ground that the floating debt, or a large portion thereof, is not for the *necessary* expenses of the county, and that this so appears by the itemized statement of said indebtedness made by the defendant. And this being so, the defendant has no right to issue bonds for

its payment without first having an act of the Legislature authorizing a submission of the question to the *majority* of the qualified voters of the county, and an approval by a *majority* of the whole qualified vote of the county.

These questions will be considered separately, and we will first consider the objections to issuing the court-house bonds. The Courts have the right to say what are necessary expenses of a county, but they have no right to *supervise and control the conduct and judgment of the Commissioners when they are necessary expenses. Broadnax v. Groom,* 64 N. C., 244; *Satterthwaite v. Commissioners,* 76 N. C., 153; *Evans v. Commissioners,* 89 N. C., 154; *McKeithan v. Commissioners,* 92 N. C., 243; *Charlotte v. Sheppard,* 120 N. C., 411; *Rodman v. Washington,* 122 N. C., 39; *Mayo v. Washington,* 122 N. C., 5. And we have held that the building a court-house is a *necessary* expense. *Vaughan v. Commissioners,* 117 N. C., 434. But as to the manner in which this expense should be incurred, or as to the cost of the court-house, the Courts have no power to control the same. This is certainly so where it is only a matter of judgment and no *mala fides* is alleged or shown. It therefore follows that the Commissioners of a county have the right to contract for the building of a court-house without any special legislative authority to do so. *Vaughan v. Commissioners, supra; Halcomb v. Commissioners,* 89 N. C., 346—exactly in point. And as the Commissioners have the right to contract for building a court-house without any special legislative authority, they would have the right to pay for the same, and could be compelled to do so if a sufficient amount of money for that purpose could be raised by taxation within the constitutional limitation. *Charlotte v. Shepard,* 122 N. C., 602. So it is only necessary to have special legislative authority to levy a special tax when the money can not be raised under the general provisions, owing to the constitutional limitation. When this can not be done under

the general law, owing to the constitutional limitation, there must be special legislative authority to levy a tax for such purpose; but such special act need not be submitted to the people for their ratification. *McCless v. Meekins,* 117 N. C., 34; *Tate v. Commissioners,* 122 N. C., 812; *Smathers v. Commissioners,* 125 N. C., 480. It is therefore seen that the act of 1901, Chapter 598, need not have been submitted to the people for their ratification. As to the manner of its passage, it appears that the ayes and noes were duly entered on the Journals upon the second and third readings on two several days in each House, as required by the Constitution, Article II, section 14. The ratification is conclusive evidence that it was read three several times in each House. *Carr v. Coe,* 116 N. C., 223, 28 L. R. A., 737, 47 Am. St. Rep., 801. The Judge finds as a fact that the three readings were on three several days, and he finds this fact as to the first reading in each House from the entries on the bill and on the calendar. This is not a matter required by the Constitution to be shown by the Journals, and the entries on the calendar and bill are both consistent with, not contradictory of, what does appear on the Journals, and the finding of fact by the Judge is sustained. But as the act itself provided for its submission to the people, and that the Commissioners should not be authorized to build the courthouse nor to levy the special tax until it was submitted to the people and approved by a *majority* of the votes cast, it was necessary to do this. This submission was a condition precedent, and not a delegation of legislative power, as claimed by the plaintiff. It was, to that extent, a local option act, the constitutionality of which has been many times sustained by this Court. *Cain v. Commissioners,* 86 N. C., 8; *Simpson v. Commissioners,* 84 N. C., 158; *Evans v. Commissioners,* 89 N. C., 154; *Halcombe v. Commissioners,* 89 N. C., 346.

It is contended that the case of *Evans v. Commissioners, supra,* gives the Commissioners the right to say what are

the necessary expenses of the county, and the Courts have no power to review their decision. This case rests on *Broadnax v. Groom,* 64 N. C., 244, and neither of the cases sustains that contention. Where it is said the Court has no power to review their decision, the Court is speaking of the manner in which they perform or administer the rights given them by virtue of their office in cases where the expenditure is for necessary expenses. This is clearly stated by the Chief Justice in *Broadnax v. Groom,* that is, the Court has the right to say what are necessary expenses, but no right to say in what manner the Commissioners shall exercise their discretion in cases where they have the same.

The legality of the act is attacked because it names a number of persons who shall have the supervision of building the court-house, and gives them $2.00 per day. This may have been unnecessary and expensive, but it does not seem to take from the Commissioners any of their Constitutional rights. It is, in effect, making these seven men a building committee at the price of $2.00 per day, and if this was unnecessary and extravagant, it does not, in our opinion, render the act void. This disposes of the first question—the validity of the court-house bonds—and the injunction as to them was properly refused. The other question—the necessary expenses of the county—has to some extent been discussed in what we have already said. As is contended by the plaintiff in his complaint, many of the items set out by defendant in its resolution and statement of indebtedness, do not appear to be for necessary county expenses—such as notes due the bank, notes due Mrs. Featherstone, and due to the *Board of Education* and others for borrowed money. These do not appear to have been given for necessary expenses. And although the defendant says in its answer that it "can prove by an abundance of evidence that they were," this does not

make it so. The allegation of the complaint that they were not, and the allegation of the answer that they were, raised an issue of fact which the Judge was not authorized to try. The defendant, probably seeing this trouble in its case, contended that the Court would presume that the Commissioners acted properly, and that the notes were given for *necessary expenses* of the county, and cited *McCless v. Meekins,* 117 N. C., 34, as authority for this contention. But that was where it was not denied but what that indebtedness was based upon the necessary expenses of the county; and this being so, the Court presumed that it was. But where there is an allegation and denial as to whether they were or were not for necessary expenses, the Court can presume nothing. And if the case had stood upon complaint and answer, we would not have held that there was error in not granting the injunction until the hearing, as to the indebtedness alleged to have been made for the *necessary expenses* of the county. But plaintiff, in his replication, comes to the relief of the defendant. The defendant, in its answer, says that "all the money obtained on these notes and overdrafts was used in payment of necessary county expenses," and the plaintiff in his replication to the answer, when it was not necessary that he should reply, says that "It is true that the money received from the notes and overdrafts at the bank was used by the county for the purposes and in the manner therein alleged." This admission, it seems to us, defeats the plaintiff's right to an injunction in this action. But as the matter of injunction turns upon an *admission of the plaintiff,* and is not a fact found by the jury upon proper instructions, we do not say what effect the judgment in this case would have in another action brought by other parties not connected with this case.

There is one thing presented by the record in this case that we feel called upon to mention, as it is a matter of much public concern. We mention this as it appears in this case and

from the fact that matters of a similar character have appeared in other cases; and that is the $9,921.40 *due by note to the Board of Education for borrowed money.* This was set forth as one of the reasons in the motion to advance the cause for hearing. But if this had been the only reason set forth as a ground for the advancement, this case would not have been advanced. This money, it seems, had been collected and paid to the Board of Education, where it was subject to the proper use of the schools and where it should have remained. But the Board, in violation of its trust as public officers, have not kept it where it belonged, but have loaned it to the County Commissioners, who admit they are not able to repay it without the aid of special legislation for that purpose. As they have violated their trust in lending this money, they are liable for the same in a civil action, if not to criminal prosecution. It seems to us that there is too great a disposition on the part of public officers, entrusted with public funds, to think of them and treat them as their own. This should be, and will be, stopped, as we will not doubt that Courts and Solicitors will do their duty. Fifty-nine thousand dollars "floating debt for necessary expenses" over and above the large amount of taxes annually levied and collected in Buncombe County, seems to be large. But that is a matter with which we have nothing to do. If it is too large, if the affairs of the county have not been well and economically managed, that is a matter for the people of the county.

For the reasons given, the judgment of the Court below is Affirmed.

IN RE HYBARTS' ESTATE.

(Filed October 22, 1901.)

JURISDICTION—*Motion in the Cause—Action—Dower—Practice.*

An *ex parte* proceeding by a widow to subject land in the hands of heirs to the payment of dower charges thereon can not be had before the Clerk, nor by a motion in the cause wherein dower was allotted, the proper remedy being in original action on the claim.

PROCEEDINGS to subject the estate of Wm. M. Hybart to the payment of dower charges thereon, heard by Judge *W. S. O'B. Robinson,* at March Term, 1899, of the Superior Court of CUMBERLAND County. From a judgment of dismissal for want of jurisdiction, Delia J. Hybart appealed.

N. A. Sinclair, and *H. L. Cook,* for the appellant.
Geo. M. Rose, contra.

CLARK, J. In 1889 dower was regularly allotted to Delia J. Hybart in an *ex parte* petition by her and her heirs-at-law. The report of the commissioners allotted her the farm of her husband for life in severalty, and to make up her third further charged upon the realty allotted to the heirs-at-law the payment of all taxes on the entire estate and the payment by the heirs to the widow of $5.00 per month out of the rents of the realty allotted to them.

For awhile these payments were made, but, having fallen into arrearage of eleven months, this is a motion in the cause to subject the realty in hands of the heirs to the payment of the $55.00 overdue.

The remedy sought could not be had before the Clerk. Nor could it be had by a motion in the cause, that cause having been terminated by a final judgment confirming the

allotment of dower. *Causey v. Snow,* 120 N. C., 279. This is an adversary proceeding, and if for a merely personal judgment against the heirs-at-law, should have been begun before a Justice of the Peace, and if it is sought to enforce the lien of $5.00 per month conferred by the judgment above recited, it should have been begun by summons returnable to term.

It is true a motion in the cause may sometimes be treated as an independent action—*Stradley v. King,* 84 N. C., 635—but that motion in an adversary cause and in the proper Court. Here this is an adversary motion in an *ex parte* cause, and begun before the Clerk when it should have been brought to term before the Judge. If we could pass the first point, counsel insist that by virtue of Chapter 276, Laws 1887, amending The Code, sec. 255 (see Clark's Code, 3d Ed., pp. 265, 267), the case having gotten into the Superior Court, the Judge is vested with jurisdiction. It is true, to prevent the anomaly of a cause brought before the Clerk and regularly carried by appeal or transfer to the Judge *of the same Court* (the Clerk being only the finger of the Court), being dismissed to be begun again before the same Judge, the above act does provide that the Judge shall have jurisdiction. *Faison v. Williams,* 121 N. C., 152; *Roseman v. Roseman,* 127 N. C., 494, and cases cited in the latter at page 497. If this were not so, our practice would be no whit better than when an action in covenant was dismissed because not brought in *assumpsit,* or an action in contract was put out of Court because not brought *in tort,* or when a man might be dismissed because his suit was not on the equity side of the docket when, after paying a big bill of costs, he could bring an action in the same Court at law. But here this adversary motion is not only made in an *ex parte* cause which had been terminated by final judgment, but if treated as a new action brought before the Clerk (when it should have been begun

to term) the record shows no appeal or transfer placing it before the Judge. Nothing indicates how it got before him, or that it was rightly carried before him. There is nothing before us except his very proper judgment that, upon the record, he had no jurisdiction to grant the petitioner the relief she asks. There is nothing that by any construction under the most liberal practice puts the jurisdiction in the Judge.

No error.

KOCH v. PORTER.

(Filed October 22, 1901.)

1. JUDGMENTS—*Setting Aside—Excusable Neglect—Evidence—Sufficiency—The Code, Sec. 274.*

   The evidence in this case is held sufficient to authorize the setting aside of a judgment for excusable neglect under The Code, sec. 274.

2. JUDGMENTS—*Setting Aside—Judge—Discretion—Findings of Court—Appeal—Review.*

   Facts found by a trial Judge, in setting aside a judgment, are not reviewable by the Supreme Court, unless there is no evidence to support the finding, or it appears that the Judge abused his discretion.

3. APPEAL—*Exceptions and Objections—Review.*

   Where the trial Court sets aside a judgment, and at the same time holds that certain other grounds are not sufficient therefor, and the defendant does not appeal, the latter ruling can not be reviewed.

ACTION by T. F. Koch and others against L. C. Porter and others, heard by Judge *George H. Brown*, at August

Term, 1900, of the Superior Court of COLUMBUS County. From an order setting aside a judgment for the plaintiffs, the plaintiffs appealed.

F. B. Schulken, for the plaintiffs.

McNeill & Bryan, and *McLean & McLean,* for the defendants.

FURCHES, C. J. This is a motion to set aside a judgment for excusable neglect, under section 274 of The Code. Therefore the merits of the controversy are not before us.

We do not think we can give a better statement of the case on appeal than by incorporating the findings and judgment of the Court below in our opinion:

"Motion by defendants to set aside judgment rendered in this cause October Term, 1899.

"Motion heard by G. H. Brown, Jr., Judge, at August Term, 1900, Columbus Superior Court, upon affidavits and exhibits filed by plaintiffs and defendants.

"It was agreed that the Judge should take the papers and render his findings and judgment at any time out of term.

"Messrs. McLean and Bryan, for defendants; Messrs. Rountree, Schulken and Lewis, for plaintiffs.

"After carefully considering and weighing all the matters and facts recited in the several affidavits and exhibits, and having considered carefully arguments of counsel, I find the following facts:

"This action was commenced on October 1, 1898, against Luther C. Porter and wife, George F. Porter and wife, and others, named in original summons; that said summons was served as to Luther C. Porter and the other non-residents of this State, as appears in the papers in the cause, on March 22, 1899, and also on said defendants by Sheriff of Hennepin County, Minnesota, in October, 1898. That shortly thereaf-

ter Luther C. Porter died in said county and State of Minnesota, and another summons was issued March 16, 1899, against his executors and others therein named. legatees of Luther C. Porter. The complaint herein was duly filed May 13, 1899.

"The plaintiff was then and is now a non-resident of this State. The defendants, the executors of Luther C. Porter, and George F. Porter and wife, and others, legatees of Luther C. Porter, were then and are now residents and citizens of Minneapolis, in the State of Minnesota. These said defendants at once employed Messrs. Wishart & Frazier, reputable attorneys of the Superior Court, and residents of Whiteville, Columbus County, to appear for them and file their answer and defend the said cause. That said defendants paid the said attorneys and they accepted the employment and entered into correspondence with defendants and their representative and agent. I find that neither of said firm of attorneys are worth over the homestead exemption allowed by law, and that execution can not be collected out of them. That at August Term, 1899, said attorneys entered a general appearance for their clients, that being the appearance term. That sixty days was granted said attorneys upon their motion on August 16, 1899, within which to file answer for their clients, the defendants. The August Term, 1899, commenced on August 14. Said answer was not filed within said sixty days—nor was it filed on October 23, 1899, the commencement of October Term of said Court. That about the first of October, 1899, and before the sixty days had expired, Wade Wishart, Esq., of said firm of Wishart & Frazier, met George Rountree, Esq., counsel for plaintiff, who brought this action, in Wilmington, N. C.; that Mr. Rountree told Wishart that he would take no advantage of any failure to file the answer within the sixty days, and that he had no objection to a continuance of the cause at October

Term, 1899; but that he desired Wishart to hurry and file the answer. At this time about forty-five of the sixty days had expired. A few days after this conversation, in consequence of a letter from the plaintiff, Mr. Rountree wrote Wishart that he should insist on a trial at October Term, and to hurry up and file his answer at once, as his client, the plaintiff, insisted on trial. I further find as a fact from the testimony of Wishart, that within the said sixty days allowed defendants to file answers and in ample time for said attorney to have prepared and filed the answer, all the facts, circumstances and documents, upon which defendants relied for a defense, were placed in his possession by defendants, and that such data was in Wishart's possession in ample time to have filed said answer within time allowed, and that his clients, being residents of far-off States, could not well know, except through Wishart, whether the answer was filed or not.

"Wishart's testimony in this respect seems to be corroborated by George F. Porter and the exhibits filed.

"It was admitted in open Court that Wishart was a reputable attorney of this Court.

"In justice to Wishart, I find that he failed to file the answer laboring under a *bona fide* but mistaken belief that Mr. Rountree had consented that an order for enlargement of time to plead might be entered at the then approaching October Term.

"I find that the defendants are not responsible for the neglect of Wishart and his firm to prepare and file the answer, as they should have done.

"The defendants, David Nealy and wife Dorcas, and J. G. Jackson, appear to be only nominal defendants, and have no definite interest set out in the complaint. (See sections 5 and 6.) All other defendants are the executors and legatees under the will of Luther C. Porter, deceased.

"At October Term, 1899, the defendants' counsel, Wishart, moved for further time to file answer. Plaintiffs moved for judgment. The Court rendered the judgment set out in record for want of answer.

"I find that the defendants have a *bona fide* and *prima facie* a valid defense, as set out in the affidavit of George F. Porter, dated August 16, 1900, filed, and that the demand of plaintiff consists largely of open account against estate of L. C. Porter, which would require some proof to substantiate.

"The defendants moved to set aside the judgment:

"1. Because irregular and not warranted by law.

"2. Because of excusable neglect.

"I am of the opinion that as to the money demand a judgment by default and inquiry only should have been rendered; but it appears that defendants' counsel was present and objected to the judgment and appealed to the Supreme Court, and failed to prosecute the appeal. Therefore, this contention can not now be sustained.

"(The defendants duly except.)

"I am of opinion, upon the facts, that defendants are entitled to relief because of excusable neglect. *Gwaltney v. Savage,* 101 N. C., 103.

"(The plaintiffs duly except.)

"It is therefore ordered and adjudged that the judgment rendered at October Term, 1899, be set aside, and the defendants are granted sixty days from date of this order within which to file an answer.

"(The plaintiffs duly except.)"

The facts found, it seems to us, entitled the defendant, in the discretion of the Court, to the relief granted. *Gwaltney v. Savage,* 101 N. C., 103. The facts found by the Court below are not reviewable by us, unless there is no evidence to support their finding. *Sikes v. Weatherly,* 110 N. C., 131; *Nicholson v. Cox,* 83 N. C., 48; *Stith v. Jones,* 119 N. C.,

428; or, where it appears that the discretion of the Judge has been abused. *Cowles v. Cowles,* 121 N. C., 272. And we can not say there was no evidence to support the findings of the Court below, nor an abuse of power.

We think this case is distinguishable from *Manning v. Railroad,* 122 N. C., 824. In that case the defendant employed Mr. Watts, a non-resident attorney, who had no right to practice in the Courts of this State, except by the courtesy of the Court and bar. And while it is true that Luther Porter, who lived in Minnesota, had been consulted by some of the defendants, he was one of the defendants in the action and did not expect to appear as counsel in the case; nor did his co-defendants expect him to do so, but at once proceeded to employ and pay attorneys living in this State who were regular attendants at Columbus Court.

We think it distinguishable from *Norton v. McLaurin,* 125 N. C., 185. That was an action of ejectment where it was necessary to give bond before answer could be filed. This was purely the duty of the defendant, and he neglected to give the bond. Besides, in that case the Court failed to find that the defendant had a meritorious defense.

It is also distinguishable from *Vick v. Baker,* 122 N. C., 98, where the negligence seems to have been entirely the negligence of the defendant.

It also seems to be distinguishable from *Cobb v. O'Hagan,* 81 N. C., 293, where the defendant lived within thirty-seven miles of the Court, but did not attend the same or give his case any attention whatever.

The judgment, it seems to us, is both irregular and erroneous, at least so far as it applies to the open accounts stated in the complaint. But the Judge refused to set aside the judgment on that account, and as the defendants did not appeal, that question is not before us.

But from the facts found, which are final, the Judge was

authorized in his discretion to set aside the judgment, which he did, and his ruling must stand.

Affirmed.

HOLT v. JOHNSON.

(Filed October 22, 1901.)

1. REFERENCES—*Findings of Court—Conclusive.*

Findings of fact by a referee, under a consent reference, are conclusive if there is any evidence to support them.

2. EVIDENCE—*Principal and Agent—The Code, Sec. 590.*

Where an agent is sent to notify a person to go to see the principal, such person can not, after the death of the principal, testify to the declarations of the agent as to statements made to him by the principal.

3. EVIDENCE—*Declarations—Incompetent—Corroboration.*

Incompetent declarations do not become competent because they tend to corroborate the evidence of other witnesses.

ACTION by T. B. Holt, executor of N. G. Burns, against Barney Johnson and F. M. Johnson, his wife, heard by Judge *H. R. Starbuck,* at April Term, 1901, of the Superior Court of WAKE County. From a judgment for the plaintiff, the defendants appealed.

Herbert E. Norris, for the plaintiff.

W. J. Peele, and *A. J. Field,* for the defendants.

FURCHES, C. J. This is an action upon a note and to foreclose a mortgage given to secure the same. The execution of the note and mortgage is admitted, and the only ques-

tion presented by the appeal is whether the defendant shall be charged with 8 per cent interest or 6 per cent.

At April Term, 1900, the following order was made: "It is, by consent, decreed that this case be referred to S. F. Mordecai to find the law and the facts, and that judgment may be entered thereon out of term."

This seems to have been a submission to arbitration rather than a reference for an account; but as the referee and the parties have treated it as a reference rather than a submission, we will so treat it. But treating it as a reference, the findings of fact are conclusive if there was any evidence to base them upon, as the order was by consent. And there is no exception to the finding of any fact upon the ground that there was *no evidence* to support it. The note on its face is for 8 per cent, but it is alleged by defendant that the testator, before the note was executed, promised to reduce it to 6 per cent if the Legislature, soon to meet, should reduce the rate of interest to 6 per cent; and that after the Legislature had reduced the rate of interest to 6 per cent, he again promised to do so, and that he should only be charged with 6 per cent. The note being at 8 per cent, the burden was upon the defendant to show that it should be reduced to 6. The referee found that defendant had failed to show this, and so reported to the Court. This being purely a question of fact, the referee's finding must stand unless he has based his finding on improper evidence. This the defendant alleges he has done, and files numerous exceptions.

The first exception (a) is to the evidence of John Kent, introduced by defendant and objected to by plaintiff. This objection was overruled, and of course the defendant can not complain of that. But it does not seem to us that this evidence was competent, and had plaintiff's objection been sustained, the defendant would have had no cause to complain. It was the detailing of a conversation with the witness and the defendant Johnson, and was incompetent.

It seems that the witness owed the testator a note, and he had sent word by Johnson to the witness Kent to come and see him and he would reduce Kent's interest to 6 per cent. And the defendant contends that this made Johnson the agent of the testator, and therefore the evidence was competent. But the error in defendant's contention consists in the fact that, while Johnson was testator's agent to tell Kent to come and see him and he would reduce the interest on his note to 6 per cent, he was not the testator's agent to tell Kent that testator said he had promised to reduce his (Johnson's) interest to 6 per cent.

It is also contended that it corroborated Kent's evidence and was competent on that account. But we do not understand the rule to extend to the extent of making a party's declarations competent that are otherwise incompetent, because they may tend to corroborate the evidence of some *other witness*. Besides, they do not corroborate Kent, as Kent said: "Johnson came to see me and told me that Mr. Burns (testator) wanted to see me. He said he wanted to see me about my note. That is all the message he delivered from Burns. This is the only message that Johnson brought me from Burns." So it is seen that Johnson's evidence did not corroborate Kent. Besides, it was incompetent under section 590 of The Code, as Johnson would not have been allowed, under objection, to have testified to anything Burns said to him about altering the interest from 8 to 6 per cent. This discussion of Kent's testimony is intended to apply to defendant's exceptions B and C, as well as to exception A.

The defendant Johnson was then examined, and testified, under objection, as to his conversation with Kent, which was ruled out by the referee and the Court, and defendant excepted as indicated by exceptions D and E. We have sufficiently discussed these exceptions, in discussing exceptions B and C. Plaintiff's exceptions F and D were overruled, and defendant has no cause to complain at that.

There are a number of other exceptions, all of which have been examined and carefully considered, and none of which can be sustained. But they do not seem to be of sufficient importance to demand a separate discussion.

We are, therefore, led to the conclusion that the judgment should be

Affirmed.

KERR v. HICKS.

(Filed October 22, 1901.)

1. REFERENCES—*Orders—Amendments.*

Where the court corrects the record so as to show that an order of reference was a compulsory reference, the reference will be treated as having been compulsory when made, and not as a new order nor as an amended order.

2. REFERENCES—*Consent Orders—Compulsory Orders.*

A consent order of reference can be changed to a compulsory order only by consent of both parties.

3. REFERENCES—*Compulsory Reference—Plea in Bar.*

The court can not make a compulsory order of reference when there is a plea in bar.

4. REFERENCES—*Compulsory Order—Appeal.*

Where the court makes a compulsory reference when there is a plea in bar, the parties are entitled to appeal from said order.

5. REFERENCES—*Compulsory References—Appeal—Waiver—Plea in Bar.*

Where there is a plea in bar, a defendant, by not appealing from a compulsory reference, will be deemed to have waived his right to have his plea in bar passed on by a jury, and the reference will be treated as a consent reference.

KERR *v.* HICKS.

ACTION by John D. Kerr and wife S. H. Kerr against R. W. Hicks, heard by Judge *W. A. Hoke,* at February Term, 1901, of the Superior Court of SAMPSON County. From a judgment for the plaintiffs, the defendant appealed.

J. L. Stewart, and *F. R. Cooper,* for the plaintiffs.

Stevens, Beasley & Weeks, E. K. Bryan, and *Frank McNeill,* for the defendant.

FURCHES, C. J. This action was brought by the plaintiff for an account and settlement with the defendant of transactions between them continuing through a number of years, and for judgment. Owing to the blanks in the pleadings, we are not able to tell just when these transactions commenced or ended. But from the statement in the record, they must have commenced as early as 1881 or 1882, and continued until 1888.

The action was commenced in October, 1891, and at December Term, 1891, there was a reference to W. R. Allen to take and state an account. This order was apparently a consent order. The plaintiff had asked for an order of reference in his complaint, and it seems at the same term when the order was made the defendant asked for it, and his counsel drew the order of reference. At this time there has been neither complaint nor answer filed, and leave was granted to the plaintiff to file his complaint and to the defendant to file his answer. The plaintiff afterwards filed his complaint and the defendant filed his answer, and the referee proceeded to take and state the account. The referee's account does not seem to be dated, as of any term of Court, or otherwise. But we suppose it was made to October Term, 1893, as we see that an allowance was made to him at that term for taking the account; and sixty days were allowed each party to file exceptions thereto. Both parties filed exceptions, the

plaintiff's dated as of October Term, 1893, amended at October Term, 1900. The defendant's exceptions do not show when they were filed, as they should do. And the Clerk should note on every paper filed in his office the date when it was filed. This would save much trouble and many disputes between parties and attorneys.

At February Term, 1894, upon notice of plaintiff, Brown, Judge, upon affidavits of the plaintiffs and others, including that of defendant's attorney, found that the order of reference to Allen, under which the account had been taken, was not a consent order, but was compulsory; and that the plaintiff had the right to have his exceptions tried by a jury, "and ordered that the plaintiff and defendant file with the Clerk of the Court, on or before the next term of the Court, such issues of fact as it is claimed by each party as arise upon said exceptions filed by plaintiff to the report of the referee." To this order the defendant excepted.

Under this order both parties filed issues, and the Court submitted to the jury a part of those filed by the plaintiff, and rejected those filed by the defendant.

In the defendant's answer, he pleaded an account stated; that he had furnished plaintiff with a monthly statement of their dealings, showing every item of debit and credit, and, in addition to that, had furnished the plaintiff with a full itemized account of their entire transactions; and the plaintiff had never objected to any one of them, but, after examining them, had assented to their correctness and had made him a payment of $75.00 thereon; that this account as thus stated showed the plaintiff was indebted to defendant more than $800.00. And the defendant contends that this was a plea in bar, and should have been disposed of before there could be a reference.

There being a verdict and judgment for the plaintiff, the defendant appealed.

The case, in some respects, is remarkable. The plaintiff brought an action against the defendant, in which he sets out the transactions of several years dealing with the defendant, amounting in all to seventy or seventy-five thousand dollars, claiming that the defendant is largely indebted to him, and *asks for a reference.* The reference is made and the account taken, which shows a balance against him. The report was made to October Term, 1893, and at February Term, 1894, *upon the motion of plaintiff,* it is found that the order of reference was not a consent order, but compulsory, and made against the consent of the plaintiff; and, in the order finding that it was a compulsory order, the Court declares that the plaintiff is entitled to a jury trial. The defendant excepts to this order, and says that the Court had no right to change the order from a consent order to a compulsory order; and if it had the right to do this, it had no right to declare that the plaintiff was entitled to a jury trial on his exceptions to the referee's report. We will not say that the Court did not have the *right* to find that the order of reference was not a consent order, but was a compulsory one, and to correct the records of the Court, so as to make them so speak. But this correction of the record made the order compulsory at the time it was first made. It was not a *new order, not an amended order.* For if the order was a consent order when made, it could not be changed to a compulsory order except by consent of both parties. *McDaniel v. Scurlock,* 115 N. C., 295; *Driller Co. v. Worth,* 117 N. C., 518; *Smith v. Hicks,* 108 N. C., 251; *Perry v. Tupper,* 77 N. C., 413. And if it was a *compulsory* order, the Court had no *right* to make it, there being a plea in bar. *Bank v. Fidelity Co.* 126 N. C., 320; *Smith v. Goldsboro,* 121 N. C., 350; *Royster v. Wright,* 118 N. C., 152; *Collins v. Young, Ibid,* 265; *Austin v. Stewart,* 126 N. C., 527. If it is said that the Court would not have made the order if the answer had been filed setting up

a plea in bar, before the order was made, this would not relieve the situation. For, if we take that view of the matter, it would have been the duty of the referee to have declined to take the account and refer the matter back to the Court. *Jones v. Beaman,* 117 N. C., 259. Since the correction the order of reference must be treated as a compulsory reference when made in 1891. The plaintiff says he so understood it to be a compulsory reference. And it being a compulsory reference, the Court had no right to make it when there was a plea in bar, and the parties had the right to appeal from said order. *Bank v. Fidelity Co.,* 126 N. C., 320. And as they did not appeal, did they not lose any right they might have had by objecting to the order? Was it not presumed that they had waived their right by not appealing, and proceeding with the account? And was not the referee justified in so considering the matter and proceeding with the account? This seems to us to be so. *Grant v. Hughes,* 96 N. C., 191; *Wilson v. Pearson,* 102 N. C., 290. If the plaintiff lost his right by not appealing, and by proceeding with the account, that is, if he waived his objection by not appealing, and it seems he did, the order will be treated as if made by consent of the parties—we say the plaintiff, because the defendant still treats it as a consent order. And if made by consent of the parties, or if the objecting party waived his objection by not appealing from the order, he lost his right to have a jury to pass upon his exceptions. *Driller Co. v. Worth* and *Grant v. Hughes, supra.* This, it would seem, disposes of the appeal.

The defendant also contends that the plaintiff has lost his right to a jury trial for the reason that he has not complied with the rule in *Driller Co. v. Worth,* 117 N.C., 515, and same case, 118 N. C., 746. This would be so if the defendant had assigned this as one of his grounds of error, which he does not seem to have done.

There are other exceptions as to the competency of evidence and as to the account, but as they are not necessary to the determination of the appeal, we do not enter upon a discussion of them.

There is error in the record below, as pointed out in this opinion.

Error.

HARRINGTON v. HATTON.

(Filed October 22, 1901.)

1. EXECUTORS AND ADMINISTRATORS—*Fraudulent Conveyances—Creditors—Innocent Purchasers—The Code, Sec. 1446.*

An administrator can not be compelled, under The Code, sec. 1446, to sell property fraudulently conveyed by his intestate and in the hands of innocent purchasers.

2. JURISDICTION — *Executors and Administrators — Clerks of Courts—Appeal—The Code, Sec. 255—Acts 1887, Chap. 276.*

In a proceeding by a judgment creditor to compel a sale of property of decedent, on appeal from the Clerk to the Superior Court, judgment should be rendered directing a sale of the property under the judgment lien, all the parties being before the Court.

PROCEEDING by W. H. Harrington against P. E. Hatton, administratrix, and others, heard by Judge *W. A. Hoke* and a jury, at August (Special) Term, 1901, of the Superior Court of PITT County. From a judgment for the defendants, the plaintiff appealed.

A. M. Moore, for the plaintiff.

Skinner & Whedbee, for the defendants.

CLARK, J. The jury having found that the defendant James R. Davenport was a "purchaser for a valuable consideration and without knowledge of any fraud" on the part of E. N. Hatton, of the lands described in the petition, the Court properly refused judgment to compel the administratrix of E. N. Hatton to sell the land to make assets. Proviso to Code, sec. 1446; *Paschal v. Harris,* 74 N. C., 335; *Heck v. Williams,* 79 N. C., 437; *Egerton v. Jones,* 107 N. C., at page 290; *McCaskill v. Graham,* 121 N. C., 190. The reason is that in such case the purchaser has gotten a valid title to whatever interest the vendor had (*Savage v. Knight,* 92 N. C., 493, 53 Am. Rep., 423), and there is nothing which his personal representative can sell. Such sale by E. N. Hatton, it is true, could not impair whatever lien his judgment creditor had by virtue of his prior docketed judgment, but the creditor must proceed to enforce that lien by some direct proceedings on his part. Upon the issues found, E. N. Hatton had no interest in the land, and the Judge properly refused to order the administratrix to sell for assets E. N. Hatton's interest in the land, since, after the execution of his conveyance, he had no interest left which could have passed to his heirs-at-law, and hence nothing to be turned into assets by his administratrix. If the issue had been found the other way, the judgment would have been different, of course. *Paschall v. Harris, supra,* is exactly " on all-fours." *Murchison v. Williams.* 71 N. C., 135, presents an entirely different state of facts. There the property subject to the lien of the docketed judgment descended to the judgment debtor's heirs-at-law, who had a right to have the personalty applied first, and the administrator had the right to sell the land for assets, if necessary, and discharge the judgment. Here, there is only $50.00 personalty, and, by reason of E. N. Hatton's conveyance, no interest in the realty descended to the heirs-at-law. Hence, there is nothing which can be sold

by the administratrix to make assets. What the creditor must seek to enforce is a sale of the realty by virtue of his judgment lien, and not to apply E. N. Hatton's interest therein to his debt. If by the lapse of time plaintiff's judgment lien had been lost, the benefit would have accrued to Hatton's vendee and not to Hatton's heirs-at-law.

In this proceeding, though begun before the Clerk, the purchaser, as well as the administratrix and heirs-at-law, are parties, and judgment should have been rendered directing a sale of the property under the judgment lien. Code, sec. 255, as amended by the Laws of 1887, Chap. 276; *Roseman v. Roseman,* 127 N. C., 494; *Faison v. Williams,* 121 N. C., 152, and other cases cited in Clark's Code (3d Ed.), page 267. All the parties being before the Court, there is no reason to compel the bringing of a new action, but the plaintiff should have any relief his allegations and proofs entitle him to, whether prayed for or not. Clark's Code (3d Ed.), page 200.

In refusing the prayer of the petition, there was no error, but there was error in dismissing the action. The cause is remanded for proper judgment. The judgment below as to costs is affirmed, and the costs of the appeal will be divided. Code, sec. 527.

Remanded for judgment.

COOK v. AMERICAN EXCHANGE BANK.

(Filed October 22, 1901.)

1. APPEARANCES—*Voluntary Appearance—Service of Process—Waiver—Stipulations—Trial.*

A stipulation giving defendants extension of time in which to take any action they could have taken at the return term amounts to a voluntary appearance.

2. TRESPASS—*Conversion—Trustee—Creditors.*

Where a trustee holds possession of property for the benefit of creditors, and the trustee and creditors permit a conversion of the property, they are liable in damages for such conversion.

3. COMPLAINT—*Demurrer—Defects—Waiver—Pleadings.*

Where advantage is not taken of the defects in a statement of a cause of action by demurrer, such right of defense is deemed to have been waived.

ACTION by P. F. Cook, trustee of Andrew Brown, a bankrupt, against the American Exchange Bank and others, heard by Judge *Thos. A. McNeill,* at Fall Term, 1900, of the Superior Court of DARE County.

On the 23d day of February, 1900, the plaintiff sued out a summons in the Superior Court of Dare County against the defendants, and delivered it to the Sheriff of that county, who returned it not served because the defendants could not be found in his county. Plaintiff also applied for and obtained an order of attachment against defendants' property. Upon the return of the summons not served, plaintiff undertook to have the service made by publication, and did cause a publication to be made, citing defendants to appear at the Spring Term (May 7) of the Court, and during the first three days of the term filed his complaint, duly verified. But

no appearance was made by defendants during the term, which continued only one week and then expired by limitation of law. Afterwards, to-wit, on the 21st day of May, the defendants, through their counsel, requested and obtained from plaintiff's counsel a stipulation as follows: "It is hereby stipulated that the defendants' time is extended to and including May 31, 1900, to take any action that they or either of them might have taken in the above-entitled action on or prior to May 5, 1900." And subsequently, on the 29th of May, they filed a petition and bond for removal of the action to the United States Circuit Court, which was, however, remanded for reasons not material to be here stated. At the Fall Term of Court, plaintiff moved for judgment by default and inquiry for want of an answer, which was resisted by defendants upon the ground that they had never been served with process and had never voluntarily appeared. Motion for judgment denied by his Honor, and plaintiff appealed.

E. F. Aydlett, and *F. H. Busbee*, for the plaintiff.
Busbee & Busbee, for the defendants.

COOK, J. The above statement of the case recites all the facts material to aid us in determining the contention between the parties as presented by the record upon appeal.

And in this Court defendants further insisted that if the Court should hold that they were properly in Court, by service or otherwise, the plaintiff could not recover judgment against them for that the complaint did not state facts sufficient to constitute a cause of action, and moved to dismiss the action.

As to the question raised in the record upon appeal, plaintiff contends that he is entitled to a judgment by default and inquiry for want of an answer, while defendants contend

that they are not within the jurisdiction of the Court for want of service of process, and have not waived such service by voluntarily appearing.

The term of the Court to which the summons was returnable began on May 7 and continued only one week. After the filing of his complaint, it became incumbent upon defendants, if they had been legally served with process, to answer or demur to the complaint during that term, or to file their petition for removal to the United States Circuit Court before the time of answering or demurring expired, which was during that term. But no action or appearance whatsoever was taken or entered by defendants, and the term expired; whereby they were deprived of all rights thereafter to plead to the action or remove the cause. And if defendants had not been legally served, no harm could befall them by paying no attention to the proceedings. But defendants chose a different course, and desired to remove the action to the United States Circuit Court, which they had no legal right to do; the term had expired and the door was closed against them. So they sought and obtained the consent of the plaintiff, set out in the stipulation, and were, by agreement, relegated to their original rights, and also obtained the further indulgence of time, which was extended, by consent, to and including May 31. By thus recognizing the action and treating with plaintiff's attorneys concerning the remedies and rights existing under it, and obtaining a standing in Court (which they once could have exercised, but had lost) which would again enable them to assert or exercise their rights, and thereafter exercising such, the action of defendants became *ipso facto* a voluntary appearance, and waived any irregularity or lack of service which may have theretofore existed. Had they not been made parties by service before, they could not at that time come in and obtain the privileges sought except by consent, and it is clear that

they could not stay out and exercise rights and privileges which belonged only to parties to the action.

In *Bayzo v. Wallace,* 16 Nev., 290, defendant's attorney had filed a special appearance for the purpose of making a motion to dismiss, and on the next day entered into a stipulation as to the continuance of the main action, viz: "It is hereby stipulated and agreed by and between the parties in the above-entitled cause that said cause be continued until February 20, 1884"; and the Court there held that his agreeing to the continuance of the action was a general appearance.

In this case, by the stipulation, defendants not only obtained a postponement of the time in which they were required by statute to file their petition, but actually acquired the *right* to do so. And further, they obtained the right to defend the action, which they had lost; and still further, to take any action they may have taken on or before the first day of the May Term. So, having been let into Court for all purposes, it is clear to us that one of their capacities must necessarily have been that of a party to the action for concluding the contentions involved.

Finding the parties before the Court with nothing except the verified complaint, upon which motion was made for judgment by default and inquiry, we think his Honor erred in not granting judgment accordingly, unless the motion to dismiss, made in this Court by defendants, can be sustained.

The complaint shows that the title to the land was held by a trustee to secure certain securities held by defendants, for which the assignor of plaintiff (Brown) was liable; and that Brown, under an agreement, had the right to sell the pine timber upon the land, alleged to be worth $200,000, and apply the proceeds of sale in payment upon his said liability. It alleges "that defendants herein have allowed the Alligator Lumber Company * * * and other parties to go upon said premises and cut a large quantity of the valuable pine tim-

ber upon said lands, which is worth $25,000, or some other large sum, all of which should be applied to the payment of said indebtedness of Anderson Brown, referred to in the mortgage of Warren, Trustee, to Chard, Trustee." And in his prayer for judgment (among other reliefs) prays judgment "for the value of the timber which was permitted to be cut by defendants upon said lands, amounting to upwards of $25,000, and for costs."

We find some difficulty in determining whether it is a defective statement of a cause of action, which should have been taken advantage of by demurrer, or a statement of a defective cause of action, for which a motion to dismiss will be sustained in this Court. Clark's Code, sec. 242, and cases there cited. But we are of opinion that it is the former rather than the latter. Under their said agreement, Brown had the right to sell the pine timber and apply the proceeds in extinguishing his indebtedness. It does not appear that the trustee or defendants had any right to control or dispose of the pine timber. They had the right of possession of the land, and it inferentially appears that they had the actual possession, but the disposition of the pine timber belonged to Brown. It is not alleged that Brown was hindered in the exercise of his rights over the timber, but as the right of possession and also the actual possession of the land were vested in the trustee for the benefit of defendants, and it appearing that they allowed and permitted parties to cut a large quantity of said timber of great value, by which permission they became and were parties to the conversion, it follows that they too are liable in damages, and should account for the value of such quantity as was thus cut, and of which Brown was deprived. They having possession of the land, the parties had no right to enter thereon for any purpose except by their permission; and having so entered and trespassed upon Brown's property, the defendants become equally

liable with the trespasser for the damage done. It is true that the trespass is not charged in the complaint, but no advantage is taken of the defects in the statement of the cause by demurrer; so defendants are deemed to have waived such right of defense.

The plaintiff is entitled to judgment by default and inquiry, and his Honor erred in not granting the same.

Error.

BOGAN v. CAROLINA CENTRAL RAILROAD.

(Filed October 29, 1901.)

1. VERDICT—*Directing Verdict—Evidence—Conflicting.*

The court should not direct a verdict for the defendant where the evidence is conflicting.

2. NEGLIGENCE—*Contributory Negligence—Last Clear Chance—Railroads.*

Contributory negligence of the injured party will not defeat a recovery if it is shown that the defendant could have avoided the accident by exercising reasonable care.

ACTION by J. S. Bogan and wife Della A. Bogan against the Carolina Central Railroad Company, heard by Judge *Frederick Moore* and a jury, at May Term, 1901, of the Superior Court of RICHMOND County. From a judgment for the plaintiffs, the defendant appealed.

Jas. A. Lockhart, for the plaintiffs.
W. H. Day, for the defendant.

DOUGLAS, J. This is an action for the recovery of damages for injuries received by the plaintiff by being knocked off a trestle by the defendant's train. The issues and answers thereto were as follows:

"1. Was Della Ann Bogan injured by the negligence of the defendant? A. 'Yes.'

"2. Did she by her own negligence contribute to her injury? A. 'Yes.'

"3. Notwithstanding her negligence, could the defendant, by the exercise of ordinary care, have prevented the injury? A. 'Yes.'

"4. What damages, if any, has plaintiff sustained? A. '$1,500.' "

The defendant asked the Court to direct a verdict in its favor upon all the issues. As the evidence was conflicting, this request was properly refused. *Spruill v. Ins. Co.,* 120 N. C., 141; *Manufacturing Co. v. Railroad,* 128 N. C., 280, and cases therein cited.

The able counsel for the defendant contended that as the plaintiff testified that she was walking upon the trestle on Sunday afternoon with a man whom she has since married, and in whom she was then "deeply interested," neither of them was in a mental condition to see or hear anything except each other, and their going upon the trestle in such a frame of mind was negligence *per se*.

The learned counsel for the plaintiff seems to tacitly admit this proposition, but contends that as the jury have found that the defendant, by the exercise of ordinary care, could have prevented the injury notwithstanding the negligence of the plaintiff, this Court should not deny to a young bride-expectant the protection which the English Court of Exchequer extended to a hobbled donkey browsing in the public highway.

The Court charged the jury that if they believed the evidence they would find that the plaintiff was guilty of contributory negligence, and they so found. The plaintiff having won the case, does not appeal.

The charge was full and explicit, and, as far as we can see,

without error. Its essential features are substantially embodied in the following extracts: "That the burden of proving by the greater weight of the evidence the first, third and fourth issues was upon the plaintiff."

"That if the jury found from the evidnece that the defendant's servants in charge of the engine either discovered, or by exercising ordinary care might have discovered, that the plaintiff was walking upon the trestle, and was so situated that she could not, without peril, owing to her position on the trestle and the length and height of the trestle, get off the trestle in time to escape the train moving as it was, and that the defendant's servants in charge of the engine could, by the exercise of ordinary care, have stopped the train and avoided the accident after seeing the plaintiff in a place of peril on the trestle, or after they should have seen her and failed to do so, and the plaintiff was injured thereby, they should answer the first issue 'Yes.'"

"It was not the duty of the defendant, through its engineer, to lessen the speed of its train as it approached the trestle, until he had reasonable grounds to believe that the female plaintiff was on the trestle and not capable of caring for herself, and that if the jury find that as soon as the engineer discovered, or by the exercise of ordinary care could have discovered, that the female plaintiff was upon the trestle and in a place of danger, he did all in his power to stop the train, they will answer the first issue 'No' and the third issue 'No.'"

"If the engineer saw the female plaintiff while upon the track, and not upon the trestle of defendant, walking in front of the engine which was moving, he had the right to assume she would get off the track and take care of herself up to the last moment, and it would not be his duty to slack the speed or stop the train until he had reason to believe she was upon the trestle, and if the female plaintiff was injured under such circumstances, the law will impute it to her own negli-

gence, and you will answer the first issue 'No' and the third issue 'No.'"

"If the plaintiff was guilty of contributory negligence, and if the jury find from the evidence that the defendant could, by the exercise of ordinary and reasonable care, have avoided the injury, and failed to do so, and had the last clear chance to so avoid it, then the jury will answer the third issue 'Yes.'"

"You must be governed by the instructions applicable to the third issue which have already been read, just as though they were now re-read."

All these instructions were excepted to by the defendant, but we do not see how any of such exceptions can be sustained under our long and unbroken lines of authorities from *Gunter v. Wicker,* 85 N. C., 310, to the present time. The principle was fully settled at least as far back as *Pickett v. Railroad,* 117 N. C., 616, 30 L. R. A., 257, 53 Am. St. Rep., 611, where the doctrine is elaborately discussed. Among the more recent cases may be cited *Fulp v. Railroad,* 120 N. C., 525; *McLamb v. Railroad,* 122 N. C., 862; *Cox v. Railroad,* 126 N. C., 103; *Arrowood v. Railroad,* 126 N. C., 629.

The defendant excepted to the submission of the third issue, but such an issue was necessary for the proper determination of the case. Its form was practically suggested by this Court in *Denmark v. Railroad,* 107 N. C., 185, 189, and has since been repeatedly approved, expressly so in *Cox v. Railroad,* 126 N. C., 103. It is in almost the exact words used by Lord Campbell in *Dowell v. Navigation Co.,* 5 Ellis & B., 195 (85 E. C. L. R.), quoted with approval in the leading case of *Tuff v. Warman,* 89 E. C. L. R., 739, 756, where he says: "In some cases there may have been negligence on the part of the plaintiff remotely connected with the accident, and in those cases the question arises whether the defendant by the exercise of *ordinary care and skill,* might have avoided the accident, *notwithstanding the negligence of the plaintiff,*

as in the oft-quoted donkey case, *Davies v. Mann.* There, although without negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject." The case therein cited (*Davies v. Mann,* 10 M. & W., 545), in which the plaintiff's immortal donkey by its death established a great principle and left a world-known name, is regarded as the origin of the rule. The plaintiff fettered the front feet of his donkey and turned him into a public highway to graze. The defendant's wagon, coming down a slight descent at a "smartish" pace, ran against the donkey and knocked it down, the wheels of the wagon passing over it. The poor brute meekly closed its wearied eyes and gave up the ghost, an apparently immortal spirit that has long since put Banquo's ghost to shame. From such an humble beginning arose the great doctrine of the "last clear chance." In that case Lord Abinger, C. B., says: "The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for, as the defendant might, by proper care, have avoided injuring the animal and did not, he is liable for the consequences of his negligence, though the animal might have been improperly there." Again, Park, B., says: "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on the public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

It is impossible to follow this case through its thousands of citations in nearly every jurisdiction subject to Anglo-American jurisprudence. The Supreme Court of the United

States, in *Railroad v. Ives,* 144 U. S., 408, thus lays down the doctrine of contributory negligence as modified by that of the *last clear chance:* "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury can not be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann,* 10 M. & W., 546), that the contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." The doctrine was distinctly adopted in this State in *Gunter v. Wicker,* 85 N. C., 310, where the Court says with approval: "The rule is thus laid down by a recent author, 'Notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages"—citing *Davies v. Mann.* The rule thus laid down has ever since met the uniform approval of this Court, and is too well established to be the further subject of controversy. A large majority of text-writers sustain the rule. It is true one or two criticise it with more or less severity, but they are no match for the avenging ghost of Davies' donkey.

The origin of the doctrine of contributory negligence is generally ascribed to the case of *Butterfield v. Forrester,* 11 East, 60. There, the defendant, for the purpose of making some repairs to his house, which was close by the roadside, had put a pole across this part of the road, a free passage being left by another branch or street in the same direction. The plaintiff, about candle-light, but while there was yet

light enough left to discern the obstruction at 100 yards distance, while riding very rapidly, rode against the pole and was thrown and badly hurt. The Court directed a jury that, "If a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care, they should find a verdict for the defendant." This charge was sustained on appeal. Two things are noticeable in this case. The active negligence was that of the plaintiff, who alone had the last clear chance, and in spite of the fact that the testimony was apparently uncontradicted, the question was submitted to the jury. This doctrine, thus first enunciated in a most reasonable form, was soon carried beyond what could ever have been contemplated by the original case. Some Courts went so far as to say that the plaintiff could not recover if he was in the slightest degree negligent, no matter how gross might be the negligence of the defendant; and that the plaintiff must not only prove the negligence of the defendant, but must also affirmatively disprove any negligence on his part. Carried to such extremes, the doctrine finally became a burden upon the judicial conscience of the age, especially where human life was concerned; and hence the prompt and general approval given to the case of *Davies v. Mann.* This latter case, though a modification to a greater or less extent of many cases professedly based upon *Butterfield v. Forrester,* was not in substantial conflict with that case itself, but rather a just extension of its underlying principles.

As we find no error in the charge, which was based on evidence tending to prove every contention of the plaintiff, the judgment is

Affirmed.

TRIMMER v. GORMAN.

(Filed October 29, 1901.)

1. SPECIFIC PERFORMANCE—*Vendor and Purchaser—Contract.*

A vendor of land can not require a purchaser to take a defective title, though the vendor offers an indemnifying bond.

2. PRESUMPTIONS—*Presumption of Death.*

The absence of a person for more than seven years, without being heard from, raises a rebuttable presumption that the person is dead.

3. REFERENCES—*Findings of Court—Pleadings—Allegations in Pleadings—Admissions in Pleadings.*

While the supreme court will not review the findings of fact by a referee where there is evidence tending to prove them, they will not sustain them when in conflict with the allegations and admissions in the pleadings.

4. APPEAL—*Review—Exceptions and Objections.*

Questions will not be considered on appeal which are not presented by motion or exception in the case on appeal.

ACTION by B. F. Trimmer against J. L. Gorman and wife Elizabeth A. Gorman, heard by Judge *W. S. O'B. Robinson,* at December (Special) Term, 1900, of the Superior Court of COLUMBUS County. From the judgment, the plaintiff appealed.

J. H. Pou, and *T. B. Womack,* for the plaintiff.
J. B. Schulken, for the defendants.

FURCHES, C. J. It seems from a paper made an exhibit and part of the complaint, that in November, 1894, the plaintiff contracted to sell Elizabeth A. Gorman a tract of land, estimated to contain 400 acres, at the price of $4,000. This

contract is lengthy, not very explicit, and not entirely clear as to what it means. But it seems that we may understand by it that the plaintiff contracted to sell the land to the defendant Elizabeth at the price stated ($4,000); that said defendant was to pay plaintiff $600 at the date of the sale, $650 in December following, and the balance in deferred payments; that a deed was to be executed at the time of the second payment, conveying an absolute title in fee-simple, and the said Elizabeth was to secure the deferred payment by a mortgage on the land. The defendant made the first payment of $600, according to the allegation of plaintiff's complaint, and no more, and neither the deed nor mortgage was ever made. This is admitted by the defendant Elizabeth, and she alleges that she was a married woman at the time she bought the land and signed the contract, and is not bound thereby. And she alleges that she was induced to buy the land through the false and fraudulent representations of the plaintiff, by which she was badly cheated and defrauded. She also alleges that the plaintiff represented himself as a single man, and able to make and convey a good title to said land; but that since the date of said contract she has learned that he is not a single man, but has a wife living in the State of Virginia, who is unwilling to join the plaintiff in a deed conveying said land. She also alleges that plaintiff's title is defective, and for these reasons he is unable to make a clear and indefeasible title to said land; and asks that an account be taken of rents and profits and of the amount paid on the purchase price, and that she have judgment for the difference in her favor.

The contract contains a clause or provision that unless the second payment provided for is made, the contract shall be utterly void and of no effect; and plaintiff asks that such contract be declared void, for possession of the land, and damages for detention, and for waste.

It is admitted that the defendant Elizabeth, at the date of her contract, was a married woman, and has so remained ever since, and is so now. The plaintiff admits that he has been a married man, but alleges that his wife left him more than seven years ago, and that he has not heard from her since, and therefore the law presumes her to be dead. He also says that he has a good and valid title to the land, and is willing to indemnify her against the contingency of his wife's not being dead.

There was no evidence offered as to defective title, nor to sustain the allegations of fraud. The case was referred to H. L. Moffitt, Clerk of the Court, to take and state an account of the rents, injury to the land by defendant, and of the amounts paid by her thereon. This account was taken and reported, to which there were exceptions filed, and the case comes before us upon this report and exceptions.

Upon the argument here, the ground was taken by plaintiff that, while the contract could not be enforced against defendant Elizabeth on account of her coverture, she could not repudiate it and recover back any money she had paid on the same. This proposition of law is substantially correct, that while plaintiff could not enforce it, the defendant could; but we can not apply it in this case. The defendant is not bound to take a defective title, although the plainitff may offer to give her an indemnifying bond. The absence of plaintiff's wife only creates a presumption that she is dead. This is a presumption of fact that may be rebutted, and defendant's title rendered imperfect. *Dowd v. Watson,* 105 N. C., 476, 18 Am. St. Rep., 920; *Springer v. Shavender,* 118 N. C., 33, 54 Am. St. Rep., 708.

But this Court is a Court of errors, and only reviews such matters as are presented by the appeal. And the question presented for the plaintiff in the argument of his counsel is not presented by any motion or exception in the case on appeal.

As the case has been treated by the parties as a matter of account between them, consisting of the amounts the defendant Elizabeth had paid the plaintiff, and the value of rents, profits and damages on the other side, we will so treat it, and will only consider the account and exceptions thereto.

The Court adopts the finding of fact by the referee, and there seems to be some evidence tending to prove all of them. We can not review these findings, and where they are raised by the pleadings they must be sustained. The payment made by the defendant Elizabeth was by a cashier's check for $991.50, endorsed by her and collected by the plaintiff. There was evidence offered by defendant tending to show that the whole of this check was paid on the land she bought; while the plaintiff offered evidence tending to show that only $600 went on this land, and the balance, by agreement, was applied to the purchase of another tract of land bought by James Gorman, husband of defendant Elizabeth. The referee finds that it was all paid on the tract the defendant Elizabeth bought, and charges the plaintiff with the same. In this there is error, for the reason that it is in conflict with the allegations and admissions of the pleadings.

It seems singular that the defendant does not allege that she paid the plaintiff anything; and the only allegation as to any payment being made is in the complaint, which is as follows: "2. That in accordance with said contract, the said defendant Elizabeth A. Gorman paid to plaintiff the first payment of six hundred dollars, cash, but has failed and neglected to make payment of six hundred and fifty dollars due on the first day of December, 1895, or to comply with the terms of said contract, and that the said agreement has become forfeited, null and void, and of no effect." To this the defendant Elizabeth answers as follows: "2. That so much of article two of the complaint as alleges that the defendant Elizabeth A. Gorman paid the plaintiff the first pay-

ment of six hundred dollars, and has failed and neglected to make the payment of six hundred and fifty dollars due December 1, 1895, and to comply with the terms of said contract, is true, and that the other allegation in said article, is denied."

While we can not review the findings of fact by the referee, we can not sustain this finding. This payment is not raised by the defendant's answer, but, as it seems to us, is contradicted by the admission in her answer. The plaintiff alleges that she made the first payment of $600 and failed to make the next payment of $650, and she admits that this is true. This was not only a failure to allege that she had paid plaintiff $991.50, but an admission that she had not.

This exception of plaintiff should have been sustained to the extent of reducing the payment from $991.50 to $600, and the account being thus corrected, it should be affirmed.

Error.

MITCHELL v. RALEIGH ELECTRIC CO.

(Filed October 29, 1901.)

1. NEGLIGENCE—*Electricity—Insulating Wires—Ordinances—Master and Servant—Employee.*

   Absence of insulation on an electric light wire, in violation of an ordinance, is *prima facie* evidence of negligence.

2. NEGLIGENCE—*Contributory Negligence—Evidence—Sufficiency—Electricity.*

   There is no evidence in this case of contributory negligence on the part of the intestate in allowing the wire he was holding to come in contact with the wire of the electric light company.

3. PRESUMPTIONS—*Negligence—Electricity.*

   It will be presumed that an electric light company had notice of an abrasion in its insulated wire where the abrasion had existed for two years.

4. NEGLIGENCE—*Proximate Cause—Contributory Negligence.*

   Where the negligence of the defendant appears, and there is no evidence of contributory negligence by the intestate, the court should charge that the negligence of the defendant was the proximate cause of the death of the intestate.

5. QUESTIONS FOR COURT—*Contributory Negligence.*

   What is contributory negligence upon a given state of facts is a question of law for the court.

MONTGOMERY, J., dissenting.

ACTION by Sallie Mitchell, administratrix of James Mitchell, against the Raleigh Electric Company, heard by Judge *H. R. Starbuck* and a jury, at April Term, 1901, of the Superior Court of WAKE County.

This action was brought to recover against defendant company damages on account of the alleged negligent killing of intestate.

It was alleged that intestate, while at work upon the line of the Bell Telephone Company in stringing a wire upon its line across and over defendant company's wires, the wire being strung by intestate came in contact with the wire of defendant company at a point at which it had negligently permitted to remain uninsulated, and thereby became charged with electricity, which was conveyed into the body of intestate, causing his death.

From the evidence of plaintiff's witnesses, it appears that intestate was in the employ of the Bell Telephone Company on January 14, 1899. While so employed, he was assisting another employee in stringing the wires upon the poles of the said company, at or near the intersection of Edenton and Blount Streets, in the city of Raleigh. The wires of said company were supported upon poles, and were ten feet higher than the wires of defendant. Intestate was on the north side of Newbern Avenue; his fellow-employee was upon the pole on the south side; intestate had the coil of wire on his left arm or shoulder; a rope or handline had been fastened to the end of the wire, and it was passed over a limb and through some trees on the north of the street over and across defendant company's wires, and placed in the hands of the employee of the Bell Company's pole, who was drawing it to him for the purpose of stringing the wire, to which it was fastened, upon the pole upon which he had climbed. Intestate was paying out the wire through his hands, and while doing so, it came in contact with defendant company's electric wire, and he was "caught" by a current of electricity transmitted to the wire in his hands and died in a minute—before the wire was cut. Some two years before this occurrence, the witness McFarland testified that he and another man (Hicks) were putting a 'phone wire across at the same place, and while doing so (but the wire was then drawn across the *arm* of a pole) Hicks carelessly permitted it to slack and

fall across the Electric Company's wire, making an abrasion in the insulation two inches wide, and Hicks got "caught" by a current of electricity, but he immediately cut the wire and released him. This was at the same place where intestate got "caught." He had noticed the place several times in the same condition between the two accidents. Bonner, the electrician, testified that about fifteen minutes after the occurrence, he went to the place where this man was killed by a current from the wire of the defendant company's wire where the insulation had been rubbed off which was the width of a lead pencil; the Bell line was lying in the place where the insulation was rubbed off; that about two years before he had noticed a place where the insulation was rubbed off; it was within ten feet of this place; caused by a 'phone wire pulling across the electric wire; it was the same size as the place he saw there the day of the accident, and did not notice but one place which was rubbed off on that day.

Several witnesses testified that the proper way for a man who knew his business would have been to have passed the rope or hand-line and wire over the arm of a tall Bell pole and then pulled it across, thus avoiding contact with the electric wire, instead of through the trees, as was done. The ordinance of the city, which was in evidence, is as follows:

"Section 7.—All electric light and power wires, excepting trolley wires for electric railways, must be covered with a durable water-proof insulation, not less than two coatings."

After the close of plaintiff's evidence (defendant having declined to introduce any), plaintiff requested the Court to give certain special instructions, which were refused, and plaintiff excepted. Verdict was rendered for defendant, and plaintiff appealed from the judgment.

J. B. Batchelor, for the plaintiff.

R. L. Gray, for the defendant.

COOK, J. (after stating the case). The plaintiff was clearly entitled to have the instructions hereinafter discussed and prayed for, given to the jury, if not *in the exact language*, certainly in substance, which does not appear in the charge as given.

The defendant company was engaged in the business of manufacturing, producing, leasing and selling light made from the use of electricity, which is the most deadly and dangerous power recognized as a necessary agency in developing our civilization and promoting our comfort and business affairs. It differs from all other dangerous utilities. Its association is with the most inoffensive and harmless piece of mechanism, if wire can be classified as such, in common use. In adhering to the wire it gives no warning or knowledge of its deadly presence; vision can not detect it; it is without color, motion or body; latently and without sound it exists, and being odorless, the only means of its discovery lie in the senses of feeling, communicated through the touch, which, as soon as done, becomes its victim. In behalf of human life and the safety of mankind generally, it behooves those who would profit by the use of this subtle and violent element of nature to exercise the greatest degree of care and constant vigilance in inspecting and maintaining the wires in perfect condition. Recognizing this peril to those in its use, or who, in the exercise of their liberty in passing along the streets of the city, might accidentally come in touch or contact with electric wires, or who in the management of their business affairs would have other wires suspended over the streets in close proximity to electric wires, the city authorities of Raleigh deemed it proper to require that all such wires should be covered with durable water-proof insulation. The duty imposed under this ordinance was imperative. Its strict observance was necessary for the safety of all. The electric wires *must* be insulated, and it was no less the duty

of defendant company to keep them so at all times and at all places. The nature of the mischief intended to be remedied required it. A failure to comply with this ordinance was *prima facie* evidence of negligence, and there being no evidence in rebuttal offered by defendant company, and none appearing from the evidence of plaintiff, it was error in his Honor in refusing to give instruction No. 1 prayed for by plaintiff, viz: "If the jury find from the evidence that the defendant left its wires uninsulated, as stated by the witnesses, this was negligence on the part of the defendant, and the jury will so find."

In *Union Pa. Railway Co. v. McDonald,* 152 U. S., 262, the Court held that where the statute imposed a duty upon a railroad company to fence its slack-pits, its failure to do so was evidence of negligence, for which it was liable. In the case of *Clements v. La. Electric Co.,* 44 La. Ann., 692, 32 Am. St. Rep., 348, 16 L. R. A., 43, it is held by the Supreme Court of Louisiana that the failure of defendant company to have the splices on its wires perfectly insulated, when so required to do by the ordinance of the city, was negligence on its part. The ordinance being a contract with each and every inhabitant of the city, its standard of duty was fixed by it, and its failure to comply with it was negligence. Also to the same effect it is held in *Tobey v. Burlington, etc., R. Co.,* 94 Iowa, 256, 33 L. R. A., 496, and cases there cited; *Hayes v. Mich. Cent. Ry. Co.,* 111 U. S., 228:

"A company maintaining electric wires over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others might have the right to go, either for work, business or pleasure, to prevent injury. It is the duty of the company under such conditions to keep the wires perfectly insulated, and it must exercise the utmost care to maintain them in such condition at such places. And the fact that it is very expensive or inconvenient to so insu-

late them, will not excuse the company for failure to keep their wires perfectly insulated. So, one who, in the course of his employment, is brought into close proximity to electrical wires, is not guilty of contributory negligence by coming in contact therewith, unless done unnecessarily or without proper precautions for his safety. And where the wires, if properly insulated, would not be a source of danger, such person is only obliged to look for patent defects and not for latent defects; and a person who touches an electrical wire from which the insulation is worn off, if he does it in ignorance of the nature and condition of the wire, is not negligent." Joyce on Electric Law, sec. 445.

The evidence in the case at bar shows that defendant company's wires were strung on poles along the same street with those of the Bell Telephone Company. At places, as was in this case, one set of wires diagonally crossed the other at a distance of only about ten feet. Each had a common right, and it was the duty of each to exercise all reasonable precautions for the prevention of injury to the servants who may be sent there in the performance of duty. Each is bound to know that the servants of the other may come in contact with its wires. The fact that defendant company's wire was insulated, was calculated to induce intestate to rely upon its safety, even if the wire he was paying out should come in contact with it. *Newark Electric Light Co. v. Garden*, 78 Fed., 74, 37 L. R. A., 725, 6 Am. Elec. Cases, 275.

We think his Honor also erred in refusing the third instruction prayed for, viz: "There is no evidence of contributory negligence on part of the intestate of plaintiff, and the jury will therefore find the second issue 'No.'" What is contributory negligence upon a given state of facts, and whether there is any evidence, are questions of law for the decision of the Court; and a review of the evidence fails to discover any act *done* by the intestate which he *ought not* to have done, or the omission to do any act which he *ought* to

have done. The witnesses testified that the proper way would have been to have conveyed the rope or hand-line and wire over the arm of the tall Bell pole not far off (and not through the trees as was done), which any man who understood his business would have done. But it also appears from the evidence that a similar accident occurred at or near the same place when the *arm* of a pole was used and the wire carelessly allowed to slack and fall upon the electric wire. So, if intestate used a different mode to accomplish his purpose, that act would not necessarily be negligence upon his part. And having undertaken to use the trees in supporting his wire while conveying it over and across the defendant company's wire, he had a right to presume that the electric wires were properly insulated as required by the ordinance; and it was his duty to look for patent defects only. *Clements v. La. Elec. Co., supra.*

There is no evidence to show that intestate so managed or mismanaged his wire as to cut through the insulation of defendant company's wire, nor is there any evidence to show that the abrasion in the insulation was seen, or by due care could have been seen by him—in extent, the evidence shows that it varied from the width of a pencil to two inches, and was suspended 30 feet above the street. It does appear that his wire came in contact with and rested upon the electric wire, but there is no evidence to show that it caused the abrasion in which it rested; nor was there any evidence to show that he knew of its existence. The *fact* that it *was* there, and had been for two years, and had been seen and known to exist there for two years by at least two people (who were witnesses in this case), the Court must presume that it was or ought to have been known by defendant company. So, where an electric light company permitted a live wire to remain on the surface of a street for three weeks, and a traveller was injured by contact with such live wire, it was held that

the Court would presume, after such a period, that the company had notice of the fact and was liable for the injury. Joyce, *supra*, sec. 450.

The fourth instruction asked was: "There is no evidence of any other cause of death of plaintiff's intestate, except from the electricity coming from the wire of the defendant; therefore, if the jury find from the evidence that the death of the intestate of plaintiff was caused by the current of electricity passing into his body from the charged wire of the defendant, the jury will find the third issue 'Yes' "—the third issue was, "was the negligence of the defendant the proximate cause of the death of intestate of plaintiff?"

The negligence of defendant appearing, and no evidence of contributory negligence by intestate, his Honor erred in refusing this instruction. There was evidence tending to show that intestate was killed by the electrical current, which clearly appears; and the jury should have been charged as requested.

As there will have to be a new trial, and the questions raised by the other exceptions may not again arise, we think it unnecessary to discuss them.

New trial.

MONTGOMERY, J., dissents.

SMITH v. WILMINGTON AND WELDON RAILROAD CO.

(Filed October 29, 1901.)

MASTER AND SERVANT—*Assumption of Risk—Negligence—Personal Injuries.*

Where an employee engaged in work obviously dangerous is ordered by the employer to change the manner of performing the service to one which the employee knows to be more dangerous, the employee assumes the risk.

SMITH *v.* RAILROAD.

ACTION by Frank Smith against the Wilmington and Weldon Railroad Company, heard by Judge *W. A. Hoke* and a jury, at February Term, 1901, of the Superior Court of SAMPSON County.

Plaintiff alleges that on the 19th day of May, 1896, he was an employee of defendant company, engaged with a fellow-workman in cutting a brake-beam by blocking so that it might be bolted to the hangers attached to the saddle; that defendant company, through its representative, Nelms, suddenly commanded them to desist from their usual and ordinary manner of cutting said brake-beams, to-wit, by blocking, which was a safe and prudent method, and to proceed at once to perform the work in an entirely different manner, to-wit, by chipping, which plaintiff now knows was not only unnecessary —the one method being equally proper and correct as the other—but likewise unsafe and dangerous; and while so engaged, by the method of chipping, a chip flew off and seriously injured his right eye, on account of which he brings this action to recover damages for the injury sustained, pursuant to the negligent order given by Nelms.

Upon the close of the plaintiff's evidence, the defendant company moved to dismiss the action under the statute, which was refused, to which it excepted, and introduced its evidence, and at the close of which it renewed its motion, which was again refused.

Divers special instructions were prayed to be given, and exceptions taken to the refusal to give such as were refused. Verdict was rendered for the plaintiff, and the defendant appealed from the judgment.

F. R. Cooper, J. D. & E. W. Kerr, and *Geo. E. Butler,* for the plaintiff.

Junius Davis, and *H. L. Stevens,* for the defendant.

COOK, J. The motion to dismiss made by defendant company in conformity to the rules of the statute ought to have been allowed. The evidence does not show any breach of duty by the employer. There is no suggestion of defects in the tools employed, place of work, or danger in the performance of the work known (or ought to have been known) to the employer and not imparted to the employee—the only contention being that the method was changed.

Plaintiff and Hardison, another employee, were engaged in "blocking" a steel brake-beam, that is, "it was necessary to cut it down from a width of three-quarters inch to a depth of one-sixteenth inch to let a hanger come down and fit and join on to a cylinder," from which, we understand, that an incision was necessary to be made in the beam three-quarters inch long and one-sixteenth inch deep to let in the hanger, for it to fit in and join to the cylinder. Plaintiff and his coworker were doing this work in the usual way by "blocking," that is, one would hold the chisel upon the beam and the other would strike it straight down with a maul, thus driving it into the beam. After cutting down to the right depth—making an incision at each end—the beam was turned over and the piece was blocked out, and went down. While so working, defendant's representative, Nelms, ordered that the beam be "chipped" instead of "blocked," saying that the company had ordered these beams chipped out, and he wanted them chipped. It was claimed that blocking weakened the beam. In chipping, one held the chisel upon the place to be cut, and the other struck upon the chisel with the maul, forcing off gradually small pieces at a time, until the desired width and depth were reached. Under the mode of "blocking," the chips or small pieces went directly downward; while under that of chipping, they would "fly off with tremendous force, and you can't tell where they will strike or which way they will go."

Plaintiff had been using the maul, but when they changed from blocking to chipping, Hardison relieved plaintiff by taking the maul, and let him hold the chisel. Plaintiff was holding the chisel at an angle, and at the third strike a chip flew off, struck the cuff (which projected from the beam close to the chipping) and bounded back and upwards, striking plaintiff in the eye, doing the injury complained of.

When Nelms ordered that the beams be chipped, Hardison replied: "I don't like to chip them out." He replied, "Well, you must chip them," and moved right off. Plaintiff said: "Hardison, what are you going to do?" He replied: "I don't like to chip them out; might be danger getting hurt." Plaintiff said: "Well, we must obey orders or leave." He said: "That's all facts." Plaintiff said: "Let's go to work and chip them out."

It does not appear clearly from plaintiff's evidence, as stated in the record, whether he had ever before done any chipping. In his direct examination, he says: "This was the first one he had ever done so; prior to that had always blocked them." In his cross-examination he said: "Had to handle castings, and sometimes, when rough, chipped some smooth. Chips fly in chipping castings; some danger in it. Chipped castings, off and on, all the time. * * * The steel beams came into use after that." However, it is clear that he had not theretofore chipped any steel beams. Plaintiff also testified that he had no time to reflect or think about it when the order to chip was given. He was told to do it, and he did it; and if he had, it would have done no good. It was obey your orders or be discharged.

There was evidence showing that the chipping of castings was of frequent occurrence, and that chipping them was more dangerous than chipping steel; that castings were more brittle and would break up into more pieces; while steel was tougher and more likely to be in one piece at a time.

Defendant company claimed that "blocking" weakened the beam, and therefore wanted the incision made by chipping which, as it claimed, did not. In other words, it was *how* the work should be done, and not *what* should be done in doing it. The mode or system in the execution of work lies exclusively within the discretion and will of the master, over which the servant has no control; and the master is not liable to him for personal injuries received, although the master might have adopted a safer method. 3 Elliott on Railroads, sec. 1289.

Plaintiff, as it appears, was a man of intelligence and an experienced workman. For some considerable time he had been employed in the shops of defendant company, where the beams had been chipped as well as blocked; whether upon castings or steel it was not material, as the process was the same. The danger and hazard of both modes or systems were apparent to plaintiff, and when he changed the work from one to the other, he assumed all the ordinary hazards naturally incident to the work. In *Myers v. The W. C. D. Co.*, 138 Ind., 590, it is held that the fact that the service is a dangerous one adds nothing to the liability of the master for injuries resulting from the natural and ordinary incidents of the undertaking. The test is not the *danger* of the employment, but the neglect of the master in the duty which he owes the servant. When the service to be performed is attended with obvious dangers, there is no duty upon the master to warn the servant against it. And in *Turner v. Lumber Co.*, 119 N. C., 387, it is held that if a servant has equal knowledge with the master of the dangers incident to the work, and has sufficient discretion to appreciate the peril, his continuance in the employment is at his own risk.

Plaintiff contends that he did not have time to reflect—"Hadn't given thought to danger of chipping; had no time to reflect or think about it." He does not contend that he did

not know that the chipping mode was dangerous, and it does not seem to us that he brings himself within the rule of sudden risk, undertaken in response to an order which must be executed speedily without having time to take in the situation.

An order to do a dangerous act in the performance of a duty (as was the case in *Shadd v. Railroad,* 116 N. C., 968, and also in *Haltom v. Railroad,* 127 N. C., 255), is not involved in this case; it was an order to change the *system* of doing the work. In making this change, no emergency existed. Plaintiff could foresee the possibility of danger as well as the employer. It was obvious to him that the chips would have to escape, and, being an experienced man, must, indeed ought, to have known that violent blows by the maul would hurl them off with great force and in various directions. But the real cause of the injury was not by a chip flying *from* the chisel held by plaintiff, but by one which rebounded from the cuff, which was very near and projected from the beam. The possibility that a chip would strike the cuff and thence rebound and strike plaintiff's eye, depended upon numerous contingencies—the angle at which the chisel was held with reference to the cuff—the distance of plaintiff's eye from the cuff—the position of his head above the cuff with the relation to the position of the chisel upon the beam, whether squarely or diagonally across—the force of the blow by the maul and the shape of the chip which struck the cuff. It is hardly probable that a similar result under like circumstances could be accomplished again, even by design—certainly it was not done by either of the two licks first given.

From all the evidence in the case, we are unable to see any breach of duty due by defendant company to plaintiff. In accepting the employment in the shops, plaintiff assumed the ordinary risks and dangers incident to the work to be done on the beams, and being accidentally injured, the burden must be borne himself.

Error.

CHEEK v. SUPREME LODGE KNIGHTS OF HONOR.

(Filed November 5, 1901.)

1. PLEADINGS—*Demurrer—Complaint.*

Facts not alleged in the complaint, but relied on by the defendant as a defense, will not be considered on appeal from an order overruling a demurrer to the complaint.

2. INSURANCE—*Benevolent Associations—Complaint—A Cause of Action—Demurrer—Contracts.*

The complaint in this case, upon a certificate of insurance of a benevolent association, is held to state a cause of action upon demurrer thereto.

ACTION by Pena C. Cheek against the Supreme Lodge of the Knights of Honor, heard by Judge *W. B. Council,* at Spring Term, 1901, of the Superior Court of ALAMANCE County. From a judgment for the plaintiff, the defendant appealed.

Chas. E. McLean, for the plaintiff.

Watson, Buxton & Watson, and *Shepherd & Shepherd,* for the defendant.

FURCHES, C. J. In 1881 Henry A. Cheek became a member of Alamance Lodge, Knights of Honor, and received a certificate of insurance of $2,000 for the benefit of his wife, who is the plaintiff in this action. The husband is dead, and the plaintiff brings this action and files the following complaint, in which she makes the card called "certificate of membership" in a "defunct" lodge a part thereof:

"The plaintiff alleges:

"1. That she is the widow of the late Henry A. Cheek, of Alamance County, North Carolina.

"2. That her said deceased husband was in his lifetime a

member of Alamance Lodge, No. 2,595, Knights of Honor, and that he received the degree of Manhood on the 2d day of November, 1881, at the age of fifty-three years.

"3. That on the 16th day of December, 1881, her said husband had issued to him by the defendant Benefit Certificate No. 117,129, for two thousand dollars, plaintiff then being his wife, a copy of which certificate is hereto attached, marked Exhibit "A," and asked to be taken as a part of this article of complaint, just as if here set out.

"4. That the statements made by her said husband for membership, and the statements made by him to the medical examiner, are true, and that he complied with the laws, rules and regulations governing the Order at the time when said certificate was issued, and with those subsequently enacted for its government, and was in good standing at his death.

"5. That said Alamance Lodge, No. 2,595, Knights of Honor, on the 10th day of June, 1896, forfeited its charter, and that on the 24th day of September, 1896, a defunct Lodge Member's Card was issued by defendant to plaintiff's said husband, a copy of which is hereto attached, marked Exhibit "B," and asked to be taken as a part of this article of complaint as fully as if here set out at length.

"6. That on May 23, 1896, the said husband of plaintiff was stricken with paralysis, from which he never recovered, and until long after the said 10th day of June, 1896, he was confined to his house in almost a helpless condition, and never did he recover so as to be able to walk, so that the requirement that he pass a medical examination indorsed upon the margin of said card was impossible of fulfilment.

"7. That plaintiff's husband paid his assessments and dues regularly until his affliction, and afterwards his family continued to pay them just as he had done, and he never changed his rate of assessment.

"8. The plaintiff's husband did not learn of the forfei-

ture of its charter by said Alamance Lodge, No. 2,595, until in September, 1896, and only a few days before the date of said defunct Lodge Member's Card; his condition forbade his sooner learning of it or informing himself, and even then the knowledge came to him through the kindness of a friend.

"9. That the total amount of assessments paid for and on account of aforesaid Benefit Certificate is more than one thousand three hundred dollars, to-wit, one thousand three hundred and nine dollars, as plaintiff is informed and verily believes.

"10. That said husband of plaintiff departed this life in the summer or early fall in the year 1899.

"11. That the plaintiff, before commencing this action, demanded payment of the defendant for and on account of said Benefit Certificate of the amount thereof.

"12. That said defendant is a corporation authorized by law, and organized in pursuance thereof.

"13. That said Benefit Certificate was never surrendered or cancelled at his request, and another certificate issued therefor, but it remained in his possession till his death, and is now in possession of plaintiff.

"Wherefore, plaintiff demands judgment—

"1. That she recover of defendant the sum of two thousand dollars, less the assessments unpaid at his death, which amount to less than one hundred and fifty dollars, to-wit, one hundred and forty dollars.

"2. For such other relief as plaintiff may be entitled to."

To this complaint the defendant demurs, and, as the demurrer admits the facts stated in the complaint, the only question presented for our consideration is whether the complaint states a cause of action. The defendant is therefore deprived of the benefit of any fact presented in its brief that does not appear in the complaint. And, from the brief and argument of defendant, it seems to us that it is a case that should have been tried upon answer and not upon demurrer.

We understand from the defendant's brief that the plaintiff's defense is restricted upon the ground that Alamance Lodge had been suspended and was "defunct," as it is termed in the brief; and that the insured (Henry) had failed and neglected to apply to any other lodge for admission, as defendant alleges he should have done; and that there were unpaid assessments due at the time of his death. But the complaint does not show these facts, and therefore we can not, and do not, pass upon their sufficiency or insufficiency, if they were presented.

It appears from the complaint that the insured had a stroke of paralysis in May, 1896; that the Alamance Lodge was suspended on the 10th of June, 1896, but the insured had no information as to said suspension until September, 1896, and that very soon after he learned of the suspension of Alamance Lodge he received the following certificate, dated September 24, 1896:

"KNIGHTS OF HONOR.

"DEFUNCT LODGE MEMBER'S CERTIFICATE.

"This is to certify that Henry A. Cheek was a member of Alamance Lodge, No. 2,595, Knights of Honor, and in good standing on the 10th day of June, 1896, the date said Lodge forfeited its charter, and that said Lodge is now defunct.

"Said Henry A. Cheek received the degree of Manhood on the 2d day of November, 1881, at the age of fifty-three years. Rate of assessment, $3.50. He has paid 374 assessments, beginning with No. 93, and has paid to No. 466, inclusive.

"Total amount paid, $1,309, and is a full-rate member.

"Witness my hand and the seal of the Supreme Lodge, this 24th day of September, 1896, at St. Louis, State of Missouri.

"B. F. NELSON,

"(Seal.) *Supreme Reporter.*

"Seal of Supreme Lodege, Knights of Honor.

"NOTE.—This certificate may be deposited in any lodge in accordance with the provisions of Article VI., sec. 3, Supreme Lodge Constitution.

"NOTE.—The Lodge accepting this card must collect all assessments, commencing with No. 467, if less than 60 days have elapsed between June 10th, 1896, and the date the member is balloted on by the lodge accepting this card. If more than sixty days, then the member must pass a medical examination and pay assessments No. 467 to 473, inclusive, and the assessments to be paid by the members for the month in which the member is elected.

"The holder of this card must pass a medical examination."

It is seen from this card, and the card so states, that the sixty days from the suspension of Alamance Lodge in which the insured might have been transferred to another lodge without re-examination, had expired; and it appears from the complaint that the insured at that time could not have passed an examination; that he had been in this condition from the time he was stricken with paralysis in March, 1896, and so remained until his death in 1899.

It is not shown by the complaint that it was the fault of the insured that he did not receive this "defunct" card earlier than he did. But the effect of not receiving it until after the 24th of September was to effectually deprive the assured of his right to be transferred to another lodge, without having to undergo a physical examination, which he could not do, and thereby to deprive him of his membership in the association.

It is held in *Bragaw v. Knights and Ladies of Honor,* 128 N. C., 354, that the secretary and treasurer of that Lodge was the agent of the Grand Lodge, although the by-laws provided that he should be deemed to be the agent of the local lodge. And if the Secretary and Treasurer is the agent of

the Grand Lodge, we see no reason why the other officers of the local lodge are not the officers of the Grand Lodge, and why the Grand Lodge is not responsible for the delay in giving the assured the "defunct" card. It may be that it is not, but, if so, it does not appear by the facts stated in the complaint.

We therefore see no error in overruling the demurrer.

No error.

LEVIN v. TOWN OF BURLINGTON.

(Filed November 5, 1901.)

MUNICIPAL CORPORATIONS—*Damnum Absque injuria—Smallpox—Illegal Arrest—Acts 1893, Ch. 214.*

A city is not liable to one arrested on the ground of having been exposed to smallpox, where the officers act without malice.

DOUGLAS, J., dissenting.

ACTION by Koen Levin against the City of Burlington, heard by Judge *W. B. Council,* at May Term, 1901, of the Superior Court of ALAMANCE County. From a judgment for the defendant, the plaintiff appealed.

Bynum & Bynum, for the plaintiff.
C. E. McLean, for the defendant.

FURCHES, C. J. This is an action to recover damages for the wrongful arrest, detention and ill-treatment of plaintiff by the defendant city. The defendant demurred *ore tenus* to plaintiff's complaint, and we know of no better way of stating the case than by inserting the entire complaint, which is as follows:

"The plaintiff, for cause of action, alleges:

"1. That he is a resident of the city of Burlington, and is a peddler by occupation.

"2. That the city of Burlington is a municipal corporation, duly chartered by the Legislature of North Carolina, and was managed at the times hereinafter mentioned by a Mayor and a Board of Aldermen or Commissioners, duly elected by the people within the corporate limits of the said town; and by policemen, duly appointed by the said Board of Aldermen or Commissioners.

"3. That on or about the .. day of February, 1899, the plaintiff came to the town of Burlington, and stopped for one night at a boarding-house in said town, kept by Mrs. Mary Ingle, where he had been stopping when in Burlington, for some months, leaving said town the next morning with his horse and wagon and goods, and went to the factory known as Altamaha, nine miles distant from said town, for the purpose of selling his goods and wares, as he was licensed to do by the laws of North Carolina.

"4. That plaintiff had never in his life been exposed to smallpox up to that time.

"5. That after arriving at Altamaha, one James Zachary, who was the duly appointed police officer of said town of Burlington, as plaintiff is advised and believes, followed him from Burlington to said Altamaha, and arrested him, under and by virtue of an alleged warrant issued by the Mayor of said town of Burlington.

"Plaintiff does not know the charge contained in said warrant, and has applied to the Mayor for said warrant, who told him it had been destroyed; but he avers, from information and belief, that said Mayor issued said warrant, and sent the same to Altamaha by the police officer of the town, and had plaintiff arrested, under special authority of said city, and

under special instruction given by said Board of Aldermen or Commissioners.

"6. That the said Zachary, the policeman of the said town of Burlington, professing to act by virtue of said warrant, did arrest this plaintiff at Altamaha, against his earnest protest, and carried him back to the town of Burlington; that when he got there, he was told by the policeman that he had to go in the house of Mrs. Mary Ingle and stay there fifteen days; that smallpox had broken out in the city, and that this plaintiff had stayed there the night before, and had to go there and stay; that plaintiff protested that he had never been exposed to smallpox in his life; that he had spent the night before there in a room by himself, with no knowledge of any smallpox in the town, and had left in the morning, not being exposed, and he earnestly protested against being put in the house; that he was informed at the time that there was a man in the house who was declared to have smallpox; that he asked for the Mayor to be sent for, or that he be examined before the Mayor; but the Mayor refused to come to him or to allow him to be carried before the Mayor; but he was told by the said policeman he had to go into said house; that he begged the said policeman and one of the Board of Aldermen, one Moore, who, as he is advised and believes, was acting for the said town by the authority of the town, not to confine him in a house where smallpox was, as he had a great dread of the disease, but to put him in another house, and he would pay all the expenses, and pay for a man to watch him and see that he did not run away; that this request was refused, and he then begged them to put him out in a field, and hire a man to watch him, and he would pay all the expenses, and also for the expense of keeping his horse; but this was also refused, and he was told by said Moore and Zachary he was to go in said house; that he told them that he had been vaccinated several times, and showed the marks; but in spite

of all his protestations, he was forced to go into said house where the man was down with smallpox, and was kept there for twenty-one days; his horse was taken from him, and his goods also put in the house, and kept there during the whole time plaintiff was.

"7. That the said house was not a house of detention, or a pest-house, provided by the town for quarantine purposes, at all, and the imprisonment of plaintiff was false and illegal.

"8. That against the protest of plaintiff, he was forced to be again vaccinated twice during his confinement, and that neither of them had any effect; and they made this plaintiff pay for said vaccination.

"9. That during his confinement in said house, the man who was declared to have smallpox died in said house; that before his death the officers in charge tried to force this plaintiff to go into his room and wait on him, but this he refused positively to do.

"10. That when he was released he found that the authorities of the town had been using his horse, and that he had been badly treated, very much reduced in flesh and depreciated in value, to-wit, in the sum of $25.00.

"11. That he had about $150.00 worth of goods, which, by reason for his exposure during all this time to smallpox, and to him; most of them he has never moved from the house, and byreason of this he was damaged $150.00.

"12. That his business was stopped during all this time, and he lost all the profits, as well as his time, which was worth reasonably the sum of five dollars per day.

"13. That the plaintiff suffered great agony of mind by reason of his exposure during all this time to smallpox, and by the great indignity and false arrest and imprisonment.

"That after being released it was several months before he could do anything at his business, as it became known he had been in the house and exposed to smallpox, and people

would not have anything to do with him; and he was damaged by this in the sum of five hundred dollars.

"That by reason of his loss in his business, and his loss of his goods, and damage to his wares, and the indignities to his person, and his false arrest and imprisonment, and agony of mind and suffering, he was damaged in the sum of five thousand dollars.

"Wherefore, plaintiff demands judgment for the sum of five thousand dollars, and his costs of suit, to be taxed by the Clerk."

The demurrer admits the facts, and from these facts it must be admitted that the plaintiff received heroic treatment and was damaged. But it is not every damage that creates a cause of action. This is where there is damage without injury—*damnum absque injuria*—damage caused by lawful means; as where one is arrested under regular process of law, charged with a violation of the criminal law of the State, but, upon investigation or trial, it appears that he was not guilty of the crime charged, and should not have been arrested. By such arrest and detention he has been damaged, but he has no right of action unless he can show that such arrest was malicious. So, with the plaintiff, if he was arrested and detained by the officers of the law, under the process of the law, and for the purpose of enforcing the law, he has no right of action, unless he can show malice or improper conduct on the part of the officers in its execution. And then his right of action would be against the party or parties maliciously instituting the proceedings, or the officers for improper conduct in making the arrest and detention. That a municipality may be sued and held liable for damage in many cases is held in *Lewis v. City of Raleigh,* 77 N. C., 229; *Moffitt v. City of Asheville,* 103 N. C., 255, 14 Am. St. Rep., 810, and *Shields v. Town of Durham,* 118 N. C., 450, 36 L. R. A., 293. But these and such cases are for the neg-

lect in failing to perform some required duty—such as erecting and keeping in proper condition city prisons, by reason whereof the health of prisoners has been seriously impaired the failure to work and keep the public streets in repair and free from obstructions, whereby some person suffers injury. These are distinguishable from the case under consideration, where public officers are in the exercise of a public duty, and engaged in enforcing a public law for the public good. They seem to have been acting under Chapter 214, Laws 1893. And if there was any doubt as to this, the plaintiff in his brief expressly alleges that the defendant was acting under sections 14, 15 and 25 of Chapter 214, Laws 1893.

It seems to be settled in this State that a municipal corporation can not be held liable in damages for the enforcement of a public law for the public good. But we will not undertake to run anew, and mark the dividing line between cases in which municipalities are liable for damages and those in which they are not liable. This has been done in *McIlhenny v. City of Wilmington*, 127 N. C., 149, and cases there cited. And if we were to attempt to do so in this case, it would be to repeat the arguments and authorities cited in that case.

We see no error, and the judgment is

Affirmed.

BROOKS v. SULLIVAN.

(Filed November 5, 1901.)

NEGOTIABLE INSTRUMENTS—*Bills and Notes—Transfer Before Maturity—Bona fide Holder—Acts 1899, Ch. 733, Secs. 25-27.*

An assignee of a negotiable instrument to secure a debt due him was not a *bona fide* purchaser, without notice, where he paid no money in consideration of such assignment, until made so by Acts 1899, Ch. 733, Secs. 25-27.

ACTION by A. F. Brooks against J. H. Sullivan and J. B. Gerringer, heard by Judge *E. W. Timberlake* and a jury, at January (Special) Term, 1901, of the Superior Court of GUILFORD County. From a judgment for the defendants, the plaintiff appealed.

T. B. Womack, for the plaintiff.
J. T. Morehead, for the defendants.

CLARK, J. The only question is whether, when a negotiable note is transferred before maturity as collateral security for a pre-existing debt, the assignee is such holder for value that he takes free from equities of which he had no notice. The "Negotiable Instruments" statute, Acts 1899, Chap. 733, secs. 25-27, settles that such is the case now to the extent of the debt secured, but that is a change of the law, which was previously otherwise. *Holderby v. Blum,* 22 N. C., 51; *Harris v. Horner,* 21 N. C., 455, 30 Am. Dec., 182; *Potts v. Blackwell,* 56 N. C., 449. This case is governed by the law as it stood prior to the act of 1899.

Affirmed.

KNIGHT v. HATFIELD.

(Filed November 5, 1901.)

1. ATTACHMENT—*Vacation—Parol Contract.*

It is proper for a trial judge to vacate an attachment pending trial of the action where it plainly appears from the pleadings that the action of plaintiff must fail.

2. ATTACHMENT—*Bond.*

Defendant in attachment need not give bond where it appears on the face of the warrant that the attachment was issued for an insufficient cause.

3. ATTACHMENT—*Contracts—Betterments.*

On motion to vacate an attachment the court need not pass on matters irrelevant to the attachment.

ACTION by J. S. Knight & Co. against Asa Hatfield, heard by Judge *Frederick Moore,* at Chambers, in Rockingham, RICHMOND County, on the 16th day of January, 1901. From a judgment for the defendant, the plaintiffs appealed.

McIver & Spence, for the plaintiffs.

Black & Adams, and *Douglass & Simms,* for the defendant.

MONTGOMERY, J. The contract, for the alleged breach of which the plaintiffs brought their action in damages, appears (upon the face of the complaint) to have been one for the conveyance of a plant for the manufacturing, drying and dressing of lumber, not in writing, the plant consisting of necessary machinery, together with the site on which the same was located. The defendant was a non-resident of the State of North Carolina, and on that ground an attachment was sued out and levied upon the plant, including the real estate and machin-

ery. The defendant, in his motion to vacate and dissolve the attachment, denied that he ever made the contract to convey the plant to the plaintiff, and averred that the same as alleged by the plaintiff was void under the Statute of Frauds.

His Honor found as facts, First, that if such contract ever existed, it was not reduced to writing, and that no note or memorandum thereof was ever reduced to writing; second, that the property consisted of both real and personal estate. There were other findings of fact not necessary to be mentioned in this opinion.

It was admitted that the defendant was a non-resident at the time of the commencement of the action, and at the time the warrant of attachment was issued and served. The attachment was vacated and dissolved by his Honor, and the attached property ordered to be released.

The plaintiffs contend that although the complaint, used as an affidavit in the attachment proceedings, alleged damages for the breach of a contract to convey a plant consisting of real estate and the machinery used therewith for the drying, dressing and manufacturing of lumber, and notwithstanding the fact that the defendant, while denying the contract, also set up the plea of the Statute of Frauds against its enforcement, if it had been made as stated in the complaint, yet his Honor should have refused to vacate the attachment because it appeared that the defendant was a non-resident of the State, and that that was a sufficient ground for the attachment to issue. The plain meaning of which contention is, that the alleged breach of contract as to whether it was valid or binding or not, was an issue of fact that could not be found by his Honor upon the motion to vacate the attachment, but must be submitted to the jury for their finding on the trial of the action. If it be conceded that the property seized under the attachment must be held *in custodia legis* until the main action shall have been determined, yet

that rule must be relaxed and changed in a case like the one before us. The seizure of property under attachment in this State is an extraordinary remedy and in derogation of the common law. It is also immediate and harsh in its effects, and is liable to be used for purposes of oppression. Such proceedings, therefore, will always demand the closest attention of the Courts, and will not be upheld except in cases where it is plainly to be seen that the modes of its procurement are regular, and that the property which is the subject of attachment should be kept under the control of the Court until the main action is tried and determined.

It is apparent upon the face of the affidavits of both parties, and the complaint of the plaintiff itself, that the plaintiff can not recover in this action. In his complaint he declares upon a breach of contract to convey property embracing land and machinery used as a whole—a plant—not in writing; and the defendants, in their affidavits, simply recite the plaintiff's statement of his own case, deny the contract as alleged, and plead the Statute of Frauds, if it was so made. The findings of fact by his Honor are simply a repetition of the facts stated in the plaintiff's complaint and affidavits. There is no issue joined between the parties as to the contract. If the contract is taken to be admitted by the defendant as set out in the complaint, yet, as the Statute of Frauds is pleaded against it, the law declares it unenforceable, and there is no issue of fact about it to be tried.

The plaintiff further excepted to the order of his Honor vacating the attachment, because the defendant gave no bond before the order was made. It was not necessary that the bond should have been executed in a case like this. Why execute a bond to provide against a contingency that never could arise, to-wit, to pay the plaintiff the amount of any judgment that the plaintiff might recover against the de-

fendant in the action? In *Devries v. Summit,* 86 N. C., 126, it was decided that a bond or undertaking would not be necessary when the warrant "on its face appears to have been issued irregularly, or for a cause insufficient in law, or false in fact." And the same reasoning would cover this case.

The plaintiff further excepted to the failure of his Honor to find that the plaintiff had expended various amounts of money on the property under his alleged contract and while he was in possession of it from a lease of the defendant. That has nothing to do with the attachment proceedings. Whatever bearing it may have on the matter is to be heard and decided by another method.

At the hearing of the motion to vacate the attachment, the Sheriff made application to his Honor for instructions as to his duty in connection with the attached property, and the plaintiff excepted to the order of his Honor directing him to deliver it to the defendant. It is unnecessary to consider that order, and we make no comment on it. Otherwise there was

No Error.

RAYNOR v. WILMINGTON SEACOAST RAILROAD COMPANY.

(Filed November 5, 1901.)

1. CARRIERS—*Ejection of Passenger—Pleadings—Answer—The Code, Sec. 1962—Evidence—Admissibility.*

In an action for wrongful ejection from a train, evidence of drunkenness of plaintiff is not admissible, where the answer simply denies the wrongful ejection alleged in the complaint.

2. EVIDENCE—*Incompetency—Carriers.*

Evidence that a passenger was drunk at 3:45 in the afternoon is inadmissible to corroborate evidence that he was drunk at 11 o'clock in the forenoon.

3. PLEADINGS—*Complaint—Answer—Allegations.*

A defense which can not be maintained by a denial of the allegations in the complaint must be set up as new matter in the answer.

4. EVIDENCE—*Opinion Evidence—Competency.*

In an action for the wrongful ejection of a passenger, the opinion of a witness that no unnecessary force was used in ejecting the passenger is incompetent.

ACTION by J. R. Raynor against the Wilmington Seacoast Railroad Company, heard by Judge *Frederick Moore* and a jury, at April Term, 1901, of the Superior Court of CUMBERLAND County. From a judgment for the plaintiff, the defendant appealed.

N. A. Sinclair, for the plaintiff.
Geo. M. Rose, for the defendant.

COOK, J. This action was brought against defendant company to recover damages on account of an alleged violent, unlawful and forcible ejection from defendant's train while

plaintiff was a passenger thereon from Wilmington to Wrightsville. The only material issue raised by the pleadings (except as to the amount of damages) is by the denial in the answer of allegation 5 of the complaint, which is as follows: "5th. That the conductor of said defendant's train some little time after the train had started, came and demanded of plaintiff a ticket, and plaintiff told him that he had no ticket, and plaintiff reached down in his pocket to get the money, and asked said conductor what the fare was, to which the reply was that the fare was 35 cents. The plaintiff remarked that he thought it was 25 cents, but at the time intended to and was getting the money out to pay the conductor, when the conductor rudely, roughly, without cause and without giving plaintiff an opportunity to pay the 35 cents, with the aid of three other persons, he and they laying violent hands on the plaintiff, unceremoniously, maliciously and forcibly ejected plaintiff from the train at a point between stations, and plaintiff had to remain where he was so rudely and forcibly put off about three hours and a half." Upon which the following issue was framed and submitted to the jury: "Was plaintiff wrongfully ejected from defendant's car?" The jury rendered a verdict in favor of plaintiff, and defendant appealed upon exceptions taken to the exclusion of evidence.

There are only two exceptions taken, both of which are without merit. As to the first: The ejection occurred about 11 o'clock in the forenoon, at which time the plaintiff testified that he was sober; had only taken two drinks—one before he left Fayetteville and one at the second station after leaving —and took no other drink that day. The conductor of defendant company's train testified that when plaintiff was ejected (11 o'clock a.m.) he was so drunk that he staggered and fell as he started back to the train. To corroborate the conductor, Hinton, defendant proposed to show the condition of plaintiff

at 3:45 o'clock that afternoon, which was excluded upon objection. The second exception was to the exclusion of the question propounded to the conductor, Hinton, "Whether any more force was used by the officials of the road than was necessary to eject the plaintiff from the train." In what way the condition of plaintiff when ejected, can be material to the issue we are unable to see. There is no suggestion in the pleadings that plaintiff was drunk or boisterous, or in any way conducted himself in an unseemly manner. Nor does the defendant, in its answer, undertake to justify or excuse the act of ejection under the rights conferred upon it by section 1962 of The Code, which was cited by the learned counsel for defendant, by showing its rules and the violation thereof by plaintiff, which section is as follows: "If any passenger shall refuse to pay his fare, or violate the rules of the corporation, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling-house, as the conductor shall elect, on stopping the train."

The answer simply denies the ejection as stated in the complaint. Plaintiff alleges that he was willing and prepared to pay the proper fare, and was put off the train without being allowed a chance to pay the fare charged by the conductor; but as there is no exception taken to any matter relating to the payment of fare, that matter is not involved in this appeal.

For either of the two causes stated in that section of The Code, defendant would have had the right to eject him, if defendant had relied upon its provisions and could have established the cause. But defendant did not avail itself of the benefit of that section by a special plea, but relied upon the general issue. From the nature of the exception taken in trying to establish the fact that plaintiff was drunk, it is in-

ferable that the corporation had some rule or rules as to drunkenness upon the train, which defendant claimed plaintiff had violated. But the violation of no such rule is pleaded in justification or excuse of the act, as should have been done if relied upon as a defense. Under the old system of pleading, upon the general issue, matter in justification could not be proved; it must be pleaded specially. *Barber v. Barham,* 3 Wilson's Rep., 368, on page 370 and 371; *Bush v. Parker,* 1 Bing. N. C., 312; *Brown v. Burnett,* 5 Cowen, 181; 1 Chitty on Pl., 501. Under our Code practice the principle is not changed. A defense which can not be maintained by a denial of the allegations in the complaint, must be set up as new matter in the answer. Clark's Code, secs. 242 and 243, and cases there cited.

But if it had been material whether plaintiff was drunk at the time he was put off, his condition nearly four hours thereafter would not have been a circumstance to corroborate the testimony of the conductor as to what it was when ejected. If intoxication once produced were a continuing condition, then there would be force in the contention. But it is not. A man may be drunk at 11 o'clock in the forenoon and sober up by 3:45 in the afternoon, or *vice versa,* he may be sober in the forenoon and by 3:45 in the afternoon be drunk. Neither drunkenness nor soberness is a necessarily continuing state. Both conditions are liable to rapid and frequent fluctuations. Therefore, plaintiff's condition four hours after last seeing him could neither be evidence nor corroborating evidence as to his real condition when seen.

While the other or second exception seems to be addressed to the defense which might have been made under the section of The Code above quoted, yet the force actually used was material to the issue as to the quantum of damages, and we will so consider it. But the question asked—"Whether any more force was used by the officials of the road than was nec-

essary"—was the matter of fact to be determined by the jury, and could not be established by his opinion. To have answered it, the witness would have had to find the facts constituting the force actually used, and draw his conclusion from them.

In *Phifer v. Railroad,* 122 N. C., 940, it was held that the witness (plaintiff) could not be allowed to testify that he was "careful" at the time of the accident, "whether the plaintiff was careful was the very question which the jury were empanelled to determine. * * * The opinion of a witness ought not to be given in evidence upon an occurrence when from its nature the whole can be described in such language as will enable persons who were not present to come to a proper conclusion concerning it." So in this case, it was for the jury to determine whether the force used was excessive, and not for the witness.

There is

No Error.

McDOUGALD v. TOWN OF LUMBERTON.

(Filed November 5, 1901.)

1. NEGLIGENCE — *Personal Injuries — Nonsuit — Assumption of Risk.*

   In an action for personal injuries by an employee against a town, it is held that the evidence does not warrant a nonsuit upon the ground that the plaintiff had assumed the risk.

2. NONSUIT—*Appeal—Presumptions—Evidence.*

   Where the record fails to disclose on which of two pleas a nonsuit was granted, it will be presumed on appeal that it was granted on the one having some evidence tending to prove it.

3. ISSUES—*Contributory Negligence—Assumption of Risk—Pleas—Practice.*

   Where evidence is offered upon pleas of contributory negligence and assumption of risk, it is the better practice to submit separate issues.

4. APPEAL—*Error—Exceptions and Objections—Statement of Case—Case on Appeal—Assignment of Errors—Demurrer—Nonsuit.*

   In case of sustaining demurrer to the evidence or nonsuit for want of evidence, the particular parts of the evidence which the appellant relies upon to prove the cause of action must be either pointed out in the case on appeal, or called to the attention of the court by brief or in the oral argument.

ACTION by Evander McDougald against the Town of Lumberton, heard by Judge *Frederick Moore* and a jury, at February Term, 1901, of the Superior Court of ROBESON County. From a judgment for the defendant, the plaintiff appealed.

No counsel for the plaintiff.

McLean & McLean, for the defendant.

MONTGOMERY, J. The plaintiff was employed by the defendant in the excavation of earth for sewerage purposes in

the town of Lumberton, and was injured by the falling in upon him of earth from the top of the ditch. The excavation was about fourteen feet deep, four feet wide at the bottom, and twenty feet wide at the top, as we understand the dimensions of it from the evidence.

The plaintiff was injured while at work at the bottom of the ditch, where there was quick-sand. As the quick-sand would be baled out with buckets, other quantities of it would come out from under the bank. The plaintiff, in his complaint alleges that the ditch or trench was in an unsafe condition, and that he himself was apprehensive of injury if he entered upon the work; and yet, that upon the assurance of the persons in charge that it was safe for him to go in to work, he relied upon their assurance and entered upon his labors.

The defendant, in its answer, put in the pleas of contributory negligence and assumption of risk on the part of the plaintiff. Upon an intimation of his Honor that the plaintiff could not recover upon the evidence, his counsel submitted to a nonsuit and appealed.

We can not tell from the record whether his Honor thought, as a matter of law, that the plaintiff had contributed to his own injury; upon evidence of the plaintiff, about which there could be no reasonable difference of opinion, or had assumed the risk of employment.

We fail to discover any evidence tending to show that the plaintiff was doing his work in a careless and negligent manner, and therefore presume that his Honor was of the opinion that he had assumed the risk of his employment, thinking that the evidence on that question was uncontradictory and so clear that reasonable men could come to no other conclusion about it. An employee assumes, of course, the ordinary risk attendant upon the employment; and if this excavation had been through and into firm and solid earth, then there

would have been no negligence on the part of defendant, and the plaintiff would have assumed the risk attendant upon the employment. But there was evidence going to show that the ditch was cut through alluvial or made soil, with mud and quicksand at the bottom, and that where the plaintiff was hurt there was neither bracing nor walling. If that was not negligence in law on the part of the defendant, it certainly was strong evidence of it. But did the plaintiff from the evidence know or have reasonable ground to believe that the danger and risk were such that as a prudent man he was bound not to assume them, and to refuse to enter upon the work, or to continue it after he had begun it. He was not compelled to quit his work unless such was the case. 14 Am. and Eng. Enc., 845, and authorities there cited.

Upon the assurance made to the plaintiff by those in charge of the work that it was safe for him to enter upon it, it would seem that the danger must have been more than a suspicion of it, and that the chances of safety were fewer than those of injury, before the plaintiff could be said to have assumed the risk. *Hinshaw v. Railroad,* 118 N. C., 1047. We can not say, as a matter of law, that the danger was so apparent and so obvious as to put the plaintiff on his guard, and to show that he not only saw the risk and the danger, but willingly made up his mind to assume it. We think, therefore, that there was error in the ruling of his Honor in dismissing the action.

In the consideration of this case, we have concluded that it is better in the trial of causes in which the pleas of contributory negligence and assumption of risk are entered (evidence, of course, under those pleas being introduced), to have separate issues submitted to the jury on those questions. While it is not necessary to submit separate issues, as we have pointed out in *Rittenhouse v. Railway,* 120 N. C.,. 544, yet

we have found out from experience, since that decision was made, that it is a better practice.

Defendant made a motion to dismiss this appeal on the ground that the appellant had failed, in the statement of the case, to point out, in his assignments of error, the relations of one part of the evidence to another and the special effect and importance of such parts of the evidence, and that that view of the case had been called to the attention of the Court below, and citing the case of *Gregory v. Forbes,* 94 N. C., 220, as authority for the motion. The evidence in that case must have been greatly more prolix and complicated than in this. Here, the evidence upon which the plaintiff was nonsuited was direct and simple, and related to the question of contributory negligence and assumption of risk by the plaintiff; and while there was a good deal of it, we have had no difficulty in finding it.

We shall hereafter, however, require that, in all cases of sustaining demurrer to the evidence of nonsuit for want of evidence, the particular parts of the evidence which the appellant relies upon to prove the cause of action, be either pointed out in the case on appeal, or called to the attention of the Court by brief, or in the oral argument.

Error.

CARTER v. CAPE FEAR LUMBER CO.

(Filed November 5, 1901.)

NEGLIGENCE—*Master and Servant—Defective Appliances—Ordinary Care—Reasonable Care.*

Slight defects in appliances causing injuries which can not be reasonably anticipated, do not render the owner of the machinery liable.

CARTER *v.* LUMBER CO.

ACTION by Charles Carter against the Cape Fear Lumber Company, heard by Judge *W. A. Hoke* and a jury, at April Term, 1901, of the Superior Court of NEW HANOVER County. From a judgment for the plaintiff, the defendant appealed.

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

MONTGOMERY, J. The plaintiff was injured while employed by the defendant, in the receiving of lumber from a slide and placing the lumber upon a truck for transfer to a car and thence to a dry-kiln. The slide was at an angle of about 35 degrees and about six feet in width. There was a platform at the base of the slide about fifteen inches wide, according to the testimony of the plaintiff. At each outer edge of the platform there was a "bumper" (a square piece of timber) protruding above the platform for the purpose of stopping and holding in position the pieces of plank, raised singly to the top of the slide by automatic machinery, as they descended on the slide to the platform. These bumpers were fastened and held by iron clamps or bands, bolted to the beams. Alongside of the platform and touching it, according to the testimony of the plaintiff, a truck was placed to receive the planks, and which, when loaded, was moved laterally on an inclined track to another track, and from that other track placed on a car and carried thence to the dry-kiln. On the other side of the truck, in its first position, were placed two upright standards to hold in place the loaded truck and keep it from rolling off. These standards rested on a platform on a level with the truck, and in front of them was an inch scantling nailed to the platform, which acted as a check or mortise to hold the standards at the bottom. The tops of the standards were placed in a mortice in a board nailed to the top of the frame. To prevent the loaded truck from

moving when the standards were removed, "chocks" (wooden blocks) of the right shape and dimensions were furnished by the defendant to be placed underneath the wheels, and they were used at the time of the plaintiff's injury. These "chocks" were removed by hand, an employee standing or stooping at each end of the truck for that purpose after the standards have been removed, in order that the loaded truck may roll to the transfer track.

The plaintiff, in his complaint, alleges negligence on the part of the defendant, first, in that the "defendant recklessly, negligently and wantonly permitted lumber to be thrown down the slide against a bumper, which was insecurely and negligently and defectively erected, and by the force and weight of the lumber, in its fall striking against the said defective bumper, caused a car, placed in its regular and customary position—which, on account of the defective condition and construction of the bumper, rested against the bumper—to turn over and throw the load of lumber and car on the body of the plaintiff, crushing him beneath its weight and breaking both legs of the plaintiff, the left leg in two places and the right leg near the thigh, inflicting serious, permanent and bodily injury to the plaintiff, and causing him great suffering and pain, prostrating and confining him to a hospital for a period of nearly six months, and seriously affecting his nervous system." And second, "That the defendant company was further negligent in not providing proper and sufficient appliances to prevent the said car from moving and turning over when struck, as hereinbefore alleged, whereby the plaintiff suffered the injury complained of."

The alleged negligence in the construction of the frame or stall may be eliminated from the case, for although the plaintiff said that the frame was insecure, yet he also said that if he had not pulled the standard out of the bottom it would not have broken. The injury, then, did not result from

want of strength or security in the frame or stall. It is true that the plaintiff testified that at other places there was in use a method of fixing standards securely, but, as we have said, the insecurity of the standard was not the cause of the injury to the plaintiff. The standards had been removed by the plaintiff, and, as he says, if they had not been pulled up at the bottom, they would not have been broken. And also, the plaintiff further said that at the Angola Lumber Company's mill at Wilmington, there was a latch that held the car until the laborers could get away to a secure place. But that testimony was in reference to the use of a latch to hold the truck instead of holding it by the method of "chocks," and not the security or insecurity of the method of holding the car by standards and frame. There was no evidence on the part of the plaintiff that the plan of holding the trucks by "chocks" was not safe and secure.

The real matter for consideration, then, is the alleged negligence of the defendant in reference to the construction of the bumpers at the time of the plaintiff's injury and about that matter was made the main argument of the plaintiff's counsel in this Court. The plaintiff testified that "the lumber that came down the slide came in the usual way, and in the same way as it had been coming ever since I had been working there. The platforms were in good condition. The frame-work was substantial. The trucks upon which the lumber is loaded is made of iron. They did not break. The iron tracks did not give way, there was nothing the matter with the slides or stalls, except the bumper was loose. It is an iron collar or band around the top of the bumper that is fastened to the beams on the slide or platform. The iron collar did not break or wrench out. The bumper had a loose play within the collar." A safe place in which to work had been furnished to plaintiff, and every appliance that was necessary to conduct the operations of the mill was furnished,

and all in good condition except that under the iron collar of one of the bumpers there was a play of half an inch, caused by the wearing of the timber, and not by decay or rot. The plaintiff did not know at the time of his injury of the loose collar around the bumper, but he saw it several months thereafter when he was at the mill, and it had not been changed, but a witness for the plaintiff said that the collar had a play of half an inch on the day of the injury. The plaintiff gave the following description of the manner in which he was hurt: "We have to lift the standard above the chocks below about one and one-fourth inch out of the groove, and then pulling the bottom ends out, lower them until the top end slips out of the mortice above. We have to take out the standards before moving the loaded trucks of lumber out of the frame. I had taken out one standard. I was raising the last standard. Just as I did so, and while in a stooping position lifting it up, a plank of lumber 16 feet long and one inch thick came down the slide by automatic machinery and struck the bumper on the side of the truck opposite to me. The plank struck the bumper and jarred the car, and the car and the lumber came right over on me. The standard which I was raising broke out of the mortice above, in which it was fastened. I could not stop the car. The bumper was loose. It had a play of one-half inch or more. The loaded trucks were tight in between the standards and the bumper." At the conclusion of the plaintiff's evidence, the defendant made a motion to dismiss as of nonsuit, and, upon the same having been overruled, introduced evidence. Upon the close of the evidence on both sides, the defendant renewed its motion to dismiss the action—a proceeding which amounts to a demurrer to the evidence under the old system of pleading. *Means v. R. Co.*, 126 N. C., 424. There was nothing in the evidence offered by the defendant helpful to the plaintiff; in fact, a number of the witnesses testified that the lumber-plant was

in excellent condition, that there was no worn place under the collar around the bumper, that there was plenty of room between the standards and the bumper; and two of them said that the plaintiff told them at the time of the accident that the chocks must not have been under the wheels of the truck. But with the defendant's evidence we are not concerned (no part of it being of aid to the plaintiff), being confined, under the motion to dismiss, to the plaintiff's evidence, and that, too, in the light most favorable to him. According to his evidence, then, at the time of the accident this was the situation: "Chocks of right size and shape were under the wheels of the truck, the platforms, tracks, trucks and cars were in good condition, and the planks were descending on the slide in the usual way; but the truck was close in between the bumpers and the standards, and there was a play of half an inch underneath the band or collar around the bumper. The plaintiff was hurt by the falling of a plank 16 feet long, a foot wide, and an inch thick, and striking the bumpers with such force as to cause the bumpers to work in the loose place under the collar, and by sudden impact upon the track to start it in motion, and in its course to harm the plaintiff. To be more specific still: The bumpers and the standards, and the half-inch play under the band around the bumper, constitute the negligence alleged by the plaintiff against the defendant--the alleged faulty construction of the standard having been already disposed of in this opinion.

The question, then, is, Was the omission of the defendant to notice the play of the bumper and to repair it, and also to provide a greater place for the truck, the plaintiff having been damaged thereby, actionable negligence? Was the plaintiff's evidence of such a character as that it should have been submitted to the jury on the question of defendant's negligence? Or, to put it in another form, was the defendant

guilty of negligence in failing to foresee and provide against what occurred?

After the most careful consideration, we have arrived at the conclusion that there was no evidence on the first issue—as to the defendant's negligence—that ought to have gone to the jury; and the motion to dismiss the action should have been allowed. *Metropolitan Railway Co. v. Jackson,* 3 App. Cases, 193 (1877); Shearman and Redfield on Neg., sec. 56; *Spruill v. Ins. Co.,* 120 N. C., 141. The most frequently cited definition of negligence, that of Alderson, B., in *Blythe v. Birmingham Water Works Co.,* 25 L. J. Ex., 213, is as follows: "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a provident and reasonable man would not do; and an action may be brought if thereby mischief is caused to a third party *not* intentionally." Negligence in law can not exist except in cases where there has been a want of ordinary care upon the part of the person charged with the act of omission or commission; and though damage has resulted from the act of omission, there is no *injuria* if there has been no want of ordinary care. No act or omission, though resulting in damage, can be deemed actionable negligence unless the one responsible could, by the exercise of ordinary care under all the circumstances, have foreseen that it might result in damage to some one. Am. and Eng. Enc. of Law, Vol. 16, page 439; Pollock on Torts, 36, 37; Shear. and Redf. on Neg., 10. There must be, before a recovery can be had in actions for negligence, a breach of duty on the part of the defendant, and the act or omission, producing the breach of duty, culpable in itself, must be such as a reasonably careful man would foresee might be productive of injury; and one is not liable for an injury which he could not foresee. Smith on Neg., 24; *Blythe v. Water Co.,* 11 Exc., 781. In action-

able negligence, there must be on the part of the defendant not only an act or omission constituting the proximate cause of the injury, but there must be also a want of ordinary care on his part. There may be damage resulting proximately from an act or omission to act, even in cases where a duty is obligatory, and yet, if there has been no want of ordinary care, there can be no recovery on account of the damage, because there has been no negligence.

There is some confusion in the decisions of the Courts in the definition of "ordinary care" and "proximate cause," but in every case of actionable negligence they must be found together. Mr. Horace Smith, in his work on the Law of Negligence, distinguishes between the two clearly. He writes: "The word 'proximately' is to be distinguished from the word 'culpable.' An act to be culpable, that is, to be a breach of legal duty, must, as we have seen, be such as a reasonably careful man would foresee would be productive of injury, and the person is not liable for an injury which he could not foresee; but a breach of duty to be proximately producing injury must be such that whether defendant could foresee the injury to be probable or not, the breach of duty is in fact the probable cause of the injury." The same distinction is also well drawn in *Wyley v. West Jersey R. Co.*, 44 N. J. Law, 248, where the Court said: "The law requires that the damages charged to a wrongdoer must be shown to be the natural and proximate effect of his delinquency. The term 'natural' imports that there are such as might reasonably have been foreseen, such as occur in an ordinary state of things. The term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss."

Ordinary care is reasonable care, "that care which a person of ordinary prudence and capacity would take under like circumstances." A good test of ordinary care may be found

in 16 Am. and Eng. Enc. of Law, page 402, deduced from the numerous and most respectable authorities cited in the note: "Where a person in the observance or performance of a duty to another has neither done nor omitted to do anything which an ordinarily careful and prudent person, in the same relation and under the same conditions and circumstances, would not have done, or omitted to do, he has not failed to use ordinary care, and is therefore not guilty of negligence, even though damage may have resulted from his action or want of action. And conversely there has been a want of ordinary care, where a person in the observance or performance of a legal duty to another has done or omitted to do something which an ordinarily careful and prudent person, in the same relation and under similar circumstances and conditions, would not have done or omitted, such act or omission being the proximate cause of injury to the other party to the relation."

It is right that one should be required to anticipate and guard against consequences that may be reasonably expected to occur; but it would be violative of every principle of law or justice if he should be compelled to foresee and provide against that which no reasonable man would expect to happen. The business affairs of life would come to a standstill if employers had to busy themselves for their own and their employee's safety in the study of ingenious devices to meet every case of possible damage and hurt. There would soon be neither capitalists nor laborer from the modern view. "The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible.. He will order his precaution by the measure of what appears likely to be known in the course of things." Pollock on Torts, 86.

Now, from the facts of this case as they appear from the

plaintiff's evidence, can it be inferred that a reasonable man, engaged in the same or like business, would have anticipated and provided against the accident which happened? If such an inference could not have been naturally drawn, then there was no injury, though there was damage. The defendant was not negligent, and there is no liability.

As we have said, everything connected with the transfer of the lumber was in good shape—tracks, trucks, platforms, lifting power and chocks. There was nothing complained of but a half of an inch play of the bumper under the collar, and the restricted space in which the track stood. If these defects had been seen by the defendant, it could not have been required of it, in reason, to anticipate and provide against such an accident as occurred. No reasonable person could have anticipated that the falling of a piece of lumber, sixteen feet long, twelve inches wide, and one inch thick, five or six feet on a descending slide at an angle of 33 degrees, could strike those bumpers with such force as to drive from its position the loaded truck, weighing thousands of pounds, over the chocks which were underneath the wheels, the chocks being of sufficient size and of the proper shape.

Error.

CARTER v. WILMINGTON AND WELDON RAILROAD CO.

(Filed November 5, 1901.)

1. CARRIERS—*Freight—Refusal to Receive Freight—Penalties—The Code, Sec. 1964.*

Under The Code, Sec. 1964, a railroad company refusing to transport cattle is liable to a separate penalty for each animal.

2. EVIDENCE—*Competency—Carriers.*

In an action to recover of a railroad company a penalty for refusing to transport cattle, a letter written by an agent of the company to a superior officer relative to the tender of the cattle is inadmissible on part of defendant.

ACTION by L. W. Carter and E. G. Mills against the Wilmington and Weldon Railroad Company and others, heard by Judge *W. S. O'B. Robinson* and a jury, at December (Special) Term, 1901, of the Superior Court of COLUMBUS County. From a judgment for the plaintiffs, the defendants appealed.

J. B. Schulken, for the plaintiffs.
Junius Davis, for the defendants.

DOUGLAS, J. This case was here before on demurrer, being reported in 126 N. C., 437. In view of what we then said, the answers of the jury to the first and third issues have reduced the case as now before us to narrow limits.

Three out of the four exceptions insisted upon by the defendant raised the point that, in order to recover under the statute for separate penalties, it was incumbent upon the plaintiffs to tender the cattle separately. We think that this question was settled in our former decision, and can not now be reopened by a second appeal in the nature of a rehearing.

If it were necessary to tender separately each individual article, in contemplation of law such article would be a distinct shipment; and the provision of the statute (The Code, sec. 1964) saying that "each article refused shall constitute a separate offense," would have no meaning. The following extracts from our former opinion sustain our present view. We said, beginning on page 439: "The defendant contends in effect that the plaintiffs have no cause of action, * * * that but one penalty attaches for the refusal of the entire shipment offered. * * * The statute provides in express terms that each *article* refused shall constitute a *separate offense,* that is, a distinct violation of the law. The penalty attaches for such violation, and for each and every violation thereof." * * *

"To say that 'each article' meant simply the entire shipment offered, would be equivalent to saying that it meant nothing, because it would add nothing to the previous part of the section. To say further that, even if each article constituted a separate offense, the statute did not intend a separate penalty, would impose upon the statute a construction utterly foreign both to its letter and spirit. The object in providing a penalty is clearly to compel the common carrier to perform its duty to the public, not simply to the abstract public, but to each individual. Penalties are made cumulative so as to make it under all circumstances, as far as practicable, to the interest of the carrier to perform its duty. Punishment and compensation are essentially different. The one aims merely to repair the injury done; the other, to prevent its recurrence. Compensation should, under all circumstances, exactly equal the injury; while punishment, to be effective, must exceed the injury, or at least be greater than any possible benefit which can accrue to the offender from a violation of the law. Suppose a large number of cattle were offered for shipment, it might be cheaper for the

carrier to pay a penalty of $50 than to go to any extra expense and trouble to obtain the necessary cars."

"Moreover, the usual and primary meaning of the word 'article' is opposed to the idea that it means the entire shipment." * * *

"As we are of opinion that each head of cattle was a separate article in contemplation of the statute, the refusal of which was a separate offense, it follows that a separate penalty attached thereto. As there were thirty head of cattle refused, thirty separate penalties were incurred by the defendant."

This seems to us to settle the present case.

Again, we say that this decision refers to the shipment of cattle, where each "article" is necessarily separate, and does not refer, directly or by analogy, to the innumerable small articles that may be enclosed in one package where they can be neither seen nor counted. Such a case is not now before us, but we have no hesitation in saying that there is an essential difference between one nail in a keg of nails and one ox in a drove of cattle.

The shipment appears to have been made in entire good faith, and there is neither proof nor allegation of any fraudulent intent. The main defense seems to have been that all the defendant's available stock-cars were then required for the transportation of two regiments of cavalry; but this issue the jury found against the defendant. Whether the instruction upon that issue can be sustained, we are not called on to decide, as it was favorable to the defendant, and therefore not now under exception.

The defendant contends that it had no facilities for taking care of cattle, but it appears that it had the ordinary pens into which the cattle were driven by the plaintiffs. The law placed upon the defendant the imperative duty of receiving these cattle, and its refusal to receive is the gist of this action. It had five days after receipt in which to ship the

cattle, and did ship them within that time. If in the interval the cattle had suffered from exposure and want of feed through no fault of the defendant, that would have been a defense to be pleaded in an action for damage to the cattle, which would have been essentially different from the one at bar. We have carefully considered the defendant's exception to the exclusion of the letter of Richardson to Divine, and after some hesitation have come to the conclusion that there is no error in such exclusion under the circumstances of this case. This letter was written by the station agent at Whiteville after the beginning of the suit, the sole foundation of which was his own unlawful conduct. While not a party to the suit, he was something more than a witness, and was deeply interested in defending the company from any loss arising from his own conduct, as well as in placing such conduct before his superiors in the light most favorable to himself. We are not passing upon the credibility of the witness, which is for the jury alone, but upon the natural bias, which, consciously or unconsciously, is liable to affect all men under such circumstances.

In any event, we do not see how the defendant has been injured by the exclusion of the letter. The jury found that the plaintiffs did not tender the cattle on August 8, and that finding destroyed half the case. They also found that the defendant was not prevented from furnishing the cattle-car by the exigencies of governmental service. Of this fact Richardson does not appear to have had any personal knowledge; and we do not see how his letter could be used to corroborate Borden, for which purpose, indeed, it does not seem to have been offered. In some respects, the letter tends to corroborate the plaintiffs. It says in part: "These parties were ping, and drove their cattle into the stock-pen here after I informed them that it was impossible to get car that day. They demanded a bill of lading, which of course I refused

to issue, as we have no place to keep stock here." Is not that a practical admission of tender and refusal?

Another significant statement is that made by Borden, a witness for the defendant, who testified as follows: "I am now, and was in August, 1898, superintendent of transportation of the defendant companies. I had charge of the car supply and train service. A telegram to me in my office in Wilmington from Mr. Lynch at Florence on the 9th of August, 1898, and one from Mr. A. S. Richardson, dated the 10th, asking for a stock-car to be sent to Whiteville station, I sent the stock-car to Whiteville on the 11th *by the first train after I was notified of its importance.*"

In the absence of substantial error, the judgment is

Affirmed.

VANDERFORD v. FOREMAN.

(Filed November 12, 1901.)

1. LANDLORD AND TENANT—*Tender—Lease—Rents—The Code, Secs. 573, 1773.*

   A tender by tenant of rent accrued after termination of lease does not preclude the landlord from recovering possession.

2. LANDLORD AND TENANT—*Rent—Termination of Lease—Tenancy from Year to Year.*

   Acceptance by the landlord of rent accruing after termination of lease, after suit for possession, does not create a tenancy from year to year, and does not preclude landlord from recovery.

ACTION by T. H. Vanderford and others against J. Q. and D. F. Foreman, trading as Foreman Bros., heard by Judge *Geo. H. Brown* and a jury, at May Term, 1901, of the Su-

perior Court of ROWAN County. From a judgment for the plaintiffs, the defendants appealed.

Overman & Gregory, and *T. F. Kluttz,* for the plaintiffs.
R. Lee Wright, for the defendants.

MONTGOMERY, J. The tender, in writing, made by the defendant and accepted by the plaintiff, and in which there was an offer made to pay a certain amount, less than that mentioned in the complaint, in full of rent claimed and the costs, contained the following words in its conclusion, "And ask and demand that the same be accepted and this action and proceeding cease and be dismissed under said sec. 1773 of The Code." Upon the further prosecution of the case by the plaintiff, his Honor, upon the motion of the defendant, made, both at the call of the case and at the end of the evidence, refused to dismiss the action.

The plaintiffs alleged in their complaint that the lease had expired on the 31st of December, 1899, and that demand for possession and notice to vacate on that date had been properly given, and that since the expiration of the lease a large amount was due as rent for the occupation of the premises.

The defendants contend that the plaintiffs can not further prosecute their action for recovery of possession for the reason that the tender contained a condition to that effect, and as the plaintiffs received the amount tendered they are bound by the condition; and also, that if it be taken as true that the lease expired on the 31st of December, 1899, yet, when the plaintiffs received under the tender the amount offered in settlement of the rent claimed for occupation after the expiration of the lease, the tenancy became one from year to year.

We think the defendants' contention can not be made good. The tender was avowedly made under section 1773 of The

Code, but the action was brought for the recovery of the possession of the premises, not upon a forfeiture of the lease for the non-payment of rent, but because of the expiration of the term; and, therefore, under that section of The Code the attempted condition contained in the tender could only apply to the settlement of the dispute about the amount of rent due.

It is not contended by the defendants that the tender was made under section 573 of The Code. It stands, then, disconnected with either section of The Code above referred to, and the request made that the suit be dismissed is no more than what it purports to be—a simple request which the plaintiffs could comply with or not as they saw fit to do.. It was merely the defendants' view of the effect, in law, of the acceptance of the money under section 1773 of The Code. It concluded the plaintiffs as to the amount of the rent due for the time mentioned, but could not affect the Court in the plaintiffs' complaint for the recovery of possession of the premises.

As to the other phase of the defendants' contention, *i. e.*, that the acceptance of the rent for the time after the expiration of the term converted the tenancy into one from year to year, it may be said that there would be force in it, if there had not been served in proper time a notice upon the defendants to vacate the premises and deliver possession at the end of the term. In an action to recover the possession of leased premises, the plaintiff can recover damages for the occupation of the premises since the cessation of the estate of the lessee, and surely the plaintiff could receive it by voluntary payment without the effect of continuing the lease.

The defendants were not entitled to have their fourteen prayers for instruction given, or either one of them, for they all covered the two points above discussed, except the seventh and the fourteenth; and the seventh was too general, and the fourteenth correct in part and incorrect in part.

No Error.

CLEMENT v. IRELAND.

(Filed November 12, 1901.)

1. JUDGMENT—*Setting Aside—Excusable Neglect—The Code, Sec. 274—Irregular Judgment.*

A judgment obtained by mistake, inadvertence, surprise or excusable neglect may be set aside upon motion in the cause within a year, and an irregular judgment may be set aside at any time.

2. JUDICIAL SALES—*Judgments—Setting Aside—Foreclosure of Mortgages—Confirmation of Sale.*

The evidence in this case warrants the setting aside of the confirmation of sale under foreclosure.

3. JUDICIAL SALES—*Confirmation—Irregular Judgment—Practice.*

It is irregular to confirm a judicial sale at the same term at which the sale is made.

ACTION by W. R. Clement and others against H. B. Ireland and others, heard by Judge *E. W. Timberlake,* at Chambers, in Winston, on .. day of December, 1900. From an order setting aside a decree confirming a foreclosure sale, the defendants appealed.

Watson, Buxton & Watson, for the plaintiffs.
A. H. Eller, and *E. E. Raper,* for the defendants.

CLARK, J. Motion in the Superior Court of Davie County at Fall Term, 1900, to set aside judgment of confirmation obtained at Spring Term, of sale of land under a decree of foreclosure. The Court found the facts to be that the decree of foreclosure was made at Fall Term, 1899, and the land was sold by the commissioner named in said decree, at the courthouse door on 3d April, 1901, being the second day of that

term; that owing to smallpoxepidemic in the town of Mocksville, notice had been given by authority of the Judge that the term would only be held long enough to dispose of jail cases, but no civil causes would be tried; that except a nominal bid at request of commissioner, the only bids were made by the attorney of the assignee of the judgment and the assignee himself, who became the purchaser, and the sum bid was not a fair and adequate price; that the sale was made at noon recess of the Court, and was immediately reported to the Court and confirmed that afternoon, though opposed by the defendant, who was precluded by the promptness of confirmation and the adjournment of the term, which took place immediately afterwards, from filing affidavits to oppose confirmation or securing an increased bid of ten per cent upon the amount bid, which he has since done, and deposited said ten per cent with the Clerk of the Court; that when the sale was confirmed as aforesaid, the defendants gave notice that they would move at the next term to set aside the judgment for irregularity, surprise and excusable neglect.

His Honor's judgment setting aside the decree of confirmation should be sustained on both grounds.

We are cited to numerous cases that a final judgment can not be set aside by a motion in the cause, and that the judgment of one Superior Court Judge can not be reversed by another, they being of co-ordinate power. Both these propositions are sound, subject, however, to the rule that a judgment obtained by mistake, inadvertence, surprise or excusable neglect may be set aside upon motion at any time within a year, Code, sec. 274; and that an irregular judgment may, upon motion, be set aside at any time. *Carter v. Rountree,* 109 N. C., 29; 1 Freeman on Judgments, sec. 100.

In *Pickens v. Fox,* 90 N. C., 369, it was held as one ground of excusable neglect to set aside a judgment, that the Judge had informed counsel that no civil business would be dis-

posed of at that term, and he left a civil cause unrepresented on his departure from the Court before its adjournment, whereupon judgment was taken therein. The facts found in the present instance make out a clear case of excusable neglect, and such being the fact, the exercise of his Honor's discretionary power to set aside or refuse to set aside a judgment is not reviewable. *Norton v. McLaurin,* 125 N. C., 185; *Manning v. Railroad,* 122 N. C., 824; *Stith v. Jones,* 119 N. C., 428.

The judgment was also irregular, because it is contrary to the regular course of the Courts to confirm a judicial sale at the very term during which the sale had taken place. Of course this could be done by consent, but in its absence there should always be some lapse of time between the date of the sale and its confirmation that the mortgagor, or other person, whose land has been sold by decree of Court, may have opportunity to file exceptions based upon affidavits and to procure an increased bid of ten per cent, and deposit the same in Court. *White ex parte,* 82 N. C., 377. In analogy to the provision as to sales for partition, this should be at least twenty days. Code, sec. 1918. The purchaser at a judicial sale is simply a mere preferred proposer, and has no independent rights before the sale is confirmed. *Attorney-General v. Nav. Co.,* 86 N. C., 408; *Dula v. Seagle,* 98 N. C., 458. A confirmation should not be made, as here, immediately upon the sale, without opportunity to defendant, either when he has no notice or when, as in this case, he has no time allowed to show cause against confirmation. No harm can be worked by setting aside the confirmation when, as here, the purchaser not only procured the speedy confirmation, but was himself the creditor, being assignee of the judgment under which the property was sold. The lien of his judgment remains unimpaired.

No Error.

IN RE WORTH'S WILL.

(Filed November 12, 1901.)

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

Under The Code, Sec. 590, a witness may testify against his own interest, even if thereby other parties to the suit are injuriously affected, and the disqualification applies only when a witness testifies in his own behalf.

2. APPEAL—*Assignment of Errors—Case on Appeal—Exceptions and Objections—Evidence.*

Where a question suggests with sufficient certainty the facts intended to be elicited, the supreme court will pass upon the exception to the refusal to admit the question, although its object is not specifically set out in the assignment of error.

3. WILLS—*Undue Influence—Instructions—Evidence.*

The unequal distribution of property of testator among his children and grandchildren and other evidences of irregularity on the face of the will is evidence tending to show undue influence upon the testator.

APPLICATION of Hal M. Worth and others for the probate of the will of J. M. Worth, deceased, heard by Judge *H. R. Bryan* and a jury, at December Term, 1900, of the Superior Court of RANDOLPH County. From an order probating will, the caveators, R. W. Bingham and others, appealed.

Long & Nicholson, and *J. T. Morehead,* for the propounders.

Bynum & Bynum, D. L. Russell, and *Watson, Buxton & Watson,* for the caveators.

MONTGOMERY, J. The first exception of the appellants is addressed to the ruling of his Honor excluding the testimony of Mrs. Crocker, one of their witnesses. She was the daugh-

ter-in-law of the testator, and had received a legacy of $2,000 under the script which was then before the Court on the issue *devisavit vel non*. It appeared in the evidence that the testator had made another will in 1894, in which a legacy had been given to the witness, but the amount of the legacy was not stated, and there was no evidence as to the destruction or revocation of that will by the testator. The appellants insist that the witness ought not to have been excluded under section 590 of The Code, because she was not testifying in her own behalf, but against her interest, and therefore a competent witness.

Under section 343 of The Code of Civil Procedure, no party to the action or proceeding, or any persons who had an interest which might be affected by the event of the action or proceeding, or who ever had an interest, were allowed to be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, * * * when such examination or any judgment or determination in such action could in any manner affect the interest of such witness, or the interest previously owned or represented by him. There was a proviso, however, which allowed the witness to be examined if the personal representative, heir-at-law, etc., testified in his own behalf in regard to such transaction and communication. It seems clear to us that under that section a party or a person interested in the event of the suit (except under the proviso) was prohibited from testifying either for or against himself concerning a transaction with a deceased person, idiot or lunatic. The appellants insist, however, that a most important change was wrought in section 343 C. C. P. by an amendment thereto, and now appearing in section 590 of

The Code, by which such a witness is excluded only when he is offered in such actions or proceedings in *his own behalf*.

The appellees contend that the witness in this case was properly excluded, first, because the witness is a legatee under the script of 1899, and also under a former will, and as no proof had been adduced that the legacy in the former will was smaller than in the will of 1899, that she ought to be excluded on the ground of being interested in the event of the action and to her advantage; and, second, that even if it should be conceded that she might have been allowed to testify against her interest, if it had appeared that her legacy was smaller in the will of 1894 than in the will of 1899, yet under no circumstances could she be allowed to testify against the other defendants (propounders), and that she would be in effect doing so if allowed to testify against her own interest in a case like this. The appellees rely in support of their position mainly upon the case of *Weinstein v. Patrick*, 75 N. C., 344. That case was a peculiar one. A fraudulent grantee in a deed for land, who was also a creditor of the grantor who had died, had made a voluntary deed for the land to the wife of the deceased grantor, with covenant of warranty, and in an action brought by creditors against the witness and his grantee to compel the administrator of his deceased debtor and original grantor to sell the land for the payment of his debts, was offered by the plaintiffs to prove the fraud in the transaction. This Court said, there, that while it might be permissible for the plaintiffs to examine the witness to testify against his own interest (connected with the covenant of warranty in his deed to the other defendant), yet in doing that he had testified against the other defendants, which could not be allowed. It seems to us that the Court in that case, when it declared that the witness might be allowed to testify against his own interest, did not follow the strict letter of section 343 of The Code of Civil Procedure, because that

section excluded the testimony of all such witnesses, where such testimony could in any manner (which means, we think, advantageously or injuriously) affect the interest of the witness. But the main reason given in that case for the exclusion of the witness was because, that although a defendant in form, he was a plaintiff in substance; that his interest was identical with the plaintiffs'—both being creditors of the deceased—and if the sale of the land to the witness should be declared void as to creditors, the witness would get his debt; and the Court, citing the case of *Redman v. Redman,* 70 N. C., 257, treated the defendant as a plaintiff. The Court there stated that the witness, in his deed to the land to the other co-defendant, warranted the title, and that to that extent he was interested to support the transaction between himself and the deceased, but on which side his interest predominated the Court did not know. They said in conclusion, "But under all the circumstances we do not think he was competent to speak of the transaction between him and the deceased." It will be obesrved that the Court in that case did not give as a reason for the exclusion of the witness the fact that they could not tell on which side the interest of the witness predominated, but they put it upon the particular circumstances of that case. We think that the rules laid down in that case do not apply to the case before us.

A very satisfactory analysis of the meaning of section 590 of The Code is found in the case of *Bunn v. Todd,* opinion by Judge CLARK, 107 N. C., 266. There, the disqualifications are shown to extend only to parties to the action, persons interested in the event of the action, persons through or under whom the persons in the first two classes derive their title or interest when they are offered to testify in behalf of themselves, or to the person succeeding to their title or interest, against the representative of a deceased person, or a committee of a lunatic, or anyone deriving his title or interest

through them, and where the subject-matter about which they offered to testify is a personal transaction or communication between the witness and the person since deceased or lunatic. And there is an exception made in the rule of disqualification in cases where the representative of the deceased or of a lunatic introduces evidence concerning the transaction. Applying that analysis to the facts of this case, it seems clear to us that the witness (Mrs. Crocker) should have been permitted to testify if the legacy in the former will did not disqualify her. We think, for it to have had that effect, it was necessary that evidence should have been adduced going to show that the legacy in the former will was larger than that given to the witness in the script of 1899, and that was not done.

As we have seen, under section 343 C. C. P, she would have been disqualified whether her testimony was to be in her own behalf or against her; and that rule, as we have seen, if varied in the case of *Weinstein v. Patrick, supra,* was only under the special circumstances of that particular case, and even then contrary to the literal expressions of section 343, C. C. P.

But under section 590 of The Code, there is nothing to prevent a witness in any civil action or proceeding to testify against his own interest, even if in doing so the interest of other parties to the suit are injuriously affected. The disqualification is when they testify *in their own behalf.* But the appellees contend that the exceptions made by the appellants to the ruling of his Honor rejecting the evidence of Mrs. Crocker were insufficiently stated. In answer to that, we will say that although the evidence which the appellants sought to bring out by the questions to the witnesses was not specially set out in the assignments of error, yet we think that the question itself, asked by counsel of caveators of a witness interested under the will of 1899, suggests with suffi-

cient certainty the meaning and materiality of the evidence offered and rejected. *Watts v. Warren,* 108 N. C., 514.

The witness R. W. Bingham does not stand on the same footing with Mrs. Crocker. The testimony offered from him was directly in his own behalf, all the evidence going to show that if the will had been executed by the testator through the undue influence of one of the main beneficiaries, that he would have taken, as representative of his deceased mother, or as legatee under a former will, a respectable estate; whereas, he got nothing under the will of 1899.

The fifteenth exception, we think, should be sustained. In his charge to the jury, his Honor said: "The jury have nothing to do with the fairness or unfairness, or the equity or inequity, of the testamentary disposition of Dr. Worth's property. The only question for them to try is this: Is the paper-writing, and every part thereof, the last will and testament of J. M. Worth? And your answer to the question must be 'Yes' or 'No.'" Then his Honor, after immediately saying, "The jury are to take the law in this case from the Court; you must determine the facts from the evidence and apply the law as given by the Court to them as you find them to be," went on to discuss fully the question of undue influence and its bearings on the case; but he nowhere, in connection with the part of his charge above quoted, told the jury that the unequal distribution of the testator's property among his children and grandchildren, and other evidences of inequality on the face of the will, should be considered by them, in connection with other circumstances, as tending to show undue influence. This he should have done. It is true that his Honor did, in the middle of a very long series of special instructions asked by the propounders (and which were all given except the last, which was to the effect that there was no sufficient testimony of the script having been executed under undue influence), read the following

prayer to the jury: "6. There is no legal presumption of undue influence on account of relationship of Dr. Worth to his daughter and her family, nor is there any legal presumption of undue influence from the fact, if you so find it, that Dr. Worth was surrounded by and lived with her and others of her family who received large benefits under the will, whilst other of his kin lived at a distance, nor is there any legal presumption of undue influence that will arise by reason of the fact, if you so find, that better provisions are made in the will for some of the testators' next of kin than those which he made for others. These facts and circumstances, if proved to the satisfaction of the jury, raise no presumption of law, but the jury may consider them only along with other facts and circumstances in the case to enable them to pass upon the question of undue influence alleged by the caveators."

If that prayer, which was given, and of course constituted a part of the charge, had been used in connection with that part which we have quoted, and as explanatory of it, no fault could have been found. But the feature of the charge which we think objectionable, having been given to the jury near the close of the charge, and without explanation, was calculated to confuse the jury, with the probabilities that they took,, as the law governing the case, from his Honor the part which we have called objectionable, and that they did not take into consideration the inequalities on the face of the will as evidence, together with other facts and circumstances tending to show undue influence exerted on the testator by one of the beneficiaries.

We will not discuss the many other exceptions of the appellants, because they are of such a nature that if disposed of in this appeal they would probably have to be considered again in other forms, or might not be raised at all.

New Trial.

PARRISH v. GRAHAM.

(Filed November 12, 1901.)

PRINCIPAL AND SURETY—*Co-obligors—Issues—Practice—The Code, Sec. 424—Negotiable Instruments.*

Under The Code, Sec. 424, in an action against the maker and indorsers of a note, an issue should be submitted as to whether or not the endorsers were co-sureties, or whether one was a supplemental surety to the other.

ACTION by W. L. Parrish and wife against P. C. Graham, receiver of the Golden Belt Hosiery Company, J. S. Carr and J. W. Smith, and the Citizens Bank of New Bern, heard by Judge *W. B. Council* and a jury, at March Term, 1901, of the Superior Court of DURHAM County. From a judgment for the plaintiffs, the defendant J. W. Smith appealed.

Manning & Foushee, for the plaintiffs.
Boone, Bryant & Biggs, for the defendant J. W. Smith.

FURCHES, C. J. To understand the case, it will be sufficient to state that on the 5th day of June, 1897, the "Golden Belt Hosiery Company" (a corporation in the city of Durham), J. S. Carr and J. W. Smith, made and executed their promissory note to Mrs. Lilly L. Parrish for $3,500. The "Golden Belt Hosiery Company" being in a state of insolvency, P. C. Graham has been appointed and is its receiver. The note not being paid, this action was brought, and Graham, as receiver, filed no answer and made no defense to plaintiff's action. The defendants Carr and Smith both filed answers admitting the execution of the note, but Smith alleges plaintiff's action. The defendants Carr and Smith both filed that he signed it as supplemental surety to the defendant Carr, who agreed to hold him harmless. This allegation in defendant Smith's answer the defendant Carr denies, and

alleges that he and Smith are equally liable as sureties of the Golden Belt Hosiery Co.

When the case was called for trial, the defendant Smith tendered an issue for the purpose of determining whether or not he was only supplemental surety to the defendant Carr. The Court asked if it was contended that Mrs. Parrish knew that Smith was only supplemental surety to Carr, and, upon being answered that there was no such contention, the Court declined to submit such issue, and remarked that it seemed that plaintiff was entitled to judgment against both Carr and Smith, and they could then determine by an action for that purpose their respective liabilities as between themselves. Plaintiff then moved for judgment against all of the defendants, which was granted, and the defendant Smith excepted and appealed.

The ruling of the Court would have been correct under the old practice, before The Code consolidating the law and equity jurisdictions in the same Court. Before then, this would have been an action at law, whose judgments, as we have said at this term, were *in solido,* yea, yea, and nay, nay. But while this was so on the law side of the docket, it was different on the equity side; its judgments or decrees, as they were called, were modified to suit the equity and the justice of the case—and they were made against plaintiffs or defendants, or against one defendant and in favor of other defendants. Under The Code, our practice has followed, to a large degree, that of the Courts of Equity; "and its tendency has been towards the enlargement of the number of rights that may be adjusted in one action." *Davis v. Mfg. Co.,* 114 N. C., 321, 23 L. R. A., 322; *Bobbitt v. Stanton,* 120 N. C., 253.

But, besides the general tendency to adopt at least the spirit of the equity practice, it seems to us that cases like this have been specially provided for by section 424 of The Code:

"1. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves."

This seems to give ample power to the Court to submit the issue tendered by the defendant Smith, as this issue has been raised by allegations in the answer of defendant Smith and denials in the answer of defendant Carr. *Hulbert v. Douglas,* 94 N. C., 128.

We do not think *Baugert v. Blades,* 117 N. C., 221, nor any other authority cited to us, is in conflict with the authorities we have cited; and in refusing to submit the issues tendered by the defendant Smith, there was

Error.

CARR v. SMITH.

(Filed November 12, 1901.)

1. WITNESSES—*Examinations—Cross-Examination.*

Where a party to an action is examined as to collateral matters, he can not be contradicted.

2. PRINCIPAL AND SURETY—*Burden of Proof—Negotiable Instruments—Supplemental Surety—Contracts.*

Where one of two sureties claims to be a supplemental surety by agreement, the burden is upon him to show the agreement.

3. PRINCIPAL AND SURETY—*Co-sureties.*

In an action against an alleged co-surety to recover money paid in settlement of their joint liability, the amount received by the plaintiff as interest on collaterals deposited, should be deducted from the amount paid by plaintiff.

ACTION by J. S. Carr against J. W. Smith, heard by Judge *W. B. Council* and a jury, at March Term, 1901, of the Su-

perior Court of DURHAM County. From a judgment for the plaintiff, the defendant appealed.

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

MONTGOMERY, J. This action was brought by the plaintiff to recover of the defendant certain amounts of money which he alleged he had paid for the defendant as a co-surety, the Golden Belt Hosiery Company being the principal debtor. The questions raised on the trial were, first, whether or not the defendant Smith was a supplemental surety or endorser to the plaintiff; and, if such, what amount did he owe the plaintiff?

On the cross-examination the defendant Smith, a witness in his own behalf, was asked by plaintiff's counsel if he did not tell Carr not to take into the business Carrington; that if they got into trouble he would "lie down" on them, and he answered he did not tell him so. Afterwards, T. M. Gorman was introduced by the plaintiff and allowed to testify, over the objection of the defendant, that "the defendant had stated to him that Carr wishes to associate Carrington in the business, and that he (Smith) objected to Carrington, saying that he (Smith) was afraid Carrington would lay down on them if they got into any trouble." The evidence ought not to have been allowed, because it was collateral to the issue. It was not substantive evidence, and did not tend to prove or disprove the main issue as to the defendant's indebtedness to the plaintiff.

The rule of evidence is thus stated in 1 Greenleaf, sec. 449: "But it is a well-settled rule that a witness can not be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he should deny it, thereby to discredit his

testimony. And if a question is put to a witness which is collateral and irrelevant to the issue, his answer can not be contradicted, but is conclusive against him." It is said that the rule is relaxed in cases when the cross-examination relates to collateral matters that tend to show the temper, disposition or bias of the witness cross-examined. But in this instance the rule can not be said to be relaxed, for the witness is one of the parties to the suit himself, and might naturally be expected to have feeling in the suit and its results, though the question put to him on cross-examination really had no tendency to prove it. The purpose of that part of the cross-examination was to discredit the witness, and the plaintiff was concluded by his answer. *Kramer v. Electric Light Co.*, 95 N. C., 277; *State v. Patterson,* 74 N. C., 157; *Burnett v. Railroad,* 120 N. C., 517.

It was admitted by the defendant that he signed and endorsed the obligations of the Golden Belt Hosiery Company with the plaintiff, and that the company made default in the payment of the balances, which the plaintiff paid after the default, but the defendant denied that he was co-surety upon these obligations with the plaintiff, but that he stood as a supplemental surety or endorser by reason of a special agreement and understanding with the plaintiff that the plaintiff would protect and save him harmless against loss on account of such signing and endorsement. His Honor properly told the jury that the Golden Belt Hosiery Company was the principal debtor, and the defendant, in order to rebut the presumption of suretyship, must prove by the greater weight of the evidence to the jury that he was supplemental surety, that is, that he signed the obligations for the accommodation of the plaintiff, and by agreement with Carr that he would be protected from liability or loss in the matter.

It was admitted that the amount paid by the plaintiff to

the bank was $685. The defendant plead in the way of a counter-claim the amount of $420, which, he averred, that the plaintiff had received from Manning, Trustee, the same being the semi-annual interest due on certain collaterals in the hands of Manning as a security for the debt due by the Golden Belt Hosiery Company to the First National Bank, and for which the plaintiff and defendant were sureties. The plaintiff admitted that he had received the $420, but that Paul C. Graham, the duly appointed receiver of the Golden Belt Hosiery Company, had instituted a suit against the plaintiff, and Manning, Trustee, wherein the $420 was inquired into before the referee, Zollicoffer, and that a report of the referee had been filed.

On the trial, no evidence was introduced in reference to the matter, and it seems clear that his Honor should have instructed the jury, as requested by the defendant, that if they believed *all* the evidence on that point, the $685.22 paid by Carr to the bank should be reduced by the amount of $420.

It makes no difference whether or not the stock in Manning's hands, as collateral, reached the bank after the maturity of the semi-annual interest on the same fell due. The plaintiff got that amount, as the interest, and it was intended for the benefit of both the plaintiff and the defendant when the collateral was put up, the interest then being not due and the coupons unclipped.

New Trial.

JEFFRIES v. SEABOARD AIR LINE RAILROAD CO.

(Filed November 12, 1901.)

1. DAMAGES—*Evidence—Admissibility—Earning Capacity.*

In an action against a railroad company for injuries to a child, evidence that the child had no property and no source of income, taken in connection with the proof of wages current in the locality, is competent on the question of damages.

2. EVIDENCE—*Opinion Evidence—Competency.*

In an action against a railroad company, it is not competent to ask the engineer whether there was anything not done that could have been done to save the child.

3. NEGLIGENCE—*Railroads—Reasonable Care.*

It is the duty of the engineer, in order to avoid injuring child on track, to check the train at the time when, in the exercise of reasonable care, he could have first seen the child.

ACTION by Carrie Jeffries, by her next friend, Leonora Jeffries, against the Seaboard Air Line Railroad Company, heard by Judge *A. L. Coble* and a jury, at April Term, 1901, of the Superior Court of FRANKLIN County. From a judgment for the plaintiff, the defendant appealed.

F. S. Spruill, and *B. B. Massenburg,* for the plaintiff.

C. M. Cooke, W. H. Day, J. B. Batchelor, and *Battle & Mordecai,* for the defendant.

CLARK, J. Carrie Jeffries, three years old, while straying upon defendant's track, was injured by its locomotive, causing the loss of her right arm at the shoulder. Some of the defendant's exceptions, taken out of abundant caution on the trial, were properly abandoned here, and we will only discuss those insisted on in the argument, though we have examined them all.

The first exception was to the admission of evidence that the child had no property and no source of income. This, standing alone, might have been irrelevant testimony, and the admission of such is no error, unless it is injurious to the party excepting. *Waggoner v. Ball,* 95 N. C., 323; *Deming v. Gainey, Ibid,* 528; *Patterson v. Wilson,* 101 N. C., 594. But the next question elicited the fact that a cook was worth in that section two to three dollars per month and board, and ten cents per day was allowed for board; that a woman field hand was worth 35 to 40 cents per day and board. The object and pertinency of the evidence were to show what this child, with no source of income and no means of education, would have been worth to herself later in life, if uninjured, in the humble vocations of cook or field hand, which are occupations within the probable reach of the illiterates of her sex. The defendant certainly has no cause to complain.

In *Railroad v. Shipley,* 31 Md., at page 374, the Court, holding that evidence was competent that plaintiff was the son of a laboring man and a mechanic, well says: "If, in fixing the amount of damages, the jury are to estimate to what extent the injury has disabled the plaintiff from engaging in such mechanical or other laborious employments or pursuits, as but for the injury he would have been qualified for, we do not see why they should not be informed by evidence that his position and reasonable expectations in life were such as would render such pursuits probable and necessary for a livelihood." The Court goes on to say that if it had been attempted to use this evidence merely to show poverty and to appeal to the prejudices of the jury, exceptions should be made to any argument on that line, and a special instruction might also be asked confining the testimony to its legitimate purpose. Nothing of that kind appears in the present case, and the evidence was clearly competent for the purpose just stated.

Many other cases hold that evidence of the condition in life of the party injured may be shown as one of the factors in determining how much money loss has been caused him by the injury. *Winters v. Railroad,* 39 Mo., 468; *Railroad v. Martin,* 41 Mich., 671; *Express Co. v. Nichols,* 33 N. J. L., 437, 97 Am. Dec., 722, in which the Court says: "The plaintiff was an architect—a business depending on his personal services as much as that of a common laborer, a clerk or a mechanic, and his emoluments were the result of his own earnings. By reason of the injuries he received, he was for a time incapacitated from pursuing his occupation, and sustained damages by reason thereof. These damages resulted proximately from the wrongful act of the defendant's servants, and obviously should be included in the compensation to be awarded to him. To what extent he had sustained pecuniary injury in that respect must depend upon the nature and extent of his business; and the jury would not be in a condition to reach any correct conclusion on that subject, unless they had before them some evidence of the value of the services to himself."

In *Stafford v. Oskaloosa,* 64 Iowa, 258, it was held that where a physician was disabled by an injury to earn a livelihood, it was competent to show his earning capacity in the practice of his profession.

In *Simonson v. Railroad,* 49 Iowa, 94, it was held competent to show that an unskilled laborer had no other source of income than his earnings as such.

In *Railroad v. Falvey,* 104 Ind., 409, it is said that the jury may consider as an element of damages "the professional occupation, if any, of the plaintiff, and her ability to earn money, and she will be entitled to recover for any permanent reduction of her power to earn money by reason of her injuries."

It is a truism that whether it is a professional man or

skilled laborer who is prevented by injury from pursuing his calling, that calling and his earnings thereby are matters to be put in evidence in awarding his compensation. The defendant has no ground to complain that here it is in evidence that the child, who as yet has no vocation, was in humble circumstances, and had not suffered any pecuniary injury by the loss of her arm other than the earnings which might have come to her later from manual labor.

Counsel for defendant say in their brief, "the child of Barabbas would be entitled to as much damages, the injuries being equal, as the child of Herod." This is true as to compensation for physical suffering. It would not be true as to compensation for loss of earning capacity as between two individuals earning different incomes, for in that aspect their injuries are not equal. When, however, by reason of immaturity neither has yet acquired a vocation, whether one with the means of obtaining an education has not suffered greater loss by being disabled to profit thereby, than one who has no expectations in life, except of earning a livelihood by manual labor, is a matter we need not discuss, for here the compensation asked is on the lowest possible basis, that of manual, unskilled labor.

The next exception is that the following question to the engineer was ruled out on plaintiff's objection: "After you saw the child, was anything not done that could have been done to save the child?" This, if a proper matter of proof, was to ask the witness to answer a question that the jury were to pass upon. This has been fully discussed by COOK, J., in *Raynor v. Railroad,* at this term, and needs no further citation of authority. The question, however, is further objectionable, for the proof should be directed to the inquiry whether the injury could have been avoided by reasonable care on the part of the defendant after the engineer, with a proper outlook, *should have seen the child.*. This

view was expressed in the following instruction to the jury, to which the defendant also excepted: "It was the duty of the engineer to have made an effort to check the speed of his engine as soon as the train reached a point on the track when, by looking, he could have seen the child. It is not material in this case whether the engineer actually saw the child on the track or not. If, in the exercise of ordinary care, by looking ahead, he could have seen the child in time, without injury to his passengers, to have stopped the train before he ran over it, and failed to do so, the defendant company was negligent. Therefore, if the jury shall find as a fact from the evidence that the engineer, in the exercise of ordinary care, by looking ahead, could have seen the child, and, without injury to his passengers, stopped the train before he struck it, and that he failed to stop the train, thinking that the child would get off the track, or be taken off before he got to it, and so ran over it, the company would be negligent, and the jury should answer the first issue 'Yes.'" This instruction was fully warranted by an unbroken line of cases from *Pickett v. Railroad,* 117 N. C., 616, 30 L. R. A., 257, 53 Am. St. Rep., 611 down to the present term, and is based upon every consideration of humanity and due regard to the rights of common carriers by rail and those injured by the dangerous machines which they must necessarily use in their rapid conveyance of freight and passengers. Among the many cases are *Pharr v. Railroad,* 119 N. C., 751; *Fulp v. Railroad,* 120 N. C., 529, and many others cited in Munroe's Notes to Pickett's Case, and there are others later than the publication of these notes.

The defendant's counsel rest their exception upon an expression in the opinion in *Bottoms v. Railroad,* 114 N. C., 704, 25 L. R. A., 784, 41 Am. St. Rep., 799, which, in general terms, approved a charge of the Judge below containing the sentence that if the engineer was so occupied about his

engine that he did not see the helpless person on the track in time to avoid the injury, the defendant would not be liable. But that identical point was an issue and reviewed in *Arrowood v. Railroad,* 126 N. C., 629. In that case the Court said: "The duty of keeping a lookout is on the defendant. If it can keep a proper lookout by means of the engineer alone, well and good. If, for any reason, a proper lookout can not be kept without the aid of the fireman, he also should be used. If, by reason of their duties, either the fireman or the engineer, or both, are so hindered that a proper lookout can not be kept, then it is the duty of the defendant, at such places on its road, to have a third man employed for that indispensable duty. In *Pickett v. Railroad,* 117 N. C., 634, 30 L. R. A., 257, 53 Am. St. Rep., 611; *Lloyd v. Railroad,* 118 N. C., 1012, 54 Am. St. Rep., 764, and a long line of similar cases, it is held that it is the duty of the *defendant* to keep a proper lookout. It is not held anywhere that such lookout as the engineer may be incidentally able to give will relieve the company, if that lookout is not a proper lookout."

The request to instruct the jury to answer the first issue "No," was properly refused. There was ample evidence, if believed by the jury, that the train could have been stopped in time to have avoided the injury after the engineer, with ordinary care, could have seen the child on or in dangerous proximity to the track.

For the same reason it was not error to add the modification made in the second instruction asked by the defendant.

Affirmed.

JERMAN v. GULLEDGE.

(Filed November 12, 1901.)

1. JUSTICES OF THE PEACE—*Appeal—When Returnable—Agreement of Counsel—The Code, Secs. 878, 880.*

Where an appellee moves in the superior court to dismiss an appeal from a justice of the peace, not docketed within ten days, as required by The Code, Sec. 878, it will not be allowed where it appears that the delay was due to the failure of counsel for the appellee to prepare a transcript with the justice as agreed upon by the counsel.

2. JUSTICES OF THE PEACE—*Appeal—When Returnable—Acts 1897, Ch. 256, Sec. 2.*

Under Acts 1897, Ch. 256, Sec. 2, an appeal from a Justice of the Peace is returnable to the January Term, 1900, of the Superior Court of Anson County, if returned within ten days, as required by Sec. 878 of The Code.

ACTION by Martin Jerman, against J. W. Gulledge, heard by Judge *Frederick Moore,* at April Term, 1901, of the Superior Court of ANSON County. From a judgment for the plaintiff, the defendant appealed.

Robinson & Caudle, for the plaintiff.
H. M. McLendon, for the defendant.

COOK, J. This action was tried in a court of a Justice of the Peace on the 7th of December, 1899. Judgment was rendered in favor of the plaintiff, and defendant took an appeal to the Superior Court. The case was returned to and docketed in the Superior Court (not to the January Term, 1900, which was the next ensuing term) on the 5th of April, 1900, which was ten days prior to the April Term of said Court. It was continued by consent from term to term until the April Term, 1901, and while then being heard

before his Honor at Chambers, the attorney for plaintiff moved to dismiss the appeal upon the ground that the case was not docketed at the January Term, 1900 (the term next ensuing after the appeal was taken), which motion his Honor allowed, and dismissed the appeal, and defendant excepted and appealed to this Court.

In the record, it appears from the uncontradicted affidavit of H. H. McLendon, attorney for defendant, that when the Justice of the Peace rendered judgment against defendant, he appealed in open Court in the presence of the plaintiff, "and paid him his costs as required by law, and asked said Justice to send up the transcript at once. That it was understood and agreed that T. L. Caudle, Esq., attorney for the plaintiff, would make up the transcript with the Justice and submit same to counsel for defendant. * * * That, by reason of the agreement entered into by said affiant with said J. S. Myers, J. P., and T. L. Caudle, attorney as aforesaid, and relying upon said agreement, the appeal was not sent up to the Superior Court till after the said January Term, 1900. That said Justice of the Peace told this affiant on two or three occasions, when asked if he had sent up the appeal, that he had been in the office of said T. L. Caudle several times to make out said transcript, and that he failed to find him. The said Justice lives about eight or nine miles from Wadesboro." It further appears from said affidavit "that on Friday of said April Term, 1901, said T. L. Caudle, attorney for plaintiff, agreed with said affiant, attorney for defendant, that they would submit the question of law raised in said answer of defendant to the complaint of plaintiff * * * and said question was to be passed upon by his Honor Fred. Moore, Judge presiding, and if adverse to plaintiff, then it was agreed that said case would be submitted to John C. McLaughlin, Clerk, to arbitrate the question of the defendant's damages. That said affiant and T.

L. Caudle, Esq., attorney for plaintiff as aforesaid, appeared before his Honor at Chambers to hear said question of law and the facts in the case. * * * While doing so, said attorney for plaintiff interrupted said affiant and said: 'In this connection, your Honor, I desire to make a motion to dismiss the appeal.' * * * That no motion was made to dismiss said appeal till the time the parties went before the Judge at Chambers, as aforesaid, and no notice of motion was given at any time."

Upon the facts stated in the affidavit of defendant's attorney, which are uncontradicted, we think his Honor erred in dismissing the appeal. Under section 878 of The Code, the Justice is required to make a return to the appellate court, and file with the Clerk thereof the papers, proceedings, etc., within ten days after the service of notice of appeal; and under section 830, "When the return is made, the Clerk of the appellate court shall docket the case on his trial docket, for a new trial of the whole matter at the ensuing term of said court." But in this case the Justice was relieved of the duty to make return thereof within ten days, as required by the agreement of attorneys for both parties. We know of no statute which *requires* that the appeal *shall* be docketed at the ensuing term, if the attorneys on both sides shall desire otherwise. While it does not here appear that it was the purpose of the attorneys not to docket the case at the January Term, yet it was not done, and no *laches* can be imputed to the Justice or attorney for defendant. By agreement, the attorney of plaintiff was to make out the return for the Justice and submit the same to the attorney of the defendant. The Justice, upon several occasions, went to the office of plaintiff's attorney to look after the matter, but could not find him, of which he informed the attorney of defendant. The delay was, therefore, caused by the plaintiff's attorney, which he seems to have recognized by not making

his motion at the April Term, 1900, and by consenting to the continuances thereafter; and the Court ought not to allow a party to take advantage of his own wrong.

The facts in this case differ from those in *Pants Co. v. Smith,* 125 N. C., 588, and cases there cited, in that the failure to docket in these cases was on account of *laches;* while in this case it was caused by an agreement of the parties.

It was insisted by the defendant's counsel in this Court that the return should *not* in any event have been made to the January Term, because that term was created for the trial of criminal actions (Acts 1897, Chap. 256); but a careful review of the statute leads us to a different construction. By section 2, that term is given *jurisdiction* of all civil matters, on account of which the appeal was properly returnable to that term.

There is error.

DOUGLAS, J., concurring. I concur in the judgment of the Court, as well as in its opinion, except in so far as it holds that the appeal was properly returnable to the criminal term of the Superior Court. Of this I doubt, as section 878 of The Code provides that "When the return is made, the Clerk of the appellate court shall docket the case on his *trial* docket, for a new trial of the whole matter at the ensuing term of said Court." This could be done at the criminal term only by the consent of parties.

WOOTEN v. WILMINGTON AND WELDON RAILROAD CO.

(Filed November 15, 1901.)

For former opinion in this case and the head-notes thereto, see *Wooten v. Wilmington and Weldon Railroad Co.*, 128 N. C., 119.

PETITION to rehear. Petition dismissed.

Bellamy & Peschau, for the plaintiff.

Junius Davis, Rountree & Carr, and *H. C. Stevens,* for the defendants.

MONTGOMERY, J. This case has been considered again by the Court upon the petition to rehear granted to the defendant. We have carefully gone over the former opinion and considered the arguments of counsel, and, in the end, are not disposed to recede from the positions taken in the former decision. Every phase of the case was there discussed at length, except the matter of the effect of the assent by the executors to the legacy of the remainderman upon the plaintiff's rights. If we were to reduce to writing the reasons which have induced us to make no change in the former opinion, the writing would be but a repetition of what was there said. We, there, carefully examined the authorities relied upon by the defendant, after weighing well the arguments and briefs of the counsel of the defendant, and we came to the conclusion that the other view of the law presented by plaintiff's counsel was the correct one.

As to the matter of the assent of the executors to the remainderman's legacy, it is only necessary to say that the plaintiffs admit that the position of the defendant that the assent of the executors to the life tenant's legacy included their assent to the remainderman; but they say they are

finding no fault with the executors, or with the defendant, on that account, but are insisting that after the assent, the executors, together with the defendants who were charged with the duty failed to protect the remainderman in the transfer of the legacy—the stock—thereby causing loss to the plaintiffs; and we are of the opinion that the plaintiff's contention must be sustained.

Petition Dismissed.

BANK v. HODGIN.

(Filed November 19, 1901.)

STATUTES—*Retroactive*—*Partnership*—*Surviving Partner*—*Acts 1901, Ch. 640.*

Acts 1901, Ch. 640, regulating settlements of partnerships by surviving partners, does not apply to actions then pending and is not retroactive.

ACTION by the People's National Bank of Winston against G. D. Hodgin, heard by Judge *H. R. Starbuck*, at May Term, 1901, of the Superior Court of FORSYTH County. From a judgment for the defendant, the plaintiff appealed.

Glenn, Manly & Hendren, for the plaintiff.

Holton & Alexander, and *Shepherd & Shepherd,* for the defendant.

FURCHES, C. J. The defendant and L. L. Lunn composed a partnership, doing business under the name and style of Hodgin Bros. & Lunn. In 1896, Lunn died, leaving the defendant the only surviving partner of the concern. Lunn, at the time of his death, was insolvent, the firm was insolvent,

and the defendant Hodgin was insolvent. At Lunn's death, he was owing the plaintiff an individual debt of $600, due by note, with the defendant Hodgin as surety, and the firm was owing the plaintiff bank $2,900. Hodgin, as surviving partner of the firm, deposited with the plaintiff bank $3,037.77, money belonging to the firm. The plaintiff, thinking it had the right to do so, undertook to apply the $3,037.77 so deposited to the two debts due the bank mentioned above, and refused to pay the same, or any part of it, to the defendant; and the defendant, as surviving partner, brought suit against the plaintiff bank therefor. After a long litigation in the Superior Court of Forsyth, and in this Court, the defendant Hodgin finally recovered judgment against the plaintiff bank for the full amount of the deposit and interest thereon. On the first hearing in this Court, *Hodgin v. Bank,* 124 N. C., 540, reheard and reported in 125 N. C., 503, a new trial was awarded the plaintiff and the case was tried again, and again came to this Court by appeal and is reported in 128 N. C., 110. This last appeal was from a judgment of Forsyth Superior Court, November Term, 1900, and was affirmed by this Court on the 9th of April, 1901, and a final judgment entered in the Superior Court of Forsyth at ..... Term, 1901.

On the 13th of March, 1901, the Legislature passed and ratified an act (Chapter 640) providing for the *pro rata* distribution of the assets of insolvent co-partnerships dissolved by the death of one of the partners. And on the 29th day of April this action was commenced by the plaintiff bank (the defendant in the former action) against Hodgin as surviving partner (the plaintiff in the former action), in which the Court is asked to enjoin Hodgin from issuing execution on his judgment, and for a receiver.

There seems to be no grounds alleged in the complaint in this action justifying the appointment of a receiver,

unless it be the act of 9th March, 1901. And this is the only ground insisted on in the argument in this Court to sustain the plaintiff's contention. The plaintiff's right to have a receiver appointed is denied in the answer, which also denies the right of the plaintiff to enforce a *pro rata* distribution of the assets, in which the defendant specially pleads the former action and the judgments therein of this Court and the Superior Court of Forsyth. It is admitted that the parties in this action are the same as those in the former action, and that the $3,037.77 is the same fund or money as that involved in the former action. This being so, it seems too clear for argument that the plaintiff has no standing-ground, unless it be the act of 1901; and we do not think this gives it any. If the defendant acquired no vested right in this fund by his judgment, as contended by him (*Dunham v. Anders,* 128 N. C., 207) still we do not think the act of 1901 applies to this case. It seems to apply only in cases where such dissolution takes place after its ratification. This is the general rule of interpretation, and will be followed by this Court, unless there is something in the act itself that shows a different intention.

Instead of this act showing any purpose in the Legislature to give it a retroactive operation, it seems plainly to show it does not. It provides that "When one of the partners dies," the surviving partner shall, "within sixty days from the time of his death, prepare an inventory of the assets," etc. This could not be done in this case, and shows to our minds that it was only intended to operate in future dissolutions of the kind described.

Besides, the tenth section provides that it shall not operate in cases where actions are then pending. The action of *Hodgin, survivor, v. Bank,* was then pending, and it seems to us that if, by reversing the parties, thereby making the defendant in that action plaintiff in this, the plaintiff can

evade the statute, this section would be to but little purpose. This can not be done. The rights of the parties have been adjudged. The statute of 1901 does not aid the plaintiff, and the judgment is

Affirmed.

CLINARD v. WHITE & CO.

(Filed November 19, 1901.)

1. SERVICE OF PROCESS — *Foreign Corporations* — *"Managing Agent"—The Code, Sec. 217, Subsec. 1.*

The agent of a foreign corporation who superintends all its work in this state and has general charge of its employees is its "managing agent" within the meaning of Sec. 217, Subsec. 1, of The Code, and service of summons on such agent is valid, where the cause of action arose and the plaintiff resides in this state.

2. APPEAL—*Dismissal—Action.*

No appeal lies from a refusal to dismiss an action.

ACTION by A. S. Clinard, administrator of W. A. Clinard, against J. G. White & Co., heard by Judge *H. R. Starbuck,* at May Term, 1901, of the Superior Court of FORSYTH County. From a refusal to dismiss the action, the defendant appealed.

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

COOK, J. The plaintiff in this action is a resident of Forsyth County, in this State, and the cause of action arose in said county. The defendant is a foreign corporation. At the time of the service of the summons, defendant company

was engaged in overhauling, extending and putting in good condition the electric lights and street-car plant of Winston-Salem, in said county.

The summons was served upon one W. S. Turner, and defendant company entered a special appearance and moved to dismiss the action upon the ground that he, Turner, was not such an agent as is contemplated by the statute regulating the service of summons upon non-resident corporations, as would bring it into Court. His Honor overruled the motion, and defendant company appealed.

The affidavits show that Turner was not the president, secretary, cashier, treasurer, or a director of the company; they are somewhat conflicting as to his authority to receive or collect moneys for the company, but it fully appears, without contradiction, that he had an oversight of all the work and had general charge of the employees of the company, and acted as its superintendent of construction. Whether this constituted him its "managing" agent within the meaning of section 217, subsection 1, of The Code, is the question presented for our determination. It appearing that the plaintiff resides in the State, and also that the cause of action arose herein, service upon a foreign corporation is to be made in the same manner as upon resident corporations, to-wit, by delivering a copy of the summons to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent; and a local agent is defined by the said section to mean a person receiving or collecting moneys within the State for or on behalf of the corporation. No statutory definition being given to "managing" agent, we must give it that meaning generally recognized by lexicographers. To "manage" (the verb from which the adjective "managing" is derived) is defined by Mr. Webster to mean "to direct; to govern; control; wield; oreder," etc.; hence, "to direct affairs, to carry on business

or affairs." Applying this meaning of the word to the duties, functions and relations which Turner performed and bore to the business carried on by defendant company, the conclusion is irresistible that he was its managing agent, and therefore service of the summons made upon him brought the defendant company into and within the jurisdiction of the Court. This being clearly so, it is unnecessary to discuss further whether or not he was a local agent also; for he may have acted in either one or both of those capacities.

No appeal lies from a refusal to dismiss—the cases are uniform, and are collected in Clark's Code, page 738. We have, however, discussed the merits, as has been sometimes done in such cases. *State v. Wylde,* 110 N. C., 500.

Appeal Dismissed.

MYERS v. LUMBER CO.

(Filed November 19, 1901.)

1. MASTER AND SERVANT—*Employer and Employee—Negligence.*

An employer owes to his employee the duty to be reasonably careful to provide safe appliances and machinery, a safe place in which to work, and a reasonably safe way for getting to and from his work.

2. EVIDENCE—*Incompetent—Negligence—Master and Servant.*

In an action by an employee to recover for injuries alleged to have been caused by the negligent arrangement of machinery, evidence that the machinery was, after the injury, removed to another part of the room, is incompetent.

ACTION by C. A. Myers against the Concord Lumber Company, heard by Judge *Geo. H. Brown, Jr.,* and a jury, at

January Term 1901, of the Superior Court of CABARRUS County. From a judgment for the plaintiff, the defendant appealed.

Montgomery & Crowell, for the plaintiff.
W. G. Means, and *Jones & Tillett,* for the defendant.

MONTGOMERY, J. An employer owes to his employee the duty to be reasonably careful, to provide sound and safe appliances and machinery, and also to see that the place prepared for him in which he is to do his work, and the ways provided for getting to and from it, be reasonably safe. *Chesson v. Lumber Co.,* 118 N. C., 59.

The plaintiff, a servant of the defendant, complains that the defendant neglected and failed to use such care and forethought as a reasonably prudent man would have done under the circumstances at the time of his injury by the defendant's machinery.

The defendant excepted to the following instructions given to the jury:

"If you find the facts to be that the defendant unnecessarily and dangerously permitted shavings to accumulate in the passageway near the moulder, and that the plaintiff, in obedience to the superintendent's orders, was compelled to pass near them, and that they caused him to fall and slip and cut himself, that would be negligence, and you should answer the first issue 'Yes.'"

"If you find the facts to be that the rip-saw and moulding-machine were dangerously close, and that in order to comply with the superintendent's order the plaintiff was compelled to pass with a load in his arms between them, and that the defendant company had permitted the regular passageway for this lumber to become filled up with plank, and had failed to provide another, that would be negligence upon the

part of the defendant, and if the plaintiff was injured thereby—if that negligence caused his injury—your answer to the first issue should be 'Yes.'"

"So if the jury find that a counter-shaft, or loose pulley, or a covering for a saw running naked was a proper and reasonable safeguard for its employees, and the defendant failed to provide it, that is negligence; and if the jury find that the plaintiff was injured by reason of such negligence they will answer the first issue 'Yes.'"

We see no error in the charge. The instructions were based on repeated decisions of this Court, and there was evidence upon which they were formulated.

But there must be a new trial in this case because of the admission of incompetent evidence. The plaintiff was allowed to testify for the purpose of showing negligence on the part of the defendant that, sometime after he was injured, the saw, by contact with which he was hurt, and which was alleged to have been negligently situated with reference to other appliances and machinery of the defendant, was removed by the defendant to another part of the room. That evidence was incompetent, and it tended to prejudice the jury against the defendant. *Lowe v. Elliott,* 109 N. C., 581.

The Supreme Court of Minnesota, in *Morse v. Railroad,* 30 Minn., 465, reversing a former ruling in which they had held that such evidence was competent, said: "But on mature reflection we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this Court is on principle wrong. * * * A person may have exercised all the care which the law requires, and yet in the light of this new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the

lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence. The same rule was adopted by the Supreme Court of the United States in the case of *Railroad v. Hawthorne,* 144 U. S., 202, and appears to be well settled in England. *Heart v. Railroad,* 21 Law Times (N. S.), 261, 263."

New Trial.

BANK v. SWINK.

(Filed November 19, 1901.)

1. FINDINGS OF COURT—*Judgment—Judge.*

Where evidence is made a part of findings of fact by trial judge and sent up with case on appeal, the evidence will be taken as a part of the findings of the court.

2. PRINCIPAL AND SURETY—*Findings of Court—Evidence.*

From the evidence set out in the findings of fact by the trial judge, it is held that the defendants, Swink and Thomason, are sureties.

3. PRINCIPAL AND SURETY—*Judgment—Extension of Time—The Code, Sec. 440.*

In an action to revive a dormant judgment, under Sec. 440 of The Code, extension of time to the principal for payment of the judgment may be pleaded by a surety, although the suretyship was not pleaded in the original action.

4. JUDGMENT—*Dormant—Revival—The Code, Sec. 440.*

In an action to revive a dormant judgment, under The Code, Sec. 440, any defense is available which has arisen since the judgment was taken.

BANK *v.* SWINK.

ACTION by the First National Bank of Salisbury against D. A. Swink, and J. A. Thomason, administratrix of George T. Thomason, heard by Judge *Geo. H. Brown,* at May Term, 1901, of the Superior Court of ROWAN County. From a judgment for the plaintiff, the defendants appealed.

Kerr Craige, L. H. Clement, and *T. C. Linn,* for the plaintiff.

Glenn, Manly & Hendren, Overman & Gregory, Swink & Swink, for the defendants.

FURCHES, C. J. This is a motion to revive a dormant judgment, in which a jury trial was waived, and, by consent of both parties, his Honor found the facts and declared the law, as follows:

This is a motion to revive a dormant judgment rendered and docketed in 1892 in favor of the plaintiff against Eugene Johnson, D. A. Swink and Geo. T. Thomason, defendants. Josephine A. Thomason is administratrix for the latter—and the motion is for leave to issue execution thereon. The motion was heard by the Clerk, and, on appeal to the Superior Court, a jury trial was waived of record by all parties, and motion heard by G. H. Brown, Jr., Judge, on Saturday, first week of said term. The Court then entered an order granting said motion, to which defendants Swink and Thomason duly excepted and appealed.

"(The Clerk will copy and send up said order, and also a copy of the Judge's notes of evidence.)

"On Tuesday of second week, before Term had been adjourned, the Court made the findings of fact, as follows, to-wit:

"On January 23, 1899, Eugene Johnson executed his note in the sum of $1,500 to plaintiff, payable at four months, and the defendants, Swink and Thomason, endorsed by signing their names on the back of said note.

"(The Clerk will send up exact copy of said note, and all entries and endorsements thereon.)

"Said note was made and endorsed under the following circumstances: The negotiation and arrangement to have the note discounted and to borrow the money was made by Johnson with Foust, cashier of said bank. The purpose of borrowing the money was to pay Swink & Thomason, then a tobacco firm, a debt Johnson owed them. Defendant Johnson signed the note and left it with Foust, cashier. Johnson then went to warehouse of Swink & Thomason and requested them to endorse said note. Swink & Thomason went to the bank, and each wrote his name across the back of said note, and then the note was discounted by the said bank, and proceeds placed by said bank to credit of Swink & Thomason on their deposit account, which was then overdrawn. This was done by consent of Swink & Thomason. The latter gave Johnson credit for said sum on his account on their books. No money was paid to Johnson by the said bank. All payments of interest on said note were made by Johnson, and none by Swink & Thomason. There is no evidence that the bank ever presented the note to Swink & Thomason, or either of them, or ever demanded payment of them, until commencement of action. Plaintiff brought suit on said note against defendants to February Term, 1892, at which time judgment was regularly taken against defendants, Swink & Thomason, in default of answering. At May Term, 1892, judgment was regularly entered against defendant Johnson. That Term commenced on May 9, 1892. Judgment against Johnson entered and signed May 13. At that date Johnson was generally reported to be solvent, and was solvent. Judgment was duly docketed as of first day of the term.

"(The Clerk will send up copies of both said judgments, and of the complaints in the cause.)

"On May 12, 1892, defendant Johnson and the said Cash-

ier Foust and W. C. Blackmer, attorney of record in the cause and general counsel for the bank, without the knowledge of the defendants Swink & Thomason, agreed on an extension of time of payment of the judgment, upon which no execution was to issue for twelve months, provided Johnson paid up interest every ninety days. On May 12, 1892, said defendant Johnson paid up interest thereon for ninety days in advance, to August 12, 1892, and bank accepted same without knowledge of Swink & Thomason.

"No execution was issued during said period in accordance with said agreement. Only execution ever issued was January 21, 1895, and returned *nulla bona* on February 18, 1895. Johnson is now insolvent. Defendant Johnson himself wrote the note and left it with the cashier, and went to the warehouse of Swink & Thomason and told them to go to bank and endorse note, and take proceeds and give him credit for same. Johnson then owed Swink & Thomason $1,900. Swink & Thomason first learned of the ninety days' extension and payment of interest in advance hereinbefore set out during August, 1893.

"(The Clerk will send up copies of entries of judgment docket, page 220, Docket No. 8, page 770, and entries, minute docket February Term, 1892, entries and record at that term, and record of judgment against D. A. Swink and G. T. Thomason.)

"Said judgment has never been paid or satisfied by anyone. The defendants' counsel contends that, taking the entire evidence, it clearly appears that Swink & Thomason are sureties, and have been released.

"The Court is of opinion as matter of law:

"(I) That Swink & Thomason received entire consideration for their own use and benefit, and in law occupied relation of co-principal.

"(II) That they were not released from the operation of the judgment rendered against them.

"(III) That upon the facts as found upon the evidence, the motion should be granted, and that leave to issue execution according to law is granted as to defendant Swink, and to take proper proceedings according to law against the administratrix of George T. Thomason, to enforce payment of said judgment. To this judgment, order and findings, defendants Swink and Thomason except and appeal."

The Judge does not, in distinct terms, as it seems to us he might have done, find that Swink & Thomason were the sureties of Johnson. But it does seem that he has done so by necessary implication, as he incorporates in his findings the evidence in the case. And in this evidence we find that Johnson testified as follows: "I borrowed money from Foust, as Cashier of the National Bank of Salisbury. It was I who borrowed the $1,500, and I gave the note sued on, with D. A. Swink and G. T. Thomason as sureties and endorsers." And D. A. Swink testified as follows: "Johnson owed us $1,900. He came by the warehouse and told us to go by the bank and see the cashier and get $1,500. I went and saw Foust, and he showed me note and said we were to endorse it for Johnson. I did not know of this before. I endorsed it, and a few days after, Thomason endorsed it. Our firm owed the bank some money at that time. Bank placed this money to the credit of our firm, and we gave Johnson credit for $1,500. I did not arrange to borrow this $1,500; Johnson did. We knew nothing of it."

This evidence of Johnson and Swink is uncontradicted, and is made a part of the Judge's findings and case on appeal. We must therefore take it as a part of the findings of the Court, as we must take it that it was within the knowledge of the Court that we could not review the Judge upon findings of fact, where there was a conflict of evidence.

Plaintiff alleges in its complaint, "That Eugene Johnson executed and delivered his promissory note for $1,500, borrowed money, * * * and Swink and Thomason endorsed said note."

We think it is clearly shown, and the Judge so finds, that Johnson negotiated the loan, borrowed the money, and gave his note therefor with Swink and Thomason as his sureties. But it is distinctly found by the Court that Swink and Thomason never paid interest on said note, nor was there ever any demand made upon them for the payment of interest, or for any other amount; while the defendant Johnson several times paid the interest due on said note, which, of itself, created the presumption that Johnson was the principal and that Swink and Thomason were his sureties. 1 Brandt on Suretyship, sec. 33. And it seems that this being a fact that plaintiff must have had knowledge of, it would also create a presumption of knowledge on the part of plaintiff that Johnson was principal and Swink and Thomason were sureties. *Sutton v. Walters,* 118 N. C., 495.

But Swink swore that Foust, cashier, said when "he showed me the note that we were to *endorse it for Johnson.*" It must therefore be taken that plaintiff had notice of the fact that Swink and Thomason were the sureties of Johnson. This being so, the extension of time given to Johnson would have been a discharge of Swink and Thomason, if it had been before judgment was taken against them, if it had been set up by them as a defense on the trial. *Sutton v. Walters, supra,* and cases there cited.

It remains to be seen whether Swink and Thomason can avail themselves of this defense, since judgment.

The judgment having become dormant, this proceeding was commenced under section 440 of The Code to revive the same. This could not be done without notice to the defendants, giving them a day in Court to show cause why the

judgment should not be revived and execution issued thereon. On the hearing of this motion, defendants are entitled to set up any defense or reasons why the judgment should not be revived against them, that have arisen or accrued since the judgment was taken. *Smith v. Sheldon,* 35 Mich., 42, 24 Am. Rep., 529 (opinion by Judge Cooley), 24 Am. and Eng. Enc. (1st Ed.), 748; 2 Brandt on Suretyship, secs. 742, 743; Freeman on Judgments (3d Ed.), sec. 226. And it is expressly said by this Court that in applications to revive judgments under section 440 of The Code, the defendant may avail himself of any defense to which he may be entitled, arising *since* the judgment was taken. *McLeod v. Williams,* 122 N. C., 451—citing *McDonald v. Dickson,* 85 N. C., 248, and *Lytle v. Lytle,* 94 N. C., 683, as authority for so holding.

It therefore seems that the defendants Swink and Thomason were entitled to the benefit of this defense in this proceeding.

But it is contended by the plaintiff that if all this should be so, as to principals and known sureties, it is not so in this case; and that the defendants Swink and Thomason are not entitled to this defense, for the reason that they received or got the benefit of the money paid for said note; that this made them principals to the plaintiff, whatever relations may have existed between them and Johnson. And for this position they cite what is said by the Court in the case of *Bank v. Sumner,* 119 N. C., 591, and *Hoffman v. Moore,* 82 N. C., 313.

The paragraph referred to in *Bank v. Sumner* is but a suggestion, and while we think it was correct as applied to the facts of that case, it does not seem to us to sustain the contention of the plaintiff in this case. In that case, Sumner got the full benefit of his endorsement; he paid his own debt with a note of Bostic and Cobb, and it was of no benefit to them that he should have endorsed it. In this case, the

endorsers, Swink and Thomason, got no benefit from the endorsement, but Johnson did. He paid Swink and Thomason a debt he owed them. Johnson was solvent at that time, and if he had not paid them in this way, or some other way, they would have made their debt out of him. But after he paid them by the money received on this note, and they gave him credit on his debt for that amount, they had no debt against him. They would hardly have done this, if it had been their note and their money. We therefore do not think the suggestion made in *Bank v. Sumner* applies, and the judgment of the Court is erroneous and is

Reversed.

PARLIER v. SOUTHERN RAILWAY COMPANY.

(Filed November 19, 1901.)

1. NONSUIT—*Dismissal—Acts 1897, Ch. 109—Acts 1899, Ch. 131—Acts 1901, Ch. 594.*

   Where a defendant introduces evidence after making a motion to dismiss at close of evidence for plaintiff, he thereby waives any rights he had under said motion; but he may renew the motion after all the evidence on both sides is in and the motion then stands upon a consideration of the entire evidence.

2. EVIDENCE—*Sufficiency—Negligence—Railroads.*

   The evidence in this case is held sufficient to have been submitted to the jury on the question of the negligence of the railroad for injury to passenger alighting from the train.

ACTION by Alice J. Parlier against the Southern Railroad Company, heard by Judge *O. H. Allen* and a jury, at June (Special) Term, 1901, of the Superior Court of CABARRUS County. From a judgment for the plaintiff, the defendant appealed.

Montgomery & Crowell, for the plaintiff.

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

FURCHES, C. J. The plaintiff fell and was injured in getting off defendant's train at the station in Concord, and brings this action for damages. At the close of plaintiff's evidence, the defendant moved to dismiss the plaintiff's action under the statute. But upon the Court's refusing this motion, the defendant introduced evidence, and the plaintiff introduced additional evidence; and at the close of the plaintiff's additional evidence, the defendant renewed its motion to dismiss the action upon the ground that the evidence, if believed, did not make a *prima facie* case. This motion being refused, the defendant excepted, and, upon appeal, assigned the following as error:

"1. The ruling of the Court refusing to nonsuit the plaintiff at the close of her own evidence.

"2. The refusal of the Court to nonsuit the plaintiff at the close of the whole evidence.

"3. The refusal of the Court to grant a new trial."

There are no exceptions to the charge of the Court, nor was there any exception to the evidence; and these assignments of error and the evidence constitute the case on appeal.

This Court held in *Means v. Railroad,* 126 N. C., 424, construing the act of 1897, Chap. 109, as amended by the act of 1899, Chap. 131, that if the defendant introduced evidence after making a motion to dismiss, he thereby waived any rights he had under said motion. But at the close of all the evidence, he might renew his motion to dismiss, and this motion stood upon a consideration of the whole evidence introduced by the plaintiff and the defendant. This construction has since been made the law by the Legislature. Acts, 1901, Chap. 594.

As the defendant waived its first motion by introducing evidence, it is not necessary to consider the evidence introduced before the first motion and that introduced afterwards, separately, as this last motion depends upon the whole evidence in the case, and this evidence must be considered in the most favorable light for the plaintiff. Nor is it necessary that we should quote all the testimony, but only enough to show the negligence of the defendant, if believed.

Taggert, a witness for the plaintiff, testified: "That he was on the train that day; there were seven passengers to get off at Concord; my wife got off first, then a little boy, then Mrs. Barringer and Aunt Flora; I was just behind Mrs. Parlier; when she was on the last step, the train jerked off like a horse when you strike him. I had my little boy in my arms, and a valise, when I got off. We prepared to get off as station was called; so did Mrs. Parlier. We did not stand and talk. Conductor did not help any of us off; he was not there trying to keep people back."

There were other witnesses examined for plaintiff, but the evidence we have quoted was the most favorable for the plaintiff. This evidence was contradicted by that of the defendant, which, if believed by the jury, showed that defendant was not negligent, and that plaintiff's injury was without fault on its part. But this contradiction was a matter for the jury to settle, and can do the defendant no good on this appeal.

Upon the evidence, we do not think the Judge could have taken the case from the jury, as he had no more right to reconcile this conflict of evidence than we have.

There was no error in overruling the defendant's motion to dismiss, and the judgment is

Affirmed.

CITY OF RALEIGH v. NORTH CAROLINA RAILROAD COMPANY.

(Filed November 26, 1901.)

1. NEGLIGENCE—*Joint Tort Feasors—Liability—Railroads—Damages.*

Where judgment is obtained against a city for injuries caused by an obstruction placed in a street by a railroad company, the railroad company is liable to the city for the amount of the judgment.

2. LEASE—*Railroads—Lessee—Negligence.*

A railroad company leasing its road is liable for the acts of its lessee.

ACTION by the City of Raleigh against the North Carolina Railroad Company, heard by Judge *H. R. Starbuck,* at April Term, 1901, of the Superior Court of WAKE County. From a judgment for the plaintiff, the defendant appealed.

W. L. Watson, and *T. M. Argo,* for the plaintiff.
F. H. Busbee, for the defendant.

CLARK, J. Hattie N. Dillon was injured by defendant's lessee, the Richmond and Danville Railroad Company, in causing an obstruction on the street of the city of Raleigh where the defendant's track crosses it, which obstruction was continued by defendant's present lessee up to the time of the aforesaid injury. When the aforesaid obstruction was placed there, the Street Commissioner of plaintiff told Adams, who was acting for defendant's lessee aforesaid in placing the obstruction, that it was dangerous, and reported the fact to the Chairman of the Street Committee of the Board of Aldermen of the city, who had the same conversation with Adams.

In an action by Hattie N. Dillon, she recovered judgment against the city, which was affirmed on appeal, *Dillon*

v. Raleigh, 124 N. C., 184, in which it was held that the party causing such obstruction, and the city, by permitting it, became liable jointly for the *tort;* that the party injured might sue either, and the question of primary or secondary liability is for them to adjust between themselves. The city of Raleigh, upon being sued, at once notified the North Carolina Railroad Company of the action and its nature, and invited it to join and aid to defend the action, which the company declined to do. This action is to recover from it the sum paid by the city for the judgment and costs in the aforesaid action.

The point now raised has been recently and fully discussed and determined in *Brown v. Louisburg,* 126 N.C., 701, 78 Am. St. Rep., 677. This case is stronger for the city, in that here it did make objection to the placing of the obstruction. The plaintiff and defendant did not concur in creating the *tort,* and are not co-delinquents. The defendant is liable primarily as the actor in placing the obstruction, and the city secondarily for not causing its removal.

The point that the defendant is liable for the acts of its lessee is settled by *Aycock v. Railroad,* 89 N.C., 330; *Logan v. Railroad,* 116 N. C., 940, and a dozen or more cases affirming the same. Upon the facts found, judgment was properly entered against the defendant.

No Error.

SMITH v. RICHARDS.

(Filed November 26, 1901.)

RELEASE—*Judgment—Contribution.*

Where the costs of an action are adjudged against several plaintiffs and two of them pay the defendant their *aliquot* parts of the judgment and receive a receipt therefor not under seal, the receipt releases other plaintiffs who have paid no part of the judgment, of the part only in excess of their *aliquot* parts, and the defendant is entitled to judgment therefor against them separately.

ACTION by John B. Smith against John Richards and others, heard by Judge *O. H. Allen,* at Spring Term, 1900, of the Superior Court of GASTON County. From a judgment for the defendants, the plaintiff appealed.

O. F. Mason, and *J. N. Holding,* for the plaintiff.
Jones & Tillett, for the defendant.

FURCHES, C. J. This is an action against several defendants upon a former judgment for seven hundred and odd dollars—being the amount of costs in an action against the plaintiff, in which these defendants (plaintiffs in that action) had failed, and judgment was entered against them and in favor of the plaintiff in this action. Since the rendition of said judgment, two of the defendants have paid the plaintiff their *aliquot* parts, and the plaintiff gave them separate receipts therefor, as follows: "Received of W. S. Richards ninety-two 94-100 dollars, for one-sixth the costs in a judgment rendered in the case of *J. B. Richards et al. v. J. B. Smith,* at Spring Term of the Superior Court, March, 1889. This is to release W. S. Richards in full of the costs of suit above mentioned. This 28th day of December, 1896. (Signed) John B. Smith." The other receipt, to Fannie Rutledge and husband J. L. Rutledge, is the same substance as the above.

All the parties against whom judgment was rendered in the former action are made defendants in this action; and the defendants W. S. Richards and Fannie Rutledge and her husband J. L. Rutledge did not plead. But the other defendants answered and set up the above-mentioned receipt as a release and discharge of them from any liability on said judgment. This presents the only question in the case.

It seems that, originally, contribution between co-obligors was held to rest upon a moral obligation only, and Courts of Equity alone could enforce it. *Moore v. Isley,* 22 N. C., 372. But, at a later date, Courts of Law in many jurisdictions considered it a joint obligation in the nature of a contract, and actions at law were sustained when they were to recover only an *aliquot* part. Parsons on Contract (3d Ed.), 34 and 35. But where more than this was demanded on account of insolvency, or for other cause, it still remained a matter for the Courts of Equity, as Courts of Law could not adjust equities between the parties. But it seems probable the Courts of Law in this State still declined to take jurisdiction of matters of contribution, as we find that in 1807 the Legislature passed an act authorizing co-sureties to bring actions on the case in assumpsit for contribution. *Sherrod v. Woodard,* 15 N. C., 360, 25 Am. Dec., 714; sec. 2094 of The Code. But this act only applied to *co-sureties,* and, it would seem, left the law as to *co-principals* as before its passage. And whether this remained so or or not, under the divided jurisdiction, it is now so under the Constitution of 1868 and The Code. *Russell v. Adderton,* 64 N. C., 417; *Dudley v. Bland,* 83 N. C., 220; *Craven v. Freeman,* 82 N. C., 361. The rights of the parties may now be administered, whether legal or equitable in their nature. *Russell v. Adderton* and *Dudley v. Bland, supra.* And the rights of the defendants, as between themselves, may be adjusted and settled in an action against them. *Parrish v. Graham,* at this term.

This is not an action for contribution; that right does not

arise at law or in equity until the co-obligor has paid the money. And none has been paid in this case by either of the defendants who are contesting the plaintiff's right to recover. But the doctrine of contribution is involved, and it was necessary to consider it in determining the rights of the parties.

The defendants contend that the payments of W. S. Richards and Rutledge and wife, and their discharge, was a discharge of them. It was admitted by defendant that the "receipt" was not a release, as it was not under seal. But it was ingeniously argued that the reason that a partial payment and receipt, stating that it was in full, were not a discharge, was because there was no consideration to support it beyond the amount paid; and that it was *nudum pactum* for all above the amount paid; whereas, a similar receipt under seal would be a discharge, because the seal imported a consideration. And it was argued that the act of 1874-5 (section 574 of The Code) supplied the consideration, and a receipt now for a part was as effective as if it was under seal. This is so in cases where the statute applies, but it seems to have no application to this case.

The receipt does not seem to have been intended as a *compromise* of the *whole,* nor of *any part of the debt.* It was a payment *in full* of the defendants' *aliquot* parts of the judgment, and a discharge of the parties paying it from any further liability. And as these defendants are discharged *from paying anything more,* it is a discharge of the other four defendants from any liability beyond their *aliquot* parts—one-sixth each. For, as plaintiff could recover nothing more out of W. S. Richards and Rutledge and wife, these four defendants could recover nothing more out of them, as their rights depend upon the rights of the plaintiff Smith and their right of subrogation.

We do not feel called upon to enter into a further discussion of the principles governing this case, as they have

been so fully discussed in *Russell v. Adderton* and *Craven v. Freeman, supra,* and especially in *Dudley v. Bland, supra.*

It therefore follows that the plaintiff Smith is not entitled to judgment *in solido* against all the defendants; nor is he entitled to such a judgment for the unpaid balance against the four defendants who have paid him nothing on his former judgment; but that he is entitled to a judgment or *decree* against them separately for their *aliquot* parts, that is, against John Richards for one-sixth, George Richards for one-sixth, Sarah Summerrow and her husband H. M. Summerrow for one-sixth, Elizabeth Jenkins and husband for one-sixth. No right of contribution exists between them upon said judgment, nor is either of these defendants liable to the plaintiff for anything more than his judgment for the said one-sixth of the original debt.

There is error, and the judgment should be entered as above indicated.

Error.

URY v. BROWN.

(Filed November 26, 1901.)

1. JURISDICTION—*Superior Court—Clerks of Courts—Special Proceedings—Actions—Acts 1887, Ch. 276.*

   Wherever any civil action or special proceeding begun before the clerk, *for any ground whatever,* is sent to the superior court, the superior court shall have jurisdiction.

2. GUARDIAN AND WARD—*Removal of Guardian—Conversion—Clerk of Superior Court—The Code, Sec. 1583, Subsec. 1.*

   The use by a guardian of the funds of his ward for his own use is sufficient to warrant his removal.

ACTION by Lillie Ury, by her next friend J. V. Fisher, against R. A. Brown, heard by Judge *O. H. Allen* and a

jury, at June (Special) Term, 1901, of the Superior Court of CABARRUS County. From a judgment for the plaintiff, the defendant appealed.

Self & Whitener, and *Montgomery & Crowell,* for the plaintiff.

W. G. Means, for the defendant.

MONTGOMERY, J. This was a special proceeding, the object of which was the removal of the defendant from the guardianship of the complainant. It appears to us from that part of the record proceedings before the Clerk, that there might have been some doubt before the enactment of Chapter 276, of the Acts of 1887, as to whether the Superior Court in term had jurisdiction when the case was heard there. But since then it seems that whenever any civil action or special proceeding begun before the Clerk be, *for any ground whatever,* sent to the Superior Court before the Judge, the Judge shall have jurisdiction and try and determine all matters in controversy at the request of either party if he shall think it expedient. *Roseman v. Roseman,* 127 N. C., 494. Many of the matters alleged as grounds for removal of the guardian were trivial, and there is no trace of dishonesty on his part in connection with the matters connected with his trust. But upon the parts of the complaint and answer which concern the use of the guardian fund by the guardian (defendant) in his own business, the judgment of removal ought to have been made, and it is therefore unnecessary to consider the other exceptions of the defendant. The defendant admitted that he qualified as guardian for the purpose of using the money in his own business, and had used it during the guardianship. That was a conversion of the funds of his ward to his own use within the meaning of section 1583, subsection 1, of The Code.

No Error.

BROWN v. PLOTT.

(Filed December 3, 1901.)

1. APPEAL—*County Commissioners—Superior Court—Justice of the Peace—The Code, Sec. 2039—Terms of Court—Practice.*

An appeal, under The Code, Sec. 2039, from an order of the county commissioners, must be docketed at the succeeding term of the superior court.

2. WAIVER—*Laches—Agreement of Counsel—Continuance.*

A party by agreeing to a continuance of a case does not thereby waive the *laches* of the other party in failing to docket the appeal.

3. APPEAL—*Dismissal—Superior Court.*

A motion in the supreme court to dismiss an appeal because the complaint does not state a cause of action, will not be allowed where it appears that the appeal from an order of the county commissioners should have been dismissed in the superior court.

ACTION by George H. Brown and others against R. C. Plott, heard by Judge *A. L. Coble* and a jury, at August Term, 1901, of the Superior Court of IREDELL County. From a judgment for the defendant, the plaintiffs appealed.

Armfield & Nattress, and *Armfield & Turner,* for the plaintiffs.

L. C. Caldwell, and *Grier & Long,* for the defendant.

MONTGOMERY, J. On May the 8th, 1900, the defendant appealed from an order made by the Board of Commissioners of Iredell County, granting certain changes in the public road over the lands of the defendant. The appeal bond was given on the 15th inst., and filed with the Clerk of the Board by the defendant's attorenys, with a request that the appeal and bond should be sent up by him at the next term of the Superior Court of Iredell, which would commence on the 21st of the same month and year. No further attention was paid to the appeal by the defendant's attorney until two

ERRATUM.

In Brown v. Plott, page 272, in line 10 of opinion, the word "attorney" should be omitted.

terms of the Superior Court had elapsed, when it was discovered that the appeal had not been docketed. It was then docketed, and a motion by the plaintiff to dismiss because it had not been docketed at the May Term—the term next ensuing after the appeal was taken—was refused. It was admitted by the counsel of the defendant that the plaintiff's motion should have been allowed if the same rule as to the docketing of appeals from orders of Boards of County Commissioners was applicable to appeals taken from the judgments of Justices of the Peace. But the contention was set up that the Judge of the Superior Court in term had the discretion, or rather the right, to make a rule as to when appeals from orders of the Board of County Commissioners to the Superior Court should be docketed in that Court. It was argued for that contention that section 2039 of The Code, which provided for appeals from the Boards of County Commissioners to the Superior Courts, was silent as to what term in point of time of the Superior Courts the appeal should be taken, and therefore that the Judges of the Superior Courts might regulate that subject by rules of their own. We do not take that view of the matter. The question of the jurisdiction of the Superior Court is not called in question. If the appeal was properly taken and docketed, then that Court had jurisdiction of the suit; if the appeal was not properly docketed, then the Superior Court could not proceed. Under the provisions of section 2039 of The Code, in proceedings like the present one, any person is allowed to appeal to the Superior Court *at term time*. The legal construction of those words, "at the term time," as bearing upon the proper time of docketing the appeal, is a matter for the Courts, and in no sense involves the jurisdiction of the Superior Court in the proper sense of that term. And we think that the words "term time" in the statute means the *next* term

of the appellate Court. *Boing v. Railroad,* 88 N. C., 62; *Hahn v. Latham,* 87 N. C., 172.

We therefore think that upon the facts of this case, there is shown a clear case of neglect, and the appeal ought to have been dismissed in the Court below upon the motion of the plaintiff. It is true that his Honor found as facts that at the May and August Terms of the Superior Court there were agreements on the part of the plaintiff's and defendant's counsel that the case should be continued, but his Honor states further that both sides believed the not docketing the appeal was in nowise caused by any agreement or conduct of the plaintiff, but was simply his own *laches.* The agreement to continue on the part of the plaintiff was made under the belief that the defendant had docketed his appeal under the rules of law. There was no agreement that the *laches* of the defendant should be overlooked or waived by the plaintiff.

We find among the papers a motion by the defendant's counsel to dismiss the plaintiff's *appeal* on account of certain defects in the petition, and alleged to amount to a failure to state a cause of action. The motion can not be entertained here, for the reason that the appeal for the defendant from the Board of Commissioners was not docketed in time, and should have been dismissed in the Court below.

Reversed.

COMMISSIONERS OF NEW HANOVER COUNTY v. DEROSSET.

(Filed December 3, 1901.)

1. STATUTES—*Ratification—Evidence—Presumptions.*

The certificate of the presiding officers of the general assembly is conclusive evidence that a bill was read and passed three several readings in each House.

2. STATUTES—*Legislative Journals—Yeas and Nays—Presumptions—The Constitution, Art. II, Sec. 14.*

Where certified extracts from the legislative journal offered in evidence give only the number of yeas and nays, without showing that the names of the members voting were recorded, it will not be presumed that they were recorded.

3. STATUTES—*Enactment—Taxation—The Constitution, Art. II, Sec. 14—Yeas and Nays—Journals.*

An act to levy a tax by a county, *not for necessary expenses*, must be read three several times and passed on three different days, and the names of those voting on the second and third readings entered on the journal.

ACTION by the Board of Commissioners of New Hanover County against A. L. DeRosset, heard by Judge *O. H. Allen*, at Chambers, on .. day of September, 1901. From judgment for plaintiff, the defendant appealed.

W. B. McKoy, for the plaintiff.
Bellamy & Peschau, for the defendant.

CLARK, J. This is a controversy submitted without action, under The Code, sec. 567. The question presented is whether Chapter 314, Laws 1901, authorizing New Hanover to issue $50,000 in bonds for road improvement, is valid and constitutional. It appears that the proposition was duly and properly submitted to the registered voters of the county, a majority of whom duly authorized the issue of said bonds. The defendant, who has purchased said bonds, avers that he

is ready and willing to take and pay for the same, if they are valid and constitutional, but he denies that the act authorizing the election was passed in the manner required by Article II., sec. 14, of the Constitution, and that presents, as we understand it, the only question before us. The transcript sets out the following as a correct extract from the Journals:

EXTRACT FROM SENATE JOURNAL.

Senate Chamber, Monday, February 18, 1901.

Reports of standing committees are submitted as follows: Bill introduced, S. B. 757, Bill to permit New Hanover County to issue bonds for road improvements, with a favorable recommendation.

Senate Chamber, February 19, 1901.

Bills and resolutions on the Calendar are taken up and disposed of as follows:

Second reading:

S. B. 757, Bill to permit New Hanover County to issue bonds for road improvements, upon second reading. The bill passes second reading, ayes 36, noes none, as follows: Those voting in the affirmative are, ayes 36, noes none.

SENATE JOURNAL.

Senate Chamber, Wednesday, February 20, 1901.

Bills and resolutions on the Calendar are taken up and disposed of as follows: S. B. 757, Bill to permit New Hanover County to issue bonds for road improvements, upon third reading. The bill passes third reading, ayes 43, noes none, as follows: Those voting in the affirmative are, ayes 43, noes none. The bill is ordered sent to the House of Representatives without engrossment.

SENATE JOURNAL.

Senate Chamber, Friday, March 1, 1901.

Mr. Smith, from the Committee on Enrollment of Bills, reports the following bills and resolutions as properly enrolled, which are duly ratified and sent to the office of Secretary of State: S. B. 757, H. B. 1494, An act to issue bonds for road improvements of New Hanover County.

Extract from House Journal:

HOUSE OF REPRESENTATIVES.

Thursday, February 21, 1901.

A message is received from the Senate transmitting the following bills, which are read the first time and disposed of as follows: S. B. 757, H. B. 1494, Bill to permit New Hanover County to issue bonds for road improvements. Referred to the Committee on Public Roads, Ferries and Turnpikes.

HOUSE OF REPRESENTATIVES.

Wednesday, February 27, 1901.

Bills and resolutions are reported from standing committees, read by their titles together with the reports accompanying them, and take their place on the Calendar, as follows: By Mr. Ardrey, for the Committee on Public Roads and Turnpikes, H. B. 1494, S. B. 757, A bill to be entitled an act to permit New Hanover County to issue bonds for road improvements, with a favorable report.

HOUSE OF REPRESENTATIVES.

Wednesday, February 27, 1901.

Bills and resolutions on the Calendar are taken up and disposed of, as follows: H. B. 1494, S. B. 757, A bill to be entitled an act to permit New Hanover County to issue

bonds for road improvements. Passes its second reading by the following vote and is ordered placed on the Calendar. Those voting in the affirmative are: Ayes 91, noes none.

HOUSE OF REPRESENTATIVES.

Thursday, February 28, 1901.

Bills and resolutions on the Calendar are taken up and disposed of as follows: H. B. 1494, S. B. 757, A bill to be entitled an act to permit New Hanover County to issue bonds for road improvements. Passes its third reading by the following vote, and is ordered enrolled for ratification. Those voting in the affirmative are: Ayes 82, noes none.

HOUSE OF REPRESENTATIVES.

Friday, March 1, 1901.

Mr. Allen, for the Committee on Enrolled Bills, reports the following bills and resolutions properly enrolled, which are duly ratified and sent to the office of Secretary of State: S. B. 757, H. B. 1494, An act to issue bonds for road improvements in New Hanover County.

The point intended to be presented seems to be, for we are not favored with either brief or argument from defendant, whether the act is valid, because the Senate Journal is silent as to the passage of the bill on its first reading, though that fact appears from the endorsement on the bill, as certified by the Secretary of State, and is agreed to by the parties hereto, and is found as a fact by the Judge.

Almost the identical point is presented in the case of *Black v. Commissioners,* at this term. Constitutional requirements can not be dispensed with in any particular by the Courts. But passing by for the present the fact that the transcript does not show that the ayes and noes were entered, by the only possible proof, the record of the names,

and assuming for the present that they were so entered, it seems to us that the bill was passed in the constitutional mode. The ayes and noes are only required to be entered on the Journals on the second and third readings in each House, and the Journals are the sole evidence of that fact. *Bank v. Commissioners,* 119 N. C., 214, and all the cases since, down to and including *Black v. Commissioners* at this term. The certificate of the Speakers is conclusive evidence that the bill was read and passed three several readings in each House. *Carr v. Coke,* 116 N. C., 223. The only additional requirement of Article II, sec. 14, of the Constitution, "which readings shall have been on three several days," is not required to be shown by the Journals, though it is necessarily so shown as to the second and third readings in each House, and is here also shown by the Journal as to the first reading in the House of Representatives. As to the first reading in the Senate, that it passed such reading is proved conclusively, as we have said, by the ratification, and that it was on 15th February, a different date from the second reading, is found as a fact by the Court from the endorsement on the original bill. Such fact not being required to be shown by the Journals, and not being contradicted by them, the finding of his Honor, there being evidence, is conclusive upon us.

The Constitution requires both ayes and noes to be entered, not merely the ayes, and of course if there were *no* noes, that should be stated. "The entry, showing *who voted* on the bill and *how* they voted, must be made before the bill can ever become a law," and "the names of the legislators who vote on the question shall be known to the people in the enrollment of their names on the Journals." MONTGOMERY, J., in *Commissioners v. Snuggs,* 121 N.C., at pages 398, 399, and in *Smathers v. Commissioners,* 125 N. C., at page 486, attention is called to the defect that it does not affirmatively appear on the Journal *"that there were no nays."* As the Consti-

tution requires both the yeas and nays to be entered, either the nays must be entered, or the Journal should show affirmatively that there were none. There is no presumption as to the regularity of a matter of this kind, but the condition precedent required by the Constitution must be complied with. "A want of power" in such cases "can not be cured by recitals or eliminated by estoppels." *Commissioners v. Call*, 123 N. C., 311. No constitutional requirement "*is directory, but all are mandatory.*" *Ibid*, 312; *Glenn v. Wray*, 126 N. C., at page 732.

If we could take the recitals in the transcript, there is no defect in this respect in the present case, as it appears that on each reading, except the last in the House, the Journal states "noes, none," and on such last reading there were some noes—the names being indicated by asterisks.

The transcript, however, is defective in that it does not set out, in copying the Journals, the names of those voting, as required by the Constitution, but simply states as above set out, "ayes 82. * * * Those voting in the affirmative are" * * * We can not take it from this that the names were duly entered, and the Court can not take the recital nor the agreement of the parties as proof of the fact. *Gatling v. Tarboro*, 78 N. C., 119. The transcript should be a true copy from the Journal, and show affirmatively the matters required by the Constitution, *i. e.*, "The yeas and nays entered on the Journals on the second and third readings" in each House.

We can not conceive that this case was intended to rest upon the mere recitals in the Journals that the ayes and noes were entered, when they were in fact not entered—yet so the transcript would indicate. We must think that there was an inadvertence, a gross inadvertence, in not giving a true transcript from the Journals instead of a mere recital; but deeming it an inadvertence, on account of the public

interest involved, we have discussed and decided the points intended to be presented, so that another appeal may not be necessary, though, by reason of above omissions, we must hold that in rendering judgment sustaining the validity of the bonds upon this record there was

Error.

LOUGHRAN v. CITY OF HICKORY.

(Filed December 3, 1901.)

1. ELECTIONS—*Towns and Cities—Acts 1901, Ch. 750, Sec. 19—Acts (Private), 1901, Ch. 255.*

   Under Acts 1901, Ch. 750, Sec. 19, and Acts (Private), 1901, Ch. 255, the election for municipal officers and local option in the city of Hickory was properly held on the first Tuesday after the first Monday in May, 1901.

2. SERVICE OF PROCESS—*Summons—Parties—Acts 1889, Ch. 238.*

   The corporation of Hickory having been chartered under the name of "The City of Hickory," a summons is properly directed against the city of Hickory and served upon the Mayor and the Secretary of the Board of Aldermen.

3. MANDAMUS—*Spirituous Liquors—Licenses.*

   In an action for mandamus to compel the aldermen of a city to issue license to sell liquor, the court should direct the aldermen to pass upon the application and not order a peremptory mandamus directing the aldermen to issue license.

ACTION by Frank Loughran against the City of Hickory and the Mayor and the Aldermen, heard by Judge *W. B. Council,* at Chambers, at Newton, on the 8th day of July, 1901. From a judgment for the plaintiff, the defendants appealed.

E. B. Cline, and *S. J. Ervin,* for the plaintiff.

Self & Whitener, and *T. M. Hufham,* for the defendants.

MONTGOMERY, J. The Board of Aldermen, of Hickory, under Chapter 238, sec. 46, Private Laws of 1889, had exclusive control of the sale of spirituous liquors within the limits of the city, including the power to refuse to allow it to be sold. The General Assembly, at its session of 1901 (Private Acts, Chap. 255), struck out section 46, of Chapter 238, of the Private Acts of 1889, and enacted in lieu thereof a section which provided that the question of whether license to sell liquor within the city limits should be granted or not should be decided by a direct vote of the qualified voters of the city, and that the Board of Aldermen, at each annual election for Mayor and Aldermen, should provide a separate box in which the voters might cast their ballots, "License" or "No License," as they might prefer; and if a majority should be in favor of license, then the Board of Aldermen should issue license to applicants who should comply with the requirements of the general law on that subject, but if a majority should be against license, then the Board should not issue any license during the following municipal year. At the same session of the General Assembly (Chapter 750, of the Public Laws), that body undertook to make uniform, as far as it could be done, the rules and regulations concerning elections in towns and cities and special elections in counties and townships, and declared that those rules and regulations should be complied with, except as otherwise provided in the charters of cities or towns (section 1). In section 19 of the last-mentioned chapter, however, all town and city elections, except those in Fayetteville, thereafter to be held, were required to be held on Tuesday after the first Monday in May, 1901, and to be held bi-ennially, and any provision to the contrary in any charter in any city or town were expressly repealed. So, by section 17 of Chapter 750, of the Laws of 1901, all town and city elections to be held after the ratification of the act were to be held on Tuesday after the

first Monday in May, and they were to be bi-ennially held; and so the city of Hickory understood the act (Chapter 750), and in accordance therewith, at the bi-ennial election for Mayor and Board of Aldermen, held on Tuesday after the first Monday in May, 1901 (instead of the first Monday in May and annually, as provided in its charter), a separate box was provided under the private act of 1901, to decide the question of whether liquor license should or should not be granted. The city polled its full vote, a usual occurrence on such issues in cities big and little, according to statement of counsel, 239 votes for license and 219 against. The plaintiff, after the election, made application to the Board of Aldermen for license to sell spirituous liquors at his hotel in the city for twelve months from 1st of July, 1901, furnishing at same time certificates by way of affidavits both that the applicant was a proper person to sell spirituous, vinuous and malt liquors, and that the building in which he proposed to sell was a suitable place for the purpose. The Board rejected the application upon the ground that the election upon which the application was based was invalid as to license. The plaintiff, therefore, commenced this action in mandamus, and prayed for judgment, first, that an order issue to the defendant and Board of Alderman commanding them to hear the application of the plaintiff and to grant license to him to sell spirituous liquors within the city of Hickory; second, for all such other and further relief as he may be entitled to herein; and, third, for cost of the action.

Upon the matter having been heard by his Honor, a judgment was rendered that the election was a valid one, and that the plaintiff was entitled to the license applied for, and that the defendants issue to him the license upon the payment of the license tax. The judgment recited that the application was rejected by the Board alone on the ground of the invalidity of the election, and it seems the order was issued peremp-

torily because the defendant made no contention over the matter of the fitness of the applicant or the suitableness of the place, and that no such contention was then made (at the time of the hearing).

As we have shown, the election for Mayor and Aldermen was regularly held (Acts 1901, Chap. 750, sec. 19), and we think that Chapter 255 of the Private Laws of 1901 must be construed together with Chapter 750 of the laws of the same session, and, that being so, we are of the opinion that the proper construction of the two acts is that on whatever day the election for Mayor and Aldermen should be held, on that day should also be held the election on license or no license, and that the result should be the rule of action of the Board until the next bi-ennial election; that is, if a majority of the qualified voters should vote in favor of the sale of liquor, then license should issue to applicants in conformity to the general law, or if a majority should vote in favor of "no license," then no license should issue until the next regular election for Mayor and Aldermen, and then only on a majority vote favoring the license system.

The defendant's motion to dismiss the action was properly refused. By the charter (amended), Chapter 238 of the Acts of 1889, the inhabitants of the city are incorporated under the name of "The City of Hickory," and not the Board of Aldermen, and therefore the summons was properly directed against "The City of Hickory." It was properly served, a copy having been left with the Mayor and one with the Secretary of the Board of Aldermen. The service on the members of the Board of Aldermen did no harm, and might have been of service in future orders of the Court. We are of the opinion, however, that the order for a peremptory mandamus was erroneous, and must be modified. We must assume that the action of the Board of Aldermen, in rejecting the petition on the ground alleged, was in good faith. We

must assume that they thought the apparently inconsistent statutes on the subject before them justified the course they pursued. We say we must assume this much. That being so, we can not say that they did not have the right to rest their refusal to grant license to the applicant on that ground —the invalidity of the election—without considering the matters embraced in the application. The fitness of the applicant and the suitableness of the place, and other matters which might possibly arise, are matters still in the sound legal discretion of the Board of Aldermen, and they are such matters as cannot be heard originally anywhere except before them sitting as a body, and as the representatives of the city and its inhabitants. They have never passed, as a Board, upon the fitness of the applicant or the suitableness of the place at which he wishes to sell liquor, and that is a discretion which we can not take from them. If the peremptory order granted by his Honor should be sustained, then bad faith would be indirectly charged upon the defendants in their conduct in this matter, and that, as we have seen, can not be done consistently with the respect which the Courts should entertain towards the governing bodies of municipal corporations—Courts within themselves.

The order must be modified so as to require and command the defendants to, at once, take up for consideration the application of the plaintiff and pass upon the same; and if it is found that the applicant is a proper person to sell spirituous liquors, and the place at which he wishes to sell is a suitable place, then to at once issue to him the license upon the payment of the license tax. There was no error otherwise.

Modified and Affirmed.

CAWFIELD v. OWENS.

(Filed December 10, 1901.)

1. EVIDENCE—*Deed—Probate.*

An improperly probated deed offered in evidence and excluded, but afterwards properly probated, was properly admitted in evidence.

2. HUSBAND AND WIFE—*Alienation—Dower—Homestead—Joinder of Wife—The Constitution, Art. X, Sec. 8.*

The husband may convey land acquired before the Constitution of 1868 without joinder of wife and thereby bar wife of dower or homestead.

3. TRUSTS—*Trustee—Mortgages—Powers—Coupled with an Interest—Power of Sale Mortgages.*

Where one of two trustees in a power of sale mortgage dies, the survivor may execute the trust, this being a trust coupled with an interest.

ACTION by Sarah Cawfield against Amos Owens and May Owens, heard by Judge *M. H. Justice* and a jury, at September Term, 1901, of the Superior Court of RUTHERFORD County. From a judgment for the plaintiff, the defendant Mary Owens appealed.

No counsel for the plaintiff.
Solomon Gallert, and *E. J. Justice,* for the defendants.

CLARK, J. A deed, made in 1854 but improperly probated, was ruled out. Thereupon, it was immediately re-probated in proper form, and was then introduced in evidence. There is no valid objection to this.

The grantee in said deed executed a mortgage in 1887 without joinder of his wife. The property having been acquired in 1854, and it appearing from her answer, averring that the land was bought by her husband with her sepa-

rate property, that she was then married, the joinder of the wife was not necessary to bar either dower or homestead. *Askew v. Sutton,* 66 N. C., 172; *Shaffer v. Bledsoe,* 117 N. C., 144.

The mortgage was upon two tracts, and was executed to two persons, with power of sale. One having died, the mortgage sale was made and the deed executed to plaintiff by the survivor.

The question presented is whether the survivor could execute the power alone, or was it necessary either to have another trustee appointed, or to have the heirs-at-law of the deceased trustee or his personal representative made parties in the sale and execution of deed to the purchaser. If there had been only one trustee formerly, a new trustee should have been appointed, and since Chapter 177, Laws 1887, the power of sale would be executed by the personal representative. But when, as here, there are two trustees in a mortgage with power of sale, the power devolves upon the survivor.

In *Peter v. Beverly,* 34 U. S. (10 Peters), 532, it is said: "The general principle of the common law laid down by Lord Coke and sanctioned by many judicial decisions, is that when the power given to several persons is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But where the power is coupled with an interest, it may be executed by the survivor." To same purport, *Hawkins v. May,* 12 Ala., 672; *Parsons v. Boyd,* 20 Ala., 118; *Hannah v. Carrington,* 18 Ark., 85, at page 104; *Franklin v. Osgood,* 14 Johns, 527. A power of sale in a mortgage is "a power coupled with an interest" and is irrevocable. *Carter v. Slocomb,* 122 N. C., 475; 2 Pingree Mort., sec. 1336; 4 Kent. Com., 148; *Hannah v. Carrington, supra.* It does not affect the execution of the power that the notes secured by the mortgage had been assigned to another, nor that two notes, one to R. McBrayer and the other to M.

McBrayer, were secured by the mortgage. *Hyman v. Devereux,* 63 N. C., 624.

The presumption of law is in favor of the regularity in the execution of the power of sale, and if there was any failure to advertise properly, the burden was on defendant to show it; but he introduced no evidence to that effect. It does not appear where the "*Western Vindicator*" was published, and if it had been shown to be in the county, *non constat* that publication was not made in another paper.

There was another tract of land sold under the power of sale in the mortgage, but that having been acquired 13th September, 1868, and it being in evidence that at the date of the execution of the mortgage the mortgagor did not have $1,000 worth of realty, his Honor ruled that the failure of the wife to join was a fatal defect. From this no appeal is taken. From his judgment in favor of the plaintiff for the recovery of the other tract acquired by the mortgagor in 1854, the defendant appealed, but we find

No Error.

DOBSON v. SOUTHERN RAILWAY CO.

(Filed December 10, 1901.)

1. PARTIES—*Who to be Plaintiffs—Amendment—The Code, Secs. 183, 273.*

The trial judge may allow proper parties to be made to an action already pending.

2. PLEADINGS—*Amendment—Issues of Fact—When to be Tried—The Code, Sec. 400—Continuance.*

Where an amendment creates a right in the adverse party to be allowed to make corresponding amendments, the disallowance of such right is reviewable error.

3. CONTINUANCES—*Amendments—Answer—Complaint—Pleadings—Issues of Fact—The Code, Sec. 400.*

Where, at trial term, an amended answer to an amended complaint raises additional issues of fact, the defendant is entitled to a continuance.

4. REMOVAL OF CAUSES—*Domestic Corporations—Foreign Corporations—Parties.*

Where a part of the plaintiffs are citizens of this state and the defendant is a domestic corporation, or part of the plaintiffs are foreign corporations and the defendant is a foreign corporation, the defendant is not entitled to remove to the Federal Court.

ACTION by Dobson & Whitley and others against the Southern Railway Company, heard by Judge *M. H. Justice* and a jury, at August Term, 1901, of the Superior Court of McDOWELL County. From a judgment for the plaintiffs, the defendant appealed.

Busbee & Busbee, and *Justice & Pless,* for the plaintiffs.
George F. Bason, for the defendant.

FURCHES, C. J. The plaintiffs, Dobson & Whitley, on or before the 12th day of August, 1900, were the owners of a grist mill in the county of McDowell, and on that day it was destroyed by fire. They had insured this property in three different companies to the amount of $1,800, which amount was paid them by said insurance companies. The plaintiffs, Dobson & Whitley, commenced this action against the defendant on the 1st day of December, 1900, and in their complaint, filed at Spring Term, 1901 (May 15, 1901), they allege that said property was burned by the negligence of the defendant, and that they were thereby damaged to the amount of $1,995.

At the same term the defendant answered the complaint, denying that it burnt the mill, or that it was negligent, or that it was liable to the plaintiffs in damages for the loss of their property. But the defendant did not deny the fifth article of the plaintiff's complaint, which fixed the amount of the damages at $1,995.

The case as thus constituted stood for trial at August Term of the Court, and at August Term, upon the motion of the three insurance companies who had paid the plaintiffs the $1,800 insurance money, they were allowed to make themselves parties plaintiff; to amend the complaint; and to allege that the plaintiffs Dobson & Whitley had been damaged $4,900.

The defendant objected to the order of the Court allowing new parties; to the amendments to the complaint; and especially to the increased damages. But, defendant's objection being overruled, it excepted and answered, denying all the allegations in the amended complaint, and insisted that as the amended pleadings had materially changed the status of the case, it was not ready for trial, and asked that the case be continued; that while it had denied the plaintiff's right to recover, it had never denied but what if plaintiffs were

entitled to recover anything, they were entitled to recover $1,995, as defendant thought plaintiff's property destroyed by the fire was worth that amount, but it did deny that it was worth $4,900. And relying on the amount claimed in the complaint as being the extent of plaintiffs' rights to recover, it had summoned no witnesses as to damages, and was not prepared to try that issue. But the Court overruled the defendant's motion to continue the case, and proceeded with the trial, and defendant excepted, and, upon a verdict and judgment against the defendant for $3,500, appealed to this Court.

The Court has the right to allow parties to be made to an action already pending, and it seems to us that this was a proper case to allow them to be made. The Code, sec. 183; *Isler v. Koonce,* 83 N. C., 55; Clark's Code, 273. The Court also has the right to allow the pleadings to be amended, when the amendments do not constitute a new *cause of complaint.* But this does not reach the merits of defendant's objections.

The defendant had not denied that the plaintiffs had been damaged to the amount of $1,995 by the fire. But it did deny that plaintiffs had been damaged $4,900, and it had a right to make this denial by filing an amended answer. And if it had not been allowed to do so, it would have been such error as would have been reviewed and corrected on appeal to this Court. *Brooks v. Brooks,* 90 N. C., 142. In such cases the defendant is entitled to a continuance. *Sams v. Price,* 119 N. C., 572. To say that because the defendant was allowed to answer, is an answer to what is said in *Brooks v. Brooks,* would be to "stick in the bark," and to ignore the principles of justice and fair dealing upon which it is based. It could do the defendant no good to allow it to answer and deny the new allegations in the amended complaint, and force it into trial at once, without time to get its evidence to sustain its denial.

There was no issue raised by the original pleadings as to

the amount of damage. The plaintiff alleged it to be $1,995, and the defendant, by not answering this paragraph of the complaint, admitted its truth. The first time there was any issue raised by the pleadings, as to the amount of damage, was by the amended complaint at August Term, when it was alleged that the damage was $4,900, and the defendant's amended answer denied this allegation. This issue was then joined for the first time, and section 400 of The Code provides that "issues of fact joined on the pleadings, and inquiries of damages required to be tried by the jury, shall be tried at the term of the Court next ensuing such joinder of issues." This statute, in connection with the cases cited, we think clearly settles the matter, and the defendant was entitled, as a matter of right, to a continuance.

As there is error, as already pointed out, for which there must be a new trial, we will not enter upon the consideration of the alleged errors in the Judge's charge, nor as to the evidence, as they will likely not be presented on another trial.

But as to the other question—the right to remove to the Federal Court, lies *in limine,* we think it best to discuss and decide it. And we do not think the defendant's claim to this right can be maintained. It is true, the defendant did not have this right under the original complaint, for the reason that the amount of damages claimed was less than $2,000; and if the amendment had been to allow the original plaintiffs to increase the amount of damages to $4,900, it would have been a legal fraud on the jurisdiction of the Federal Court to have allowed the amendment. But the case now stands as if the insurance companies had been original parties; and this being so, the defendant would have had no right to remove the case, and has none now, whether the defendant is treated as a domestic corporation under the act of 1899, or as a foreign corporation. If it is a domestic corporation, a part of the plaintiffs are citizens of this State.

If it is a foreign corporation, a part of the plaintiffs are foreign corporations. So, in neither view, has the defendant the right to have the case removed.

But for the error pointed out above there must be a new trial.

New Trial.

SEAMAN v. SEAMAN.

(Filed December 10, 1901.)

DOWER—*Partition—Sale—Infants.*

Where there is a petition to sell land for partition, and one of the defendants is a widow entitled to dower and the other defendants are infants, the dower should be assigned before the land is sold.

ACTION by George F. Seaman and others against Nettie Seaman and others, heard by Judge *W. B. Council,* at Chambers, at Boone, N. C., on the 27th day of December, 1900. From a judgment for the plaintiffs, the defendants appealed.

No counsel for the plaintiffs.

E. J. Justice appeared in this Court for counsel who represented the defendant in the Court below.

FURCHES, C. J. After much trouble, we hope we sufficiently understand the facts of this case to render our opinion upon what seems to be the point presented. But we are not willing to do so without mentioning the manner in which the case comes to us, as a reason for any error in the facts, if there should be such. It is a pauper appeal, but this should not be a sufficient excuse for the condition of this record. There is no summons in the record, and the first

thing is the case on appeal, then the various judgments, and then the pleadings, no pages to the record, and the index is to the complaint, answer, etc., without saying where they are to be found.

The complaint states that plaintiffs and defendants are tenants in common, the plaintiffs owning three-sevenths and the defendants four sevenths of the land described in the complaint, without saying how they came to be tenants in common. But the answer comes to the aid of the complaint, and states that the plaintiffs and the infant defendants, Hannah, William and Joseph, are the children and heirs-at-law of Joseph Seaman, deceased, and Nettie is his widow. And the defendant Nettie alleges in her answer that she is the owner in fee of one undivided one-twenty-eighth part of said land. She also allgese that, as the widow of said Joseph, she is entitled to dower therein, and asks that it may be laid off and assigned to her before any partition or sale of the lands. And while it was admitted that she was entitled to dower, her prayer to have it allotted to her before sale was refused, and an order of sale made.

We see no legal reason why the prayer for dower should not have been made, and it seems to us that it was eminently proper that it should have been made, and the dower allotted before sale.

It appears from the pleadings that the plaintiffs are the children of the intestate, Joseph, by a former marriage, and are of full age; while the defendant heirs are the children of the last marriage, of tender age, the oldest being only nine years old. It is, therefore, the duty of the Court to see that their rights are protected, and not to allow their lands to be sold, with an undefined claim of dower overshadowing the title. No one cares to "buy a pig in a poke." *Marsh v. Dellinger,* 127 N. C., 360.

It seems that all the heirs of Joseph Seaman and his widow

Nettie are parties to this proceeding. It was commenced in the Superior Court before the Clerk; and that Court has jurisdiction of dower and sales of land for partition, and the widow in her answer sets up her right to dower and asks that it may be assigned to her. Why should it not be done? There is no particular form of making this application, so all the parties interested are before the Court. The heirs may join the widow in making the application, or they may be made adversary parties. *Avery Ex Parte,* 64 N. C., 113. As the widow was made a party to this proceeding, it is entirely proper that she should set up her right to dower, lest she might have been estopped from afterwards claiming it. *Weeks v. McPhail,* at this term.

The widow's right to dower is upon the land asked to be sold—a part of the same subject-matter, and both dower and sales for partition being equitable in their nature, the Court will make orders and decrees as become necessary to do justice between the parties. *Weeks v. McPhail, supra.* This is the spirit of the Code practice—to settle the whole controversy between the parties in one action, when they are raised by the pleadings. *Parrish v. Graham,* at this term.

The widow is therefore entitled to her order for dower, and, for her protection and that of the *infant* defendants, it should be allotted and assigned to her before the land is sold. The Court should therefore make both orders, providing that the order of sale should not be executed until dower is assigned.

Error.

SETZER v. SETZER.

(Filed December 10, 1901.)

1. APPEAL—*Exceptions and Objections.*

Where no appeal is taken from the finding of the jury and the judgment, exceptions thereto will not be heard upon an appeal from a subsequent judgment in the case.

2. FORMER ADJUDICATION—*Rehearing—Appeal.*

It is not allowable to rehear a cause by raising the same points upon a second appeal.

3. DIVORCE—*Children—Custody and Tuition of Children—The Code, Secs. 1570 and 1296.*

In a divorce proceeding, whether to grant the custody and tuition of the children to the father or mother, is discretionary with the court, and it may, upon notice, change the custody before or after judgment.

ACTION by H. T. Setzer against Laura A. Setzer, heard by Judge *W. B. Council,* at July Term, 1901, of the Superior Court of CATAWBA County. From a judgment for the plaintiff, the defendant appealed.

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

COOK, J. This action was brought for a divorce *a vinculo matrimonii* for causes assigned under The Code, sec. 1285—Acts 1895, Chap. 277, Acts 1899, Chap. 211, and reviewed by this Court upon plaintiff's appeal at the February Term, 1901 (128 N. C., 170).

Upon motion for judgment in the Superior Court upon the transcript from this Court, his Honor rendered a decree in favor of plaintiff in conformity to the opinion of this Court, dissolving the bonds of matrimony, and adjudging that

defendant be taxed with the costs. Defendant resisted said decree, and moved for a decree for the sale of the land (adjudged to belong to her as tenant in common, from which no appeal was taken) for partition and for an account to be taken of the rents and profits, including the value of the timber cut from said land by the plaintiff, and that defendant have the care and custody of the minor child, and for an allowance for the support of the child, and that the costs be taxed against the plaintiff. His Honor overruled defendant's motion, and she excepted and assigned as error, first, for not rendering decree as prayed for; second, for rendering decree dissolving the bonds of matrimony; third, for disallowing the allowance of ten dollars per month for the support of the minor child, made by the Court upon the trial; fourth, for ordering the costs to be taxed against the defendant; fifth, for refusing to allow to be read the notes of the evidence taken upon the trial of the action.

Defendant's exceptions and assignments of error can not be sustained; for that no appeal was taken from the finding of the jury and judgment, that defendant was the equitable owner of 50-145 undivided interest in the tract of land described in the answer. The questions of divorce and costs were adjudicated in the former appeal, and can not again be heard by this Court in this action, except by petition to rehear under the rules of Court (*Hendon v. Railroad Co.*, 127 N. C., 110; *Pretzfelder v. Ins. Co.*, 123 N. C., 164), and the notes of the evidence taken by the Judge upon the trial were irrelevant.

As to the third assignment, it was within the discretion of the Court granting the divorce to commit the custody and tuition of the child to the father or mother; or to one parent for a limited time, and after the expiration of that time, to the other parent, and so on alternately (Code, sec. 1570). It was likewise within the discretion of the Court, both be-

fore as well as after judgment, upon application after notice, etc., to make such orders respecting the care, custody, tuition and maintenance of the child as may be proper, and from time to time modify or vacate such orders (Code, sec. 1296). In this case, his Honor has rendered a decree in the exercise of his discretion allowed by statute, and we see no error committed by him, and none is pointed out.

There is no error, and the judgment below must be

Affirmed.

McCALL v. SOUTHERN RAILWAY CO.

(Filed December 10, 1901.)

1. EVIDENCE—*Railroads—Negligence.*

   Evidence that a space between two parallel railroad tracks was much used as a walkway by the public is competent.

2. NONSUIT—*Exceptions and Objections—Acts 1901, Ch. 594—Practice.*

   Where, at close of evidence for plaintiff, a motion for nonsuit is made and not allowed and defendant excepts, by introducing evidence thereafter he waives this exception.

3. EVIDENCE—*Sufficiency—Negligence.*

   The evidence in this case as to negligence of defendant is held sufficient to be submitted to the jury.

4. NEGLIGENCE—*Contributory Negligence—Proximate Cause.*

   The instructions of the trial judge in this case as to negligence, contributory negligence, and proximate cause, are held to be correct.

5. ISSUES—*Last Clear Chance—Practice.*

   Where negligence on part of defendant and contributory negligence on part of the plaintiff are relied upon by the respective parties, an issue as to the *last clear chance* should be submitted.

MONTGOMERY and COOK, J.J., dissenting.

MCCALL *v.* RAILROAD.

ACTION by M. J. McCall against the Southern Railway Company, heard by Judge *W. A. Hoke* and a jury, at July Term, 1901, of the Superior Court of MECKLENBURG County. From a judgment for the plaintiff, the defendant appealed.

Osborne, Maxwell & Keerans, for the plaintiff.

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

FURCHES, C. J. The plaintiff was injured by the defendant's train, and brings this action for damages. The defendant is now, and was at the time of the injury, operating two railroads that run into the city of Charlotte; one of them is known as the Atlantic, Tennessee and Ohio Railroad, from Charlotte to Statesville, and the other runs to the city of Atlanta, Ga., and is known as the Atlanta and Charlotte Air-Line Railroad. In passing through the city of Charlotte, the tracks of these two roads parallel each other for a considerable distance; and for a considerable distance these tracks are not more than eight feet apart, and the projection of the coaches on these roads is something near two feet and a half beyond the rails of the track. So that when the coaches on the two roads pass each other, they leave a space between them of not more than three feet and a half, if that much. At the time the plaintiff was injured, the train on the A., T. and O. road and the train on the Air-Line were passing each other—the A., T. and O. train going north and the Air-Line going south. The plaintiff was walking north on the A., T. and O road, when she heard the train of that road coming, and stepped off the track of that road to let the train pass, and was looking at that train as it approached. She had her little boy, six years old, with her, and he became very much frightened, and she had to hold him to keep him out of danger of being run over. While she was thus stand-

ing between the tracks of the A., T. and O. road and the Air-Line road, the two trains passed her at the same moment of time—one on one side and the other on the other—when she was stricken by the Atlanta Air-Line train and received the injuries complained of.

It was in evidence that these tracks were much traveled by footmen in passing from one part of the city to the other, although the public was notified not to do so. The conductor on the Atlanta Air-Line testified that he was running his train at the rate of six or seven miles an hour; that he saw the plaintiff and little boy when he was 125 or 200 yards from them, and could have stopped his train before reaching them, but did not think them in danger. These seem to be the substantial facts as disclosed by the evidence. The following issues were submitted to the jury and found as indicated:

"1. Was the plaintiff's injury caused by the negligence of the defendant? 'Yes.'

"2. Was the plaintiff guilty of contributory negligence? 'No.'

"3. What damage is plaintiff entitled to recover? '$900.'"

There are two exceptions to evidence, but they are the same in substance and legal effect. The plaintiff introduced evidence to show that the defendant's track, where the plaintiff was injured, was much used as a walkway by the public. To this the defendant objected and excepted. But it seems that the ruling of the Court is sustained by *Cox v. Railroad,* 126 N. C., 106, same case 123 N. C., 604, and *Arrowood v. Railroad, Ibid,* 630.

"The defendant assigns for error—1. The admission by the Court of evidence duly excepted to by defendant, which is the grounds of defendant's first exception.

"2. The refusal of the Court to nonsuit the plaintiff at the close of the plaintiff's evidence, which is the ground of defendant's second exception.

"3. The refusal of the Court to nonsuit the plaintiff at the close of the whole evidence, which is the ground of defendant's third exception.

"4. To the charge of the Court, as is set out in defendant's exceptions numbered 4 to 7, inclusive.

"5. The refusal of the Court to grant a new trial as prayed for by defendant, which is covered by defendant's eighth exception."

The first exception, as to the admission of evidence, has already been disposed of, and is not sustained.

The second exception can not be sustained. Several decisions of this Court and the act of the Legislature of 1901, Chap. 594, are against it. *Parlier v. Railroad,* at this term.

The third exception can not be sustained. There is certainly enough evidence to carry the case to the jury.

"4. To the charge of the Court, as is set out in defendant's exceptions numbered 4 to 7, inclusive." We find some difficulty in discussing this exception, for the reason that none of them are numbered in the record. They seem to be indicated by letters designating certain paragraphs in the charge of the Court as excepted to. The first of them is as follows: "(a) But if a grown person is evidently inattentive to the approach of the train, and in a position of such apparent danger that ordinary prudence could not extricate them, then, in that case, it becomes the duty of the engineer to warn them at once by signal, and stop the train if necessary in order to save them, if he could do so by the exercise of proper care." If this paragraph stopped with the word "train" in the second line (of the printed matter) it would be objectionable, and under the condemnation of *Neal v. Railroad,* 126 N. C., 639. But as it does not, and is connected with the balance of the paragraph by the conjunction "and," which makes it necessary that the other facts stated should be found, we do not think it is. Taking it alto-

gether, it does not conflict with *Neal v. Railroad,* and is sustained by *McLamb v. Railroad,* 122 N. C., 862.

The next exception is to the following paragraph in the charge of the Court: "If the plaintiff, under all the evidence of this case, was in a position of evident peril from which ordinary care on her part would not save her, and defendant saw her, or could have seen her position by keeping a proper lookout, in time to have warned her or stopped its train and saved her, under those circumstances it was the duty of the engineer to have stopped the train in time to have avoided the injury, and if he did not do it, then you should answer the first issue 'Yes,' if this was the proximate cause of the woman's injury (c)." We do not think the defendant's exception to this paragraph can be sustained. It is not necessary for the charge to have stated—"or could have seen her position by keeping a proper lookout"—as the engineer testified that he saw her 125 or 200 yards from where she was standing, and in time to have stopped the train before it reached her. But we are unable to see that this unnecessary part of the charge could have damaged the defendant; and, stripped of this sentence, it is sustained by *Neal v. Railroad* and *McLamb v. Railroad, supra.*

The next paragraph excepted to is, in substance, if not in the very language, as the first paragraph quoted in this opinion.

The defendant's next exception is to the following paragraph of his Honor's charge: "(f) The plaintiff is required to exercise due care, but if she fails to do so, and thereby brings injury on herself, then her own negligence is the proximate cause of her injury, and she has not the right to recover. It was negligent for her to go on this track."

"If you answer the first issue 'Yes,' and then say that the defendant was negligent because it failed to stop the train, and because it could have stopped it by the exercise of proper

care, then the defendant is responsible notwithstanding her negligence. Her negligence in this case would not be the proximate cause. While she may have been negligent in going on the track, if you find that after she got in the position of peril the company negligently failed to avoid the injury by stopping the train, then it would not be contributory negligence on her part because they failed to stop the train after she was in a position of peril and could not get out of the way in time to avoid the injury. If you find these to be the facts, then you will answer the second issue 'No,' there was no contributory negligence on her part (g)."

These paragraphs are not as lucid as the charges of his Honor usually are. They are only apparently involved, and, to some extent, seem to be contradictory. But while this may seem to be so, we do not think they are. It is contended by the defendant that the Court charged the jury that the plaintiff was guilty of contributory negligence, and then charged them that she was not guilty of contributory negligence.

This apparent conflict grew out of the fact that no issue was submitted as to whose negligence was the proximate cause of the injury. And while it is thought best not to have too many issues, yet, as contributory negligence was to be pleaded and a separate issue submitted as to that, it seems that it would be entirely proper, if not best, to submit a direct issue to the jury that they may say by a direct finding, whose negligence caused the injury. But we do not think this charge, properly understood, is contradictory. Nor do we see that the defendant has been prejudiced by the manner in which it is stated.

We have considered all of the defendant's exceptions appearing on the record, and as there is no eighth exception, we can not consider the fifth assignment of error.

Upon a careful examination of the whole record, we find no substantial error, and the judgment appealed from is

Affirmed.

MONTGOMERY, J., dissents.

COOK, J., dissenting. There are only two views of the case in which defendant company can be considered to have been guilty of negligence, and there is no evidence to support either. The first is that of the engineer, when he saw the plaintiff walking on the track of the other railroad (150 or 200 yards away) knew that the train he was meeting was coming at such a rate of speed that the two trains would meet just at that point where plaintiff would be when they met; or that the child was frightened and attracting her attention, and that the oil mill near by was running and making such a noise that she could not hear the train; and that she would remain there between the tracks until the trains met; then and in that event it would have been negligence not to increase his speed to such a high rate as to pass her before meeting the other train, or to have slowed his speed or stopped so as to allow the other train to pass her first. The second is that if the engineer, after discovering her peril (which did not exist until the two trains were closing in on her) could have stopped the train and prevented the injury and failed to use his best efforts to do so, then defendant company would be guilty of negligence.

It is certain that the engineer had a right to assume that plaintiff could and would take care of herself and boy, whom she was caring for and protecting; no obstruction existed to prevent her from getting off the track on the opposite side rather than between the tracks while in sight of two trains coming from opposite directions, and the law does not impose upon engineers the duty of supposing that people will do the foolish rather than the sensible thing.

Or, there may be a third view, to-wit, that it was negli-

gence in defendant company in placing the two parallel tracks so close together that trespassers could not stand with safety between trains meeting along the route, but I do not subscribe to such doctrine. I therefore think the Court erred in not sustaining the motion to nonsuit.

HORD v. SOUTHERN RAILWAY.

(Filed December 10, 1901.)

1. EVIDENCE—*Railroads—Negligence—Walkway.*

Evidence that people walk along a railroad track at 11 o'clock at night is competent on the question of negligence of a person killed while on the track.

2. CONTRIBUTORY NEGLIGENCE — *Negligence — Instructions — Form of—Burden of Proof.*

An instruction that the intestate was negligent in being on a railroad track and not getting off, unless it is found that he was in a helpless condition, is correct, and the burden of showing such helplessness by a preponderance of evidence is on the person alleging it.

3. NONSUIT—*Evidence—Sufficiency—Negligence—Personal Injuries.*

There is sufficient evidence in this case as to negligent killing of intestate by railroad to be submitted to the jury.

COOK, J., dissenting.

ACTION by J. G. Hord, administrator of John Ramsay, against the Southern Railway Company, heard by Judge *H. R. Starbuck* and a jury, at May Term, 1901, of the Superior Court of GASTON County. From a judgment for the plaintiff, the defendant appealed.

A. G. Mangum, for the plaintiff.

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

FURCHES, C. J. This is an action for damages upon the allegation that the plaintiff's intestate was killed by the negligence of the defendant. The intestate was seen between 8 and 9 o'clock the night he was killed, in a drunken condition, lying on the ground near the defendant's railroad track, asleep. He was aroused from his sleep by some friends, who helped him up and upon his feet. These friends started him home, which was only a few hundred yards off, and went with him a part of the way, which was down the track of the railroad; and would have gone with him all the way home, but he objected, saying that he could take care of himself. This was near the corporate boundary line of the town of Kings Mountain, and the next morning he was found dead a short distance outside of the corporate limits. When found, he was lying lengthwise with the track of the road, on the end of the cross-ties outside of the rail, with the top of his head crushed, a hole torn in his jaw, his arm crushed above the elbow and severed from the body, except a little piece of skin, with grease on his hair, face and clothing. No one saw him killed so far as the evidence showed.

It was in evidence that the passenger train of the defendant passed over that road shortly after 11 o'clock the night the intestate was killed, going south and running at the rate of about 30 miles an hour. There was evidence that there were two crossings, one some fifty yards before reaching the place where the intestate was killed, and the other some three hundred yards further on. There was evidence tending to show that the whistle was not sounded, and that a man on the track where the intestate was killed could have been seen for two hundred and fifty yards, by reason of the headlight of the engine, if there had been a proper lookout.

There are but three exceptions: one is as to evidence, as follows: "Question—Do people walk along the track at that time?" This question was allowed over the objection of the

defendant, and defendant excepted, and was answered as follows: "Yes, sir; they walk there every day, the people from the mill." We can not sustain this exception. *McCall v. Railroad,* at this term.

The next exception is as follows: "(a) Inasmuch as it appears that the intestate was negligent, I charge you to answer the second issue 'Yes,' unless you find that he was in a helpless condition, and the burden is on the plaintiff to satisfy you by a preponderance of the evidence that his intestate was in a helpless condition; but if you are so satisfied, you will answer the second issue 'No' (b)."

The usual charge is, "If he is in an apparently helpless condition." But as the burden of showing this fact was upon the plaintiff, we do not see that the defendant has cause to complain—supposing there may be a shade of difference between them, and, if there is not, the charge of the Court is sustained by *McCall v. Railroad,* at this term, and authorities there cited. *Brinkley v. Railroad,* 126 N. C., 88.

The next exception is to the refusal of the Court to nonsuit the plaintiff at the close of the evidence; and this exception is grounded principally, as we understand, upon the fact that as the intestate was not found upon the track, it could not be presumed that he was killed by the defendant's train; and, further, as he was not found on the track of the road, it could not be inferred or presumed from the fact that he was killed, that the engineer was negligent in not seeing him and stopping the train. But this exception seems to be answered and the Court sustained by *Powell v. Railroad,* 125 N. C., 370, and *Cox v. Railroad,* 123 N. C., 604, and other cases.

Affirmed.

COOK, J., dissenting. Plaintiff's intestate was found, soon in the morning, dead, lying upon the cross-ties near the rail

of the defendant company's track, with a wound on his jaw, marks on his face, a hole in his head (where his skull had been broken in) "bigger than a hen egg, * * * his arm cut off right at the elbow, with oil on his coat, in his hair and on his face." During the night before he was found near the railroad track by some friends, in a drunken condition, and they started him on his way home, a short distance away. He was lying when found, next morning, not at or near a public crossing, but was 50 yards from the nearest and 300 or 400 yards from the next nearest public crossing, that is, he was between them. There is *no evidence* showing how, by whom or what, why, or under what circumstances he was killed; his condition and position were the only circumstances from which the jury could infer that he was killed by defendant company's train.

Assuming that the jury were justified in finding that he was killed by one of the trains passing during that night, then we are confronted with the proposition: Is negligence presumed from the mere fact that a man is killed by a train, at a point on the railroad where the public have no right in common with the railroad company? If so, the demands for rapid travel and speedy carriage of freight, pressed upon railroad companies by the necessities and requirements of this progressive age and a constantly increasing commerce, must be denied in deference to the trespasser or drunkard who may choose to appropriate to his own use the right-of-way rightfully owned by another, to the annoyance, hindrance and damage of those who have paid a valuable consideration for the passage of themselves and carriage of their freight over the same in a stated length of time, as regulated by the schedules? Why license and demand rapid transit, and then punish it with a presumption if it is obeyed? The presumption of law is that the exercise of a right or duty is rightfully and lawfully done, and the contrary must be shown.

The engineer of a train is entitled—has a right—to presume that the track is clear, and, except at public crossings, or such places where others have a right in common, his chief concern is to look out for obstructions or defects in the road, in defense and protection of his passengers and cargo, and not for the safety of those who deem their bodies and lives of so little value as to wilfully and wantonly thrust them in dangerous places and perilous conditions. Why should the law impose a *special* duty upon railroad companies to maintain a lookout with the view of promoting the safety of such persons? If the engineer discovers such a person *on* the track in an apparently helpless condition, *then* it is his duty to use every available means, consistent with the safety of his passengers, to prevent injury to him.

In *March v. Weston, etc., Ry. Co.*, 85 Hun., 601, deceased was in an intoxicated condition, wandered upon the defendant's track in the city of Rochester, and fell or voluntarily laid down upon the track and went to sleep, and was run over and killed by one of the passing trains in the afternoon. When the train was within 400 or 500 feet, the brakeman upon the engine discovered an object upon the track, but was not able to determine what it was. He called the engineer's attention to it, and he was not able to distinguish what it was, until the engine was within 200 or 250 feet, when he discovered that the object was a man. He immediately reversed his engine, gave the signal to apply the brakes, and did all he could to stop the train before reaching him, but failed. The Court held that it was not the duty of the engineer to slow up or stop his train before he became aware that the object upon the track was a human being. He had the right to assume in the first instance that if it was a man he would leave the track.

In *Smith v. Fordyce* (Supreme Court of Texas), 18 S. W. Rep., 663, where the evidence showed that deceased, while

intoxicated, trespassed upon the railroad track in the night, sat down beside the track and fell asleep, and was struck and killed by a passing train, the Court held that the railroad company would not be liable unless its servants, *after* seeing his peril, took no steps to avoid the accident, and if they did not see him in time to avoid the accident, the railroad would not be liable.

In *Sullivan v. St. Louis Ry. Co.* (Court of Civil Appeals of Texas), 36 S. W. Rep., 1020, 1022, plaintiff's pleadings alleged that deceased, when killed, was lying on defendant's track asleep and unconscious, in a helpless condition, being in a state of intoxication. The Court held that deceased, being on the track in such a condition, was negligent, and, in order to fix liability on defendant, it was necessary to *show* that its servants saw deceased on the track in time to have avoided his death, and their failure then to use proper care to prevent it.

In this case, there is no evidence to show that he was *on* the track, in any position, whether standing, walking, running, lying down, or otherwise. Nor is there any evidence that he was seen by, or could have been seen and recognized as a man, by the engineer, had he been keeping a vigilant lookout; or, if he got on the track in front of the engine, there is no evidence to show whether he was on it when the engine came in sight, or got on it just as it came near him, or attempted to do so and was injured in the attempt. From the condition in which he was found, the natural inference is that he was not *on* the track, or otherwise his body would have shown greater mutilation; or, should he have been lying upon or near the track in such a way that the engineer might have seen the object and taken it to be a bundle of paper, rubbish or coat (as was the case in *N. Y., etc., R. Co. v. Kelly*, 93 Fed. Rep., 745), then it would not have been his duty to stop the train. Any of these conditions may or may not have

existed, and, in the absence of any evidence, it can not be sound law to presume negligence and cast the burden of proof upon the party who, in all other business enterprises, is presumed to be innocent; nor is it tenable to substitute suspicion for evidence. For, it is held that "there is no presumption in this State of negligence against railroad companies upon simple proof of injuries or death caused by their trains" (*Upton v. R. Co.*, 128 N. C., 173, on page 176), which I conceive to be the true and sound doctrine, and to which I shall strictly adhere. Then, applying this rule in this case, the record failing to show any evidence establishing negligence, his Honor should have sustained the motion to nonsuit the plaintiff.

HANES v. LAND CO.

(Filed December 10, 1901.)

DEDICATION—*What Constitutes—Plat.*

Where a land company sells lots by a plat and in a deed calls for a "hotel site," it is not such a dedication that the "hotel site" may not be used for other than hotel purposes.

ACTION by P. H. and J. W. Hanes against The West End Hotel and Land Company, Thomas Patterson and others, heard by Judge *H. R. Starbuck,* at September Term, 1901, of the Superior Court of FORSYTH County. From a judgment for the plaintiffs, the defendant Patterson appealed.

Jones & Patterson, for the plaintiffs.
No counsel for the defendants.

MONTGOMERY, J. The defendant The West End Hotel and Land Company, with the view of opening up a tract of land

as a suburb of the city of Winston, laid it off into lots to be sold for homes and business purposes, with convenient squares, streets and avenues, and at the same time made a map or plat of the property to be used, and which was used, in making sales of the lots. A part of this map or plat represented a lot of six acres, and was designated as the "Hotel Site." While the Hotel Zinzendorf, which was afterwards built on the six-acre lot, was standing and being operated, the defendant Patterson, in 1892, bought one of the lots from the land company, and in the deed from the company to him, reference was made to the map or plat.

The plaintiff, in 1896, after the hotel was burnt, bought from the defendant, the land company, the six-acre lot on which it stood. The plaintiff does not intend to rebuild the hotel, but does intend to use the land for other purposes, and the defendant Patterson, particularly, is claiming a special interest in the lot to the extent, as he insists, that the property can be used for no other purpose than for that of a hotel; and this insistence and claim of the plaintiff, the defendant alleges, is injuring the value of his property and casting a cloud upon his title to the same.

The claim of the defendant Patterson that the "hotel site," because it was laid off on the map and referred to in the deed to himself, was on that account in some way dedicated to the public, incapable of being put to any other use, we think, is not well founded.

The Court decided in *Conrad v. Land Co.*, 126 N. C., 776, that as the purchasers of lots had been induced to buy under the map and plat, the streets and public grounds designated on the map should be forever open to the purchasers and to the public; but it was not intended to go to the length of extending that principle to a lot, marked as the "hotel site." All the streets on such a map are deemed in law to be of advantage to the owners of lots, and parks and squares are both

useful and ornamental, and their use and benefit form such a consideration in the purchase of property laid out on the map as that purchases are made largely upon such inducement. They are for the use of the public as well as for the purchasers. It is not certain, however, that a hotel would necessarily be a benefit to the owners of the lots. If it was a building of correct design and proportions, and well ordered in its management, it might be a benefit to a community; on the other hand, if it was an inferior structure, unsightly in its proportions and badly conducted as an inn, it might be of more than doubtful utility. But, beyond that, the purchasers of lots had no more right to anticipate that the hotel would be built upon the lot of six acres than that the other lots on the plat would be built upon.

The certainty of streets and squares was the inducement to purchasers to buy lots, the sale and utilization of other lots being a matter more of hope and faith than of implied bargain and contract. The lot marked "hotel site," meant no more than if the promoters had said "this would be a good location for a hotel"; it was no guaranty that it would be built. It makes no difference that the plaintiff bought the six-acre lot after the hotel was burnt, because there was no implied or express agreement that either he or the land company would rebuild it in case of its destruction.

We think, therefore, that the judgment of his Honor was a proper one, and the same is

Affirmed.

DOUGLAS, J., concurs in result only.

McMILLAN v. HOGAN.

(Filed December 10, 1901.)

1. TAX TITLES—*Sales—Heirs—Death of Owner.*

Where the owner of land sold for taxes dies before sheriff makes the deed, the validity of the deed is not thereby affected.

2. TAX TITLES—*Sales—Heirs—Infants—Acts 1895, Ch. 119, Sec. 60.*

In order to entitle a minor to an extension of time for the redemption of land sold for taxes, beyond the statutory period, he must have been the owner of the property at the time of the sale.

3. PRESUMPTIONS—*Tax Titles—Deeds—Sheriff's Deeds.*

A deed of sheriff for land sold for taxes is presumptive evidence of the regularity of the sale.

4. TAX TITLES—*Sheriff's Deed—Payment of Taxes.*

Before contesting the title under a tax deed, the contestant must pay the taxes for which the land was sold.

ACTION by R. McMillan against Sallie Hogan and others, heard by Judge *Frederick Moore* and a jury, at May Term, 1901, of the Superior Court of CUMBERLAND County. From a judgment for the plaintiff, the defendants appealed.

S. H. McRae, for the plaintiff.
Geo. M. Rose, for the defendants.

CLARK, J. The land was bought by plaintiff at a sale thereof for taxes. The defendants have neither paid the taxes nor tendered the plaintiff the money paid by him for the purchase-money and the costs. The land was sold for taxes due by Dennis Hogan, 11th May, 1896. He died thereafter, on 15th March, 1897, without having redeemed the land, and on 17th May, 1897, the Sheriff executed title

to the plaintiff. The defendants are the widow and heirs-at-law of Dennis Hogan, and the sole defense relied on is an averment that the deed was void, because when made said Dennis was dead and his heirs-at-law minors.

The State can not exist without the collection of taxes, and when any tax-payer or any property defaults in the payment of his or its fair share of contribution to the public burdens, it throws upon those who pay their *pro rata,* the burden also of paying the taxes of those who default. The share due by defaulters can only be coerced by sale of their property. Buyers at such sale are a necessity, and to encourage them a new law was reported by a Tax Commission (appointed by the Legislature of 1885), and was adopted by force of public necessity in 1887. With slight modification, it has been in force ever since. What indulgence shall be extended to those who fail to discharge the dues levied on their property by the law-making power, and what steps shall be taken to enforce collection, are matters peculiarly within the province of the General Assembly, and the Courts can intervene only when the legislative provision conflicts with some clause of the Constitution.

The sale of decedent's land, made in 1896, seems to have been in all respects regular. Such is the presumption raised by the statute, and no evidence has been adduced to the contrary. The defendants have not paid the taxes then due, which the law requires as a condition precedent to contesting the title carried by the deed executed to plaintiff by authority of the State. *Moore v. Byrd,* 118 N. C., 688.

By virtue of the sale and payment of the purchase-money, the title passed to the plaintiff, subject to be defeated if the sum, with interest and costs, was reimbursed to the purchaser within one year. This was a grace given to the tax-defaulter, and if it is not accepted for any cause at the end of the year of grace, the purchaser at the tax sale becomes enti-

tled to an absolute deed. The general dislike to becoming purchasers of land at tax sales, and the insecurity of such purchases (notwithstanding the new statute), are already such that if, in addition, a purchaser should be subjected to losing both his money and his purchase when the tax defaulter shall die within the year leaving minor children, the State would get few purchasers, and the enforced collection of taxes become well-nigh impossible.

Still, the Legislature could so enact, but it has not done so. The act, then, in force, 1895, Chap. 119, sec. 60, provides: "Infants, idiots and insane persons may redeem any land *belonging to them* from such sale (after the expiration of such disability in like terms as if the redemption had been made within one year) from the date of said sale." But, here, no land belonging to the defendants was sold. When sold, the land belonged to Dennis Hogan, and the purchaser got the title upon payment of his purchase-money, subject only to a right in Dennis to redeem within one year (or anyone for him), and his death did not have the effect to extend the time till any infant, perhaps 21 years later, should redeem. Purchasers could not be had on those terms. The contract of the plaintiff with the State was made 11th May, 1896, and had become absolute when the deed was delivered to him 17th May, 1897.

By paragraph 6977, General Statutes of Kansas, 1899, it is provided: "That lands of minors, or any interest they may have in any land sold for taxes, may be redeemed at any time before such minor becomes of age and during one year thereafter." In *Doudna v. Harlan,* 45 Kan., 484, it is held that the right of redemption, conferred by this paragraph, applies only to lands in which minors have an interest *at the time they are sold* for taxes, and did not apply to lands which, when sold, belonged to their ancestor—approving *Stevens v. Casady,* 59 Iowa, 113, which is to the same effect. The

same ruling is made in *McCormack v. Russell,* 25 Pa. St., 185, and in *Kulp v. Kulp,* 51 Kan., 341, which appears also in 21 L. R. A., 550.

In Black Tax-Titles (2d Ed.), sec. 374, it is said: "It may be laid down as a general rule, obtaining under most systems, that in order to entitle a minor to an extension of itme for redemption of a tax sale beyond the regular statutory period, he must have been the owner of the property at the time of the sale." As the tax delinquent, after the sale of his land for taxes, has only left in him the bare right of redemption within one year, that right can not be extended (in the absence of statutory provision) by his deed, his will or his death devolving the right upon a minor.

In the United States Supreme Court (*Keeley v. Sanders,* 99 U. S., 441, 445), it is held that the right of redemption from tax sales, although it is to be regarded favorably, does not exist, except as permitted by statute. The same is held in *Levi v. Newman,* 130 N. Y., 11; *Smith v. Macon,* 20 Ark., 17; *McGee v. Bailey,* 86 Iowa, 513; *Metz v. Hipps,* 96 Pa. St., 15.

In Coley on Taxation (1st Ed.), 364, the law is thus stated by its distinguished author: "But while the statutes (allowing redemption) are to be favorably regarded, it is at the same time to be borne in mind that the right to redeem comes from the statute exclusively, and is to be asserted only in the cases and under the circumstances which are there prescribed. The Courts can make no extension of statutory time; they can make no exceptions from the general provisions of the statute to meet the circumstances of hard cases; and if the statutes fail to provide for cases of disability, like those of infancy, coverture, or absence from the country, the Courts are without authority to do so." This and several other of the above decisions are cited with approval

in *Dumphey v. Hilton,* 121 Mich., 315 (1899), the Court saying "no authority is cited to the contrary."

No Error.

DOUGLAS, J., concurs in result only.

FULLER v. KNIGHTS OF PYTHIAS.

(Filed December 10, 1901.)

1. EVIDENCE—*Privileged Communications—Physicians—Patient—Acts 1885, Ch. 159—Insurance—Practice.*

A person in his application for insurance may waive the right to object to the evidence of a physician acquired while attending him and the physician may be compelled to testify.

2. EXAMINATION OF WITNESSES—*Evidence—Trial—Practice.*

The practice of admitting evidence to be made competent by subsequent evidence is disapproved.

ACTION by Mamie Fuller against the Endowment Rank, Knights of Pythias, heard by Judge *Frederick Moore* and a jury, at April Term, 1901, of the Superior Court of ROBESON County.

This action was brought by the plaintiff, the widow and beneficiary, to recover the sum of $1,000 upon a policy of insurance issued upon the life of J. R. Fuller. The policy was issued and based upon the statements and agreements contained in his application, and made a part of the contract. Defendant resisted the recovery upon the grounds, first, that the death of the assured was caused or superinduced by the use of intoxicating liquors, or by the use of narcotics or opiates, in violation of the contract set out in the application; and, second, that the assured, in his application for insu-

rance, falsely stated that he was not and had not been afflicted with any disease of the heart, in breach of his warranty of the truth thereof, whereby he forfeited the benefit provided in the policy; and, upon the trial, claimed the right to prove such cause of death and false statement, by his physicians, Dr. McMillan and Dr. Pope, under a waiver contained in the application, in the following words: "And I hereby, for myself, my heirs, assigns, representatives and beneficiaries, expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me, professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material."

In its answer, defendants set up the application as a part of the contract (*Bobbitt v. Ins. Co.*, 66 N. C., 70), and relied upon the terms and conditions therein stated as specifically averred.

In addition to the case on appeal made out and certified on the 16th day of September, 1901, there appears the following, which counsel agreed (agreement filed in this Court) shall be inserted in and made a part of the case, to-wit:

"At the request of counsel for the defendants, and without notice to the plaintiff or her counsel, I make the following statement, to be added to the case on appeal heretofore settled in this action:

"The defendants offered the application for the policy of insurance sued on, as I now remember, as their first piece of evidence. The plaintiff objected upon the ground that the paper offered by the defendants had not been proved to be what it purported to be. Thereupon the defendants offered certain evidence for the purpose of proving it, but were un-

able to prove it. The Court then stated to the defendant's counsel that they could go on with their evidence, and that the order in which the application was introduced was of no importance. Certain exceptions to the admission and exclusion of evidence were then taken by the defendants during the examination of their witnesses. The Court made the rulings so excepted to, which appear in the statement of case on appeal heretofore settled, as though the said application had been in evidence when they were made. In other words, the Court ruled, as matters of law, that the evidence offered was competent or incompetent, as shown in the statement of case on appeal, just as it would have done if the application had been admitted before such rulings were made.

"Near the close of the defendant's evidence, the Court announced that a new trial would be ordered unless the plaintiff would withdraw her objection to said application, and such objections were then withdrawn, and the said application was admitted without objection.

"I intended to insert the foregoing statement, or a similar statement, in the case on appeal heretofore settled, immediately after the statement that the application was introduced, but inadvertently failed to do so.

"At the request of counsel for defendants, and without notice to the counsel for plaintiff, I also make the following statement, to be added to the case on appeal heretofore settled:

"During the examination of the physicians who were examined as witnesses for the defendants, as shown by the case on appeal heretofore settled, certain questions were asked by the defendants' counsel, and objected to by the plaintiff's counsel, as is shown by the case on appeal, and some of said objections were sustained by the Court, as is shown by the case on appeal. In ruling upon some of these objections,

the Court instructed Dr. McMillan, and perhaps the other physician, that he could not testify as to any communication made to him by the assured while he was attending the assured as his physician, and could not express an opinion based upon knowledge of the condition of the assured acquired from him while he was attending him as his physician. The defendants did not except to such instruction, but did except to the rulings of the Court upon the objections made by the plaintiff to certain of the questions which the defendants' counsel asked the witnesses, as is shown by the case on appeal. The witnesses testified as is shown by the case on appeal.

"The Court did not insert the statement last above made in the case on appeal, for the reason that the instructions given to the witnesses were not excepted to, and for the further reason that the case on appeal shows the exceptions taken by the defendants to the rulings made by the Court upon the various objections made by the plaintiff to the testimony of the physicians who were examined as witnesses for the defendants."

"As the counsel for defendant request that the foregoing statements be made and added to the case on appeal, I make the same and now direct the Clerk to copy and certify the whole of the foregoing statements, and attach the same to the case heretofore settled, before transmitting the transcript to the Supreme Court. The Clerk will first certify the record and original case on appeal in the usual manner, and will then properly certify a copy of the foregoing and attach the same to the original case on appeal. This 24th day of September, 1901. Fred. Moore, Judge," etc.

There were many exceptions taken to the exclusion of evidence, failure to give certain special instructions asked to be given, and to instructions given by the Court. A verdict

was rendered in favor of the plaintiff, and defendant appealed.

McLean & McLean, for the plaintiff.
Patterson & McCormick, for the defendant.

COOK, J., after stating the case. Defendant's counsel insist in this Court that it did not have a fair trial, upon the grounds (in part) that it was most material to its defense to elicit from the physicians their opinions and the knowledge they possessed of the *cause* of assured's death and his true physical condition, especially as to his heart at and before the time of making the application, upon which its defense was based, which knowledge they had obtained while being his attending physicians; and that they had a right, by reason of the waiver set out in the application, to have their evidence as to those matters submitted to the jury. But that the Court below excluded such evidence and confined them, the physicians, in their evidence to such knowledge as they had obtained otherwise than as attending physicians, under the act of 1885, Chap. 159, viz: "No person duly authorized to practice physic or surgery shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon; provided that the presiding Judge of a Superior Court may compel such disclosure if, in his opinion, the same is necessary to a proper administration of justice."

But it is contended by plaintiff's counsel that defendant did not except to the instruction by the Court to Dr. McMillan and other physicians that they could not testify as to such communications, and could not express an opinion based on such knowledge so acquired, and therefore this Court can not review such ruling.

The record in the case is conflicting upon this contention. While it is stated in the "supplemental statement to be added, * * * the defendant did not except to such instructions," yet it does appear in the record (pages 20, 21), upon the examination of Dr. McMillan, who was admitted to be an expert, that the following questions were propounded to him, excluded and exception taken, viz: "State, Doctor, for what purpose you administered narcotics to the deceased, John R. Fuller. * * * State, Doctor, from your attendance upon deceased, from having treated him, and from your knowledege of his habits and condition, if you can give an opinion as to the cause of his death. * * * Defendant proposed to show by this witness the purpose for which he attended him, Fuller." Excluded and exception taken. Also, upon the examination of Dr. Pope, who was admitted to be an expert: "From your knowledge of the deceased, your association with him, and your knowledge of his use of whiskey and narcotics, state what, in your opinion, was the cause of his death." Excluded upon objection, and excepted to. Also, "From what he told you when he came to you in a nervous condition, what was the cause of his nervousness?" Excluded upon objection, and excepted to.

Couple these questions with the statement of his Honor (in the "additional statement") that "the Court ruled as matters of law that the evidence was competent or incompetent, as shown in the statement of the case on appeal, just as it would have done if the application had been admitted before such rulings were made," it clearly appears to us from the record that the exception *was* taken, and became competent upon the introduction of the application *thereafter*. This practice, however, of admitting evidence out of its order, and ruling upon evidence upon the assumption that other evidence had been introduced, or that it would be afterwards, is not approved and should not be allowed. The confusion

involved in the trial of this action seems to have arisen from that cause.

The question, therefore, first requiring our decision is whether the plaintiff is bound by the waiver set out in the application, notwithstanding the statute of 1885.

At common law there is no privilege extending to the relation between patient and physician; while, as between attorney and client, the attorney entrusted with the secrets of the cause by the client shall not be compelled to give evidence of such conversation or matters of privacy, as come to his knowledge by virtue of such trust and confidence; but, with the client's *consent,* it may be waived, and he may be compelled to testify. The privilege between patient and physician created by our statute is less stringent and more lax than that of the common law between attorney and client. As between the latter, the attorney's mouth is sealed for all time (except by consent of client), and he *can not* be compelled by the Court to testify; while under our statute it is provided that the Judge, in furtherance of the administration of justice, *may compel* the physician to disclose the information acquired by him from his patient.

We are, therefore, of the opinion that the waiver stated in the application is good and binding upon the beneficiary, and that his Honor erred in excluding the testimony of the physician as to knowledge and information acquired from deceased while attending him professionally. This view is sustained by many authorities cited by the learned counsel of defendant, among which are *Grand Rapids v. Martin,* 41 Mich., 667; *Foley v. Royal Arcanum,* 78 Hun., 222; *Anderina v. Mutual Reserve Fund Life Asso.,* 34 Fed. Rep., 870; *Daughtery v. Life Ins. Co.,* 87 Hun., 15.

The other exceptions and assignments of error seem to have grown out, to a great extent, of the exclusion of the evidence

above stated, and causes for the same may not again arise. We therefore deem it unnecessary to pass upon them.

For the error above stated, there will have to be a new trial.

New trial.

BOND v. WILSON.

(Filed December 17, 1901.)

1. EVIDENCE—*Relevancy—Competency.*

Evidence of a fact which is neither raised by the pleadings nor by the issues submitted, is irrelevant and therefore incompetent.

2. DEEDS—*Delivery—Escrow—Agency.*

Where a deed is given to an agent for the principal, without right by grantor to recall it, it amounts to a delivery.

3. ABANDONMENT—*Deeds.*

Where a purchaser fails for 17 years to take possession of land under an unregistered deed, it does not amount to abandonment.

4. VENDOR AND PURCHASER — *Betterments — Improvements — Ejectment.*

Where a vendee is induced to take possession of land by the owner under a promise that he may reasonably rely upon that he will have the benefit of the improvements, he is entitled to pay for betterments and taxes paid by him.

5. VENDOR AND PURCHASER—*Betterments—Rents—Ejectment.*

Where a vendee, in ejectment, claims pay for betterments, he must account for rents.

6. EJECTMENT—*Ouster—Betterments—Writ of Assistance.*

In ejectment a writ of ouster should not issue until a judgment for betterments is paid.

CLARK, J., did not sit.

BOND *v.* WILSON.

ACTION by Louise N. Bond against J. W. Wilson and J. W. Wilson, Jr., heard by Judge *E. W. Timberlake* and a jury, at Spring Term, 1901, of the Superior Court of BURKE County. From a judgment for the plaintiff, the defendants appealed.

Avery & Avery, Justice & Pless, and *J. T. Perkins,* for the plaintiff.

Osborne, Maxwell & Keerans, T. N. Hill, Avery & Ervin, and *Bynum & Bynum,* for the defendants.

FURCHES, C. J. In January 1875, the defendant Wilson made and executed his deed to the plaintiff for the land mentioned in the pleadings. This purchase was made by H. F. Bond, the father of the plaintiff, acting as her agent. H. F. Bond died in 1881, and the deed was not registered until 1896. At the time the deed was made, the plaintiff, her father, H. F. Bond, and other members of his family, were living in Morganton, and it appears that this property (a vacant lot) was bought to build a residence upon. But after buying the lot the family moved to Georgia, without improving the lot, and on the 9th of September, 1880, H. F. Bond wrote the defendant the following letter: "Gainesville, Ga., 9th September, 1880. My Dear Sir:—Yours enclosing check for two hundred dollars was received several days ago (29th ultimo). Will place to credit. I write you in regard to the lot near you; when you let me have it, you did so thinking I wanted to build on it and become your neighbor, a kindness which I appreciate; but the last winter I spent in Burke convinced me that the winters are too cold for my family. Louisa had cold constantly, and Rebecca took such a deep cold that she did not recover from it for two or three months after our arrival in Atlanta; was under a physician then, and we were very uneasy about her. Lou's colds rarely come

now, nor has Rebecca been troubled with them either. If we could stand the climate, would return. Besides, Mrs. Hollman had cough there, too, from which she has almost entirely recovered out here. We are very much attached to the people of M***, and can say truthfully that we have met no such in Atlanta, Ga. Under the circumstances, therefore, I can not consent to go back—health being first considered in locating, find I must ask you to do me the favor to take the lot back. Of course I lose money by the operation, having lost interest on investment for several years. If you will do me this favor, will try to be as indulgent on the notes as I can. You can let me have the money by 1st January ($600), and I shall not want probably more than $1,000, and may not want that—in the spring. My operations in Burke proved very unfavorable, but I hope the land in C*** may bring me out some day. With kindest regards to yourself and family, etc. (Signed) H. F. Bond."

Upon the receipt of this letter, the defendant took possession of the lot, treated it as his own, returned it for taxes and paid the taxes thereon, and put buildings and other valuable improvements on the same to the value of $300, and paid taxes to the amount of $130. Not long after H. F. Bond died the plaintiff moved back to Morganton to live, and had full knowledge of the fact that the defendant was in possession of said lot, improving the same, and treating it in every respect as his own property.

After the death of H. F. Bond, S. McD. Tate became his administrator, and the papers in the hands of H. F. Bond as agent of plaintiff, went into his possession, and it seems that he undertook to act as plaintiff's agent, and caused the deed to this lot to be registered.

This action was commenced on the 18th of March, 1897, for possession and damages for wrongful detention by the defendant. The defendant, by his answer and amended answer,

admits the execution of the deed, but denies the plaintiff's right to the possession of the lot; and also alleges that if the plaintiff should be entitled to the possession, that he is entitled to pay for the valuable improvements he has put on the lot, and for the taxes he has paid. Both of these were denied by the plaintiff's replication, and the following issues were submitted to the jury:

"1. Is plaintiff the owner of the land described in the complaint? 'Yes.'

"2. Are defendants unlawfully in possession of said land? 'Yes.'

"3. What is the annual rental value of said land? '$18.50.'

"4. What, if any, is the value of the improvements put upon said land by the defendant J. W. Wilson since the alleged abandonment by plaintiff on the 9th day of September, 1880? '$300.'

"5. What amount of taxes, if any, has the defendant J. W. Wilson paid on said land since September, 1880? '$130.'"

It was claimed by the defendant Wilson that H. F. Bond was the agent of the plaintiff in loaning her money and in investing the same for her in lands and in various ways; that as such agent he loaned the defendant large sums of money; that he invested large sums in buying grants to timber lands in Caldwell County, and running and operating a saw-mill thereon, besides buying the lot in controversy; that he was her general agent for the purpose of loaning and investing her money. And upon these allegations he alleged that there was an understanding between him and the agent H. F. Bond that if they did not decide to build on the lot they need not keep it, and if they did, H. F. Bond was to give him credit for $600 on one of the notes he held as agent of the plaintiff against the defendant, and that he is entitled to show this, and have the benefit of the same; that he supposed the credit had been entered when he received the letter of September 9,

1880, from H. F. Bond, but he has since found out that no such credit had ever been entered. He contends that he has shown by the evidence of W. C. Newland, H. A. Howard and J. D. McCall that the plaintiff admitted (testified as a witness in the case of *Sprague v. Bond*) that her father, H. F. Bond, was her general agent in loaning and investing her money; that having shown this, she is bound by the acts and contracts of her father in making the purchase of this lot; that she can not take this deed and claim its benefits without being liable to the terms and conditions upon which it was made.

And upon these allegations, which the defendant alleges he has shown, the deed failed for want of consideration; that plaintiff left the State without improving the property, and abandoned it, as the deed, until registered, was only an equitable title, and might be and was abandoned; that the deed was not delivered to the plaintiff, but was delivered to H. F. Bond, as an escrow, and not being delivered to the plaintiff or registered until after the letter of H. F. Bond to him of September 9, 1880, it could not be delivered or registered after that time. He claims that in consideration of these facts, the plaintiff is estopped to prosecute this action.

The defendant's counsel proposed to ask the defendant what was the price Bond agreed to pay him for the lot, and whether he had ever received payment. This question was objected to, objection sustained, and defendant excepted.

The defendant has introduced very strong evidence tending to show that H. F. Bond was the general agent of the plaintiff in loaning and investing her money, and that he was undoubtedly her agent in the purchase of the lot in controversy—sufficient, we think, to make his declarations and acts concerning it competent testimony. And the question asked, as stated above, might have been competent if it had been relevant. But it is neither raised by the pleadings nor

by the issues submitted to the jury, and therefore is incompetent. The defendant's exception to the refusal to admit other evidence can not be sustained.

The delivery of the deed to H. F. Bond was a delivery in law to the plaintiff. If it had been upon the terms the defendant contends it was, still it was a delivery. They were all left to the plaintiff or her agent, and none of them were conditions precedent, or that the defendant had control of. He had no right to recall the deed after it was delivered to H. F. Bond, which we understand to be the test of delivery. *Robbins v. Roscoe,* 120 N. C., 79. It was not a delivery in escrow, as a delivery to H. F. Bond, the recognized agent of the plaintiff, was in law a delivery to her. And the general rule is that a deed can not be delivered in escrow to the grantee, and we see nothing to take this case out of the general rule. 11 Am. and Eng. Enc., 336. It could not be void for want of consideration, as the seal implies that there was a consideration. A consideration is expressed in the deed, and we do not understand the defendant to contend but what the consideration stated in the deed is the price agreed upon by the parties—in fact, he insists that $600 was the price agreed upon, to be paid in a certain way, which he says has not been done. And if this be so, that it has not been paid, that does not affect the validity of the deed. The only way that fact (if it be a fact) could have been material in this action would have been in the way of counter-claim; if it had been properly raised by the pleadings and issues, it might have then affected the measure of defendant's recovery, and not the title to the lot.

Neither do we think the doctrine of abandonment applies in this case. An unregistered deed is more than a mere equitable estate in the land conveyed. It is an inchoate legal title, as well as equitable, and becomes a complete legal title upon registration. *Austin v. King,* 91 N. C., 286. So this

deed conveyted the absolute title when it was registered, and related back to the date of its execution.

But H. F. Bond having been shown to be the agent of the plaintiff generally, and especially so in the purchase and management of the land in controversy—writing to the defendant and saying, "I must ask you to do me the favor to take the lot back. * * * You can let me have the money by the 1st of January ($600), and I shall not want probably more than $1,000, and may not want that—in the spring"; and the fact that the defendant at once went into possession and soon thereafter commenced erecting a house upon the lot, and putting other valuable improvements on the same, with the perfect knowledge of the plaintiff, and was allowed to continue in the possession of the land without objection or molestation for seventeen years, is sufficient to raise an equity in his favor for betterments. To our minds, the letter of the 9th of September, 1880, was a proposition to resell the lot to the defendant at the price of $600; and although there is no direct evidence that the defendant accepted this offer, we think the fact that he at once took possession of the lot and commenced to put permanent improvements on it, is evidence that he did. And the fact that he was allowed to do this, and to retain the undisputed control of the lot as his own for so long a time, is evidence going to show that the plaintiff so understood it. The right to betterments is not a matter of contract, but an equity growing out of the relation of the parties to prevent fraud and injustice, and to prevent one party from wrongfully enjoying the fruits of another's labor without paying for them. Of course this rule does not and should not obtain when a volunteer—a trespasser—has improved the land of another; that would be his own folly. But where a party has been induced to do so by the owner, under a promise he may reasonably rely upon, that he will have the benefit of the improvements, and not

the party inducing him to make them, he should be allowed to pay for such improvements—not what it cost to put them on the land, but the amount they had improved the land. We are, therefore, of the opinion that the defendant in this case is entitled to pay for his improvements, betterments. *Luton v. Badham,* 127 N. C., 96.

The question, then, arises as to whether he is entitled to be repaid the taxes he has paid on the lot since he took possession of it in September, 1880. If he had paid the plaintiff that much money on the land, under this agreement to reconvey, and she then refused to convey, the defendant would have been entitled to recover it back; as the land was the plaintiff's, the taxes were hers. And their payment by the defendant was the payment of her debt, not officiously, but under the belief that it was his duty to do so. We therefore see no reason why he should not be allowed to recover the amount of taxes he has paid. They were paid under the same assurance he had in the letter of the 9th of September, 1880, that the plaintiff would reconvey the land to him. And it seems to us that if he is entitled to the one, he is entitled to the other.

As the defendant claims betterments, he must account for rent at $18.50 a year, from September, 1880, until his ouster, as he is still in possession, and $18.50 being the amount the jury found to be the proper annual rental, and the jury having found that the permanent improvements put on the land are $300, and the amount of taxes paid $130, equal $430, the annual rental from September, 1880, at $18.50 will be deducted from the amount of defendant's betterments and taxes ($430), and defendant will have judgment for the residue.

The plaintiff is entitled to judgment for the land, but no writ of ouster should issue until the defendant's judgment for betterments is satisfied. *Albea v. Griffin,* 22 N. C., 9.

We see no error except in the judgment, which will be corrected as stated above, and thus corrected, it will be affirmed.

Modified and Affirmed.

[CLARK, J., did not sit.]

PERRY v. WESTERN NORTH CAROLINA RAILROAD CO.

(Filed December 17, 1901.)

1. APPEAL—*Former Adjudication—Former Appeal.*

An appeal on a point decided on a former appeal is not allowable.

2. JURY—*Judge—Discretion—Challenge.*

A trial judge may excuse a juror because he is related to a witness.

3. LEASE—*Railroads—Damages—Negligence.*

The lessor of a railroad is liable for the negligence of the lessee in the operation of the road.

MONTGOMERY and COOK, J.J., dissenting.

ACTION by J. A. Perry, administrator, against the Western North Carolina Railroad Company, heard by Judge *M. H. Justice* and a jury, at August Term, 1901, of the Superior Court of BURKE County.

T. A. Simpson, a juror, was challenged by plaintiff because he was related to R. E. Simpson, conductor of the train which killed plaintiff's intestate, R. E. Simpson being a witness for the defendant. The Court, in its discretion, excused the juror, to which defendant excepted. From a judgment for the plaintiff, the defendant appealed.

Avery & Avery, for the plaintiff.
Geo. F. Bason, for the defendant.

DOUGLAS, J. This case was before us at the last term of this Court, being reported in 128 N. C., 471. The questions there decided remain the law of the case, and can not be re heard under the form of a second appeal. *Pretzfelder v. Ins. Co.,* 123 N. C., 164; *Shoaf v. Frost,* 127 N. C., 306; *Wright v. Railroad,* 128 N. C., 77; *Kramer v. Railway Co.,* 128 N. C., 269. The case now practically presents the same material points then decided, except the error for which a new trial was then granted. As we see no substantial error in the trial of the action, we must affirm the verdict.

We see no error in his Honor excusing the juror as a matter of discretion. *State v. Barber,* 113 N. C., 711; *State v. McDowell,* 123 N. C., 764. In the latter case, this Court says, on page 768: "Challenge is not given to the prisoner that he should have a particular individual on the jury, but that he should *not* have one against whom he had a valid objection. In other words, he has the right to accept or reject, but not the right to *select.*"

In spite of what we said in our former opinion, the defendant again comes here with an exception to the finding of the Court of the fourth issue in favor of the plaintiff. This issue is as follows: "Is the defendant answerable for the negligence of the Southern Railway Company in causing the death of the plaintiff's intestate?" This issue was properly answered in the affirmative on the record and decision in the James case, reported in 121 N. C., 523.

We can only say that we reaffirm that case in every essential particular. We are of opinion that the Western North Carolina Railroad Company still exists under its charter as a North Carolina corporation. If it does not so exist, then it has no legal existence whatever; and grave questions must

arise as to the illegal use of its franchise and the tenure of its easement.

While we are of opinion that the construction of the statutes of this State is peculiarly within our jurisdiction, and especially those creating corporations which have no natural right of existence, we do not think that the case of *James v. Central Trust Co.*, 98 Fed. Rep., 489, tends to sustain any doctrine inconsistent with those laid down by us in the James case.

If this exception is intended to raise the question of the liability of the lessor, we can only repeat what we said before: "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. Railroad,* 89 N. C., 321, 330; *Logan v. Railroad,* 116 N. C., 940; *Tillett v. Railroad,* 118 N. C., 1031, 1043; *James v. Railroad,* 121 N. C., 523, 528; *Benton v. Railroad,* 122 N. C., 1007, 1009; *Norton v. Railroad,* 122 N. C., 910, 937; *Pierce v. Railroad,* 124 N. C., 83, 93; *Perry v. Railroad,* 128 N. C., 471, 473; *Raleigh v. Railroad* and *Harden v. Railroad,* at this term.

The judgment is affirmed.

MONTGOMERY, J. I dissent on the same ground that I did when the case was on its first hearing—reported in 123 N. C., 471.

COOK, J., dissents.

ALLISON v. SOUTHERN RAILWAY CO.

(Filed December 17, 1901.)

1. REMOVAL OF CAUSES—*Foreign Corporations—Domestic Corporations—Acts 1899, Ch. 62—Local Prejudice.*

A foreign corporation domesticated under Acts 1899, Ch. 62, can not remove an action to the federal court on account of local prejudice.

2. ATTORNEY AND CLIENT—*Parties—In Forma Pauperis—Pauper Suit—Fees—Contingent—Presumptions.*

The bringing of a pauper suit does not raise a presumption that the attorney took the case for a contingent fee and was therefore a party in interest.

3. CONTINUANCES—*Interest—Trial.*

The fact that an attorney in an action is the son of the trial judge is not ground for a continuance.

4. MASTER AND SERVANT—*Vice-Principal—Negligence.*

Where a section master fails to use reasonable care for the protection of persons working under him and one of them is injured, the defendant company is liable for the negligence of its servant.

5. MASTER AND SERVANT—*Contributory Negligence—Assumption of Risk—Section Master.*

Where a section master orders a person under him to throw a hand-car off the track to prevent a collision with a freight train and the employee is injured in the execution of the act, he is not guilty of contributory negligence.

ACTION by J. H. Allison against the Southern Railway Company, heard by Judge *M. H. Justice* and a jury, at October Term, 1901, of the Superior Court of McDOWELL County. From a judgment for the plaintiff, the defendant appealed.

Justice & Pless, for the plaintiff.
George F. Bason, for the defendant.

MONTGOMERY, J. The defendant is now, and was at the time of the commencement of this action, a domestic corporation originally created and organized under the laws of the State of Virginia, and, by proceedings in the Circuit Court of the United States for the Western District of North Carolina, obtained an order for the removal of the action from the Superior Court of McDowell County to the Circuit Court of the United States in and for the Western District of North Carolina.

The plaintiff, in his complaint, alleged his damages to be $6,000, and the order of removal was based upon affidavits alleging local prejudice. The proceedings were certified to the Superior Court of McDowell County, and a motion of defendant's counsel to dismiss the action from the docket because of the order of removal was refused by his Honor. The reason assigned for his Honor's refusal to dismiss the action, or to stay proceedings in the State Court, was that the defendant had complied with the terms of the act of the Legislature of the State of North Carolina, Chapter 62 of the Acts of 1899, and thereby became a corporation of this State. The ruling of his Honor is sustained in the cases of *Debnam v. Telephone Co.,* 126 N. C., 831, and *Layden v. Knights of Pythias,* 128 N. C., 546.

The defendant then moved to continue the cause on the alleged ground that the petition of the plaintiff to sue *in forma pauperis* showed that his counsel had taken the case for a contingent fee, and was therefore "a partner in the suit, as much so as if his name had appeared in the summons and the complaint"; and also upon the ground that plaintiff's counsel was a son of the Judge before whom he pro

posed to try the case. His Honor, we think, properly refused the motion.

The plaintiff, in his affidavit, affirmed that he was unable to give a prosecution bond in the sum of $200, or to make a deposit of like amount for the same purpose; but it did not necessarily follow that he was unable to compensate his counsel in some way other than by a division of the amount of recovery, or that his counsel had not assumed the prosecution of the suit without compensation. But suppose it was the contract between the plaintiff and his attorney that the attorney's compensation should be contingent upon recovery, and that fact should have been known to his Honor, should his Honor have declined to preside over the trial, as Judge, because of the interest which his son had in the recovery? We know of no law which requires such a course on his part. The Judges of our Courts are presumed to be men of character and learning, and not to be influenced by fear, favor or affection towards any suitor or attorney in causes before them. And especially in this case does the Judge seem to be justified in proceeding with the trial. He stated "that he knew not nor cared what arrangements counsel had with client as to fees. That he had no interest whatever in the matter, and that he was fully conscious of his ability to try the case with absolute impartiality. That he had two sons practicing law in his district who had been often appearing and trying cases before him, and that to grant this motion now would be to make an admission of his inability to hear their cases impartially, which his feelings did not justify, and which he did not feel called upon to make; besides, it appeared to the Court that at the local bar meeting, when the calendar for this term was made, one of the defendant's counsel was present and requested that this case be placed on the calendar a day certain with other cases for the accommodation of other of defendant's counsel, and that it was so arranged for trial, and that out of twenty cases on the calen-

dar, Justice & Pless appeared in eighteen of them, and this was the first case called for trial, and a continuance of this on such ground would set a precedent to continue the calendar and adjourn the Court. That the Judge then stated that unless other grounds for continuance were offered, he would proceed to try the case, as he could not abdicate the bench or debar his relatives from practicing by granting continuances upon this ground."

The fifth and sixth exceptions of defendant concerned certain instructions given by his Honor on the question of the defendant's negligence. The fifth exception is to that part of the charge which is in this language:

"If you believe from the evidence that the plaintiff was a section hand, and Martin was a track foreman or section boss in the employment of the defendant company, and was a vice-principal of the plaintiff, and the duties of plaintiff and Martin are as set out in the printed rules introduced in evidence, and that Martin ordered his hand-car put on the track by plaintiff and others, and ordered plaintiff and others to go on said car towards Old Fort, said Martin knowing there was a past-due train liable to come along the track meeting them, and the said Martin, without informing plaintiff of the danger, met the train at a point where it could not be seen by those on the hand-car until it was within 510 feet of them, and would reach the point where the hand-car was in nine or ten seconds, and said Martin had not sent out a flagman, or taken other precaution to protect the plaintiff, this would be negligence on the part of the defendant, and the plaintiff would not be guilty of negligence in riding on said hand-car."

And the sixth exception is to that portion of the charge which is in these words:

"It was his duty to listen and look, and in case danger was reasonably to be apprehended from a belated train or

otherwise, to send a flagman in front of the hand-car to notify the engineer on the train, so that the train might be stopped or slowed up, or by bell or whistle give notice of its approach, in order that the hand-car crew might save themselves from danger. If you find that there was negligence on the part of the track foreman in his duties as just defined to you, and find that he was the defendant's agent, as I have described the agency to you, and plaintiff's superior, and further find that the injury occurred, if it did occur, in the performance of the duties conferred on the agent, and that Martin negligently ordered plaintiff to go on the track to remove the car, and that the injury was the result of the negligence of Martin, then you will answer the first issue 'Yes.'"

There was evidence on the part of the plaintiff going to show that the plaintiff and others were, at the time of the plaintiff's injury, under the control and management of a man by the name of Martin, and that he was the section master, or track foreman, of defendant company, and that he hired and discharged hands without consultation or advice from anybody; that a day's labor on the part of Martin's employees began in the morning when they put the car on the track, and ended after the hand-car was put in the tool-house; that when the day's work was over, and Martin and the hands upon the hand-car were returning to their homes, they met suddenly a freight train that was known to be late by both Martin and the plaintiff, and at a distance of about one hundred yards off before it was seen—the view of the approaching train being obstructed by a curve in the shape of an S; that no signals or precaution had been taken by Martin to discover the approach of the belated train, as was required by the rules of the company.

The rules and regulations of the company in respect to track foremen were introduced, and from them it appeared that the track foreman had charge of the track, laborers and

road-watchmen employed upon that section; that a constant lookout should be kept for trains, and that when there was not a clear view of the track far enough to insure absolute safety, flagmen must be sent out with danger signals to protect them.

There was also evidence on the part of the plaintiff tending to show that the whole party jumped from the hand-car when they saw the rapidly approaching train about a hundred yards off, and were in places of safety, but at the sudden and peremptory command of Martin, the plaintiff attempted to go back and lift the hand-car from the track, and in doing so was struck by the engine and badly hurt.

Upon that testimony, we can see no error in the instructions of his Honor, which have been complained of. The *defendant* was negligent whether he informed the plaintiff or did not inform him of the danger of a collision.

On the question of whether the plaintiff contributed to his own injury, the defendant excepted (8th exception) to the following instruction of his Honor: "If, however, the act required of plaintiff was essentially hazardous, he was not bound by his duties to obey orders, and would not be exculpated from the charge of contributory negligence." By the language 'essentially hazardous,' is meant apparent certainty to plaintiff that the act would cause injury." There was no error in that instruction under the evidence and circumstances of this case. Ordinarily, however, that would not be the rule, and a person would certainly be guilty of contributory negligence if he obeyed the orders of his superior in cases where it appeared reasonably certain that his obedience would be attended with injury to himself. In *Hinshaw v. Railroad*, 118 N. C., 1047, where a passenger, after having been told by the conductor to get off, did so, and was hurt because the place was not a safe one for him to alight, all of which was seen and known by the plaintiff, this

Court said: "The danger must not only be apparent, but great—more chances against a safe exit than in favor of it." That, we think, would be a safe rule to be applied ordinarily in cases where employees were ordered by their superiors to do certain acts in the ordinary course of their business. But in cases like the one now before the Court, where there was imminent peril of a colision between a train moving at 30 or 35 miles an hour downgrade, and a hand-car, its occupants being greatly excited and disturbed by the sudden approach of the train, we think, as did his Honor, that in the effort to prevent the effects of such a collision an order from the foreman to an employee to return to the track and throw the hand-car off could be obeyed without culpability on the part of the employee, unless it was certain that in doing so injury would occur to him.

Further, under the head of contributory negligence, his Honor instructed the jury that "If the plaintiff was an employee of defendant, and by reason of the negligence of the defendant through a vice-principal, Martin, put in sudden peril and great danger, and immediately after the plaintiff had extricated himself from his hazardous and dangerous position, was commanded by such vice-principal to get a hand-car off the track, and if, in attempting to obey this order, was hurt, the law in regard to the contributory negligence of the plaintiff is as follows: 'If the agent of the employer' and the vice-principal of the plaintiff 'suddenly commanded the plaintiff (a laborer) to do an extra hazardous act in the course of his duty, one that may, though not probably, be safely done by observing due care, one that must be done at once, if done at all, and if the laborer obeys the command promptly, moved only by a faithful sense of duty, and as a consequence suffered serious bodily injury—in that case the injured party does not contribute to his own injury."

We think the instruction a proper one, and that the law

as announced in *Patton v. Railroad,* 96 N. C., 456, supports the charge. The other exceptions of the defendant are only variations in the manner of their statement of the ones which we have discussed, and it is not necessary to particularly consider them.

No Error.

DOUGLAS, J., concurs in result only.

FURCHES, C. J., concurring in the judgment: This action is *in forma pauperis,* and the counsel of plaintiff is the son of the Judge presiding at the trial. When the case was called for trial, the defendant called the attention of the Court to this fact, and alleged that the plaintiff's counsel was prosecuting the case under a contract for a part of the recovery as a contingent fee. The plaintiff's counsel, in arguing this motion, called it extraordinary, but did not deny the facts alleged by the defendant. The Court refused the motion, giving his reasons therefor, as set out in the opinion of this Court.

The motion was not alone made upon the ground that the presiding Judge was the father of plaintiff's counsel. If it had been made upon this ground alone, it would have been extraordinary, and contrary to the uniform practice in this Court and in the Superior Courts of the State.

The record states the mtoion as follows: "The defendant then moved to continue the case, for that, as was sufficiently shown by the petition of plaintiff to bring this suit *in forma pauperis,* his counsel, E. J. Justice, had taken the same for a contingent fee, and was therefore a partner in the suit, as much so as if his name had appeared in the summons and complaint." This was the motion, and the Judge, in assigning his reasons for refusing it (among other things) said "that he knew not, nor did he care, what arrangements coun-

sel had made with his client as to fees; that he had no interest whatever in the matter, and that he was fully conscious of his ability to try this case with absolute impartiality; * * * that out of twenty cases on the calendar, Justice & Pless appeared in eighteen of them, and this was the first case called for trial, and a continuance of this case on such grounds would set a precedent to continue the calendar and adjourn the Court."

To make a continuance of this case a precedent for continuing the other seventeen cases, would be to put them on the same footing as this case, that is, that they were all *pauper cases brought for contingent fees.* This, I am satisfied, was not the case, and the reason assigned, as I think, does his son injustice. And it may be that it does his other son injustice, as I am inclined to think it does. If the motion had been made to continue for the reason alone that the plaintiff's counsel was the son of the presiding Judge, then the grounds stated would have been correct.

The law of this State, adopting the law of England as far back as Eleventh Henry VII did not allow an attorney "to take any fee or reward" for his services in pauper suits. Revised Statutes, Chap. 31, sec. 153; Rev. Code, Chap. 31, sec. 43,which continued to be the law until the adoption of The Code, as it was regarded as a species of champetery. But that is not the law now, and probably never will be again. But it is doubtful whether there should not be some legislation with regard to such fees.

Under the law, as contained in the Revised Statutes and the Revised Code, an administrator was not allowed to bring and prosecute a suit *in forma pauperis. McKeil v. Cutler,* 45 N. C., 139. This question, so far as I am advised, has not been presented to the Court since the act of 1868-9 (Code, secs. 210, 211). But no such motion was made in this case,

and no such question is before the Court now; and I know the practice has been otherwise since the adoption of The Code.

I shall take it, then, at least so far as this case is concerned, that Mr. Justice had the right to bring this suit *in forma pauperis,* and to contract with his client for a part of the recovery as a contingent fee, and this brings up the question of his pecuniary interest in the recovery. And taking it that he had a direct pecuniary interest in the recovery, or that he was to have all the recovery, or that it had been his own action, I know of no law in this State that would have prevented his father from trying the case. This, I think, was altogether a matter of propriety with him, and for him to determine whether he would or not try the case; and I see no legal grounds upon which this exception can be sustained.

NEAL v. TOWN OF MARION.

(Filed December 17, 1901.)

1. NEGLIGENCE—*Municipal Corporations—Towns and Cities—Sidewalks—Streets.*

   Under the evidence in this case the defendant is held liable in damages for the injury to the plaintiff caused by a defective sidewalk.

2. CONTRIBUTORY NEGLIGENCE—*Negligence—Instructions.*

   The charge of the trial judge in this case as to negligence and contributory negligence is sustained.

ACTION by Lizzie C. Neal against the Town of Marion, heard by Judge *M. H. Justice* and a jury, at August Term, 1901, of the Superior Court of McDOWELL County. From a judgment for the plaintiff, the defendant appealed.

Justice & Pless, for the plaintiff.
Geo. F. Bason, and *J. T. Perkins,* for the defendant.

MONTGOMERY, J. The plaintiff, in her complaint, alleged that upon her arrival at the depot of the Southern Railway Company, in Marion, at 12 o'clock at night, she started, walking, to her home along a pathway in the town on the north side of the street leading towards her home, when she fell into a deep hole in the pathway, negligently left there by the town authorities, and sustained severe personal injuries. In the answer of the defendant it was averred that the plaintiff "knew of her own personal knowledge that the north side of said thoroughfare was not constructed, or prepared or intended to be used by foot passengers, and that the corporation of Marion had provided a sidewalk for foot passengers on the south side thereof, of easy access and perfectly safe. And this defendant further alleges that the plaintiff had knowledge of the excavation, and voluntarily and carelessly, through inadvertence and indifference to exercise due care, and negligently and for convenience refused to go upon the sidewalk prepared for foot passengers, and took the chance of the dangerous path that led over the washout, and was injured, if at all, by her own contributory negligence."

The statement of the case on appeal at the former hearing, 126 N. C., 412, contained the testimony of only one of the witnesses, J. L. Morgan, who was or had been an alderman of the town. The substance of his testimony was that the side of the street (north side) on which the plaintiff was injured, had been abandoned by the town as a walking-way for pedestrians since 1889 or 1890, and that a good and safe sidewalk was at that time constructed on the south side of the street; that there were holes in the pathway along the north side of the street at and before the time of the plaintiff's

injury, and that no person could have walked along that pathway without seeing the holes.

It appeared also in the case that the plaintiff was a resident of the town, and had walked along that pathway very frequently.

On the first trial of the case, his Honor instructed the jury "that though the plaintiff may have known of the existence of this defect prior to this time, yet the Court further charges you that she is not required to carry around in her memory the defect in the street, and if she may have known of its existence at the time, she did not think about it, and was injured, that would not be contributory negligence."

We said that that instruction was erroneous in the light of the evidence in the case, which tended to show that she was acquainted with the street, and that there were dangerous holes in it at and before the time of her injury, that it had been abandoned by the town as a walking-way, that she went upon that pathway in the night time and when she knew that on the other side of the street there was a good and safe sidewalk. In the conclusion of the opinion in the former case, this Court used language which seems to have misled the defendant's counsel, judging from the manner in which the case was last tried. The language referred to was as follows: "But, besides, if the authorities of a town make and keep in repair a good sidewalk on one side of a street and leave on the other side an abandoned and neglected walk, and those facts are known to a person who chooses in the night time to walk along the neglected path instead of upon the safe walkway, and such person be injured by reason of a defect in the path along which she chooses to walk, then there is contributory negligence on the part of the injured person, to say the least, and there can be no recovery for the injury sustained." That was an instruction that we thought ought to have been given upon the hypothesis of the evidence of the witness Mor-

gan, in that case as it was then presented; but of course it is not the only view of the case in its present shape.

But the defendant's counsel regarded the closing words of the former opinion as a decision that the conditions of the hypothesis were admitted, or proved without contradiction; whereas, we simply meant to say that the question should be submitted to the jury on that view of the law and the evidence. As we have said, the evidence of the witness Morgan alone was printed in the former case, and it presented a very strong case for the defendant.

The case on the present appeal, however, contains the whole evidence, and is very much changed in its aspect. It all tends to show that since 1889 or 1890, notwithstanding there has been a good and safe sidewalk on the south side of the street, and that no sidewalk has been kept up on the north side, yet people generally, with the knowledge of the town authorities, and without their disapproval, have been since that time constantly using, day and night, the north side of the street as a walking-way to and from the depot, and that the town has worked and repaired it for the use of the people as a walking-way and driving-way for vehicles. All the exceptions of the defendant as to the evidence are founded on the supposition that the right of the plaintiff to recover was decided against her by the concluding sentences of the former opinion, which we have referred to in this opinion, and they can not be sustained, for the reasons we have herein given. We have carefully gone through the charge of his Honor, and find no error. Neither was there error in his refusal to give those of the defendant's prayers which were declined, nor in giving such of the plaintiff's as he gave.

The substance of his Honor's charge on the issue of defendant's negligence was, first, that the law requires cities and towns to keep their streets and sidewalks in safe condition, and on failure to do so, if injury occurs without negligence

on the part of the injured party, liability would attach to the town or city for such injury; second, that where a town or city attempts to keep up a street by working and repairing it, and voluntarily allows the street to remain with dangerous holes or excavations, with knowledge at the same time that that part of the street is being used as a walkway, generally, the municipality would be negligent; third, that the keeping up a sidewalk on one side of the street would not relieve a town or city from liability where a person should be injured by falling into a hole negligently allowed to remain in another part of the street, though not a sidewalk, and over which people generally passed on foot with the knowledge on the part of the municipal authorities.

His charge on the alleged contributory negligence of the defendant was, in substance, first, that though the defendant might be guilty of negligence, the plaintiff could not recover if she negligently exposed herself to danger; second, that if the place where she was injured was an abandoned or neglected sidewalk, and a safe one had been built on the other side of the street, and she had knowledge of these facts, and in the night time chose to walk along the neglected path and was injured by falling into a hole, then she contributed to her own injury, and could not recover; third, that if the town from time to time repaired that part of the street where she was hurt, and the public generally had used it as a footway with the knowledge of the town authorities, then it was the duty of the town to keep the street in safe condition, and the plaintiff would have the right to walk along it, unless she knew, or had reason to believe, that it was unsafe or had been abandoned; fourth, that the law does not require the municipal authorities to construct two sidewalks on each street, nor even one, but it does impose on it the duty to keep the streets in safe condition, and if it negligently leaves any of its public streets in a dangerous condition, it would be negli-

gent and liable to persons who became injured thereby without fault or negligence on their part.

The prayers of the plaintiff for special instructions given were, in substance, as follows: 1. That a person has the right to assume that the authorities of towns or cities have used reasonable care to keep their streets in proper condition for foot passengers as to those portions of streets which are apparently used for footways, and which the public use for footways with the knowledge of the authorities. 2. If there be a walkway, although not a sidewalk, and a person should be injured while traveling along the same at night, not knowing that the walkway was in a dangerous condition, he would not be guilty of contributory negligence, if the way had been used from time to time by the public generally with the knowledge of the town authorities. 3. That a place in a street used by the town authorities and the public, can not be abandoned by town or city so as to put persons on notice not to use it, without some action on the part of municipal authorities showing that it had been abandoned as a walkway, as long as it continues to be used and has the appearance of being safe. 4. That the building of a sidewalk on one side of a street is not necessarily a notice of a purpose, on the part of the town authorities, to abandon a walkway on the opposite side of the street. 5. That a sidewalk does not depend on guttering or ditches, but a walkway without such markings may be used by the public with the knowledge of a town or city so as to justify one in assuming that it is a walkway.

The defendant tendered seventeen prayers for special instructions intended to procure rulings of his Honor to the effect, first, that the construction of a sidewalk on only one side of the street is notice to pedestrians not to walk on the opposite side where there is no sidewalk, although there may be evidence going to show that the people generally have used, night and day, without disapproval of the municipal author-

ities, as a footway, the other side of the street, and that the town has repaired and worked the whole street; second, that a person is negligent who uses any part of a street as a walkway, unless the same is laid off in some manner, as by curbing, ditches, gutters, or a line of trees, to indicate where the walkway ends and the driveway begins; third, that if a town constructs a sidewalk on one side of the street, and does not make a sidewalk on the other side of the street, no use, however extensive, by the public of that other side as a footway can make it a walkway, so as to make the town liable for injuries on account of defects; fourth, that a person would be negligent who knew that there was a good sidewalk on one side of the street and none on the other side, and chose to walk in the night time where there was no walking-way, and was hurt; fifth, that if a person knew of a hole in a footway, not a sidewalk, and when there was a good safe sidewalk on the other side of the street, and attempted to pass in the night time, that person would take the risk and could not recover, even if he had forgotten the existence of the hole.

His Honor properly refused to adopt the first, second and third of the propositions, as we have arranged them, and properly gave the fourth and fifth.

Affirmed.

MOWERY v. SOUTHERN RAILWAY CO.

(Filed December 17, 1901.)

REMOVAL OF CAUSES—*Acts 1899, Ch. 62—Domestication—Foreign Corporations.*

Where an action for more than $2,000 is brought against a foreign corporation for personal injuries received before it domesticated under Acts 1899, Ch. 62, a petition to remove to the federal courts was properly allowed.

MOWERY *v.* RAILROAD.

ACTION by Roberta Mowery, administratrix, against the Southern Railway Company, heard by Judge *E. W. Timberlake,* at February Term, 1901, of the Superior Court of ROWAN County. From an order allowing a removal of the action to the Federal Court, the plaintiff appealed.

Overman & Gregory, for the plaintiff.

Chas. Price, F. H. Busbee, and *A. B. Andrews, Jr.,* for the defendant.

DOUGLAS, J. This is an action for damages in the sum of $25,000, for the negligent killing of plaintiff's intestate. It is before us on a petition to remove into the Circuit Court of the United States, allowed by the Court below. The following allegations appear in the complaint:

"2. That the Southern Railway, the defendant herein, is a corporation created and organized originally under the laws of Virginia, and on the 12th day of August, 1898, was engaged in operating, as a common carrier of freight and passengers, a line of railway between the town of Salisbury and the town of Asheville, in the State of North Carolina.

"3. That prior to the 1st day of June, 1899, the defendant became a domestic corporation of the State of North Carolina by filing in the office of the Secretary of State a copy of its charter and by-laws, duly authenticated, and by performing all of the acts and duties required of it in order to domesticate itself agreeably to the requirements and provisions of an act of the General Assembly of the State of North Carolina, entitled 'An act to provide a manner in which foreign corporations may become domestic corporations,' as set forth in Acts 1899, Chap. 62, and this domestication of defendant company occurred prior to the institution of this action.

That on the said 12th day of August, 1898, plaintiff's intestate, W. A. Mowery, was acting in the capacity of a conduc-

tor on a freight train of defendant, being then and there an employee of defendant, and in such capacity as conductor was in charge of a train which was then being run westward over the said line of railway, and, the plaintiff is informed and believes, that while her intestate was so engaged in his duties that he was, by the negligence of defendant, killed whilst passing under a bridge across the track of defendant, which said bridge was allowed to remain and be in a condition unsafe for cars to pass under it at the time of the killing as aforesaid."

The Court below, considering the facts appearing on the face of the complaint and petition, properly recognized the order of removal of the Federal Court. It appears from the complaint itself that the injury occurred on the 12th day of August, 1898, while the Virginia corporation, known as the Southern Railway Company, was lawfully doing business in the State of North Carolina. This corporation was sued alone, and as the sum demanded exceeded two thousand dollars, it had a right to remove the action into the Circuit Court of the United States upon a proper application. The act revoking, as to certain classes of foreign corporations, the implied law of comity theretofore existing, did not become a law until the 10th day of February, 1899, the date of its ratification. The North Carolina corporation, known as the Southern Railway Company, the only corporation of that name now authorized to do business in this State, did not come into being until on or about the 1st day of June, 1899, after the occurrence of the injury. If the plaintiff has sued the Virginia corporation, then that corporation has a right to remove the action. If, on the contrary, she has sued the domestic corporation, then it has done nothing of which she can complain, as it can not be held responsible for an injury sustained before its birth, and occurring through the negligence of a foreign corporation with which it stands in no relation

of privity as far as the laws of this State are concerned. This point was not raised in the defendant's brief, which was simply an attack upon our decision in the Debnam case.

After mature consideration, and in the light of such additional authorities as we have been able to find, we deem it our duty to adhere to the decision of this Court in the cases of *James v. Railroad,* 121 N. C., 523, and *Debnam v. Tel. Co.,* 126 N. C., 831. We would have been more than pleased if the latter case had been carried up to the Supreme Court of the United States upon writ of error, so that it might be finally determined by a Court of competent jurisdiction and of last resort *upon the case as presented to us.* We have neither the inclination nor the motive to assume any powers not properly belonging to us; but, on the other hand, we have no right to abandon any part of our lawful jurisdiction when properly invoked, or to refuse to anyone the equal protection of the laws.

Affirmed.

HARDEN v. NORTH CAROLINA RAILROAD CO.

(Filed December 17, 1901.)

1. NEGLIGENCE—*Master and Servant—Automatic Couplers—Railroads.*

   The failure of a railroad company to equip its freight cars with self-coupling devices is negligence *per se.*

2. LEASE—*Railroads—Damages—Negligence.*

   The lessor of a railroad is liable for the negligence of the lessee in the operation of the road.

COOK, J., dissenting.

ACTION by C. D. Harden against the North Carolina Rail-

road Company, heard by Judge *George H. Brown* and a jury, at May Term, 1901, of the Superior Court of ROWAN County. From a judgment for the plaintiff, the defendant appealed.

Overman & Gregory, for the plaintiff.

Chas. Price, F. H. Busbee, and *A. B. Andrews, Jr.,* for the defendant.

CLARK, J. The plaintiff was a brakeman in the service of the Southern Railway Company (lessee of defendant), on a freight train, and was injured in making a coupling between a box-car and the shanty-car "with a link and the old-style draw-head." The shanty-car was not equipped with automatic couplers, nor was the train fully equipped with Janney couplers, or other modern self-coupling devices, and the Court charged the jury, citing *Greenlee v. Railroad,* 122 N. C., 977, 65 Am. St. Rep., 734—since followed in *Troxler v. Railroad,* 124 N. C., 189, 70 Am. St. Rep., 580, and othe cases—as follows: "If you find that the freight train was not fuly provided with modern self-acting couplers, and that the plaintiff *would not have been injured had the cars been so provided,* you will find the first issue 'Yes' and the second issue 'No.'" The Judge followed the decisions of this Court, and, without repeating the argument therein, it is sufficient to say that we re-affirm our former rulings holding a railroad company responsible for injuries to its employees which would not have occurred if there had been provided by it those humane devices protecting the lives and limbs of its employees, which are in general use. The reports of the United States Intercommerce Commission, issued by the authority of the Federal government, show the reduction of many thousands annually in the number of employees killed or maimed in coupling cars since the introduction of automatic couplers (which now is compulsory under the act of Congress as to all interstate roads). This should

be a sufficient answer to all complaints as to our former ruling. If the lives and limbs of employees can be saved by such provision of improved appliances, public policy and humanity require the Courts to exact liability for failure to furnish them.

The principal point made, however, is in the effort to induce this Court to overrule a still longer line of decisions which hold this lessor, the North Carolina Railroad Company, liable for the act and defaults of its lessee, the Southern Railway Company. The charter of the North Carolina Railroad Company, Laws 1848-9, Chap. 82, sec. 19, authorize the company "to farm out its right of transportation over said railroad, subject to the rules above mentioned." There are no other words from which a right to lease the road can be inferred. As at the date of the charter railroads were comparatively new, and the popular idea was that a railroad company was to maintain the road-bed and "farm out" rights of transportation over it, as was the case with canal companies, and is to-day the case with express companies and many "fast freight" and "through lines," it was thought by many that these words did not authorize, and were not intended to authorize, a lease of its entire property, which lease had the effect to take it out of a "State system" running from the mountains to the seacoast under State control, and make it a part of an interstate line running North and South, under the control of foreign corporations, to the utter destruction of the "State system" intended by the charter of the defendant. The authority to lease, based upon the permission "to farm out its rights of transportation," came before this Court in *State v. Railroad,* 72 N. C., 634, and that expanded construction was sustained by a divided Court, Judge Settle writing the opinion, Judge Bynum dissenting in a remarkably able opinion. Judge Rodman did not sit. If it were a new question, this Court might possibly hold with Judge

Bynum as to the reasonable construction of the meaning of the words "to farm out the right of transportation," but the lessee would rely upon the fact that it took its lease relying upon the construction placed by this Court upon the meaning of those words. But it also made its lease subsequent to the decision of this Court—often since repeated—that those words did not allow the lessor to rid itself, by any lease made under authority conferred by those words, of liability for any acts or negligence or torts committed by the lessee as to the world, its passengers or its employees, the latter being held in effect to be simply sub-employees of the lessor, employed by its agent for the operation of the road, its lessee.

In *Aycock v. Railroad,* 89 N. C., 321 (1883), it had been held, Smith, C. J., the authorities "fully sustain the proposition that the defendant company leasing the use of its road or permitting the use of it by another company, remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter and the injury thence resulting, *to the same extent* as if such mismanagement was the act or neglect of its own servants operating its own train," citing the authorities.

In *Logan v. Railroad,* 116 N. C., 940, this very charter of the defendant company was elaborately considered, and in an able opinion by Mr. Justice Avery, concurred in by the entire Court, it was held that no lease made by virtue of the above-cited words—there being no clause of exemption granted to the lessor—would exempt the defendant from liability for the wrongful acts, defaults or negligence of its lessee, and hence that the lessor company was liable for injuries sustained from the negligence of its lessee by a section hand employed by such lessee.

This decision was rendered by this Court at February Term, 1895, and the lessor and lessee, both aware of the construction placed by the Court upon a contract by lessor to

"farm out its right of transportation" on 16th August following executed the lease under which the lessee is now operating the defendant's road. Both parties had that decision in view, and provided for the liability of the defendant for all the acts and defaults of its lessee by a stipulation in said lease (which lease is filed as a part of the record in this case) for a deposit of "not less than $175,000 in cash, or its equivalent, to be applied" to the performance of the stipulations in the contract to be performed by the lessee, and among them "to any judgment or judgments recovered in any Court of the State or of the United States when finally adjudicated, *for any tort, wrong, injury, negligence, default or contract, done, made or permitted by the parties of the second part,* its successors, assigns, employees, agents or servants for which the party of the first part shall be adjudged liable, whether the party of the first part is sued jointly with or separately from the party of the second part," and further provides to what agents of the lessee notices of such suits shall be given by the lessor when sued singly, and for the renewal and maintenance of said sum whenever diminished by such application of any part thereof.

The lease was made subsequent to the decision of the Logan case. Both lessor and lessee knew of the continuing liability of lessor under any lease authorized by the words "farm out," as construed by this Court, and stipulated, in view of such liability, a deposit being put up, to be maintained at a fixed sum to guarantee the lessor, the defendant herein. If the lease is valid because made subsequent to the decision of a divided Court in *State v. Railroad,* 72 N. C., 634, it does not lie in the mouth of the lessor to contend that it does not remain liable for all acts of its lessee in the operation of its road under a lease made subsequent to the decision of a unanimous Court in *Logan v. Railroad,* 116 N. C., 940, especially when it has stipulated against loss therefrom by exacting

a deposit from its lessee. And, in fact, the lessor has not complained. This objection has several times been raised in this Court, but always by counsel of the lessee, and ruled upon again and again, always in conformity to the precedents in Aycock's case, 89 N. C., 321, and Logan's case, *supra.* The defendant has never averred any loss, detriment or probable damage by reason of its being held liable for the acts of its lessee as its agent in the operation of the road. The lessee, the Southern Railway Company, is the only railroad company operating in this State which claims to be a foreign corporation, as we know from the statutes incorporating all others, except possibly one other lessee. It has been stated by its counsel in their place here that the Southern Railway Company has "domesticated"—but it is unnecessary to discuss here the point which has been decided in *Debnam v. Tel. Co.,* 126 N. C., 831. Whether the lessee be a foreign corporation or not, the lessor when it entered into this lease, knew that by the terms of its charter, as construed by this Court, it would remain liable, notwithstanding such lease, for the acts of its lessee. *Logan v. Railroad, supra,* has been cited and approved on this point, *Tillett v. Railroad,* 118 N. C., at page 1043; *James v. Railroad,* 121 N. C., 528; *Norton v. Railroad,* 122 N. C., at page 937; *Benton v. Railroad, Ibid,* at page 1009; *Pierce v. Railroad,* 124 N. C., at page 93; *Perry v. Railroad,* 128 N. C., at page 473, and in *Raleigh v. Railroad,* at this term, in most of which cases this defendant was a party.

Had Logan's case not been decided prior to the lease made by the lessor, and stipulations in view thereof made in the lease, and viewed as an original question, it is sustained by the overwhelming weight of authority and upon reason. In 20 Am. and Eng. R. R. Cases Annotated, at page 847, the rule is laid down: "A railroad company which has leased its road, cars and engines, and allows the lessee company to

operate the same, is liable to third persons or the public for the carelessness and negligence of the lessee, and for defects in the construction and maintenance of the road and its *equipments,* unless there is a statutory provision to the contrary" (and there is none in this case). For this proposition it there cites thirty-six cases from the United States Courts and the Courts of the different States, and from England, and it is not necessary to repeat them here. In *Railroad v. Brown,* 84 U. S., at page 450, the Court says: "It is the accepted doctrine in this country that a railroad corporation can not escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public," and cites with approval 1 Redf. Railways, to same effect. Also to the same purport are 1 Beach Pr. Corp., sec. 366; 1 Spelling Pr. Corp., 135, and several other authorities cited in *Logan v. Railroad,* 116 N. C., at pages 946 *et seq.*

In *Harmon v. Railroad,* 28 S. C., 401, the words of the charter construed were almost identical with those in defendant's charter, and it was held that a lease made thereunder did not relieve the lessor from liability for the acts of its lessee. In *Bank v. Railroad,* 25 S. C., 216, the same ruling is made as to non-delivery of freight, the Court saying: "We are unable to appreciate the distinction attempted to be drawn by appellant's counsel between the liability of a railroad company which has leased its line to another, to actions *ex delicto* and *ex contractu.* The foundation for such liability is that such company, by accepting its charter, assumed obligations to the community from which it can not absolve itself by leasing its road to another company; and as such carrier is not only under an obligation to carry passengers safely, but also to deliver goods entrusted to it for trans-

portation, we think the same principle which would make the lessor liable in the one case would make it liable in the other."

In *Balsley v. Railroad,* 119 Ill., 68, it is said that the liabilty of the lessor for the acts of the lessee is not merely because the lessee is the agent of the lessor, but further because the lessor in consideration of the grant of its charter undertook the performance of duties and obligations, and it is against public policy for it to be relieved therefrom without the express consent of the Legislature.

In 20 Am. and Eng. R. Cases, at page 848, it is said: "A railroad company which leases its road pursuant to a statutory authority, which does not contain any provision releasing it from the performance of its duties to the public, is liable for personal injuries sustained through negligence in the operation of the road by the lessee. To the same purport are:

United States.—Thomas v. Railroad, 101 U. S., 83; *R. Co. v. Brown,* 84 U. S., 445; *R. Co. v. Barron,* 72 U. S., 90; *R. Co. v. Winans,* 58 U. S., 39.

Georgia.—Singleton v. Railroad, 70 Ga., 464, 48 Am. Rep., 574; *Railroad v. Moyes,* 49 Ga., 355.

Illinois.—Railroad v. Dunbar, 20 Ill., 623; *R. Co. v. Lane,* 83 Ill., 448; *Railroad v. Campbell,* 86 Ill., 443; *Railroad v. Peyton,* 106 Ill., 534; *Balsley v. Railroad,* 119 Ill., 68, 59 Am. Rep., 785; *R. Co. v. Meech,* 163 Ill., 305.

Maine.—Whitney v. Railroad, 44 Me., 362; *Stearns v. R. Co.,* 46 Me., 95; *Nugent v. R. Co.,* 80 Me., 62.

Massachusetts.—Quested v. R. Co., 127 Mass., 204; *Braslin v. R. Co.,* 145 Mass., 64 (where the contract of lease is much as in this case).

Missouri.—Brown v. R. Co., 27 Mo., App., 394.

Nebraska.—Charlotte v. R. Co., 26 Neb., 159.

New York.—Abbott v. R. Co., 80 N. Y., 27, 36 Am. Rep., 572.

North Carolina.—Aycock v. Railroad, (1883) 89 N. C., 321; *Logan v. R. Co.,* 116 N. C., 940; *Tillett v. Railroad,* 118 N. C., 1043; *James v. R. Co.,* 121 N. C., 528; *Norton v. R. Co.,* 122 N. C., 937; *Benton v. R. Co., Ibid.,* 1009; *Pierce v. R. Co.,* 124 N. C., 93; *Perry v. R. Co.,* 128 N. C., 473; *Raleigh v. R. Co.,* at this term.

Oregon.—Lakin v. R. Co., 13 Ore., 436, 57 Am. Rep., 25.

South Carolina.—Harmon v. R. Co., 28 S. C., 401; *Hart v. R. Co.,* 33 S. C., 427; *Bank v. R. Co.,* 25 S. C., 216.

Texas.—Railroad v. Underwood, 67 Tex., 589; Railroad *v. Morris, Ibid,* 692; *Railroad v. Morris,* 68 Tex., 49.

Washington.—Cogswell v. R. Co., 5 Wash., 46.

In 71 Am. Dec., 295, it is said by Judge Freeman in his notes: "It is a well-settled doctrine that, in the absence of legislative authority permitting a lease *and exempting the company from liability,* it is responsible for the torts of the lessee"—citing many cases.

In *Nelson v. R. Co.,* 26 Vt., 717, 62 Am. Dec., 614, Chief Justice Redfield says: "As to the liability of the defendants for the acts of their lessees, who were running the defendants' road under a long lease, we think there can be no doubt. Unless we can hold the defendants thus liable, they might put their road into the hands or corporations or individuals of no responsibility."

If a railroad corporation could relieve itself of liability by leasing, it would follow that leases could be made to another corporation with no tangible assets—as, indeed, the lessee in this case, if a foreign corporation, has none in this State—leaving the travellers and shippers over its line, the general public and its employees alike, without recourse on the property of the corporation which was chartered to operate the road, and which is left in receipt of the rent, which might readily be made high enough to cover the profits. Thus

the company would, by a device of a lease, receive the profits without incurring the liabilities of its business.

In many cases it has been held that a *bona fide* mortgage can not have that effect. *Acker v. Railroad,* 84 Va., 648; *Naglee v. R. Co.,* 83 Va., 707; *Railroad v. Burnett,* 123 N. C., 210, and the rights of mortgagees for money presumably applied to debts are stronger than those of lessors.

The question here is not the liability of lessees, which also exists, but of the right of the lessor to put off the liabilities incident to the franchise given it, while continuing to enjoy its profits through the medium of a lease. This the corporation owning the property can not do.

No Error.

COOK, J., dissenting. As stated in the opinion of the Court, the principal point raised in this case is to review and overrule the principle heretofore laid down by this Court in the case of *Logan v. R. R.,* 116 N. C., 940. And this being the first time the question has ever been squarely presented for our consideration since I have been a member of the Court, I shall now express my opinion independent of what has heretofore been held, and shall confine my investigation closely to the subject-matter of this case.

The issue is plain: Is the North Carolina Railroad Company, lessor of the Southern Railway Company, lessee, responsible for the contracts and liable for the torts made and committed by the said lessee in the management and operation of its business of *transportation* as a common carrier *under the rights and powers* granted in the *charter* of the former, the North Carolina Railroad Company? This is the principal point to be decided in this case, and arises in an action brought by plaintiff, a brakeman and employee of the Southern Railway Company, to recover damages for in-

juries sustained by him while coupling its cars and while in its employment.

Regardless of what has been decided upon the statutes of other States, and the liability of railroads operating under various charters under those statutes, let us read the *charter* in this case, introduced as evidence and sent up as a part of the record in this appeal, and consider it as it really is, and place upon it a plain common sense construction according to the true meaning of its terms and the intent of the Legislature which enacted it.

Our first inquiry is directed to the nature and character of the charter with relation to the contracting parties, viz., the State which authorized it on the one part and the citizens or stockholders who paid their money and became a party to it on the other part; next, to the terms expressed therein, and then to the powers, rights and liabilitise under its terms.

The charter having been enacted *prior to the Constitution of 1868*, to-wit, January 27, 1849, it became and was a contract between the State and the company, and can not be amended, changed or repealed, except with and by the consent of both parties. As to the terms, it is unnecessary to set out any part of the charter except sections 18 and 19, which are the only sections material to the decision of this action, the other sections referring principally to the organization and management of the company. Sections 18 and 19 are as follows: "18. That the said company shall have the exclusive right of conveyance or transportation of persons, goods, merchandise and produce over the said railroad to be by them constructed, at such charges as may be fixed on by a majority of the directors. 19. That the said company may, when they see fit, farm out their right of transportation over said railroad, subject to the rules above mentioned; and said company, and every person who may have received from them the right of transportation of goods, wares and produce

on the said railroad, shall be deemed and taken to be a common carrier, as respects goods, wares, produce and merchandise entrusted to them for transportation."

The right of the North Carolina Railroad Company to make the lease to the Southern Railway Company is conceded in the opinion of the Court, so this narrows our discussion down to the liabilities resting upon the two parties to this lease. The "exclusive right of conveyance or transportation" granted in section 18, being "farmed out," or leased, under the authority and power granted in section 19, it must necessarily follow under the terms of the lease that all contracts by the lessor of the same ceased, and there could be no relationship of principal and agent existing between the parties; and under section 19 the lessee company "received from them (the North Carolina Railroad Company) the right of transportation," and were "deemed and taken to be a common carrier." And it must likewise follow, as a logical result, that when the *actual* as well as *legal* right of contract ceased under the authority of law, all liability on account of such contract must likewise cease. It would be an anomaly in law to hold one party responsible for the acts of another over whom he had no authority, in fact or by right, and between whom there was no privity of interest.

If this construction of the chartered rights of the North Carolina Railroad be sound in law, then it can not be liable for a contract or tort made or done by the sole owner of the right of transportation. And, therefore, it is my opinion that the plaintiff is not entitled to recover against the defendant company.

The question of liability incident to the *corpus* or management of the physical structure of the property owned by defendant company under its charter, and upon which the transportation depends, does not arise in this action.

At this term of the Court, in *City of Raleigh v. N. C. Rail-*

road Co., we have in a measure passed upon that question, but such liability is not involved in this case.

The case of *Aycock v. Railroad,* 89 N. C., 321, is not an authority in this case. There, the Carolina Central Railroad Company was running its engines and trains over the track of the Raleigh and Augusta Air-Line Railroad Company, simply by its permission and by courtesy; and, by reason of the accumulation of grass, leaves and other inflammable matter upon the land appropriated to the defendant for right-of-way, fire was transmitted to it from a defective spark-arrester and it ignited, and then the fire spread to the plaintiff's land, doing the damage complained of. It was not there contended, nor was it a fact, that the defendant company had sold or leased its exclusive right to run trains over the road.

The foundation upon which the plaintiff's action rests is the case of *Logan v. Railroad,* 116 N. C., 940, and if the doctrine therein laid down be sound law, then his action must be sustained, and the other cases following it, which are its offspring, must stand.

Much is said about the original obligation of the lessor company to the public in furnishing trains, providing for the safety of passengers, etc., which is said to be inseparable from the grant and the exercise of the corporate privileges, and from the road-bed, right-of-way, station-houses, etc., until the Legislature, for the sovereign, declares the lessor absolved from it. All of which seems to have been said and discussed upon *general* principles based upon the numerous decisions of other States, but the construction of the *contract* between this State and the defendant company, *sections 18 and 19 of the charter,* seem to have been smothered and forgotten under the weight of so many authorities. No reference is made to the power of the sovereignty to grant a franchise which may be separated or divided in its exercise and enjoyment between

two or more parties or corporations; nor of its power to grant a delegation of power. Under sections 18 and 19, the grant carried with it the right of delegation as to the active transportation, without divesting the defendant compnay of the remaining franchise without which the former could not exist. To my mind, it is clear that the lessee in this case is exclusively responsible for liabilities incurred in the active operation of the road in exercising the "right of transportation" (which they were authorized to lease), whether it arises *ex contractu* or *ex delicto;* and that the lessor company is responsible for the liabilities arising from the *corpus*—the structure and all of its incidents—which, under the terms of the charter and the franchise therein granted, it is bound to preserve and properly keep for the benefit of the public for its safety while the right of transportation is being exercised.

If there be a single authority cited in Logan's case, or one cited in the opinion of the Court, to sustain the contention of plaintiff in this case, I am unable to so understand it, except possibly the one single case of *Hammon v. Railway,* 28 S. C., 401 (on page 404), which cites and relies upon *Railway Co. v. Brown,* 17 Wall. (84 U. S.), and upon examining the facts and principle therein involved, it will be found not to sustain the decision. I have examined each and every case cited in 1 Spellings on Private Corporations, sec. 135, quoted in Logan's case as an authority, and I find the facts and principles involved in the decisions to be so different that they fail to sustain the conclusion reached by the Court. For instance, I will briefly state the principles decided in some of the cases there cited, as well as some of the cases cited in the opinion of the Court as authority, from which it clearly appears that they do not sustain the decision of the Court: In the case of *Railway Co. v. Brown,* 17 Wall. (84 U. S.), cited by Redfield on the Law of Rail-

ways (5th Ed.), Chap. 22, page 616, and other authors, and so often cited in the opinions of the Courts to which reference has been made, as an authority that the lessor can not divest itself of its liability as a common carrier by leasing its road, it expressly appears that the corporation (railway company) had leased its road to two individuals, and that no authority appears to have been given, either by its charter or legislation, and that the injury complained of was committed while it was being operated by the servant (jointly with those of the receiver) of the said lessees, and the rule of *principal and agent* there obtains.

And the *only* case I have been able to find which squarely supports Logan's case is that of *Hammon v. Railway Co.*, 28 S. C., 401, on page 404, which cites the above case (17 Wallace) for its authority, and in it the learned Justice McIver seems to have accepted the decision of the Court without investigating the facts upon which it was based, and therefore failed to discover the principle upon which the decision was made.

In *Bank v. Railway Co.*, 25 S. C., 216, on page 222, the Court says: "In this case, however, it appears that defendant company (lessor), by its own agent and not its lessee, receipted for the cotton, and hence the contract must be regarded as made directly with defendant company (lessor), though its road may at the time have been operated by the Richmond and Danville Railroad Company, its lessee."

In *Thomas v. Railroad*, 101 U. S., 71, the lease was made without authority of its charter or of law, and was *ultra vires* and void.

In *Great Western Railway Co. v. Blake*, 7 Hurlstone and Norman, 986, there were two connecting lines, and by arrangement between the two companies the lines were worked together and tickets sold over the whole route and the fares paid by passengers apportioned between them; held, that the

company selling the ticket is responsible for negligence and damage done upon and by the connecting line.

In *Nuget v. Railroad,* 80 Me., 62, defendant company leased for ninety-nine years its railroad, stations, etc., to another company. While being operated by the lessee, one of the lessee's brakemen was injured, *solely* caused by a *negligently constructed awning* upon one of the *station-houses.* The awning was negligently constructed on account of its proximity to the passing car, and the injury was caused solely thereby; held, that lessor was liable on that account.

In *Stearns v. R. Co.,* 46 Me., 95, on p. 117, it there appears that in the statute "authorizing the defendants to lease their road, it was enacted that nothing contained in said act, or in any lease or contract entered into under the authority of the same, should exonerate the said company or the stockholders thereof from any duties or liabilities therein imposed upon them by the *charter* of said company, or by the *general laws* of the State. * * * Whatever duties or liabilities therefor were assumed by defendants by the acceptance of their charter, or afterwards rightly imposed upon them by the laws of the State, were at least for the purpose of a remedy, to remain and continue to be obligatory upon them in the same manner and to the same extent as if the lease had not been executed, and the use, possession and management of their property had not been transferred to their lessees."

In *Whitney v. Railroad,* 44 Me., 362, 69 Am. Dec., 103, one of the *chartered* obligations of the defendant was to erect, maintain, etc., legal and sufficient fences where the road passed through enclosed and improved lands, and in default they are liable for injuries occasioned thereby; held, that it was not released from its obligation by leasing its road. And it was enacted and provided by the Legislature, permitting the transfer, that "nothing contained in this act, or in any lease or contract that may be entered into under the authority of the same,

shall exonerate the said company or the stockholders thereof from any duties or liabilities imposed upon them by the charter of said company, or by the general laws of the State."

In *Railroad v. Dunbar*, 20 Ill., 623, the Court says the question before them was a new one. The lease was made *without* any authority in its charter and without any legislative consent; and the Court says, on page 627: "But we do not undertake to determine whether a railroad may make such a lease as would authorize the lessees to run and use such road or not, as the question is not presented by the record in the case." A careful review of the case, and of the facts upon which the decision is based, shows clearly that the question therein decided is not involved in this case.

In *Singleton v. Railroad,* 70 Ga., 464, 48 Am. St. Rep., 574, the lessor company had no *grant* of power conferred upon it by its charter to lease; the lease was made only with legislative *consent.* And it will clearly appear that the decision of the Court rests upon the *text* and head-notes of the authorities relied on, and they are not sustained by a close scrutiny of the body of the decision relied upon.

In *Railway Co. v. Mayes,* 49 Ga., 355, there was no lease, only a permit for another company to run its trains over the road, as was the case of *Aycock v. Railroad, supra.*

In *Railway Co. v. Campbell,* 86 Ill., 443, it was the *lessee* of a railway company which *permitted,* by contract, another company to use its road, and was held liable for its negligent conduct.

In *Balsley v. Railway Co.,* 119 Ill., 68, the lessor was held liable for damages resulting from fire. The lessor permitted dry grass and weeds to accumulate upon its right-of-way, which took fire from a passing engine of lessee, and was communicated therefrom to plaintiff's property, which was burned. The same as Aycock's case, and not applicable.

In *Quested v. Railway Co.,* 127 Mass., 204, the charter of

the lessor company *expressly* provided that the corporation *should* be liable for any injury inflicted by the carelessness or misconduct of its agents or servants; held, that a lessee is likewise liable, notwithstanding the lease was made under authority of a statute; said statute expressly provided: "But such lease or contract shall not release or exempt said company from any duties, liabilities or restrictions to which it would otherwise be subject." The Court said: "The effect of this provision is that the defendant has the same liability to compensate persons injured in the operation or management of the road, while the lease is in force, which it would have had if the injury had been sustained while the corporation was managing its own road."

Braslin v. Railway Co., 145 Mass., 64, is a *similar* case.

In *Brown v. Railway,* 27 Mo. App., 394, the statute under which the lease was made provided "that the lessor shall be and remain liable for the acts of the lessee" (page 400).

In *Charlotte v. Railway Co.,* 26 Neb., on page 166, the Court says: "We are unable to find any proof in the record as to the capacity in which the Union Pacific Railway Company had possession of defendant's road—if it had such possession—whether of lessee, owner, or by a traffic arrangement."

In *Abbott v. Railway Co.,* 80 N. Y., 27, 36 Am. Rep., 572, the lease was made without authority of charter or legislative special authority. Therefore the lessee was held to be the agent of the corporation.

In *Cogswell v. Railway Co.,* 5 Wash., 46, the appellant was the owner of the railroad bed, track, cars, etc., and had contracted with a construction company, in consideration of equipping, etc., the road, that it should operate the road satisfactorily for at least ten days before it could require payment for its equipments; and the cause of action accrued during that time, and the corporation held liable.

In *Lakin v. Railway Co.,* 13 Oregon, 436, 57 Am. Rep., 25, the Court says: "It will be observed by the answer of defendant that the Oregon Pacific Railroad Company had not leased the defendant's road, but was engaged under a contract in building and constructing it, and at the time the alleged accident occurred was running and operating said road for the purpose of traffic in the carriage of passengers."

In *Railway Co. v. Underwood,* 67 Texas, on page 593, the Court says: "The proposition that the owner is absolved from liability when the lease is duly authorized by law is not to be disputed, but that without a statute conferring that power, a railroad company can not lawfully lease and transfer the control of its road, is settled by the cases we have previously cited. We have been referred to no general law of our Legislature authorizing such a lease. If any private act existed, the defendant should have pleaded it, so as to show that the lease was lawfully made. This not having been done, we conclude that the leases were not warranted by law."

Railway Co. v. Morris, 68 Texas, 49, is to the same effect.

In *Miller v. Railway Co.,* 3 N. Y., Supp., 245: By the *terms* of the *lease,* it was provided that the lessor would, from time to time, upon request of the lessee, pay for locomotives, etc., and for construction of extensions, etc., and for all other things, work or works, which the lessee may desire to have done; and the lessee erected an embankment causing the injury complained of—damage to adjoining land—for which the lessor paid, thereby ratifying the act, and received the benefits of; held, lessor to be liable.

In *Naglee v. Railway Co.,* 83 Va., 707, the liability occurred while the road was being run by trustees *selected* by the *corporation* to do so. To the same effect is *Acker v. Railway Co.,* 84 Va., 648.

In *Stella v. Railway Co.,* 49 Wis., 609, the relationship of

lessor and lessee was not involved. The action grew out of defendant's running its train on a private spur-track.

In *Nelson v. Railway Co.*, 26 Vt., 717, page 721, the Court holds the lessor responsible for the acts and torts of the lessee solely upon the principle that the lessee was the *general agent* of the lessor. The lease seems to have been executed without legislative authority, and the decision is based upon the principle of pricipal and agent.

In *Railroad v. Peyton*, 106 Ill., 534, the Chicago and Western Indiana Railroad Company permitted the W. St. L. and P. Railway Co., by a lease or agreement, to run its trains over a part of the former's track, and by this agreement the C. and W. I. R. Co. *retained the control* of the passenger trains of the W. St. L. and P. Ry. Co. over that portion of its track. By it, the servants of the *lessor directed and controlled* the servants and trains of the lessee in coming and going over the track. When the lessee "was permitted to perform that service, it was under the direction of lessor's yardmaster—this being the legal relation of the two companies by the terms of the lease or agreement entered into by them." The train which did the injury complained of was under the direction of the yardmaster (page 588). So the case is not an authority in our case.

It is contended that the contract of indemnity provided in the lease was a recognition of Logan's case, and doubtless was to some extent, but it does not estop defendant company from contesting the principle again in the Courts.

It is urged by counsel that Logan's case has been repeatedly quoted as an authority by this Court, and should therefore stand. If wrong, why? No interest or vested right will be disturbed by overruling it. If it be inconsistent with the chartered rights of the defendant company, it is better to return to a sound principle than to continue in error.

While I shall have to yield to the decision of the Court, yet I deem it my privilege to state my views upon the sub-

ject, now that the question is again presented and the Court is called upon to review and reaffirm or overrule the principle decided in Logan's case. In that case the Court spoke of a conflict between the decisions of different jurisdictions, and quoted the *text* of authors compiling the many decisions; but I have chosen rather to refer to the decisions themselves, and, in doing so, I am led to the conclusion that their conflict with the principles in the case at bar is less *real* than apparent.

I deem it unnecessary to further encumber the record by a discussion of the merits involved.

SMITH v. SOUTHERN RAILWAY CO.

(Filed December 17, 1901.)

1. NEGLIGENCE—*Complaint—Demurrer.*

A complaint alleging that the person injured was ordered by the railroad company to unload freight from a car and while doing so, the car was put in motion, and the person injured in attempting to escape from the moving car, states facts sufficient to constitute a cause of action.

2. CONTRIBUTORY NEGLIGENCE — *Complaint —Demurrer —Answer.*

The question of contributory negligence can not be raised by demurrer.

3. CONTRIBUTORY NEGLIGENCE—*Questions for Jury—Questions for Court.*

Under the facts set out in the complaint in this case, it is a question for the jury whether the person injured was guilty of contributory negligence.

COOK, J., dissenting.

ACTION by J. F. Smith against the Southern Railway

Company, heard by Judge *W. B. Council,* at May Term, 1901, of the Superior Court of ALAMANCE County. From judgment for the defendant, the plaintiff appealed.

C. E. McLean, for the plaintiff.
F. H. Busbee, and *A. B. Andrews, Jr.,* for the defendant.

MONTGOMERY, J. The effect of the demurrer is the admission of the facts stated in the complaint and in the light most favorable to the plaintiff. The plaintiff, an employee of the Elmira Cotton Mills Compnay, went to the depot and warehouse of the defendant, in Burlington, with the team of the Cotton Mills Company, for the purpose of receiving a consignment of goods belonging to his employer. He was told by the defendant's agent at the depot to get the goods from a car which was detached from the engine, and from other cars, and standing on a siding next to the platform of the freight depot. While so employed, he suddenly, no notice having been given him, discovered that the car was in motion, and in looking out saw that the car was attached to a train of cars and an engine and moving, and to prevent his being carried off he stepped, while the train was slowly moving, upon the platform, a space of about fourteen inches, and in so doing his leg was broken.

The negligence which the plaintiff charges upon the defendant is the moving of the car in the manner described by the defendant without first having given notice of its intention to do so to the plaintiff, and after having directed him to enter the car for the purpose and under the circumstances alleged in the complaint.

We think that his Honor committed error in sustaining the demurrer. The defendant owed the plaintiff, under the facts of this case, as shown by the complaint and the demurrer, the duty to make him as secure from harm while he was un-

loading the freight from the car as if the goods had been in the warehouse. Probably it was a saving of labor and expense in having the goods unloaded from the car. The defendant owed to the plaintiff, under the circumstances, the duty not only to protect him from harm to his person, but to protect him from anxiety and dread concerning his own personal comfort and the safety protection of his team. Owing him, then, this duty, they should have notified him of their intention to move the car, so that he could have gotten out without harm to himself, or anxiety or dread concerning his personal comfort and the safety of his team.

The injury can not be regarded as the result of an unavoidable accident. It was neither "an event from an unknown cause," nor "an unusual or unexpected event from a known cause." It is exactly what might have been reasonably anticipated by the defendant—all the facts stated in the complaint being admitted to be true so far as the case in its present shape is concerned.

The main contention presented by the demurrer is, of course, the one that the facts set forth in the complaint do not constitute, in law, negligence on the part of the defendant; but there is also presented the view of the contributory negligence of the plaintiff, although the words "contributory negligence" do not appear. That defense must be pleaded by way of *answer*, and not by demurrer. In view of the probable course of this case, it is proper for us to add that upon the facts set out in the complaint, it could not be held as a matter of law that the plaintiff contributed to his own injury. Different views of that matter could be reasonably entertained by disinterested persons; and the jury must decide whether the plaintiff, under all the circumstances, acted with ordinary care, as a reasonably prudent man would have done under all the circumstances.

Error.

COOK, J., dissenting. I do not think the facts stated in the complaint show negligence upon the part of defendant company, and therefore see no error in his Honor's sustaining the demurrer. The facts are as follows: "That on December 28, 1897, the plaintiff, at the time in the employment of the Elmira Cotton Mills Company, went to the freight depot of defendant, at Burlington, N. C., the lessee as aforesaid, for the purpose of getting goods and freight consigned to his employers; that upon inquiry he learned from defendant's agent that the goods for which he had come were not in the depot, but were still in one of defendant's freight cars, which was moved to the siding nearest the platform, and the engine detached; that thereupon, at the invitation and under the direction of, and accompanied by, defendant's agent, he entered the car and was proceeding to unload the goods, and when he, assisted by the agent, had unloaded a few bales of said goods, the agent left, directing him to proceed and finish the unloading; that in unloading he would throw two or three bales from the car on the platform and then go on the platform and place these bales on a truck and roll them to the opposite side of the depot, where his horse and wagon were, and then place them on the wagon, and then returning would enter the car and throw out more bales of goods; that while he was in the car unloading the last of the bales that he intended to unload, he suddenly found that the car was in motion, and upon looking out found that it was attached to a train of cars, and apprehended that he was attached to a regular train; and knowing that he was being delayed in delivering the goods to his employers, and thereby delaying the operation of their mill, and knowing that he was leaving his horse and wagon standing at the depot, that before said train had attained any speed, and while it was slowly moving by the depot, he attempted to step from the car, in which he was, to the platform, a distance of about

fourteen inches, and in such attempt he was thrown from the platform and had his right leg broken, to his damage one thousand dollars. That said accident and damage were caused by the negligence of defendant's servants in moving the car without first giving notice to the plaintiff, after having invited and directed him to enter the car for the purposes aforesaid. Wherefore, plaintiff demands judgment for $1,000," etc.

For what purpose the car was being moved, or to what place it was intended to be carried, does not appear; nor did plaintiff inquire or endeavor to inquire. Having been invited or permitted to go into the car and unload the goods, defendant company was under obligations, first, to do him no injury while in the car; second, to do him no injury while carrying the goods out of the car; and third, to give him sufficient notice to safely get his goods and himself out of the car, in the event that it was intended to carry the car to some other station before doing so.

As plaintiff was not injured by any act of defendant company while he was in the car, or while getting the goods out of the car, the first and second duties or obligations are not in controversy.

As to the third: It is not alleged (only apprehended) that it was the purpose to carry the car away from the depot, or that it was done. In the absence of such an allegation, we have no right to assume it. For what purpose, or to what point the car was being moved, does not appear. If, in shifting its cars at that depot, or in placing other cars on the siding, it became necessary to move that car, in which plaintiff was, to some other point, or to move it temporarily for the convenience of handling other cars, then it would not have been negligence for defendant company to have done so. Therefore, to move the car was not negligence; and as plaintiff was not injured by its "moving," or on that account, de-

fendant company can not be liable for the injury sustained. Had he remained in the car, he would not have been hurt; and had defendant company's train carried him away, defendant would have been liable for the damages resulting for carrying him away from his business and horse and wagon without giving him notice of such purpose.

From the complaint, it appears that plaintiff "*apprehended*" that the car was going to be carried away, and *assumed* that he could step off with safety. In his *assumption* he shows he was mistaken, but is silent in his pleading as to the correctness of his "apprehension." Whether he was injured by his own mistake or his own negligence is not material to this decision; nor could we discuss the question of contributory negligence in the absence of such plea. Acts 1887, Chap. 33. So, the question of law raised by the demurrer to the complaint is, whether the injury resulted from the negligence or breach of duty upon the part of defendant, as appears from the facts alleged by plaintiff. None appearing, it is our duty, as it was that of the Court below, to so hold.

McARVER v. SOUTHERN RAILWAY CO.

(Filed December 20, 1901.)

1. EVIDENCE—*Sufficiency—Negligence.*

The evidence in this case as to the negligent killing of the intestate by the defendant company is held sufficient to be submitted to the jury.

2. NEGLIGENCE—*Presumptions.*

Where an engineer sees a person on the track apparently able to get out of the way of the train, he is not required to check his speed or stop his train.

3. NEGLIGENCE—*Proximate Cause.*

It is error to charge that a failure on part of an engineer to see a person on the track, if he could have done so by keeping a proper lookout, is such negligence on part of railroad as to make it the proximate cause of the injury.

ACTION by J. E. McArver, administrator, against the Southern Railway Company, heard by Judge *H. R. Starbuck* and a jury, at May (Special) Term, 1900, of the Superior Court of GASTON County. From a judgment for the plaintiff, the defendant appealed.

A. G. Mangum, for the plaintiff.

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

MONTGOMERY, J. The plaintiff's intestate was killed about 11 o'clock at night, within the corporate limits of the town of Gastonia, by a westward bound train of the defendant from Charlotte, moving at the rate of about twenty-five miles an hour. The dead body was found, the head toward the west, in a little path alongside the track, and about two feet from ten end of the cross-ties. Below the left ear there were signs of injury, and the left shoulder, down to the elbow, was badly

broken and mashed. There was evidence to the effect that the engineer could have seen the intestate if he had been keeping a lookout along the track in time to have stopped the train before it reached the place where he was; and also that the intestate was drunk an hour before he was killed. The engineer testified that he saw someone sitting on the ground on the left-hand side of the track, with his back against the end of the cross-ties, and his head and shoulders bent forward; and that if he had straightened up he would have been struck by the train. He further testified that the cross-ties extended about two feet outside of the rails, and that the car steps extended eighteen or twenty inches over and beyond the rails. He also said: "When I got to Gastonia, I got off my engine and told the agent to send someone back over there; that I had seen someone over there close to the railroad, that perhaps he might have been struck, and I told him to let me know at Blacksburg. I was so well satisfied in my mind that it is a wonder I did that." Certainly that evidence, even without that touching the position of the body after death and the nature of the wounds, was sufficient to be submitted to the jury on the first issue; and there was no error in the refusal of the Court to nonsuit the plaintiff for want of evidence on the question of defendant's negligence. The statement of the engineer that the intestate was in a safe position and would not have been hurt if he had remained where he was when he saw him, is merely an opinion, and the fact that he manifested uneasiness about the condition of the intestate, as shown by his requesting the agent at Gastonia to send back to the place and investigate conditions, makes it evident that he himself was doubtful about the correctness of his conclusions. The prayers for instruction of the defendant, except the fifth, concerning questions of the liability of the defendant as dependent upon the evidence concerning the position and condition of the plaintiff at the time of the injury,

and they are covered by a proper modification of the ninth prayer, as follows: "If the engineer saw intestate sitting in an erect position, or in any other position, which did not make it appear that he was helpless, he had a right to assume up to the last moment that he would get out of danger, and was under no obligation to check his speed or stop his train, and if the jury find from the evidence that intestate's position was not such as to make it appear to him that he was helpless in time to have stopped the train, the answers to the first and third issues should be 'No.' "

The fifth prayer was in these words: "If the jury believe the evidence that plaintiff's intestate was not attempting to use the road-crossing, but was at a point between the road-crossing, the defendant owed him no duty to give signals of its approach, either by whistle or bell, and if the failure to ring a bell or blow a whistle was the cause of intestate's death, the answer to the first issue should be 'No.' "

In response, his Honor told the jury in substance that the failure to ring the bell or blow the whistle could not be considered as negligence concerning the intestate's death; that such failure could only be considered as evidence upon the question of whether a proper lookout was kept by the engineer. We see no cause of complaint on the part of the defendant to that instruction. But there was an error in a part of the general charge of his Honor, which entitles the defendant to a new trial.

We might have sent this case back without a discussion of the other exceptions, but we have thought it not best to do so, as it is almost certain that the same questions will be raised again on a new trial. His Honor, in the course of his charge, instructed the jury in these words, "Did the servants of the railroad company in charge of the engine fail to keep the lookout in front of the engine and on the track? If they failed to keep a lookout upon this occasion, your answer to the

first issue will be 'Yes.'" The first issue was, "Was defendant negligent as alleged?" The allegation of negligence was: "That defendant, by its employees and agents, carelessly and negligently ran a train of cars with locomotive attached against the plaintiff's intestate, while the said intestate was in the helpless and insensible condition aforesaid, when the said employees and agents of defendant saw, or by the exercise of reasonable care could have seen, from the position and posture of plaintiff's intestate, that he was in an unconscious, helpless and insensible condition upon said track, or so near thereto that he would be stricken by said train of cars and locomotive."

And there was added an additional allegation that the intestate was killed within the corporate limits of Gastonia, the train being run at that time with a reckless and unlawful rate of speed, and at a faster rate than the ordinance of the town allowed, and without keeping the proper lookout, using reasonable care or properly controlling the train, and without blowing the whistle or ringing the bell as the train approached the point where the intestate was. The error consisted in the statement that a failure on the part of the engineer to keep a lookout was such negligence on the part of the defendant as to be in effect the proximate cause of the injury. For it was assumed that the intestate was on the track, helpless and unconscious, or so near to the track as to be in peril of being killed by a passing train, and also that the defendant saw, or could by keeping a diligent lookout have seen, him in that situation and condition in time, by the use of available means, to have prevented the injury—the very issue of fact to be tried by the jury upon the evidence. If the intestate was sitting upright with his back to the cross-ties, or in any other attitude which did not make it apparent to the engineer that he was in a helpless condition and in danger of being stricken by the train, then the engineer could

have assumed up to the last moment that he would have gotten out of danger, and the engineer was not bound to either stop his train or slacken its speed, or give him notice by bell or whistle. A lookout by the engineer for such a person in such a position is not required by the law. Engineers in charge of moving trains are required by the decisions of this Court to exercise reasonable care in observing the track, keeping a diligent lookout for obstructions of any kind, including cattle, horses and hogs, and also persons who may be helpless or unconscious, or both. And this lookout is not only for the safety of the passengers on the train, but also for the protection of cattle, etc., and of those persons who may be in the condition and situation as just described. If, therefore, an engineer, in the omission of the requirement to keep a vigilant outlook fails to see such a person on the track, or so near to it as to be in peril from a passing train, and could have, by the use of his appliances, prevented the injury and failed to do so, then he would be also guilty of negligence. *Deans v. Railroad Co.*, 107 N. C., 686; *Carlton v. Railroad Co.*, 104 N. C., 365; *Pharr v. Railroad Co.*, 119 N. C., 751; *Norwood v. Railroad Co.*, 111 N. C., 236; *Baker v. Railroad Co.*, 119 N. C., 1015; *Upton v. Railroad Co.*, 128 N. C., 173.

So the defendant's negligence in this case did not depend entirely upon whether the engineer failed to keep a lookout in front of the engine and along the track.

Before the first issue could be found against the defendant, it was necessary for the jury not only to have found the fact that the engineer had failed to keep a proper lookout, but also that the intestate was on the track in a helpless condition, or so near to it in that condition as to be in peril of being stricken by a passing train, and also that the engineer saw, or could by keeping a diligent lookout have seen, him in that situation and condition in time to have prevented the

injury, and failed to do so. The defendant, in its brief, insists that that instruction could not have misled the jury; that it was a mere continuation of the charge, and when taken in connection with that part of the charge which preceded it and that part which followed it, it could have done no harm. But the whole of that part of the charge concerning the first issue is in line with that part which is specially objected to, and which we have been discussing. It is in the following words:

"The general definition of negligence is the failure to do what a man of ordinary intelligence and prudence would do under the circumstances. In this case, in considering whether or not the engineer was negligent, you will consider whether or not he failed to do what an ordinarily prudent and skillful engineer would have done under the circumstances. To make my instruction still more specific, in order to find that the defendant railroad company was negligent, you must find either that the engineer was negligent in not keeping a proper lookout along the track ahead of him, or if he was keeping a proper lookout, that he saw the intestate, McArver, upon the track, and that he was lying or sitting in an apparently helpless condition, and that the engineer would, by reasonable efforts, without imperilling the lives or safety of those on the train, have stopped the train in time to have avoided the injury. It was the duty of the engineer to keep a lookout along the track ahead of him, or at least it was the duty of the company to have some one in the engine to keep a lookout ahead. It was the further duty, if by keeping such a lookout the servants of the defendant in charge of the engine saw, or could by reasonable care have seen, the intestate upon the track in an apparently helpless condition, or so close to the track as to make it likely he would be stricken by the engine as it passed, to use reasonable efforts to stop the train, if they could have stopped it in time to have prevented the

injury and without imperilling the safety of those on board. If the servants of the defendant in charge of the engine failed to perform either one of these duties, then the defendant railroad company is negligent, and the answer to the first issue should be 'Yes,' otherwise 'No.'"

New Trial.

DOUGLAS, J., concurring in result only: For the reasons stated in my dissenting opinion in the case of *Stewart v. Railroad Co.*, 128 N. C., 519, I can not concur in the opinion. I concur in the result only because his Honor appears to have fallen into the error pointed out in *Edwards v. Railroad,* at this term, of assuming that if the defendant was negligent, such negligence was the proximate cause of the injury. The jury might have inferred this fact from the evidence, but the Court could not do so as matter of law.

CLARK, J., concurs in the concurring opinion.

BOND v. WILSON.

(Filed December 20, 1901.)

1. NEGOTIABLE INSTRUMENTS—*Payments—Limitations of Actions.*

The payments endorsed on a note are no evidence as to the time when the payments were made.

2. NEGOTIABLE INSTRUMENTS—*Payments—Limitations of Actions.*

The endorsed payments on a note, made after the statute of limitations has run against the note, are no evidence that the payments were made.

3. PRINCIPAL AND AGENT—*Evidence—Sufficiency.*

The evidence herein is not sufficient to show that the agent of the plaintiff was also the agent of the defendant.

ACTION by Lou. N. Bond, Rebecca B. Adams and others against J. W. Wilson, heard by Judge *W. B. Council* and a jury, at Fall Term, 1900, of the Superior Court of BURKE County. From a judgment for the plaintiffs, the defendant appealed.

Avery & Avery, E. J. Justice, and *J. T. Perkins,* for the plaintiffs.

Avery & Ervin, Osborne, Maxwell & Keerans, T. N. Hill, and *Bynum & Bynum,* for the defendant.

MONTGOMERY, J. The defendant, both in his answer and in his testimony on the trial, admitted that the endorsed credit of date June 3, 1884, on one of the bonds, and that of August 12, 1884, on the other, were correct, both as to the amounts and dates. The Statute of Limitations, subsection 2 of section 152 of The Code, began to run, then, from those dates, and the suits on the two bonds (consolidated in this action) were commenced on the 15th of August, 1896. The

defendant set up that statute as a bar to the actions, averring that the endorsement of a credit of date September 11, 1890, on one of the bonds, and the endorsement on the other of a credit of date August 7, 1893, were entered without his privity, and that he made no such payments, nor any other payments on either bond since those of 1884. It became necessary, then, for the plaintiffs to show by evidence other than the endorsements themselves that the endorsements of the credits of 1890 and 1893 were made at the dates upon which they purport to have been made, or at least that they were made within ten years next after the payments of 1884 and also within ten years before the action was begun, before they could be read as evidence of payments on the bonds. *Williams v. Alexander,* 51 N. C., 137; *Woodhouse v. Simmons,* 73 N. C., 30; *Grant v. Burgwyn,* 84 N. C., 560; *Young v. Alford,* 118 N. C., 215. The defendant insisted that it was necessary to prove actual payments for which the credits were endorsed, and that the endorsements themselves were not evidence of payment. That would be the rule only in cases where the dates of the endorsed credits themselves show that they were entered after the Statute of Limitations had become a complete bar. In such cases only actual payments have to be proved. *Young v. Alford, supra.*

It was admitted by the defendant that the credits were in the handwriting of S. McD. Tate, now deceased, and that he was the authorized agent of the plaintiffs for the collection of these bonds; and F. P. Tate, a witness for the plaintiffs, testified that he saw his father, the plaintiff's agent, make the endorsements of credit at or about the times they bear date. But this witness also testified that the defendant was not present, and that no money was paid. That evidence, considering it as true, destroyed the presumption of payment as evidenced by the endorsed credits, nothing else appearing.

However, the plaintiffs then undertook to prove that the plaintiff's agent was also the agent of the defendant, and that he had authorized Mr. Tate to pay, out of certain funds which he had control of for the defendant, the amounts of the credits. Certain sheets of paper found among the effects of the deceased agent, after his death, and in his handwriting, in the nature of an account as to his transactions with the defendant in respect to the disposition of the proceeds of sales of certain real estate in which the defendant was equally interested with the agent Tate, were introduced in evidence. Upon these sheets it appeared that there were charged to the defendant moneys corresponding in amount and dates of entry with the payments of 1884, and to the endorsed credits of 1890 and 1893. They were introduced as general evidence in the case, over the objection of the defendant. They were not in themselves evidence of any agency from the defendant as to the payments of 1890 and 1893, and if they were evidence for any purpose it was only to corroborate the witness F. P. Tate as to his statement about the endorsements. The defendant admitted that he had instructed Tate to apply certain amounts from the real estate transaction referred to in this opinion to the payment of the bonds, and that those amounts were the basis of the endorsed credits of 1884; but he denied in his answer that he had authorized him, or had given him instructions to apply any other amounts of his money in Tate's hands to any other payments on the bonds; and his testimony was to the same effect. We do not find any testimony in the whole record to the contrary, and the defendant was entitled to have his special prayers 19 and 20 on the issue of the Statute of Limitations given to the jury, and because they were refused by his Honor, there must be a

New Trial.

(CLARK, J., did not sit on the hearing of this case.)

DOUGLAS, J., concurring: There is one part of the opinion of the Court which I think is liable to misconstruction. It is as follows: "The defendant insisted that it was necessary to prove actual payments for which the credits were endorsed, and that the endorsements themselves were not evidence of payment. That is, would be the rule only in cases where the dates of the endorsed credits themselves show that they were made after the Statute of Limitations had become a complete bar." I fear this might be construed into meaning that the mere endorsement, if made before the statute had become a complete bar, would in itself create a presumption of payment. To this I could not assent. If, however, the Court means, as I am told it does, that such an endorsement would not of itself raise any presumption of a corresponding payment, but would simply be some evidence to go to the jury tending to prove payment, I agree with the opinion.

My views may be briefly stated as follows: Section 152 of The Code provides that an action upon a sealed instrument against the principal thereto must be brought in ten years. Section 172 is as follows: "No acknowledgment or promise shall be received as evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." It will be seen that the statute uses the word *payment,* and therefore a mere endorsement of a payment *not* signed "by the party to be charged thereby," can never amount to anything more than mere evidence of payment. Our decisions hold that if such endorsement is made after the note or bond is barred by the statute, it is of itself not even evidence of payment; and that if made before such bar, it is evidence of such payment simply because it is supposed to have been entered by the

creditor or his agent, as he holds the paper, and it is therefore a declaration against his own interest, inasmuch as it tends to lessen the amount due on the note.

But if, on the contrary, it turns out, as in the case at bar, that such an endorsement is the only thing that brings the note within the statute, then such an endorsement is *not* against the interest of the holder, but becomes his own declaration in his own favor. *Cessat ratione cessat ipsa lex.*

As it is the fact of payment itself, and not the mere endorsement that prevents the bar of the statute, the burden of proving payment in such cases always rests upon the holder of the paper. This comes within the general rule that where the Statute of Limitations is pleaded, the burden rests upon the plaintiff of bringing his claim within the statute, as otherwise he has no cause of action.

FURCHES, C. J. I concur in the concurring opinion.

THOMAS v. RALEIGH AND AUGUSTA AIR-LINE RAILROAD CO.

(Filed December 20, 1901.)

1. NEGLIGENCE—*Assumption of Risk—Master and Servant—Acts (Private) 1897, Ch. 56.*

Under Acts (Private) 1897, Ch. 56, railroad companies are deprived of the defense of the assumption of risk.

2. VERDICT — *Directing — Contributory Negligence — Burden of Proof.*

A verdict on the issue of contributory negligence can not be directed in favor of person alleging it, the burden of proof being on such person.

3. CONTRIBUTORY NEGLIGENCE—*Assumption of Risk—Negligence.*

A person is not guilty of contributory negligence in undertaking the performance of a dangerous work, unless he performs it in a negligent manner, or unless the inherent probabilities of injury are greater than those of safety.

COOK, J., dissenting.

ACTION by W. A. Thomas against the Raleigh and Augusta Air-Line Railway Company, heard by Judge *H. R. Starbuck* and a jury, at February Term, 1901, of the Superior Court of WAKE County.

This is an action for damages on account of personal injuries received by the plaintiff while in the service of the defendant company. There is evidence tending to prove the following facts, many of which are uncontradicted. The plaintiff was 27 years of age, and had been employed by the defendant for two months. At the time of the injury he was working as a section hand under one Davenport, who was section master or foreman. Said Davenport directed the plaintiff and other hands then working under him to place a

hand-car, which they were then using in their work, upon a flat-car attached to a material train, to be transported to a point near Sanford. The said flat-car was loaded with sand and dirt. The plaintiff and other hands, after loading the hand-car, got upon the material train and rode to the point where they were to work. When the train reached said point, it was stopped in such a position as to leave the flat-car, on which the hand-car had been placed, upon a high and steep fill or embankment, where the ground was frozen and slippery. The said Davenport negligently ordered the plaintiff and the other section hands to remove the said hand-car from the train. Davenport was warned, and knew, or by reasonable inspection could have known, that it was dangerous to remove said hand-car at that place. He was requested to direct the engineer to pull the flat-car up a few yards to level ground, where the hand-car could have been removed easily and without danger. The said Davenport refused to do so, although the train could have been so moved without difficulty, and again ordered the plaintiff to assist in moving the hand-car. The plaintiff knew there was danger in doing so, but did so in obedience to orders and for fear of losing his place. It is admitted that Davenport had employed the plaintiff and had the right to discharge him. While the plaintiff and the other section hands were removing the hand-car, it got beyond their control, fell down the embankment against the plaintiff, and ran over him, breaking his leg and otherwise injuring him. Davenport, the section master, had been in the employment of the defendant about fourteen years, and had been section master for several years. While there was some danger, it does not appear to have been obviously so great as to have deterred a reasonably prudent man from undertaking it when ordered to do so. Defendant appealed.

T. M. Argo, for the plaintiff.

W. H. Day, J. B. Batchelor, and *Battle & Mordecai,* for the defendant.

DOUGLAS, J., after stating the facts. There are several exceptions, but they are all practically to the effect that the plaintiff, as matter of *law,* assumed the risk or was guilty of contributory negligence. We have so fully considered these questions in the recent case of *Coley v. Railroad,* at this term, that there is but little need for further discussion. We can only repeat what we there said, that the act of February 23, 1897, deprived all railroad companies operating in this State of the defense of assumption of risk, whether existing in contract express or implied, and whether pleaded directly or under the doctrine of Fellow Servant.

This brings us to the consideration of the plea of contributory negligence, which is always a matter of defense, with the burden resting upon the defendant. Beyond certain exceptional circumstances, which have no connection with the case at bar, a verdict upon this issue can never be directed in favor of the defendant. *Hardison v. Railroad,* 120 N. C., 492; *Bank v. School Commissioners,* 121 N. C., 109; *Bolden v. Railway,* 123 N. C., 614; *Cogdell v. Railroad,* 124 N. C., 302.

In all cases upon such a motion, the evidence for the plaintiff must be accepted as true, and all the evidence construed in the light most favorable to him. *Purnell v. Railroad,* 122 N. C., 832; *Cox v. Railroad,* 123 N. C., 604; *Printing Co. v. Raleigh,* 126 N. C., 516; *Moore v. Railway Co.,* 128 N. C., 455.

Taking the evidence in the light most favorable to the plaintiff and excluding all assumption of risk, he can not be deemed guilty of contributory negligence. It is true, he realized there was danger, but he had been in the defend-

ant's service only two months, and might well rely upon the judgment of his superior officer, who had been in the same service for fourteen years. Of the ten men engaged in moving the hand-car, only the plaintiff was injured.

Moreover, there is serious conflict even in the defendant's own testimony. Davenport admits that it was dangerous to move the hand-car at that place, and says that if he had known the character of the place he would not have ordered the hand-car to be taken off there, as it was not necessary to do so. Brown, also a section foreman and witness for the defendant, says that "with the number of men around it (the car), I did *not* consider it a dangerous place."

Many branches of the railroad service are necessarily dangerous, but the company is not responsible for such inherent danger unless it unnecessarily causes or increases it by some unlawful act or wilful or negligent omission of duty. On the other hand, the plaintiff is not guilty of contributory negligence in undertaking the performance of a dangerous work unless he performs it in a negligent manner, or unless the act itself is obviously so dangerous that in its careful performance the inherent probabilities of injury are greater than those of safety. *Hinshaw v. Railroad,* 118 N. C., 1047. Many of the cases cited by defendant appear to have more or less confused assumption of risk with contributory negligence, but they are essentially different. As is said in Coley's case, *supra:* "Contributory negligence of course always involves the fact of *actual* negligence on the part of the plaintiff, while the simple assumption of risk does not of itself imply negligence, which may or may not co-exist." This distinction is recognized in *Rittenhouse v. St. Ry. Co.,* 120 N. C., 544; where the Court says: "*Reckless* assumption of risk has always been taken in our Court as being embraced in the issue of contributory negligence." This is so because of the very use of the word "reckless" presupposes

negligence in connection with the assumption of risk. If it is a "negligent" assumption of risk by the plaintiff, and such negligence directly contributes to his injury, of course it is included in the issue of contributory negligence, for such it is. But it is essentially different where the defect is neither so great nor so patent as to deter a man of ordinary prudence. A defective machine carefully handled, or a safe machine carelessly handled, may equally result in an accident; but the resulting responsibility would be by no means the same.

It is true, in Rittenhouse's case, the Court says: "But upon the issue of contributory negligence both phases of the matter, negligence and voluntary assumption of risk, could be submitted to the jury." This was the old practice, and, in fact, the Courts at first did not generally submit even the issue of contributory negligence, leaving the entire case to the jury upon the single issue of the defendant's negligence. In such cases, it all depended upon the charge of the Court; but it was found that the respective negligence of the plaintiff and the defendant could be more intelligently presented under separate issues. We are strongly of opinion that the same principle holds good as to the respective issues of contributory negligence and assumption of risk, where the latter defense is permitted. We must remember that the primary object of submitting issues, and indeed of the Judge's charge, is not simply to "run the gauntlet" of the Supreme Court on appeal, but to submit the case to the jury in such a manner as will best enable them to render a just and intelligent verdict. We think this has been substantially done in the case at bar, and there are certainly no errors in the charge of which the defendant can complain.

In *Railroad Co. v. Egeland,* 163 U. S., 93, where the plaintiff, a laborer in the employ of defendant, was ordered by the conductor to jump off a train going about four miles an hour,

and was injured in doing so, the Court says: "If plaintiff reasonably thought he could with safety obey the order by taking care and jumping carefully, and if because of the order he did jump, the jury ought to be at liberty to say whether under such circumstances he was or was not guilty of negligence."

That the defendant in the case at bar was guilty of negligence has been found by the jury upon substantial evidence and under proper instruction. They have also found that the plaintiff was not guilty of contributory negligence as a matter of fact, while it is plain to us that he can not be so considered as matter of law. The judgment is

Affirmed.

COOK, J., dissents.

COGDELL v. SOUTHERN RAILWAY CO.

(Filed December 20, 1901.)

1. NEGLIGENCE—*Assumption of Risk—Acts (Private) 1897, Ch. 56—Master and Servant.*

Under Acts (Private) 1897, Ch. 56, an issue as to assumption of risk by an employee need not be submitted.

2. NEGLIGENCE—*Assumption of Risk—Acts (Private) 1897, Ch. 56.*

Acts (Private) 1897, Ch. 56, deprives railroad companies of the defense of assumption of risk, whether resting in contract, express or implied, and whether treated directly or under the doctrine of fellow-servant.

3. EVIDENCE—*Scintilla.*

Where there is more than a scintilla of evidence, it should be submitted to the jury.

4. INSTRUCTIONS—*Judge—Evidence—Witnesses.*

The trial judge should not single out one or more witnesses, as the effect might be to give undue credit to such testimony.

COOK, J., dissenting.

ACTION by Chas. D. Cogdell against the Southern Railway Company, heard by Judge *Frederick Moore* and a jury, at May Term, 1901, of the Superior Court of CUMBERLAND County.

This is an action for damages for personal injuries to the plaintiff, caused by the alleged negligence of the defendant. The material allegations of the complaint are as follows:

"2. That the plaintiff was, at the date hereinafter mentioned, and for some time previous thereto, an employee of the said defendant corporation, in the capacity of a fireman on one of the said defendant's engines, then operating at Winston-Salem, N. C.

"3. That on the 11th day of November, 1899, as it was his duty and daily custom as such employee, the plaintiff was working and performing his duties as fireman upon said engine.

"4. That while so working as fireman on said engine, it was his duty to shake the clinkers or cinders out of the grate, to clean the fires from time to time, as became necessary.

"5. That on the said date, while cleaning fires as aforesaid, plaintiff was thrown down violently against the boiler, falling with great force, by reason of the defective condition of the grate handle or shaker-bar rigging, which defective condition caused the lever to slip off while plaintiff, with his full weight and strength, was cleaning fires as aforesaid.

"6. That at the time aforesaid, the said defendant was, with gross carelessness and negligence, wilfully operating said engine in its defective condition, to the great danger of plaintiff.

"7. That in consequence of said defective condition of said machinery, which could and ought to have been kept in good condition, the plaintiff, when thrown down violently as aforesaid, was very painfully and dangerously and permanently injured."

There was evidence tending to sustain the plaintiff's contention.

The defendant asked that the following issues be submitted to the jury:

"I. Was the plaintiff injured by the negligence of the defendant in the manner alleged in the complaint?

"II. Did the plaintiff, by his own negligence, contribute to the injury complained of?

"III. Did the plaintiff assume the risk of any defect in the shaker-bar or grate handle?

"IV. What damages, if any, has the plaintiff sustained?"

The Court submitted the first, second and fourth issues

as requested, but refused to submit the third issue, and the defendant excepted.

The issues submitted were found in favor of the plaintiff, and from judgment thereon the defendant appealed.

N. A. Sinclair, for the plaintiff.
F. H. Busbee, for the defendant.

DOUGLAS, J., after stating the facts. In view of the act of February 23, 1897 (Private Laws, Chap. 56), the Court properly refused to submit the third issue tendered by defendant. This point has been so fully considered in the cases *Coley v. Railroad* and *Thomas v. Railroad,* both at this term, that further discussion seems unnecessary. It may now be considered settled that the said act deprives all railroad companies operating in this State of the defense of assumption of risk, whether resting in contract, express or implied, and whether treated directly or under the doctrine of fellow servant. It is further settled that the plaintiff is not guilty of contributory negligence in undertaking the performance of a dangerous work unless he performs it in a negligent manner, or unless the act itself is obviously so dangerous that, in its careful performance, the inherent probabilities of injury are greater than those of safety. *Hinshaw v. R. Co.,* 118 N. C., 1047; *Coley v. Railroad* and *Thomas v. Railroad, supra.*

We see no error in the charge. As there was more than a scintilla of evidence tending to prove the negligence of the defendant, the case could not have been taken from the jury. *Bank v. School Committee,* 121 N. C., 107; *Cable v. Railway Co.,* 122 N. C., 892; *Moore v. Street Ry. Co.,* 128 N. C., 455. The Court properly refused to charge as to contributory negligence on the first issue, especially as he substantially embodied that part of the prayer in his instructions upon the second issue.

The defendant requested the Court to charge: "If the jury believe from the testimony of defendant's witnesses as to the condition of the grate-bar, or the testimony of plaintiff's witness Clark, that the grate-bar was worn 'the least bit in the world,' this would not be sufficient evidence of a defective appliance to go to the jury, and they should find the first issue 'No'" The Court refused to give the instruction as requested, but gave it in the following modified form: "If the jury find from the testimony that the condition of the grate-bar was good and not worn, or that the grate-bar was worn only 'the least bit in the world,' this would not be sufficient evidence of a defective appliance to go to the jury, and they should find the first issue 'No.'" Defendant excepted to the modification. His Honor was correct in modifying the prayer, because its effect would have been, or might have been, to give undue credit to the defendant's witnesses as well as the witness Clark, whose testimony was by no means favorable to the plaintiff. *Jackson v. Commissioners*, 76 N. C., 282; *Young v. Steamboat Co.*, 64 N. C., 399; *Weisenfield v. McLean*, 96 N. C., 248.

We are inclined to think that it would have been error if the instruction had been given as asked, as it tended to discredit the plaintiff, who had testified in his own behalf; but in any event the defendant had no right to demand that his Honor should single out by name any one witness from amongst others who had testified to the same matter.

Among other prayers, some of which were given, the defendant asked for the following instruction: "A railroad is not an insurer of the safety of its employees, nor is it required to have every appliance in perfect condition at all times. If its machinery is reasonably suitable for the purpose for which it is designed, if used with ordinary care, the railroad can not be found negligent because the corners of a grate-bar are worn 'the least bit in the world,' provided

that this would not cause the accident if due care should be observed by the fireman using it." The Court gave this instruction as requested; and cahrged the jury upon the second issue, among other things, as follows: "If you find from the evidence that the grate-bar was in a dangerous condition on account of two of its corners having worn until they were round, that the plaintiff knew of its defective and dangerous condition, and that with knowledge of such defective and dangerous condition he voluntarily remained in the service of defendant and continued to use such grate-bar, he assumed the risk incident to the use of such defective grate-bar, and you should answer the second issue 'Yes.' If you find from the evidence that the plaintiff did not use that degree of care and caution in attaching the handle to the grate-bar which a prudent man would have used in so attaching it, and that such want of care caused or contributed to the injury of which the plaintiff complains, then, whether the grate-bar was worn or not, you should answer the second issue 'Yes.'"

These instructions, with others, went fully as far as the defendant had a right to demand, and, in fact, if the point were before us, we might seriously question its correctness as being too favorable to the defendant as to the assumption of risk under the act of 1897.

This case is peculiarly one whose determination comes within the province of the jury, as the testimony was conflicting upon material points. Even if the facts were undisputed, it would be extremely difficult for a Court to say as matter of *law* what degree of wear would render a piece of machinery, not in common use, so far dangerous as to imply negligence on the part of the defendant, or to deter a man of ordinary prudence from undertaking to use it.

Considering the testimony and the charge, the jury might well have found for the defendant, if they had given to its witnesses the same degree of credibility that they appear to

have given to the plaintiff. But they have found otherwise, and we can not say that they are wrong. The credibility of a witness is a matter peculiarly for the jury, and depends not only upon his desire to tell the truth, but also, and sometimes even to a greater extent, upon his insensible bias, his intelligence, his means of knowledge and powers of observation. The judgment is

Affirmed.

COOK, J., dissents.

ABBOTT v. HUNT.

(Filed December 20, 1901.)

1. FRAUDS, STATUTE OF—*Contract—Brokers.*

The statute of frauds does not apply to contracts by brokers and their principal for the sale of real estate.

2. BROKERS—*Principal—Contracts.*

Where no time is fixed for the continuance of a contract between a broker and his principal, either party may terminate it at will, subject only to the ordinary requirements of good faith.

ACTION by Abbott & Stephens against J. W. Hunt, heard by Judge *W. S. O'B. Robinson* and a jury, at March Term, 1901, of the Superior Court of MECKLENBURG County. From a judgment for the defendant, the plaintiffs appealed.

Jones & Tillett, for the plaintiffs.
Burwell, Walker & Cansler, for the defendant.

CLARK, J. In March, 1899, the defendant, who was the owner of certain real estate in Charlotte, agreed orally with

the plaintiffs, who were real estate agents and at that time in charge of said property as his rental agents, that they might sell it if they could secure a price that would net the defendant the sum of $33,000. The plaintiffs made effort to sell the property, and on 4th April telegraphed defendant an "offer of $32,000, subject to a commission of 2 per cent." This offer the defendant declined by letter, and added: "I prefer you do not offer it again, even at the price named, unless I can sell my residence. Sell the residence, then I will sell the business property." On 10th April the plaintiffs wrote defendant they had sold the property at $33,000 net, and he declined to ratify their action. His Honor below correctly held that the defendant's letter of 4th April terminated the agency.

The contract being denied in the answer, the defendant contends that it could not be proved by oral evidence, and that the plaintiffs are barred in any aspect by the Statute of Frauds in an action thereon—citing *Dunn v. Moore,* 38 N. C., 364; *McCracken v. McCracken,* 88 N. C., 272; *Kivett v. McKethan,* 90 N. C., 106. The plaintiffs were allowed to amend and allege a *quantum meruit,* but that did not improve their condition, for unless the services were rendered upon a valid agreement, they were officious and gratuitous. But we can not agree that the Statute of Frauds applies. This is not an action for specific performance, but on a contract for personal services, or for damages on breach of such contract for the value of the services.

But aside from that, an agency can be revoked at any time before a valid and binding contract, within the scope of the agency, has been made with a third party. The only exception is an agency coupled with an interest, and that must be an interest in the subject of the agency, and not merely something collateral, as commissions or compensation for making sale. Hartley's Appeal, 53 Pa. St., 212, 91 Am.

Dec., 207, which holds that a power of attorney by which the attorney is to receive as compensation "one-half of the net proceeds" is not a power coupled with an interest,and is revocable. This case cites a very clear enunciation of the same principle by Marshall, C. J., in *Hunt v. Rousmanier,* 8 Wheat., 174, which is also cited by this Court (as to agencies to solicit insurance) in *Insurance Co. v. Williams,* 91 N. C., 69. In *Brookshire v. Voncannon,* 28 N. C., 231, it is held that a power of attorney is revocable "at any moment before the actual execution of it." To same purport *Wilcox v. Ewing,* 141 U. S., 627; *Mansfield v. Mansfield,* 6 Conn., 559, 16 Am. Dec., 76; Mechem on Agency, sections 204-210; *Hall v. Gambrill,* 88 Fed. Rep., 709. In *Sibbald v. Iron Company,* 83 N. Y., 378, 22 Am. Rep., 441, it is said: "Where no time is fixed for the continuance of a contract between broker and principal, either party can terminate it at will, subject only to the ordinary requirements of good faith." A case on "all-fours" is *Coffin v. Landis,* 46 Pa. St., 426,which holds (page 434): "Where one as agent for another contracts to sell the land of the latter in consideration of one-half of the net proceeds of the sale, and there is no stipulation in the contract as to the duration of the employment, the principal has a right to terminate it at any time, and to discharge the agent from his service without notice, and the plaintiff (agent) can not recover for any services rendered, or for his loss of employment after his discharge." And almost as directly in point are the recent cases *Young v. Trainor,* 158 Ill., 428 (1895), which holds that "a real estate broker who produces a customer after his principal has withdrawn his offer to sell, is not entitled to a commission," and *Bailey v. Smith,* 103 Ala., 641 (1894), which is to the same effect, and *Mallonee v. Young,* 119 N. C., 549.

In *Sibbald v. Iron Co., supra,* the Court of Appeals of New York reviews the cases and states the law thus:

"It follows as a necessary deduction from the established rule, that a broker is never entitled to a commission for unsuccessful efforts. The risk of a failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interest of his employer, and yet if he fails, if without effecting an agreement or acomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which were staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions, which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale; he may have planted the very seed from which others reap the harvest; but all that gives him no claim. It was part of his risk that, failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors."

In *Atkinson v. Pack,* 114 N. C., 597, and *Martin v. Holley,* 104 N. C., 36, the broker had procured a purchaser at the stipulated price before the revocation of the power, and, of course, being an executed contract, the agent was entitled to his commission, and the same might be true where the revocation was in bad faith, just as the contract was about being consummated, the revocation being for the purpose of depriving the agent of his commissions. But such is not the case here. There is no evidence tending to show it.

No Error.

COLEY v. NORTH CAROLINA RAILROAD CO.

(Filed December 20, 1901.)

1. NEGLIGENCE—*Assumption of Risk—Master and Servant—Railroads—Acts (Private) 1897, Ch. 56.*

The use of machinery obviously defective will not prevent a person from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference of probable consequences.

2. CONTRIBUTORY NEGLIGENCE—*Questions for Jury—Questions for Court.*

Whether an engineer is guilty of contributory negligence in using drain-pipe as a grab-iron, in trying to get upon an engine, is a question for the jury.

3. NONSUIT — *Dismissal —Evidence —Construction —Negligence — Verdict—Directing.*

On a motion for a nonsuit, or its counterpart, the direction of a verdict, the evidence for the plaintiff must be accepted as true and construed in the light most favorable to him.

PETITION to rehear. Petition denied. For former opinion see 128 N. C., 534.

F. H. Busbee, for the petitioner.

T. M. Argo, and *W. H. Day,* in opposition.

DOUGLAS, J. This case is now before us on a petition to rehear. It was first argued in this Court at the September Term, 1900, and was carried over under *advisari.* At the February Term, 1901, it was re-argued by leave of the Court, and determined, the case being reported in 128 N. C., 534.

We have thus had the advantage of three distinct arguments by able and learned counsel, who have also filed elaborate briefs. With such a presentation of the case, and after care-

ful consideration, we feel compelled to adhere to our former decision. We do so upon an entire review of its merits, on account of its importance as a precedent, which, we think, takes it out of the strict operation of the rule invoked by the plaintiff and laid down in *Weisel v. Cobb,* 122 N. C., 67, and cases therein cited. The facts are sufficiently stated in the well-considered opinion of the Chief Justice.

The doctrine of Fellow Servant is generally said to have had its origin in the case of *Priestly v. Fowler,* 3 M. and W., 1, decided in 1837, where the plaintiff had his thigh broken by the breaking down of an overloaded butcher's van, loaded and conducted by a fellow servant. The doctrine, which was rather inferentially laid down in Priestly's case, was for the first time distinctly enunciated in 1841, in *Murray v. South Carolina R. R. Co.,* 1 McMull., 385, 36 Am. Dec., 268, where a fireman was injured through the negligence of an engineer on the same train. However, the leading case upon the subject is undoubtedly that of *Farwell v. Boston, etc., R. Co.,* 4 Met., 49, 38 Am. Dec., 339, in which Chief Justice Shaw delivered an elaborate opinion, which has been characterized by a distinguished jurist as "the fountain-head of the common law of England and America on this subject."

The development of the doctrine through judicial construction and the largely increased area of its application caused by the increasing use of dangerous machinery, with a relative increase in the number of serious accidents, suggested the necessity of its material modification. Some of the States attempted to do so through judicial construction, by the introduction of the rule of vice-principal, while others had recourse to special legislation. Among such statutes that have been most generally cited and most frequently construed, we find the English Employer's Liability Act of 1880, and the subsequent acts of Alabama, Massachusetts, Colorado and Indiana. All of these acts are more comprehensive than our

own, inasmuch as they are not restricted to railroad companies, but, on the other hand, they all contain certain conditions which materially affect their application. Our statute, on the contrary, is simply an unconditional abrogation of the kindred doctrines of Fellow Servant and Assumption of Risk as applied to railroad companies. It is the act of February 23, 1897, erroneously printed as Chapter 56 of the *Private* Laws of 1897, and is as follows:

"The General Assembly of North Carolina do enact:

"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 services 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 an employee of said company to waive the benefit of the aforesaid section shall be null and void."

This Court has held this act to be constitutional as far as it applied to fellow servants. *Kinney v. Railroad,* 122 N. C., 961; *Wright v. Railroad,* 123 N. C., 280; *Hancock v. Railroad,* 124 N. C., 222. We see no reason why the remainder of the act is not equally constitutional, as it is necessary to give any practical value to this act itself. It is well settled that the doctrines of Fellow Servant and Assumption of Risk rest entirely upon an implied contract; and if an express contract could be made to take the place of an implied contract, the essential purposes of the act could be practically defeated at the will of the employer.

That such statutes are not repugnant to the Constitution of the United States has been repeatedly decided. The

Kansas statute was sustained in *Railroad v. Mackey,* 127 U. S., 205, where the Court says, on page 210: "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objection therefore can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities." This case was quoted and approved in *Railroad v. Herrick,* 127 U. S., 211, sustaining the Iowa statute; in *Railroad v. Pontius,* 157 U. S., 209, and in *Railroad v. Matthews,* 165 U. S., 1. We have, therefore, no hesitation in holding the act of February, 1897, valid in its entirety, and that it deprives all railroad companies operating in this State of the defense of assumption of risk, whether resting in contract, express or implied, and whether pleaded directly or under the doctrine of Fellow Servant.

Beyond this we can not go, as we think that the intent of the statute related simply to the contractual relations existing, expressly or by implication, between the plaintiff and defendant; and that the General Assembly did not intend to forbid the plea of contributory negligence in the real meaning of the term. Some Courts appear to have confused assumption of risk with contributory negligence, by regarding them as equivalent defenses; but they are essentially different in their nature, their origin and their results. Contributory negligence, of course, always involves the fact of *actual* negligence on the part of the plaintiff, while the simple assumption of risk does not of itself imply negligence, which may or may not co-exist. A defective machine carefully handled, or a safe machine carelessly handled, may equally result in

an accident; but the resulting responsibility would be by no means the same. This is especially true since the act of 1897.

As the law now stands, the use of machinery obviously defective will not prevent the plaintiff from a recovery for an injury resulting therefrom, unless the apparent danger is so great that its assumption would amount to a reckless indifference to probable consequences. What is recklessness, depending upon the rule of the prudent man, is, as is said in the former opinion of the Court, a matter of fact for the jury, as it necessarily depends upon the peculiar facts of each case. The best definition we can give, applicable to such cases as that at bar, is that adopted by this Court in *Hinshaw v. Railroad,* 118 N. C., 1047, that the danger of using the defective machine must be not only apparent, but so great that there are more chances against its safe use than there are in favor of it. This risk must be considered in connection with the skill and experience of the plaintiff, as a sailor might with entire safety climb up into the rigging where it would be utter recklessness for a landsman to follow. In all such cases the "personal equation" is an important factor.

It is admitted that at the time of the injury the plaintiff had been in the railroad service for thirty years, in the service of the defendant over four years as a yard conductor, and was fully versed in the duties of his position. It further appears that the regular switch engine, with a sloping tender, was taken away, and a road engine substituted therefor, that had no hand-hold above the platform of the tender. This hand-hold could be used only while he was on the lower step, and yet if he remained on that step he could not see the engineer or signal to him without leaning outward in an uncomfortable and dangerous position. The proper performance of his duties required him to stand upon the platform of the tender, where he could see and be seen, and to get up there he

must pull up by catching hold either of the drain-pipe or the top of the tender. He swears that of the two he considered the drain-pipe the safer as well as the more convenient. Neither had been provided for such use, and if he pulled himself up at all, he was compelled to do so by using something intended for another purpose. He had been using this drain-pipe regularly for such purpose for three weeks, but had used the one on the other side more because the most of his work was on that side. If the drain-pipe had been properly fastened, it would have been safe and he would not have been hurt. These are the most material points of his testimony, and he is largely corroborated by other witnesses. The plaintiff testifies that if the drain-pipe had been in proper condition, it should have held a thousand pounds. Heilig testified that drain-pipes are usually threaded through a nut on the inside, and should support a thousand pounds, if necessary. Lacy, a witness for the defendant, says that drain-pipes, when in proper condition, are very secure, and would hold a man's weight, adding, "When first put in always would." Hill, a witness for the defendant, says that the drain-pipe "would hold a man's weight if in proper condition." Taking this evidence as true, and construing it in the light most favorable for the plaintiff, as we are bound to do on a motion to nonsuit or direction of the verdict, can we say in the light of our own decisions that the plaintiff was guilty of contributory negligence *as a matter of law?* The question is not whether the defendant had placed the drain-pipe there for any such purpose; but whether, when the defendant made it necessary for him to pull up by something, without placing *anything* there for the purpose, the plaintiff was guilty of contributory negligence *per se* in catching hold of a drain-pipe which was apparently secure, which he had been using for three weeks, and which, if in proper condition, could have supported a thousand pounds. It seems to us there can be

but one answer. It was an issue of fact for the jury, and in the absence of any error in his Honor's charge prejudicial to the defendant, we can not disturb the verdict.

It is well settled that on a motion for nonsuit, or its counterpart, the direction of a verdict, the evidence for the plaintiff must be accepted as true, and construed in the light most favorable to him, as the jury might take that view of it if left to them, as they appear to have done in the case at bar. *Avery v. Sexton,* 35 N. C., 247; *Hathaway v. Hinton,* 46 N. C., 243; *State v. Allen,* 48 N. C., 257; *Abernathy v. Stowe,* 92 N. C., 213; *Gibbs v. Lyon,* 95 N. C., 146; *Springs v. Schenck,* 99 N. C., 551; *Hodges v. Railroad,* 120 N. C., 555; *Collins v. Swanson,* 121 N. C., 67; *Purnell v. Railroad,* 122 N. C., 832; *Cable v. Railroad, Ibid,* 892; *Whitley v. Railroad, Ibid,* 987; *Cox v. Railroad,* 123 N. C., 604; *Howell v. Railroad,* 124 N. C., 24; *Cogdell v. Railroad, Ibid,* 302; *Cowles v. McNeill,* 125 N. C., 385; *Brinkley v. Railroad,* 126 N. C., 88; *Moore v. Ry. Co.,* 128 N. C., 455.

In Purnell's case, *supra,* Justice Furches, speaking for the Court, says: "This motion is substantially a demurrer to the plaintiff's evidence, and this being so, and the Court having no right to pass upon the weight of evidence, every fact that plaintiff's evidence proved or *tended* to prove must be taken by the Court to be proved. It must be taken in the strongest light, as against the defendant."

In *Printing Co. v. Raleigh,* 126 N. C., 516, Chief Justice Faircloth, speaking for the Court, says: "The defendant's motion to dismiss the action was equivalent to a demurrer to the evidence, and the plaintiff's evidence will be taken as true, and taken in the most favorable light for him (citing authorities). An appellate Court reviewing a judgment of nonsuit will assume every fact proved, necessary to be proved, when the evidence tends to prove it." This same rule applies even in the Federal Court, where the Judges are permitted

to express an opinion upon the facts, and where the rule as to a direction of the verdict is not so rigid as with us, as will be shown by the following quotations from a long line of cases:

"If the evidence, giving the *plaintiff* every benefit of every inference to be fairly drawn from it, sustained his view, then the direction to find for the defendant was proper." *Kane v. Railroad,* 128 U. S., 91, 94.

"It is only where the facts are such that all reasonable men must draw *the same conclusion from them,* that the question of negligence is ever considered as one of *law* for the Court." *Railroad v. Ives,* 144 U. S., 427.

"In determining whether the plaintiff was so guilty of contributory negligence as to entitle the defendant to a verdict, we are bound to put upon the testimony the construction *most favorable to him.*" *Railroad Co. v. Lowell,* 151 U. S., 209, 217.

The inference from the facts must be "*so plain as to be a legal conclusion*" before the question can be withdrawn from the jury. *Railroad Co. v. Egeland,* 163 U. S., 93, 98.

"We see no reason, as long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these (negligence and contributory negligence) as well as others." *Jones v. Railway Co.,* 128 U. S., 443, 445.

"The Court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, *as matter of law,* that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." *Dunlap v. Railway Co.,* 130 U. S., 652.

(The italics are our own.)

It can not be doubted, and in fact it does not seem to be seriously questioned, that it was negligence on the part of the

defendant to furnish an engine so obviously defective for its intended use, when the defect could have been so easily supplied. In fact, it is questionable whether this case would not come under the rule of continuing negligence, laid down in the cases of Greenlee and Troxler, aside from the act of 1897. *Greenlee v. Railroad,* 122 N. C., 978; *Troxler v. Railroad,* 122 N. C., 903; S. C., 124 N. C., 189; *McLamb v. Railroad,* 122 N. C., 862.

In the celebrated case of *Farwell v. Railroad, supra,* the following significant reservation in the opinion of the Court is found on pages 61 and 62: "In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no wilful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied w nties and undertakings arising out of the relation of m ter and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness or sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated company, are questions on which we give no opinion." Does not this contain the germ of the Greenlee case? If so, what would be the use of raising an implied warranty if the law at once rebutted it by an implied assumption of risk?

We do not think it necessary to add anything more to the opinion of the Court, as delivered by the Chief Justice, as the remaining principles therein decided are too well settled to need further discussion.

It may be that if we were jurors, we would find the plaintiff guilty of contributory negligence as a matter of fact, and not at all unlikely that the recovery would be less. But we are not jurors, and have no right to assume their functions. The plaintiff has a judgment obtained in a Court of competent jurisdiction, which is before us on appeal only as to matters of law. As we find no substantial error in his Honor's charge, or the conduct of the trial, we can not disturb the verdict or reverse the judgment on any view we have as to the mere weight of the evidence.

Petition Dismissed.

COOK, J., dissenting. The decision of the Court is made to turn upon the "Fellow Servant" act of 1897, which is quoted in full in the opinion. The construction placed upon that act, in my opinion, is not warranted by its text or the remedy intended to be provided by the Legislature which passed it. So I will first peruse and consider the act in respect of the remedy intended.

The rule for construing a remedial statute, as taught by Mr. Blackstone, is that there are three points to be considered; the old law, the mischief and the remedy; that is, how the law stood at the making of the act; what the mischief was for which the old law did not provide; and what remedy is provided to cure the mischief. To illustrate his meaning, he instances the restraining statute of 13 Elizabeth, Chap. 10. "By the common law," he says, "ecclesiastical corporations might let as long leases as they thought proper; the mischief was, that they let long and unreasonable leases to the impoverishment of their successors; the remedy applied by the

statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years."

Applying this rule in construing the act, we find the law (made by judicial construction) to have been, first, that where an employee of a railroad company was injured by the negligence of a fellow servant, the common employer was not responsible for the injury; and, second, that there was no statute or judicial ruling in this State by which an employee could be prevented from contracting with a railroad company to waive his right of action for injuries resulting from defects in the machinery.

The mischief to be remedied was to release a fellow servant from his responsibility for the negligence of a fellow servant; and, second, to secure to the employee the right of action for injuries inflicted on account of defects in the machinery.

The remedy applied by the statute is to create a liability upon the railroad company in favor of an employee for injury inflicted by the negligence of a fellow servant, and to declare null and void any such contract or agreement, express or implied, made for the purpose of waiving the right to maintain an action, (1) from injury resulting from the negligence of a fellow servant, and (2) from injuries resulting from defects in the machinery. An analysis of the statute shows two propositions:

1. To change the relationship existing between fellow servants and make them vice-principal as to each other with respect to injuries resulting on account of their negligence, carelessness or incompetency, and to prevent them from forfeiting their right of action by contract.

2. To prevent an employee from waiving his right of action for injuries received on account of defects in the machinery, ways or appliances; or, in other words, a right of action accrues to a fellow servant, and the right to waive either action by an employee is forbidden.

These relations being established by the statute, the liability of the railroad company as to furnishing safe and suitable machinery, ways and appliances, and the relationship of the employee and his assumption of risks in the performance of his work remain unchanged. So, I do not understand that it is within the purview of the statute to exempt employee from responsibility for negligence in the use of safe machinery or to license him to voluntarily assume unnecessary risk or hazard at the expense or upon the responsibility of the railroad company. For, if danger or peril exists in the performance of a service, it becomes obvious *first* to the employee, and frequently arises suddenly and unexpectedly, and he is under no obligation to the railroad company to incur it. Nor is the railroad company under a legal obligation to be ever present with its employee, and to exercise for him that good judgment and common sense in avoiding hazard while performing service, which he assumed to have in accepting employment in a service which he knew to be accompanied with much danger, and liable to various accidents. The railroad company necessarily sees through the eyes of its employees, and a proper performance of its service and duties is dependent upon their eyes, good sense and judgment. Whether machinery, ways and appliances are sound or defective depends upon the knowledge and skill of its officers and employees, upon whom there must rest an obligation to make known and have remedied such defects when discovered, as well as to inspect them before and during use for the security of themselves as well as those using them; when once placed in the hands and under the control of an employee, it is through his eyes, above all others, that the company must rely for the detection of defects, and from whom information of the same should be obtained.

Nor do I understand that it is within the purview of the statute, either by expression or intendment, to abrogate the doctrine of assumption of risk—*volenti non fit injuria*—from

the nature of the employer corporation, it is compelled to operate through and depend upon its officers and employees; each employee becomes a vice-principal as to the service under his absolute control; and if defects exist in the machinery entrusted to him, or become apparent thereafter, it is his duty to his employer, as well as to himself, to make it known and to use his best offices to have them remedied: his *failure* to give information of such defects leads the employer to assume that none exist, to the great hazard of its property and service. But should he continue in the use of such, knowing the defects, and failing to give the employer an opportunity of making the remedy, then he does so knowingly and willingly, and must be considered to have undertaken to run the risks incident thereto.

Defendant company exhibited to the Court, as a part of the case on appeal, a photograph of the engine and tender upon which the accident occurred. It appears therefrom, as explained by the evidence recited in the record (the tender when backing being in front, I shall speak of the rear end of the tender as the "front"), that there was a platform upon the "front" of the tender, six inches wide, extending the width of the tender across the railroad track, and being about a foot or sixteen inches from the ground or sills upon the track. This was a safe place for plaintiff, and was provided with a hand-hold; but it was not a comfortable place to stay and signal the engineer, as he would have to stoop over to see him, or by peeping around the corner. Above this platform, or step, was a tool-box, and, with the lid shut down, was about two feet wide, and was a safe place to stand, and perfectly convenient in signalling the engineer. The way provided for getting up on this tool-box was a step on the *side* of the tender, about two feet four inches from the ground; there was no grab-iron there on the tender, and it was on that corner of the tender where the drain-pipe extended out.

The drain-pipe was not used for, and was known to be unfit to be used as, a grab-iron; but plaintiff *had* used the one on the opposite side three hundred times, and this one not so often—two or three times—and had never examined it to see if it was sound or securely fastened, but, if it were, it would hold 1,000 pounds.

Plaintiff, when injured, was not getting upon the tool-box from the *side* of the tender, where the grab-iron should have been for that purpose, but was getting up from the platform (provided for his use, and in "front" of the tender) upon the tool-box, and in doing so used for his support the drain-pipe, which broke out, and he fell backwards upon the track in "front" of the moving tender, and was injured before he could get outside of the rails by one of the wheels running over his arm and otherwise doing him harm. Plaintiff was the yard conductor, having under his control the engineer and another employee. He was experienced in the railroad service, and for over two years had occupied the same position, and well knew the safe and unsafe methods of performing his service.

Now, then, with this understanding of the statute, and the burden of plaintiff's case resting upon the fact that there was no grab-iron on the *side* of the tender, and that his injury resulted from the *lack* of such at *that* place, I shall briefly consider what I take to be the *main* question presented in this case:

Was defendant company negligent in not putting a grab-iron on the side of the tender before delivering the engine and tender to plaintiff for his use in its service?

Plaintiff says his injuries resulted from the breaking of a defective drain-pipe (used as a substitute for the grab-iron) while he was undertaking to mount upon the tool-box. He was not mounting from the *side* of the tender where the grab-iron was necessary for that purpose, for had he chosen that

mode, which was the proper one, and used the drain-pipe and fallen, his fall would have been *outside* of the track, and the wheels could not have injured him. But he was mounting from the platform (or step) in "front," with his back to the middle of the track, and undertaking to get upon the tool-box from *that* direction, and in doing so used the drain-pipe for his support, which broke out and he fell in "front" in the middle of the track, and was injured by the moving train before he could get out of the track. Had he undertaken to mount from the *side* of the tender, this injury could not have occurred; but having undertaken to mount from the "front," from which position no appliances were *required* to be fixed for mounting, and in a way not contemplated or suggested by the structure of the machine or the provisions made, his injuries did not result from the neglect of the defendant in failing to put grab-irons on the engine, and I think his Honor erred in not instructing the jury as prayed by defendant, "that upon the whole evidence, taken in the light most favorable to the plaintiff, there is no sufficient evidence to go to the jury of any defective appliance, so far as the want of a grab-iron is concerned, except that of which the plaintiff accepted the risk of continuing in the service of the defendant after full knowledge of such defect," to which defendant excepted and assigned as error.

When this case was last before the Court (128 N. C., 534), I simply entered my dissent, because the opinion of the Court was filed so late that I did not have time thereafter to complete my opinion, which I was preparing, and was unwilling to delay the case on that account. And now, again, I find myself, in the press of other business before the Court, similarly situated.

MONTGOMERY, J., dissenting. I can not concur in the opinion of the Court. It can serve no useful purpose for me to write anything further in the matter, and I content my-

self with the dissent entered by me in the case on its first trial and reported in 128 N. C., 534.

YOUNG v. TOWN OF HENDERSONVILLE.

(Filed December 20, 1901.)

1. ELECTIONS—*Judges of Election—Voters—Qualified—Acts (Private) 1901, Ch. 122.*

Under Acts (Private) 1901, Ch. 122, the judges of election can not decide upon the number of qualified voters or declare the result of the election.

2. ELECTIONS—*Registration Books—Voters—Qualified.*

The names on the registration book are *prima facie* qualified voters, but without other support it is not sufficient to overcome the evidence of the legal declaration of the persons authorized to declare the result of an election.

3. INJUNCTION—*Taxation—Elections.*

The injunction to restrain the collection of the tax complained of in this case was properly refused.

DOUGLAS, J., dissenting.

FURCHES, C. J. I think the injunction should have been continued to the hearing.

ACTION by C. C. Young and others against the Town of Hendersonville, heard by Judge *M. H. Justice,* at Chambers, at Columbus, July 3, 1901. From an order refusing an injunction, the plaintiffs appealed.

Shepherd & Shepherd, for the plaintiffs.
Busbee & Busbee, for the defendant.

MONTGOMERY, J. The General Assembly, at its session of 1901, Private Acts, Chap. 122, empowered the Board of Commissioners of the town of Hendersonville, to submit to the qualified voters of that town the question whether or not a special tax should be levied annually for graded school purposes to supplement the public school fund, the election to be held "under the rules and regulations governing municipal elections in said town." The election was held on July 3, 1901; and there being but one polling-place in the town, the judges of election declared the result of the election giving the number of the votes for the special tax and the number against it, and that a majority of the qualified voters had not voted for the tax. And they made a report to the Board of Commissioners of the town of the number of votes cast for and against the tax, and the number of the qualified voters of the town. Afterwards, on the 1st day of August, 1901, the Board of Commissioners of the town, receiving the number of votes cast for and against the tax set out in the report of the judges of election as correct and true, went into an examination of the registration book in order to ascertain the number of the qualified voters on the day of the election. Upon that examination they took proof, and found that 35 names on the registration book had ceased to be qualified voters because of removals and death. They eliminated those 35 names from the registration book, with the result that the number of votes cast for the special tax was a majority of the qualified voters of the town, and they so held and declared. At the same time, the Board of Commissioners levied a special tax upon the property and polls of the town, and placed the same in the hands of a collector.

The plaintiffs, who are citizens and tax-payers of the town, brought this action against the defendants, the Board of Commissioners, for the purpose of having the action of the defendants declared void, and to have them enjoined from

collecting the taxes, claiming the declaration of the judges of election to be the true result. Upon the motion for an injunction by the plaintiffs to restrain the defendants from collecting the taxes, the matter was heard upon the complaint and answer, treated as affidavits, and other affidavits on both sides, and the injunction was refused and a former restraining order in the case vacated.

His Honor held that the declaration of the vote by the judges of election and their report of the same made out a *prima facie* case for the plaintiffs, that is, that the election was against the levying of the special tax, but that, as the defendants had shown by their answer and affidavits that 35 of the names on the register of voters were not qualified voters at the time of the election, and that as the plaintiffs did not deny or dispute that fact, under the decision of *Riggsbee v. Durham*, 99 N. C., 341, the *prima facie* case of the correctness of the declaration and the return of the votes by the judges of election had been overcome, and that he, in chambers, upon the hearing of the injunction, could find that fact upon the evidence and declare the result. We think the order refusing the injunction and vacating the restraining order theretofore granted was correct, but that the true ground therefor was another one than that given by his Honor.

We think that it was no part of the duty of the judges of election to decide upon the number of qualified voters, but that it was their duty, simply, to declare the number of votes cast for and against the special tax, and report that vote to the Board of Commissioners. In the case of *Smallwood v. City of New Bern*, 90 N. C., 36, the Mayor and Council were charged with the duty of submitting a similar proposition to the one in this case to the qualified voters of that city. The statute authorizing the submitting of the proposition was in these words: "The Mayor and Council of the city of New Bern are authorized and required to submit to the

qualified voters of said city, at the next regular meeting of Councilmen, and under the rules and regulations governing said election, whether an annual assessment shall be levied therein for the support of one or more graded schools in said city." The language there is substantially the same as that of the act which authorized the submitting of the proposition to the qualified voters of Hendersonville. The Court said there, they (the Board of Commissioners) had to act upon the result, if a majority of the votes should be cast in the affirmative. They were disinterested—had no personal interest to subserve not common to every other citizen. They might well and reasonably be charged with a service germane to their official relations to the city. They were required to *submit* the proposition. How and to what extent? When was the submission to be complete? And how was it to be completed? Certainly not until the vote should be completely taken by them "under the rules and regulations governing said (the ordinary city) election." This latter clause can not be construed to mean literally "under the rules and regulations governing" the city election. It means, and must mean in the nature of the matter, only that such rules and regulations as apply, and as far as they needfully apply, in taking the vote. The Mayor and Council were to submit the proposition, that is, superintend, direct, supervise the vote upon it from the beginning to the end of taking and ascertaining the result of it, employing the ordinary machinery of the regular election as far as the same might be applicable. The decision in that case seems decisive of the one before us.

His Honor had before him the action of the Board of Commissioners of the town—their investigation and examination as to how many qualified voters there were on the day of election, the declaration of the result, and that a majority of that vote had been cast for the special election on the one

side, and the declaration of the judges of election and their report, and the number of names on the registration book, on the other side. The names on the registration book were *prima facie* voters, but without other support it is not sufficient to overcome the evidence of the legal declaration of the persons authorized to declare the result of the election that a different number was the true one. It was the duty, as we have seen, of the Board of Commissioners to ascertain the whole number of the qualified voters of the town, and therefore their declaration as to the number was better and higher evidence *prima facie* in that respect than registration books. The register was corrected by the Board, and the registration book alone was not evidence sufficient to rebut the presumption of the Board's declaration of the true number of qualified voters. *Riggsbee v. Durham, supra.*

The injunction, therefore, should not have been granted for the reasons stated above. Of course the declaration of the result of the vote is not final. It may be attacked in the Courts directly for fraud or mistake, and the true vote, if there was fraud or mistake in the declaration of the result by the Commissioners, ascertained and declared by the Court. But, until that is done, the declaration of the Board of the result is conclusive. *Smallwood v. New Bern* and *Riggsbee v. Durham, supra.* That is the main object of this action. The injunction prayed for in the meantime the plaintiffs were not entitled to, for the reasons we have given. The plaintiffs' whole alleged equity is denied, and it appears from the answer and affidavits that their case was fully met at all points.

Affirmed.

DOUGLAS, J., dissents.

FURCHES, C. J. I think the injunction should have been continued to the hearing.

LOVICK v. ATLANTIC COAST LINE RAILROAD CO.

(Filed December 20, 1901.)

1. EVIDENCE—*Sufficiency—Agency—Ultra Vires—Railroads—False Imprisonment—Illegal Arrest.*

   There is sufficient evidence in this case to be submitted to the jury on the question whether the general manager, counsel and agent of the defendant company were acting in the scope of their authority in advising the arrest of the plaintiff.

2. WITNESSES—*Appearance Bond—Justices of the Peace.*

   A justice of the peace is not authorized to put a witness under bond to appear at a subsequent trial before a justice.

3. FALSE IMPRISONMENT—*Justice of the Peace—Judicial Acts.*

   A justice of the peace, together with those advising him, who order a witness to give a bond to appear before a justice, thereby become trespassers.

4. DAMAGES—*Actual—Punitive—Malice—False Imprisonment.*

   A person in an action for damages for false imprisonment can recover only actual damages, including injury to feelings and mental suffering, and is not entitled to punitive damages unless the arrest was accompanied with malice, gross negligence, insult or other aggravating circumstances.

5. FALSE IMPRISONMENT—*Illegal Arrest.*

   To be illegally restrained of one's liberty for any period of time constitutes false imprisonment.

6. PRINCIPAL AND AGENT—*Liability of Principal for Acts of Agent.*

   A railroad is liable for the acts of its agents done in the scope of their authority.

CLARK, J., and FURCHES, C. J., dissenting.

LOVICK *v.* RAILROAD.

ACTION by George A. Lovick against the Atlantic Coast Line Railroad Company, heard by Judge *Fred. Moore* and a jury, at May Term, 1901, of the Superior Court of CUMBERLAND County.

This action was brought to recover damages against defendant company on account of the alleged illegal arrest and imprisonment of plaintiff caused by defendant company through its manager, agents and attorneys. Defendant company denied that it authorized said arrest or imprisonment through its manager, agents and attorneys, and denied that it took any part in the matter, or gave any instructions about it, or assumed any responsibility for the same. Upon the trial, the jury found the issues in favor of the plaintiff, and defendant appealed.

The circumstances under which plaintiff was arrested, and facts appearing from the evidence are, substantially, that on November 10, 1900, defendant company's passenger train was wrecked near Hope Mills, about two hundred yards from plaintiff's house. The engineer was killed, the fireman and many others seriously injured, the engine demolished and some of the cars torn to pieces. It occurred about midday, and was caused by the placing of a spike on one of the rails. Plaintiff was not at home, but at a house near by, when the wreck occurred, and went to it ten minutes afterwards. He then went to his house, and, after getting his dinner, he and one Tart, who had been boarding with him about two weeks, went out of the house together, and Tart told him that he (Tart) put the spike on the track. After walking about twenty-five yards, and about two minutes after Tart told him of his act, they separated, and Tart went in the direction of Rockfish (a creek); he then told his wife and wife's mother, who was at his house, about this, and then went in pursuit of officers to inform them of what had been told him. After talking to several persons about it, he went to defendant com-

pany's depot and told Campbell, defendant's agent, about it, and he reported it to the train dispatcher. While with Campbell, Monaghan, a Deputy Sheriff, came in and arrested him, and carried him over the woods looking for Tart. After returning, Monaghan put him in custody of Johnson. He was taken into the depot, and they had him to swear out a warrant before Cashwell, a Justice of the Peace, against Tart, which had been prepared by Pope. After Cashwell issued the warrant, Geo. M. Rose made a motion that the State's witness, the plaintiff, should be put under bond. Cashwell then required plaintiff to give a $500 justified bond for his appearance on Monday as a State's witness. Rose, attorney of defendant, or Kenly, general manager of defendant, were present. In the presence of the Justice, Rose and Kenly, Pope, attorney for defendant, said he wanted to know what they were going to do with him, and Rose and Kenly said they would have to bring him on to town with them; then Monaghan, the Deputy Sheriff, put him in the custody of Faircloth, town policeman. He was kept under arrest five days and nights. On Saturday night, Monaghan told him he was arrested as a State witness for safe keeping. Tart was not arrested; no trial was had; plaintiff was not charged with any crime; there was no trial or hearing, nor was he sworn as a witness. Afterwards, the plaintiff was discharged by Faircloth upon giving bond for $100, drawn by Rose, the amount of which was not authorized by the Justice to be reduced.

Upon the conclusion of the evidence, defendant's attorney asked the Court to give eleven special instructions, eight of which were refused upon exception, and are as follows:

"1. A principal can not be held liable for the acts of an agent unless the agent acts within the scope of his authority, and in this case the defendant can not be held liable for the arrest of the plaintiff, made by the verbal direction of Mr.

Pope, because there is no evidence that Mr. Pope was authorized by defendant to do this act, and that the act was within the scope of his authority.

"4. That defendant is not liable for the mistake or error, if such there be, of the committing magistrate acting in his judicial capacity, and if the jury should believe that the plaintiff was put under bond for his appearance at a future day by the Justice acting as a judicial officer, that neither he nor the defendant would be liable unless his error was wilfully made and unlawfully procured by defendant.

"5. If the jury believe from the evidence that a felony had been committed, and the plaintiff had taken out a warrant charging such felony, it was the duty of the magistrate to hold the plaintiff under bond as a witness for the State, if he believed that the proofs and facts before him made it probable that the plaintiff would not appear as such witness at the hearing.

"6. If the jury believe from the evidence that a passenger train on defendant's road had been wrecked as described by the witnesses, and a felony committed, and death ensued from such wrecking, it was the duty of the defendant, as a good citizen, to pursue all lawful remedies to arrest the felon, and in so doing it was not a violation of the law for it to hold a person who had declared his knowledge of the facts until a legal investigation could be had.

"7. If the jury believe the evidence, the defendant is not responsible for anything that took place after the warrant had been issued, and the matter acted upon by the Justice in his judicial capacity, and a mere fact that an attorney of the company, or an officer thereof, asked the Court, sitting as a Court, to hold the plaintiff upon a bond, does not render the defendant liable therefor, or for any of the other acts of the public officers in their official capacity, and they should answer the first issue 'No.'

"8. If the jury find from the evidence as testified to by the Justice that after Monday morning, November 12, he held the plaintiff as a State's witness upon the telegram from the Solicitor, and not upon his former order, that then in no event could defendant be held responsible for the acts of public officers after that time." (The Court gave this instruction, striking out the words "as testified to by the Justice," and defendant excepted to the striking out of said words.)

"10. If the jury believe from the evidence in this case that the arrest of the plaintiff was unlawful, there is no evidence of any injury or mental suffering or insult accompanying the arrest, and plaintiff is not entitled to punitive damages, and can only recover such actual damages as he has proved.

"11. If the jury believe from the evidence that defendant acting in good faith for the protection of the lives of its passengers and property, made a mistake in asking the officer to hold the plaintiff as a witness, and this mistake was an honest one, and the holding was not accompanied by fraud or malice toward the plaintiff, that then he would not be entitled to any damages except nominal damages."

At the request of plaintiff's attorney, his Honor gave the following special instructions, to which defendant excepted:

"1. In order to constitute an arrest, it is not necessary that plaintiff be actually imprisoned, that is, put in jail; but if he be placed in custody, restrained of his liberty for any though least period of time, then he is imprisoned, and if such restraint is without authority or warrant of law, then he is falsely imprisoned and illegally restrained.

"3. That the agent Campbell and the general manager Kenly, and attorneys for the defendant, Rose and Pope, were the agents and servants of defendant, and the latter is

responsible for the acts of its agents done in the exercise of the authority conferred upon them.

"5. It is no defense to the corporation that the acts complained of were *ultra vires,* for it matters not how much in excess of its authority the wrongful act may be, if such act has been done by the agent or attorney, while acting within the scope of his authority, either express or implied.

"8. There is no authority in law, under section 1154 of The Code, or otherwise, to restrain the plaintiff of his liberty, nor is the telegram of the Solicitor authority to arrest or detain the plaintiff."

From judgment for the plaintiff, the defendant appealed.

N. A. Sinclair, and *R. C. Lawrence,* for the plaintiff.
Geo. M. Rose, for the defendant.

COOK, J., after stating the case. In its defense, defendant company contends that there is *no* evidence to show that the arrest, in the first instance, or the imprisonment under the order of Cashwell, the Justice, was authorized by it, through anyone whomsoever. And if its agents were present and did participate in the arrest and imprisonment, there is no evidence that they acted within the scope of their authority, and thereupon asked the Court to give the special instruction No. 1. In view of all the testimony set out in the record, we think his Honor properly refused to give said instruction. The evidence shows that Kenly, the general manager, Campbell, the local agent, and two of defendant's attorneys, were present at the depot, only a few hundred yards from the wreck, and that Pope was one of the attorneys. On account of the great destruction of the company's property, interference with its business, killing its engineer and injuring others of its servants and passengers, it was deeply interested in apprehending the criminal; and being only a legal entity and having to perform all of its duties and busi-

ness through agents, one of which duties being that of protecting its passengers while on its train and safely carrying them to their destinations, which casts upon them a burden, in common with other good citizens, of disarming those evilly disposed to its property and traffic by arresting and bringing them to trial and having them justly punished, we think the conduct and acts of its agents, attorneys and officers upon that occasion was some evidence that they were acting within the scope of their authority. The single act of Pope, disconnected from the acts and conduct of his fellow attorney and general manager and local agent, and from the wreck, would not have been any evidence that he was acting within the scope of his authority as attorney. But taken in connection with that of Campbell, the local agent, to whom plaintiff told Tart's confession, and his repeating the same to the train dispatcher, the arrest taking place in his warehouse within thirty-five or forty minutes, his sending for the Justice, Cashwell, and what followed, we think it was clearly some evidence to be submitted to the jury for their consideration in determining whether the general manager, agent and attorneys were acting within the scope of their authority. *Hussey v. Railroad,* 98 N. C., 34; *Daniel v. Railroad,* 117 N. C., 592; and that his Honor ought not to have given the same.

There was no charge or suggestion that plaintiff was guilty of the crime of wrecking the train. His only connection with the matter was, that he sought to communicate to officers of the law and defendant's agents that Tart had told him that he (Tart) had put the spike on the track which caused the wreck. Having done so, he was arrested without warrant and carried under arrest through the woods looking for Tart. Failing to find Tart, upon his return he was called upon to make an affidavit and apply for a warrant against Tart, which had been prepared by Pope, who was an attorney of defendant company. As soon as it was issued, he was, on

motion of Rose, another attorney, made in the presence of Kenly the manager and Pope, required to give a bond in the sum of $500 for his appearance the following Monday before the Justice who issued the warrant, and in default thereof was kept in custody.

There is no law which warrants such a proceeding. There is no statute which authorizes a Justice of the Peace or magistrate to require of a *witness* to give bond for his appearance before such Justice or magistrate. The only provision for requiring a *witness* to give bond is when upon the examination of a matter wherein a person is accused of an offense and it shall appear that an offense has been committed, and there is probable cause to believe the *prisoner* to be guilty thereof, the magistrate shall bind over or commit such prisoner, and shall bind by recognizance the prosecutor and all the material witnesses against such *prisoner* to appear and testify at the *next term of the Court* having jurisdiction. Code, sec. 1152. And if such magistrate shall be satisfied by proof that there is good reason to believe that any such witness will not fulfill the conditions of such recognizance *unless* security be required, he may order such witness to enter into a recognizance with such sureties as may secure his appearance. Code, sec. 154. If any witness so required to enter into a recognizance shall refuse to comply with such order, it shall be the duty of the magistrate to commit him to prison. Code, sec. 1155.

In this case the person charged with the offense had not been taken. So there was no examination; there could be no examination in the absence of the person charged; in fact, the record shows that none was attempted; upon the issuing of the warrant, on motion, the Justice required the bond to be given conditioned upon his (plaintiff's) appearance on the following Monday before said Justice. Having issued the warrant against Tart, it properly belonged in the

hands of the Sheriff or constable. Tart not having been arrested, there was nothing before the Justice over which he had jurisdiction—neither subject-matter nor person. It therefore follows that he was not acting in his judicial capacity, and his order had no legal force. He, together with those encouraging and advising him, was a trespasser. Newell on Malic. Pros., pages 89, 90; *People v. Liscomb,* 60 N. Y., 559, 19 Am. Rep., 211; *Bigelow v. Stearnes,* 19 Johns (N. Y.), 39, 10 Am. Dec., 189. Wherefore, his Honor properly refused instructions Nos. 4, 5, 6 and 7.

The exception to his Honor's striking out the words "as testified to by the Justice," in giving instruction No. 8, is without merit. So, this brings us to the investigation of instructions 10 and 11, refused by the Court, relating to the damages, and we find no error in his refusal. There was evidence of injury to plaintiff on account of his arrest and imprisonment. He was restrained of his liberty and deprived of the comforts of his family—wife and two children under five years of age, and during the five days he was under arrest, they needed him for lack of something to eat, for lack of wood and for lack of attention in sickness. And his Honor did instruct the jury in the latter part of his charge "that in no event could they find that plaintiff was entitled to recover punitive damages." But he instructed them, as requested by defendant in its ninth prayer, that plaintiff could "only recover actual damages, including injury to feelings and mental sufferings, and is not entitled to punitive damages unless the arrest was accompanied with malice, gross negligence, insult or other aggravating circumstances." *Lewis v. Klegg,* 120 N. C., 292; *Neal v. Joyner,* 89 N. C., 287.

We are unable to discover any error in giving the special instructions asked for by plaintiff. They seem to have been prepared in conformity to well-considered rulings made by

this and other Courts. The first is supported by *State v. Buxton,* 102 N. C., 129, and cases there cited; the third and fifth by *Cook v. Railroad,* 128 N. C., 336; *Strother v. Railroad,* 123 N. C., 197; *Fogg v. Railroad,* 148 Mass., 514; 12 Am. St. Rep., 583; *Wells v. Market Co.,* 19 D. C., 385; *Penn Co. v. Weddle,* 100 Ind., 138; 14 Howard (55 N. S.), 468; *Hussey v. Railroad,* 98 N. C., 34; 12 Am. and Eng. Enc. (2d Ed.), 725, and cases there cited; and the eighth is covered by what we have hereinbefore said and authorities cited.

There is no Error.

FURCHES, C. J., dissenting. While it appears that the plaintiff has been badly treated, and is entitled to damages for the unlawful arrest and detention, I see no evidence that makes the defendant railroad liable therefor. To do this it was necessary to show that the railroad caused the arrest to be made. This, in my opinion, has not been shown by any evidence authorizing such finding. There is no evidence that Kenly, Campbell, Pope or Rose were authorized to make or cause the arrest of the plaintiff, nor that it was within the scope of their general powers. But if there was evidence showing any such authority from the road, there is no evidence showing that either one of them made the arrest or caused it to be made. "After talking to several persons about it, he went to defendant company's depot and told Campbell, defendant's agent, about it, and he reported it to the train dispatcher. While with Campbell, Monaghan, a Deputy Sheriff, came in and arrested him and carried him over the woods looking for Tart. After returning, Monaghan put him in the custody of Johnson. He was taken into the depot, and they had him to swear out a warrant before Cashwell, a Justice of the Peace, against Tart, which had been prepared by Pope. After Cashwell issued the warrant, Geo. M. Rose made a motion that the State's witness,

the plaintiff, should be put under bond. Cashwell then required plaintiff to give a $500 justified bond for his appearance on Monday as a State's witness. Rose, attorney of defendant, and Kenly, general manager of defendant, were present."

The above-quoted statement of facts is taken from the opinion of the Court, and I respectfully submit that it does not show that the defendant arrested the plaintiff, or caused his arrest. It does not show that the plaintiff was arrested by Campbell, Kenly, Pope or Rose, the alleged agents and attorneys of defendant, nor that they advised or encouraged his arrest. It is true that Campbell was present when the arrest was made by the Deputy Sheriff, but it does not appear that he said one word. It can not be that the defendant is liable for Campbell's presence when the plaintiff was arrested, nor for going with the plaintiff to the Justice of the Peace when he swore out the warrant. Nor can the defendant be liable for Pope's writing a warrant against Tart.

To hold the defendant liable for the acts of Kenly, Campbell, Pope or Rose, they must have been defendant's agents with a general or special authority to do the act. *Redditt v. Mfg. Co.*, 104 N. C., 100. But in this case the plaintiff failed to show that the defendant's agent made the arrest, or caused it to be made.

It certainly can not be that the defendant is liable for the acts of Cashwell, while acting as Justice of the Peace, however erroneous they may have been. Nor can it be that the defendant is liable for the motion Rose made in asking the Justice to hold the plaintiff to bail for his appearance as a witness, whether the motion was a proper one or not. If this could be done, but few parties in Court would be safe. *Moore v. Cohen*, 128 N. C., 345.

I think the defendant was entitled to the first and fourth

prayers for instruction, and it was error to refuse to give them.

CLARK, J., concurs in the dissenting opinion.

HUYETT-SMITH MANUFACTURING CO. v. GRAY.

(Filed December 20, 1901.)

CONTRACTS—*Sale—Machinery—Warranty—Issue.*

Where a party bought machinery and used it for a long time and when sued for the purchase-price, sets up a breach of warranty, the only issue to submit is one as to the val of the machinery when delivered.

ACTION by Huyett-Smith Manufacturing Company against Ralph Gray and Ira Gray, administrators of S. H. Gray, heard by Judge *A. L. Coble* and a jury, at Fall Term, 1900, of the Superior Court of CRAVEN County. From a judgment for the defendants, the plaintiff appealed.

W. D. McIver, for the plaintiff.
Simmons & Ward, and *W. W. Clark,* for the defendants.

CLARK, J. This action began 20th January, 1890, to recover possession of a "dry-kiln hot-blast apparatus" which plaintiff sold to defendant for the price of $2,337, title retained till purchase-money paid, and on which only $400 has been paid. The case has been pending ever since, and four opinions therein have been heretofore written in this Court. In the meantime, the defendant has gone on using the machine, and the evidence in the last trial below is that the machinery is now only a lot of scrap-iron worth $100. That, and the bill of costs (which doubtless is much more than

$100) and the replevin bond alone remain. The original defendant is dead, and is now represented by his administrator.

It is necessary to review the former decisions herein. In 111 N. C., 87 (1892), in plaintiff's appeal, it was held that the plaintiff was entitled to recover possession and damages for use and deterioration during detention by defendant, and that it was error to exclude evidence to show such damages. That was the only error declared, as in the defendant's appeal, same volume, pages 92, 93, it was held that there was no error in excluding defendant's counter-claim for cost of house he had built to shelter the machinery. This issue of damages for deterioration has been found in both trials since, and the deterioration assessed at $1,400, which, as the value of the property when bought is assessed at $1,500, bears out the above evidence of the "remains" being worth $100. It has now become a useless issue, as delivery in specie is no longer possible.

When the case was here again, 124 N. C., 322 (1899), the jury found that the difference between the value of the machine sent and what it would have been worth if it had come up to contract, was $2,000. As $400 had been paid on the $2,337 purchase price, leaving $1,937 unpaid, the Judge gave judgment for $63 in favor of defendant, who retained the machinery, which he had used for years. This was putting the worth of the machinery when bought at $337, though on another issue the jury found it had depreciated in value $1,400 since bought, the evidence for the defense being that at the time of the purchase it was worth $1,500. The Court held that the second issue should have been "the difference between the value of the machinery when delivered and the contract price." The Court had already said the same on the defendant's appeal, 111 N. C., 92, that this should be the abatement of the purchase price for breach of warranty.

On this basis the defendant would be liable for $1,500, less payment $400, *i. e.*, $1,100 and interest, which is evidently, upon the evidence and all the findings, the just result, if defendant's evidence is to be believed. If plaintiff's is to be believed, there should be no abatement, and a judgment for the purchase price less payment made of $400.

On a rehearing, 126 N. C., 108 (1900), the Court held that, as an abstract proposition, the defendant could show what such a machine as he had contracted for "could have been bought on the market"—else a buyer would lose the profit of a good bargain if he had bought at less than the market price—but further held that, inasmuch as the defendant in his answer had averred that the value of such a machine as he had contracted for was $2,337, the error in the former decision was not detrimental, and dismissed the petition to rehear, though correcting the abstract proposition of law to conform to *Marsh v. McPherson,* 105 U. S., 709.

When the case went back, the Judge below allowed the defendant to amend his answer to allege that such a machine as he had contracted for would have been worth $3,500. The jury evidently so found, as they assessed defendant's damages at $2,000, assessing $1,400 again as the deterioration, and the defendant's evidence being that the "remains" were worth $100, *i. e.*, that the machine was worth $1,500 when bought, on which only $400 had been paid, but that the machine such as he had contracted for would have been worth $3,500. Deducting $2,000,abatement for breach of warranty, from the balance of $1,937 due on the purchase-money, the defendant again recovered $63 and costs, besides the free use of the machinery till worn out, and even keeps $100 of scrap iron still left.

But it appeared from defendant's evidence that there is no dry-kiln in the market that would "dry 25,000 feet of North Carolina green sap-pine, with 80-horse power boiler

and 60 pound pressure." The defendant thereupon asked the following instruction, which should have been given: "If the jury find that there was no apparatus on the market which had the capacity claimed for that in question, then what its value was would be speculative and not a fair basis to estimate the damages; and in that case, the measure of damages would be the difference in value between the apparatus as delivered and the contract price."

In effect, under the ruling in our previous decisions, the issue should be only one—simply, what was the value of the machinery when delivered? The defendant having accepted and used the machinery, is, upon the evidence as heretofore uniformly given in his behalf, entitled to damages for breach of warranty by abating the purchase-price down to the real value of the machinery when delivered, if the jury find there was a breach of warranty. The plaintiff's evidence has been that it was worth $2,337; the defendant's that it was worth $1,500. Whatever the jury find that it was, the agreed amount of payment—$400—should be deducted, and the plaintiff is entitled to a judgment for the difference, with interest and costs. Any other result would be a miscarriage of justice. The defendant is not entitled to speculative damages for an ideal machine which was not on the market in 1889, and which, by his own evidence, is not on the market now. It could therefore have no market value. As the claim-and-delivery remedy is now out of the question, the issue as to deterioration has become useless. The above measure of damages has been laid down by us in all the previous decisions in this case, and the case must have gone off upon them but for the amendment allowing defendant to charge that he had contracted to buy a new machine worth $3,500 of the manufacturers for $2,337. This was an ideal valuation, as there was no such machine, and no market value for it. This his own evidence has established by showing that no machine

of that description was then, or is now, made. If defendant insists on his damages being assessed in a separate issue, the Court should give the above instruction if there is evidence to that purport.

If the jury find that the machine did not come up to the warranty, the defendant should pay for the real value at the time of purchase of the machine he bought, used and wore out, and if it is less than the contract price, it is for the jury to assess its value at date of purchase, and the Court should deduct the admitted payment, and, as already said, render judgment for the balance, with interest from date when purchase-money was due—without, of course, the attorney's fee of ten per cent stipulated for in the contract (*Turner v. Boger,* 126 N. C., 300, and cases cited), and for costs.

Error.

SULLIVAN v. JONES.

(Filed December 20, 1901.)

1. WILLS—*Construction.*

Where a testator in one clause of his will "leaves" land to his widow, in another "loans" personal property to her, and in a later clause gives all the property "loaned" to the widow to his daughters, this latter clause will be construed to cover the land and the personal property.

2. WILLS—*Construction.*

Where property is left to daughters after death of widow of intestate and the widow dies before the daughters, the children and grandchildren of the only daughter leaving heirs are entitled to the whole property, under the following clause of the will: "Should either of my daughters die intestate, leaving no issue, my will is that the others inherit to the exclusion of my sons."

SULLIVAN *v.* JONES.

ACTION by Henry Sullivan and others against James Jones and others, heard by Judge *Frederick Moore,* at December Term, 1900, of the Superior Court of DUPLIN County. From a judgment for the plaintiffs, the defendants appealed

A. D. Ward, and *J. A. Gavin,* for the plaintiffs.

W. R. Allen, and *Stevens, Beasley & Weeks,* for the defendants.

MONTGOMERY, J. The testator, in the second clause of his will, devised to his widow, during her widowhood, a tract of land, and in the fourth clause bequeathed to her a like interest in his personal property. As words of conveyancing he used that of "leave" in reference to the land, and "loan" in reference to the personal property, as follows: "Second, I leave to my beloved wife, Sallie, during widowhood, the following property, to-wit, all the lands I now possess (not otherwise disposed of). Fourth, I loan to my beloved wife, Sallie, during her widowhood, all the other property I may die seized or possessed of, consisting of horses and cattle and stock and furniture and farming tools of all kinds."

The fifth clause of the will is in these words: "In the event of my widow's marriage, my will and desire then is, that all of the above-mentioned property loaned to her during her widowhood be sold on a credit of six months, and the proceeds be equally divided between my five daughters, to-wit, Susan, Fanny, Sally, Kitty and Zilpha. Should either of my daughters die intestate leaving no issue, my will and desire is that the others inherit to the exclusion of my sons."

The widow died in 1870, not having married, and afterwards the daughters died intestate and without issue, except Fanny, who married, and whose children and grandchildren are the defendants in this proceeding, and claim the land as her heirs-at-law. The plaintiffs are one of the sons of the

testator and the children of the other sons who are dead, and this proceeding was originally one for the partition of the devised tract of land, the plaintiffs alleging that they were tenants in common with the defendants.

The plaintiffs contend that under the will the five daughters took no interest in the real estate whatever. If we should give the very strictest and most literal meaning of the words "all of the above-mentioned property *loaned* to her during her widowhood," and which is the estate given to the daughters in the fifth clause of the will, it might be plausibly held that reference was made by the testator to the personal property only, as to the rights of the daughters. But we are disposed to give those words, as did his Honor below, a broader significance, and to hold that they are full enough to embrace the real estate also, mentioned in the second clause of the will.

That being settled, what was the nature of the estate of the daughters in the tract of land? One in remainder after the life estate of the widow. The interest of each daughter, however, was defeasible upon the death of either intestate or without issue.

The real question in the case for decision, then, is, when did the limitation end—the interest of each become absolute?

His Honor, upon the finding of the facts, a jury trial having been waived, was of the opinion that the five daughters took each a one-fifth undivided interest in the land under the will of James Sullivan, and that upon the death of the daughters without issue, the share of each descended to the surviving brothers and sisters, or to the representatives of them, by operation of the statute of descents, and not to the surviving daughters under the will, and he rendered judgment that the plaintiffs were tenants in common with the defendants, and that the interest of the plaintiffs in the land was 12-20 undivided interest, and the defendants were enti-

tled to 8-20 undivided interest. We are of opinion that there was error in the ruling of his Honor.

There are three words used by the testator in the last sentence of the fifth clause of the will, which forbid the construction his Honor put upon the will in respect to the intention of the testator as to the interest of the daughters in the real estate. These words are, *"intestate," "inherit," "exclusive."* The word "intestate" of course refers to either of his daughters dying without a will affecting the property devised to her in the testator's will; and there could be no disposition by either daughter, by way of will, of property which she was to receive by the testator's will, before his death. So, it must have been the testator's intention to impose the limitation beyond his death. The death of the widow, however, would have put an end to the contingency, and have vested the estate of either of the daughters absolutely, but for the words in the fifth clause of the will, "that the others inherit to the exclusion of my sons." *Buchanan v. Buchanan,* 99 N. C., 308. In the last case, Jarman on Wills is quoted from as follows: "Yet, when there is another point of time to which such dying may be referred, as is obviously the case when the bequest is to take effect in possession at a period subsequent to the testator's decease, the words in question are considered as extending to the event of the legatee dying in the interval between the testator's death and the period of vesting in possession." But we think the intention of the testator, fairly inferable from his language, was, that his sons should have no portion of the lands devised as long as there was a surviving sister or the representative of such.

Probably one view of this point is strengthened by a finding of fact by his Honor that each of the four sons had been advanced, a short while before the testator's death, an amount in real estate equal in point of value to the whole of the land

devised in the will. The law does not favor such disposition of property, but it does not prohibit it; and when the purpose of the testator to make such a disposition appears with reasonable certainty, the law will enforce it. The will was inartificially drawn, and we are not sure that we have apprehended, to a certainty, the testator's purpose. But we think the legal significance of the words "inherit," "intestate," "exclusive," in the connection in which they appear in the fifth clause of the will, justifies us in the conclusion we have reached.

We think the legal effect of that part of the will last considered is the same as if the testator had said, "My will further is that if any, or either, of my daughters should die without leaving a will, or issue living at her death or their deaths, the share or shares of her or them so dying (as well the accruing as the original share) shall be, go over, and remain to the surviving sisters and the child or children of such of them as may be then dead, equally to be divided between them, share and share alike; but the children of any deceased child shall in such case represent their parents respectively, and take in families."

We think, from the facts found, judgment should have been given below for the defendants.

Reversed.

WILSON v. RANKIN.

(Filed December 23, 1901.)

1. RECEIVERS—*Suit Against—Jurisdiction.*

Leave to sue a receiver may be granted at chambers either by the resident judge or the judge holding the courts of the district by assignment or exchange.

2. RECEIVERS—*Jurisdiction—Waiver.*

Failure to secure leave to sue a receiver, if necessary, is cured unless demurred to.

3. JUDGMENT—*Assignment of Errors—Reversal.*

Where the only error assigned is as to an issue of law which the trial judge improperly submitted to the jury and instructed them erroneously thereon, the judgment below should be reversed.

ACTION by Geo. T. Wilson, administrator of W. T. Wilson, against J. E. Rankin, receiver of the Asheville Street Railroad Company, heard by Judge *Frederick Moore* and a jury, at September Term, 1901, of the Superior Court of BUNCOMBE County. From a judgment for the defendant, the plaintiff appealed.

Stevens & Weaver, and *Locke Craige,* for the plaintiff.
F. A. Sondley, and *J. C. Martin,* for the defendant.

CLARK, J. This is an action by the plaintiff, administrator of his infant son, against the defendant as receiver of the Asheville Street Railway Company, to recover damages for the death of his intestate, alleged to have been caused by the negligence of said company while being operated by said receiver. The defendant answered, denying the plaintiff being administrator, denying the appointment of defendant as

receiver and his operation of the road as such, at the time of the accident, and denying that the plaintiff's intestate was killed by the negligence of those operating said street railway. Nine issues were submitted, covering all the controverted points, all of which were answered in favor of the plaintiff, except the third, which was answered, under the direction of the Court, in favor of the defendant, and the plaintiff's damages were assessed at $3,375.

The defendant moved for a new trial for alleged errors appearing on the trial. The plaintiff, on an intimation from the Court, reduced the amount of damages by remitting all in excess of $2,500, and the defendant has made no exceptions and does not appeal. By reason of the finding on the third issue, the Court refused the plaintiff's motion for judgment on the verdict (as amended) for $2,500, and dismissed the action, and the plaintiff appealed.

The third issue was as follows: "Did the plaintiff obtain the permission of this Court to sue the defendant in this action before commencing the same?" The evidence on this point was documentary and uncontradicted, and the Judge found as facts that, immediately before the beginning of this action, in August, 1898, the plaintiff, as administrator, applied to "Hon. Eugene D. Carter, then resident Judge of the Twelfth Judicial District, at his private office," for leave to bring this action against the defendant, and "the said Eugene D. Carter, as Judge, did then and there sign an order" granting the leave asked. The order is regular in form, and was granted upon a motion entitled as of the cause in which the defendant had been appointed receiver. The receiver had been appointed in said cause 1st January, 1897, by the Judge of the Superior Court. On this third issue, upon this evidence, the Court charged the jury as follows:

"The defendant being an officer of the Court, the law required the plaintiff to apply to the Court which appointed

the defendant as receiver and obtain the permission of the Court to sue the defendant in this action. The plaintiff contends that he applied to Eugene D. Carter and obtained the leave. The defendant contends that the leave to bring this action *did not have the legal effect* which the plaintiff contends that it had, and that the plaintiff did not *in a proper manner* obtain the leave of this Court to bring this action, before bringing it. Upon that issue, the third, I charge you that there is no evidence that the plaintiff, before the institution of this action, obtained the permission of the Court to bring it, and you should answer the third issue 'No.'" The plaintiff excepted.

This presents the only point in the case. We were favored with an able discussion, with a wide citation of authorities, on the question whether, if this was not sufficient leave to sue, any leave to sue was necessary. From these citations, it appears that in the United States Courts, the act of Congress of 1887 permits any receiver to be sued without leave, and that in the Courts of our sister States, while it is generally held that leave to sue a receiver should be obtained, and that while in some States it is ruled that the lack of such leave is a jurisdictional defect, in many others it is held that it is not, and that it may be cured, if objection is not made in apt time—among the latter States are New York, Massachusetts, Pennsylvania, Illinois, Indiana, Wisconsin and several others—and the plaintiff claims that the defect, if any in this case, was waived by not demurring. The only authority in our State, *Black v. Gentery*, 119 N. C., 502, so holds. This being merely an action to establish a debt, and not to interfere with the property or management of the receiver, leave to sue was a mere formal matter of course, and its omission, if not demurred to, was certainly cured. Moreover, Judge Greene later granted leave to issue an alias summons, which was itself leave to further prosecute the action.

But aside from that, we are of opinion that leave to sue was granted in this case. The Code, section 336, confers jurisdictions as to injunctions upon "the resident Judge of the district, or the Judge assigned to the district, or holding by exchange the Courts of the district. *Hamilton v. Icard,* 112 N. C., 589. The Code, sec. 379, confers jurisdiction to appoint receivers upon the Judges of the Superior Court having authority to grant restraining orders and injunctions, as prescribed by section 336. The resident Judge being one of those having jurisdiction over receivers, it must follow that he has the incidental powers connected therewith, and could grant the leave to sue by the same authority which confers that power on the Judge holding the Courts of the district in rotation or by exchange. His Honor was right in holding that the application should be "to the Court which appointed the defendant as receiver," but that Court was the Superior Court, not the individual who appointed the defendant receiver in January, 1897, and in the Superior Court, the statute confers as to receivers jurisdiction on the resident Judge as much as upon the Judge assigned to the district or holding the Courts thereof by exchange. It would be very inconvenient ofttimes if this were not so, when during a long vacation the Judges assigned to a district may be at the other end of the State. We do not attach any importance to the heading of the order, the essential thing being that the Judge granted the leave; but it would seem more regular and proper that leave to sue a receiver should be upon motion in the cause in which he is appointed, as was here done, that a record thereof may be kept in that case for reference in passing on a motion to discharge him. No reason or precedent occurs to us why an application for leave to sue should be made at term time, and the fact that either of the Judges named has jurisdiction clearly indicates such orders may be granted at Chambers, like injunctions and like orders.

If this had been an erroneous instruction to the jury upon an issue of fact, a new trial upon this issue would be necessary. But it was a question of fact, and the Judge found the fact, upon documentary and uncontroverted evidence. He submitted an issue of law to the jury. Upon the facts found by him, he should have held as a matter of law that leave to sue had been granted. The instruction to the jury to answer the issue "No," was erroneous, and their response to the issue of law is irrelevant and immaterial.

Upon the findings of the jury on the other eight issues, as to which there is no exception, judgment should have been entered in favor of the plaintiff for the sum of $2,500, with interest from the first day of that term, and costs. The judgment below is set aside, and the case is remanded that judgment may be entered below in conformity to this opinion.

Reversed.

COTTON MILLS v. WEIL.

(Filed December 23, 1901.)

1. ATTACHMENT—*Intervenor—Interpleader—Burden of Proof.*

In attachment the burden is on the intervenor to establish title to the property.

2. BANKS AND BANKING—*Attachment—Agency—Draft—Negotiable Instruments—Collection.*

Where a bank credited to the drawer the amount of a draft, with the right to charge it off if not collected, the bank becomes only an agent for collection.

3. ATTACHMENT—*Order of Publication—Summons.*

In attachment the plaintiff can not recover an amount in excess of that stated in the summons.

4. ATTACHMENT—*Intervenor—Parties—Trial.*

In attachment an intervenor has no right to interfere in the action between the original parties, he being interested only as to title to the property.

5 TRIAL—*Separate—Practice—Judge.*

In attachment a separate trial for the intervenor is discretionary with the trial judge.

ACTION by Alpine Cotton Mills against Weil Brothers and the Bank of Opelika, intervenor, heard by Judge *E. W. Timberlake* and a jury, at May Term, 1901, of the Superior Court of BURKE County. From the judgment, the plaintiff and intervenor bank appealed.

E. J. Justice, and *J. T. Perkins,* for the plaintiff.
Avery & Erwin, and *S. J. Erwin,* for the intervenor.

COOK, J. Weil Brothers shipped to plaintiff fifty bales of cotton, and drew a sight draft upon plaintiff for the value of

the cotton, with bill of lading attached, in favor of appellant, Bank of Opelika.

Weil Brothers and the Bank of Opelika were non-residents of this State, being residents of the State of Alabama, and plaintiff resided at Morganton, in this State. Upon arrival of the cotton in Morganton, and while it was in the possession of the Southern Railway Company, plaintiff instituted an action against Weil Brothers, wherein it claimed that they were liable to it in the sum of $500 on account of damages resulting from a former transaction in the purchase of two hundred bales of cotton, purchased from them, and sued out an attachment against said 50 bales of cotton and caused it to be levied upon the same while in possession of the Southern Railway Company, and caused the summons and warrant of attachment to be served upon said Weil Brothers by publication (as they could not be personally served), wherein they were notified that the amount claimed was $500.

Weil Brothers entered a special appearance before the Clerk of the Superior Court, and moved to dismiss the attachment and set aside the order of publication for irregularities or defects appearing in the affidavit in the proceedings, which motion was overruled by the Clerk, and defendants appealed to the Superior Court.

The Bank of Opelika intervened in the action, claiming title to the cotton by reason of the sight draft with the bill of lading attached. Plaintiff filed its complaint, alleging damage to the amount of $900, and defendant bank (intervenor) filed its answer, setting up title in itself. Upon reaching the case for trial, Weil Brothers again entered a special appearance, and moved to dismiss the action and vacate the attachment proceedings, which motion was overruled, and they decline to enter a general appearance, and did not further defend said action.

Intervenor bank asked a separate trial as to the bank's

title, which was refused by the Court, and it excepted. This was the first exception.

Upon the trial, the Court submitted the following issues to the jury:

"1. What amount is the plaintiff entitled to recover of defendant firm of Weil Brothers?

"2. Was the cotton attached by plaintiff the property of the Bank of Opelika, intervenor, when attached?"

His Honor instructed the jury that the burden was upon the intervenor to establish title to the property, and that, if they believed the evidence, the bank had failed to establish title in itself, to which the bank excepted. This is the second exception.

The jury, under the instructions of the Court, answered both issues in favor of the plaintiff; and, upon motion of intervenor for a new trial, the motion was denied and exception taken. This was the third exception. The bank appealed. The jury assessed the plaintiff's damages at $657.66. Thereupon the plaintiff moved for judgment for $657.66 upon the verdict, and his Honor refused to render judgment for that amount, but did render judgment for $500, as calimed in the attachment proceedings and in the summons as published, to which plaintiff excepted and appealed

So this case is heard upon the appeals of plaintiff and intervenor bank, upon their respective exceptions, and we sustain the rulings of his Honor in both appeals.

The service by publication gave the Court jurisdiction over the property attached (and not over the person) to the extent of its value, not exceeding the amount claimed in the publication. The object of the publication is to inform the defendant of the amount claimed, and that his property within the jurisdiction is sought to be condemned to pay that amount. Being informed by the publication of the amount claimed, and it being true, the defendant might content himself with

the proceedings and allow that amount collected out of his property. For it is expressly required in section 352 of The Code that said publication (of the warrant of attachment and summons) "shall state * * * the amount of the claims." * * *

The intervenor's exceptions can not be sustained; (1) because it was interested in one issue only—"was the cotton attached by plaintiff its property when attached?"—and that issue was submitted. So it was not its right to have a separate trial as to that, unless the Court, in the exercise of its discretion, should so order. *Blair v. Puryear,* 87 N. C., 101; Code, secs. 375 and 331.

(2) and (3) being considered together: Because Weil Brothers having failed to appear and answer, and judgment by default being taken against them for want of an answer, as to them the only issue was the *quantum* of damages. And the intervenor had no right to interfere in the action or remedy between plaintiff and defendant. It was none of its business. *Bank v. Furniture Co.,* 120 N. C., 475.

The bank, being the intervenor and actor, the burden of proving its title to the property levied on was upon it to show the affirmative (*Wallace v. Robeson,* 100 N. C., 206), and if there was no evidence to sustain its title, it was the duty of the Court to so instruct the jury. And the evidence sent up in the record sustains his Honor in so ruling.

The evidence relied upon is that one of the members of the firm of Weil Brothers was a director of the bank, and the firm owed the bank for money advanced in buying cotton. When the shipment of fifty bales was made, Weil Brothers drew on the consignee, the plaintiff, the bill of lading attached to the draft, for the value of the cotton, in favor of the bank. The bank did not cash the draft, nor did it accept the same in settlement of Weil Brothers' indebtedness, or any part thereof, but simply credited them with the amount of the draft (less discount charges for collection) "with the right

on the part of the bank to charge it back to Weil Brothers in case the draft was returned not collected"; and the bank "sent the draft with bill of lading attached for collection to its representative at Baltimore," with "collection" stamped on its face. When payment was refused by the drawee, and the draft returned, it *was charged back* against Weil Brothers. No money passed, nor did Weil Brothers draw against the amount credited, nor could the bank officers remember whether they returned the draft and bill of lading to Weil Brothers, after it was returned to them. The bank intervened in this action upon the request of Weil Brothers for the benefit of Weil Brothers, who were stockholders in the bank. Now, then, it seems clear to us from the evidence of the intervenor that it did not pay anything of value for the draft with bill of lading attached, and did not become the owner of the same. Its possession was that of an agent to collect, and, when the draft was returned, the credit originally entered was cancelled by charging it back, thus placing the parties in the same position that they originally occupied, and Weil Brothers then had a right to demand and maintain an action against the bank for the bill of lading and return of its draft.

The principle herein involved is fully discussed and settled in *Packing Co. v. Davis,* 118 N. C., 548, and *Boykin v. Bank, Ibid,* 566.

There being no error, the judgment below is

Affirmed.

IN RE DREWRY.

(Filed December 23, 1901.)

GRANTS—*Entries—Caveators—Protest—The Code, Sec. 2765—Public Lands.*

The Code, sec. 2765, applies only where it is admitted by both sides that the land entered is vacant land and the question to be determined is as to whom the grant shall be issued.

IN the matter of entry of lands by F. S. Drewry, heard by Judge *E. W. Timberlake,* at Spring Term, 1901, of the Superior Court of BURKE County. From a judgment for Drewry, caveators, J. M. Barnhardt and others, appealed.

Avery & Ervin, for Drewry.

J. T. Perkins, S. J. Ervin, and *E. J. Justice,* for the caveator J. M. Barnhardt.

FURCHES, C. J. The respondent Drewry made three entries of land on the South Mountain in Burke County—one of 600 acres, and two of 640 acres each. The entry-taker advertised these entries, as provided for in section 2765 of The Code, and the appellants, Barnhardt and others, filed their caveat and protest. And the matter was certified to the Superior Court, notice issued to the enterer, Drewry, according to the provisions of said section, and Drewry filed a reply. The caveators, in their protest, say they are the owners of the land the enterer claims that said entries cover; that said lands were granted to William Erwin, James Erwin and James Greenlee many years ago, and they derived their title through *mesne* conveyances from them, and they are now in the actual possession of said lands by their tenants. The caveators also allege that said entries are so vague and uncertain, in location and description, as to render them void and of no effect.

The respondent, Drewry, in his answer avers that said entries are not void for vagueness and uncertainty, and alleges that they are altogether regular and sufficient in location and description. He also denies that the caveators are the owners of the lands covered by his entries, or that they are in possession of the same.

Upon the matter coming on for trial, and the pleadings, including the entries, the caveat, notice, and respondent's answer being read, his Honor dismissed the proceeding at the cost of the caveators, and they appealed to this Court.

The matter has given us trouble, as it has been difficult to determine what was the policy of that part of the statute which provides for this proceeding, or to discover its benefits. We have certainly been unable to see how it could affect the caveators in this case.

As well as we have been able to learn the history of the statute, this provision of it was incorporated into the law on account of the land offices (entry offices) being closed during the Revolutionary War. And although it has stood upon our statute books for more than a hundred years, we are unable to find out one reported case in which the proceedings seem to have been under this statute. *McNeill v. Lewis,* 4 N. C., 517. And the information we get from that case leads us to sustain the action of the Court in dismissing the proceedings. That case holds that this proceeding applies only where it is admitted on both sides that the land entered is vacant land, and the question to be determined is as to whom the grant shall be issued. We readily yield our assent to this interpretation of the statute, as it seems to us to be the only one that can be supported by reason. For if it be true that said land had once been granted and the caveators are the owners of said land by a regular chain of title from the State, and are in the actual possession of the same, as they say they are, no entry or grant the enterer

Drewry could make or procure could affect their title; and the enterer would be liable as a trespasser for entering upon and "treading down the grass."

We do not think it necessary to discuss the regularity or sufficiency of the entries, as they can in no way affect the rights and title of the caveators, whether they are regular and sufficient in form or not.

There are quite a number of cases cited under section 2765 of The Code, but when they are examined, it is found that they do not apply to the provision of that section which provides for a proceeding by caveat. They are suits in equity, where there has been a grant issued by the State, in fraud of some prior enterer; or, at least where this is alleged; and the Court is asked to declare such alleged fraudulent grantee trustee for the benefit of the first enterers, and have no application to the case now under consideration.

For the reasons stated, and the authority cited, the judgment of the Court is

Affirmed.

LEA v. DURHAM AND NORTHERN RAILROAD CO.

(Filed December 23, 1901.)

NEGLIGENCE—*Contributory Negligence.*

Where the person killed and the railroad are each guilty of negligence, and both are on equal terms, having equal opportunities, the railroad is not liable in damages for the killing.

CLARK and DOUGLAS, J.J., dissenting.

ACTION by John S. Lea, administrator of Sidney Lea, against the Durham and Northern Railway Company and the Seaboard Air Line, heard by Judge *T. J. Shaw* and a jury, at August Term, 1901, of the Superior Court of PER-

SON County. From a judgment for the plaintiff, the defendants appealed.

W. W. Kitchin, for the plaintiff.
Winston & Fuller, for the defendants.

FURCHES, C. J. Sidney Lea, the intestate of the plaintiff, was run over and killed by defendant's freight train in the city of Durham, about 8 o'clock in the morning, on or about the 1st day of November, 1900. The defendant, for the purpose of making up a freight train, was moving two freight cars, with an engine between them, and the deceased was standing on the end of the cross-ties of the defendant road.

The defendant's track is on the north side of one of the streets of Durham, and is not used as a street, though persons occasionally travel it on foot, there being a clear street of fifty feet besides that portion occupied by defendant's road, kept up by the city as a street, and was in good condition at that time. There was no one on the front car in the direction the train was moving at the time the intestate was killed. And it was in evidence that the city of Durham had an ordinance against running a train more than eight miles an hour; and there was evidence tending to show that this train was running at a greater rate of speed than the ordinance allowed at the time the intestate was killed. There was also evidence tending to show that no bell was rung or whistle sounded by the defendant. Wiley Weaver, a boy about 14 years old, testified: "We walked near the track about ten minutes; we were going around to see the town; went by a fine house, looked at the yard, and went by a street near the railroad, and we stopped to look at some letters on the house, and then we stepped out there to look at the train couple up; and he asked me if I knew what the letters were,

and I told him 'No,' I did not; to come and let us go to market; he said to hold on a minute, he would see the train couple up and he would go, and I turned around and said, 'Come on, I'm in a hurry,' and he said, 'Go on, I'll catch you,' and I turned and looked back and the train was in about two yards of him, and I told him to look out, the train would run over him, and that is all I think of; * * * about the time I called him, the train struck him on side under his arm rather from the back."

There are no exceptions in the Judge's charge, but at the close of his charge he says: "Defendant excepts to the Court, giving so much of the charge as is embraced in numbers 1 to 2, 3 to 4, and 5 to 6." And upon examination we find that no such numbers appear in the charge. This throws upon us the burden of examining the entire charge, or, in other words, makes it a broadside exception. There has certainly been carelessness in making up the case on appeal or in making out the transcript of record. But the point in the case, as we view it, seems to be sufficiently presented by the defendant's prayers for instruction and their refusal by the Court.

There are quite a number of prayers for instruction on the part of defendant. A number of them are refused "except as given in the charge," and, as the case is made up, there is nothing to point us to that part not given; while a number of them are refused without any reference to what is given in the charge, and we prefer to put our opinion on those.

The main question, and the one upon which the case depends, as we think, is the contributory negligence of plaintiff's intestate;, and this is presented by defendant's fifth and seventh prayers for instruction, both of which the Court refused to give. The fifth prayer is as follows:

"That taking the plaintiff's evidence, and also the defendant's evidence (which latter does not furnish any contradic-

tion as bearing upon the third issue), and the conclusion could not reasonably be avoided that the plaintiff's intestate, by his own negligence, contributed to cause the injury."

The seventh prayer is as follows: "In this case, taking all the evidence together, there was nothing which placed the intestate at any disadvantage as regards avoidance of this injury, and when such is the case no recovery can be had when each party, that is to say, both intestate and the railroad company, were negligent."

We think the defendant and the intestate were both guilty of negligence; this was so found by the jury under the instruction of the Court, and was not excepted to. The intestate was killed in broad daylight, about 8 o'clock in the morning. It is true, he was killed in the city of Durham, on the defendant's railroad track, which is constructed on the north side of the street, not used as a part of the street—there being fifty feet of said street in good condition and unobstructed in any way.

It is contended by the plaintiff that this is a fact in its favor, in determining the liability of the defendant, but it does not appear so to us. It may be a reason going to show the defendant's negligence, but this does not help the plaintiff, as the defendant is found to have been negligent. And it may be a reason why the intestate should have exercised more care, as he was in town on the railroad track and saw that the road was engaged in shifting cars and making up a train. But this has but little to do with the case, as presented to us, as the intestate was also found to be guilty of negligence. Nor do we see that the testimony of Wiley Weaver affects the case. He says that he looked back, the train was in two yards of intestate, *and struck him just about the time he called to him to look out or he would be struck.* This being so, the rate of speed at which the train was moving could have had no effect; it was too late when he called

to do any good, as the intestate was stricken *just about the time* this warning was given. The intestate was not killed at a street crossing, nor on a track much used, even as a footway. The case does not fall under any of the exceptions that require that the whistle should be sounded or the bell should be rung, or the train stopped. He was not an infant, as in Bottom's case, 109 N. C., 72; nor drunk and down, as in Lloyd's case, 118 N. C., 1011; nor prostrate on the track, as in Dean's case, 107 N. C., 686; nor on a trestle, nor in any other dangerous situation putting him at a disadvantage, as in Clark's case, 109 N. C., 430, or McLamb's case, 122 N. C., 862; nor was it in the night time with no headlight, as in Stanly's case, 120 N. C., 514, and Purnell's case, 122 N. C., 832; nor was he at a crossing, as in Edwards' case at this term. And the doctrine of the last clear chance—proximate cause—does not arise in this case. Both were guilty of negligence, and both were on equal terms. The intestate was at no disadvantage. He was on equal opportunities with the defendant. *Neal v. Railroad,* 126 N. C., 639. The intestate was, unfortunately, killed, but it will not do to say that the railroad company is liable in damages for every man killed by its trains.

So far as we remember, every principle involved in this case is decided in Neal's case, and that case must control this case. We do not think the plaintiff was entitled to recover upon the evidence.

There was another question presented by the case on appeal—as to the receipt given by the plaintiff—but we have not found it necessary to consider that matter.

There was error in refusing the fifth and seventh prayers of defendant for instructions to the jury.

Error—New Trial.

DOUGLAS, J., dissenting. I am forced to dissent from the

opinion of the Court. I dissented in *Neal v. Railroad,* 126 N. C., 634, 647, and in *Stewart v. Railroad,* 128 N. C., 517, 519. It is useless for me to repeat now what I said therein. In my opinion, the Court in the case at bar goes far beyond either of those cases, and establishes a new and most dangerous precedent. Neal's case is cited as its controlling authority, but that case is authority only in so far as the two coincide. Beyond that point, it becomes by its own limitation an authority to the contrary. Neal's case is put upon the exclusive ground that *all* the testimony in the case was introduced by the *plaintiff,* and therefore could not be discredited by him. To prevent any possible injustice to the Court, I will quote its own words, on page 641, which are as follows: "But the Court could not do that (submit the case to the jury) without impeaching the plaintiff's witnesses. *All* the evidence was offered by the *plaintiff,* and the defendant had demurred to it. 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. As to the plaintiff, it stood unimpeached and unimpeachable. It is true that if the plaintiff offered other evidence tending to show the facts different, then it would have become a matter for the jury as to which witness they would believe. But both witnesses stand alike credited, so far as the plaintiff or the party introducing them is concerned. If this evidence, *or any part of it, had been introduced by the defendant,* it would have been the duty of the Court *to submit it to the jury,* because the plaintiff would not have been bound to give credit to the defendant's witnesses, and the defendant could not give them credit by demurring to their evidence." Is this any authority for the opinion of the Court in the case at bar? What are the special instructions which the Court says the Court below should have given to the jury? They are as follows, including the

words in parenthesis: "That, taking the plaintiff's evidence, *and also the defendant's evidence* (which latter does not furnish any contradiction as bearing upon the third issue), and the conclusion could not be reasonably avoided that the plaintiff's intestate, by his own negligence, contributed to cause the injury." This, of course, amounts to a peremptory direction of the verdict, which is equivalent to taking the case from the jury. What, then, becomes of the rule laid down in Neal's case that "if the evidence, or any part of it, had been introduced by the *defendant,* it would have been the duty of the Court to submit it to the jury"?

The seventh prayer, which the Court says should also have been given to the jury is as follows: "In this case, taking all the evidence together, there was nothing which placed the intestate at any disadvantage as regards avoidance of his injury, and when such is the case no recovery can be had, when each party, that is to say, both intestate and the railroad company were negligent." As the defendant introduced more witnesses than the plaintiff, again what becomes of Neal's case?

The opinion of the Court says: "The defendant's track is on the north side of one of the streets, and is not used as a street, though persons occasionally travel it on foot, there being a clear street of fifty feet besides that portion occupied by defendant's road, kept up by the city as a street, and was in good condition at that time." Nearly the whole of this sentence is taken from the defendant's testimony, and is not corroborated in the slightest degree by the testimony of the plaintiff. In the light of our decisions, can we say that an affirmative issue can be answered by the Court solely upon the testimony of the party on whom rests the burden of proof? In other words, the opinion holds in substance that his Honor should have directed an affirmative verdict of contributory negligence on the testimony of the defendant

without leaving to the jury even the question of the credibility of the defendant's witnesses. Who has vouched for the defendant's witnesses? Certainly the plaintiff has not done so; nor does it appear that the Court below, or the jury, have done so to any appreciable extent. I do not mean to say that the defendant's testimony is not true, but simply that we have no right to pass upon its truth. And yet this Court assumes their testimony to be true, the credibility of which, under the uniform decisions of this Court, is a question exclusively within the province of the jury.

There is another essential difference between Neal's case and that at bar. Neal's intestate was not on the public highway, and was, therefore, a trespasser, or, at most, a licensee. Here, the intestate *was* on the public highway, and therefore his mere presence on the track was not *per se* contributory negligence, nor even *prima facie* evidence thereof. I do not think it would be any evidence at all unless he were negligent in other respects. In this opinion, the italics are mostly my own, used to direct attention to words or expressions on which I chiefly rely.

This opinion has been received by me in the closing days of the session, too late to permit a full citation of authorities. In the extreme pressure of other cases, I can give only a few quotations from standard authorities.

"When the railroad is laid *along a highway,* and the cars are restricted to a moderate speed, such as ordinary vehicles use, travellers have the same right to drive or walk upon it that they would have if the track were not there; and the rights of both parties are equal." Shearman and Redfield on Negligence, sec. 480.

"As a general rule, a railroad company has the exclusive rigt to use its own track, and one who goes upon it without an invitation or license from the company, is a trespasser. But this rule *does not apply* at highway crossings, nor, under

ordinary circumstances, where the track is laid *longitudinally* upon the surface of a street, whether it be that of a commercial or a street railroad company. The public, exercising due care, still have a right to use the street. And so, the railroad company, likewise exercising due care, has also the right to use that portion of the street upon which its track is laid. Their rights are, in most respects, *mutual, reciprocal and equal,* neither being superior or paramount to the other, except that, as the company can not so readily stop its trains or cars and is confined to its track, it has the right of way of passage thereon, and persons who are upon the track must leave it and give way until the train or car has passed." Elliott on Roads and Streets, sec. 810.

"Where a railroad runs along the surface of a street, the rights of the company and of travelers must be exercised with due regard to the rights of the other, in a reasonable and duly careful manner." *Ibid,* sec. 811. The same rule is laid down in 3 Elliott Railroads, sec. 1094.

As the authorities generally make no distinction between "commercial" and street railways, when laid longitudinally along a public street, where the public have a right to be, the case of *Moore v. Electric St. Ry. Co.,* 128 N. C., 455, with the authorities therein cited, would seem to apply to the case at bar. Another material point relates to the continuing negligence of the defendant in driving its train at an unlawful speed, and failing to ring the bell and to have a flagman stationed upon the leading car. The plaintiff introduced the city ordinances, which contained the following: "No train or engine shall be run in the corporate limits of the city of Durham at a greater rate of speed than eight miles an hour." He also introduced the rules of the defendant company, containing the following: "367.—The engine bell must be rung while moving within the corporate limits of towns or cities." 408.—"When a train is being pushed by an engine (except

when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, to immediately signal the engineer in case of danger." Can there be any doubt that, if these rules had been observed, the injury could have been prevented? Even if the intestate had not heard the bell, a brakeman stationed on the front of the leading car, if one had been there, could have warned him off in time, or have stopped the train if it were going less than eight miles an hour. It has been repeatedly held that the public have a right to presume that a railroad company will obey the law. Shearman and Redfield on Negligence says: "Section 473.—Travellers have a right to expect that railroad trains will be managed in conformity to law, including statutes and ordinances, and they are generally not negligent in acting upon the assumption that speed will be limited or signals given, as required by law."

Elliott on Roads and Streets says, in section 811: "The violation of an ordinance or statute requiring a 'lookout' or limiting the speed, or the like, is at least *prima facie,* if not conclusive, evidence of negligence." See also *Mitchell v. Electric Co.,* at this term, and *Railway v. Ives,* 144 U. S., 408, 418.

One more quotation, and I am done. In *Pennsylvania v. Ogier,* 35 Pa. St., 60, a jurisdiction that has certainly never shown any disposition to needlessly hamper the operation of a railroad, the Court says: "But there were other considerations to be taken into account here. If there was no notice by blowing the whistle, a thing required to be done before reaching the point, and usually done, a traveller accustomed to expect this, would not only not be so likely to look out for danger, or be in such a preparedness to avoid it as he likewise might have been, and this without any culpable negligence on his part. For, if by negligence or omission of

those in charge of the train, his vigilance was allayed, they are not at liberty to impute the consequences of their acts to his want of vigilance, a quality of which they deprived him. If their acts brought him within the boundaries of peril, they must answer for the results of that condition. If, therefore, he had a right to expect to hear the whistle sounded at a sufficient distance from the crossing, and did not, it is evident a different degree of care or vigilance might follow. Care is undoubtdly a relative term, or rather conveys a relative idea, as to the degree necessary to be observed under circumstances. It is different, certainly, when there is reason to apprehend danger, from that degree to be exercised where it is not to be apprehended."

It may be said that there is no evidence that the intestate knew of any such rules or ordinances. There is no evidence that he did not. He is not here to answer. His mouth has been closed forever by the defendant. I respectfully dissent from the opinion of the Court.

CLARK, J., concurs in the dissenting opinion.

BENEDICT v. JONES.

(Filed December 23, 1901.)

1. HUSBAND AND WIFE—*Privy Examination of Wife—Mortgages —Probate—Deeds—Acts 1889, Ch. 389.*

Where the privy examination of a wife is not taken, or is taken in a manner insufficient to fulfill the requirements of the law, though the grantee has no knowledge thereof, the matter is open to judicial investigation.

2. HUSBAND AND WIFE—*Privy Examination of Wife—Mortgages —Probate—Presumptions.*

To rebut the presumption that the privy examination of a wife was properly taken, it must be shown by clear, strong and convincing proof that it was not properly taken.

3. HUSBAND AND WIFE—*Privy Examination of Wife—Mortgages —Probate.*

If the acts and language of a married woman at the time of her privy examination are of the same legal effect as the words used in the statute for her private examination, it will be deemed sufficient in law.

PLAINTIFF'S APPEAL.

ACTION by Mary Benedict and others against H. C. Jones and wife and S. G. Atkin, heard by Judge *Frederick Moore* and a jury, at September Term, 1901, of the Superior Court of BUNCOMBE County. From a judgment for the defendants, the plaintiffs appealed.

J. C. Martin, and *F. H. Busbee,* for the plaintiffs.
Locke Craige, for the defendants.

MONTGOMERY, J. This action was brought to recover possession of a lot of land in the possession of the defendants. On the 4th day of August, 1891, the defendant H. C. Jones, being the owner of six undivided one-sevenths interest in the same, and Hattie, his wife, another defendant, being the

owner of the other one-seventh interest, all subject, however, to the right of dower of the other defendant, S. G. Atkin, who was the widow of T. W. Atkin, a former owner of the property, executed to J. C. Dickerson a deed of trust (the defendant S. G. Atkin joining in the deed) upon the property to secure a large debt, the consideration of which was money borrowed by H. C. Jones from C. B. Benedict. A sale of the property was made by the trustee under the terms of the deed, and the same was bought by the creditor, C B. Benedict, and a deed made to him by the trustee on the 9th of August, 1895.

The plaintiffs in this action are the devisees of C. B. Benedict, who died in 1898. The defendant H. C. Jones filed no answer. His wife, Hattie, in her original answer, set up the one single defense that she was never privily examined touching her execution of the deed of trust, and never signified her voluntary assent thereto to the Clerk of the Court, who certified that her private examination had been properly taken. Four years later she filed an amendment to her complaint, in which she set up the further defense that Benedict, the creditor, had agreed with H. C. Jones, the principal debtor, to extend the time of payment of the debt, without her knowledge or consent, and that she, being a surety, was thereby released. The jury found against her on an issue submitted on the latter defense, and that matter is the subject of an appeal on her part.

Upon instructions of his Honor on the issue raised by the complaint and first answer, the jury found in favor of Hattie, the wife of H. C. Jones, and this is the plaintiff's appeal on that question.

There is no fraud, duress or undue influence alleged to have been practiced upon the defendant Hattie by her husband, or anyone else, in the execution of the deed, or in the private examination.

The question, as we have said, is as to whether her private examination was taken by the Clerk. That question, as we understand it, is a matter that can be inquired into notwithstanding the act of 1889, Chap. 389. The words "privy examination of the wife" in the connection in which they are used in that act, have been construed by this Court to mean that the married woman must have been, both as a matter of fact and in a manner sufficient under the requirements of the law, examined privately, and that she must have acknowledged that she signed the deed of her own free will and without compulsion, etc. If such a privy examination is had and certified by the officer, then that deed can not be invalidated by proof of fraud, deceit or coercion in its execution, unless the grantee participated in the fraud before the delivery of the deed. If, however, the privy examination was never in fact taken, or if it had been taken in a manner insufficient to fulfill the requirements of the law on that subject, notwithstanding the grantee may have had no knowledge of the failure or insufficiency of the private examination, then that matter is open to judicial investigation. *McCaskill v. McKinnon,* 121 N. C., 214; *Butner v. Blevins,* 125 N. C., 585.

In the case before us, his Honor properly told the jury "that there is a presumption of law raised by the certificate of the Clerk, attached to the deed in trust introduced in this case, that the deed was duly executed and acknowledged by Hattie Jones, and that she was privily examined as required by law, and in order to rebut that presumption she must show to the jury by clear, strong and convincing proof that she was not privately examined separate and apart from her husband touching her execution of the deed of trust according to law." But when he refused to instruct them, as he was requested to do, that if they believed the evidence they would find that the plaintiffs were the owners of the land described

in the complaint, and that the defendants were in the unlawful possession thereof, we think he was in error. Mrs. Jones had testified that the paper was lying on the table in the room, at her house, when she entered, and that Cathey, the Clerk, was present. She said further, "I can read and write, but did not read the paper. I do not know why I did not read it. I had been in the habit of signing papers as they were presented to me. My husband told me he had a paper which he wanted signed, and I signed it. No one threatened me. I was not under fear, compulsion or undue influence from anyone. * * * I had signed a good many deeds in my life. I had been privily examined concerning other papers before this time." She also said that "he (Cathey, the Clerk) asked me if I signed the paper of my own free will, and I told him that I did not know what the paper was." We think, in view of the pleadings in the case, and of all the evidence, including that of the defendant Hattie Jones herself, that she did, to all intents and purposes, and in legal effect, acknowledge in her privy examination that she signed the deed freely and voluntarily, without fear or compulsion of her husband or any other person, and that she did voluntarily assent thereto. It is not necessary to constitute a valid privy examination that the very words used in the statute should be employed in making the acknowledgment. If the acts and language of the married woman, at the time of her examination, are of the same legal effect as the words used in the statute, it will be deemed sufficient in law. *McCaskill v. McKinnon, supra.* It makes no difference that she said that she did not know what the paper contained, that she did not understand its contents, and that if she had she would not have signed it. She could read and write. The paper was before her, and she was under no coercion. It was not the duty of the Clerk to read it to her, under all the circumstances, nor to explain to her anything about the matter, for,

from her own testimony, she had been in the habit of signing deeds and having her privy examination taken thereto.

Error.

CLARK, J., concurring in the result. I do not assent to some of the reasoning of the Court, which, it seems to me, is contrary to the intent of the statute, and which is likely to shake the security of all titles in which a married woman is joined. It was, as is well known, to cure this effect of a decision of this Court that a privy examination did not have the effect of a fine and recovery (as had been understood by the profession), that Chapter 389, Laws 1889, was passed. It would be a singular result if "fraud, duress and undue influence" can not impair the validity of a privy examination if unknown to the grantee, but that a mere irregularity in the form of a question asked a *feme covert,* or her evasive reply, which is equally known to the grantee, should avail to set aside the solemn certificate of the officer of the law appointed to take her examination. He may die, and then the security of title to property for which full value has been paid, and which has been taken bby the grantee in full reliance upon the certificate in due form by the officer appointed by the law, depends not thereon but upon the woman's recollection, after the lapse of years, of the precise form of words she used. It is not thus, I think, that this Court has understood the statute. *Butner v. Blevins,* 125 N. C., 585; *Bank v. Ireland,* 122 N. C., 571; *Riggan v. Sledge,* 116 N. C., 87. In England, and in probably all the States which have a clause in their Constitutions as to the property rights of married women similar to that in our Constitution, no privy examination of a married woman is now required. If her recollection of what she was asked or answers can prevail over the certificate of the officer, the sooner the requirement of a privy examination is abolished in our State, the better it will be for those who take title to realty by a deed in which a married woman must join.

BENEDICT v. JONES.

(Filed December 23, 1901.)

1. PRINCIPAL AND SURETY—*Extension of Time—Release of Surety—Payment—Evidence—Sufficiency.*

The payment of interest and failure to sell land after advertisement under mortgage is not sufficient evidence to show extension of time to principal so as to release sureties.

2. WITNESSES—*The Code, Sec. 590.*

Under The Code, Sec. 590, where the evidence of a witness is incompetent, the same fact can not be proven by the same witness indirectly or by inference.

DEFENDANT'S APPEAL.

ACTION by Mary E. Benedict and others against H. C. Jones and wife and S. G. Atkin, heard by Judge *Frederick Moore* and a jury, at September Term, 1901, of the Superior Court of BUNCOMBE County. From a judgment for the plaintiffs, the defendants appealed.

J. C. Martin, and *F. H. Busbee,* for the plaintiffs.
Locke Craige, for the defendants.

CLARK, J. The defendants Hattie Jones and S. G. Atkin, who were parties to the deed of trust, answered that the mortgaged property therein was theirs, that they were sureties to the debt thereby secured, and the property was released from the mortgage because the plaintiff's testator "made a binding contract to extend the time of payment of the note secured by said deed of trust for a definite period and for a valuable consideration, well knowing that they were sureties and that said extension of time was without their knowledge or consent, their purpose evidently being to bring the case under the principle in *Hinton v. Greenleaf,* 113 N. C., 6.

The only evidence offered by defendants in support of that

allegation was that the land was advertised for sale in July, 1894; that the advertisement was withdrawn, and the creditor stated to a witness that the matter had been "arranged and the advertisement would be withdrawn," and on the back of the note was endorsed, "paid 4th August, 1894, $120 interest to date." His Honor properly told the jury that this was no evidence of an agreement to extend the time for a definite period, and to answer the issue "No." If it were otherwise, any payment of interest on a bond or note would release the surety. To have that effect, there must be a contract by the creditor to extend payment for a fixed definite period.

The testimony of the defendant H. C. Jones, the principal debtor and husband of defendant Hattie C. Jones, as to any alleged contract of extension made by him with the deceased creditor, plaintiff's testator, was properly excluded under The Code, sec. 590. It is immaterial whether he was or not interested in the land mortgaged. He is a "party to the action," and is excluded under the very terms of the section. His testimony as to how much money he drew out of the bank 20th July, 1894, and how much he carried into Dickerson's store, were irrelevant, unless offered to show a personal transaction with the deceased, and then it was incompetent. His negative testimony that he did not pay the deceased any money after 20th July, 1894, is equally incompetent. It was an attempt to get in by indirection and inference that which the statute forbids to be given in directly. The testator, if living, was competent to testify that the debtor did pay him money after 20th July. His mouth being closed by death, the law closes the mouth of the other party. Besides, the testimony was irrelevant, and tended to prove nothing.

No Error.

BEARDEN v. FULLAM.

(Filed December 23, 1901.)

1. MANDAMUS—*Jurisdiction—Chambers.*

A public officer may be compelled by mandamus to deposit public funds in his hands in the proper depository.

2. PARTIES—*Chief of Police—Cities and Towns.*

A suit to compel a city to pay fines and penalties to the county board of education should be brought against the city or the board of aldermen, not against the chief of police.

ACTION by M. J. Bearden and others against J. S. Fullam, Chief of Police for the City of Asheville, heard by Judge *Frederick Moore,* at Chambers, at Asheville, on 23d November, 1901. From a judgment for the defendant, the plaintiffs appealed.

J. D. Murphy, and *Locke Craige,* for the plaintiffs.
L. M. Bourne, for the defendant.

MONTGOMERY, J. This is an action in mandamus, brought before his Honor in Chambers by the plaintiffs, the first three of whom constitute the County Board of Education of Buncombe County, and the last-named the Treasurer of the County School Fund of that county, to compel the defendant, who is the city Chief of Police of Asheville, to pay over to the Treasurer of the County School Fund the fines which he, by law, is required to collect, arising from judgments and sentences rendered and imposed in an Inferior Criminal Court in Asheville, known as the Police Justice's Court, instead of to the Treasurer of the city of Asheville, to whom he has been accustomed to pay the same. The defendant did not answer, but entered a demurrer, specifying three grounds therefor, the second one of which it is useless to consider be-

cause that ground was removed by an amendment to the complaint. The first ground was "that this Court is without jurisdiction, it appearing from the plaintiff's complaint that plaintiffs are seeking to enforce a money demand in this action; and, second, "that it appears from said complaint that plaintiff's cause of action, if any exists, is against the city of Asheville or the Board of Aldermen thereof, and not against this defendant." We think there is no merit in the first specification; this is a proceeding not to litigate a matter to obtain a judgment for money, not to ascertain the defendant's liability on an issue of whether he is indebted to the plaintiffs or not, but to compel a public officer to deposit public funds in his hands in the proper depository. It is not a money demand in the sense in which that word is used in the statute (section 623 of The Code). No demand was made on the defendant for misapplication of the funds in his hands before the suit was brought, and the judgment prayed for is not for any specific amount, but only a demand that the defendant pay to the person by law entitled to it, the moneys which he receives in the nature of fines arising from judgments of the Police Justice's Court. We think, however, that the last ground of demurrer must be sustained. The defendant is a mere agent of the city government for the collection of these fines, and by express requirement of law has to make a report of such collections periodically, on oath, to the City Clerk, and to pay over the same to the City Treasurer. The city authorities are entrusted with the power to supervise his action in these matters, to see that he makes proper reports and settlements; and for failure on his part to make them, they can relieve him of his office, and they, the facts being admitted by the answer, the city authorities, are the ones really responsible for the present condition of things which have brought about this lawsuit. The plaintiffs have no power vested in them by law to take action

against the defendant for any failure on his part to discharge his duties in reference to the matters complained of.

We can not let this case pass off without an unqualified expression of our disapproval of the conduct of those who have caused this litigation by their refusal to turn these fines over to the proper fund. We are met with an open defiance of two most solemn decisions of this Court on the matter which is the subject of this litigation. In the case of *Board of Education v. Henderson,* 126 N. C., 689, we decided that all fines for violation of the criminal laws of the State, whether the fines were for violations of town ordinances made misdemeanors by section 3820 of The Code, or other criminal statutes, were appropriated by Article IX., sec. 5, of the Constitution for establishing and maintaining free public schools in the several counties. And that case was reviewed and approved in *School Directors v. City of Asheville,* 128 N. C., 249, and yet, in the face of these two decisions, it is sought to raise this question again. We are surprised at the continual violation of the law and the persistent refusal of the authorities of the city of Asheville to conform their actions to the decisions of this Court on the matter before us; and we would be untrue to ourselves if we did not express in unmistakable terms our disapprobation of their conduct. Their course is a dangerous example, and an incentive to others to defy the rulings of the Supreme Court of the State, and it manifests as well an indifference to public education which ought not to characterize the ruling authorities of ane of the largest and most progressive cities of the State.

The demurrer must be sustained on the last ground. But we are justified in suggesting to the plaintiffs that they might make a demand on the Treasurer of the city and the Board of Aldermen that they pay over these fines to the plaintiff E. W. Patton, Treasurer of the County School Fund of Buncombe County, and that, if they still refuse to pay over as

demanded, an action be brought against them for that purpose. And, if it is thought by the plaintiffs that the city authorities, pending the litigation, will use the money (fines paid in by the Chief of Police) for general city purposes, that they be enjoined from so doing. Also, it is suggested that the money paid into the city treasury by the Chief of Police since the decision made by this Court in *Board of Education v. Henderson,* and which has been paid out by the City Treasurer for other purposes than for the Public School Fund of Buncombe County, has been paid out unlawfully and knowingly so by that officer.

No Error.

IN RE GORHAM.

(Filed December 23, 1901.)

1. CONTEMPT—*Punishment as for Contempt—The Code, Sec. 654, Subsec. 3.*

Under The Code, Sec. 654, Subsec. 3, a person may be punished, *as for contempt*, for unlawful interferences with proceedings in any action.

2. CONTEMPT—*Punishment as for Contempt—The Code, Sec. 654, Subsec. 5—Juror.*

Under The Code, Subsec. 5, a juror may be punished, *as for contempt*, for allowing himself to be improperly influenced.

3. CONTEMPT—*Jury Trial.*

Respondents in a proceeding as for contempt are not entitled to a jury trial.

4. FINDINGS OF COURT—*Judge—Appeal.*

The findings of fact by a trial judge in a proceeding as for contempt, there being evidence, can not be reviewed on appeal.

5. CONTEMPT—*Purging.*

The respondents in a proceeding as for contempt can purge themselves only where the intention is the gravamen of the offense.

This was a proceeding to punish *as for contempt*. The acts were alleged to have been committed by the respondents during the trial of the civil action of B. F. Long, administrator, against the North Carolina Railroad and others, in Iredell Superior Court, at its May Term, 1901, and upon the answers of the respondents and the affidavits filed in the matter, his Honor, Judge George H. Brown, found the following facts:

"1. That after the jury were empaneled in said action, the Court instructed them, in addition to the usual instruc-

tion, that it was their duty to report to the Court the name of any person who attempted to talk to them about the case or in their presence, and had each member of the jury to so promise the Court upon their honor. He further advised the jury not to associate with anyone connected with the case during the trial.

"2. That while the trial was in progress, and just as the jury were discharged from Court on Friday evening, May 24, R. A. Ramsey placed himself at one of the exits of the court-house grounds, and there met juror B. C. Deaton and took him to a bar-room and treated him to a drink of whiskey, and remained with him for about two hours, until about the ringing of the bell for the night session of the Court, and was seen in earnest conversation with him. That after Deaton had gone back to the court-house, Ramsey declared it was his purpose in his communications with Deaton to influence his verdict in favor of the defendant in said cause, and that was his only business here, and the Court also finds as a fact that he attempted to carry out his said purpose.

"3. That J. A. Gorham is the law agent of the Southern Railway Company, which company is defending said suit in behalf of the said N. C. R. R. Co., and the State University R. R. Co., and has been present during the trial, sitting in the bar and assisting counsel therein, and that the fact was known to juror J. H. Brown. That after the adjournment of the Court at its night session on Friday, May 24, the said J. A. Gorham and the juror J. H. Brown were together, holding a long and close conversation in front of the Hotel Iredell, which continued for something like two hours, and until the hotel doors were closed for the night and most of the guests had retired. That the said law agent and juror talked about the case on trial. That about the hour of 11 o'clock, the said Gorham left his seat, went into the hotel, ascended partly up the first stairway, where he remained un-

til the juror Brown overtook him. That prior to this, juror Brown had left the seat where he sat talking with Gorham, crossed the street to the court-house well, and remained for two or three minutes and then returned, joining Gorham on the stairway; that both of said parties then went to the room of said Gorham, No. 18, on the third floor, locked the door and extinguished the light, and remained together until the next morning; that the said Brown went to Gorham's room in consequence of an agreement between them that Brown should occupy a bed in said Gorham's room and that it should cost him nothing—Gorham saying that it cost him nothing.

"4. That soon after, within a few minutes, after the said parties went to said room, three of plaintiff's attorneys, who had been advised of such proceedings, went to the said room, knocked upon the door twice, and received no response.

"5. That the next morning, about 7 o'clock, juror Brown went down to the hotel clerk and stated that he had occupied a bed in room No. 18, and would pay for it before leaving Court. That said Brown had not registered as a guest. That shortly after Brown left room 18, Gorham opened the door to start down, and saw Geo. B. Nicholson, one of the plaintiff's counsel, standing in the hallway and dodged back. That he shortly afterwards went downstairs and told the hotel clerk that Brown had staid in his room the night before, but also said that he did not know he was a juror until he (Brown) told him. The Court finds as a fact that said Gorham and said Brown knew each other as a juror and law agent before any of said conversations or actions took place.

"6. The Court finds as a fact that the object and purpose of the said J. A. Gorham and J. H. Brown was to improperly and unlawfully influence the verdict of the said J. H. Brown in favor of the defendant in the said case on trial.

"7. As to juror Deaton, by consent of all parties, the rule is discharged.

"8. As to L. C. Caldwell, and as to his conversation with R. A. Ramsey and juror Brown, and his connection with J. A. Gorham at the hotel, the Court is not able to find as a fact that said L. C. Caldwell had any unlawful or corrupt or wrongful purpose, and the rule as to him is therefore discharged."

Thereupon the following order and judgment were entered:

"Upon the foregoing facts, it is adjudged that J. A. Gorham, J. H. Brown and R. A. Ramsey are guilty of gross contempt of this Court, and have attempted to pervert the course of justice and to obstruct the enforcement of the civil remedies and rights of the plaintiff in the civil action pending in this Court, wherein B. F. Long, administrator, is plaintiff, and the N. C. R. R. Co. et al. are defendants, in the following particulars:

"1. That the said respondent J. A. Gorham has attempted to corrupt and influence J. H. Brown, one of the jurors sworn to try the said case, and has been guilty of conduct that tended to defeat, impair, impede and prejudice the rights and remedies of the plaintiff in the above-entitled suit.

"2. That the respondent R. A. Ramsey had attempted to corrupt and influence the juror B. C. Deaton, to the prejudice of the plaintiff, B. F. Long, administrator, in the above-entitled action, and has been guilty of conduct that tended to defeat, impair, impede the rights and remedies of the said B. F. Long, administrator, plaintiff in the said suit.

"3. That the respondent J. H. Brown, one of the jurors sworn to try the said case, has permitted himself to be corrupted and influenced by the respondent J. A. Gorham, to the prejudice of the plaintiff, B. F. Long, administrator, in the said suit, and has been guilty of conduct that tended to defeat, impair and impede the rights and remedies of the said B. F. Long, administrator, plaintiff in said suit, and the due and orderly course of justice.

"It is therefore adjudged that the respondents, J. A. Gorham, R. A. Ramsey, J. H. Brown, are guilty as for contempt of the Court in the particulars above specified and set forth, and it is further adjudged:

"1. That the said J. A. Gorham be committed to the common jail of this county for twenty days, and be fined fifty dollars ($50.00), and that he is further adjudged to pay the costs of this rule, and to be confined till the said fine and costs are paid.

"2. That the said R. A. Ramsey be committed to the common jail of Iredell County for twenty days, and shall pay a fine of fifty dollars ($50.00) and costs, and shall pay the fine and costs before being discharged.

"3. That the said J. H. Brown be fined fifty dollars and costs, and shall be in custody of the Sheriff till said fine and costs are paid."

From the judgment of the Court, the respondents appealed.

Osborne, Maxwell & Keerans, for Gorham.
J. F. Gamble, for Ramsey and Brown.
Brown Shepherd, for Attorney-General, contra.

MONTGOMERY, J. This proceeding in the Court below, as the record discloses, had for its object the punishment of the respondents *as for contempt* of Court, and the judgment was pronounced against them *as for contempt.* But the argument for the State here was also directed to the proposition that the judgment could be supported on the ground that the facts constituted a case of contempt of Court. In support of this proposition, numerous authorities were referred to, but in none of those jurisdictions were the statutory laws like those of our State on this subject. One of them, however, *People v. Wilson,* 64 Ill., 195, 16 Am. Rep., 528-531, contains a most significant expression: it is said there: "The statute may

be regarded as a limitation upon the power of the Court to punish for any other than those acts committed in its presence. In this power would be necessarily included all acts calculated to impede, embarrass or obstruct the Court in the administration of justice. Such acts would be considered as done in the presence of the Court." But the peculiarities of the language used in our statutory law, and the decisions of this Court upon that law, forbid us from following such precedents. Chapter 14 of The Code, a compilation of the acts 1869 and 1870-71, concerning contempt, embraces the whole law of our State at the present time on that subject. With the origin, history and objects of those acts the older lawyers of the State are familiar, and it would serve no good purpose to enter upon a discussion of the same. The act of 1868 was exactly the law which we now have embodied in Chapter 14 of The Code, except that subdivision 7 of section 1 of that act, concerning the publication of the proceedings in Courts of Record, was amended by the act of 1871, there being added also in the act of 1871 a section concerning the debarring of attorneys of their license to practice law, and two further sections in the following words: "Section 2. That the several acts, neglects and omissions of duty, malfeasances misfeasances and nonfeasances specified and described in said act of April, 1869, as hereby amended, shall be and they are hereby declared to be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be subject of contempt of Court. Section 3. That if there be any parts of the common law now in force in this State which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances or nonfeasances besides those specified and described in said act, the same are hereby repealed and annulled." The preamble to the act of 1871 refers indirectly, but clearly, to an opinion of this Court delivered by Chief Justice Pearson in the case of *Ex Parte Moore*, 62 N.

C., 397, in which it was said that there were other matters and acts which were the subjects of contempt at common law which were not embraced in the act of 1869, and the added sections above quoted were the admitted result of that opinion of the Court. This Court has repeatedly held that the act of 1871, limiting the power of the Courts to punish for contempt to the particular instances and acts embraced in the act of 1869 was not unconstitutional. *Ex Parte Schenck,* 65 N. C., 353; *In re Oldham,* 89 N. C., 23; *Kane v. Haywood,* 66 N. C., 1. In the last-mentioned case, the Court said, Chief Justice Pearson delivering the opinion: "The preamble (to the act of 1871) sets out that doubts have been expressed as to the construction of the act of 1869, by reason of which the judicial authority has asserted that other acts of contempt not specified in said act still exist at the common law, and the Courts have assumed to exercise jurisdiction over the same, and to impose other punishments therefor. The statute then goes on with *a manifest intention to restrict the power of the judiciary just as far as the Constitution permits the General Assembly to do* (italics ours), and confines the neglects and omissions of duty, malfeasances, etc., to the specified particulars in the act of 1869, and for fear of evasion by the Courts, it is enacted 'If there be any parts of the common law now in force in this State which recognize other acts, neglects, malfeasances, etc., etc., the same are hereby repealed and annulled.'" The facts in the case before us do not fall under the specifications of contempt in Chapter 14 of The Code, and the respondents are therefore not guilty of contempt. They would be but for the act of 1871, although not specified in The Code, for, but for that act, we would have no hesitancy in saying, as was said in *Ex Parte Moore*, that the act of 1869 did not embrace all the acts which, at common law, constituted contempt. But as we have said in the beginning of this opinion, this matter was

proceeded with in the Court below *as for contempt,* and particularly under subdivision 7 of section 654 of The Code, which is in these words: "All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record of this State to enforce civil remedies, or protect the rights of any party to an action." That provision clearly applies to civil remedies, as was decided in the matter of *In re Deaton,* 105 N. C., 59. In the argument here our attention was called to section 656 of The Code, which is in these words: "To sustain a proceeding as for contempt, the act complained of must have been such as tended to defeat, impair, impede or prejudice the rights or remedies of a party to an action then pending in Court," and it was insisted that that section covered the facts in the case before the Court. But we think that that section must refer only to those specifications of acts which subject persons to punishment *as for contempt* set out in section 654 of The Code, and restricted instead of being matter of aider. But we think, from the facts found by his Honor, that the respondents Gorham and Ramsey unlawfully interferred with the proceedings of an action pending and being tried by him, and in doing so, violated the law as it is written in the last sentence of sub-section 3 of section 654 of The Code, and that for that offense the judgment and sentence pronounced upon them should be sustained. The whole of subsection 3 (prefaced by the opening words of section 654, "every Court of record shall have power to punish as for contempt"), reads as follows: "All persons for assuming to be officers, attorneys or counsellors of the Court, and acting as such without authority, for receiving any property or person which may be in custody of any officers by virtue of any order or process of the Court, for unlawfully detaining any witness or party to any suit, while going to, remaining at or returning from the Court where the same may be set for trial, or for the unlawful interference

with the proceedings in any action." The acts for which the respondents were found guilty were interferences with the proceedings in that action of the most unlawful and reprehensible kind. As to the juror Brown, the other respondent, the proceeding was also properly had as to him under subsection 5, section 654 of The Code, in which it is declared that punishment as for contempt may be awarded against "parties summoned as jurors for impropriety, conversing with parties or others in relation to an action to be tried at such Court, or receiving communications therefrom." The respondents were not entitled to a trial by jury, nor to have the findings of fact reviewed in this Court. There was evidence before his Honor to support the findings, and that is all that it required. *In re Deaton, supra.* Neither can their attempts to relieve themselves by avowals of lack of intention to bring the Court into contempt avail them. That rule—the disavowal of the imputed intent purges the contempt and relieves the respondent—applies only to that class of cases "where the *intention* to injure constitutes the gravamen of the offense." *Baker v. Cordon,* 86 N. C., 116.

Under the facts found, they can plead neither ignorance nor innocency. Upon a careful consideration of the whole case, we think the judgment must be

Affirmed.

CLARK, J., concurring. The administration of justice must be kept pure at its source. The evidence is set out in the record. The Court found thereon the following facts: 1. That the said respondent J. A. Gorham has attempted to corrupt and influence J. H. Brown, one of the jurors sworn to try the said case, and has been guilty of conduct that tended to defeat, impair, impede and prejudice the rights and remedies of the plaintiff in the above-entitled suit. 2. That the respondent R. A. Ramsey has attempted to corrupt and in-

fluence the juror B. C. Deaton, to the prejudice of the plaintiff, B. F. Long, administrator, in the above-entitled action, and has been guilty of conduct that tended to defeat, impair and impede the rights and remedies of the said B. F. Long, administrator, plaintiff in the said suit. 3. That the respondent J. H. Brown, one of the jurors sworn to try the said case, has permitted himself to be corrupted and influenced by the respondent J. A. Gorham, to the prejudice of the plaintiff, B. F. Long, administrator, in said suit, and has been guilty of conduct that tended to defeat, impair and impede the rights and remedies of the said B. F. Long, administrator, plaintiff in said suit, and the due and orderly course of justice."

The findings of fact, there being evidence, can not be reviewed on appeal. *In re Deaton*, 105 N. C., 59, and upon those facts the Judge could not do less than adjudge the respondents guilty. The sentence of $50 fine and twenty days' imprisonment each, for Gorham and Ramsey, the most guilty parties, and of $50 fine without imprisonment for Brown, were moderate sentences for an offense which, if unchecked, would overthrow and make contemptible the administration of justice.

The besetting sin of Courts is to go beyond their jurisdiction and supervise the action of the other departments, and the Courts should strive against that tendency. But, on the other hand, the judiciary should be firm and prompt to maintain and defend the exercise of their own prerogative and authority from the invasion of the other departments. *Suum cuique*. Let each department keep within its own limits.

The Constitution, Article IV, section 12, provides: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government." If the General Assembly had expressly enacted that such acts

as are here found to have been committed by the respondents, could not be punished by the Courts, it would have been a nullity as an attempt to deprive the judiciary of a power which has belonged to it from the remotest antiquity, and which has never been denied to any other Court, and which is an inherent power necessary to the very existence of any authority in the Courts. If the moment a juror passes out of the court-room, hired lobbyists in the pay of powerful and wealthy suitors can take them in charge, suborn them, bribe them, sleep with them, treat them and snap their fingers with impunity at the Court, then indeed the judiciary is worse than "exhausted." It will not avail that the parties can be tried for "embracery" at the next term, if all the Judge can do is to make a mistrial. The injury is done, and the contempt of the Court most fully shown by preventing a trial at this term. The contempt could not be more direct or palpable if a band of armed men had followed the jury to the court-house with threats of violence if their verdict was unfavorable, and had stood just outside the door to execute punishement if disappointed. It is equally a contempt of Court whether a man meets a juror just outside the court-room with a bribe or a bludgeon in his hand. If the Court can not prevent either because not done within the court-room, the administration of justice is no longer free. The independence of the judiciary no longer exists. If a juror can with impunity be bribed or bullied on this trial, the same thing can be done when these respondents are on trial for embracery at another term. If jury lobbyists or "law-agents" can with impunity tamper with this verdict, they can with that. It can not be justly imputed to any General Assembly that they passed an act intended or so worded as to justly mean that the administration of justice can be "defeated, impaired and impeded." Were it possible that such an act had been passed, it would be our duty to declare it unconstitutional, and with

as great reason as the Court has ever done so in any case. If the Court can seriously question the power of the Legislature, acting within its exclusive power of laying taxes, to tax an emigrant agent $25, it can surely call in question the construction of any act which would deprive this department of its right to administer justice without being hindered by bribery and fraud. It is clearly stated by Smith, C. J., *In re Oldham,* 89 N. C., 23, that an act having such effect would be invalid. But, as the Judge below held, the Legislature, not wishing to deprive this co-ordinate department of any just powers inherently necessary for the administration of justice, provided in section 656 of The Code: "To sustain a proceeding as for contempt, the act complained of must have been such as tended to defeat, impair, impede or prejudice the rights or remedies of a party to an action then pending in Court," and The Code, section 654 (3) recognizes the power to punish as for contempt, among others, all persons guilty of "unlawful interference with the proceedings in any action." This legislative construction fits this case as a glove does the hand. That the power to punish for contempt is not restricted to those acts committed in view of the Court is further recognized by section 653 of The Code, which provides: "Whenever the contempt shall not have been committed in the immediate presence of the Court, or so near as to interrupt its business," notice shall issue to the defendant.

In Rapalje on Contempt, section 1, it is said: "The better opinion seems to be that legislative bodies have not power to limit or regulate the inherent powers of Courts to punish for contempt. This power being necessary to the very existence of the Court, as such, the legislature has no power to take it away or hamper its free exercise. This is undoubtedly true in the case of a Court created by the Constitution. Such a Court can go beyond the statute in order to preserve and enforce its constitutional powers, by treating as contempts

acts which may clearly invade them. On the other hand, the Circuit and District Courts of the United States, being the creatures of Congress, their powers and duties depend upon the act calling them into existence and subsequent acts extending or limiting their jurisdiction are valid. A statute which limits the amount of the fine or the term of imprisonment which the Courts may impose, does not deprive them of their power to enforce affirmatively their orders, or to enforce any decree." This inherent power applies to Superior Courts, Rapalje Contempt, sec. 1, and does not at common law inhere in inferior courts. *Ibid,* sec. 4. As to them, the power to punish for contempt is statutory.

In *Rhyne v. Lipscombe,* 122 N. C., 650, and many decisions following, it is held that an act of the Legislature depriving the Superior Court of its recognized power to review the Courts below was unconstitutional as depriving it of its inherent power and position. *A fortiori* would this act be unconstitutional if it is construed to deprive the Superior Court of its inherent power to punish such acts as those which directly, not constructively, "defeat, impair and impede" the administration of justice in that Court.

The respondents can not purge themselves in a case of this kind. That is admissible only "where the intention is the gravamen of the offense." The intention here is not to be considered, for it is the acts of the appellants which constitute the contempt.

STATE v. MOORE.

(Filed September 18, 1901.)

1. INDICTMENT—*Sufficiency—Larceny—Arrest of Judgment—Insufficient Ground—Meat.*

Where an indictment charges the larceny of various articles, judgment will not be arrested, or the indictment quashed, because the indictment includes meat, not the subject of larcency.

2. INDICTMENT—*Sufficiency—Quantity—Value.*

An indictment for larceny and for receiving stolen goods is not defective because it fails to charge the quantity and separate value of each article.

3 EVIDENCE—*Admissibility—Trailing by Bloodhound.*

The evidence in this case of the trailing by a bloodhound should not have been admitted.

INDICTMENT against Amos Moore and others, heard by Judge *A. L. Coble* and a jury, at April Term, 1901, of the Superior Court of PITT County.

The defendants, Amos Moore, Ashley Dixon, Jesse Edwards and Joseph Edwards, were tried and convicted upon the following bill of indictment, viz:

"The jurors for the State, upon their oath, present: That Albert Rountree, Amos Moore, Ashley Dixon, Jesse Edwards, Joseph Edwards, John Smith, late of Pitt County, on the 9th day of February, 1901, with force and arms, in said county, 50 lbs. of meat, 20 lbs. flour, 10 lbs. sugar, 4 boxes tobacco, 6 pair drawers, 6 undershirts, of the value of $50, the goods and chattels of J. C. Gaskins, then and there being found, then and there feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year aforesaid, in said

county, the said Albert Rountree, Amos Moore, Ashley Dixon Jesse Edwards, Joseph Edwards, John Smith, the said meat, flour, sugar, tobacco, drawers, undershirts, of the value of fifty dollars, the goods and chattels of J. C. Gaskins, then and there being found, feloniously did have and receive, well knowing the same to have been feloniously stolen, taken and carried away, contrary to the statute in such case made and provided, and against the peace and dignity of the State."

In apt time defendants' counsel moved to quash; motion overruled, and defendants excepted. After verdict, they moved in arrest of judgment upon the following grounds: (1) That it appeared upon the face of the bill of indictment that there was a fatal defect in the first count, in that it charged the larceny of 50 pounds of meat, 20 pounds of flour, 10 ponds of sugar, 4 boxes of tobacco, 6 pairs of drawers, 6 undershirts, and also that it failed to state the value of each article which it alleges to have been stolen; (2) that the second count charges that the defendants received the said meat, flour, sugar, tobacco, drawers and undershirts, without specifying the quantity and value of each article. Which motion was overruled, and defendants excepted.

The State then introduced Albert Rountree, an accomplice, who testified that defendants and himself committed the crime; that on the night of the store-breaking and larceny, the defendant Jesse Edwards broke the first window of the store with a piece of scantling, and then ran across the bridge; that witness was, at the time of the breaking, standing near the store; that defendants Ashley Dixon, Amos Moore and Joseph Edwards were outside of the store; that Jesse Edwards came back and went into the store through the window; that no one went into the store except Jesse Edwards; that Jesse Edwards came out with a sack on his shoulder, divided up what he had in his sack, and gave witness a sack of flour, and divided out the things among the others, and then he left and did not know what became of the others. It

was also in evidence that the next morning several persons, including Moore and Dixon, went to the store and walked around and inside, viewing the premises from which the articles were stolen.

In order to corroborate the witness Rountree (whose evidence was impeached by reason of confession of guilt, and in whose possession alone stolen goods were found, and which was further impeached by reason of his admission upon cross-examination, that after his arrest on Wednesday following, and before he confessed, the magistrate, Sam Laughinghouse, before whom he was taken for trial, gave him whiskey, and told him they would turn him loose if he would tell on the other boys; and that Gaskins, the prosecuting witness, had told him afterwards, while in jail, to stick to what he had said, and gave him ten cents in money and some tobacco, and promised him more money if he would stick to what he had sworn to in the magistrate's court), the State introduced, after exception by defendants, the conduct of a dog, called a bloodhound, as testified to by Brinson and Gaskins: That sometime during the next day Brinson arrived from Kinston with his dog, and carried him to the window, where he smelt in a basket, and was then carried inside, where he smelt at the window, and around the counters, and when he reached the meat-block, he barked, and then went to the back door and smelt the steps and went to the creek eighteen or twenty feet away and barked and came back, and then trailed about the door and steps and up the street, going into divers places, and finally went up to Dixon, one of the defendants, and bayed him, and then trailed about, and afterwards went up to defendant Moore and bayed him. It was also in evidence that said Moore and Dixon were present all the while in the crowd while the dog was trailing, and frequently near the dog. And that the other two defendants, Jessee and Joseph Edwards, were also there in the crowd near the dog at the time.

After verdict of guilty, defendants moved for new trial, assigning, among others, as error the admission as evidence the conduct of the dog, either to establish a circumstance or to corroborate Rountree. Motion overruled, and defendants appealed.

Robert D. Gilmer, Attorney-General, for the State.
Swift Galloway and *A. M. Moore,* for the defendants.

COOK, J., after stating the case. While the bill of indictment is inartificially and carelessly drawn, yet no such defect appears upon its face as would authorize the Court in quashing it, or arresting judgment after verdict.

In the first count, several articles are alleged to have been stolen, and the valuation placed upon them all is fixed at fifty dollars. Among the articles appears one not the subject of larceny, "meat," but all the others are, and are of substantial value; to all or any one of which, if shown to have been stolen, the valuation assigned would attach, and proof of larceny of any one is sufficient (*State v. Martin,* 82 N. C., 672). In the second count, the same articles are alleged to have been received, and the same valuation assigned, but the quantity and number of pounds are not stated. Defendants' contention upon that point can not be sustained, because the quantity does not enter into the element of the crime, nor could it in any way prejudice the defendants' defense. So, it is held that charging the larceny of a "parcel of oats" is sufficiently certain (*State v. Brown,* 12 N. C., 138).

We think the objection taken to the introduction of the conduct of the dog should have been sustained by his Honor, and that he erred in admitting it as evidence. We do not base our opinion upon the ground that the dog, being an animal of instinct and not possessed of reason, and *ergo* his

conduct would not be a circumstance to be considered in connecting a person with an act, or in corroborating a statement made by a witness, but upon the ground that we fail to see that it was a circumstance which would tend to connect the defendants with the larceny, or that it in any way corroborated the testimony of the witness Rountree. It is a matter of common knowledge that there are many breeds of dogs endowed with special traits and gifts peculiar to their respective kind—the pointer and setter take instinctively to hunting birds; the hound to foxes, deer and rabbits, but we know of no breed which instinctively hunts mankind. Yet we know that dogs are capable of running the tracks of human beings, as is frequently evidenced by the lost dog trailing his master's track long distances and through crowded streets, and finally overtaking him, which demonstrates the further fact that some distinctive peculiarity exists between different persons which can be recognized and known by a dog. And it is a well-known fact that the bloodhound can be trained to run the tracks of strangers; and in this the "training" consists only in being taught to *pursue* the *human* track; the gifts or powers or instincts being already inherent in the animal, he is induced to exercise them under the persuasive influence and protection of his trainer or master. Once trained in this pursuit, we must assume that his accuracy depends not upon his training, but upon the degree of capacity bestowed upon him by nature. Experience and common observation show that among dogs of the full blood and full brothers or sisters, one or more may be highly proficient, while others will be inefficient, unreliable and sometimes worthless; some may be acute to scent, while others will be dull to scent and incapable of running a "cold" track. Then again we may find the most reliable and favorite hound taking the "fresher" track which crosses his trail, or quitting the "cold" trail of a fox and following the "hot" track of a deer

which he may strike. Likewise, the pointer or setter may abandon a "cold" trail of a covey of birds and follow a "warmer" one upon which he may happen to run. Or the squirrel dog may leave the tree at which he has taken his stand and barked, and go to another, or quit entirely. So it does no violence to common experience to assume that dogs are liable to be deficient in their instincts. Therefore, we frequently hear huntsmen speak of some dogs as "true" and 'staunch," while others will be denounced as unreliable or "liars." It sometimes happens that the best-trained fox-hounds will lead their master into a rabbit chase, or a pointer will hold his master with trembling excitement while he "points" a terrapin.

Applying common knowledge and experience, of which the Court is justified in taking notice, in connection with the evidence, to the case at bar, we are led to consider whether there is any evidence tending to show that Brinson's dog pursued either one of the tracks made upon the premises at the time of the commission of the crime. After scenting at the window and in and around the store and upon the steps leading to the ground, he went eighteen or twenty feet to the creek and then barked and turned back, which is understood by all followers of hounds to mean that he found he was going the wrong direction, or the track was so "cold" he could not follow it, or that he was scenting for a track and had failed to find one. In either event, it fails to be any evidence that Jesse's track had been identified, or that the dog had discovered any track at all, or, if he had detected a track, it would not follow that it was not made by some person other than Jesse. And if it be that he did discover a track, and it was too "cold" to follow, a like condition would exist as to the tracks of others made at or about the same time.

This incident tends rather to discredit than corroborate Rountree, for he said Jesse went across the bridge, while the

dog went eighteen or twenty feet to the creek. Had the dog been trailing Jesse's track, and had Jesse crossed the bridge, the dog would also have gone there and taken the track back, provided it had not been too "cold" to follow; or, if for any reason he had lost the trail, having once positively identified Jesse's track, then surely Jesse would have been the person recognized and bayed by the dog, to the exclusion of others; while, on the contrary, he bayed two of the persons who did not go in the direction of the creek or bridge (or if they did, there is no evidence of it), and who were shown to have been on the premises, whence the trail was made, that morning a few hours before the dog arrived, and it is not improbable that, had he been pressed or urged, he would have identified each and every one of the persons present at the store that morning.

This is a novel feature of evidence in our jurisprudence, and is attended with some danger, and is calculated to excite the superstition of some people that the exercise of that instinctive power, not possessed by human beings, is a supernatural agency in the aid of human justice, to which too great importance may be attached, and against which Courts will have to guard when the occasion arises

There are only three cases cited by the Attorney-General (and we are satisfied that had there been others they would not have escaped his diligent eye) in which the conduct of a dog has been used as evidence. One is *Hodge v. The State,* 98 Ala., 10, in which it appears that tracks of a peculiar character, and easily identified, were found near the rear of the house in which the murder was committed; that a dog trained to follow human tracks was put upon them, and trailed by him to defendant's house; that the tracks found at the house of deceased were followed by several persons to the defendant's house, being measured at various points along the route, and at each of such points, identified as being made by

the same shoes as were the tracks at the place of murder, and that the route thus traced by them was precisely that taken by the dog throughout, and when the defendant was soon captured he had on shoes that made tracks precisely corresponding to those traced by the dog. In that case the Court held that the conduct of the dog was competent to go to the jury for their consideration, in connection with all the other evidence, as a circumstance tending to connect the defendant with the crime.

In another case, *Pedego v. Com.,* found in 44 S. W. Rep., 143, from Kentucky, the Court held, Guffy, J., dissenting, "That in order to make such testimony (the trailing of a track by a dog) competent, even where it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted at a point where the circumstances tend clearly to show that the guilty party has been, or upon a track which such circumstances indicated to have been made by him. When so indicated, testimony as to trailing by the bloodhound may be permitted to go to the jury for what it is worth, as one of the circumstances which may tend to connect the defendant with the crime of which he is accused. When not so indicated, the trial Court should exclude the entire testimony in that regard from the jury."

The third is *Simpson v. State,* 20 Southern Rep., 572 (an Alabama case), in which the evidence of trailing by the dog was admitted without objection.

In this case, there is no evidence to connect the circumstance of the baying of the two defendants, or either of them, with the making of tracks at the time the larceny was committed; nor is there any evidence that the dog scented any that were then made by either of the defendants; nor is there any way to ascertain that fact.

The evidence admitted failing to become a circumstance to connect the defendants with the crime, and failing to become a circumstance in corroboration of Rountree's testimony, there was error in admitting it, and there must be a

New Trial.

STATE v. VAUGHN.

(Filed September 18, 1901.)

EVIDENCE—*Sufficiency—Homicide—Murder.*

The facts in this case as to the guilt of the prisoner of murder were properly submitted to the jury.

INDICTMENT against Drew Vaughn, heard by Judge *O. H. Allen* and a jury, at Spring Term, 1901, of the Superior Court of HERTFORD County.

The evidence on which the State relied, and material to be stated, is as follows: J. L. Dosier testified: On the 26th of January last I was engineer of the Steamer Keystone. I knew John Barton, who is now dead. He was fireman on the Keystone. Whitfield was mate on the 26th January. We got to Murfreesboro at 7:15 p. m. I stayed on the boat 15 minutes. I left the whole crew on board except Henry Pool, Henry Cole, Peter, Bill, John Barton and George, about all except Whitfield. Henry Pool was one of the crew, but he was not left on board. I got to the boat about 9 o'clock,

and found John Barton missing. I looked at the door, and it was closed. I found a stream of blood. I stopped. Then next to the rail I saw something that looked like somebody overboard; then I opened the door and found a handkerchief and blood around behind the stove-pipe; I also found a pocket knife—John's knife; then I found keys and his cap. The blood was in a cooked condition. The fire went out Saturday night. Shortly afterwards the body was found, with $30 in the pockets in two bags. The body had been out of the water one and a half hours when I saw it. Hammer (produced) belonged to the Keystone. I found it underneath where blood was; fell through. It was bloody. Barton got the lick in the burr of his ear, and about the temple bone; there was an impression of the hammer on his cap; there were four wounds; some trickles of blood came from the ear after we took the body out. Whitfield and Barton stayed on the Boat Saturday night. Barton stayed underneath, and Whitfield on upper deck. Cross-examination: Any other hammer of that size would have done the same.

Evans testified: I was company's agent. On night of January 26, I saw John Barton about 8:30 o'clock. Whitfield went with me uptown. About 7:30 next morning I went to the wharf. I went on board and saw blood near the engine door—saw more blood on the door. The handkerchief was found where the body was pulled around and thrown overboard. The body, when raised, had blows on the head. The doctor examined the skull—it was not fractured. The hammer had blood on it; it was not in the usual place, having dropped in the fireman's room below; it usually stayed on a shelf in the room where deceased stayed. The blood dried up under the engine, though off from the engine it was cold; it appeared to be fresh blood dried. The tracks were examined outside and measured by me. They led from boat near the engine door on left side, shoe tracks, to a fence di-

rect south of boat to a stream which led up old road in direction of Drew Vaughn's house. Sumner measured the tracks also. There was also a woman's track, not measured, Sunday morning. The track was measured at other places. The man's track was made after a rain, the woman's before. Vaughan's foot was measured—the width of the heel and the width of the shoe. The length of his shoe compared to a dot with the track, and the heel was the same. The tracks measured led in direction of prisoner's house—at the pea-field could not see it—went within 140 yards of his house; woman's track was older; made before the rain.

Dr. Gany testified: I examined the dead body, but did not find fracture, but contused wounds produced by some blunt substance—a hammer, for example. The lick would produce death. In my opinion, those wounds produced death.

B. Watford testified: I knew John Barton and Drew. Had conversation with prisoner about Barton on the 15th of June of last year. I was plowing. I said if it was my mule I would cut his throat. He said, if I had the spite against Barton as I had against the mule, I would go down there sometime and cut his throat and throw him overboard. He spoke about putting $50 improvement on his (Barton's) land, and did not get any pay for it. In October he said to me if Barton did not pay him he was going to have recompense. I have heard him speak of it several times since. He said that Barton had treated him wrong, and that but for him (Barton), he could get regular work on the boat. I have heard him say that Barton kept his money on the boat; that his wife was extravagant, and he kept it himself. Drew Vaughn married my wife's sister. He sent for me. I went to Drew's home Monday morning after the murder. He asked me if I had heard any suspicion about who had killed Barton; then asked me about picking him out a house when he got ready to buy one. Cross-examined: I told no

one about what prisoner had said to me. Charles Boone was present.

L. F. Sumner, constable: I measured tracks (exhibits measure). The measurement of the track fitted the prisoner's foot exactly. The tracks looked like the person was walking fast. On the way to the jail he spoke about his wife, saying she burnt the trousers. He said he burnt them up himself.

Charles Boone: I saw the prisoner the night Barton was killed. I heard him say in June to Ben Watford that if he had as much ambition as he had against that old man he would go down there and knock him in the head and throw him overboard. I asked him what would become of him (prisoner). Said Barton answered him, saying, "He didn't care, so he got his recompense out of him." Cross-examined: Spoke of him as old gentleman.

Emma Boone: Before Christmas last, about three weeks before he killed him, he told me to tell John Barton if he did not pay him he would kill him and put him in a hole. Nobody was present but John Roberts' wife. I told John Barton.

J. C. Carter: Heard him on the 8th January last. He spoke about running on the Steamer Keystone—said Mr. Dee was a good captain. Uncle John would not give me a bit of chance when he ran on the boat with him; said "he is a mean old rascal—he cheated me out of $50." I remonstrated. He said, "I've got no money or nothing, but I'm going to have something." I heard him speak of John two or three times as a grand old rascal, when he ran on the boat.

Parker: I heard prisoner make those statements about Barton. Said old man John was a grand old rascal, and he was going to have his position if he had to kill him. Prisoner said he was going on the boat as foreman—November last. In January I was at father's. Drew was in there, and in going on said he wanted money to pay for land—said he was going on the boat.

J. P. Hedgepeth: I knew Barton. I went to the boat Sunday morning and searched for him and found him. I saw Vaughn on the night of the murder at 8:30. He had his jaws tied up.

Sheriff Tayloe: I heard prisoner make statements several times free from inducements and threats. About the second day after he was put in jail, he said he did not do the murder himself, but he knew who did. He said it was Henry Garriss, Henry Pool and Ben Watford. He said they did it. Prisoner was at the foot of the steps near a cedar tree, heard the scrimmage and heard the old man when he went overboard, and he then went to his house and did not come out until next day. He told that to anybody at any time, and told it several times.

Ben Watford: I was near when boat blew for wharf; was then at Hill's store about 12 o'clock that night. I and Henry Garriss and Henry Pool (the parties mentioned to the Sheriff by prisoner) did not kill him.

Whitfield: I am mate on the Steamer Keystone, and left the boat at 8:30 o'clock to buy provisions. I saw, among others, Henry Garriss, cook. Then I went to the boat about 20 minutes to 11 and went to my room and went to bed. When I left, I left five deck hands and John Barton. He slept below, aft. Next morning some lamps were burning which ought to have been put out. Then I saw some blood.

Sumner: Ben Watford was in Hill's store, and stayed there until 12 o'clock.

Hill: Ben Watford was in my store from 10 o'clock until 12 o'clock.

The State rested.

From a verdict of guilty of murder in the first degree and judgment thereon, the prisoner appealed.

Robert D. Gilmer, Attorney-General, for the State.
George Cowper, for the defendant.

COOK, J. Upon the conclusion of the evidence introduced by the State, the prisoner requested the Court to charge: "That there is no evidence before the jury sufficient to convict the prisoner of the murder," which request was refused and the prisoner excepted. A verdict of guilty was rendered; motion for new trial, etc., and prisoner appealed.

So the question for our determination is presented solely upon the evidence introduced and relied upon by the State, and upon which alone we must presume the jury acted in arriving at their verdict. So we are again confronted with the difficult and serious task of deciding whether the evidence is sufficient to go or be left to the jury, upon which, in some aspect of it, they might reasonably render a verdict of guilty. The finding of the *fact* at issue and the *weight* to be given to the evidence upon which the finding is made, are exclusively within the province of the jury; whether there is evidence sufficient to be submitted, is a question of law to be decided by the Court (*State v. White,* 89 N. C., 462; *State v. James,* 90 N. C., 702; *State v. Brackville,* 106 N. C., 701; *State v. Gragg,* 122 N. C., 1082), and with which we now have to deal in reviewing the ruling of his Honor in the Court below.

Considering the several circumstances testified to by the witnesses, collectively, we think they established such a state of facts as warranted his Honor in submitting them as some evidence of the prisoner's guilt. Malice is shown from the threats; motive is shown from his desire to get deceased out of the way so that he could get employment on the steamer; the killing was done at the place and in the manner indicated by his threats; his presence at the steamer on the night of the homicide is shown by the tracks, fitting, by measurement, his own, and also by his voluntary statement that he was near by and heard the scrimmage, and heard the old man when he went overboard, thus showing an opportunity; his professing knowledge of the homicide and failing to disclose

it until after his arrest and imprisonment; destruction of his trousers by burning them before arrested, and failure to explain the cause

Whether these circumstances formed such an unbroken chain of evidence as to carry conviction of his guilt to a moral certainty, or beyond a reasonable doubt, rested in the judgment and conscience of the jury, over which the Court has no control. There is

No error.

STATE v. JONES.

(Filed October 22, 1901.)

INJURY TO PROPERTY—*Houses—Trespass—Mortgages—The Code, Sec. 1062.*

A mortgagor in possession after sale under the mortgage, not being a trespasser, is not indictable under The Code, Sec. 1062, for tearing down the building.

INDICTMENT against Primus Jones, heard by Judge *H. R. Starbuck* and a jury, at April Term, 1901, of the Superior Court of WAYNE County. From a verdict of guilty and judgment thereon, the defendant appealed.

Brown Shepherd, with *Robert D. Gilmer, Attorney-General,* for the State.

No counsel for the defendant.

FURCHES, C. J. This is an indictment under The Code, sec. 1062, for pulling down a house. The defendant, it seems, was the owner of the house and mortgaged it to Mrs. Exum, with power of sale. The debt not being paid, Mrs.

Exum sold, and the prosecutor Best bought and took a deed therefor from the mortgagee. This sale took place a few days before the alleged offense was committed. The defendant was living in the house at the time he pulled it down, and had been for several years, as the mortgagor of Mrs. Exum. Best, the purchaser, was present when the defendant pulled down the house, offered to show the defendant his deed from the mortgagee, and forbade the defendant pulling down the house. The defendant, who was present at the mortgage sale, said he did not want to see the deed, and proceeded to pull down the house. Neither had the prosecutor Best nor Mrs. Exum ever been in the actual possession of the house.

Upon this evidence, which was uncontradicted, the defendant requested the Court to charge the jury that the defendant was not guilty. The Court refused to charge as requested, and defendant excepted, and, upon a verdict of guilty and judgment, appealed.

If this statute had not been already construed by the Court in so many cases, we would be very much disposed to affirm the judgment below, as it seems to us that it was the intention of the statute to prevent the *wilful* pulling down a house not belonging to the party doing so, to the damage of the owner; and the *wilful* act of pulling down such a house constituted the criminal offense. But this Court has put a different construction upon the statute; and being instructed by these decisions, it would seem that we should say the defendant was entitled to the charge asked for, "that upon the evidence he was not guilty."

It is held, to constitute a criminal offense under section 1062 of The Code, there must be a *trespass*. *State v. Williams*, 44 N. C., 197; *State v. Watson*, 86 N. C., 626; *State v. McCracken*, 118 N. C., 1240. And a party in *actual* possession can not commit a trespass upon the property he is in possession of. *State v. Howell*, 107 N. C., 835; *State*

v. Reynolds, 95 N. C., 616; *Dobbs v. Gullidge,* 20 N. C., 68. Therefore, according to the logic of these decisions, as the defendant is shown to have been in the actual lawful possession of the house at the time he tore it down, he committed no criminal offense under this statute. We say the lawful possession to distinguish his possession from that of a mere trespasser, which would not protect him from the penalty of the statute. The prosecutor doubtless was entitled to the possession of the house; but his being entitled to have the possession, did not give him the possession. If the house had been vacant, the prosecutor's title would have given him constructive possession of the house. But there is no such thing as a constructive possession as against the *actual adverse* possession of another person. *State v. Reynolds* and *Dobbs v. Gullidge supra.*

We have said, the defendant being in the *lawful* possession, that is, his possession commenced rightfully and not tortiously. And while the prosecutor may have been entitled to the possession, the defendant having gone into possession rightfully, his possession was not *unlawful* within the criminal meaning of the term.

Error.

STATE v. COUNCIL.

(Filed October 29, 1901.)

1. REHEARING—*Supreme Court—Appeal—Criminal Law.*

Petitions to rehear are not allowable in criminal actions.

2. SUPREME COURT—*Opinions—Per Curiam—Acts 1893, Ch. 379, Sec. 5—Criminal Law.*

The supreme court justices are not required to write their opinions in full.

3. NEW TRIAL—*Supreme Court—Newly-discovered Evidence—Criminal Law.*

The supreme court will not grant new trial in criminal actions for newly-discovered evidence.

4. SUPREME COURT—*Per Curiam Opinions—Homicide—Appeal.*

A person convicted of a capital felony is not prejudiced by the fact that the supreme court renders a *per curiam* opinion affirming the conviction.

5. JURY—*Incompetent Juror—Exceptions and Objections.*

The manner in which a juror is sworn is not ground for objection after verdict.

6. SUPREME COURT—*Appeal Dismissed—Exceptions and Objections—Appeal.*

The supreme court will sometimes decide the points presented in the case on appeal, though the appeal be dismissed.

DOUGLAS, J., dissenting.

ON petition to rehear. Petition dismissed.

E. K. Bryan, for the petitioner.

Robert D. Gilmer, Attorney-General, and *N. A. Sinclair* in opposition, for the State.

CLARK, J. The Attorney-General moves to dismiss the petition to rehear on the ground that by the uniform practice of the Court, observed from its beginning till now, petitions to rehear are not allowable in criminal actions.

An appeal to this Court is a right. Not so as to a petition to rehear (*Herndon v. Insurance Co.,* 111 N. C., 384; *Solomon v. Bates,* 118 N. C., 321), which is an appeal from this Court to itself and only allowable *ex necessitata* when there is no other possible relief from its judgment. In criminal actions, there is the fullest power vested in the Executive not only to relieve from a judgment of this Court, as could be done by us upon a rehearing, but the facts can be inquired into as the Court could not do, and considerations of equity and of mercy may have a weight which can not be presented on a rehearing in a Court.

In *State v. Jones,* 69 N. C., 16 (for murder), it was held that this Court had no power to rehear a criminal case, Reade, J., saying: "Neither the learned counsel for the prisoner nor the Attorney-General has been able to cite any authority showing that we have the *power* to rehear the case." This has been uniformly followed ever since—as it had been up to that time—and this case is cited in *State v. Starnes,* 94 N. C., by Smith, C. J., who says (page 982): "No such proposition in reference to criminal prosecutions has ever been made or entertained, so far as our investigations have gone, in this Court. The absence of a precedent (for we can not but suppose such application would have been made on behalf of convicted offenders, if it had been supposed that a power to grant them resided in the appellate Court), is strong confirmatory evidence of what the law was understood to be by the profession." The particular point before the Court in *State v. Starnes* was the motion for a new trial for newly discovered evidence in the Supreme Court on a conviction for rape, which motion was denied in the language

above cited, and this has been cited as authority (*State v. Gooch,* 94 N. C., 1008; *State v. Starnes,* 97 N. C., 423; *State v. Rowe,* 98 N. C., 630), and has been observed, without filing an opinion, uniformly since, both as to new trials, for newly discovered evidence and rehearings, both of which are allowed (but with certain well-defined restrictions) in civil actions, but never on the criminal side of the docket. It would indeed be an anomaly if the Court can not grant a new trial in criminal cases for newly discovered evidence, but could grant a rehearing. That the practice in this matter has been unbroken for nearly one hundred years is of itself, as the Court has already observed—speaking through Mr. Justice Reade and Chief Justice Smith—a strong argument why we should follow the precedents.

Petitions to rehear were first authorized, in the present terms of the statute at least. Rev. Code, Chap. 33, sec. 1. That with full knowledge of the construction placed upon that provision by the uniform practice of the Court and the decision in *State v. Jones, supra,* it was repeated in the same terms in The Code, sec. 966, it is clear that the profession and the General Assembly and the Code Commission acquiesced in that construction. If, however, the Court were not bound by a century of legislative acquiescence, as well as judicial construction, and, viewed as a new question, the Court might well pause assuming a jurisdiction over the strenuous applications of defendants in criminal actions after the highest Court has decided against them. It is the concurrent testimony of successive Governors that such applications have been the most troublesome matters they have had to deal with, yet they have means of investigation and examination and a leisure which is denied to this Court.

However, legislation has now clearly deprived us of the power, if we had ever possessed it, of granting rehearings in criminal actions. By the Laws of 1887, Chap. 192, sec. 3,

amending The Code, sec. 962, it is provided: "In all cases of affirmance of a sentence for a capital felony, the Clerk of the Supreme Court at the same time that the decision of the Supreme Court is certified down to the Superior Court, shall send a duplicate thereof to the Governor, who shall immediately issue his warrant under the Great Seal of the State to the Sheriff of the county in which the appellant was sentenced, directing him to execute the death penalty on a day specified in said warrant, not less than thirty days from the date of said warrant; but this shall not deprive the Governor of the power to pardon or reprieve the defendant, or to commute the sentence."

By virtue of Chapter 41, Laws 1887, and Rule 48 of this Court, opinions are certified down on the first Monday in each month, provided they shall have been on file ten days. As opinions are usually filed on Tuesdays, they remain not less than thirteen days and not more than forty-two days *in fieri,* and, in that time, if there is error (and in criminal cases it should be scrutinized in that time) it can be observed and the matter called to the attention of the Court, which, in such cases, on sufficient cause shown, has more than once called up the opinion for reconsideration. If this is not done, the remedy is by application to the Governor. After the opinion is certified to the Governor for execution, the matter is out of the jurisdiction of the Judicial Department, for he is required to issue his warrant immediately to the Sheriff. One Judge of this Court can not, upon an application to rehear, issue his mandamus or his injunction to restrain the Governor from proceeding as the statute has expressly directed him to do, upon reception by him of the certified opinion of the Court. In this very case, the suspension of execution has been by the courtesy of the Governor in granting a respite under his prerogative, and not by virtue of the order of a member of this Court. That a Judge of

this Court could not issue his order to the Governor commanding him not to proceed, is conclusive that we have no power over the matter after the certificate of the opinion of this Court has gone to him. The matter has then gone into his hands, and the public history of this case shows that the Executive has fully and carefully investigated all claims made for leniency. Further action is left by the Constitution and laws with him. No criticism is intended upon the action of the member of the Court who granted the order for a rehearing, for it was desirable that this point should be squarely presented and finally set at rest, which might as well be done in this case as in another.

The same is true as to convictions for lesser offenses, for the same section (section 3, Chap. 192, Laws 1887) provides: "In criminal cases the Clerk of the Superior Court, in all cases where the judgment has been affirmed (except where the conviction is of a capital felony) shall forthwith, on receipt of the certificate of the opinion of the Supreme Court, notify the Sheriff, who shall proceed to execute the sentence appealed from." Thus showing the evident clearly expressed intention that the matter should then be in the hands of the Executive Department, and execution of the judgment proceed without interruption, unless by executive clemency. It is otherwise as to civil matters, as to which, by the same statute, no action can be taken till a new judgment is rendered by the Court below.

Counsel for the prisoner seem to think it a grievance that a *per curiam* decision, instead of an opinion, was filed in this case, 128 N. C., 616. But if the General Assembly could still require the Court to file opinions (which it can not do since the Constitution of 1868, *Horton v. Green*, 104 N. C., 400; *Herndon v. Ins. Co.*, 111 N. C., 384), the same authority has relieved the Court of the former statute by enacting (Laws 1893, Chap. 379, sec. 5): "The Supreme Court

Justices shall not be required to write their opinions in full except in cases in which they deem it necessary."

As the Court had already held, in the cases above cited, that the General Assembly, under the present Constitution had no control over such matters, this has only a persuasive effect on us as the opinion of a co-ordinate branch that unnecessary opinions had been filed, taxing alike the public treasury and the time of the profession. In deciding what cases shall be disposed of by a *per curiam* decision without an opinion, we have always been guided, not by the importance or unimportance of the matter at issue, but by considering whether or not the propositions of law presented had not been already frequently decided. Accordingly, we find that in other States appeals in capital cases have not infrequently gone off on a *per curiam* decision without opinion, and in some States it is always done when the judgment is affirmed, and in England no appeal has ever been allowed in criminal cases, the remedy being by application for executive clemency.

When the appeal was heard at last term, the point most pressed was the motion for a new trial for newly discovered evidence. It had been well settled that such motions in criminal cases would not be heard in this Court (*State v. Starnes, supra*), and that even in civil cases such motions would be disposed of by *per curiam order. Herndon v. Railroad,* 121 N. C., 499; *Brown v. Mitchell,* 102 N. C., 347; *Ferebee v. Pritchard,* 112 N. C., 83, and many other cases, and the same course was necessarily pursued in this case.

Another point was made, though properly not much relied on, that one of the jurors had not been properly sworn. This has been more pressed on this argument, but it was presented and considered and decided by us before. It was so well settled that if there was such irregularity, it was cured by not objecting in apt time, that we deemed no repetition of adju-

dications necessary. The juror was sworn in presence of prisoner and his counsel, and to let him acquiesce in the manner in which the oath was taken, and then object after verdict, would simply make a trial not a decision upon the merits, but a series of pitfalls for the State. Not having spoken when he was called upon to speak, the prisoner should not be heard after the verdict has gone against him. *State v. Boone,* 82 N. C., 637; *State v. Patrick,* 48 N. C., 443; *Briggs v. Byrd,* 34 N. C., 377; *State v. Ward,* 9 N. C., 443. Even where a juror is incompetent because a minor (*State v. Lambert,* 93 N. C., 618), or an atheist (*State v. Davis,* 80 N. C., 412), or not a freeholder (*State v. Crawford,* 3 N. C., 485), or a non-resident (*State v. White,* 68 N. C., 158), or related (*Baxter v. Wilson,* 95 N. C., 137), and these objections are not discovered until after verdict, setting aside the verdict, rests in the discretion of the trial Judge. *State v. Lambert, supra,* and many cases there cited. For a stronger reason, this must be so when the objection is merely to the manner in which a competent juror is sworn, when the oath is taken in the prisoner's presence who makes no objection. This is like the case of incompetent evidence admitted without objection, and the like. In *State v. Gee,* 92 N. C., 756, where a witness was not sworn at all, the Court held that this was not ground of objection after verdict.

Indeed, it appears from the affidavit of the Clerk of the Court that the juror was sworn in the proper manner, and the manner of his oath taken before the Judge afterwards, indicates as much. Besides, there is no finding of fact by the Judge as to the manner in which the oath was taken (*State v. DeGraff,* 113 N. C., 689), which the appellant should have asked for if he wished the action of the Judge reviewed. *Whitehead v. Hale,* 118 N. C., 601.

Though the petition to rehear must be dismissed, we have discussed the objection, as has sometimes been done when

an appeal is dismissed. *State v. Wylde,* 110 N. C., 500, and cases there cited.

Petition Dismissed.

DOUGLAS, J., dissenting. I can not concur in the opinion of the Court, because my convictions are to the contrary. I readily concede that this decision settles the question that in no case can a rehearing be had in a criminal action, and I think it better that it should be settled one way or the other. And yet, knowing that rehearings are constantly granted in civil cases, and finding no distinction between civil and criminal actions, either in the statute or the rules of this Court, I am unwilling to say, even by implication, that property is more valuable than life and liberty, or entitled to a greater degree of protection. The argument that in criminal cases the pardoning power of the Governor fulfills the purpose of a rehearing, is purely *ab inconvenienti,* and, to my mind, does not meet the ends of justice. Pardon is an act of mercy, and so far from establishing the innocence of anyone, presupposes his guilt. The Governor may restore to him his liberty, but not his character.

What a defendant asks in a rehearing is that he may have a fair trial; and yet, no matter how clearly his innocence may appear, nor how great the error we ourselves may have committed, we can give him no relief. He must throw himself at the feet of the Executive and beg the poor favor of passing the remainder of his life in the penitentiary, or, at best, wandering through the world a social outcast, bearing the brand of a convicted felon. This may become the law, but through no act of mine.

As the petition to rehear is dismissed, it is useless for me to discuss the merits of the case. My reasons for directing it to be docketed are given at length in the original order, which is hereto attached, to-wit:

"This is a petition made in apt time and proper form to rehear a criminal case, wherein the petitioner is under sentence of death. As this case was decided upon a *per curiam* order while I was absent from the bench, I am ignorant equally of the grounds of the decision and the reasons and authorities influencing the Court. However, I have no hesitation in saying that, in my opinion, this is a proper case to be reheard, but I feel great hesitation in ordering it to be docketed in view of the decision of this Court in *State v. Jones,* 69 N. C.,16. That case is directly in point, and expressly holds that "the Supreme Court has no power to entertain a petition to rehear a criminal action." It is but just to counsel as well as myself to say that that decision does not meet my approval, in spite of my respect and admiration for the great Court that delivered it. In fact, it scarcely seemed to satisfy the Court itself, as the learned Justice writing the opinion, after deciding this vital point against the petitioner, proceeds to discuss the points raised in the petition as fully as if the petition had been allowed.

"This case was decided upon no precedents whatever, as there were admittedly none then, and I am able to find none other since. It is true, Jones' case is cited in *State v. Starnes,* 94 N. C., 973, 981; and in *State v. Rowe,* 98 N. C., 629, 630; but these latter cases relate exclusively to motions for new trial for newly discovered evidence, and have no apparent bearing upon the question of rehearing. The reasons given by the Court are as follows: 'Neither the learned counsel for the prisoner nor the Attorney-General has been able to cite any authority showing that we have the *power* to rehear the case. In equity cases and in civil actions the practice has been common, but in criminal cases never to our knowledge. In the former cases, this Court makes decrees and passes judgments, which may be reviewed. But in criminal cases we do not pass judgment. Such cases are sent up for our opinion only,

which we certify to the Court below, and there our jurisdiction ends.' Whatever force these reasons might then have had, they have none now to my mind. This Court constantly grants rehearings in civil actions, where it passes no judgment whatever, and makes no decrees. Rules 52 and 53, providing for rehearings, make no distinction between civil and criminal cases, and I see none. If the title to a chicken were involved, I could grant a rehearing; but as a human life is at stake, I am utterly powerless. To my mind, such a distinction finds no just foundation in law, in public policy or in humanity. The rights of property can never be more sacred than the security of the person, as they have no independent existence, but exist only in relation to the owner.

"The guilt or innocence of the prisoner is not for me to decide, nor can I properly consider the facts that the Judge who tried the prisoner has grave doubts of his guilt, that the Solicitor who prosecuted him does not believe that he is guilty, and that the jury that convicted him rendered a verdict only after a distinct understanding among themselves and with the Court that it should be coupled with a recommendation to mercy. These facts, however strong and significant, appeal only to executive clemency, and not to judicial action.

"However much a Justice may dissent from the decisions of a Court, and however full his right of dissent when sitting with the Court, he is bound by them when acting in his individual capacity. But docketing a case is not overruling any opinion that may be involved. It is simply bringing the matter before the Court for such action as it may see fit to take. In no other way whatever can it be brought before the Court. Even if the Court were in favor of a rehearing, it could not act under its rules unless some individual Judge took the responsibility of ordering the case to be docketed. Feeling as I do, I think the Court should have an opportunity to pass upon the question, which can never be presented more clearly or more forcibly.

"I am somewhat influenced in this course by the fact that the Governor frankly states that he will reprieve the prisoner if I order his petition to be docketed, *but not otherwise;* and by the further fact that eminent members of the bar think that criminal cases *can* be reheard, a view in which I understand His Excellency to fully concur. Unless his case is docketed, the petitioner will be hanged next Monday, and this Court would then be powerless to correct any error that may exist, no matter how great or manifest. The petitioner has been convicted of what is properly regarded as the highest crime known to our law, and if guilty should be punished. But he is entitled to a fair trial, and if innocent, his execution would inflict a wrong which eternity alone can repair. Under such circumstances, I feel it my duty to act, no matter how great may be my reluctance or the responsibility which it involves.

"The Clerk will docket this case, and file this opinion with the petition. He will also issue the proper notices, including one to the Governor.

"This 8th day of August, 1901.

"R. M. DOUGLAS,
"*Associate Justice.*"

STATE v. ANDERSON.

(Filed November 5, 1901.)

CARRYING CONCEALED WEAPONS—*The Code, Sec. 1005.*

A private night watchman is not guilty of carrying a concealed weapon, under The Code, Sec. 1005, while on duty upon the premises he is employed to watch.

INDICTMENT against C. Anderson, heard by Judge *A. L. Coble* and a jury, at July Term, 1901, of the Superior

Court of RANDOLPH County. From a verdict of not guilty on a special verdict, the State appealed.

Brown Shepherd, for *R. D. Gilmer, Attorney-General,* for the State.

No counsel for the defendant.

FURCHES, C. J. This is an indictment for carrying concealed weapons, under section 1005 of The Code, in which the jury found the following special verdict: "That the defendant was an employee of the Randleman Manufacturing Company, as a night watchman, and on the 30th of March, 1901, was in discharge of his duty as such, and carried a pistol concealed about his person on the premises of the company." Upon this verdict, the Court held that the defendant was not guilty, and the State appealed.

The statute makes it a criminal offense to carry a pistol concealed about one's person, "except when on his own premises." "And if anyone, not being on his own land, shall have about his person any such deadly weapon, such possession shall be *prima facie* evidence of concealment thereof." So it is seen that the statute uses the word "premises" when it describes the offense, and the word "land" when it makes the fact of carrying the weapon *prima facie* evidence of concealment. But it is held in *State v. Perry,* 93 N. C., 585, that one in possession as "an agent or overseer, or anyone else who is vested with the right of dominion, is the owner within the meaning of the statute." This opinion seems to sustain the opinion and judgment of the Court below. And we do not think that the opinion in the case of *State v. Perry,* 120 N. C., 580, is in conflict with the definition given in *State v. Terry,* 93 N. C., 585, as above stated.

The judgment must be

Affirmed.

STATE v. McDOWELL.

(Filed November 12, 1901.)

1. EVIDENCE—*Opinion Evidence—Competency.*

Whether there was light enough for the prisoner to see the deceased at time of killing is not an expression of opinion.

2. EVIDENCE—*Res Gestae—Competency.*

Evidence as to what prisoner on trial for murder said to a party after the shooting is not competent unless a part of the *res gestae.*

3. CONFESSIONS—*Admissibility.*

Where a prisoner denies knowing anything about the killing, such statements are not inadmissible as confessions.

4. INSTRUCTIONS—*Charge—Judge.*

Where the trial judge in his general charge gives "every reasonable contention of the State," it is erroneous to give an entirely new charge, containing "a powerful summing up" for the state.

5. EVIDENCE—*Weight—Expression of Opinion by Judge—The Code, Sec. 413.*

The instructions in this case are erroneous as expressing an opinion on the evidence.

6. INSTRUCTIONS—*Charge—Misstatement of Evidence by the Court.*

An incorrect and unfair statement of evidence against prisoner by the trial judge is erroneous.

7. WITNESSES—*Evidence—Near Relations—Instructions.*

It is error to instruct the jury that because of relationship the jury should carefully scrutinize the testimony, *without adding* that, if the jury believed the testimony it should have the same weight as if the witness was not interested.

INDICTMENT against Jim McDowell, heard by Judge *T. A.*

McNeill and a jury, at July (Special) Term, 1901, of the Superior Court of ROBESON County. From a verdict of guilty and judgment thereon, the defendant appealed.

R. D. Gilmer, Attorney-General, and *McLean & McLean,* for the State.

Wade Wishart, W. D. Bizell, and *R. E. Lee,* for the defendant.

FURCHES, C. J. The prisoner was indicted for the murder of one Harlee Leak, convicted of murder in the second degree, sentenced to ten years in the penitentiary, and appealed. And this being a Court of errors, we can only consider the *errors of law* presented by the record.

There are several exceptions to the rulings of the Court upon the evidence, none of which can be sustained.

The witness James Jenkins was asked by the State: "Was it light enough for defendant to have seen deceased as he passed out of the house and know who he was?" To the question the prisoner objected, and upon his objection being overruled, excepted. This exception is put upon the ground that the question "involved the expression of an opinion by the witness," and *State v. McLaughlin,* 126 N. C., 1080, is cited as authority for this contention. But we do not think McLaughlin's case sustains the exception. In that case two statements of the evidence were made, and the witness was asked and allowed to testify that in his opinion they were substantially the same. This was purely a matter of opinion, and invaded the province of the jury. Not so in this case, which was a statement of what he knew by sight, and not what he believed by the exercise of his mind and powers of reasoning.

The next exception is to the exclusion of what the prisoner said to James Jenkins after the shooting. This exception

can not be sustained, as it does not appear to be a part of the *res gestae,* nor does it appear to be as to a conversation between the witness and Jenkins, about which Jenkins had testified.

Another exceptions is to the evidence of Sheriff McLeod at the time he arrested the prisoner. It appears that the Sheriff and three other men went to the house of the prisoner about 11 o'clock the night the deceased was killed, for the purpose of arresting him. The door was closed, and the Sheriff pushed it open, and he and the three persons with him, acting as his deputies went in and found the prisoner standing near the foot of the bed. They drew their pistols, told him that he was their prisoner, and to throw up his hands, which he did, and asked what was the matter. The Sheriff replied, "You know what is the matter; you have killed Harlee Leak." To this the prisoner replied: "That he had not done anything of the kind. He said he had not had his pistol; it had been home with his wife. He didn't seem to know much about the shooting." The evidence was received over the objection of the prisoner, upon the ground that it was not a confession obtained through fear. But the prisoner contended that it should not have been admitted under the rulings of this Court in the cases of *State v. Dildy,* 72 N. C., 325, and *State v. Davis,* 125 N. C., 612. It does not seem to us that either of these cases sustains the exception. In the case of *State v. Davis,* the defendant was arrested by one Conrad, and, while under arrest, Conrad said to him: "That he had worked up the case, and he had as well tell all about it." At first the defendant denied any knowledge of the alleged stolen articles, but afterwards said that another person had brought them into his house, and this evidence was held to be incompetent. But Davis' case differs from this in two respects. In that case the defendant was *induced* to make the confession by being told by the officer that he "had worked

up the case, and *he had better tell all about it"*; while in this case nothing of the kind is said to the prisoner, but he volunteered to say what he did. But a greater distinction is that in this case there was no confession. The prisoner denied all knowledge of the killing, and it is difficult to see how this could be considered a *confession* of the crime.

There are other matters shown by the record which have given us trouble. It appears from the evidence offered by the prisoner that other shots were fired than those fired by the prisoner, and from different directions. There is also evidence tending to show that if the deceased was killed by the prisoner, he would have been shot in the back; while the evidence is that he was killed by a shot from the front. It is also in evidence from the Sheriff and othres with him at the time of the arrest, that the prisoner's pistol, freshly fired, was a 32 Iver & Johnson pistol. This evidence was undisputed and uncontradicted. G. W. Waddell took the witness-stand with his scales, and in the presence of the Court and jury proceeded to weigh the bullet that killed the deceased, and to weigh one taken from the prisoner's pistol by the Sheriff. The bullet that killed the deceased weighed 105 grains, and the bullet taken from the prisoner's pistol by the Sheriff, when he arrested the prisoner, weighed but 85 grains; and the witness Waddell testified that the bullet which killed the deceased could not have been shot out of a 32 Iver & Johnson pistol. This evidence was uncontradicted. And we find that, at the request of the prisoner, the Court charged the jury: "That if you find from the evidence that the deceased came to his death by a bullet which could not have been fired from an Iver & Johnson 32 cal. pistol, you should acquit the prisoner." But they found him guilty. We suppose they did not believe this undisputed testimony of the witness Waddell. The prisoner asked several instructions, all of which were given but one, and that one should not have been given.

The State asked several special instructions, all of which were given and excepted to by the prisoner; and the case states: "His Honor, after having stated to the jury, in his general charge, every reasonable contention of the *State*, gave the following special instructions asked by the State:

"1. The prisoner, Jim McDowell, is charged in the indictment with murder in the first degree. Under the indictment, the jury may find a verdict of murder in the first degree or the second degree, or manslaughter, or not guilty, accordingly as the jury may find the facts to be from the evidence produced upon the trial. If the State has satisfied you beyond a reasonable doubt that the prisoner slew the deceased with a pistol, as contended for by the State, then the law presumes that the prisoner is guilty of murder in the second degree, and the burden shifts to the prisoner to satisfy the jury, not beyond a reasonable doubt, but simply to satisfy the jury of such mitigating circumstances as are sufficient in law to mitigate and reduce the murder in the second degree to manslaughter. This instruction was given, and prisoner excepted.

"2. If you find beyond a reasonable doubt from the evidence in this case that the prisoner slew deceased with a pistol, and if the prisoner has failed to show to the satisfaction of the jury such mitigating circumstances as in law would reduce the killing to manslaughter, then the jury should find a verdict of murder in the second degree. Given. Prisoner excepted.

"3. The first thing for you to decide is, did the prisoner slay the deceased, as is alleged by the State, and the State relies on the following testimony to sustain its contention that the prisoner actually slew the deceased: The evidence of Dave Sammons, who was with the deceased at the time he was shot; Jim Jenkins, who was with the prisoner at the time he fired the pistol; John Leak, who testified as to threats on the afternoon before the killing; of Mary Faulk, who testi-

fied as to hearing three shots in the direction of Jim Jenkins' house; of Dave Love, who heard three shots in the direction of Jim Jenkins' house, and who also testified that he examined pistol found in possession of prisoner after the killing, and which had been recently shot; of Sheriff McLeod, who examined the pistol found in the possession of prisoner; of Jim French, who was immediately behind the prisoner when he fired the pistol, and other evidence tending to show that the shot which struck Harlee was fired from the direction of Jim Jenkins' house, in which direction the prisoner was at the time of the shooting. The State also relies upon what it claims were contradictory statements made by the prisoner immediately after the killing, and to the fact that he admitted going home by an unusual and different route, and by his denying any knowledge of the death of Harlee Leak at the time he was arrested, and also upon the evidence of Jay Barnes and Frank Barnes, who swore that three shots were fired, and that they were in the direction of Jim Jenkins' house. If you are satisfied beyond a reasonable doubt that the prisoner killed the deceased, then you will proceed to determine whether the crime be murder in the first degree, second degree or manslaughter. If you find from the evidence, beyond a reasonable doubt, that he did the killing as alleged, with a pistol, nothing else appearing, you should render a verdict of murder in the second degree. Before you can render a verdict in the first degree, the State must prove to you, further beyond a reasonable doubt, that the killing was wilful, deliberate and premeditated. It is not necessary that the purpose or design to kill should exist for any particular length of time, but that it must have existed before the killing; otherwise it would not be murder in the first degree. The testimony relied on by the State to show murder in the first degree is that of John Leak, that on the afternoon of the day on which Harlee Leak was killed, the prisoner and de-

ceased had a quarrel in the barber shop in the town of Lumberton; that prisoner told deceased on leaving that he would get *him*, the exact language which you will find in the testimony of John Leak, and also upon evidence of Jim Jenkins, in which he testified as to the alleged statement of the prisoner that he went to Jim Jenkins' house that night to kill some damned son-of-a-bitch, and also upon the evidence of Jim Jenkins to the effect that at the time the prisoner shot, that Harlee Leak was about twenty-one steps in front of him in the lane, and that the prisoner had walked some distance after leaving Jim Jenkins' house behind Harlee Leak in the lane before the killing took place. You will remember the evidence as to these matters according to the testimony of the witnesses as produced upon the trial. It is your duty to decide these facts, to pass upon the weight of the testimony, to say whether it is to be believed or not, to say that it established certain facts or it does not. In weighing the testimony, it will be your duty to consider the interest of any witness, if you find there is any; to consider the conflicting statements, if there are any; to consider the demeanor of the witnesses upon the stand, and to consider any facts or circumstances which tend to uphold or discredit any of the testimony of any of the witnesses. As before stated, if you find beyond a reasonable doubt that the prisoner slew deceased with a pistol, and if you find further that the killing was wilful, deliberate and premeditated, and if you find these facts beyond a reasonable doubt, then you will render a verdict of murder in the first degree. On the other hand, if you find beyond a reasonable doubt that the prisoner slew deceased with a pistol and the killing was not deliberate or premeditated, then you will render a verdict of murder in the second degree, unless you find that the prisoner was guilty of manslaughter, or that the killing was the result of an accident. *State v. Booker,* 123 N. C., 713. This instruction was given, and defendant excepted.

"4. If you find from the evidence, beyond a reasonable doubt that the prisoner slew deceased as alleged by the State, and if you find that the killing was without deliberation and premeditation, and if you find that the prisoner did not intend to kill deceased, but if you go further and find from the evidence that prisoner discharged his pistol down the lane, as alleged by the State, toward the crowd of people in the lane, without regard to the consequences of his act, then he will be guilty of manslaughter. *State v. Vines,* 93 N. C., 493. This instruction was given, and prisoner excepted.

"5. If you find from the evidence, beyond a reasonable doubt, that the prisoner discharged his pistol carelessly and recklessly and unlawfully, and that he killed deceased in such manner accidentally, still it would be manslaughter, and if you so find from the evidence, you will return a verdict of manslaughter. In such cases the test of responsibility depends upon the conduct of the party accused, was unlawful, or even if it was not unlawful, if it was so grossly negligent, reckless or violent as necessarily to imply moral impropriety or turpitude. *State v. Vines,* 93 N. C., 493. This instruction was given, and the prisoner excepted.

"6. The Court charges you that if you find beyond a reasonable doubt that the prisoner discharged his pistol among a crowd of people in the lane near Jim Jenkins' house, knowing at the time that there were people in front of him, and if you find further beyond a reasonable doubt that the pistol was discharged, causing the death of Harlee Leak, then the prisoner would be guilty of manslaughter, even if he did not intend to do any harm to any particular person, or even if he intended it only in sport or to frighten someone. *State v. Vines,* 93 N. C., 493. This instruction was given, and prisoner excepted.

"7. It is the duty of the jury, in passing upon the evidence of the prisoner himself, and of his near relatives who testified

for him, to scrutinize their evidence with great caution, considering their interest in the result of the verdict, and, after so considering, the jury will give to it such weight as they may deem proper. This instruction was given, and prisoner excepted. Signed by C. M. McLean, Solicitor; McLean & McLean, Proctor & McIntyre, and John D. Shaw, Jr., associate counsel for State."

The case on appeal states that the whole evidence in the case has been sent up, and we have read the whole of it. And from the view we have taken of the case, we thought it proper to insert in full the prayers of the State for special instructions.

We can not think the manner in which the trial was conducted is the ordinary practice of the Courts of this State. That after his Honor "had stated to the jury in his general charge *every reasonable contention of the State,* he should, at the request of the State, give an entirely new charge commencing: "The prisoner, Jim McDowell, is charged in the bill of indictment with murder in the first degree," etc. This charge, written by the attorneys for the prosecution, is a powerful summing up for the State. It does not pursue the usual course, in asking special instructions, by asking the Court to charge some proposition of law predicated upon some fact the evidence tends to prove, but, as we have said, it is a powerful summing up of the whole argument for the State, after the Judge had "stated to the jury in his general charge every reasonable contention of the State." This, we think, was calculated to prejudice the prisoner's case with the jury, if every word of *this* charge was correct. But there are some expressions in *this* charge that are objectionable as matters of law. In the third prayer the Court says, in summing up: "The evidence of Dave Sammons, *who was with* the deceased *at the time he was shot;* Jim Jenkins, *who was with the pris-*

oner at the time he fired the pistol; Jim French, who was immediately behind the prisoner when he fired the pistol."

The prisoner, on cross-examination, testified: "I went home by the old bridge. Jim McQueen was with me. We went some out of our way."

And the Court, in this summing up, in giving the grounds relied on by the State, says: "The fact that he admitted going home by an *unusual and different route.*" This reads like the argument of counsel to a jury. But it is not a correct and, as we think, not a fair statement of the prisoner's evidence.

It seems to us that the statements as to Dave Sammons, Jim Jenkins and Jim French were a violation of section 413 of The Code; and the statement as to the admission of the prisoner is incorrect and calculated to prejudice him in his defense.

In the seventh prayer, which was given, the Court, after instructing the jury to "scrutinize the evidence of the *prisoner's relations* with great caution, considering their interest in the result of the verdict, and, after so considering, the jury will give to it such weight as they may deem proper." This charge is a very common one, and when applied to witnesses on both sides and properly applied by the jury, may do no harm. But the scrutiny referred to is for the purpose of aiding the jury in determining the credit of the witnesses, as the jury are to pass upon that, whether the witness is interested or not. If they find the witness to be credible, and that he has sworn the truth, his testimony should have the same weight as if he was not interested; and it was error in the Court, when charging the jury upon the subject of interest, not to so have charged the jury. This, as all the other special prayers of the State, was excepted to, and the exception must be sustained. *State v. Collins,* 118 N. C., 1203; *State v. Holloway,* 117 N. C., 730; *State v. Lee,* 121 N. C., 544; *State v. Apple,* 121 N. C., 584.

Error. New Trial.

CLARK, J., concurring. Though a Judge may think he has fully charged the contentions of both sides, when correct prayers for instruction are asked by either, it must rest in his sound discretion whether to give them or take the risk of their having been substantially given already in the charge. If the charges in themselves are correct, he is not forced to refuse them because he may think they have been already given, and thus subject the public to the expense of a new trial, if (as precedents show) ingenious counsel can find that every point therein made was not given in the main charge. Here, the Judge gave every charge asked by defendant (save one, which was properly refused), though he had given substantially his prayers in the main charge. The fact that the State could not appeal from errors against the State, properly did not prevent him from showing equal liberality in giving instructions asked by its representative.

I think, however, there was error in those instructions in the two particulars pointed out in the opinion of the Court, and concur in the result on that ground alone.

MONTGOMERY, J., concurring. He thinks that the defendant was prejudiced in his trial, as set out in the opinion in chief, by the second charge of his Honor—the giving of the special instructions of the Solicitor and his associate counsel. But he further thinks that the harm that may have been done can not be corrected by this Court as an error in law. He concurs in the result.

STATE v. AUSTIN.

(Filed November 26, 1901.)

EVIDENCE—*Competency—Larceny.*

Where, upon trial of an indictment for larceny of money, it appears in evidence that on the second day after the imprisonment of the defendant a bag containing $35 in money was found lying exposed in a public lot, and there was no evidence tending to show that the defendant had put it there, it was error for the trial judge to refuse to charge that the finding of the money was not a circumstance to be considered against the defendant.

INDICTMENT against J. F. Austin, heard by Judge *A. L. Coble* and a jury, at September Term, 1901, of the Superior Court of ROWAN County. From a verdict of guilty and judgment thereon, the defendant appealed.

Brown Shepherd, for *Robert D. Gilmer, Attorney-General,* for the State.

T. F. Kluttz, for the defendant.

DOUGLAS, J. This is a conviction for the larceny of money from one Surratt. The evidence is entirely circumstantial. There are various exceptions, but only one that we think necessary to consider. The defendant's sixteenth prayer for instruction is as follows: "In this case there is no evidence that the lot on which the bag of money is said to have been found was at any time in the actual or constructive possession of the defendant, and therefore if the jury believe that the money so found was the property of Surratt, no presumption of defendant's guilt is raised thereby, as the defendant had no dominion or control over said premises (and the alleged finding of said money on said lot is not a circumstance against the defendant in this case)." His Honor gave the instruction

as asked, except the latter part that is in parenthesis. This, we think, he should have given in view of the evidence. It appears from the evidence that the defendant was arrested and put in jail on the night or evening of July 3d, and remained in jail for more than a month. In the afternoon of the second day after his arrest and imprisonment, one of the witnesses found $35 in money in a shot-sack, lying exposed in a public lot used as a camping lot. It does not appear how it got there, and there is no evidence tending to show that the defendant had put it there. It does appear that he was held in close custody after his arrest, and had no opportunity thereafter of getting to the lot. The loss of the money seems to have been generally known, and it seems improbable that it should have lain in so public a place for two days without attracting attention. The mere fact of its being found there under such circumstances is no evidence that the defendant put it there, and therefore no evidence of his guilt. Everyone of the general public had equal facilities for putting it there with the defendant. It is true they did not all have equal facilities for stealing it, but while that fact might be a circumstance to go to the jury, it is not corroborated by the further fact of the money being found in a public lot, two days after the defendant's imprisonment.

Circumstantial evidence may be of two kinds, consisting either of a number of consecutive links, each depending upon the other; or a number of independent circumstances all pointing in the same direction. In the former case, it is said that each link must be complete in itself, and that the resulting chain can not be stronger than its weakest link. In the latter case, the individual circumstances are compared to the strands in a rope, where no one of them may be sufficient in itself, but all together may be strong enough to prove the guilt of the defendant beyond a reasonable doubt. But it necessarily follows that in either case every individual circum-

stance must in itself at least *tend* to prove the defendant's guilt before it can be admitted as evidence. No possible accumulation of irrelevant facts could ever satisfy the minds of the jury beyond a reasonable doubt.

His Honor properly charged that, "In order to justify the inference of guilt from circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." In furtherance of this instruction, and as its natural corollary, he should have instructed the jury under the facts of this case that the mere finding of the money in the public lot did not tend to prove the guilt of the defendant, and therefore should not be considered by them. For his failure to do so at the prayer of the defendant, a new trial must be ordered.

New Trial.

STATE v. GARNER.

(Filed November 26, 1901.)

1. RAPE—*Attempt to Commit Rape—Evidence—Sufficiency.*

The evidence in this case is sufficient to go to the jury upon the question of the guilt of defendant of an assault with intent to commit rape.

2. INSTRUCTIONS—*Charge—Punishment—Judgment—Trial.*

It is not erroneous for the trial judge to inform the jury of the punishment prescribed for the crime for which the defendant is indicted.

INDICTMENT against Walter Garner, heard by Judge *W. A. Hoke* and a jury, at September Term, 1901, of the Superior Court of GASTON County.

Defendant was tried upon a bill of indictment for an

assault with intent to commit rape upon Beulah White. A concise statement of the evidence shows that Beulah White, a white girl about 14 years old, was walking along the railroad track near Gastonia, accompanied by her little brother, about 8 years old. She saw defendant, a colored man, about 19 or 20 years old, of ordinary and usual size and vigor of a man of that age, walking along the track about 200 yards ahead of her, going in the same direction she was. While so walking, defendant slowed his gait and she slowed hers; he would stop and look back, and she would stop, and he kept on stopping and looking, and folding his arms in front of him and opening them, and once shook his hat at her while looking back; she would change from the railroad track to the dirt road, which ran parallel with it, and he would likewise change and keep in front of her; she continued to change and he continued to change until she had gotten within thirty feet of him, when he turned back, and she became so frightened she turned and ran up a side-way leading towards her cousin's house, about 200 yards away, carrying her little brother by the hand; he ran after her about sixty feet, and had gotten within fifteen feet of her when he stopped; the house at this place where he stopped could not be seen on account of the corn standing in the field; defendant did not speak, nor did she; when she got to the porch of the house, she looked back and saw defendant going down the railroad; the house could not be seen from the place where she began to run, because of the thick corn standing in the field; there was a school-house (and school was being taught therein) about 200 or 300 yards from where she began to run, and in sight, and two dwelling-houses in sight where people lived. This occurred about 3 o'clock in the afternoon. There was also evidence of defendant's flight when approached by the officers that afternoon.

Defendant introduced no testimony, and demurred to the

evidence of the State upon the ground that it was not sufficient to be submitted to the jury to convict. Demurrer was overruled, and defendant excepted.

To the following parts of his Honor's charge to the jury, the defendant excepted:

"1. That if the jury are satisfied beyond a reasonable doubt that defendant acted in such a manner as to put Beulah White in reasonable fear of personal violence from him, and caused her to turn from her path and escape and avoid him, this would be an assault on his part; and if the jury are satisfied beyond a reasonable doubt that he assaulted her, and that he intended to catch her and then have sexual intercourse with her by force and violence and against her will, that he intended to overcome at all hazards any resistance she might offer, they would render a verdict of guilty as charged in the bill of indictment.

"2. That if the jury are satisfied beyond a reasonable doubt that an assault was committed by defendant as defined and stated above, and have a reasonable doubt of the felonious purpose to effect an actual sexual intercourse by force and violence and against her will as stated, they would render a verdict of not guilty of the felony, but guilty of simple assault.

"3. The jury, after being out sometime, returned into Court and requested the Court to restate the law on the different phases of the testimony, and the Court, in defining the case of simple assault, added ('inadvertently'), 'in which case the punishment could be a fine of fifty dollars or thirty days on the roads.' "

Verdict of guilty as charged in the indictment was rendered, and motion for new trial overruled. Sentence imposed, and defendant appealed.

Brown Shepherd represented the Attorney-General, for the State.

A. G. Mangum, for the defendant.

COOK, J., after stating the case. The first two exceptions to the charge are without merit. As to the third, we do not see that any prejudice was done the defendant by his Honor's charge as to the punishment. In passing upon the issues in a criminal action, the jury know that some punishment follows a verdict of guilty. They are entitled to be informed upon the law creating the offense charged, and, as the punishment prescribed is a part thereof, we see no reason why the Court should not accurately and correctly inform them as to the same, rather than leave them to rely upon their own information.

The difficult question involved in this case is, whether the evidence and circumstances set out amount to evidence fit to go to the jury, and upon which they could reasonably find the defendant guilty of committing the assault with the intent charged.

The facts are very similar to those stated in *State v. Neely,* 74 N. C., 425, 21 Am. Rep., 496, and similar to those in *State v. Massey,* 86 N. C., 658, 41 Am. Rep., 478, but contain evidence of intent and purpose not apparent in those cases. In applying the rule that "when the act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal," we are not able to find evidence upon which we can attribute his motive to any other than to ravish the prosecuting witness. Neither does the testimony, nor any of the circumstances or surroundings suggest any other motive; theft (or robbery) is negatived by the absence of any visible or known property to steal; no grudge or grievance or offense appears upon which to base a suspicion of malice or anger inducive to murder or personal injury; no acquaintance or social relation appears to have existed which would suggest the idea of romp, joke or play; nothing suggests that he was in distress and needed aid or information which could have been obtainable from the

prosecuting witness. His conduct while walking in front of the girl indicates a flirtation not warranted by the social or racial relations of the parties. The signs made to her by folding his arms in front of him and opening them—suggestive of hugging her—indicated amorousness, and shaking his hat at her might be considered as soliciting a kindly response. Failing in his strategy to enlist her favorable attention, which became evident to him when she turned and ran, as soon as he turned back, carrying by his hand her little brother, he pursued her, and only stopped when nearing the sight of the house to which she was fleeing. For what purpose could he have chased her. Was not such conduct by him evidence fit to go to the jury in determining the *intent* with which he pursued her? We think it was, and sustain his Honor in so ruling.

There is no evidence to establish any motive other than to do an unlawful act—none was expressed—he did not speak, nor did she. Every person is presumed to have intended the natural consequences of his acts, and it must follow that he is presumed to have made the attempt to commit it, if the act done would be such as would apparently result in the natural course of events in the commission of the crime itself, if not prevented. The intent was locked up in his own breast, and can only be interpreted by his acts and conduct under the circumstances and surroundings. As assault is an *intentional* attempt by violence to do injury to another; but how is the intention to be ascertained otherwise than by the conduct? Intent is likewise an essential element in larceny, burglary, etc., which can only be ascertained by the conduct and acts and circumstances accompanying the transaction.

But it is argued that the commission of the offense charged is negatived by the location in that there was a school-house two hundred or three hundred yards away, and a dwelling-house in sight of the place where she first saw him, and that she was accompanied by her brother eight years old. But

that is only evidence in his behalf to be considered by the jury in inquiring into his intent and purpose—the contention being that it would be unreasonable for a man to undertake to commit a capital felony so near a school-house where a school was in session, and so near dwelling-houses where people lived, when he would probably be caught and the chances of escape so limited. But the rules of reason are not employed by the criminal; if they were, crime would rarely be committed. Every element of reason is wanting in the commission of the crime which he is charged with having attempted. Even the instinct of brutes, when allowed to roam together in their natural state, forbids such an act, leaving this, the most fiendish of all offenses against nature, within the possibilities of the human-kind. There is

No Error.

DOUGLAS, J., dissenting. I can not concur in the opinion of the Court for two reasons. While I am not prepared to say that it is reversible error for the Judge to tell the jury what is the punishment of the crime, I can not agree with the Court that the jury are entitled to be informed of the punishment. The jury have nothing to do with the *quantum* of punishment. Their only province is to determine the guilt or innocence of the accused, leaving the question of punishment to be determined by the Court, within the limitations of law. In fact, I think the better practice is not to inform the jury of the possible punishment, and this seems to have been the idea of the Judge below, who says that he did so "inadvertently."

But to come to the vital point: I do not think that there was sufficient evidence to go to the jury. There is a difference in the measure of evidence in civil and criminal cases, arising equally from reason and necessity. The Court cites the cases of *State v. Neely*, 74 N. C., 425, and *State v. Massey*,

86 N. C., 658. The former, decided by a divided Court, is distinctly overruled in the latter case by a unanimous Court.

I can not better express by own views than by citing from the opinion in Massey's case, where this Court says on page 660: "In order to convict a defendant on the charge of an assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so at all events, notwithstanding any resistance on her part (*citing authorities*). When the act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal. 'It is neither charity nor common sense nor law to infer the worst intent which the facts will admit of. The reverse is the rule of justice and law. If the facts will reasonably admit the inference of an intent, which though immoral is not criminal, we are bound to infer that intent' (citing *State v. Neely,* dissenting opinion). Every man is presumed to be innocent until the contrary is proved, and it is a well-established rule in criminal cases, that if there is any reasonable hypothesis upon which the circumstances are consistent with the innocence of the party accused, the Court should instruct the jury to acquit, for the reason the proof fails to sustain the charge. * * * There is no evidence in this case, in our opinion, from which a jury might reasonably come to the conclusion that the defendant intended to have carnal knowledge of the person of the prosecutrix at all hazards and against her will. At most, the circumstances only raised a suspicion of his purpose, and therefore should not have been left to the consideration of the jury."

I have cited thus fully from Massey's case because it is the leading case upon the subject, being a carefully considered

opinion by a unanimous of acknowledged learning and sagacity.

In the case before us, there is no evidence whatever that the defendant ever touched the girl, that he ever spoke to her, or that he made any gesture that was in itself either lewd or obscene. It appears that he might have caught her if he had wished to; and if he did not wish to, he was not guilty. In our abhorrence of the crime with which he is charged, we must no lose sight of the fact that to convict an innocent man of such a crime would be in itself a terrible wrong. Such crimes should be promptly and severely punished, but the accused should be fairly tried. I am in favor of *punishing* criminals, but not of *making* criminals by assumption of fact or construction of law.

That the defendant is guilty of a simple assault, I do not doubt; but he does not appear to have been guilty of the crime of which he was convicted. What was his motive I do not know. It may have been mere impertinence, or a malicious desire to frighten a child, which we see too often in older persons. Let it be what it may, I can not distinguish the underlying principles in this case from those in Massey's case, and hence I must dissent from the opinion of the Court. I may be wrong, but I can never hope to have greater learning than Smith, or a more chivalrous appreciation of the highest ideals of womanhood than Ashe and Ruffin.

FURCHES, C. J. I concur in the dissenting opinion.

STATE v. YODER.

(Filed November 26, 1901.)

HIGHWAYS—*Public Roads—Failure to Work.*

Where a person is notified to work the public road for two consecutive days, and goes to the place appointed the first day and the overseer is not there, he is not indictable for failure to attend on the second day, not having further notice.

INDICTMENT against Jacob Yoder, heard by Judge *W. B. Council* and a jury, at October Term, 1901, of the Superior Court of CATAWBA County.

This case was tried in the Court below on appeal from the judgment of a Justice of the Peace. The jury rendered the following special verdict: "That defendant was a resident and citizen of Jacob's Fork Township, and was liable to work on the public roads of said township; he was indicted for failing to work the road; he was served with notice by one Whitener, who was overseer of a portion of the public road leading from Hickory to King's Mountain; said Whitener was a resident and citizen of Hickory Township, but was appointed overseer of the road by the Board of Supervisors of Jacob's Fork Township; the said overseer notified the defendant, who had been assigned to him as one of his hands, to meet him at the forks of the roads in Hickory Township, to work for two days; the notice was three days or more before the day fixed for the working to begin; he was to work on that portion of the road in Hickory Township; defendant went to the place at the time, prepared to begin work; the overseer was not there, and did not arrive during the day; the defendant did not go on the second day; the overseer did not work the first day, but, at the request of some of the hands, did not work until the second day; the defendant had no notice of

the postponement; the road he was to work was not on the dividing line between Hickory and Jacob's Fork townships; one hundred and fifty yards of the road was in Hickory Township, the residue in Jacob's Fork Township. If, upon the foregoing facts, the Court is of the opinion that defendant is guilty, then the jury find him guilty; but if the Court is of the opinion that he is not guilty, then the jury so find." Upon the special verdict, the Court pronounced the defendant guilty, and he appealed from the judgment.

Brown Shepherd, for the Attorney-General, for the State.
L. L. Wilherspoon, for the defendant.

DOUGLAS, J., after stating the facts. We think his Honor erred in pronouncing the defendant guilty upon the special verdict. The defendant being notified to meet the overseer at a certain place on a certain day, was present at the time and place appointed. That he did not meet the overseer, was the overseer's fault, and not his own. It is contended that the defendant is guilty because he failed to return the second day. Where ought he to have gone? It is true, he was summoned to work two days, but he was not summoned to meet the overseer at the same place on both days. If the overseer had worked the road with his hands on the day appointed, surely he would have gotten out of sight of the starting place by the second day. Moreover, the defendant had no notice of the postponement, and had no assurance of meeting the hands on the second day. If the overseer could postpone the work without notice for a day, why could he not do it for a week? And yet could a man be expected to lose a week's time in the vain endeavor to do two day's work? The general road law is burdensome enough, without our adding any additional burden by judicial construction.

In our opinion, the defendant has complied with the notice

as far as could reasonably be required, and is therefore not guilty.

This ends the case, and it is not necessary for us to discuss the interesting questions raised by the motion in arrest of judgment. The judgment of the Court below is reversed.

Reversed.

STATE v. SMITH.

(Filed November 26, 1901.)

NOLLE PROSEQUI—"*With Leave*"—*Indictment—Trial.*

Where a "*nolle prosequi* with leave" is entered, the solicitor may issue a *capias* without further leave of the court.

INDICTMENT against Joe Smith, heard by Judge *M. H. Justice* and a jury, at October Term, 1901, of the Superior Court of BURKE County. There was a verdict of guilty and judgment thereon. From refusal of the Court to discharge the defendant upon the ground that the Solicitor had no right to order a *capias* to issue, the defendant appealed.

R. D. Gilmer, Attorney-General, and *Brown Shepherd,* for the State.

Self & Whitener, for the defendant.

FURCHES, C. J. At June Term, 1899, of Burke Criminal Court, the defendant was indicted for assault with deadly weapon, from which term a *capias* was issued, but not executed. At the next two succeeding terms of said Court, the case was continued and *alias capiases* ordered. This was the last term of the Criminal Court in that county—the same having been abolished by the Legislature—and the case was transferred to the Superior Court for trial. At May Term of the Supe-

rior Court, a "*nolle prosequi* with leave" was taken. And after that term, and before October Term of said Court, the Clerk, at the request of the Solicitor for that District, issued a *capias,* returnable to said October Term. Upon this *capias* the defendant was taken and bound over to Court, and at said October Term he appeared and moved to be discharged upon the ground that the Solicitor had no right to order a *capias* to issue, and that he was wrongfully arrested. This motion was refused, and the defendant excepted. The case was then proceeded with, the defendant convicted, sentence pronounced, and the defendant appealed.

A *nolle prosequi* is a discharge of the defendant, but not an acquittal. It is the end of the prosecution, unless it be with leave of the Court. And neither the Solicitor nor the Clerk has the right to authorize a *capias* to issue without such leave. *State v. Thornton,* 35 N. C., 256. But in that case, as it did not affirmatively appear that the Court had not given leave to issue the *capias,* the Court presumed that it had; as it must be presumed, in the absence of proof to the contrary, that Solicitors and Clerks would not have done so without such leave.

But this case is not put upon that ground by the State. The entry is "*nolle prosequi* with leave." The State says this entry is an abbreviation or memorandum of the order of the Court, and if it had been drawn in full, it would have shown that the Solicitor took the *nol. pros.,* with leave given him by the Court to issue another *capias* if he thought proper to do so, and the *capias* was not issued without leave of the Court, which was given at the time the *nol. pros.* was entered. Whether this is strictly a compliance with the rule laid down in *State v. Thornton, supra,* or not, it is, so far as we know, the universal practice in the Superior Courts of this State.

And while we recognize the fact that the Courts should control its processes, and see that it is not used to the oppres-

sion of the citizens of the State, it is also necessary to so use it as to bring offenders to trial and justice. If the Court thinks proper to grant such leave at the time the *nol. pros.* is entered, we do not see why it may not do so; and we do not feel like reversing a practice so universally adopted in the State.

There was another exception taken by the defendant as to the transfer of the case from the Criminal Court to the Superior Court. But this exception was not pressed on the argument, and we suppose is not relied upon. But if it is, the transfer seems to have been provided for by the Legislature.

As we see no error, the judgment is

Affirmed.

STATE v. HEFNER.

(Filed November 26, 1901.)

ATTEMPTS TO COMMIT CRIME—*Indictment—Overt Act—Buggery—Trial.*

In an indictment for an attempt to commit a crime, here buggery, some overt act must be alleged.

INDICTMENT against Arthur Hefner, heard by Judge *W. B. Council* and a jury, at October Term, 1901, of the Superior Court of CATAWBA County.

Indictment for buggery, tried before Council, J. "The jurors, etc., present that Arthur Hefner, etc., with force and arms, at and in the county aforesaid, did unlawfully, wilfully and feloniously, abominably and detestably attempt to commit the crime against nature with a beast, to-wit, a cow, against the form of the statute," etc. Verdict of guilty. Defendant moved in arrest of judgment for that the indict-

ment failed to charge any overt act constituting the alleged attempt, and that in an indictment for an attempt to commit a felony, some overt act must be charged. Motion sustained, and the Solicitor for the State appealed.

Brown Shepherd, for the Attorney-General, for the State.
Self & Whitener, for the defendant.

COOK, J. His Honor did not err in sustaining the motion in arrest. When an *attempt* is charged, it is necessary that some act constituting such attempt should be laid, as the *attempt* is not *per se* indictable, and needs extraneous facts to make it the subject of an indictment. Whatrton's Cr. Pl. and Pr. (9th Ed.), sec. 159. In *State v. Colvin,* 90 N. C., 717 (indictment for attempt to commit burglary), the Court says: "From an investigation of the authorities upon the subject, our conclusion is that to warrant the conviction of a defendant for such an offense, it is essential that the defendant should have done some act intended, adapted, approximating and in the ordinary and likely course of things would result in the commission of a particular crime, and this must be averred in the indictment and proved." In *State v. Brown,* 95 N. C., on page 688, the Court cites with approval 2 Wharton Cr. Law, sec. 2703: "Attempt is a term peculiarly indefinite," and adds, "and consequently the facts which develop the attempt should be set out so as to show that the attempt is itself criminal." In *State v. Crews,* 128 N. C., 581, 582, the Court, in citing with approval *State v. Colvin, supra,* says: "This is not an attempt to commit another crime, in which case the overt act must be charged."

The principle being well established, we deem it unnecessary to encumber our records with a further discussion of the subject in this case. There is

No Error.

STATE v. HARWELL.

(Filed December 3, 1901.)

1. INDICTMENT—*Quashal—Slander of Innocent Women—Discretion—Judge.*
   The quashal of an indictment is discretionary with the trial judge.

2. INDICTMENT—*Slander of Innocent Women—The Code, Sec. 1113.*
   An indictment for slander of innocent woman must charge that the defendant did attempt in a "wanton and malicious" manner to destroy the reputation of an innocent woman.

3. SLANDER—*Of Innocent Women—The Code, Sec. 1113.*
   To call a woman a damned bitch and say to her that "I have a quarter for you," is not *per se* criminal under The Code, Sec. 113.

INDICTMENT against Lawson Harwell, heard by Judge *W. B. Council,* at October Term, 1901, of the Superior Court of CATAWBA County. From a judgment of quashal, the State Solicitor appealed.

Brown Shepherd, for *Robert D. Gilmer, Attorney-General,* for the State.

L. L. Witherspoon, for the defendant.

FURCHES, C. J. This is an indictment under section 1113 of The Code, for the slander of an innocent woman. The statute provides "that if any person shall attempt, *in a wanton and malicious manner,* to destroy the reputation of an innocent woman," etc. And the bill of indictment charges that the defendant "unlawfully, wilfully and feloniously did attempt to destroy the reputation of Miss Beulah Gaither, she being an innocent and virtuous woman, by calling her a damned bitch, and I have a quarter for you, meaning thereby

that she was incontinent, this being said in the presence of third parties." The defendant moved to quash the bill, which motion was allowed, and the State appealed.

The defendant puts his motion upon two grounds: The insufficiency of the bill of indictment, and also upon the ground that the words spoken do not constitute a criminal offense under the statute. The words used are so offensive that they are calculated to create a feeling of resentment, and a disposition to say he deserves to be punished. And in such cases, there is danger of yielding to a sentiment that leads us from that careful consideration of the law that the case is entitled to. Therefore, in order that we may not do this, it is necessary that we should examine carefully the precedents and reason of the thing.

The bill does not follow the language of the statute, as it should do. And admitting that it has been held that bills for statutory offenses may be sustained without following the exact language of the statute, the words used must be the equivalent of the words of the statute. The word "feloniously" has no meaning in this indictment, as the offense created by the statute is only a misdemeanor, and not a felony, and the word feloniously must be treated as surplusage. The word "wilfully" usually means "stubbornly," and here could not mean more than defendant intentionally used this language. And does not necessarily mean that he did so "in a wanton and malicious manner." The word "unlawfully" does not import "wanton and malicious manner." *State v. Morgan,* 98 N. C., 641; *State v. Tweedy,* 115 N. C., 704. But the ground was taken for the State upon the argument, that if the bill was defective in the manner pointed out, it was error in the Court to quash, and *State v. Flowers,* 109 N. C., 841; *State v. Skidmore,* 109 N. C., 795; *State v. Caldwell,* 112 N. C., 854; *State v. Colbert,* 75 N. C., 368, were cited for this position.

In the case of *State v. Colbert,* it was held to be error to quash the bill. That case was for perjury, and the Court said *in high crimes such as treason and felony,* it was error to quash the bill, as it released the bail, and the defendant might escape. And Flowers' case, Skidmore's case and Caldwell's case, all being felonies, followed Colbert's case. And if it should be held that Colbert's case, and the other cases cited, and following Colbert's case, is correct, they are not authority for reversing the Court in this case, which is not treason or felony, but only a *misdemeanor.*

But with the greatest respect for the learned Court that decided Colbert's case, and the other following cases, we must say that they are not in harmony with the former opinions of this Court, and that the reason given for the decision is not tenable—"that the defendant might escape"—as it was perfectly within the power of the Court upon quashing the bill *to hold the defendant* until another bill could be sent. *State v. Griffice,* 74 N. C., 316; *State v. Roach,* 3 N. C., 540. In both of these cases the bill was quashed and the defendant held in bail. In *State v. Baldwin,* 18 N. C., 195 (Gaston, Judge), it is said that in indictments for heinous crimes, it is not usual to quash. But the right to do so is entirely discretionary with the presiding Judge, and he will not be reviewed except as upon a writ of error where he has quashed a good bill.

In the case of *State v. Roach, supra,* it is said: "It is proper to quash when the Court could not proceed to judgment. The law does not require a vain thing to be done, as it would be to try a defendant when the Court could render no judgment upon a conviction. Though it is said in *State v. Caldwell, supra,* that a motion to quash was properly overruled, but it was held to be proper to arrest the judgment after the defendant had been convicted. The bill, in our opinion, is de-

fective, and the judgment of the Court in quashing the bill of indictment must be sustained."

The language used by the defendant, though very offensive, is not, in our opinion, *per se*, criminal under the statute. To constitute the offense for which the defendant is indicted, he must have charged the prosecutrix of having had criminal intercourse in direct terms, or in words equivalent to that. In *State v. Moody*, 95 N. C., 671, the defendant said the prosecutrix "had promised to let him have criminal connection with her, and he intended to have that thing." The Court said this was not sufficient to constitute the crime, as it did not amount to saying that she had had criminal intercourse with him.

In *State v. Benton*, 117 N. C., 788, the defendant said of the prosecutrix that "she looks like she has had a miscarriage." The Court said this did not, *per se*, constitute a crime under the statute. That this language might have had some other meaning, and the defendant should have had the right to explain the matter to the jury.

The fact that the defendant said he had a quarter for the prosecutrix, of itself, did not amount to a criminal offense. That he said the prosecutrix was a "damn bitch," was mean and offensive, but does not necessarily amount to a charge that the prosecutrix had been guilty of sexual intercourse. Bitch, according to Webster's Unabridged Dictionary, means "a female dog, wolf or fox. 2. An opprobrious name for a woman, especially a lewd woman." Then, as these words do not primarily mean a woman, and secondarily being only an opprobrious name applied to a woman, when she is not a lewd woman, can it be said that they *necessarily* mean that the prosecutrix has had *sexual intercourse* with a man; although this language is more especially used as to a lewd woman? It seems to us that it does not. But taking both together, they may amount to the statutory offense, and upon

a proper bill should be submitted to the jury to say whether they do or not. But as they do not necessarily mean that the prosecutrix has had sexual intercourse, the Judge can not say they do.

No Error.

CLARK, J., dissenting. The indictment charged that the defendant "unlawfully, wilfully and feloniously did attempt to destroy the reputation of Miss Beulah Gaither, she being an innocent woman, by calling her 'a damned bitch,' and 'I had a quarter for you,' meaning thereby that she was incontinent, this being said in the presence of third parties." The defendant moved to quash the indictment because it did not charge a criminal offense. Motion allowed, and appeal by the State.

The Code, sec. 1113, makes it a misdemeanor for any person to "attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words written or spoken, which amount to a charge of incontinency."

The word "bitch" is thus defined in Webster's International Dictionary: "1. Female of the canine kind, as of dog, wolf and fox. 2. An opprobrious name for a woman, especially a lewd woman. *Pope.*" The defendant did not mean to apply the first definition to her, and there can be no doubt that he meant the second, and to call her a "lewd woman," especially when coupled with the profane expletive and the addition of the words, "I had a quarter for you," which were clearly meant to convey the impression to the bystanders that she was a woman who had her price. We are told that his Honor quashed the bill on the ground that these words did not amount to a charge of incontinency. This was error. Whether the defendant used the words or not, and whether the prosecutrix was an innocent woman within the meaning of the statute as construed in *State v. Brown,* 100 N. C., 519, are questions of fact for the jury.

It is very questionable whether the words in the statute in a "wanton and malicious manner" are sufficiently charged by the words used in the indictment—"unlawfully and wilfully." *State v. Morgan,* 98 N. C., 641; *State v. Tweedy,* 115 N. C., 704. Though words of the same meaning as those used in the statute can be substituted in an indictment, it is best usually to follow the words of the statute. Still, an indictment should never be quashed for such defects, but a new bill should be sent. *State v. Flowers,* 109 N. C., 841; *State v. Skidmore, Ibid,* 795; *State v. Caldwell,* 112 N. C., 854; *State v. Colbert,* 75 N. C., 368. As the case goes back, the Solicitor may consider whether he shall not send a new bill in the words of the statute.

MONTGOMERY, J. I concur in the dissenting opinion.

STATE v. PETERSON.

(Filed December 3, 1901.)

1. FORGERY—*Indictment—Lost Instruments—Practice.*

An indictment for forgery need not allege the loss of the forged instrument, and in the absence of the instrument only its substance need be charged.

2. EVIDENCE—*Forgery—Lost Instruments.*

Where it is shown that a forged instrument is lost, it is competent for a witness to give its substance from memory.

3. EVIDENCE—*Sufficiency—Forgery.*

It appearing that a defendant was in possession of a forged note, attempting to pass it, this was sufficient evidence to submit to the jury.

4. DRUNKARDS—*Voluntary—Intoxication—Insanity.*

Voluntary drunkenness is never an excuse for crime.

5. EVIDENCE—*Revenue Stamp—Forgery.*

The absence of a revenue stamp upon a forged note has no bearing upon the question of forgery of the instrument.

6. PRESUMPTIONS—*Forgery.*

Where one is found in possession of a forged instrument, endeavoring to pass it, he is presumed either to have forged or consented to the forging of it.

INDICTMENT for forgery against L. R. Peterson, heard by Judge *W. B. Council* and a jury, at July Term, 1901, of the Superior Court of CATAWBA County. From a verdict of guilty and judgment thereon, the defendant appealed.

Brown Shepherd, for *R. D. Gilmer, Attorney-General,* for the State.

Self & Whitener, and *L. L. Witherspoon,* for the defendant.

CLARK, J. In an indictment for forgery, it is not necessary to allege loss of the instrument in the indictment, and in the absence of the instrument, only its substance need be charged. 2 McClain Criminal Law, sec. 805; *Mead v. State,* 53 N. J., 601; *People v. Badgely,* 16 Wend., 53; *State v. Callahan,* 124 Ind., 364, though it would be better practice in such cases to aver the loss of the instrument, or that it is in defendant's possession. The instrument being shown to be lost, the witness stated he could not give the entire contents of the note *verbatim,* but could give its substance. This was competent. *State v. Lowry,* 42 W. Va., 205; *Com. v. Snell,* 3 Mass., 82; 13 Am. and Eng. Enc. (2d Ed.), 111.

The Court properly refused to charge that there was no evidence to go to the jury. Even if there had been no other evidence, the defendant being in possession of the forged instrument attempting to utter, pass or deliver it, was evidence, and the Court charged, at request of defendant, that the jury should not convict unless they were satisfied beyond a reasonable doubt that the defendant did so attempt for personal gain or a fraudulent purpose.

The evidence did not authorize the Court to give the instruction asked as to drunkenness. Voluntary drunkenness is never an excuse for crime.. *State v. Kale,* 124 N. C., and cases cited at page 819; *Howard v. State,* 36 S. W., 475.

The absence of a revenue stamp has no bearing upon the inquiry whether the defendant forged the paper-writing, though not decorated with such stamp. 1 Randolph Com. Paper, sec. 213; *State v. Hill,* 30 Wis., 416; *Thomas v. State,* (Tex. Cr. App.), 46 L. R. A., 454, 76 Am. St. Rep., 240. And such is the law in England also. Hawkeswood's case, 2 East P. C., 955.

The defendant excepted to the charge because of the following instructions: "(1) Where one is found in the possession of a forged instrument and is endeavoring to obtain money or advances upon it, this raises a presumption that

defendant either forged or consented to the forging such instrument, and nothing else appearing the person would be presumed to be guilty." In this there was no error. *State v. Morgan,* 19 N. C., 348; *State v. Britt,* 14 N. C., 122; *State v. Lane,* 80 N. C., 407; *State v. Allen,* 116 N. C., 548. "(2) If you are satisfied beyond a reasonable doubt that the paper (in this case the note) was a forgery, and that the defendant had it in his possession and tried to obtain money from Crowell or Shuford or the bank upon it, then this raises a presumption of guilt, and, unless he has rebutted it, you will return a verdict of guilty." This is also warranted by the precedents. 2 McClain Cr. Law, sec. 809, and cases there cited.

No Error.

STATE v. JACKSON.

(Filed December 10, 1901.)

INTENT—*Motion—Criminal Intent.*

Where the court, at request of prisoner, charges that "where the act or language of a person may be attributed to two motives, one criminal, the other not, the law will ascribe it to that which is innocent," but added that "this is a general rule and applies in this case, unless the testimony convinces the jury the criminal motive is the true one," the addition to the charge was not erroneous.

INDICTMENT against Andrew Jackson for burglary, heard by Judge *W. A. Hoke* and a jury, at September Term, 1901, of the Superior Court of LINCOLN County. From a verdict of guilty of burglary in the first degree and judgment thereon, the prisoner appealed.

A. L. Quickel, and *Brown Shepherd,* for *R. D. Gilmer, Attorney-General,* for the State.

D. W. Robinson, for the defendant.

CLARK, J. A careful examination of each of the exceptions made by the prisoner reveals no question that requires discussion, or that has not already been passed upon in some previous case. The exceptions evidently were taken out of abundant caution, and show that the prisoner's counsel were alert to do their utmost duty in a defense which they conducted by assignment of the Court and without pecuniary recompense. They have done their full duty. Upon the trial, few points of law were presented, and these were ruled correctly by the careful presiding Judge. The controversy was almost solely upon the facts, and what they were, and what they proved were matters exclusively in the province of the jury, and not reviewable here.

The point perhaps most earnestly pressed here was the following: The prisoner asked the Court to instruct the jury, "Where the act or language of a person may be attributed to two motives, one criminal, the other not, the law will ascribe it to that which is innocent." The Court gave this, but added: "This is a general rule, and applies in this case, unless the testimony convince the jury the criminal motive is the true one." The prisoner excepted to the addition, but, as it simply amounts to telling the jury that such presumption is rebuttable, we find no error therein.

Affirmed.

STATE v. CARTER.

(Filed December 10, 1901.)

1. LICENSES—*Taxation—Trades—Professions—Constitution, Art. V, Sec. 3, Acts 1899, Ch. 11, Sec. 51.*

A statute imposing a license tax on the business of buying and selling fresh meat, in cities and towns, the tax being graded according to population, is unconstitutional.

2 LICENSES—*Taxation—Trades—Professions.*

A statute imposing a tax on the business of buying and selling fresh meat applies to persons buying and butchering cattle and selling the meat.

INDICTMENT against C. W. Carter and J. E. Jones, heard by Judge *O. H. Allen* and a jury, at Spring Term, 1901, of the Superior Court of HERTFORD County. From a verdict of guilty and judgment thereon, the defendants appealed.

Robert D. Gilmer, Attorney-General, for the State.
Winborne & Lawrence, for the defendants.

CLARK, J. That the Legislature in enacting police regulations may make different provisions for different localities according to the supposed wishes or needs of the inhabitants thereof, has been uniformly held in this State—many of the decisions being collected in *State v. Sharp,* 125 N. C., at page 632, 74 Am. St. Rep., 663. And this is the recognized rule. Cooley Const. Lim. (6th Ed.), 480. Frequently a license tax is exacted for the purpose of regulation, and then the same principle applies. 1 Desty Tax, 305; Burroughs Taxation, sec. 77.

Here, however, the tax is not of that nature, but for revenue. The statute (section 51, Chapter 11, Laws 1899) imposes an annual license tax upon the business of "buying and selling fresh meat from offices, stores, stalls or vehicles,"

as follows: "In cities or towns of 12,000 inhabitants or over, $7.50; in cities and towns from 8,000 to 12,000 inhabitants, $5.00; in cities or towns under 8,000 inhabitants, $3.00." The defendants were indicted for carrying on said business in a town of less than 8,000 inhabitants, and, being found guilty and sentenced to a fine of $5.00 each, appealed upon the ground of the unconstitutionality of the act in that it was not uniform, and especially because it imposed no license tax if the business was carried on outside a city or town.

In *Gatlin v. Tarboro,* 78 N. C.,119, it was pointed out that the Constitutional requirement (Art. V., sec. 3) that taxation be uniform and *ad valorem* applied in its terms only to the tax upon property, for the section adds, "and may also tax trades," etc., without any requirement of uniformity as to the latter. But that opinion goes on to say that conceding that a tax on trades, occupations, etc., should be uniform, it is uniform when it is "equal upon all persons in the same class," as in that case a license tax on traders regulated by the amount of sales. So a license tax may be graduated, or it may be laid on some businesses and not on others. *State v. Stevenson,* 109 N. C., at page 733; *Insurance Co. v. New York,* 134 U. S., 594. Here, the tax laying $7.50 on the business when carried on in towns of over 12,000 inhabitants; $5.00 when carried on in towns having between 8,000 and 12,000, and $3.00 in towns under 8,000, is a classification made roughly with reference to the greater opportunity for profit, according to the number of customers accessible. A license tax on this business, which would be moderate in a large town, would prohibit the business in a small town or in the country. The classification is in the legislative discretion. Being uniform upon all those in each class, it is open to no objection except such as may be urged to the Legislature itself to secure a change or repeal of the law. In *State v. Moore,* 113 N. C., 697, the tax on a certain business was held invalid because it

was restricted to that business in certain counties, and it was held that, while such discrimination was within the legislative power as to the exercise of the police power, it was otherwise in the matter of taxation.

In the present case, there is no restriction based on locality, but a classification, according to the opportunity for patronage, with uniformity of taxation as to every individual in each class.

Indeed, this identical statute was, impliedly at least, sustained in *State v. Green,* 126 N. C., 1032, in which it was held that one carrying on the business in a town, not incorporated, was not liable to the tax imposed by this act. If the act had been unconstitutional, the Court should *ex mero motu* have quashed the proceedings.

The validity of the statute is also recognized in *State v. Spaugh,* at this term, in which Douglas, J., appropriately quotes from *Rochester v. Pettinger,* 17 Wend., 265, the following, with approval: "The plain object of the ordinance was, while it protected licensed butchers, to allow farmers to come in and sell the produce of their farms."

But the further point is raised in this case that to buy cattle, butcher them and sell the meat at the defendant's place of business does not subject them to the tax exacted upon the business of "buying and selling fresh meat from offices and stores," etc. We must, however, consider the words in their usual acceptation. It does not mean that the party must necessarily buy and sell the meat when in the same state or condition. It means simply a "dealer" in fresh meat, *i. e.,* one who buys and sells. It is intended to tax the *business* of buying fresh meat and the business of selling fresh meat, either or both, if prosecuted for gain as a vocation. The maxim that criminal statutes shall be strictly construed has no application, for this is not a criminal statute at all. It is a provision (section 51) in the Revenue Law, Chapter

11, Laws 1889, laying a tax upon the business of buying and selling, dealing in, fresh meat. Another section (71) provides that "every person who shall practice any trade," etc., taxed by the laws of this State, without having paid the tax, shall be deemed guilty of a misdemeanor. The strictest construction of that statute would make it applicable to the defendants, if by a fair construction this section covers their business, for they have not paid the tax. The charge of the Court excepted to was as follows: "If the defendants, not being farmers, were engaged in buying cattle, killing them and selling the meat at their store, or under the shed in front of their store, after their license had expired, they would be guilty of buying and selling fresh meats in the meaning of the statute." That is the very business intended to be taxed, as is shown by the clause exempting farmers who kill their own product and sell it, without a regular place of business. Doubtless, by reason of the very strict construction placed by the Court on the word "trader," in *State v. Chadbourn,* 80 N. C., 479, and by *State v. Yearby,* 82 N. C., 561, on the word "dealer," both of those words are omitted in the present statute, which, in lieu of those words, uses simply "one engaged in the business of buying and selling," etc.

It is true that the meat was living when bought and dead when sold, but the business intended to be taxed is clearly indicated.

In holding the defendants liable to the tax, we find

No Error.

STATE v. SPAUGH.

(Filed December 10, 1901.)

LICENSES — *Trades — Professions — Taxation—Revenue Acts 1899 Ch. 11, Secs. 51, 71.*

Acts 1899, Ch. 11, Sec. 51, providing that every individual or firm engaged in the business of buying and selling fresh meats from offices, stores, stalls, or vehicles, shall be taxed: *Provided*, that nothing in this section shall apply to farmers vending their own products and without a regular place of business, does not apply to persons who buy cattle, keep them on their farm, and butcher and sell them by retail from a wagon.

INDICTMENT against Arthur Spaugh and J. D. Beckel, heard by Judge *H. R. Starbuck* and a jury, at May Term, 1901, of the Superior Court of FORSYTH County.

These defendants were separately indicted under sections 51 and 71 of Chapter 11, of the Public Laws of 1899. The cases were consolidated by consent, upon motion of the Solicitor. Section 51 of said act is as follows: "On every individual or firm, or his or their agents, engaged in the business of buying and selling fresh meats from offices, stores, stalls or vehicles, an annual license tax as follows: * * * in cities or towns of less than eight thousand inhabitants, three dollars: *Provided,* that nothing in this section shall apply to farmers vending their own products and without a regular place of business."

Section 71 prescribes the penalty. The entire evidence is as follows:

"The State introduced E. A. Ebert, Deputy Sheriff of Forsyth County, who testified that in December, 1900, the defendant applied to the Sheriff of Forsyth County for license to buy and sell fresh meats in the town of Salem, a municipal corporation of the State of North Carolina of less than

eight thousand inhabitants. That he issued license to the defendants, as partners, trading as Beckel & Spaugh, in December, 1900, and dated it back to September 1, 1900, at their request.

"That witness had purchased fresh meats of the defendants, trading as Beckel & Spaugh, but that it was during other times when they had license. That he did not buy any meats of them during the period embraced between September 1, 1900, and December 1, 1900, but defendants stated to witness they did not sell during that period. Witness testified that the defendants were both farmers, but witness did not know whether the fresh meats sold was produced from defendants' own farm or not.

"L. A. Breitz, witness for the State, testified that he bought fresh meats at different times and frequently from the defendants, who were partners, sometimes on foot and sometimes dressed. That they were both farmers and owned their farms. He had been to their homes.

"State here rested.

"And defendants introduced defendant Beckel, who testified that witness and his co-defendant traded sometimes as partners and sometimes individually, in the business of buying, butchering and selling beef cattle. That in the spring of 1900, witness and co-defendant purchased a number of cattle, some of them calves in poor condition; that they took them to their farms, where they lived, grazed and fattened them on their farms. And that during the months of September, October and November, 1900, they sold out these cattle, some by wholesale, some they butchered and sold by retail from their wagons in the city of Salem. But that during the months of September, October and November, 1900, they sold no other fresh meats in the city of Salem, except what they raised on their farms, and those they pur-

chased in the spring of 1900 and grazed and fattened on their own farms, and these they bought for the purpose of grazing, fattening, butchering and selling.

"That they sold no fresh meats without license by retail except during the months of September, October and November, 1900, and that these fresh meats were of cattle from their farms, as before stated."

The defendants here rested their case, and asked his Honor to charge the jury that, if they believed the evidence, they should render a verdict of not guilty, as defendants were indicted under Chapter 11, Public Laws 1899, sec. 51, and, being farmers, the meat sold, according to the testimony, was produced on their own farms, and the defendants were expressly exempt in said section.

His Honor refused to give this instruction, but charged the jury that, if they believed the testimony, they must find the defendants guilty. From a verdict of guilty and judgment thereon, the defendants appealed.

Brown Shepherd, for *the Attorney-General,* for the State.
Jones & Patterson, for the defendants.

DOUGLAS, J., after stating the facts. We think there was error in the charge of his Honor. The evidence was practically without contradiction, and the defendants should have been acquitted if the jury believed their evidence, which fully brought them within the exception, if, indeed, the burden of proof rested upon them. The State contends (1) that the word "product," as applied to a farm, does not include live stock; and (2) that if it does include live stock, it applies only to such as were "produced" or dropped upon the farm, natives, so to speak.

Whatever may be the strict meaning of the word, it is evident that the Legislature intended to include fresh meats, for the simple reason that it used the word in a section which,

by its very terms, applied solely to fresh meats. Any other construction would deprive the proviso of any meaning whatever.

The second contention is equally untenable, considering either the letter of the law or its essential purposes. If a farmer, and we use this word in the sense of an occupation and not a class, finds it more profitable to turn his corn and grass into meat, it makes no difference to him whether a calf is dropped on his farm or on that of someone else. What he wants is the calf, and he wants it at once. He may have more feed than stock, and may find it impossible to dispose of his surplus provender even at the cost of production. If he happens to raise an unusually good crop of corn, it is quite likely that his neighbors have done the same thing, and therefore corn will be cheap. To compel him to haul it to a distant market, there to come in competition with Western corn, or to await the slow process of "producing" a calf to eat it, can not be within the intention of the law.

Moreover, we think there is, as contended by defendants' counsel, a broad view of public policy underlying this provision of the statute, applying to the community as well as to the individual. It is to encourage the general raising of live stock by the small farmer, which will not only be profitable to the individual, but add to the aggregate wealth of the community, and tend to preserve and increase the fertility of its lands. In this view of the law it makes no difference where the calf was dropped, as its principal value is in raising it, owing to its two distinctive qualities of converting an unmarketable crop into one more marketable and of greater value, and at the same time giving back to the land the greater part of what has been taken from it.

One drawback in the raising of beef cattle at a distance from the large cities is the difficulty of disposing of it in bulk, or of preserving it for home consumption. Therefore, the

law leaves his home market open to the producer. With our increasing tendency to small farms, and the absolute necessity for the average farmer to raise enough for his own support, with a little surplus to exchange for those things he can not raise, it is essential that that surplus should find a ready market where it will not be eaten up by the cost of transportation or absorbed by the want of competition. Hence, the Legislature has confined the exemption to farmers, not because they are in a sense a privileged class, for we have no privileged classes in this country, but because they are the only class whose occupation brings them within the reason of the law. Hence, we do not see why a market gardener who should raise a calf or a hog on the waste products of his land, should not be equally entitled to kill it and peddle out the product.

And yet this must be done in good faith, which, if disputed, would be largely a question of fact. A man whose principal occupation is that of a butcher can not claim this privilege simply by buying or renting a few acres of land to be used as fattening pens in furtherance of his regular business of a butcher. In such a case, the beeves would be his own products only to the extent of the few extra pounds of flesh he put on them. What this law contemplates is that the meat in its essential character must be the product of the land owned or worked by the man who seeks to peddle it. There is a singular dearth of authority on this subject. The case most nearly in point seems to be that of *Trustees of Rochester v. Pettinger*, 17 Wendell, 265, decided in 1837. There the Court says, on page 266: "Now, if the farm was in fact used and occupied as a convenient and profitable appendage to another calling, to-wit, the business of butchering, and was not occupied and cultivated as a farm in the ordinary mode of farming, in the common and popular acceptation of the term, he could not be considered as coming within the exception. He would occupy it, *not as a farmer*, but *as a butcher*, with the

view the better to promote his business in that line. The plain object of the ordinance was, while it protected *licensed butchers,* to allow *farmers* to come in and sell the produce of their farms." The defendants here appear to live on their farm, and to be farmers in the truest acceptation of the term, as their regular occupation is farming, although they may occupy some of their spare time dealing in fresh meats. When they have done so, they have paid the tax; but that does not deprive them of the right to sell the product of their own farms without tax.

We have carefully considered this case, because it involves a principle of general importance, which it seeks to determine. Counsel frankly stated that this was their object, which is apparent from the record, as we can scarcely suppose that able lawyers would be employed to carry a case through all the Courts to that of last resort for the simple purpose of avoiding the payment of a single license tax of three dollars.

For error in the direction of his Honor, there must be a new trial.

New Trial.

STATE v. DAVIS.

(Filed December 20, 1901.)

1. STATUTES—*Repeal by Implication—Road Overseer—Highways—Acts 1899, Ch. 581—Acts 1901, Ch. 501.*

A township being a unit of a county, a general law for the county repeals a local law existing in one or more townships, where it provides a different rule about the same subject-matter.

2. JURISDICTION—*Superior Court—Justices of the Peace—The Constitution, Art. IV, Sec. 27—Acts 1901, Ch. 501.*

Where a statute prescribes a penalty of not less than ten nor more than fifty dollars, and no imprisonment is imposed, a justice of the peace has exclusive original jurisdiction.

INDICTMENT against James Davis, heard by Judge *M. H. Justice*, on motion to quash, at Fall Term, 1901, of the Superior Court of McDOWELL County. From order of quashal, the State Solicitor appealed.

Brown Shepherd, for *Robert D. Gilmer, Attorney-General*, for the State.

E. J. Justice, for the defendant.

COOK, J. Defendant was indicted for failing to perform his duties as a road overseer in Marion Township, in McDowell County. His counsel moved to quash the bill of indictment. The Solicitor for the State admitted that Chapter 581 of the Acts of 1899, was adopted and made applicable to the township of Marion, in the county of McDowell, as is provided by section 23 of said act, and that defendant was an overseer of the roads in Marion Township, appointed by the Justices of the Peace, under the law as amended by Chapter 501, of the Acts of 1901. His Honor held that said Chapter 581, Acts 1899, was applicable to and the law in said Ma-

rion Township, and not repealed by Chapter 501, Acts 1901, and therefore his appointment was invalid.

His Honor further held that if Chapter 501, Acts 1901, was applicable to Marion Township, the Superior Court would not have jurisdiction over the offense, and adjudged that the bill of indictment be quashed on both grounds; from which judgment the Solicitor appealed.

The first question raised is whether the act of 1899, Chap. 581, the provisions of which were adopted by and for Marion Township, was repealed as to said township by the act of 1901, Chap. 501.

Pursuant to the act of 1899, the township of Marion adopted a special system, therein provided, for the working of the roads within its territory, wherein and whereby the office of overseer of the roads was abolished.

The act of 1901 amends the general road law of The Code (section 2017), and as amended makes it apply "only to the county of McDowell," having no repealing clause whatsoever; and it was under this act that the defendant was appointed overseer of roads in his, Marion, township, the authority of which he refused to recognize, and indictment followed.

The general rule of construing statutes, as laid down by Mr. Blackstone, is that when the later statute differs from the older, the older gives place to the later one, *"leges posteriores priores contrarias abrogant."* But, he says, that is to be understood *only* when the later law is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative, and for illustration says: "As if a former act says that a juror upon such a trial shall have twenty pounds a year, and a new statute afterwards enacts that he shall have twenty marks; here, the later statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former."

Applying this rule to the case now under consideration, we have a statute saying the whole of McDowell County, or any one or all of the townships, *may* adopt the statute of 1899, and it is in fact adopted by this one of the townships; and a new statute afterwards enacts that Chapter 50 of The Code, sec. 2017, be amended, and, as amended, adopted and *apply* to the *county* of McDowell. These two statutes relate to the same subject-matter, and are enacted for the same purpose. The former provides for a system which may or may not be uniform in the county; while the latter provides for a different system which *is* uniform throughout the county, and operated upon a different basis. Wherefore, though it does not express, yet necessarily implies, a negative and repeals the former. A township is a unit of the county, and a general law for the county must necessarily repeal a local law existing in one or more townships providing a different rule about the same subject-matter.

In *Winslow v. Morton,* 118 N. C., 486 (on page 492), it is held that "where a later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the Legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by necessary implication. *Matter of N. Y. Institution,* 121 N. Y., 234; *N. S. v. Linen,* 11 Wallace, 88; *Jernigan v. Holden,* 34 Fla., 530."

In *Pulaski County v. Downer,* 10 Ark., 590, approved in *Meares v. Stuart,* 31 Ark., 17, the Court says: "The authorities are abundant to support the proposition that where the Legislature takes up a whole subject anew, and covers the entire ground of the subject-matter of a former statute, and evidently intended it as a substitute for it, the prior act will be repealed thereby, although there may be no express words to that effect, and there may be in the old act provisions not embraced in the new."

In *Norris v. Crocker,* 13 How., 429, approved and quoted in *U. S. v. Claflin,* 97 U. S., 546 (on pages 551 and 552), it was said by the Court: "As a general rule, it is not open to controversy that where a new statute covers the whole subject-matter of an old one, adds offense, and prescribes different penalties for those enumerated in the old law, the former is repealed by implication, as the provisions of both can not stand together."

In *Tracy v. Tuffly,* 134 U. S., 206, on page 223, the Court says: "And while it is true that repeals by implication are not favored by the Courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole the subject embraced by both, and to prescribe the only rules in respect of that subject that are to govern."

Both of the acts now under consideration relate to the subject of working the roads in that county. The former provides a complete system of machinery for carrying into operation the purposes of the act, repealing all former acts inconsistent with it, and prescribing as a penalty for failure to perform duty upon the part of the officers and employees employed thereunder that they shall be guilty of a misdemeanor; and requires that all able-bodied male persons of the county between the ages of twenty-one and forty-five years shall work on the public roads four days in each year, or in lieu pay the sum of two dollars, and upon failure or refusal, to be guilty of a misdemeanor and fined not less than two or more than five dollars, or sentenced to work on the public roads not less than ten nor more than twenty days. While the latter act, covering the same subject, provides an entirely different system and creates new and different duties and penalties, which, by necessary implication, repealed the former. And as to this question, we think his Honor was in error.

As to the other question, the act of 1901 prescribes *only* a fine of not less than ten nor more than fifty dollars for failure to perform the duty imposed. And the indictment was instituted in the Superior Court. Under Article IV., sec. 27, of our Constitution, it is declared that Justices of the Peace shall have jurisdiction "of all criminal matters arising within their counties where the punishment can not exceed a fine of fifty dollars or imprisonment for thirty days." The fine prescribed by this act does not exceed fifty dollars, and no imprisonment is imposed; therefore, the Superior Court did not have original jurisdiction of the offense, and his Honor properly quashed the bill upon that ground, and the action must be dismissed for want of jurisdiction in the Superior Court.

Error, and action dismissed.

STATE v. ROSE.

(Filed December 20, 1901.)

1. EVIDENCE—*Competency—Motion—Threats.*

Evidence that the prisoner had threatened to kill the deceased and had accused him of having reported blockade still of prisoner, is competent as tending to show threats and motive.

2. HOMICIDE—*Evidence—Murder in First Degree.*

Under the evidence in this case the trial judge properly charged that the prisoner was guilty of murder in the first degree or nothing.

3. NEW TRIAL—*Judge—Discretion—Verdict Against Weight of Evidence.*

The granting of a new trial because the verdict is contrary to the weight of evidence is discretionary with the trial judge.

4. INSTRUCTIONS—*Case on Appeal.*

The court holds that in this case the charge of the trial judge fully complies with the law.

INDICTMENT against John H. Rose, heard by Judge *E. W. Timberlake* and a jury, at September Term, 1901, of the Superior Court of WILSON County. From a verdict of guilty and judgment thereon, the defendant appealed.

Brown Shepherd, for *the Attorney-General,* for the State.
D. Worthington, and *S. G. Mewborne,* for the defendant.

CLARK, J. The prisoner is convicted of the murder of Thomas Farmer. There was evidence that the prisoner had threatened to kill the deceased "if he caught him messing round his still," that "if he caught him on his side the road he would kill him before he got back." The witness further stated, over objection and exception by prisoner, that the still was a blockade still, and that the revenue officers came

and took it; that he had heard prisoner say that the revenue officers got it, and that the deceased was the one who had reported the still to them. This evidence was competent, as tending to show threats and motive.

Bennet Wheeler testified that he and the deceased were riding along the road in a buggy, when they were shot from ambush from the left side of the road; that Farmer, who was on that side of the buggy, was killed, and witness was shot in the knee, breast, arm and face; that he looked up and saw the prisoner run through the woods with a gun in his hand; that later he went back to the place and pointed out to others where he saw the man run; "a bush was cut down right by the side of the stump. It is about 15 steps from where we were shot to the stump, and about the same distance from the place from where I saw the man run. Rose was right plain. I saw him. He started to run. I didn't see anybody fire the gun, but I saw the prisoner run from the stump from where the shot came. He ran to the left through the woods. He had just got up and started when I saw him. He was right at place fixed to shoot from. He had on a light-colored hat and no coat. As soon as I jumped out of the buggy and stopped the mule, I saw him run." There was corroborative evidence as to the condition of the spot, that from the stump one could see to fire at men in the buggy, a place having been cleared out by cutting down the bush; that a man running as described by witness could be seen from the place where he said he stood after getting out of the buggy; that this had been proved by actual experiment, that standing where Wheeler said he stood a man raising up from behind the stump could be seen and recognized; that the prisoner had that day tried to buy "double B" shot, such as were found embedded in the buggy; that he was seen not far off that afternoon, and the like.. One of the witnesses for the defense testified on cross-examination that he saw the

prisoner cross the road three-quarters of a mile from the place of the homicide about 5:30 o'clock of the same evening Farmer was killed, and that he had on a white hat and no coat. Another witness for the defense testified he had heard prisoner say that if he knew Farmer had reported his still he would whip him.

The case states that after explaining fully the law of homicide, the Court said: "The counsel for the prisoner, in his argument to you, said that under the evidence in this case you must either return a verdict of not guilty, or guilty of murder in the first degree, and the Court charges you that this is the law of the case." Singularly enough, his counsel now contend that this is error. But we think it is correct, as is also the further charge, excepted to, that if, after considering all the circumstances carefully and deliberately, in connection with all the evidence in the case, the jury "are satisfied, after having done this, beyond a reasonable doubt, that the prisoner slew the deceased as alleged by the State, then it would be your duty to return a verdict of murder in the first degree; but if not so satisfied, it would be your duty to return a verdict of not guilty."

All the evidence tends to show that the killing was done by someone "lying in wait," which comes expressly within the statutory definition of murder in the first degree. There was no evidence of an altercation or a killing under any other circumstances. If the prisoner was the man who fired the fatal shot, he was guilty of murder in the first degree, and if this was not shown beyond a reasonable doubt, the jury should, and under the Judge's charge would, have acquitted the prisoner.

The first ground of exception to the refusal of a new trial is "because the verdict was contrary to the weight of the evidence." This was in the discretion of the Judge below, and is not reviewable on appeal. *Edwards v. Phifer,* 120 N. C.,

405, and numerous cases there cited; *Benton v. Railroad,* 122 N. C., 1007.

The second, fourth and fifth exceptions have already been disposed of. The third exception is "Because the Court failed to state the contentions of the prisoner in his charge to the jury. The Court did not state the contentions of either side, other than appears herein, and no request was made that it be done." The charge does not appear to have been sent up in full, but therein the Court refers to the contentions of prisoner's counsel, charges fully the law, recapitulates the evidence, and directs the jury's attention to the principal point, to-wit, that the jury must acquit unless satisfied beyond a reasonable doubt that the prisoner slew the deceased as alleged by the State, the uncontradicted evidence being that the deceased was killed by someone lying in wait. The prisoner's contention was solely that he was not the man. The jury declared themselves satisfied by the evidence beyond a reasonable doubt that he was.

We see no error of which the prisoner can complain.

No Error.

STATE v. WELCH.

(Filed December 20, 1901.)

1. INDICTMENT—*Proviso—Negatived—Statutes.*

A proviso in a statute withdrawing a certain class from the operation of the statute need not be negatived in an indictment.

2. PHYSICIANS AND SURGEONS—*Indictment—Acts 1889, Ch. 181, Sec. 5.*

An indictment for practicing medicine without license need not charge that it was done for fee or reward.

3. INDICTMENT—*Physicians and Surgeons—Practicing Without License.*

It is sufficient to charge that a person wilfully and unlawfully practiced or attempted to practice medicine or surgery.

4. INDICTMENT—*Physicians and Surgeons—Practicing Without License.*

It is not necessary to allege in an indictment for practicing medicine without license that the defendant failed to "register and obtain" license, but it is sufficient to allege the failure to obtain license.

5. PHYSICIANS AND SURGEONS—*Obstetrics.*

The practice of obstetrics comes within the statute forbidding practicing medicine without license.

INDICTMENT against J. L. Welch, heard by Judge *George A. Jones* and a jury, at August Term, 1901, of the Superior Court of MACON County. From a verdict of guilty and judgment thereon, the defendant appealed.

Brown Shepherd, for *Robert D. Gilmer, Attorney-General,* for the State.

J. F. Ray, for the defendant.

CLARK, J. The defendant is indicted for practicing medicine or surgery without license. The bill is drawn under section 5, Chapter 181, Laws 1889, and is a *verbatim* copy of the indictment which was sustained in *State v. VanDoran,* 109 N. C., 864. The defendant moved to quash the bill, and also in arrest of judgment, because:

1. It did not negative the provision of the statute allowing persons to pursue the avocation of midwifery.

2. The bill fails to allege the defendant practiced for "fee or reward."

3. The bill alleges defendant "unlawfully and wilfully did practice or attempt to practice medicine or surgery," and the offense of practicing and attempting to practice are so distinct that the charge is not set forth in "a plain, intelligent and explicit manner."

4. That the words "register and obtain" license should be in the bill, and not merely a failure to obtain license.

The motion being overruled, the defendant excepted. The provision as to the exception of "women practicing as midwives" is in the *proviso,* and instead of constituting a part of the offense, withdraws a certain class from its operation. Hence, the bill need not negative the defendant belonging to that class. That would be a matter of defense, and, indeed, it affirmatively appears in the evidence that the defendant is not a woman.

This statute does not contain the words "without fee or reward." The first two exceptions are passed upon and denied in *State v. Call,* 121 N. C., 643. The third exception is fully discussed and held invalid in *State v. VanDoran, supra.* The words excepted to in the fourth ground of defendant's motion are copied from the bill in VanDoran's case, which was cited again in *State v. Call, supra,* which case says "an approved form of indictment under the act of 1889 may be found in *State v. VanDoran.*" Indeed, as the

bill charges that the defendant did not exhibit to the Clerk the license, nor make the oath necessary to procure registration, and did practice, "not then and there having obtained from said Clerk of the Court a certificate of registration," it certainly charges that the defendant "did not register and obtain license."

The evidence was uncontradicted that the defendant practiced obstetrics. The defendant offered no evidence, and requested the Court to charge the jury "that the practice of obstetrics was not in any sense the practice of medicine or surgery." This the Court refused, and told the jury, if they believed the evidence, to find the defendant guilty. In this, also, there was

No Error.

STATE v. WILLIAMS.

(Filed December 20, 1901.)

1. EXCEPTIONS AND OBJECTIONS — *Appeal — Evidence — Sufficiency.*

   It is too late after verdict to raise the objection that there was not sufficient evidence to warrant the verdict.

2. EVIDENCE—*Admissions—Co-defendants—Confessions.*

   Confessions made by one defendant not in the presence of the other defendant, is competent against one making them if the jury be instructed not to consider them as against the co-defendant.

3. EVIDENCE—*Corroboration—Declarations.*

   Where a verdict of not guilty is entered as to one of two co-defendants and this defendant is introduced as a State's witness, declarations made by said witness can not be used as substantive evidence, but only to contradict or corroborate what the witness has already testified.

STATE *v.* WILLIAMS.

INDICTMENT against Dixie Williams and Bettie Caddell, heard by Judge *A. L. Coble* and a jury, at September Term, 1901, of the Superior Court of MONTGOMERY County. From a verdict of guilty as to Dixie Williams and judgment thereon, he appealed.

Brown Shepherd, for *R. D. Gilmer, Attorney-General,* for the State.

No counsel for the defendant.

CLARK, J. The prisoner was convicted of murder in the second degree. After verdict, he excepted because there was "no evidence to warrant a verdict for murder in the second degree." There was no prayer to that effect, and an exception that there was no evidence is waived if not asked before verdict. *State v. Harris,* 120 N. C., 577, and numerous cases there cited; Clark's Code (3d Ed.), page 773, and other citations down to *State v. Huggins,* 126 N. C., 1055. There were confessions of the prisoner made to different persons, which would have justified a conviction of murder in the first degree, with evidence of jealousy as a motive, and threats. There was no eye-witness of the killing. The killing being shown to have been done with a deadly weapon, and if the jury found that it was done by the prisoner, the law raised a presumption that it was murder in the second degree, and the jury may not have been satisfied by the confessions and other evidence, of the circumstances necessary to raise the offense to murder in the first degree, and his Honor properly left both aspects to the jury. Upon the evidence, the jury might very well have found the prisoner guilty of murder in the first degree, the evidence would justify such a finding, but it does not lie in the prisoner's mouth to complain that he was found guilty of the lesser offense. This is not like the case of *State v. Rose,* at this term, where the evidence all

established a killing by lying in wait, and the sole question was whether the prisoner did the killing, and the Judge properly told the jury, as argued to them by prisoner's counsel, that the prisoner, if they believed the evidence, was guilty of murder or nothing.

Bettie Caldwell was a co-defendant, and certain admissions of hers not in the presence of Williams, were admitted as evidence against her, with instructions to the jury that they could not consider such evidence as against Williams. In this there was no error.

During the progress of the trial, the State submitted to a verdict of not guilty as to Bettie Caldwell, and placed her on the witness stand. His Honor, in his charge, told the jury that the evidence of the declarations of Bettie Caldwell out of Court could not be considered by them as substantive evidence, but the jury might now consider such previous statements by her so far as they tended to contradict or corroborate what she had testified upon the stand. This is well-settled law. *Burnett v. Railroad,* 120 N. C., 517, and numerous cases there collected.

No Error.

STATE v. HOWARD.—GOLD BRICK CASE.

(Filed December 3, 1901.)

1. INDICTMENTS—*Counts—Joinder.*

Where the several counts in an indictment are simply descriptions of the same transaction in different ways, a joinder is not objectionable.

2. BILLS OF PARTICULARS—*Counts—Nolle Prosequi.*

Where, on motion of the defendant, the solicitor is ordered after the evidence is in to elect and thereupon *nol prosses* several counts, which gave as full information as a bill of particulars, the defendant can not complain of the refusal of the court to order a bill of particulars.

3. INDICTMENT—*Conspiracy.*

An indictment for conspiracy need not set out the means by which the conspiracy was to be executed.

4. CONSPIRACY—*At Common Law—Statute 33, Edward I.*

Conspiracy is a crime of common law origin, and is not restricted or abridged by Statute 33, Edward I.

5. CONSPIRACY—*What Constitutes.*

A conspiracy to do an act that is criminal *per se* is an indictable offense at common law.

6. INDICTMENT—*Sufficiency—Conspiracy—The Code, Sec. 1025.*

In an indictment for a conspiracy to obtain money by false pretenses, it is sufficient to allege the doing of the act with such intent without setting out the name of the person intended to be defrauded.

7. JURY—*Instructions—Judge—The Code, Sec. 413—Witnesses—"Act of 1796."*

A remark of the trial judge complimentary to the character of one who was a witness in the cause, made before the jury is empannelled, is not forbidden at common law, nor by The Code, Sec. 413.

STATE *v.* HOWARD.—GOLD BRICK CASE.

8. PUNISHMENT—*Conspiracy—State Prison.*

A judgment, upon a conviction of conspiracy with intent to defraud, of imprisonment in the state prison is correct.

FURCHES, C. J., and DOUGLAS, J., dissenting.

INDICTMENT against J. L. Howard *alias* Frank Thompson, A. L. Daley *alias* Gonez Bono, and H. D. Hawley, heard by Judge *W. B. Council* and a jury, at June Term, 1901, of the Superior Court of GUILFORD County.

INDICTMENT—FIRST COUNT.

"The jurors for the State, upon their oath, present, that J. L. Howard *alias* Frank Thompson, A. L. Daley *alias* Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22d day of March, A. D. 1901, with force and arms at and in the county aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest practices, in secrecy, with deceit and with intent to defraud, among themselves unlawfully, wilfully, fraudulently, feloniously and deceitfully did combine, conspire, confederate and agree together by divers false pretenses and subtle means and devices, to obtain from one Paul Garrett large sums of money, and him, the said Paul Garrett, to cheat and defraud out of his moneys, goods and chattels, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State."

SECOND COUNT.

"Second Count. The jurors for the State, upon their oath, do further present, that J. L. Howard *alias* Frank Thompson, A. L. Daley *alias* Gonez Bono, and H. D. Hawley, late of the county of Guilford, on the 22d day of March, A. D. 1901, being persons of fraudulent minds and evil dispositions,

and wickedly devising and intending to rob one Paul Garrett of his moneys, goods and chattels, did unlawfully, wickedly and feloniously conspire, combine, confederate and agree together, in and upon one Paul Garrett in the peace of God and of the State then and there being, feloniously to make an assault, and him, the said Paul Garrett, in bodily fear and danger of his life, then and there feloniously to put, and the moneys, goods and chattels of the said Paul Garrett from the person and against the will of the said Paul Garrett, then and there feloniously and fraudulently to steal, take and carry away as by the said J. L. Howard *alias* Frank Thompson, A. L. Daley *alias* Gonez Bono, and H. D. Hawley, had been mutually agreed and undertaken to do; to the evil example of all good citizens, and against the peace and dignity of the State.

THIRD COUNT.

"Third count. The jurors for the State, upon their oath, do further present, that J. L. Howard *alias* Frank Thompson, A. L. Daley *alias* Gonez Bono, and H. D. Hawley, late of the county of Guilford, being persons of fraudulent minds and dispositions, and wickedly devising and intending to cheat and defraud the said Paul Garrett of his moneys, goods, chattels and property, did, on the 20th day of March, A. D. 1901, in the county of Guilford aforesaid, feloniously, wickedly and deceitfully combine, conspire, confederate and agree together to cheat and defraud the said Paul Garrett of his moneys, goods, chattels and property as aforesaid by the false and deceitful color and pretenses as follows, to-wit, by him, the said J. L. Howard *alias* Frank Thompson, pursuant to a conspiracy, confederation and agreement theretofore had and made between him and his co-conspirators above named, falsely, fraudulently and deceitfully pretending and representing to the said Paul Garrett, that he, the said J. L. How-

ard *alias* Frank Thompson, and his associate and confederate, Gonez Bono *alias* A. L. Daley, were then and there the owners of and in possession of large blocks of gold as well as the owners of large and valuable mining interests in Arizona, which said gold was held by the said Gonez Bono on Buffalo Creek, near the city of Greensboro, where the said Paul Garrett was then and there taken, and the said blocks of metal then and there shown him; when the said J. L. Howard *alias* Frank Thompson, pursuant to the conspiracy theretofore had and made, pretended that the said blocks of metal were solid gold 22 karats fine, and of the value of many thousands of dollars, which they offered to demonstrate by a chemical analysis, to be made by their said co-conspirator, H. D. Hawley, who was then and there waiting near by in the city of Greensboro with an assayer's outfit to fraudulently and falsely analyze and assay said spurious metal and pronounce it pure gold, thereby aiding his co-conspirators in the execution of their common, fraudulent and felonious design to cheat and defraud the said Paul Garrett, in pursuance of a common conspiracy and confederation had and made by and between the said J. L. Howard *alias* Frank Thompson, A. L. Daley *alias* Gonez Bono, and H. D. Hawley. And the said J. L. Howard *alias* Frank Thompson, then and there sought to dispose of and sell to said Paul Garrett the said blocks of metal for large sums of money; whereas, in truth and in fact, the said blocks of metal falsely and fraudulently represented to be gold were not gold, but of a cheap and comparatively worthless metal, by means of which said false, fraudulent and felonious representations, the said J. L. Howard *alias* Frank Thompson, A. L. Daley *alias* Gonez Bono, and the said H. D. Hawley sought and attempted to obtain unjustly and unlawfully large sums of money from the said Paul Garrett, contrary to the form of the statute in such cases provided, and against the peace and dignity of the State.

(Signed) "BROOKS, *Solicitor.*"

PAUL GARRETT, DIRECT EXAMINATION.

That on Friday, June 7, 1901, being one of the days of said term of the Court, the State to prove its case produced and had sworn one Paul Garrett, whose testimony so given tended to prove in substance as follows:

"My name is Paul Garrett; I live in Weldon, North Carolina. Saw the defendant J. L. Howard *alias* Frank Thompson, Wednesday morning, March 20, 1901, about 9 o'clock, at my office in Weldon, N. C."

And was then asked by the said Solicitor this question: "Q. Now, you may go ahead in your own way and state to his Honor and the jury the circumstances under which he came there, and what occurred between you?"

To which question the defendants, by their counsel, objected, on the ground that the indictment alleged the offense charged therein and its venue as having been committed in Guilford County, and that the Court would take judicial notice that Weldon was in Halifax County; and that being so, no acts or declarations by any one or more of the defendants occurring in any county other than Guilford were competent, relevant and material; and this because it related to another jurisdiction than the one alleged in the indictment, where the defendants might be prosecuted.

First exception to evidence. Which objection was overruled by the Court, and defendants then and there, by their counsel, duly excepted.

The Solicitor then announced to the Court that he proposed to prove by witness certain declarations and acts that are to be afterwards connected as to be evidence before the jury, of the conspiracy among the defendants now on trial, that if such acts and declarations of the defendant Howard are not so connected, then such will not be asked as evidence against the other defendants.

To which proffer by the State, defendants, by their counsel, objected, as same is not sufficient to authorize the testimony of certain acts and declarations of the defendant Thompson in a county other than Guilford, and in the absence of the other defendants.

Second Exception. Which objection was overruled by the Court, with direction to witness to proceed; to which ruling of the Court defendants, by their counsel, then and there duly excepted.

On the morning in question, as I before stated, I was dictating my correspondence to my stenographer. The door to the room was opened and a man appeared there. He was in the garb of a miner, or a laboring man of the better class. He asked if Mr. Garrett was in. I replied that he was, and asked what he wanted. He stated that he wished to have a private interview. I replied that I was busy at that time, and that he would have to have a seat in the outer office. I finished the letter on which I was engaged, and went into the next room and asked the gentleman what it was he wished. There was another clerk present, and he, looking over at him, said that he wished to see me privately. I stated that any business matter could be discussed in the presence of this clerk. He stated he must see me entirely alone. So instead of stopping the clerk and sending him out, I went on the outside with him. Arriving at the outside, he asked me if I had a brother named Andrew Garrett. I told him no, that I had no brother, that I never had but one, and he died in infancy. He said that he was mighty sorry, that he was looking for Andrew Garrett's brother; that he was from Arizona; that Andrew Garrett was his partner there a number of years before, and that Andrew had come east in response to an invitation from an aunt of his, who lived in Charlottesville, Va., to take charge of her affairs; that she was quite a wealthy woman, and he had come to take charge

of her affairs; that they had an understanding when he left, which was four years before, that any time either of them got anything good, they would acquaint the other with the fact. That in the meantime he had "struck it rich," and in the company of an Indian chief—I think he said an Indian chief— he had come east to look for Andrew and to buy machinery for his mine. I cut him rather short; told him that, unfortunately, I was neither Andrew nor Andrew's brother, and I did not see how I could serve him at all. He said it appeared to him like nobody wanted to talk to him; that everybody seemed to think he wanted to get some money out of them. He pulled out his purse and exhibited quite a roll of money. I told him that I did not see where it interested me at all, that I was not Andrew's brother. Well, he said, they were in search of Andrew's brother, and they were coming along east, the Indian, whose name was Gonez Bono, had eaten a lot of trash on the train, candy and peanuts, etc., and had gotten sick, and at Greensboro he refused to go any further, and he had taken him off the train here and carried him out in the woods; that the Indian would not stay in the house, he had to have a camp in the woods. That he had gone on through Greensboro to Charlottesville, looking for Andrew, but when he got to Charlottesville he found that Andrew had died; that his aunt had moved to Washington City, and that he had asked of that family in Charlottesville, and he was told that in Weldon there was a man named P. Garrett; that he knew that Andrew had a brother named Peter Garrett, and he thought this might be the man; and he was mighty sorry that I was not Andrew's brother. I told him that inasmuch as such good things were in view, I was sorry myself that I was not Andrew's brother, but I didn't see how I could help it. I was not; that my name was Paul instead of Peter. We exchanged condolences on the death of Andrew and the absence of his brother, and the result of it was he said he had been making some inquiries about me

before he got there, and found that I was pretty good at figures and an honest man, and that he was looking for such a man to look after the business of their affairs, that he was a very ignorant man, could not read nor write, nor make figures, and that they wanted some good, reliable man to take charge of their business interests; that they had with them two bars of gold (he may have said chunks), two pieces of gold; and they were on their way to Philadelphia mint to sell the same, and the proceeds of which were to be invested in mining machinery, outfit, etc. The conversation proceeded along those lines—a good deal of repetition in it, and, as confirming his statement about the circumstances, he gave me some incidents in his life of his trip east. That at Albuquerque, New Mexico, at which point I think he said he took the train to come east, he had met up with some character in that country whose business it was to keep an eye on every new mine that was started and cheat them out of their claims, and this fellow had tried to pump him out of his information, but he had been very discreet and had not said anything about the discovery of this gold mine; in confirmation of it,he drew this from his pocket. It is an envelope purporting to be from a hotel in Minnesota; there was no address on it, but he had a clipping, which purports to be an extract from some newspaper. He handed it to me and asked me to read it to him. He said some fellow had read it to him, but he was not sure it was read right.

Which paper, in substance, was that Frank Thompson and an Indian chief, named Gonez Bono, were on their way to Philadelphia to dispose of the product of a certain gold mine in Arizona, and that they were very careful in not disclosing its location, or saying much in particular about it, for fear that some one would discover its location and take it from them before they had filed their claim thereon.

That the defendant Thompson then said that the Indian,

Gonez Bono, stopping at Greensboro, was the same that accompanied him there. That after exhibiting these pieces of paper, and some other conversation along the same line, he also exhibited a little bag and began shaking it, and in it were specimens of ore and a little gold bar, about, I suppose, three and a half or four (3½ or 4) inches long, and one and a half (1½) inches wide, one-tenth or one-eighth (1-10 or 1-8) of an inch thick. I think I could identify it, and it is among the effects. He showed them to me, and I handled them and handed them back, and still intimated that I did not see exactly what connection I had with the case, but that it was all mighty pretty and nice; and he then went on and said that as Andrew was dead and he could not find his brother, he didn't see why I couldn't look after it for him. He said they wanted a man to take charge of it for them, and would give him a third interest in it. I then went on to question him about the mine, how they had been working it. He said they had never had any machinery, excepting Indian squaws had "toted" part of the ore on their backs. They had gotten up this much gold in two years, and that there was a big thing in it for whoever would take hold of it and work it right. I told him that I had already taken great interest in gold mining; had worked in a gold mine a short while, had familiarized myself with it, and had a little experience with gold mining myself. He explained then the situation of the country, its location in the mountains, it was several miles, I think about 40 miles from ..... The conversation drifted along these lines. Finally, he wanted to know what I thought of it, and I told him that if there was anything in it, I didn't know that I would object to take up a proposition. I asked him what would be expected of me. He said the first thing he wanted me to do was to go along with them to Philadelphia, and sell it to the mint. That they needed somebody that could figure,

and I said that I had no objection to going; that I was up for business. He said that, too, I would be expected to go with them to Washington City and file the claim; that the claim had never been filed; that it was in the Indian reservation. "Well," I said, "that is going to require a good deal of time and absence from home, and I generally get pay for my services." Well, he said, they would give me one-third interest in the two gold bars. And I asked him what that would be. He said they would weigh about one hundred and fifty (150) pounds. Didn't know exactly; that somebody had weighed them for them. He seemed to be very suspicious of everybody. I asked him what it was worth. "Well, dat Jew at Albuquerque had bought ten (10 lbs.) pounds of it, and he gave me twelve $20 gold pieces for dat much." He said there were one hundred and fifty pounds of it, about $36,000, and that he would give me one-third of it. I asked him what the mining outfit was going to cost, and he enumerated; and I figured that the mining outfit would cost $20,000, and there would be a balance left of $16,000, of which I was to have one-third. He asked me what my part would be. I told him it would be something like $5,000. He said he reckoned we could have a good time in Philadelphia on that after paying our expenses. I told him yes, it might serve for a short trip. "But," said I, "I don't know anything about these gold bars. I want to see something beside that. If I leave my business, I will have to get somebody here to look after it for me." He wanted to know what I wanted for my services. I told him it was hard to place an estimate on my services, but I would not make a charge less than $25 a day to recompense me for my absence from my business and my expenses. He said he thought I put a pretty good value on my services. I told him I did. He said, well he didn't mind paying a good man, for he wanted a good man, he wanted an honest man,

and that they told him I was honest; that he had met a man on the train, and had inquired about me downtown, and he consented then to it, so far as he was concerned; said he would not mind if the Indian would not mind; he would have to see the Indian about it before he could consummate it. Wanted to know if I would not go back with him and see the Indian that afternoon. I told him that I had an engagement in Norfolk to-morrow, that I could not go this afternoon. I can't remember now, there was quite a number of questions passed. I said, "You go on to Greensboro. I will go to Norfolk. You want to go to Philadelphia. I can go right over to Philadelphia and get this matter transacted. I will make my arrangements to leave home. He said the Indian was mighty curious and mighty suspicious, and he was afraid he could not get him off. In fact, he didn't have but twenty days' leave of absence from Col. Crook, and they had been off twelve days, and the Indian was getting restless and wanted to go back anyhow. I told him I did not know how I could help him then, that I could not break my engagement at Norfolk. He asked me if I could come to Greensboro. "Certainly," I said, "I can, but if you want to go to Philadelphia, come by Norfolk, and I will go with you on these terms." Well, he said, maybe we might arrange to do it, but he didn't know what he would do with the Indian. Then he asked me if I would not agree to go on Friday. But in the meantime he had gone on a good deal about the vast resources of this mine. It was plausible in one view, and it was not plausible in another. It was mighty pretty. I told him then that if the Indian was willing and he would let me know at Norfolk, I would come back. He said they didn't have any time to lose. I said, "You can telegraph me at Norfolk to-morrow." He wanted to know what a telegram was. I said, "You write the message to me and carry it to the telegraph office, and they send it to me." He

wanted to know how that was, if they stuck it on the wires and they sent it to me. I explained. He seemed to be very much enlightened as to what a telegram was, and said that would work all right. But how was he going to manage it? He didn't want to take anybody else into his confidence. I said, "I will write out a telegram here, and if the Indian is willing, you can send it to me." He said that would be a good idea. So we then went into my office. All this conversation took place on the outside. The young man was still sitting there, and I took down a telegraph blank and wrote it. "Now," I said, "if Gonez is willing to this proposition, you will send this telegram." The telegram read, "Gonez willing; come at once; will meet at train." I signed it, at his suggestion, "Frank Thompson." "Now," he says, "suppose the Indian is not willing?" I said, "Well, I will write another one." And I really can not recall that one, but it was to the effect that Gonez refused to agree. I wrote the telegram, and he said, "I can't tell one from the other." "Well," I said, "I will put a cross-mark in blue pencil on the one that means "yes"; on the other, not to come, I will put a round mark." And I made him repeat it. "You say you are going to pay my expenses?" He pulled out his purse and handed me a $10 bill. *I looked at it pretty closely* and put it in my pocket. We talked a little while on that line, and he asked me about the trains—when one went back. I told him shortly after noon. I told him I would meet him at the train. He went out, and had to go round the corner of the house, and go back right in full view of my office, which has three compartments. The front office is occupied by two young men, and the rear offices, one of them is occupied by myself and another young man, who hears everything that goes on of a business matter; and the one at the rear, or at the farther angle, is occupied by the stenographer, and I dictate my letters in that office generally. I walked into

the office as he turned the corner, and touched the two young men on the shoulder. I didn't want the stenographer to hear. I said, "If you want to see a genuine gold-brick man, look out of the window quick." They both ran to the window. I said, "If he is not one, I never saw one." I rang the 'phone and called up the Revenue Officer at Littleton, N. C., whom I know personally, and under the suspicion that the bill I had from Howard was a counterfeit bill, I told him I would like to have him come down that afternoon on the next train, I wanted to see him on a matter of importance. Thompson was crossing the bridge then. He answered, and said that he would be down on the next train. I went on and finished what correspondence I could, and about the noon hour, as usual, I went to town. I took with me the deposits for the day. I went to the bank at once and made my deposit, and went into the cashier's private office and told him that I had a big proposition, that I was about to go into the gold mine business. We had a conversation on the merits of the case. I went over the situation with him.

Q. Mr. Garrett, when was it that you began to suspect him? That there was something wrong about it?

A. The real suspicion began when he made reference to the Indian being out in the woods.

Here defendants, by their counsel, objected to the witness relating any further of the conversation then or subsequently occurring between him and the defendant Thompson with respect to the gold mine, or its supposed product, or the Indian in the woods, etc.

Third Exception. Which motion was overruled by the Court, and the witness directed to proceed; to which ruling of the Court the defendants then and there duly excepted.

Witness proceeds: I have omitted just one item in answer as to what my services would be. I explained to him that inasmuch as the claim was all right, I could not leave my

present business to take charge of the mine in Arizona. It was agreed between us that if it would be agreeable to the other parties, that we would employ a timekeeper, bookkeeper and general manager, to be paid from out of the expenses of the mine.

Q. Was there any consideration or suggestion made as to what part?

A. One-third interest.

Q. It was agreed that you were to employ a bookkeeper?

A. Yes, sir. He was to work on a salary. Another point I will bring in right here. While writing these telegrams, there was an electric light over my desk of a little peculiar pattern, and he got down and looked at it and said, "What might that be?" I told him that was an electric light. He said, "What's that?" I told him, "It gives light here at night." He said, "How do you light it? do you stick a match to it?" I told him no, that I turned a little peg and it lit up, and I turned another one and it went out. He said a boy down at the hotel showed him. He wanted to know if I could explain it. I told him no, that I was not sufficiently an electrician to explain it. I told him at home I would see him at the train. I went to the bank and talked with the cashier, and told him to go down to the depot and stand around and observe the man that I was talking to. When I went up he was buying his ticket. I stood on the outside, and as soon as he saw me he came and engaged in conversation again. He said the ticket cost so much and he gave him a bill for so much, and asked me if he gave him the right change. I counted his money, and told him his change was correct. I asked him what hotel he stopped at. He said the tavern right there. He said he had to get the tavern keeper to write his name on the book, he didn't know what that was for. I told him that was customary. He wanted to know if he didn't charge him too much for lodging.

I told him no, that was the regular charge. He said, "He asked me if I was a commercial man, I believe." I said, "What did you tell him?" "I said I didn't know what that was." I told him they gave drummers a special rate, "If you had told them you were a commercial man, I guess that would have been all right." And the conversation drifted along these lines. He then had me read this paper to him again, and he went over again the question of the cost of the mining outfit. And according to the understanding there, I took out a letter which I had in my pocket, and on the back of it had him give me the cost of the mining outfit.

(Letter marked Exhibit "A" introduced, was a pencil memrandum by the witness of mining machinery, consisting of engines, boilers, derricks, wagons, plows, picks, horses, harness, etc., of the aggregate value of twenty thousand ($20,000) dollars.)

He then asked me if that was not pretty good pay for my services. I told him yes. I began to question him further about the mine. He intimated in his conversation that the output of the mine would assay, with the machinery we proposed to buy, a million dollars a year apiece. I then asked him about the general conditions of the country, health, water, atmospheric conditions, nice country to live in; if there was any hunting and fishing. He said he was not fond of hunting, but that he hunted sometimes to get game for the camp, could shoot with a rifle, but never could shoot with a pistol. I asked him if he ever carried any weapons with him. He said no, that when they came to take the train they brought along the rifles in the wagon, but they sent the rifles back; that he was not a good shot with a pistol. I replied that I was a very poor hand also. We discussed other matters. While we were talking, the cashier of the bank came forward, and I had seen him standing near. The cashier walked up and remarked, "Mr. Garrett, it is about the time of day that

I take my drink. Won't you and your friend come and have a drink with me?" "Mr. Smith, let me introduce you to Mr. Thompson, of Arizona," I said. Thompson declined, and I declined also. We continued our conversation then, and he said coming out east was mighty tiresome, that he didn't mind it for the first day or two, but he passed El Paso, and after he left there it was a long, tiresome road; that he crossed a big river. I said, "The Mississippi?" He said yes, that he thought it was. He said there was a great big city there, and he had to lay over there. He counted up the time they had been away from Arizona. He said up to that day they had been away 12 days, that the Indian's leave of absence would be out in 20 days, and the Indian was getting very restless and uneasy, and wanted to go back to the reservation; that they would imprison him if he did not get back in time, and that it might be that the Indian would be so worried out and tired that we would just have to buy the Indian out, and let him go back home. I asked him what he thought he would take. Thought the Indian's share would be about $12,000. He then said that the Indian was mighty suspicious anyhow, and that at New Orleans they had run up against a man there; the fellow come up to him looking real nice; said he had on a white shirt, stiff collar, a great big diamond in cravat; said he was walking up and down the platform, and this fellow came up and spoke to him, and asked him where he was going. He told him he was going to Charlottesville, Va. He asked him if he knew anybody in Charlottesville. He told him no, that he was looking for a man named Andrew Garrett. He said, "Why I live in Charlottesville, and know him very well." They got to talking, and he said after talking a little with the fellow he told him he was in mighty hard luck, and that he and his brother, who had consumption, had, I think, started from Colorado to Arizona for his brother's health, but his brother died on

the way, and he was on his way back to Charlottesville. He said, "I am in hard luck. I have not got any money in my pocket to buy my ticket. I wish you would loan me enough money to buy my ticket, etc., and when I get on the train I will pay you back." Well, he said the fellow seemed honest, had a good face, and said that his mother had always told him to be honest.

Said his mother, after his father's death, had grieved herself to death, that she kept a little testament, and sometimes she would read it and cry, and told him he must not tell a lie, that if he told a lie he would go to hell, and that he didn't believe that a man like that would tell him anything but the truth, and so he pulled out his roll of money and started to count it out, and said when he did Gonez commenced to shake his head. But he knew that Gonez hadn't heard him. So he counted him out $300. Said the fellow was mighty nice, and they got on the train. The first station they got to, he left his seat, and when he came back to look for the fellow, he didn't see him, but he thought he would turn up directly. After going by two or three stations, he went to the man who had the buttons on his coat, and asked him where his friend was who had the corpse on the train. He said there was no corpse on the train. He told him yes, there was, for his friend had told him so, and he knew his friend would not lie to him. The conductor told him not to talk to every stranger that he came up with, and he would better divide his money into two rolls so as not to show it all at the same time. He said he followed the conductor's advice, and since that time he carried some of his money in one bag and some in another. I told him that he must be pretty unused to the ways of the world, and I thought he needed someone to look after his affairs for him. While we were standing there talking about various things, he said while he was in Charlottesville the other day he saw a woman coming down the street riding on

a little seat with two wheels made out of wire. Said, "How in the name of the Lord did she sit on that?" "Why," I said, "didn't you ever see a bicycle?" Said, "No, what was that?" Said he saw something else, "saw a little car on the street about half as long as a railroad car, and that it had a pole on top of it and a man standing out in front of it, and it just went along with nothing pulling it and nothing pushing it." "Why, that is an electric car," I said. And he wanted me to explain to him what electricity was. I told him that was beyond me, that I could not do it. He explained to me then, in this conversation at the shed, if Gonez agreed to the bargain, that when we came to Greensboro we would go out and see Gonez, and have a talk with him, and bore into the bricks and bring them back to town and have them tested, and if the tests showed up all right, and if the Indian was still uneasy, why we would just buy the Indian out, and let him go on back. He was a great deal of trouble. His time was nearly out, and he doubted whether he could get through with the work in Philadelphia and get through filing the claim in Washington in time for the Indian to get back.

I agreed to the estimate that he gave me of the value of the gold as $36,000, and the cost of the machinery, $20,000, which would leave $16,000 to be divided between the Indian, myself and himself as pin money. He intimated that if the Indian would not go to Philadelphia we would just buy him out, and he made some inquiries as to how much money I could raise. Up to this time he made no suggestions as to what the Indian could be bought out for. He afterward said, "We will just buy the Indian's share and let him go home. It's worth $12,000." This beaded bag is the one he showed me, and contained two or three pieces of ore and a small bar of gold. The defendant sitting in the middle with glasses is Howard, the one who showed me the bag or gold; and his appearance now is different than it was then; then he had on

a flannel shirt, good and substantial, but showed evidences of use, and he had a full beard. I saw him take the train at Weldon for Greensboro, and I awaited the arrival of Mr. Lewis, the gentleman whom I had 'phoned. I simply transacted my own business affairs. After a conference with Mr. Lewis, I drove out in the country late in the afternoon, just before dark, to the house of Mr. H. A. Mims. I reached there just about dark. It was raining. I called Mr. Mims to his front gate. I engaged Mr. Mims to come to Greensboro and confer with the authorities here.

Q. Did you give Mr. Mims any letter of instruction?

A. After I got home. I drove back home then, and addressed this letter myself to Mr. Patterson, accompanying it with a letter, a short note of introduction, to Mr. Lewis. I wrote the letter myself; I addressed this letter to Mr. Patterson. Mr. Mims reached my house at about 8:30, or a quarter to nine. I wanted him to take the 9 o'clock train. I handed him the letter, and told him to read it for his own intelligence, and to confer with Mr. Patterson here, and the other authorities to whom he might introduce him. On the next morning I fulfilled my engagement in Norfolk. There is now a point I omitted to state. I sent a telegram to the Chief of Police at Richmond, I think that night. I wrote it in the afternoon, but don't think I sent it until that night. I received the telegram in Norfolk, Va., at the Monticello Hotel, about night, from Thompson. I have the telegram that I received. Telegram reads: "Greensboro, N. C., March 21, 1901. Paul Garrett, Norfolk, Va., care Monticello Hotel. Gonez willing; come at once; will meet all trains. Frank Thompson."

Q. One other question, Mr. Garrett. What was the arrangement between you and Mr. Howard as to how much you should receive?

A. Twenty-five dollars a day and my expenses, and he handed me $10 on account.

Q. In response to the telegram, what did you do?

A. In response to the telegram, I came to Greensboro. Reached here next day at about noon. I do not know the exact hour by schedule time. I got off the train, looked out of the window before getting off, to see who was in sight. I saw Mr. Mims walking up and down the platform. I stepped off the train and walked in another direction so as not to meet him face to face. In about a moment Howard was there, and told me he had been waiting for all trains since morning; seemed to be very disappointed because I did not come earlier. I told him I came as early as possible, that I had to come by home to leave my wife, who was in Norfolk. We walked in the waiting-room, to look around and see if anybody was there to listen. I asked him what his programme was. He said he would drive right out and see Gonez; everything was all right, he thought. Gonez was sorter uneasy, but he reckoned maybe we could fix things. I said, "I have got to have some dinner." He said that was all right, where did I want to go. I told him I thought I would go to the McAdoo House, I had stopped there years ago. So we walked up the street together. Going up the street, I had occasion to slip my handkerchief out of my pocket, and a bit of paper flew out and blew up the street; he chased it very actively, and caught it and examined it very carefully. I said, "That is nothing but a bit of paper." He showed me that he was thoroughly on the alert. I went into the hotel and registered. I turned to him and said, "You will take dinner with me?" He said no, he had had dinner. I asked the clerk the dinner hour; he said 1 o'clock. It was then a few minutes after 12. I said we would sit down here for a little talk. We sat down on the right side of the desk and began discussing matters generally. Mr. Mims walked in and took his seat

right near opposite. Other people passed in. I paid no attention to Mr. Mims, nor he to me. And we had quite a conversation. I had him recount again the mine. He had me count his money, to see whether he had been cheated on the trip back here. I said to him, "I'm glad you have got some money. I am busted. I went to Norfolk and took along $75, expecting to pay my expenses and the recording of the deed. I will have to borrow some money to pay my hotel bill." He said he had plenty to get to Philadelphia, and if we got to Philadelphia and sold our bars we would have lots of money. We discussed many matters there. Among them, I asked him how far the Indian was, how far the camp was from town. He said about three miles out in the woods. I said I did not know there were any woods in Greensboro sufficiently close to hide an Indian. I said I would like to know where it is, for I have been down here a good many times, and I thought the country was all cleared up for two or three miles around here. He pointed his finger right out down the railroad, a little creek down there. I did not want to press the matter too far. I thought that might be some clue as to the direction we were going. He then said, he told me this at the shed, but he repeated it more fully this time; that when we bored the brick, we would get out plenty of borings, and when it was assayed and melted down we would have a nice little piece of gold to have my wife a ring made of. I said that certainly would be nice; she would appreciate it. About this time I told him that my wife was not sure where I was going, and he explained that we could go out to the woods and bore the brick and have them assayed; he said we would come back to town and get it done at a drug store. I didn't see how a drug store was going to assay it. But this is what he said, we would go to a drug store and get it assayed, and that if everything was all right with the Indian, we would go to Philadelphia that night, but if the

Indian broke up the arrangement, or anything of the sort, we would buy the Indian's share and let him go on back. And then he began questioning me about raising some money, whether I could get any money, and how much I could raise. I told him he had struck me at a mighty bad time. I told him I had just bought a large piece of property which cost in the neighborhood of $40,000. He wanted to know if I paid all cash. I told him no, that was the deed that I had recorded; I had to pay about $35 stamps, and $35 for recording. They charge $1 a thousand for recording. It took $70, I remember, to complete the deed. He wanted to know if I could not raise money on that land. I told him that if the necessity arose, I could raise a little money, I reckoned. The bricks had not been weighed at that time; he told me we would go out there, and if the Indian was cranky, we would just buy him out. I would have to raise the money, but that I would be recompensed when I got to Philadelphia. I told him that on a push I reckoned I could raise a little money. He wanted to know how. I told him it would require some time. I would have to go to the bank and get identification. He wanted to know what banks were. I told him it was too much of a subject to go into fully. He absolutely confessed ignorance of banks.. I then remarked that I had to write to my wife. I went into the writing-room and sat down at the desk, where I could keep him in view. At the McAdoo House, Mr. Mims walked in. I caught a chance when Mr. Thompson was not looking at me, and asked Mims to go down stairs. There was another man in the writing-room; didn't know who it was. I handed Mims a little slip of paper, some further instructions that I had jotted down on the train. I arranged for Mr. Patterson, the revenue officer, to come to dinner with me. I finished my letter, went and bought a stamp at the cigar stand, and asked the clerk, in a tone of voice that Thompson could hear, for re-assurance when the

next train went to Weldon, that I was anxious for my wife to get that letter. He said while I was at dinner he would get the horse and have a buggy ready when I finished dinner. The intimation was that we would make arrangements with the Indian; there was no assurance that he would back out; but there was a strong intimation that the Indian was very restless and was going to want to go back. There was a broad hint that we would have to pay him a one-third interest, but we might get out for less. I went up to dinner. I asked him if he would take dinner. He said no, he would go and get the horse and buggy, and have it ready. Mr. Patterson and I got to the table. I asked him to look around the room and see if he knew everybody there. He said he thought we were safe. We went over the plans then; I told him what had developed, and stated to him that I wished protection. I located practically the point, just picked up the question and made further developments. I think it is proper for me to say here that Mr. Patterson left me in doubt at that time, until just before we left he gave me assurance that he would go along. Mr. Patterson left the table before I did. I waited a little while. When I went down, Mr. Mims was in the corridor, and a buggy was standing at the door, held by Thompson (as I knew him then). He was standing on the ground. I passed by Mr. Mims, and he remarked that they had gotten the papers. I loitered around the lobby a few minutes, and then went out and got into the buggy. I said, "You have got no buggy robe." He said we didn't need any. I said, "March weather is very changeable; I would rather have a buggy robe, and if it will be no inconvenience I would like to have you drive up to the stable and get a buggy robe." We drove up to the stable and got tangled up in a lot of buggies, and it took some two or three minutes to get out. We drove out across the railroad. Went out southwest, I believe it is. We drove along pretty nicely. I complimented him

on the way he held his reins. He said he had been accustomed to driving a team of four horses, and he went again back to the question of banks, and asked me where I kept my money. I told him I didn't keep all my eggs in one basket. He said he didn't understand. I said, "Yes, you do." He said, "You mean you keep some in one bank and some in another?" I told him that was about the size of it. "Do you keep any money in Weldon?" I said, a little. "Do you keep some in Norfolk?" I said, perhaps so. I was noncommittal about the money. And again he referred to the fact that he didn't know how we would find the Indian, that when he left him that morning he seemed to be in a good humor. They were mighty suspicious, and we might find him all upset, and if so, we would just buy him out and let him go on back; he was a trouble, anyhow, and in Philadelphia he didn't know what on earth he would do with him in a city. I consented to what he said. We drove along at a nice, easy gait. At about two miles from town, he said we were approaching the place, and we would drive a little slow. I told him that it was agreeable to me, that I was not in any hurry. We drove up right behind a wagon; I think there was a man and little boy in the wagon; they were driving in a little dog-trot. We followed on for about half a mile, I think. He didn't want to pass them, they might see us. All right then, drive along behind them. Don't make any difference to me. Right at the top of the hill the wagon stopped, and the man got out to get a drink of water. He stopped his horse and said, "Now, I don't know what to do. If I drive on he'll see me." I said, "If you do not want to pass him, get out and get a drink of water." He got out and looked down the road, and said, "Somebody is watching us." "What makes you think that?" About that time a buggy drove by. I thought I recognized Mr. Patterson. I didn't know Mr. Jordan. I just got a glimpse of them. It was

Sheriff Jordan and Mr. Patterson. They drove right on ahead. Well, he watched those two men on horseback. He said, "I don't like it, it looks suspicious." I said, "I guess it is just two fellows that have been down to town and got a little boozy, or possibly there has something broken about the harness." He went and got a drink of water and pulled out his handkerchief and said, "I don't like the looks of those fellows, do you?" I said, "What's the matter?" "Nothing in the world, but a couple of fellows been down town and got drunk, or maybe something is broken. If you want to, we'll go back to town." He got in the buggy, drove about two steps, pulled his horse short, turned around and looked. He said, "I don't like that a bit." I said, "What's the matter? Man, you are looking mighty suspicious to me." He said they looked suspicious. I said, "Those fellows have not got any such notion. Just go right along." "All right," he said; and drove on three or four more steps and stopped. I said, "The next time you stop, I am going to take the horse and buggy and go back to town. If there is anything about this transaction that is not straightforward, I am out of it. If everything is all right, you may go along with the transaction. What if those two men do come upon us, why we will have them go on about their own business." He drove on to the foot of the hill. He drove very rapidly. I never looked back. We went over the top of the hill and down into the bottom. He said we would stop there. I noticed as we crossed the road another buggy track; I made no remark. We got out, and he began to tie the horse. I commenced unhitching my side of the horse. He said, "Don't unhitch." I said, "Yes, it is my rule always to unhitch with a strange horse." Said he didn't want to unhitch. "It is the safest plan to unhitch," I said. Said he didn't want to unhitch. So I hitched up again. After that we started off through the woods, he walking ahead. He was taking the lead. I

talked to him in as loud voice as I could, without seeming intentionally loud. Walking through the leaves made a good deal of noise. I suppose we walked 100 or 125 yards almost in a straight direction; he then began turning around. At last I said, "I believe you are lost out here in the woods." He said, "Oh! no, we are most there." He had doubled back in the meantime. We approached then a place that was a little marshy and woods and briars, and you could not see far through it; I was behind him about three steps, he held up his hand, and looking at me with rather a startled face, said, "Look! there is the Indian!" And in a loud voice he said (here the witness mimicked the peculiar language they used as best he could). There was a repetition of the noise in the bushes. The man in the bushes repeated practically the same thing. He looked around at me and said, "That's him." I said, "Yes," and commenced looking through the bushes. They kept up that conversation for I suppose ten minutes, with various inflections of the voice. I naturally got a little interested to see who the other man was, and I suppose I was a little too eager in peeping through the bushes. The Indian's voice I suppose got quite angry. He told me to stand up straight. I straightened back, put my hat on the back of my head, and squared up. I could see the black object in there. I saw something moving, and could see various maneuvers. He says, "He likes that better." I said, "All right." They conversed again for several minutes, and again the Indian's voice got even more antagonistic than before. He shook the bushes, and I could almost imagine I saw a tomahawk waving around in there. I said, "What's the matter with him?" He said, "He's not satisfied. You know Indians are mighty suspicious." I said, "Well, what will satisfy him?" I said, "You tell him I'm Andrew Garrett's brother." He said, "That's a good idea." So he had another conversation with him, and the Indian's voice got very sooth-

ing and complacent. It dropped its tone several degrees. He said, "That fixes things all right. I will go and get the bricks. I will go and get the bar." I said, "You had better let me go with you." "No," he said, "you stand right still. The Indian don't like white men anyhow." So he approached the Indian, and they kept up this conversation between them pretty steadily, and he went to pick up the bricks, and the Indian again remonstrating quite distinctly, he sounded like a remonstrant, and he set them down and explained it to him, laid it off with his hands, etc., and the Indian gave his consent apparently, and he started off with it. He got about half way, and the Indian again raised a remonstrance and he sat down on the ground and explained to the Indian. I said, "You had better let me help you." I had a little curiosity to get a little closer view of the Indian. He said, "You stand right still." I said, "All right," so he brought them forward; in one hand he had a brace, and in the other he had a pair of spring balances. And when he came up to where I was, he said, "Now, we'll weigh them." I said, "All right." They were in some oil-cloth wrappers, with a heavy strap around them.

(Here counsel for defendant objected to the State offering in evidence the package or the substance claimed to be in the package; or substance shown or exhibited to the witness on the occasion when he accompanied and was with the two defendants Thompson and Daley in the woods near Greensboro, upon the ground of identification of the object or substance now offered as being the same, and for the further reason that the object as described by the testimony of witness was one securely done up and bound by a shawl strap, and the object now before the witness is not so done up, and is not bound by a shawl strap, and further because the package and contents are not relevant or competent.)

Before ruling upon the objection, the witness was allowed

by the Court to further describe and identify the package; when he said that it was black, was wrapped and tied with a leather shawl strap, and that he saw it unwrapped at the time; that it is the same package, and—

Fourth Exception. The objection was then overruled by the Court, to which defendants then and there excepted.

The two packages and contents were then offered in evidence, to which proffer the defendants, by their counsel, objected, because neither the packages nor contents was of the *res gestae,* was no part of the representation and was not a token of a public character, or of such as was calculated to, intended for, or capable of deceiving, and because irrelevant and immaterial.

Fifth Exception. Which objection was overruled by the Court, and defendants, by their counsel, then and there excepted.

The witness Garrett then said the package was unwrapped after weighing by spring balances. He came up with a brace in one hand and a spring balance in the other, and as he reached down to get the brick, he said, "Now we weigh him." I said, "All right." So he took the balances, and his first effort was to lift it up in front, but it was more than his grip permitted; so he stood almost astride of it, and he could not carry it from the ground much. So I had to get right down on the ground to see the figures, and I took my pencil and followed the dots, and said, "95, 96 pounds." He said, "Let's try him again," and with that he pulled it almost up again, and I counted, "93, 94, 95, 96 pounds." Then he said, "We will weigh the other one." And then he got in the correct position, and we weighed the other one, which weighed, as I remember, 95 pounds. While I was figuring, he was down on the ground unwrapping the package, took off the oil cloth, then the flannel. The packages before me are the identical ones which he showed me on this

occasion. I notice the same mark now upon one that I noticed then. After weighing both of them, he then unwrapped one, and he looked at it, and I went right down on the ground and said, "Is that thing gold?" I looked up at him, and he said, "Pure gold, 22 karat fine." I said, "My God, it's a pretty thing as I ever saw in my life." He said, "Ain't it pretty?" And just in that attitude, as he sat there, he was putting his bit into the brick, and said, "Now we bore him." I reached out my hand, and I heard a voice in the woods some little distance say, "Throw up your hands." The miner Thompson heard something apparently, and with the brace in his left hand—whether he dropped the brace or not I do not know, but with his right hand he went into his coat pocket; I sprang at him and said, "What's the matter?" He asked me, "Did you hear something?" I said, "No, not a thing," and he said, "I thought I did." I said, "I heard nothing." I said, "Give me the brace now, and let's bore this and get out of here; there may be somebody prowling around here," and so he took his hand out of his pocket. I got astride of the brick again, the one on the ground. I did not have the brace and bit in my hand, but just at this point I held my hand out for the brace; then a voice very much more distinct and penetrating says, "If you don't drop that, I will put a ball through you." That was a voice back in the woods. The Indian in the meantime was keeping up quite a chatter. I didn't pay any attention to the Indian. As soon as he heard that remark, he again sprang up and went into his pocket again. As soon as he did, I sprang at him and caught his coat, and held it down so he could not spring his hand out. I said, "My God Almighty, there's one behind every tree in these woods! Man, you have played a mean trick on me! You have fooled me away from home up here, where we are surrounded by officers." He said, "I didn't do it." About that time a man ran up and came around behind me, and laid his hand upon the man and began feeling his pockets,

and all up to his face; seeming to be satisfied with his search, quick as thought, he turned around to me and said, "What's your name?" I said, "My name is Garrett." "What are you doing up here, anyhow?" He said, "That makes no difference; I am an officer, and I command you to take charge of this man?" "Me take charge of him?" "Yes." "Suppose he tries to run away from me?" He says, "If he moves a finger, shoot him." That was Mr. Patterson.

Sixth Exception. (Counsel for defendants object to any further evidence of the acts or declarations or conduct of the defendants being detailed by witness, after the approach of Officer Patterson, who then and there put the defendant Thompson under arrest. Objection overruled. Exception.)

At this point I realized that the officer had not disarmed the man, and that he evidently was armed, so I felt that it was prudent to let him see that I was protected, so I brought my rifle into evidence. I held him there, and in a few moments another officer approached. Another man came up and began to search him, getting everything out of his pockets. Finally he took out a pistol from his breast pocket where his hand had been. As he disarmed him, I released my hold, the officer had him under his gun; another one had a handcuff on him.

Seventh Exception. Here defendants, through their counsel, moved to strike out the evidence just detailed by the witness, because it relates to facts and circumstances occurring subsequent to the termination of the alleged conspiracy, and is not of the *res gestae,* which motion was denied by the Court, and defendants then and there duly excepted.

At this time I do not know if the Indian had been arrested. I saw an object; I could not identify the object. I saw it moving around. I recognized a lot of black hair.

The hair which was produced and shown to the witness, was long and black, and affixed to a false face resempling that of an

Indian, which the witness identified as being that worn by the defendant Daley at the time of his arrest.

Mr. Patterson took off the headgear, and also a beaded buckskin jacket from Mr. Daley.

Eighth Exception. Here counsel for defendants moved to strike out all the evidence given by witness with respect to the explanation and identity of the Indian garb, alleged to have been worn by the defendant Daley, and taken off of him at the time of his arrest, as detailed by witness. Motion denied. Defendants except.

I saw Mr. Daniels make a move to take something from the miner. Mr. Daniels took a card, I think from under the miner's foot. Some words passed then.

Ninth Exception. Defendants' counsel here moves to strike out the evidence with respect to the card, as detailed by witness. Motion denied. Defendants except.

The card read Henry D. Hawley, Hotel Guilford; that is one of the defendants. The two defendants Thompson and Daley were then arrested and brought to town.

"My purpose and intention after the interview with Thompson, in which my suspicion was aroused, was to come to Greensboro, and, if the proposition which he was making me was a legitimate one and truthful, to trade with him; but if it developed that the whole scheme was a fraud, and their purpose was to cheat and defraud me, I proposed to turn them over to the legal authorities, and have them punished."

CROSS-EXAMINATION OF PAUL GARRETT.

Being cross-examined by Mr. Gilmore, the witness said: That he is 38 years old, six feet tall, weighs 205 pounds, of common school education; been engaged in the manufacture of wine since he was fourteen, and since 1890 has been at the head of the concern; that the annual business ranges from $100,000 to $150,000; that he employs about forty people; that the moment he first met defendant Thomp-

son, he was dictating to his stenographer, and that by invitation Thompson waited until he was through.

It puzzled me to know how he got into my office. I spoke to him about five minutes, and asked him what his business was, and he said he wished to see me privately. I don't recall what I said to him, but he insisted on seeing me privately. Do not remember his words nor mine to him, but we went through the shipping room and on to the outside of the building, a distance from my office of 60 to 75 feet.

Up to this time he had said nothing as to what his mission was. The first thing he then asked me, if I had a brother Andrew Garrett, and I told him no. He said he was sorry, that he was looking for Andrew Garrett's brother. As we talked I looked straight at him. I told him I had no brother; never had but one, and he died in infancy. He said that Andrew and he had been partners in Arizona, and that about four years ago Andrew had come back to his rich aunt, living in Charlottesville; that she had written him a letter, and he had come back to look after her property; and before he had left he and Andrew made a bargain that if either one of them ever run upon anything (I can not give his exact expression, I will do my best at it) that they would let the other know. That he had come to look for Andrew, but found that Andrew was dead, and his aunt had gone away; and at Charlottesville he was told that there was a man at Weldon named P. Garrett; that he knew Andrew had a brother named Peter, and he thought it was him, and he had come to look and see if it was so, and he was might sorry that I was not Andrew's brother. I told him no, that my name was not Peter, that it was Paul, and as I could not serve him, I was busy. He said, "Looked like nobody didn't want to talk to him anyhow; he warn't after no money; had plenty of money;" and with that he exhibited his roll of money. A little purse with a lot of money. It was a leather purse with

a number of large bills, some in denominations of $100, and there seemed to be several of them. He made the impression on me that he was not after money. He said he was not after money. He then took up the question of being a poor ignorant man; that he could not write nor read nor figure. He then said he was looking for Andrew's brother to take Andrew's place—to take Andrew's interest; that he and Andrew had bargained that if he was ever rich he would take him in. He wanted Andrew's brother to look after the business of the enterprise because he (Thompson) was ignorant. I told him I did not see what connection I had with it; that I was not Andrew's brother. Up to this time I had not become interested in the matter. He represented that he was mighty sorry; he didn't know what he would do; that he could not find Andrew's brother nor Andrew. I told him I didn't know what he would do either. He then said that he had met a man on the train who told him I was a good man at figures and honest. I told him I tried to be.

From what he said, I gained the impression that I might take Andrew's brother's place, and I told him that if it came to a question of business consideration, I was open to any business proposition he might see fit to make. He stated that they wanted some good man; that the job was going to somebody, and that if I didn't take it, somebody else would. He said he needed a man that could read, write and figure, and was honest.

Up to this time he had no opportunity to know that I was such a person; he said he wanted such a party. I asked him what there was in it, and that he might ascertain regarding my competency and honesty from my partners and the business men of the community. He then repeated substantially what he had said about Andrew's brother, and that he had found this man before in Arizona, and that he was on his way east for the specific purpose of purchasing min-

ing machinery and taking out a patent on his mine; that he needed somebody to go with him to Philadelphia, and he thought that I would answer; he explained that they had previously worked the mine with Indians—six squaws, no machinery, that it was machinery he wanted to arrange for; that he had found the mine about two years ago; that the equipment he had operating in the mine was not sufficient, that he wanted to get machinery; that he had none; he then practically enumerated all the machinery he wanted; spoke entirely familiar of it; for that kind of stuff; I told him I would have to rely upon him as to the place where and the equipment to be bought; he then made me a proposition as to my services in connection with the enterprise; he offered me one-third (1-3) interest in everything he had, mentioned the two bars of gold. I told him that there was nothing material in that, and that ordinarily I got something for my services, and that I should expect my expenses paid and a remuneration of $25 per day. We came to the agreement that I should have my expenses and $25 per day; that was our contract, with the one-third (1-3) interest. I was only to give my services as consideration; the $25 per day was to cover the time that I was absent from my business, going to Philadelphia and Washington, or to Arizona, and the one-third (1-3) interest on the confirmation of the Indian; so far as Thompson was concerned, we made the agreement. The $25 per day and expenses was to apply only to the time that I was neglecting my own business for the other, absence from home caused by the work pertaining to the gold mine and the purchase of machinery. The business management was all I was to give for the $25 per day, and the one-third interest; I don't consider I was receiving a double compensation; it was the compensation he and I agreed to. He then paid me ten ($10) dollars on account of expenses in good money; I suspicioned it as bad money at the time he gave it to me, but

took it right down to Mr. Smith, cashier of the bank of Weldon, and he said it was good money.

Thompson first called on me about 9 o'clock a. m.; was there about two hours, when he left, walking back to the station. As he departed to return to the depot, I called the attention of Mr. Cole, my bookkeeper, and another employee in the office, to look out of the window, saying, "There goes a gold-brick man." We all three observed him a couple of minutes, all took a good look at him. I suspected as soon as he mentioned the Indian and the gold brick hidden up there in the woods that he was a gold-brick man; that was before he paid me the ten ($10) dollars. I had suspected that this transaction was fraudulent before he paid me the ten ($10) dollars. I have never returned it. I did not return it after I knew it was good money and suspected the transaction was fraudulent, because I expected to go to Greensboro. I retained it to defray expenses to watch developments in the gold mine scheme. It was mighty pretty, and I thought possibly there might be something in it. I may have been something of a phantom chaser in this transcation. I went down to the depot to the 11:30, when I showed Mr. Smith the ten ($10) dollar bill, and later met Mr. Thompson at the depot shed in Weldon, where he was waiting to take the train, and after suspecting his story I had a conversation with him, we went over the ground practically again and discussed quite a number of things; we made arrangements regarding the machinery and figured it out, I professing still to be his partner, meaning to carry out my part if figures had truly represented facts. I proceeded further to honestly carry out my part of the contract by making arrangements to come to Greensboro; by arranging my business so I could be absent from home a good while; left instructions with my assistant as to what should be done during my absence if I should be gone over two or three days, and

made those preparations which I ordinarily make when being called from home on business; and made such arrangements in an honest endeavor to carry out my part of the contract. Had a conversation with Mr. Smith regarding it; introduced Mr. Smith to Mr. Thompson at the shed. While talking with Thompson, I went into a saloon for a pencil to figure up the machinery, returned and waited with him until he left on the train. There was possibly an exhibit between him and me of the telegrams I had written; possibly I asked him to show me which one meant for me to come, and which one not. My memory is faulty at times. I talked with him twenty or thirty minutes at the shed; saw him take the train, and after he had, I hung around the shed for a while and went home, and proceeded to attend to my business affairs until the arrival of Mr. Lewis, whom I had telephoned, after Thompson left my office and before I went to the depot. I said to him over the 'phone that I had a matter of importance to consider with him. He arrived about 3:30 p. m. I explained the matter to him. That afternoon I wrote a telegram to the Chief of Police at Richmond, Va., that I had a gold-brick gang spotted, and wanted him to send me a detective to the Monticello Hotel, Norfolk, Va. This is in the afternoon of the 20th day of March, 1901, that I have reference to. The same day I first saw Thompson. Up to this day I had not seen or heard of any of the other defendants in this case, except the Indian. Mr. Thompson told me in the first instance that he had an Indian associate; that together they were interested in this transaction.

I went to Norfolk the morning of the 21st, leaving about 4 o'clock in the morning; bought a piece of property approximately of the value of $40,000; I paid $1,000 cash, and up to that time $1,250 note, and made other notes of $1,250, each payable monthly; don't remember the exact amount of unpaid purchase-money; but think it cost in the aggregate

about $70 for revenue stamps on the deed and mortgage. When I left home, I took $75 with me. I left Norfolk for Greensboro by way of Weldon, traveling on mileage, and, including the sleeper and hotel bill I had to pay at Raleigh, I think it would have exceeded ten ($10) dollars. I drove out to the house of Mr. Mims on the evening of March 20, 1901, and asked him to come to my office, which he did, and I wrote a letter on the typewriter, single spaced, over two pages long, addressed to Mr. Patterson; starting with an introduction of Mr. Mims, accompanied by a letter of introduction from Mr. Lewis, and requesting Mr. Patterson's assistance in the apprehension of certain men, whom I had reason to believe were criminals, saying I that day had a call from a man, describing him and giving his name, and repeating nearly as one can in a typewritten letter some of the characteristic remarks that he had made, and as nearly as possible in the language he gave, describing him so that he could know him. I then outlined to him the leading impression that the man had left on my mind by his conversation, including the impression of the many possibilities that there might be something in it, but that the preponderance of the evidence made me believe he was a man whom it was my duty as a citizen to apprehend and bring to the bar of justice, and I asked his assistance in doing this. The greater part of the letter was devoted to a description of the conversation between us, and the programme and plan outlined by miner Thompson; in order that Mr. Patterson's judgment might be used with some discretion. I told Mr. Patterson that the letter, as written, would no doubt sound pretty fishy; that I placed myself entirely in his hands for him to protect me, if the following out of these plans developed into danger, and that in the event of any emergency or necessity for action, that I hoped he would not stand for a moment, but shoot straight to the mark, and be sure to hit the right

man. I mentioned my suspicion that possibly there was some reward for the Withers gang, and that in such event I proposed to deal liberally and not be hoggish about the matter. But I impressed on him that the prime consideration was not reward, but was to carry out what I thought to be my duty as a citizen, and to bring these men to justice if it should develop that they were crooked. I meant to be liberal, and I would not claim all the reward, meaning to divide such reward as might be obtained with Patterson and others; that I could not give to myself all the credit of any remuneration that might come. I think I said that the reward in the Withers case was very large, my impression at that time was, it was for $20,000. I did not mention any sum in my letter.

I signed, folded and gave the letter to Mr. Mims, with $20 or $25 for expenses. I directed that he read the letter for his own guidance, and deliver it to Mr. Patterson, and to be governed by his advice. My conversation with Mr. Mims before his departure was about five minutes. I heard from Mr. Mims by telegraph at Norfolk the next day, which telegram read: "Men are located; arrangements complete." Arrangements had reference to my protection. I thought I was up against a pretty hard proposition; I didn't want to be carried out into the woods and to be butchered; I went up against the proposition with suspicion that it was crooked before I accepted the ten-dollar bill. I thought when I called my stenographer's and clerk's attention to look out of the window some 70 feet away and observe a gold-brick man, that he was a fraud; and thought it pretty strong, and was under that impression when I took the ten-dollar bill down to the bank and had it examined, and had the same impression when I sent the telegram to the police of Virginia, the next day. The protection I thought Mr. Mims would arrange for me at Greensboro, was firearms. Upon my arrival at Greens-

boro, I met Mr. Mims and Mr. Patterson before starting with Thompson to the woods where the supposed Indian was. Patterson told me he had communicated with the Sheriff, but no papers had been issued. It seems that the magistrate thought it was too thin a tale. Patterson told me this. Mr. Patterson told me that he had turned my letter to him over to the Sheriff, and that there had been considerable consultation over it, and that the Sheriff had taken the advice of attorneys, and that the matter had at that time been submitted to the Justice. I talked with Mr. Patterson pretty plainly for about thirty minutes before leaving for the woods with Thompson.

Upon my arrival at Greensboro, Mr. Thompson met me at the depot, and he walked with me up to the McAdoo House; sat down with me in the corridor; had quite a long talk, going over the ordinary discussion. He wanted to know where I had been and what I had done; I asked him which way we were going, how long it was going to take to get there, which direction it was from there, if there was woods around here sufficiently thick for an Indian to camp; and he told me that we would get enough borings from that brick, after it was melted down, to make a nice ring for my wife, and one thing and another; he said that at the time, and he said the same thing at Weldon; said I could use the borings for that purpose; he was going to give them to me. We talked of the expense of the trip to Philadelphia and Washington, and as to whether he had money enough to defray the expense. He handed me his money to count, and asked if that was sufficient to take the trip contemplated to Philadelphia and Washington; I told him it was.

It was my intention during that conversation to take the train and go to Philadelphia; but that was not altogether my reason for wanting to know if he had sufficient money to defray the expense; I told him at the time he would have to

loan me something to pay my hotel bill before we could leave; I asked him for no specified sum; he did not refuse to let me have any part or all of it. I had some accrued compensation up to that time. I didn't talk with him as to an advance on account of compensation for time already devoted to the scheme; I didn't make the effort, because I did not want to pull his leg too hard at once; thought it would create suspicion; had not at all changed my mind. Have not made any demands on him for money at all. I entered a suit here, don't remember the amount; I think I swore to an affidavit in the suit brought against these defendants, but can not recollect positively; that is my best memory in that instance. Referring back to the instance of bringing suit, I can not recollect the amount I sued for; might get it by reference to the papers, but not to my mind; I think it was a "claim-and-delivery" suit for breach of contract. I was trying to recover a certain amount of money that they had in their possession. The defendants had a contract that I was trying to recover; I had not made any demands on them for the performance of the contract. My memory refreshed by my signature to the affidavit before John J. Nelson, Clerk of the Superior Court, on the 23d day of March, 1901, that I there swore that J. L. Howard *alias* Frank Thompson, A. L. Daley *alias* Gonez Bono, and H. D. Hawley were indebted to me in the sum of $2,000. I put that as a light estimate on the mine, one-third interest in which I was suing them for—one-third interest in this gold-mining property. I attached everything in sight that belonged to them; the suit is still pending. I claim they are indebted to me. I rest upon the paper—$2,000. Thompson represented to me that there were two gold bars at Greensboro, worth $36,000; two others in Arizona, worth about $48,000, and a gold mine in Arizona worth millions. I thought my claim was very reasonable. I had a third interest. I had never met or talked with defendant Hawley before I brought the civil suit; I involved

him because they all seemed to be in the gang. I involved Daley because I had a telegram with his assent to the contract. It was the telegram Thompson sent me, "Gonez willing." He was to confer with him, and wire me if he was willing. That telegram said nothing about Mr. Hawley. I involved Mr. Hawley in that suit because I was playing for all in sight. That civil suit is still pending, as I understand, and I understand that property of the defendants was seized under the process in that suit; but I do not know what the property seized is, and don't know as a matter of evidence what property was seized under that process. I got possession of the newspaper clipping I have read from and offered in evidence from Mr. Brooks or Mr. King, or some of them. After the attachment, I retained Messrs. King and Kimball to bring the civil suit for $2,000, and advised with them about it. Immediately after coming from the woods, I drove to their office and retained them to appear in this case. They are the first lawyers that I saw in connection with this matter. I did not know when I first went to their office who the State Solicitor was. I did not find out who the State Solicitor was until after supper, when I was introduced to Mr. Brooks as Solicitor. This civil suit was entered at 2 o'clock in the night. I do not know who went on the attachment bond in the civil suit. I have no recollection. My recollection is that Mr. Mims went on the bond; don't remember requesting anyone else. The papers were ordered in Messrs. King & Kimball's office after 12 o'clock at night. I heard the examination of the defendants before magistrate, which concluded about midnight. I went to the woods the same day I arrived at Greensboro, and went to the office of Messrs. King & Kimball on the same day and sued out the attachment for $2,000 on the night of the same day; I was willing to get $2,000 if I could. When I arrived at the woods Thompson brought out two packages, both done up in

flannel oil cloth, and bound with a shawl strap, and we went through the process of weighing them; remember weighing each one of them, down on my all-fours with pencil and paper in my hand to set down the weight. I stood up between their weighing sufficiently long for him to change the scales from one package to the other. It is not true that while weighing the second we heard a cry, "Hold up your hands, or I will shoot." Mr. Patterson came up toward Thompson and I stood, caught Thompson by the arm and said, "You are under arrest"; I then said to Thompson, "This is a mean trick you have played on me to get me here away from home in a strange land, and get me arrested." Patterson then turned to me and said, "What's your name?" I said, "My name is Garrett." "What are you doing out here? You got nothing to do with this." I was scheming, I was matching my wit against his. He says, "That makes no difference, I am an officer, and I command you to take charge of him." At this time Thompson had put his hand in his pocket, as if to draw a weapon; he had not drawn it. This was after the cry of someone, "Hold up your hands, or I will shoot you." I pulled a gun I had in my right outside coat pocket. But I had that gun out before Mr. Patterson came there, a few minutes, I suppose, when I was holding out my hand for the last boring. I am right-handed; don't think I could have missed him that close. I tried to keep up with Thompson's lies. The only difference was, he lied straight to taw, I tried to serve my purpose better. Don't think I had to lie to him. I took the gun in my right hand out of my pocket, and held it a little back of me, and the officer said, if you don't drop that gun I will put a hole through you. Thompson said, "Officers!" I grabbed him, and said, "For God's sake, don't pull a gun, they will shoot us to death." It was a Colt's revolver, nickel-plated. When I made this remark to Thompson, the gun was in my hand behind me. I brought it into

evidence. Patterson had not robbed him of his gun; I thought there was one there, but I had not seen it up to this time. I saw Deputy Sheriff Weatherly take a gun from Thompson's right inner pocket of the lapel of his coat. I had my gun in my hand at that time; had had it there for awhile. I do not remember that I was frightened as we approached the woods; I remember a wagon passing us on the way, and stopped for a drink. Thompson acted afraid, and I insisted that there was nothing to be afraid of, that I was going on. I invited him more than once to proceed on. At the time Patterson came up, he had the brace in his left hand; his right hand in the right lapel of his coat. I was mistaken when I heretofore said that his right hand was under the left lapel of his coat. I don't think that Mr. Weatherly took a gun from his right-hand pants pocket. It was taken on Mr. Weatherly's search; Mr. Patterson made a brief search around his hips, but did not get as high as his coat pockets.

I wrote the Attorney-General of Virginia to know the reward offered for the Withers gang. This was after I returned home from Greensboro. If there had been a reward, I would not have hesitated to accept it. It was my purpose to divide the reward with those that assisted me. I felt that it was too delicate a matter to approach gentlemen with, to offer them a fee for services of that nature.

At the time of Thompson's arrest in the woods he asked me a number of questions, but I only replied to the last one, knowing that he would have an opportunity to ask the same in the court-house. It is not my recollection that he there said to me that he had not asked me for any money, or that I replied to him, "No, he had not, but that I had ten dollars of his money and would get more," that such in substance was not said at that time. Mr. Thompson said at the McAdoo House that he would pay all expenses.

Q. Don't you know at that time you told him you had no money with you?

A. I told him I would have to borrow some money.

Q. Didn't you say to him that you would have to borrow some from him?

A. I think I did.

Q. And that was before you started to the woods?

A. Yes.

Q. Were you telling the truth?

A. I think I had a little. I didn't want to be taken up. I explained to him at the McAdoo House, when I counted some $340 of his money, that I had become indebted at Norfolk, Va, and the character of the indebtedness. I have retained Messrs. King & Kimball to assist in this prosecution; so retained them the evening of the arrest. Before I knew that the Solicitor was in town.

Q. Do you regard yourself responsible for this prosecution?

A. Not at all. I explained to Mr. King that I was in the hands of this people; that I had carried this thing as far as I could.

Q. Have you said to anyone what you would do with the money realized in this civil suit for $2,000?

A. I think that is the only time I have made any direct statement. I proposed to get some little souvenirs for my friends who had assisted me.

Q. Isn't it a fact that at the time you pulled your gun down and levelled it on the defendant Thompson in this case, that you had no positive information from any source that Mr. Thompson had told you an untruth?

A. I had reasonable ground to believe that it was an untruth. I had no positive knowledge, but thought it was a fake.

Q. Relying on that same judgment of yours, didn't it dictate to you the same thing when Howard was talking to you about this matter in your office?

A. Not so thoroughly.

Q. As he departed from your office, and at the time that you called the attention of your stenographer and clerk to the appearance of Thompson, did that same judgment of yours convince you that this was a fraud as at a later time?

A. Pretty much so.

Q. And the same day you took that $10 bill to the bank?

A. Yes.

Q. And the same day you telegraphed to the Chief of Police at Richmond, Va.?

A. Yes. The preponderance of the evidence was in favor of the fraud.

RE-DIRECT EXAMINATION OF PAUL GARRETT.

On re-direct examination, witness identified two satchels found in the woods at the time of the arrest, and the same were offered in evidence.

DIRECT EXAMINATION OF J. F. JORDAN.

The State, to further prove its case, produced and had sworn J. F. Jordan, who testified in substance as follows:

My name is J. F. Jordan; am Sheriff of Guilford County; remember the occasion of the arrest of Howard, Daley and Hawley. My first information of the matter was on the 22d day of March, about 12 o'clock, when Mr. A. C. Patterson came into my office and gave me a letter, which I read. I went to the telegraph office and saw Thompson about 1:15 p. m., on Thursday, the day preceding the arrest; he was sending a telegram when I went into the office. He had on a flannel shirt, which looked as though worn for some time, and a kind of brown suit, and rather full beard, rather ragged;

and a crushed hat, light colored. I heard the operator read the telegram over to him, which was addressed Paul Garrett, Monticello Hotel, Norfolk, Va., and read, "Gonez willing; come to-morrow." It bore a cross-mark on it in blue pencil. Thompson then came out of the telegraph office and went into the hotel Guilford; left there ten minutes later. I next saw defendant Hawley at the hotel Guilford with Thompson; he went out at the same time. They had at that time a little conversation, and then separated, Thompson going down street and Hawley going back to the hotel. I came back to my office and remained a little while, and then I went home to dinner and came back and spent most of the afternoon driving up and down the main street here, stopping now and then and loitering about. I permitted Mr. Weatherly and Mr. Mims to aid me in tracking these men. After Thompson and Gonez left the hotel, I saw him and Gonez conferring together that afternoon once or twice before night upon the street near the McAdoo House, the first time on the opposite side of the street. I saw no further conference between the defendants until the next morning. The next morning I saw Thompson, Hawley and Gonez in conversation three or four times before the arrival of the train from Raleigh, at 11:55. Their conversations were always more or less secret and suppressed; they seemed very anxious in their movements in anything they had to say to each other for about an hour before the arrival of the train referred to at 11:55, they were from the McAdoo House to the depot, and most of the time they were about the platform at the depot. This was the train Mr. Garrett came on; they were there when the train arrived. For a few minutes before the train came, Thompson was standing before the entrance for white people at the main depot, with his back right up to the wall; Hawley and Gonez were further down to near where the street crosses the railroad; they were near that point. There was

a large crowd down there, and they were moving about in the crowd. Hawley and Gonez Bono were together; that was the position when the train came in. I did not know Garrett, and I was watching who Thompson would go to see when the train came in. He walked up and met Garrett about one-third of the way from where the train was standing. Thompson and Garrett walked into the waiting-room and had, I suppose, five or ten minutes' conversation. They then got up and came out of the waiting-room, turned around the corner by Scott's store, and started up the street; next came round on the other side of the depot and kept on the opposite side of the street from the one that Thompson and Garrett were going up, and they went about 30 or 40 yards behind Thompson and Garrett to the McAdoo House. Garrett and Thompson went into the McAdoo House and took a seat on a bench in the lobby, just outside the desk. Gonez walked beyond the depot to where Washington Street crosses South Elm at Scott's store, and took a stand there round the corner of the building, and was watching the McAdoo House. Hawley got into a stairway leading up into one of those buildings right opposite the McAdoo House, occasionally coming out to where he could see and then retreating. I walked into the McAdoo House and saw Garrett and Thompson in conversation, sitting there on the bench. I sat down a little while, and then got up and went into Holton's drug store, and watched the movements of Hawley and Garrett; one was standing there watching from the corner, the other was in the stairway. When Garrett went up to dinner, I went to dinner; returning at 2 o'clock, I drove in my buggy down and stopped a little north of J. W. Scott & Co.'s store, walked on down to Holton's drug store and went in. I saw Thompson drive up to the McAdoo House in a buggy and stop, and I saw Garrett come out and then get in the buggy. I am pretty positive that Hawley went across the street and said something to Thompson at that time; Thompson with his

buggy was on the street. After they went off, I went to my buggy as quickly as I could. I did not know exactly where they were going, but I had a fairly good idea, knowing the country as I do, from the way they started. I drove down to Ogburn's livery stable, where Patterson was to meet me, in case they should start out in the woods anywhere, and as I drove into Davie street, Gonez came up driving very rapidly the old horse that I knew very well belonged to Mr. Vanstory's livery stable. He drove on very rapidly until he got to the depot, and some freight trains crossing the street detained him a few minutes, and made him very restless and nervous. Finally, he got across, and I saw him going pretty rapidly up Ashboro street. In the meantime, Patterson came up. I told him what I had seen. We got into the buggy and started off, and I think the first sight we got of them was just before we got to the late Judge Settle's residence. We saw Thompson and Garrett in the buggy, and Weatherly and Mims riding on horseback some two or three hundred yards behind them. We went on in that position until we got about two miles from town, and at ..... place, just about 2 or 2½ miles from town, Thompson stopped his horse, got out and went up to the well and got a drink of water, and when he stopped his buggy and got out, Weatherly and Mims stopped their horses. I then whipped up my horse and drove up rapidly, without stopping as I passed them, said "For God's sake, men, turn and go back and don't stop here." They turned round and went on, and then I drove on as fast as my old horse could go, right by Garrett and Thompson at the well, and some three hundred yards, I suppose, across the creek. When I got across Buffalo Creek and looked back, nobody was in sight. I stopped my horse and remained there some three or four minutes, and looked back and saw Thompson and Garrett turn off and leave the main road, and drive rapidly through a body of pines, lead-

ing round down Buffalo Creek; drove my horse over the road, went back across the creek and Weatherly and Mims were then in sight. I beckoned them to come on. They rode up pretty rapidly to me. Weatherly and Mims turned off the road, then following the tracks of the buggy that Howard and Garrett were in. I took Patterson with me and went right down the bank of Buffalo Creek, and when we got about 200 or 300 yards down the creek, I saw the buggy that I saw Gonez leave town in, hitched to a tree. Immediately beyond that was a pretty dense thicket; bamboo vines, grape vines, blackberry briars, and all such stuff. Patterson and I had not advanced more than 20 steps beyond where that buggy was hitched before we heard conversation going on in a very exciting manner. We remained there a little while and listened to it, as long as I felt safe to do so. There was only one doing that kind of talking, but the other was in conversation a little beyond, some 20 or 25 steps, I reckon. Patterson went down the path and turned into the thicket, and I turned into the thicket and went immediately to where I heard the conversation. We did not make any noise as long as we were in the path. The leaves were very dry, and, in fact, my hat fell off, and I made some little noise, and when I got in some 25 paces of where Gonez was located, he rose right up and started toward me, using this peculiar language, and I covered him with my pistol, and said, "Throw up your hands, or I will shoot you, and I have the authority." First, he did not throw up his hands. The second time I commanded and said, "Throw up your hands, or I will put a ball through you." When I said that he went down on his knees. I advanced rapidly, where I could see him well, keeping him covered with my pistol. "Now, if you move a hand or muscle, I will kill you," I said; "Close in, men." I did not know how many were around. I had my deputies surrounded, and I wanted to get all I

could. About that time I heard Patterson get up to Thompson and Garrett, and I could not from the distance I was at, and in the excitement and confusion, I could not tell exactly what they were saying, though I could hear them and see them. After I had hollered at the deputies to close in, and after I saw Weatherly and Mims get up to Garrett and Thompson, then I did not suppose anyone else was in there, as they had come in without stopping anybody. I hollered to Patterson to come to me; the excitement had kinder worn off then, and I saw Patterson was getting very near the Indian, and I let him go on until he got in ten feet of the Indian, and then I said, "There he sits right by you."

Tenth Exception. Counsel for defendants here objected to any further evidence as to what occurred after last statement of witness; because it appears by the witness' own statement that the alleged conspiracy was put at an end by the arrest of one or more of the defendants. Objection overruled. Defendants, by their counsel, then and there except.

I had just gotten up to the Indian. Patterson walked up to him and jerked his mask off. I found it on defendant Daley. He took off his mask, his beaded coat and red bandanna handkerchief. He looked like an Indian when he had his garb on. He was a very good representative.

(Two cases are here shown witness.)

I saw these cases when I went up to the Indian, before I put my hands on him; they were only a few feet from him.

Eleventh Exception. Here counsel for defendants moved to strike out evidence as to showing the cases because an act or fact not of the *res gestae,* immaterial and irrelevant. Motion denied, to which ruling of the Court defendants, by their counsel, then and there excepted.

The first sight that he got of the Indian was when he heard him coming; he rose up out of the brush. I don't know where he got his pistol from; he had it waving to me

when I first saw him. When the mask was jerked from him, he did not say anything. I then picked up the cases and this mask, I think both of these cases, and Patterson led the Indian up to where Garrett and Thompson were. I saw one of the gold bricks uncovered about like this now. I recognize it by the mark that was made on it at the time. It was 6 or 7 feet from Thompson and Garrett. I saw the brace and bit that was exhibited here this morning. I could not say that I saw the scales. I saw the episode between Garrett and Thompson about the card that Daniels got from under his foot; it was not under his foot, but it seemed that he was trying to stick it up his trouser's leg.

(The card is produced and identified by witness, and offered in evidence.)

Twelfth Exception. Defendants here objected to the witness stating anything in reference to the card taken from under the foot of defendant Thompson, or any declaration made by Thompson as to the same, as an act or fact occurring subsequent to the termination of the alleged conspiracy and arrest of one or more of the defendants. Objection overruled, to which ruling of the Court defendants, by their counsel, then and there excepted.

The signature on the card is that of defendant Hawley. I took the card and put it in my pocket. Patterson and I left and came back to my buggy, and left the others to bring in these that had been arrested. Patterson and I drove rapidly back to town. I left my horse standing at the depot; Patterson got out on one side of the street and I on the other. Just before we got in front of the Hotel Guilford, Daniels came up, and we all joined there just before we got to the Hotel Guilford, and Hawley was standing in front of the Hotel Guilford, looking down the street. Patterson, Daniels and I walked up to him, and told him to come into the hotel very quietly; he turned right round and we all walked in

together right into the reading-room, and sat down. I said, "You can consider yourself under arrest." I told him I was Sheriff of the County, and had a warrant for him. I showed him this card, and asked him if he knew it; if he knew anybody in Greensboro. He said he did not know anybody here, and he had never seen the card. I asked him if he had a room; said he did. I said, "Let's go to it." He, Daniels and I went up to his room, and picked up a case he had; it looked like a dress-suit case.

Q. What did you find in the first one?

Thirteenth Exception. Defendants object to any further evidence as to what was found in defendant Hawley's possession, or what was said to him by the Sheriff of the county, or anyone, in his presence at the time he went to his room, and before taken from the hotel while under arrest. Objection overruled. Defendants except.

Q. What did you find in the first one?

A. Went through the case and found nothing much, except his personal effects, clothing, combs and brushes, and articles of that kind. We took this, closed it up, and picked up another case in the room, kind of square case, and it was locked. I asked him for the key. He said he did not have the key. I asked him whose it was. He said it belonged to a friend of his who had gone to Florida and left it in his room. In the meantime, the keys were given over to us, and the second one we tried unlocked the case. I found this bag in his room, but it is necessary to state how it was found; I found it in the trunk of the Indian, when I examined it in the hotel, after I got possession of that trunk. We did not find that trunk that day. Late Sunday afternoon, as a matter of precaution, as I was the custodian of those people, I thought it best to search them. I went to the jail with my deputies and did so. I found a trunk check under the lining of his vest. I went to the Hotel Guilford, and after

some little search found this trunk in a back hall, in not a very conspicuous place, and I took possession of it, and went upstairs, and we searched that, and in the Indian's trunk I found that bag which you have in your hand. I found some things in this case; I found these blanks purporting to be assayer's blanks, and quite a number of typewritten letters.

These were offered in evidence, and marked Exhibit C.

These were typewritten communications addressed to Harry, or William, or Henry, and in substance all the same, and to the effect that the addressee had been reappointed to the staff of the mint assayers by the government at the mint at Philadelphia. I don't remember where I first saw one of these letters. I found some safe-keys, a good many bits, a dirk and bronzing fluid in the case belonging to Gonez Bono; bronzing fluid like that on the brick, and a lot of copies of Bradstreet showing all the banks in the country and portions of Canada; how the vaults were located, names of the officers and things like that; a very complete guide to all the banks of the country; railroad guides and maps, very complete, well gotten up and nicely bound. Bradstreet's Reports gives the rating of different men of wealth.

Fourteenth Exception. At this juncture, the defendants, through their counsel, moved to strike out all the evidence of the witness as to the acts and disclosures or conversations with any one of the defendants in the absence of the others; and any and all evidence of the witness relating to property belonging to any one or more of the defendants, which was by the witness discovered and investigated subsequent to the arrest of defendants in the woods, because the same is not of the *res gestae,* is immaterial and irrelevant. Objection overruled by the Court, and defendants, by their counsel, then and there except.

I remember two different sets of maps spoken of; one in

Hawley's baggage and one in the Indian's trunk. The Indian was stopping at the Guilford Hotel.

CROSS-EXAMINATION OF J. F. JORDAN.

Being cross-examined by Mr. Barringer, he testified in substance as follows:

I saw Howard with Hawley the day I made the arrest, a few minutes in front of the Guilford Hotel; people were passing at the time as usual; saw them down street further, that afternoon, standing on the pavement; saw them about three times the first day; once at the hotel, and twice in the afternoon; don't know if he was a guest at the Hotel Guilford, except that I saw him there and his name on the register. Went up to his room and looked in that case at the hotel. The next day after I came back from the woods saw Hawley go in the stairway opposite the McAdoo House. He went in and turned around and came out. He staid in there nearly thirty minutes, right inside the first entrance. He came from the depot about four or five yards beyond Garrett and Thompson, with a crowd that were at the depot. A great many people were going up the street on both sides. Hawley and Daley separated just before the train came in; saw them together just before the train came in at the entrance of the white ladies' place of reception. I saw Hawley by himself at the depot in a great crowd of people. Saw Howard and Hawley together at the depot, where South Elm street crosses the railroad.

I found three maps in Hawley's satchel. I saw him standing in the stairway between 2 or 3 o'clock. Don't know if Hawley and Daley had the same room at the hotel; I presumed they roomed together from finding their baggage together; that is, this assayer's case was in Hawley's room; don't know if it was his. I think I made a mistake about

their rooming together. I have been talking about Daley's baggage when I meant Hawley's baggage; I have been talking about this case when I was in Hawley's room. I will say I don't know anything about the room; I was mistaken about this baggage.

Being cross-examined by Mr. Gilmore, witness said:

Q. Were you present at the preliminary hearing of this case?

A. I was.

Q. I will ask you if it is your memory if Mr. Garrett was asked the question at that time, if Mr. Thompson didn't say to Mr. Garrett, "I have never asked you for any money, have I, Mr. Garrett?" And Mr. Garrett replied, "No. But I have got $10 of yours, and I will have more"?

A. I remember that there was something of that kind said; just what it was, I don't remember.

RE-DIRECT EXAMINATION OF J. F. JORDAN.

Further examination in direct by Mr. Brooks:

Said he never heard Garrett say that he had ten dollars of his money, and would have more, but he heard them have someting like a quarrel.

In Hawley's room the only baggage I found was this case and Hawley's satchel, which he then disowned and declared having no key to, when urged he produced the key.

DIRECT EXAMINATION OF W. J. WEATHERLY.

To further prove its case, the State called W. J. Weatherly as a witness, who, being duly sworn, testified in substance as follows:

My name is W. J. Weatherly; I am Deputy Sheriff of Guilford County; have served 20 years as policeman and 3 years as Deputy Sheriff. Sheriff Jordan first intimated the presence of the defendants in Greensboro on Thursday,

March 21, 1901. I went on the street looking for the men, and saw Thompson standing against a store on South Elm street eating an orange. He looked rather rough; had on a sort of brown looking suit and flannel shirt; broad-brimmed hat his hair being longer than it is right now; beard all over his face, but not so very long—a good heavy beard. I saw him on the street several times that day—up and down the street—and think I saw him and Hawley together once or twice. The first time I saw them together about the Guilford Hotel, then toward the depot near Scott's store. I saw them together twice on Thursday in the afternoon; I saw Mr. Daley with Mr. Thompson once in the afternoon near where Jim West keeps on South Elm; they stopped, had a few words, and passed on down the street together. That is about the only time I saw them on Thursday. I saw them the next Friday morning; saw Mr. Thompson first; he seemed to be walking up and down South Elm street. Then I saw him and Mr. Daley in the morning the first time where the Benbow Hotel is building now. I saw them meet there; I think they stopped and had a little talk, and Thompson went on toward the depot and Daley came up the street. I saw Mr. Thompson on the street pretty regularly all the time up and down towards the depot. I was at the depot when the train came in on Friday, which Mr. Garrett came in on. Saw Mr. Daley and Mr. Thompson both at the depot, and saw Mr. Hawley at the corner at Clegg's. Mr. Thompson seemed to be standing back against the depot for awhile, just before the arrival of the train. Mr. Daley passed him two or three times up and down the platform, and would speak to him as he would go by; they made remarks to one another; just before the train came in, Mr. Thompson, who was walking up and down the platform, seemed to be restless, and Mr. Daley would pass him every once in a while; they never passed without they looked like they spoke, saying something to one

another. Hawley was walking on the platform part of the time, and for awhile stood back against the depot near the sitting-room door. I left him right on the corner. Cleggs' corner is just across a narrow street, not more than 20 feet from the depot. One standing there could readily see passengers leaving the depot. When the train came in and Mr. Garrett got off, Mr. Thompson spoke to him, and they went into the depot; I went in there, too, and they went over to the northeast corner and sat down and talked a little while there and came out; I followed along. Mr. Daley was then standing on the north corner of the depot, the one towards the railroad. He was standing on the platform of the depot at Clegg's hotel. I didn't see anything more of him until I came out. Mr. Daley went across the street, on the right-hand side of the street, and as Mr. Garrett and Mr. Thompson went down on the left-hand side of the street, he went down on the right-hand side, and Mr. Hawley followed along behind him. I was right behind him. Mr. Garrett went on down the street. He and Mr. Thompson went in the hotel. Mr. Hawley went down below a drug store, and went and stood up in a door. Mr. Daley came across and looked in the hotel, and went across to him and said something to him; then he went right up the street to Mathews-Chisholm-Stoud's corner, and stood around the corner. He stood there waiting some time. Mr. Hawley was right in front of the hotel, and Mr. Daley was a little further up the street, and could see the hotel. I saw him when he left the corner at Clegg's hotel. He came on down the street at a pretty good gait. The stairway he was standing in, the door opens right on the street; you come in, and it is some five feet, I reckon, before you strike the steps to go upstairs. He was standing right inside. I don't know what became of Mr. Daley at the corner; that is the last I saw of him, but Mr. Hawley stood there for awhile, round about, and after awhile Mr. How-

ard drove up with a buggy in front of the McAdoo House. Mr. Hawley went across the street and said something to him. He had come on the outside of the door. He went across the street to speak to Mr. Howard. When he came back across the street, he was looking around, seemed to be very restless. I was standing looking through a window at him. He started in the house that I was in. I got under the counter. I told the young man if anybody came in there and asked for me to tell him he knew nothing about me. He came in the house and stood in there a little while, and went out. I was hid under the counter. This was Jim West's place of business. He went out, and I went to the door and looked out and saw him go into the shoe store. Garrett had come out and got in the buggy then, and started up the street. I had a horse over at Ogburn's stable right across the street. When he went in the shoe store, I went across the street, and went down there and got my horse; met Mr. Mims there. He and I got on our horses and rode the other way. Just as we got around the other way, Mr. Garrett and Howard came out of the lot where a livery-stable stood. We met them nearly face to face. We turned right down the street, and let them get on a piece. Mr. Garrett and Howard had gone on in a buggy. We turned down and came up to the court-house a piece, then we turned back and followed the buggy on out. We drove very slowly, and tried to keep back about the proper distance. About two and a half miles from here we came in behind a wagon; the wagon stopped, and for some reason or other the buggy was brought close to it. They stopped. Mr. Howard got out and went and got a drink of water. Mims and I were pretty close on them then. Sheriff Jordan drove right up behind us. He drove on by us. We got down then. They drove on then after they got their water. We followed on, then turned out to the left and went down through the pines. We went on down to the bridge

and met some other parties; dismounted and tied our horses; and Mims and I undertook to follow the buggy track through the old field; we followed it to the pines. There was a double track, but we didn't notice that until we came back. We followed one track to the road. We came to a different horse and buggy altogether, a horse that I knew very well, tied out there, and it was not the horse that I was following. We went back to the path, and took the other track, and went down and found the other buggy tied in the woods. We went down to the creek, I reckon probably 100 or 150 yards. I heard someone talking. The first noise I heard I couldn't understand at all. It was sorter of a j . . . . . Then I heard the Sheriff's voice. I knew his voice. I heard him holler: "Close in! Close in!" We went right in then, and I saw Mr. Garrett and Mr. Howard standing by a tree. Garrett had his hand on his shoulder. Howard was standing there with a brace in his hand. I went up to him and asked Garrett who he was. I think he said, "I am in charge of this man." I said, "You get away from here." At this time Mr. Garrett had his pistol out; at this time I saw one of the bars of metal.

Fifteenth Exception. Here defendants objected to any further examination of witness relative to anything done or said further, or subsequent to the time that the officers arrived in the woods and arrested any one or more of the defendants, because it is a circumstance occurring subsequent to the consummation or discontinuation of the alleged conspiracy, is immaterial and irrelevant and not of the *res gestae,* which objection was overruled by the Court; to which ruling defendants then and there duly excepted.

I saw a gold brick on the ground; there was but one open and another one wrapped up in a cloth that was opened afterwards. I know nothing about the baggage of this gentleman, that was at the hotel. I saw the Indian garb.

CROSS-EXAMINATION OF W. J. WEATHERLY.

Being cross-examined by Mr. Gilmore, the witness said: I did not see Mr. Patterson at the time he put Mr. Thompson or Howard under arrest, but did soon thereafter. I participated in searching Mr. Thompson for weapons; I found a revolver in his pants pocket, and took it out myself.

Being cross-examined by Mr. Barringer, witness said: People frequently located on the corner at Cleggs' hotel, where he saw Mr. Hawley standing. One standing there where he was could not see the passengers get off the train; when the train pulls in from the east, it usually leaves the hindermost coach in full view of the street, so Hawley could have seen the crowd alight from there from the position in which he stood. I went down there to watch for Garrett; saw Howard meet him; there was a great many people at the depot walking about. Mr. Hawley was walking about.

RE-DIRECT EXAMINATION OF W. J. WEATHERLY.

Mr. Thompson had his pistol in his inside pants pocket on the inside; it was not in his usual pocket. I recognized Thompson on the street by the description I had of him from the Sheriff. I saw the letter the Sheriff had.

DIRECT EXAMINATION OF GARLAND DANIELS.

The State further produced Garland Daniels, who, being first duly sworn, testified substantially as follows:

My name is Garland Daniels; I live in Greensboro; I remember the occasion, the 21st day of March, the day preceding the arrest of the defendants; I was in town, but did not on that day see any of the defendants; I saw them on Friday; saw Mr. Howard first about 8:30 o'clock, when I was going to breakfast. He attracted my attention by look-

ing back at me, as he was quite a fine-looking fellow for a workingman. I kinder sized him up. I saw him no more that day. I saw Mr. Hawley and Daley on Friday, paid no attention to them at first; they looked at me as I passed them on the street, which did attract my attention very much. I watched them standing on the street together for some little time. I saw them two or three times in a door across from the McAdoo House, which is right across the street from my store. My office is in the window of my store, where I could, without trouble, look across the street. I saw them talking considerable; they would first go up to the corner around Shield's shoe store, and then to West's place. I saw them separate and meet at the doorway again. Howard put up a fine appearance for a farmer; he looked fine; he was walking with his hands folded behind him; had a beard then, and attracted my attention. Had on a kind of light suit, gray mixture of some kind; think he had on a soft shirt. I followed the party out to where they were arrested. I got there just in time to hear the Indian make a sound something like a dog barking. It was all done so quickly. I have seen this card before, marked Exhibit "B."

Sixteenth Exception. Here defendant Hawley, through his counsel, objected to the evidence relating to the card found at the feet of defendant Thompson, at the time the parties were arrested in the woods near Greensboro, because a matter occurring in the absence of the defendant Hawley and not of the *res gestae,* and is immaterial and irrelevant. Objection overruled by the Court, to which ruling defendant then and there excepted.

I got the card from under Mr. Howard's leg in the woods at the place of the arrest. Shortly after I came up they handcuffed Mr. Howard and Mr. Daley, and they sat down by a large tree, and were sitting there while Mr. Howard tried to put this card under his leg; I lifted his leg up and

picked it up, and gave it to Sheriff Jordan; there was on it "Henry D. Hawley, Hotel Guilford." I was then deputized to go to town, and I went ahead of the Sheriff, and Mr. Weatherly was to hold the prisoners for an hour in the woods. I passed the Sheriff and came to town; I sent my horse back by another gentleman and came up the street, and saw Mr. Hawley standing in front of the hotel; he was standing on the left of the door going up town. I passed by him and took my stand on the other side of the door and at the other window. He had a very nervous appearance; he was twisting his moustache and looking up and down the street, and seemed to pay no attention to me while I was watching him; he stood there some little time, and I saw Sheriff Jordan and Mr. Patterson coming up the street, and as they came up the street, I went in the ladies' entrance to the Guilford, and they brought Mr. Hawley in their door, and I followed them. They took him back in the writing-room and read a warrant to him.

Seventeenth Exception. Here defendants make a motion to strike out all the evidence of the witness relating to his own acts, or of the conduct or appearance of defendant Hawley, subsequent to the arrest of either of the defendants in the woods, as not being of the *res gestae,* and because it is immaterial and irrelevant. Objection overruled by the Court, to which ruling defendants then and there excepted.

Sheriff Jordan asked him if he knew anybody here; he said he did not. I asked the Sheriff to give me that card, and asked him if it was his. He said it was not. We then went up to his room. We found two cases there, one a dress-suit case and an assayer's case. When we got in Mr. Hawley's room, Mr. Patterson asked him whose things those were; he said the suit grip was his, as to the case, it belonged to a friend down South, and he asked him if he had the key to it; he said he didn't. Mr. Patterson asked him to give him

his keys; he did so, and he unlocked the grip and the case both. They then left the gentleman in the custody of myself. We sat in the room a few minutes; it was rather warm, and I insisted that we go down stairs. We went down in the office, and stood there for awhile. We left the office pretty soon. Mr. Hawley said he had taken a little medicine and asked me to go to the toilet-room with him, which I did. There Mr. Hawley reached in his pocket and pulled out this envelope; he tore it half in two. As he did, I grabbed him back of the neck. He threw this into the sink and grabbed for the chain. As he did, I grabbed him; in the scuffle, I secured the letter out of the sink. You can see it has been in the water.

Here the letter, marked Exhibit "D" was read in evidence. It was a typewritten letter to "Harry," suggesting that he had been reappointed by the United States Government to the position as assistant assayer at the mint at Philadelphia, and signed in typewriting. ..... Witness identifies another letter as being the same found in the assayer's case.

CROSS-EXAMINATION OF GARLAND DANIELS.

Being cross-examined, the witness said:

Before I went to the place with Mr. Hawley that he requested me to go, I had already taken this case from his possession; it had been seized by the Sheriff, and had been opened and the contents examined, not thoroughly examined. These letters were found in the case after it was thoroughly examined. The officer had taken it from the hotel and examined it for whatever was in it. I am not an assayist, and will ask Mr. Hawley to explain what an assayer's outfit consists of. While I do not know what an assayer's outfit consists of—the case had scales, acids of different kinds, and also a little bellows; that is all. I understand it is an assayer's

outfit—it may be something else. I could take an acid and test gold myself with it.

Witness was then asked the question, "What is exclusively used in an assayer's outfit that is not used in anything else?" when the witness remarked, "I don't know that you could find anything that could not be used for something else." And the Court said: "You can not examine the witness any further on this subject, as the witness has stated that he does not know what constitutes an assayer's outfit."

Eighteenth Exception. Here counsel for defendants objected to the remarks and ruling of the Court, as being an expression of opinion prejudicial to the defendants, and an undue limitation of their right of testing the witness' knowledge with respect to what the case and its contents were. Objection overruled by the Court, to which ruling defendants then and there, by their counsel, excepted.

BANKS BOONE, DIRECT EXAMINATION.

The State then called Banks Boone as witness, who, being sworn, testified in substance as follows:

My name is Banks Boone; I live in Greensboro. I remember the 21st or 22d of March this year when defendants were arrested. I was in town that day; saw Mr. Hawley. Was then working for Simpson Shields Shoe Company, situated diagonally across the street from the McAdoo Hotel; saw him after dinner. I was standing near the door, and the door was shut. There was a gentleman came in the store, said "Good morning," and slammed the door behind him on the inside. I walked up to him and asked him if there was something I could do for him. He said no, he ran in there to dodge a man. He stood around in there a few minutes, and I talked with him. I reckon he was in there possibly five minutes; then he turned around, looked over the store and

said, "This is a wholesale shoe store, isn't it?" I said, "Yes." He said, "I am a shoe drummer myself." We passed a few words, and then he went out.

HENRY WHITFIELD, DIRECT EXAMINATION.

The State then called Henry Whitfield as a witness, who, being sworn, testified in substance as follows:

My name is Henry Whitfield; I work at the Guilford Hotel; was there last March. Remember when defendants were arrested. Saw Daley in the morning, and he told me he wanted me to let him out; that he would be in with a buggy some time that day, and he wanted me to let him out. He went in to dinner; I held the horse for him. He got out, went in the house, got his satchel and came back and got in the buggy and went on out, and told me he would be back between three and four, or five o'clock, and to be there to let him in. I did not notice the satchels particularly when he came out with them; I did not notice what kind they were. That was the usual place for loading the baggage; we generally loaded the grips and smaller pieces at the front of the house. I kept the gate locked. He did not come back the evening he went out; he paid me a quarter. He was stopping at the hotel.

Nineteenth Exception. Defendant Hawley, by his counsel, in ample time, objects to the testimony of the witness, because it relates to conversation between the witness and defendant Daley in the absence of defendant Hawley, and because it is irrelevant and immaterial, and moved to strike out his testimony, which objection and motion was overruled by the Court, to which ruling defendant Hawley then and there excepted.

J. P. TURNER, DIRECT EXAMINATION.

The State then called Dr. Turner as witness, who, being sworn, testified in substance as follows:

My name is J. P. Turner; am coroner of Guilford County; reside at Greensboro. I remember to have seen and examined the trunk that Mr. Jordan spoke of yesterday, for which he got a check from defendant Daley, and opened it down at the Hotel Guilford. It was found, I think, on the day following the trial, the preliminary hearing. There was a research made, and this check was found, as I understand it, on the person of Gonez Bono. I examined it the same day it was found; the check was turned over to me. This was Saturday, I think, and at the same hotel where he was stopping.

Twentieth Exception. Here defendants' counsel objected to the witness testifying with reference to the trunk and its contents found after the arrest and incarceration of defendants, as not being of the *res gestae,* incompetent, irrelevant and immaterial. Objection overruled, to which ruling of the Court defendants, by their counsel, then and there excepted.

It was found at the Guilford Hotel, where Hawley and Daley were stopping. The trunk was a box arrangement; a strong box, well bound with iron, and had on it two locks, one at either end towards the end, not in the middle like an ordinary trunk. I suppose the trunk was about three feet long by eighteen inches wide, and about fifteen inches deep. The inside arrangement was in layers or trays. The first tray contained just simply some of their paraphernalia. I don't remember exactly what, a place built especially, it looked like, for these two cases that contained the gold brick, and there was a board there to wedge in between them so as to make them stationary so they could not move. In the lower part of the trunk I found quite a number of maps of

the Southern States, and some parts of Canada, the eastern part of Canada especially, and also some well-bound copies, parts of copies of Dun, a part of Bradstreet and Dun; I think this was Dun's part of it, bank reports, reports of the wealth of men throughout the country, and also all the bank officers, and the amount of shares that the different men held in banks. There was also in the bottom of this trunk, in different compartments, for holding this material, bronzing liquid, in fact a bronzing outfit, bronzing liquid and bronzing powders, together with two brushes in good order. Also quite a number of bits like this in here, like this part of it (showing jury). Some four or five, possibly more, of the new shawl straps you saw around the second brick that we opened here yesterday; there were four or more of the oil cloth covers like was around those bricks.

I saw no flannel wrappers or goods in the trunk. There was also some 12 packages of borings, which, on being tested, proved to be pure gold. I have studied chemistry, and am familiar with acids upon metal, and I say it was pure gold. I don't remember anything else in the trunk. The gold was fixed up in nice little paper, colored slightly, not exactly brown; packages 2 or 2½ inches long and 1½ inches wide.

J. P. TURNER, CROSS-EXAMINATION.

Being cross-examined by Mr. Gilmore, the witness said:

In the capacity of Coroner of Guilford County, I handled the writ in the suit of Paul Garrett against J. L. Howard; I served the paper; I levied upon the property belonging to these defendants; by that writ I levied on their baggage and the money they had on their persons, and such other effects as could be found belonging to them; I don't remember the exact amount of money, but I have got it in the bank; it is $300 and some odd dollars, possibly $400. I levied on their baggage. There was some clothing; I levied on one hat and

some slippers or shoes; I don't remember which. As nearly as I could, I took everything they possessed on their persons, everything in the clothing line, I suppose. That was just before the trial, I believe. I don't remember what day; I don't remember the exact date when I got possession of the writ. I have not the writ with me; it is filed in the Clerk's office. I think it was Saturday morning I received the writ, and I executed upon it immediately. I don't think I made a second levy under it after the preliminary examination. The trunk was given into my custody after the preliminary hearing. I don't know whether you call it a levy or not; I was sent for to take charge of the trunk; I took it into my custody, subject to the preliminary hearing in this case, and I don't know whether or not I levied on the trunk by virtue of that attachment or not; I had no other authority than that attachment writ for doing so. I now claim custody of the trunk on the authority that attachment gave; I don't know what else. I supposed I held it by that attachment. I have the money in the City National Bank. It is in my name for them; for the men whose persons it was taken from. I have had the custody of the Indian outfit since levying upon it by the attachment writ. I have made an exhibition of it since then to a great many people. I have let them see it. I could not tell how many had seen it in my office, too many to remember; one man was dressed up in it with my permission.

J. P. TURNER, RE-DIRECT EXAMINATION.

Being re-examined in direct by Mr. Brooks:

Twenty-first Exception. The trunk and contents spoken of by witness were offered in evidence, to which offer the defendants, by their counsel, then and there objected. Objection overruled, and exception.

The trunk being of the description heretofore given and

contained therein was: One book, Duns' rating on Tennessee, Louisiana, Mississippi and Missouri; one copy of the American Bank Reporter, printed by Aaron; one copy marked American Bank Reporter, without the printer's name; one pair of wire-cutters; one hand-vise; one screw-driver; one pair small pinchers; one 2-foot rule; one 3-cornered file; one pair scales; 17 packages borings, purporting to be gold borings; four squares of oilcloth; 7 shawl straps; quite a number of small bits; several small brushes; three cans of bronzing liquid; two bottles of bronzing powder; bunch of hand maps of the different Southern States and parts of Canada; quite a number of blanks.

Twenty-second Exception. Here defendants moved to strike out all the evidence offered by the State by the trunk and its contents, and as testified to by the witness. Motion being denied, defendants, by their counsel, then and there except.

The witness, proceeding, said: I remember the day defendants were arrested; had seen Hawley and Daley at the hotel. I don't know the day, it was several days before the arrest. Mr. Daley was there the first time, it was a week, I think, or close on to that before the arrest. He was there three days and a quarter, or something like that. Paid me his bill, and left, I think, on the 9:55 train, and said he would come back. He came back. The first time he came, he brought some baggage with him, a trunk, which was checked and left in the office.

Twenty-third Exception. Here defendant Hawley, by his counsel, objects to the testimony of the witness, because it relates to conversation and acts between the witness and defendant Daley in the absence of defendant Hawley, is irrelevant and immaterial; which objection was overruled, and defendant Hawley, by his counsel, then and there excepts.

I gave him a check for the trunk, and it was put in the

hall between the elevator and the back door of the private entrance. It was there from that time up to and including the time of the arrest. During that time Hawley stopped at the hotel. He came there about two or two and a half days, I think, before the arrest; I am not positive about that. He remained there from the time he came until the arrest. The trunk was the only piece of baggage that I saw Daley leave. The trunk was delivered to the Sheriff; there were two came there after it.

The morning of the day of the arrest, Mr. Hawley was put on call for five o'clock. There was a train coming into Greensboro at 5:48, running from Washington to Columbia. One coming from Richmond might readily come on that train. It is a reasonably direct way by Danville from Norfolk. Don't know that prior to then Daley or Hawley met this train, they had never been put on call before. The passenger coach arrived from Raleigh in the morning about 5:15.

RE-CROSS-EXAMINATION OF J. P. TURNER.

Cross-examination by Mr. Gilmore:

I was present in the court-room yesterday, and heard the examination in this case.

Twenty-fourth Exception. Here counsel for defendants moved to strike out the testimony of the witness, upon the ground that he was in Court yesterday and heard the evidence of the witnesses testifying in the case, in violation of the order of the Court that excluded all the witnesses from the court-room during the progress of the trial. Motion overruled, and defendants, by their counsel, then and there excepted.

In examination by Mr. Barringer, witness said:

Mr. Hawley came on the 5:48 train for breakfast. He registered his name, and I gave him a room to himself; Daley had a room by himself.

RE-RE-DIRECT EXAMINATION OF J. P. TURNER.

Being examined in re-re-direct by Mr. Brooks, the witness said:

I think Mr. Daley registered the first time from Roanoke, and from Danville the second time. I don't think Mr. Daley's room was ever changed. Mr. Hawley's room was. He first occupied No. 43, on the second sleeping-floor, and was removed to 20 on the first sleeping-floor. Mr. Daley occupied 23 on the first sleeping-floor all the time he was there; that put them about three doors from each other, across the hall.

PROF. JOHN THOMPSON, DIRECT EXAMINATION.

The State then produced Prof. John Thompson, who, being sworn, testified as follows:

My name is John Thompson; reside at Greensboro; am a teacher of chemistry at the A. and M. College. Was educated in the University of Minnesota. I specialized chemistry. I am capable of making tests and determining the weight of that bar there. I have made an analysis of the borings taken from these pieces.

Was then asked by the State Solicitor this question: "What is the result?"

Twenty-fifth Exception. To which question defendants, by their counsel, objected to any evidence tending to show the substance or material which constitutes the alleged gold bricks in evidence in this case, as the same are not of the *res gestae,* are immaterial and irrelevant. Which objection was overruled by the Court, and defendants, by their counsel, then and there excepted.

The witness, proceeding, said: After testing I found them principally copper; I found no presence of gold. One was bored in three places, and the other in two.

The gold bricks, and the cloths in which they were bound, were offered in evidence, to which offer defendants then and there objected, because they were not of the *res gestae,* irrelevant and immaterial, and moved to strike out the testimony of witness relating to them. Which objection and motion by defendants was by the Court overruled and denied; to which ruling defendants, by their counsel, then and there duly excepted.

MARION COBB, DIRECT EXAMINATION.

The State then called as a witness Marion Cobb, who, being sworn, testified in substance as follows:

My name is Marion Cobb; my father is proprietor of the Hotel Guilford. I remember the occasion in March when these defendants were arrested. Prior to arrest, two of them, Daley and Hawley, stopped at the hotel. I have the hotel register in my hand, beginning in December and ending in April. This is the register in which they registered.

State closes.

And which is all the evidence offered by the State to prove its charge against the defendants under the indictment and the several counts thereof.

MOTION BY DEFENDANTS FOR STATE TO ELECT—STATE ELECTS TO PROCEED ON FIRST COUNT.

Here defendants, by their counsel, moved the Court to require an election by the State on which count in the indictment it will rely for conviction against the defendants. Whereupon, the State, by its Solicitor, elected to rely upon the first count in the indictment, and enter a *nolle prosequi* to the second and third counts of the indictment, the other counts to be referred to as furnishing particulars. Which being done and entered by the Court in the said cause, the

defendants moved the Court to instruct the jury that upon the evidence adduced in this case, the defendants, as a matter of law, are not guilty, and the jury should so find and return their verdict accordingly. Which motion of the defendants the Court overruled, to which ruling of the Court the defendants then and there excepted.

Defense declines to offer any witnesses.

From a verdict of guilty, and judgment that defendant J. L. Howard be imprisoned in State Prison 10 years, defendant H. D. Hawley in State's Prison 10 years, and defendant A. R. Daley 7 years, the defendants appealed.

Robert D. Gilmer, Attorney General, for the State.

Bynum & Bynum, F. P. Blair, and *L. A. Gilmore,* for the defendants.

CLARK, J. The defendants, J. L. Howard *alias* Thompson, Gonez Bono *alias* A. L. Daley, and H. D. Hawley, are indicted for a conspiracy to defraud. The indictment was in three counts. At the close of the evidence for the State, the defendants moved the Court to require an election by the State upon which count it would rely for conviction. Thereupon the Solicitor elected to rely upon the first count, and entered a "*nolle prosequi* as to the second and third counts—these other counts to be referred to as furnishing particulars." Upon this being done, the defendants asked the Court to instruct the jury to return a verdict of not guilty, and excepted to the refusal. The defendants introduced no evidence.

The three counts were simply a description of the same transaction in different ways, and the joinder was unobjectionable. The Court need not, therefore, have required an election. *State v. Barber,* 113 N. C., at page 714, citing *State v. Morrison,* 85 N. C., 561; *State v. Allen,* 107 N. C., 805; *State v. Harris,* 106 N. C., 682; *State v. Parish,* 104 N. C., 679; *State v. Horan,* 61 N. C., 571, 576.

The evidence is uncontradicted, and its chief features will be set out by the reporter in the statement of the case. It is almost dramatic in its details, and presents with striking clearness the methods of a fashion of swindling, which has doubtless been little practiced in this State. The indictment in full will also be copied by the reporter.

The first exception is, that the indictment did not set out the means by which the conspiracy was to be executed. The point is expressly decided in *State v. Brady,* 107 N. C., 822, where it is held, upon our own authorities, that a conspiracy to cheat and defraud need not charge the means to be used. Such was also the common law, as will be seen by reference to the English cases therein cited; also, citing *Commonwealth v. McKisson,* 8 S. & R. (Pa.), 419; 3 Greenleaf Ev., sec. 95; and while stating that some States had held differently, this Court decided to abide by our own and the English rule. The learned counsel from Illinois, who ably argued this exception for the defendants, admitted this, but at great length endeavored to persuade us to overrule our own decisions, contending that the weight of authority in this country was to the contrary. We think not, but if it were, that alone would not be sufficient to induce us to change, unless injustice was shown to follow from our decisions. In fact, however, the weight of authority in other States seems to uphold our ruling. Among many cases to like effect are *State v. Noyes,* 25 Vt., 415; *State v. Bartlett,* 30 Mo., 132; *State v. Crowley,* 41 Wis., 271; *Thomas v. People,* 113 Ill., 351; *State v. Stewart,* 59 Vt., 273; *State v. Grant,* 86 Iowa, 216; *People v. Clark,* 10 Mich., 310; 2 Bish. New Crim. Proc., sec. 207(2).

The Code of Civil Procedure, sec. 259, provides: "The Court may in all cases order a bill of particulars of the claim of either party to be furnished." In this case these particulars were fully furnished by the second and third counts, which were only *nol prossed* at the instance of the defendants

and after the close of the evidence, so that they were in full possession of all the information which a bill of particulars could have furnished them.

The next exception was for refusal of the motion to quash: "For that the allegations in the said bill of indictment, and in each and every count thereof, do not constitute a crime under the Ordinance of Conspirators, made and accorded by King Edward the First and his Council in the thirty-third year of his reign, A. D. 1305, nor by any statutes in England since that date, nor under any common law in force in the State of North Carolina at the date of the said alleged offense."

With reference to the statute 33 Edward I, *de conspiratoribus,* Judge Council charged the jury as follows:

"Its existence can be traced back centuries prior to our Independence, and such eminent ancient law writers as Coke, Hawkins and others, refer in their works to the existence of this crime prior to the passage of the Statute 33 Edward I, *de conspiratoribus,* which statute has been commented upon by counsel for the defendants. Law writers upon the subject of conspiracy generally agree that the statute referred to was only declaratory of the common law to the extent of the crimes enumerated in the act, leaving the common law as applicable to all other forms of conspiracy known to the law."

The cases sustaining his Honor's view of the law of conspiracy are numerous; among them, *State v. Buchanan,* 5 Harris and Johnson (Maryland), page 317, is an elaborate discussion of the question, covering fifty pages, and many authorities are cited. In this case, at page 333, the Court says: "Much reliance is placed on the statute of Edward I, *de conspiratoribus* on the supposition that the offense of conspiracy was originally created by that statute." The learned Judge then proceeds to show, pages 333-351, that the offense of conspiracy existed prior to the passage of 33 Edward I, was

passed in 1304, and on page 351 observes: "By a course of decisions running through a space of more than four hundred years from the reign of Edward I to the 59th of George III, without a single conflicting adjudication, these points are clearly settled:

"1. That the offense of conspiracy is of common law origin, and not restricted or abridged by the statute 33 Edward I.

"2. That a conspiracy to do any act that is criminal *per se.*, is an indictable offense at common law, for which it can scarcely be necessary to offer any authority."

In *State v. Burnham,* 15 New Hamp., 396, Gilchrist, J., speaking for the Court, says: "In the first place, we have no doubt that conspiracy is an indictable offense in this State. It is punishable at common law, its punishment is most repugnant to our institutions, and it is an offense productive of much injury, and as deserving reprehension under one form of government as another."

To the same effect are *Commonwealth v. Hunt,* 45 Mass., 111; *State v. Pulle,* 12 Minn., 164.

In the last case the defendants were indicted for a conspiracy to assault one James H. Murray, to daub and put upon his naked body a great quantity of tar and feathers, and the point was made "that there is no statute in this State creating or defining the crime of conspiracy, nor is any punishment affixed by law to any such offense, and, therefore, this Court had no jurisdiction thereof. The Supreme Court held on appeal that conspiracy not declared a crime by the statute law was punishable because of the common law."

In *United States v. McCord,* 72 Fed. Rep., 159, it is said: "The statutes of the United States do not define what a conspiracy is, or create any new offense. They merely recognize the crime of conspiracy as known to the common law and the courts must go to the common law to determine what it is."

In 2 Bishop's New Criminal Law, sec. 174, the statute of

33 Edward I is quoted in full, and the author adds, in subsection 2, the following:

"Since this statute contains no negative word, a principle explained in another connection shows that it abrogates nothing of the prior common law, but leaves indictable whatever of conspiracy was so before."

In *State v. Younger,* 12 N. C., 357, this Court held that "a combination of two or more to do any unlawful act, or *one prejudicial to another,* is indictable at common law as a conspiracy." *State v. Brady,* 107 N. C., 822; *State v. Powell,* 121 N. C., 635; *State v. Wilson,* 121 N. C., 650.

The cases already cited dispose of the other exceptions for refusal to quash. Some of the authorities cited by defendants are no longer authorities, since The Code of 1883 added to section 1025 the second *proviso* thereof, that in indictments for false pretence, "it shall be sufficient in any indictment for obtaining, or *attempting to obtain,* any such property by false pretences, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act with intent to defraud."

The third exception is as follows: "While the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and empaneled and during the trial of said cause. The Solicitor, objecting, said that the witness Paul Garrett would be the first witness examined, and the others would testify as to matters not in his knowledge, except the detection in Greensboro. Whereupon the Court remarked that it was a matter of discretion with

the Court, and that all the witnesses, except the complaining witness, Garrett, and the high Sheriff of the county, might be excluded from the Court; but as to these witnesses, their high character as citizens forbade the idea that either of them would be influenced by the testimony of the other." It would indeed be sufficient to say that it does not appear that any one of the jurors, who actually sat on the trial, heard the remark; but we prefer to put our ruling upon broader ground. By the common law, Judges were not prohibited from expressing an opinion upon the facts, and this is still true of the Federal Courts and all the States in which there is no statute making a change in this respect. In North Carolina, the only change is that made by the Act of 1796, now Code, sec. 413, which reads as follows: "No Judge, *in giving a charge to the petit jury*, either in a civil or a criminal action, shall give an opinion whether a *fact is fully or sufficiently proven.*" This is the extent of the statutory change. It goes no further. In *State v. Angel*, 29 N. C., 27, Ruffin, C. J., says: "The 'facts' on which the act (1796) restrains him (the Judge) from expressing an opinion to the jury are those respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendants depends." In *State v. Laxton*, 78 N. C., 564, Smith, C. J., says: "It is quite obvious from the words of the act that its special object was to prevent the intimation of such opinion *in connection with and constituting a part of the instructions* by which the jury were to be governed, and when its influence on their minds would be direct and effective." To same purport in *DeBerry v. Railroad*, 100 N. C., 310; *State v. Robertson*, 86 N. C., 628; *State v. Jones*, 67 N. C., 285. These were cases in which the remarks were made by the Judge during the progress of the trial, but it is not necessary that we pass upon the question whether the remark here made by the Judge would be ground for setting aside the ver-

dict if made during the progress of the trial, for it was not made at such time. At the time when made, no juror had been selected, and the remark was not "to the jury," nor did it contain any opinion that "a fact was fully or sufficiently proven." No fact had been shown in evidence. The remark was not prohibited at common law, and is certainly not prohibited by any terms in the statute. No decision of our Court has ever hinted that a statute forbidding the Judge "in a charge to the petit jury" from "expressing an opinion whether a fact is fully or sufficiently proven," extended to the remarks of a Judge complimentary to one (who was afterwards examined as a witness) made before the jury was selected or empaneled. In every case where such a proposition has been presented, this Court has denied the application of the statute. *State v. Jacobs,* 106 N. C., 695; S. C., 107, N. C., 774; *State v. Jackson,* 112 N. C., 853.

The defendants except to the sentence imposed of imprisonment in the penitentiary, but concede that this Court has ruled otherwise in *State v. Mallett,* 125 N. C., 718, which we re-affirm.

The other exceptions were without merit and were not seriously pressed in this Court.

Affirmed.

MONTGOMERY, J., concurs in the conclusion reached by the Court. He thinks, however, that what his Honor said on the trial below, in declaring that two of the State's witnesses were of so high a personal character as that he would not ask them to leave the court-room, on a motion for the separation of the witnesses, and also, what he said in his instructions to the jury in defending one of the same witnesses against the adverse criticisms of the defendant's counsel on the witness's testimony, was inappropriate and indiscreet. The language of the statute on the subject may not have been violated, but its spirit certainly was.

DOUGLAS, J., dissenting. In dissenting from the opinion of the Court, which I am constrained to do, upon the highest considerations of private right and public policy, I feel much diffidence in expressing my own opinions, as they are so totally different from those of the Court. However, they are the result of my deliberate judgment, and as such must find expression, as I can not even silently concur in a decision, which, to me, seems so dangerous in its tendencies, and so devoid of legal basis in its conclusions.

I have no sympathy whatever for a gold-brick swindler, and but little for his victim, who is usually caught in the trap he thinks he has set for another. The ordinary business man has no earthly use for gold, except for what it will bring in the market, and no object in buying it unless he can resell at a higher price. Therefore, he always expects to get it for less than its value from a supposed owner, who must be ignorant of its value. He knows, or should know, that gold is current the world over, and that anyone having it can carry or send it to the nearest mint and obtain its full value in current coin. Usually the pretended miner professes to be very ignorant, or has a partner who is even more ignorant than himself, and whose interest may be *bought out* at a small sum.

In the case at bar the inducements offered Garrett appear to have been $25 per day and his expenses, together with a "one-third interest in everything he had," including $36,000 in gold at Greensboro, $48,000 in gold in Arizona, and a gold mine capable of producing one million dollars a year. In consideration for such great wealth, Garrett was to give *his services only;* and yet, in his suit for a total breach of this contract, he places his damages at the modest sum of $2,000. (Printed record, pages 15, 41, 47, 48.) Again, he says on page 42: "It was mighty pretty, and I thought possibly there might be something in it. I may have been something of a phantom chaser in this transaction." It would seem so.

There is nothing in this case that appeals to my sympathies, and hence I am free to view it in its legal aspect. I believe that the defendants are all guilty, but this will not induce me to deny to them a single one of the rights which the law gives to them for their protection. I do not believe that the sole purpose of the law is to punish the guilty. A higher object still is the protection of the innocent; but whether innocent or guilty, every citizen is entitled to a fair trial and the equal protection of the laws. As was said by this Court in *State v. Keith*, 63 N. C., 144: "These great principles are inseparable from American government and follow the American flag. No political assemblage under American law, however it may be summoned, or by whatever name it may be called, can rightfully violate them, nor can any court sitting on American soil sanction their violation." This case finds its counterpart in the great case, *Ex Parte Milligan*, 4 Wall., 2, great in the Court that decided it, great in the counsel who argued it, great in the ability of its opinions, and greater still in the principle it settled. Milligan was, before the close of the war, tried and convicted by a court-martial of conspiracy, followed by overt acts, to seize the Federal arsenals and set free and arm the Confederate prisoners. It was held by a unanimous court that he was entitled to a trial by jury, according to the law of the land.

The opinion of the Court uses the following language on page 18: "Had this tribunal the *legal* power and authority to try and punish this man? No graver question was ever considered by this Court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and, if they are ineffectual, there is an immunity from punishment, no matter how great an offender

the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people."

In this spirit I approach the case at bar. The defendants may be guilty and deserve their sentence, but to deny them a fair trial would be a wrong, not to them alone, but greater still to the integrity of the law in the preservation of which every citizen has the supremest interest.

To begin with, I am opposed to any further extension of the doctrine of conspiracies, which, in this State, has been already carried far beyond the danger line. The Court seems to rely principally upon the cases of *State v. Buchanan*, 5 H. & J. (Md.), 317; *State v. Brady*, 107 N. C., 822, and *State v. Younger*, 12 N. C., 357. Buchanan's case is regarded as one of the leading cases, and will probably continue to be so regarded as long as Judges, impressed with its apparent learning, take for granted its citations. But I am free to say that the argument of the learned counsel for the defendants has convinced me that that case is not only inherently vicious upon its face, but is founded upon a large array of miscitations and embellished with a vast amount of misinformation. For instance, that case holds "that an indictment will lie at common law for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only." What limit is there to such a definition, and what is meant by the word "immoral?" In its widest sense it might mean any act, which, in the opinion of the Court, was contrary to private morality or revealed religion. Can this be the law anywhere? Certainly not in this State, unless made so by Brady's case, or that at bar. I do not think that Brady's case goes that far in that direction; but on another point it does go beyond any case within my knowledge. With-

out any citation of authority, and by some process of reasoning incomprehensible to me, it holds that the Court below *properly refused* an instruction that, *"though the representations might be false, if the defendants honestly entertained the opinion they were true, they would be not guilty."* I can only say that such a ruling is, in my opinion, without foundation in law or justice, and I regret that it should be found in an opinion of this Court. It is true the Court says that the "Court properly refused them in the words asked," but as the words themselves were unobjectionable, and the instruction does not appear to have been given in any words, the qualification of the Court merely emphasizes the refusal.

The opinion of the Court before us cites Younger's case as holding that "a combination of two or more to do an unlawful act, or *one prejudicial to another,* is indictable at common law as a conspiracy." This is in the syllabus, but not in the case. What the *Court* said was, "that every conspiracy to injure individuals, or to do acts which are unlawful, *or prejudicial to the community,* is a conspiracy, and indictable." There is an essential difference between being prejudicial to the *community* and only to an individual. In that case the offense was a conspiracy to cheat by gambling, which was in itself unlawful.

Younger's case is moreover in direct conflict with the opinion of the Court as to the antiquity of the present doctrine of conspiracies, as in that case Chief Justice Taylor, perhaps more learned in the ancient common law than any Judge who has ever sat upon this bench, says that, "conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person, by perjury and a perversion of the law."

But it may be said that the swindle which these parties contemplated was so clearly a crime that some of this discussion has no necessary application. Admitting that to be true, I

am now discussing the opinion of the Court. If it goes beyond the facts of this case, so must I. If it gives its unqualified approval to the cases of Buchanan and Brady, with all their inherent errors and vast possibilities of danger, then I must express my disapproval in terms equally plain; and if any unguarded words of mine may appear too strong, I know my brethren will ascribe them to their true motive—the strength of my convictions. The opinions of this Court are not mere decisions of pending cases. If they were, mere *per curiam* judgments would suffice, at least in cases of affirmation. The real object of the *opinion,* as contra-distinguished from the judgment, is to lay down general principles as applied to a certain state of facts for the determination of all future cases of similar nature. The mere character of the defendant does not affect the principle. It is only a gold-brick man to-day, but who may it be to-morrow? Among the *general principles* resulting from the opinion of the Court and the cases it specifically approves are the following: That an indictment for conspiracy will lie at common law, (1) "for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only;" (2) for "a combination of two or more to do any unlawful act, or one prejudicial to another," individual; (3) that "though the representations (relied on to convict) might be false, if the defendants honestly entertained the opinion they were true, they would be * * guilty."

From these propositions of law I emphatically dissent. My own views as to the dangers attending the expansion of the doctrine of conspiracies can not be better expressed than in the following words of Judge Campbell, in delivering the opinion of the Court in *People v. Barkelow,* 37 Mich., 455: "There is no class of cases where defendants are better entitled to the protection of the law against vague charges than where they are charged with conspiracy. The course of legal

experience has shown this to have been a familiar resort to catch innocent persons by throwing a drag-net of vague charges, and resorting to suspicions and prejudices to induce juries to convict persons who find it impossible to escape the malicious insinuations of false accusers. Titus Oates' plot has been a warning to all courts and jurists not to encourage any looseness in charges, which, in exciting times, juries and communities are only too ready to catch at to punish those who are unfortunate enough to be suspected." This opinion, concurred in, amongst others, by Judge Cooley, shows not only the great learning and clear comprehension of the present, of those eminent jurists, but also their prophetic grasp of the possibilities of the future. A few years later the English doctrine found its legitimate outcome in *Regina v. Parnell*, 14 Cox, 508, where the great Irish leader, with others, was indicted for a conspiracy to impoverish owners of land in Ireland by soliciting their tenants not to pay rent. Lord Fitzgerald in summing up the case to the jury said that it was plain and clear that an agreement of two or more persons to commit any wrongful act was an indictable offense. "If," said he, "a tenant withholds his rent, that is a violation of the right of the landlord to receive it; but it would not be a criminal act in the tenant, though it would be in the violation of a right; but if two or more incite him to do that act, their agreement so to incite him is, by the law of the land, an offense." Is not this equivalent to saying that a bare agreement of two persons to break a simple contract, or to induce another one to do so, is a crime? I do not suppose that anyone will deny that the indictment of Parnell was purely for political reasons; and if the English rule prevails in this State, what is there to prevent the indictment of the members of our usual labor organizations?

I am further of the opinion that the first count in the indictment, on which alone the defendants were tried, is not

sufficient either to put them upon their guard or to furnish the basis for the future defence of former conviction or acquittal. Again the English rule is invoked, but there a bill of particulars is granted practically as a matter of course. The Court in its opinion cites section 259 of The Code, to the effect that "the Court may in all cases order a bill of particulars of the claim of either party to be furnished." If this section applies to criminal actions, which I doubt, it can not help this case, because the Judge *refused* the request. Whatever might have been the effect of a bill of particulars, if it had been furnished, surely the refusal of the Court to grant it can not validate an indictment insufficient in itself.

But again, the Court says that the Solicitor for the State need not have elected between the counts, but he *did* elect, and *nol prossed* all but the first count. Those counts are, therefore, as much out of the indictment as if they had never been in it. But the opinion says that the second and third counts gave the defendants the information they desired. Can it be that a defendant is required to go to a bill of indictment that has been *nol prossed* to find out the meaning of the bill on which he is tried? I am aware of the line of decisions that it is not necessary to set out the particular means by which the cheating was to be accomplished, that is, the indictment need not state each particular act or false pretense upon which the State relied, because this would be impracticable; but it *must set out enough to constitute a crime, and to identify that particular crime with reasonable certainty.* Suppose an indictment were to charge simply that John Smith did, in the year 1900, in the county of Wake, attempt to steal from William Jones, would anyone suppose that Smith could be convicted? Again, suppose that Smith was indicted for attempting to burn a *barn* in the year 1900, and in the county of Wake, could be tried for attempting to burn any or all of the numerous barns in Wake County that may have been

in existence during the year 1900, or any other year within the legal radius thereof? But, forsooth, if Smith is indicted for *conspiracy* to burn some indefinite barn, without burning, or attempting to burn, any barn whatever, then nothing more need be said. If such is the law, then I am ignorant of the law.

There are several errors, which, for want of time, I must pass over, or notice only in the briefest possible manner.

I think the admission in evidence against Hawley of the card bearing his name was fatal error. This card was found in Howard's possession *after* his arrest. There is no evidence that it was ever in Hawley's possession and no suggestion that it is in his handwriting. When shown to him he denied all knowledge of it. It might as well have borne the name of any prominent citizen of Greensboro or State official. Would it then have been evidence against anyone? If not, why should it have been evidence against Hawley? The majesty of the law is such that the loftiest are within its reach and the lowliest within its protection.

Passing over other points, I come now to two errors, similar in nature, but occurring at different stages of the trial, either one of which is sufficient to entitle the defendants to a new trial, and the combination of which renders it morally impossible that they should have had such a trial as they are entitled to by "the law of the land."

The record shows that after the case had been called for trial and the defendants had pleaded not guilty, and while the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and empaneled and during the trial of said cause. The Solicitor objecting, said that the witness Paul Garrett would be the first witness examined, and the others would testify as to matters not in his knowledge, except the detection in Greensboro.

Whereupon the Court remarked, "that it was a matter of discretion with the Court, and that all the witnesses, except the complaining witness, Garrett, and the high Sheriff of the county, might be excluded from the Court; but as to these witnesses, *their high character as citizens forbade the idea that either of them would be influenced by the testimony of the others!*"

This remarkable statement of fact by his Honor was made in the presence of the jury, after the case had been called for trial, and in passing upon a motion in the action. It was not necessary, as he could have refused the motion in his discretion without giving any reason, or he might have given the reason suggested by the Solicitor, which would have been harmless. His testimony to the high character of Garrett could not have been stronger, even if he had been a witness; and can we suppose that the jury would not be influenced by such a statement coming from the Judge as to the character of a witness personally unknown to them? Taken in connection with his subsequent charge—and the jury must have connected the two—its practical effect was to withdraw from their consideration the credibility of a witness whose testimony was absolutely essential to the prosecution. The opinion suggests that the jury may not have heard the remark. Such a suggestion comes from the Court alone. The evident gist of the exception is that the remarks were made in the presence of the jury and were calculated to influence them. The Attorney-General, in his able brief for the State, says: "It is conceded by the defendants in their third assignment of error, page 111, that 'these remarks of his Honor were made before the jury was passed upon by either the State or defendants, but when the regular panel was present in the court-room *in the jury box.*'" The italics are mine. He never for a moment suggests that they were beyond the hearing of the Court, but proceeds to argue that the defendants'

remedy was to "have taken steps looking to the elimination of such jurors as might have been affected by the remarks of his Honor."

The opinion refers to the English rule permitting Judges to express an opinion upon the facts, but this rule has long ceased to prevail in this country. Even where it still lingers, it is coupled with the obligation upon the Judge to instruct the jury that they are not bound by his opinion of the facts. The general rule is thus clearly stated in 11 Enc. Pl. & Prac., 97: "As stated in a preceding section, the practice in most States forbids any expression of opinion as to the weight and sufficiency of the evidence; and the rule, as will be subsequently shown, *is most stringently enforced.* Not infrequently Judges evinced partisanship in their charges, and moulded verdicts to their will; and juries as frequently shirked responsibility, and really adopted the opinion of the Judge, finding their verdict as he directed. It was to put a stop to this, and *to secure the constitutional right of trial by a jury,* and *not* by a Judge, that the various limitations upon this common law power were imposed by the Constitution or by statutes. The trend of modern action, both legislative and judicial, is to watch over and protect very jealously the legitimate powers of the jury, and to prevent the Court from overstepping the line which separates law from fact. 'Trial Judges can not legally indicate their opinion, either expressly or impliedly, *intentionally or otherwise,* as to the credibility of the witnesses, or as to the truth of any fact at issue, and the subject of the evidence.'" In support of this rule five or six hundred cases are cited, of which twenty are from this State. The common law rule was expressly abrogated in this State by the Act of 1796, now Code, sec. 413, which reads as follows: "No Judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true

office and province of the jury." From the first, this statute has been uniformly given a liberal interpretation in order to carry out its essential principles; but now, for the first time, this Court proposes to overrule the settled policy of a hundred years, and adhere to the exact letter of the law. This necessarily involves overruling numerous decided cases, amongst others those of *Reel v. Reel,* 9 N. C., 63; *State v. Dick,* 60 N. C., 440; *Willey v. Gatling,* 70 N. C., 410; *MacRae v. Lawrence,* 75 N. C., 289; *Crutchfield v. Railroad,* 76 N. C., 320; *State v. Dancy,* 78 N. C., 437; *State v. Jenkins,* 85 N. C., 544.

There are numerous other cases enunciating the same principle, but I have cited those only in which a new trial was granted. In all of these cases a new trial was ordered, although none of them came within the letter of the statute, inasmuch as the Judge did *not* "give an opinion whether a fact is fully or sufficiently proven." In some of them he was not even addressing the jury, as in Dick's case. In that case this Court says: "On the trial a question arose as to the withdrawal of certain confessions of the prisoner. The Court declined withdrawing them, but remarked to the Solicitor for the State that after the other evidence already given in the cause, he (the Solicitor) might withdraw them if he chose to do so, which the Solicitor declined. This seems to us an expression of opinion on the part of the Judge, that the case was sufficiently proved without the aid of the confessions. This is not directly asserted, but is a matter of inference plainly from the manner in which the expedient of withdrawing the testimony is suggested." * * * "The object" (of the statute) "is not to inform the jury of their province, but to guard them against any invasion of it. The division of our courts of record into two departments, the one for the judging of the law, the other for judging of the facts, is a matter lying on the surface of our judicature, and is known

to everybody. It was not information on this subject the Legislature intended to furnish; but their purpose was to lay down an inflexible rule of practice—that the Judge of the law should not undertake to decide the facts. *If he can not do so directly, he can not indirectly; if not explicitly, he can not by innuendo.* * * * This, we suppose, has been to maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was without some such provision constantly in danger from the will of the Judge acting upon men mostly passive in their natures, and disposed to shift off responsibility; and in danger also from the ever active principle that power is always stealing from the many to the few."

The Court has said in *State v. Davis,* 15 N. C., 612, speaking by Gaston, J.: "It is obvious that if we confine ourselves to the *words* of this statute (Act of 1796), there is no ground for the complaint which we are now considering. But it has been long since settled that the literal is not the true interpretation of the act. Solicitous to discover and faithfully to carry into execution the legislative will, this Court has fixed its intention upon the purposes declared in the act, and has given to it such a construction as, it believed, would most effectually accomplish these purposes. * * * But if in doing all this, he (the Judge) intimates his individual opinion as to the existence or non-existence of a controverted fact, on which side of the controversy he believes the truth to be, or which of the witnesses he regards as having the higher claims to respect for his accuracy and probity, he overleaps the boundary of duty and invades the peculiar and exclusive province of the jury."

This Court has said in *State v. Jones,* 67 N. C., 285: "This (the statute) has been held to mean that the Judge shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of the evidence. This

construction, in the last particular, *goes beyond the words of the act,* but it is accepted as a proper one."

In *State v. Dixon,* 75 N. C., 275, this Court has said: "This statute is but in affirmance of the Constitution, Art. I, secs. 13-17; and well settled principles of the common law as set forth in *Magna Charta.* The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and *any inference* by the Court tending to influence them into a verdict against their convictions is irregular and without the warrant of law."

In *Crutchfield v. Railroad,* 76 N. C., 320, this Court granted a *venire de novo* because the Judge below in his charge to the jury said that, "It was not denied but that Dr. Bahnsen was a gentleman of unquestionably high character in his profession and that he appeared to be a gentleman of culture." In that case the Court says, on page 324: "Nor does it matter if his Honor was (if he was) speaking of another part of Dr. Bahnsen's testimony when he put his estimate upon him as a physician of high character and a gentleman of culture. That was the mark put upon the *man,* and it attached to every part of his testimony. A Judge ought not to state to the jury his estimate of a witness, or how he appears to him."

In *MacRae v. Lawrence,* 75 N. C., 289, a new trial was granted by this Court because the Judge below, referring to two witnesses, whose testimony was conflicting, charged the jury, "that both the witnesses were gentlemen, and that it was a pure matter of memory." This Court, holding that such an expression was fatal error, says: "Again, one of two witnesses, where they differ, may be corrupt. And the party against whom his evidence is, may so insist before the jury, and his Honor can not tell the jury that he is not corrupt, but that he is a 'gentleman.'" If it is fatal error for the Court

to tell the jury that the principal witnesses on each side are *both* gentlemen, how much greater error is it for the Judge to single out the prosecuting witness alone, and say that he is a gentleman of such high character that his veracity must not be questioned.

But it is said that this remark was made before the jury was empaneled. With all due respect for the Court, this seems to me the purest technicality. If it is not *haerens in cortice,* it is because it does not reach the inner bark.

It is true the jury had not been *empaneled,* but the case had been called for trial, and the regular venire was in the jury box. The remark was not a mere "passing compliment," but a statement of fact upon which his Honor based his ruling on a motion in the action itself. It did all the harm it could have done if it had been in the charge, and is clearly in violation of the act which this Court has repeatedly said in substance confers no new right, but is simply in affirmance of the Constitution of this State and the principles laid down in *Magna Charta.*

And yet, it is proposed to overrule so many cases, and establish so dangerous a precedent, upon an immaterial ruling in Jacob's case sustained by a mere dictum in Jackson's. Let us examine those cases. When Jacob's case was here in the 107th Reports, no allusion whatever was made to the point before us. When the case was first here, 106 N. C., 695, the Court says: "It is difficult to see how the remark of the Judge (that he had been informed by the jailer that he apprehended that Jacobs would escape if he had the opportunity) violated any provision of this statute. No juror had been selected; the remark was not in the presence of the jury, nor did it contain any opinion that 'a fact was fully or sufficiently proved.' No facts had been shown in evidence. Indeed, had the jury been empaneled, the statute prohibited the Judge 'from expressing an opinion only upon those facts re-

specting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends.' " If the remark was not made in the presence of the jury, and would not have been improper, even if the jury had been empaneled, what difference did it make whether the jury was empaneled or not?

In *Jackson's case,* 112 N. C., 851, the objectionable remark was made, not by the Judge, but only by a *bystander;* and yet the opinion proceeds to say that "remarks made by the Judge on such motions do not come within the prohibition of the statute." (Citing *State v. Jacobs.*) As the Judge had made no remark whatever, this was a pure dictum. And yet these two are the only cases which are even claimed to furnish any authority for the position of the Court.

I come now to the last exceptions that I shall discuss. These two exceptions are addressed to the following portion of his Honor's charge: "Reference has been made by counsel for the defence to the testimony of the witness Garrett and his course in connection with the apprehension and arrest of the defendants in connection with this charge, and has been made the subject of comment and criticism. The Court, therefore, takes occasion to say that if the evidence, as disclosed by the testimony of Garrett, satisfies you that he acted in the matter either for the purpose of detecting the defendants, having suspected them of an intention to cheat and defraud him, or if he acted under the belief that the representations and inducements held out to him were honest and true, and that in consequence of either of these beliefs he came to Greensboro to ascertain the truth of such impressions, then he acted within the provisions of the law, *and his course is not the proper subject of criticism or adverse comment.* The Court in this connection charges you that there is no evidence that in any way connects him with the defendants in any charge of conspiracy to violate the law. If he comes to detect and

apprehend the defendants in the commission of an intended crime, his course is not only proper, but *is commendable.* If he came under the impression that the business transaction was a legitimate and honest one, by means of which he would be able to acquire legitimate and honest profit, then he had a right to come for such purpose, and *it would not be a subject of criticism."*

His Honor apparently proceeded upon the assumption that there were only two possible constructions to place upon Garrett's conduct, either that his purpose was to detect crime, or to engage in a legitimate business enterprise, one of which was proper and the other commendable. No other hypothesis seems to have entered his Honor's mind, or to have been left to the jury. Taken in connection with his previous ruling as to Garrett's high character, what was left for the jury except to convict? If they believed Garrett, they must find at least two of the defendant's guilty, Howard and Daley. Without Garrett, they could find no one guilty. The defendants did not introduce any testimony, but relied upon their legal presumption of innocence. If they could impeach Garrett they would be acquitted, and this they attempted to do by a rigid cross-examination. Whether they succeeded was for the jury alone to say, without any intimation whatever from his Honor as to the weight of the evidence, or the credibility of the witnesses. The parts of Garrett's testimony relied upon by the defendants for his impeachment are thus set out in their brief: Garrett, a man of wealth, is approached by defendant Howard and has laid before him a proposition to take him into partnership in a gold mine, with immediate compensation for a time at $25 per day and expenses, and incidentally the probable purchase by him (Garrett) of some $12,000 worth of gold. (Record 22, 23, 24.) Howard at this interview exhibited a large roll of bills (Record 39) and paid Garrett $10 on account. (Record 25.) Garrett accepted

this money and Howard left the office, having appointed a rendezvous two days later at Greensboro. Garrett testified that at this interview he made up his mind Howard was a confidence man (Record 42), and as the latter crossed the street on leaving Garrett's office, Garrett pointed him out to two of his employees, with the remark, 'If you want to see a genuine gold-brick man, look out of the window, quick.' (Record 18.) His faith in Howard was so small that he even suspected the $10 bill paid him to be counterfeit (Record 18). What then was the duty of Garrett when his mind first reached the conclusion that Howard was a confidence man, a 'gold-brick man.' Clearly it was to order him out of his office with a threat to denounce him to the authorities. He might well have gone farther. He might have informed the Sheriff or the police of his interview and of his suspicions, leaving to them the duty of dealing with Howard and the others. What he did was to put himself into communication with the Chief of Police at Richmond, Va.; he wrote a long letter to Patterson, accompanying it with a letter of introduction of Mims from Lewis (Record 25). All this was to lay an elaborate plan to apprehend the defendants, for whom, by the way, he believed there was a reward outstanding of $20,000 (Record 45). He then gave his letters to Mims, and so solicitous was he that there should be no failure of justice, and, incidentally, that he should not fail of the reward, that he gave Mims $20 or $25 for expenses (Record 45). Thus his arrangement for arrest having been completed, he set about enticing defendants into a completion of the supposed objects of the conspiracy. He had previously, at his first interview with Howard, so far fallen in with Howard's plans as to make two drafts of a telegram, one to use if the Indian were amenable, the other in the event he were not (Record 17). On the second day after the interview with Howard, Garrett proceeded to Greensboro to keep the appointment.

On arrival he saw Mims and Patterson, to whom for thirty minutes he talked 'pretty plainly,' and was told that the Sheriff had the matter in charge (Record 25, 28). There, also, he met Howard, and after he counted Howard's money for him (Record 26), the two drove out in a buggy to the place where the Indian was camped (Record 29, 30). On this drive, Howard showed signs of backing out, but Garrett urged him on—not once, but several times. The Sheriff and Patterson passed them on the road. Howard thought they looked suspicious, but Garrett, mindful of his civic duty and the reward and the roll of bills he had just counted, ridiculed the notion. The Sheriff and Patterson were 'just two fellows that had been down town and got drunk.' Again, Garrett said, 'The next time you stop I am going to take the horse and buggy and go back to town' (Record 31). When they arrived at the Indian's camp, Garrett suggested that Howard tell the Indian that he, Garrett, was Andrew Garrett's brother. 'You tell him I'm Andrew Garrett's brother' (Record 33). The alleged gold bars were then produced, and just as the weighing was completed the officers closed in and arrested Howard and Daley (Record 35). This successfully completed the first half of Garrett's plan. In *Com. v. Shea*, 9 Phil., 569, which was a case where certain parties induced a saloon-keeper to sell them beer in violation of the Sunday liquor law for the purpose of informing on him, Judge Paxson said: 'For the relators it was urged that they were engaged in a lawful object, to-wit, the enforcement of the Sunday liquor law. * * * It was never intended that a man should violate the law in order to vindicate the law.' * * * Immediately after the returning from the scene of arrest, Garrent went to the office of King & Kimball, attorneys at law, and retained them to appear in the criminal prosecution; and also, being still mindful of his civic duty, to prosecute a cival suit for $2,000 against these defendants for

an alleged breach of contract (Record 48, 49). In aid of this suit he caused an attachment to be levied on the clothes, trunks, jewelry and other personal effects (Record 49, 76, 77), including the roll of bills displayed by Howard at their first interview, and which he had kindly counted for Howard at Greensboro just before the arrest. Having secured everything in sight, even to their changes of underwear, this good citizen leaves the State of North Carolina to pay the expenses of defendants in this suit by compelling them to defend *in forma pauperorum.*"

Upon this review of the testimony of the prosecuting witness as relied upon by the defendants, it seems to me clear that his Honor committed fatal error in his charge, and that a new trial should be granted.

I have given much attention to this case, more than my official duties would justly allow, and much more than the defendants apparently deserve; but I am firmly convinced that there is nothing more dangerous than to attempt to stretch established principles to meet the supposed exigencies of particular cases. I can not do better than close this opinion with the words of Chief Justice Chase in the concurring opinion in Ex Parte Milligan, 4 Wall., 2, 132, as follows: "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this Court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict even upon the guilty, unauthorized though merited justice."

FURCHES, C. J., dissenting. Without affirming all that is

said by my brother Douglas in the elaborate and learned discussion in his dissenting opinion, I can not say that I am satisfied that the defendants have had a fair trial. In my opinion there is error, at least, in what the Judge said as to Garrett's high character on the motion to separate the witnesses, and in what he said near the close of his charge to the jury, that Garrett's conduct was not a proper subject for unfriendly comment.

In my opinion there should be a new trial.

STATE v. CALDWELL.

(Filed December 20, 1901.)

1. JURY—*Peremptory Challenges—Homicide—The Code, Sec. 1199.*

Where, upon a trial of an indictment for murder, the solicitor states that he will ask only for a verdict of murder in the second degree or manslaughter, the prisoner is not entitled to more than four peremptory challenges.

2. NOLLE PROSEQUI—*Indictment—Counts—Trial.*

Where a person is indicted for murder, the solicitor may take a *nolle prosequi* as to murder in the first degree, and the prisoner may be tried on the indictment for murder in the second degree or manslaughter.

INDICTMENT against Hezekiah Caldwell, heard by Judge *Frederick Moore* and a jury, at July (Special) Term, 1901, of the Superior Court of MADISON County. From a verdict of guilty of murder in the second degree and judgment thereon, the prisoner appealed.

Brown Shepherd, for *Robert D. Gilmer, Attorney-General,* for the State.

W. W. Zachary, for the defendant.

STATE *v.* CALDWELL.

FURCHES, C. J.: Indictment for murder. At the trial, and before the jury were called or empaneled, the Solicitor, with the permission of the Court, caused the following entry to be made upon the docket: "State v. Caldwell. In this case the State files notice (the prisoner being present in open court) that a verdict of guilty of murder in the first degree will not be asked for by the State, but only murder in the second degree or manslaughter. Gudger, Solicitor." Whereupon, the prisoner, by his attorney, Mr. Zachary, moved for his discharge, upon the ground that the order of the Solicitor was equivalent to a *nol pros.* of the charge of murder in the first degree, and that being so, he was entitled to his discharge. The motion was refused and the prisoner excepted, and the trial was proceeded with.

This exception has been virtually disposed of in the case of *State v. Hunt,* at last term, 128 N. C., 584. In that case the Solicitor, in a more informal manner than the Solicitor did in this case before the commencement of the trial, said he would not ask for a verdict of murder in the first degree, and the trial was then proceeded with; and in selecting the jury the prisoner demanded the right to challenge twenty-three jurors. This demand was denied, the Court stating that the Solicitor having stated that he would not ask for a verdict for murder in the first degree, and that the Court would treat it as a *nol pros.* as to that offense, and would so charge the jury. And so treating it, the prisoner was not on *trial for his life.* The prisoner in that case was convicted of manslaughter and appealed upon the ground that he was not allowed twenty-three peremptory challenges. This Court sustained the ruling of the Judge in that case upon the ground that, although the charges of murder in the first degree and in the second degree and manslaughter were all in the same bill of indictment and in one count, this was specially provided for in the

Act of 1893, Chap. 85; that the offenses were distinct, and it was as if they had been charged in separate counts.

The case of *State v. Hunt* is the same in principle, and this case must be controlled by it. There was no error in refusing the motion.

During the progress of the trial there were several exceptions taken by the prisoner to the ruling of the Court upon questions of evidence. We have examined them all and find them to be without merit, and not of sufficient importance to demand a discussion.

The prisoner asked several prayers for instruction, and some of them were not given and he excepted. To understand these prayers, it is necessary to state briefly some of the facts as shown by the evidence:

The prisoner and the deceased were young men, and in the morning of the day of the homicide (Sunday) they had a personal difficulty at a church, a few miles from where the killing took place. At the time of the killing the prisoner and his brother (now dead) were at the house of one Lewis. The deceased, Payne, and his brother passed the house of of Lewis and inquired for the prisoner and his brother. After passing the house of Lewis for a short distance, they turned back and passed the house of Lewis again, going in the direction from which they came, when they inquired for the prisoner and his brother. During this time the prisoner had taken Lewis' gun from the rack and loaded it, and shot the deceased through a crack in the house. And the prisoner contended that this was murder in the first degree, and as the Solicitor had entered a *nolle prosequi,* or what was equivalent thereto, the prisoner could not be convicted of murder in the second degree, and asked the Court to so charge the jury. The Court refused and the prisoner excepted.

We agree with the prisoner that this evidence, if believed, made a case of murder in the first degree. And we are at a

loss to know why the Solicitor declined to ask a conviction of murder in the first degree. We must suppose that he had reasons for so doing, which we have no knowledge of. But we do not agree with the prisoner that the evidence did not also prove murder in the second degree. The law of murder in the second degree, since the statute of 1893 is the same that was murder before that statute. *State v. Booker,* 123 N. C., 713. And before that statute, where the killing was admitted or shown to have been done with a deadly weapon, the law presumed malice, and, nothing else appearing, the killing was murder. This is the law as laid down by Sir Michael Foster in his Crown Pleas, and has been the law in this State ever since we have had a government.

It may be fortunate for the prisoner that we have found no error for which we should give him a new trial. For he is insisting that the evidence proves murder in the first degree. If we had given him a new trial and upon the case coming on for trial again, the Solicitor, with the consent of the Court, should withdraw his notice to the prisoner, that he would not ask for a conviction on the charge of murder in the first degree, as he would have had the right to do (*State v. Smith,* at this term), it seems to us the prisoner would have been in a bad condition—a new trial upon his own contention that the evidence so clearly showed murder in the first degree, that it was error for the Judge to charge the jury that it was also evidence of murder in the second degree.

But we have found no error that entitles the prisoner to a new trial, and the judgment is

Affirmed.

STATE v. HUNT.

(Filed December 23, 1901.)

LICENSES—*Taxation—Emigrant Agent—Acts 1901, Ch. 9, Secs. 84, 104—The Constitution, Art. V, Sec. 3—U. S. Constitution, Art. I. Sec. 8, Clause 3.*

Under Acts 1901, Chap. 9, secs. 84, 104, a tax of twenty-five dollars on emigrant agents or persons engaged in procuring laborers to accept employment in another State is constitutional.

INDICTMENT against Chas. Hunt, heard by Judge *H. R. Starbuck* and a jury, at July Term, 1901, of the Superior Court of FORSYTH County. From a judgment of guilty on a special verdict, the defendant appealed.

Brown Shepherd, for Robert D. Gilmer, Attorney-General, for the State.

Holton & Alexander, for the defendant.

CLARK, J. The defendant is indicted for acting as "emigrant agent in procuring laborers to accept employment in another State" without having obtained a license as emigrant agent. The special verdict finds that "the defendant has been getting hands to work for the Norfolk and Western Railway Company in the States of Virginia and West Virginia; that he has been engaged in the business of obtaining hands to accept employment in another State," and that on demand he refused to pay said tax.

The statute provides, Laws 1901, Chap. 9, sec. 84: "On every emigrant agent or person engaged in procuring laborers to accept employment in another State, a tax of $25." Section 104, same chapter, prescribes: "Every individual or firm carrying on or conducting either of the trades or business upon which a specific amount of license tax is levied, shall pay

the required license tax for every separate location in which the trade or business is conducted, unless otherwise herein provided," and section 102 authorizes the county to "levy the same tax and no more."

The defendant moved in arrest of judgment on the ground that the act is in violation of the Federal Constitution, because: (1) It is contrary to the Interstate Commerce clause, Art. I, sec. 8, Cl. 3. (2) That it impairs the privileges of the citizens of one State in other States. (3) Because it wrongfully affects the functions and operations of the Federal Government. (4) For "these and other reasons" the act is void. The points thus presented have been recently decided by the United States Supreme Court. *Williams v. Fears,* 179 U. S., 270 (10 Dec., 1900). The Georgia statute there called in question imposed a tax "upon each emigrant agent, or employer or employee of such agents, doing business in this State, the sum of five hundred dollars, for each county in which business is conducted." It is held, in the opinion by Fuller, C. J., that this tax "upon emigrant agents, meaning persons engaged in hiring laborers to be employed beyond the limits of the State, does not amount to such an interference with the freedom of transit, or of contract, as to violate the Federal Constitution; nor does it deny the equal protection of the laws, because the business of hiring persons to labor within the State is not subjected to a like tax; that these labor contracts are not in themselves interstate commerce, nor is the tax upon such occupation a burden upon such commerce."

The opinion further holds that "the business itself is of such nature and importance as to justify the exercise of the police power in its regulation." The opinion is so full and complete as to render unnecessary any discussion by us.

The defendant also demurred to the indictment that it was in conflict with the State Constitution in that: (1) It is not

such a tax as is authorized to be levied by Art. V, sec. 3 of the State Constitution. (2) Because it restricts a harmless occupation. (3) That it prescribes no supervision of the business, and is, therefore, not an exercise of the police power. (4) Because of the unreasonableness of the license fee.

The tax, if regarded as a tax upon a trade or business, is within the terms of section 3, Art. V, of the Constitution of North Carolina. It is not a restriction upon the business any more than any other tax upon trades and professions. That it can also be upheld as an exercise of the police power is decided in the above cited case in 179 U. S. The reasonableness or unreasonableness of the tax is a matter for the Legislature, not for the Courts. Tiedman Police Powers, sec. 101, page 277. It is only when the license fee is exacted solely as a police regulation that the Court can consider whether it is so unreasonable as to amount to a prohibition, and that only as to vocations which can not be prohibited. And in no aspect could we hold this tax to be an unreasonable one in amount. We understand the legislative imposition of "$25 for every separate location in which the trade or business is conducted" to mean each town, city or village where the business is conducted as a separate, distinct, business, requiring the personal attention of the agent or his sub-agent. Only those counties in which such sub-agencies are operated can levy a tax, and then only to duplicate the $25 levied by the State. It does not appear that the defendant operated in more than one county and one town, and indeed the judgment only requires the defendant to pay $50, "the tax he should have paid," and the costs. It is also by section 103 of said Chapter 9, Laws 1901, made the duty of the Sheriff in all cases of conviction for failure to pay the license tax on any business, occupation, etc., to collect before a Justice of the Peace a penalty of $50 for the benefit of the public schools.

The defendant relies principally upon *State v. Moore,* 113

N. C., 697, but that case was decided upon an entirely different state of facts, and, so far as any expressions therein conflict with what is said in the above cited case in the 179 U. S., or with this opinion, it is overruled.

It is a matter of some inconsistency that the defendant, professing to act as agent, representing the Norfolk and Western Railroad Company, should be appealing to this Court as a pauper. From the special verdict it would seem he was not the agent of the company, but a contractor agreeing to find and ship hands for a specified consideration.

No error.

MONTGOMERY, J., concurring. I concur in the opinion of the Court on the single ground that the defendant was exercising a trade, and the act of the Legislature imposing a tax of $25 on that trade was constitutional. Art. V, sec. 3, State Constitution; *State v. Worth,* 116 N. C., 1007. It is a tax, pure and simple. It is found in the Revenue Act, Chap. 9, sec. 84, of the Acts of 1901, and is there called a tax.

DOUGLAS, J., concurring. I concur in the judgment of the Court that the tax is constitutional, because it seems to me to come within the expressions "trades" and "professions" used in section 3, Art. V, of the Constitution. I am not disposed to strictly construe those words as referring only to the "learned professions" which are said to be theology, law and medicine. Such a construction would exclude many occupations that have always been regarded as legitimate subjects of taxation under the form of license. I think the definition most probably contemplated by the Constitution is the following taken from Webster. A profession is said to be "that of which one professes knowledge, the occupation, *if not mechanical, agricultural or the like,* to which one devotes one's self; the business which one professes to understand, and to follow

for subsistence." On the other hand, it is said that "trade comprehends every species of exchange or dealing, either in the produce of land, in manufactures, in bills or in money; but it is chiefly used to denote the barter or purchase and sale of goods, wares and merchandise either by wholesale or retail." Neither of these words is equivalent to occupation in its general sense. Therefore, I do not think that a farmer or a carpenter could be taxed as such, although one trading or dealing in the products of either might be liable as a trader. In the case at bar, if the defendant had acted only as the agent of one principal, I would doubt his guilt, but as he appears to have engaged hands for more than one, I think it may be said to be his profession. As he must necessarily travel from place to place to hunt up hands, it seems to me that the tax applies to the county. I do not see any other construction that would be reasonable, and if the law must be construed so as to impose an unreasonable and prohibitory tax, then I think it would be unconstitutional. It does not seem to me to be necessary to interfere with Moore's case. I freely admit that in the sense used in the Federal decisions, this clearly comes within the police power of the States; but the Constitution of this State is equally binding upon us as that of the United States, where there is no conflict, and it is the former which we are now construing.

FURCHES, C. J., dissenting. I do not concur in the opinion of the Court. If Art. V, sec. 3, of the Constitution, authorizes this tax, I see no restriction upon the legislative power of taxation, except taxes on properties, moneys and stocks, which shall be uniform. If it can tax a man for hiring hands to work on a railroad in another State, why not for hiring them to work on such roads in this State? And if it can tax a man for hiring hands to work on a railroad in this State, why can it not tax a man for hiring hands to work in a factory or upon his farm? Indeed, why may it not tax a man who is

"engaged" in farming or carrying on a farm? That is a *business,* and to hire hands is to procure hands. This law provides that "on every emigrant agent or persons engaged in procuring laborers to accept employment in another State," etc. An emigrant agent may be such a calling or business as might be taxed. But, in my opinion, one may engage in employing hands without being an agent, and if he does, I do not believe the Constitution will allow him to be punished as a criminal for so doing.

Under this indictment it was not necessary to show that the defendant was the agent of the Norfolk and Western Railroad Company, to make him guilty; but it was sufficient to show that he procured, employed hands "to work in another State." How many did he have to employ, procure, to make him a criminal, two or *three?* And he is to be liable for this tax and to indictment for "every separate location where it is carried on." What is meant by "every separate location?" Is it every place where he may hire a hand? If so, with the right of the county to duplicate the State tax, it may become larger than that of the Act of 1891, which was declared to be unconstitutional. *State v. Moore,* 113 N. C., 697. It is stated in the opinion of the Court that it means "each town, city or village" where the business is conducted. By what authority this is said I do not know, as neither "town, city, nor village" is mentioned in the act. If the act had said in each county, I would have known what it meant. But when it says in "each locality," I do not know what it means. Nor do I believe a revenue act is a police regulation. It is admitted in the opinion of the Court that, in order to sustain this conviction, it is necessary to overrule *State v. Moore, supra.* This I am not willing to do.

COOK, J., concurs in the dissenting opinion.

STATE v. NEAL.

(Filed December 23, 1901.)

LANDLORD AND TENANT—*Removal of Crops by Tenant—The Code, Sec. 1759—Evidence.*

Where a tenant is indicted for removal of a crop, he may show that on account of the breach of the contract of rental by the landlord he was due the landlord nothing at the time of the removal.

CLARK and COOK, J.J., dissenting.

INDICTMENT against Geo. M. Neal, heard by Judge *A. L. Coble,* at April Term, 1901, of the Superior Court of NASH County. From the judgment granting a new trial in the Eastern Criminal Court, the Solicitor appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for the defendant.

MONTGOMERY, J. The indictment is for the removal of a crop of cotton under section 1759 of The Code. That section is in the following words: "Any lessee or cropper, or the assignees of either, or any other person, who shall remove said crop or any part thereof from such land without the consent of the lessor or his assignees, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assignees on said crop, shall be guilty of a misdemeanor; and if any landlord shall unlawfully, wilfully, knowingly, and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor."

On the trial the defendant offered to testify that there was embraced in the contract between the landlord and himself a promise on the part of the landlord to repair the buildings on

the rented premises and that he failed to do so; and he also offered to testify that the landlord agreed to let him have 25 acres of land to cultivate that year, and instead let him have only 15 acres, and that in consequence of those breaches of the contract he had suffered damages to such an extent that at the time of the removal of the crop he owed nothing on the rent, or on account of advances. His Honor (the Judge of the Eastern Criminal Court) refused to allow the offered testimony and the defendant excepted. A verdict and judgment followed and the defendant appealed to the Superior Court. In that Court it was held that there was error in the ruling of his Honor (the Judge of the Eastern Criminal Court) rejecting the offered evidence, and a new trial was granted. The Solicitor for the State appealed to this Court.

The question presented for decision is a very important one in its practical relations to the agricultural interests of the State—important equally to the land owner and to the lessee and cropper. Can a lessee or cropper, who has not paid his rents and advances in money, or in a part of the crop, in an indictment for removal of the crops from the lands of his landlord without his consent, set up in that indictment the defence that he has suffered damages by a breach of the contract by the landlord in as great, or greater, amount than the amount due for rent and advances and try in the criminal action that question?

The Code, in the Chapter Landlord and Tenant, confers on the landlord remedies which guard his rights and interests in the crop more effectually than those afforded the tenant for the purpose of protecting his own against the landlord. The intention of the landlord, for instance, can be inquired of by the Court in indictments for the seizure of the crop of the tenant, and before he can be convicted the seizure must be shown to have been *unlawful, wilful, with a knowledge that nothing was due, without process of law and unjust.* On the

other hand, the intention of the tenant can not be inquired into; if he removes any part of the crop before satisfying all the liens held by the lessor or his assigns on the crop (even if he honestly believes he has paid all the rent) without a notice of five days to the landlord, or unless he gets the landlord's consent, his motives or intentions can not be gone into—he is guilty.

The main object of the statute, and especially section 1759 of The Code, is to protect the landlord. But we have no disposition either to extend the powers and rights of the landlord or to impair or restrict the rights and privileges of the tenant, and the law will not be construed by us to mean that the tenant can not remove the crop in cases where there is nothing due by him to his landlord or his assigns for rent, or for advancements, or to cover any amount due under stipulations in the contract. And we are of opinion that that matter can be shown in the trial of the indictment for the removal of the crop, although a verdict of not guilty would not be conclusive in a civil action afterwards brought about the same matter.

It is true that there are provisions in the Chapter entitled Landlord and Tenant in The Code which afford a speedy remedy to a tenant who has a controversy with his landlord in order that the rights of both may be ascertained and adjudicated. But the tenant is not compelled to resort to that remedy whenever the landlord makes a claim for rent or advances, or for damages for failure to comply with the stipulations in the lease or contract. He may, if there is nothing due, remove the crop without the notice required by the statute, or the consent of the landlord. And it makes no difference as to the question of whether the tenant is or is not indebted to the landlord is made to appear by proof that the tenant has suffered damages at the hands of the landlord by reason of his breach of the contract of rent or lease in a sum equal to or greater than the amount of the rent due, or by

proof of payment in money. Certainly in such an indictment the tenant would be allowed to prove, if he could, that he had paid in money to the landlord what he owed him—that there was nothing due; and we can not see any difference in legal effect between such a payment and a payment by the recovery of damages for a breach of contract by the landlord, and by which defendant has suffered in an amount equal to the rent due. The first method of proving payment is as much the trial of an action in debt is the last.

But, as we have said, the verdict of the jury on this indictment, even if in favor of the tenant defendant, could not estop the landlord from afterwards instituting a civil action against the tenant or a purchaser of the crop from him, either for its value or for its recovery in specie if it could be found. It would only put an end to criminal proceedings against either the tenant or a purchaser from him.

However, it may be proper to add that if in the trial of such an indictment it should turn out that the verdict would be against the defendant, neither his good intentions nor his motives, nor his belief that he had been endamaged by the landlord, would avail him, and they could not be proved on the trial. There was no error in the ruling of his Honor (the Judge of the Superior Court), and there must be a new trial.

DOUGLAS, J., concurring. I concur in the opinion of the Court that where the defendant is indicted for removal of the crop he may justify by showing payment, either actual or constructive, by a failure of consideration of the contract of the lease. The burden is on the defendant to show by a preponderance of the evidence satisfaction, either by payment or its equivalent. My reason for so holding is the hardship which might result to the tenant. It is practically impossible for the average tenant to give the bond required by law. Upon his failure to do so the landlord can take the entire crop,

no matter how largely it may exceed the rent in value, upon giving bond, and hold it until the action is finally determined. He can appeal to the Superior Court, and thence to this Court. In the meantime, the tenant can starve, or subsist upon charity. Under such circumstances, if he uses a part of his crop, under the penalty of going to jail if he fails to show that he has fully satisfied all liens, I think he should have the opportunity of showing payment, or its equivalent.

CLARK, J., dissenting. The statute under which the defendant is indicted, Code, sec. 1759, prohibits any lessee or cropper to remove any part of the crop "without the consent of the lessor or his assignees, and without giving him or his agent five days' notice of such intended removal, and before *satisfying* all liens held by the lessor or his assignees on said crop." This statute, passed in 1876-'77, is a most important one to the agricultural interests of the State. Indeed there is not one probably whose preservation in its integrity is more important to our farmers, whether owning or renting land. It was passed after careful deliberation and the fullest consideration in 1876-'77, and, with a slight modification in 1883, has been retained, amid all mutations of parties during the quarter of a century since.

The defendant does not allege *payment*. That would be a single issue, and would at once, if found in his favor, be an acquittal. But he sets up not payment, but alleged damages for breach of contract by way of counter-claim and set-off. Those matters can not be a "satisfaction" of lessor's lien, unless they had been either agreed to by him, or adjudged in a civil action to be so applied. Till then they are merely counter-claims for unliquidated and unallowed damages, and can not be set up as a defence of "satisfaction" in a criminal proceeding. To permit this to be done would be to destroy the efficacy of the criminal proceeding which the General As-

sembly deemed essential for the protection of the land owners of the State, and which no succeeding General Assembly has thought it ought to impair or repeal. Section 1754 emphasizes this remedy by guaranteeing the landlord's lien till his rents and advances are "*paid.*" Section 1756 further particularly points out the lessee's remedy when there is, as here, a controversy between him and the lessor. It is by application to a Justice of the Peace if the amount in controversy is under $200, or to the Superior Court if over that sum. If there is an appeal from the judgment, this section permits the lessee or cropper to retain and use the crop upon giving proper bond. If he fails to do so, the lessor can take the crop upon giving bond. If neither gives bond, the crop remains *in custodia legis*, and if perishable is to be sold and proceeds held by the Court to abide the result of the action. If the defendant had pursued that course, as required by the statute, this proceeding would not be pending. But to allow him to take the law into his hands, adjudge for himself that his counter-claim or set-off is good, and thus throw the statement of the account into a criminal action, would be contrary to the express language of the statute, and would deprive the lessor of the very protection the statute was enacted to give him, *i. e.*, the security of so much of the crop raised on his land as is equal to the rent unless the lessee or cropper (usually irresponsible pecuniarily) should give bond to abide the civil judgment upon the controverted matters.

In rejecting the evidence here offered by defendant to show damages for breach of contract to repair buildings and shortage in land agreed to be rented for a lump sum, there was no error, and none in the charge. *State v. Williams*, 106 N. C., 646. The possession of the landlord was not transferred to the lessee by sending the cotton to be ginned.

No error.

COOK, J. I concur in the dissenting opinion.

STATE v. JARVIS.

(Filed December 23, 1901.)

1. EVIDENCE—*Defect of Proof—Arrest of Judgment—Evidence—Waiver—Indictment—Exceptions and Objections.*

A defect of proof is waived if not taken advantage of before verdict.

2. VARIANCE—*Indictment—Waiver—Arrest of Judgment—Exceptions and Objections—Forgery.*

A variance between the *allegata* and *probata* is waived if not taken advantage of before verdict.

3. INDICTMENT—*Multifariousness—Forgery.*

The allegation in an indictment of different phases of the same transaction does not make the indictment multifarious.

INDICTMENT against Joseph F. Jarvis, heard by Judge *Frederick Moore* and a jury, at June (Special) Term, 1901, of the Superior Court of BUNCOMBE County. From a verdict of guilty and judgment thereon, the defendant appealed.

Brown Shepherd, for *Robert D. Gilmer, Attorney-General*, and *Frank Carter*, for the State.

Thomas Settle, for the defendant.

CLARK, J. The defendant was indicted for "uttering and publishing" a certain promissory note (set out in the indictment), knowing the same to be forged with intent to defraud, etc. There was no exception to the evidence or to the charge. It appears in the case that there was no evidence of "showing forth in evidence," and after verdict the defendant moved "in arrest of judgment," because those words are used in the bill which charges "did utter and publish and show forth in evi-

dence." The sole exception is to the refusal of the motion to arrest the judgment.

If it were essential to prove both the showing forth in evidence, as well as the uttering and publishing, still this is probably the first time that an appellant has gone on record as supposing that a variance or a defect of proof can be taken advantage of by a motion in arrest of judgment, which has till now always been restricted to errors on the face of the bill, which is in nowise deficient. 1 Bish. New Crim. Pro., sec. 1285. Besides, "an exception that there is no evidence is waived if not taken before verdict." *State v. Huggins,* 126 N. C., 1056, and a long line of cases cited in *State v. Harris,* 120 N. C., 578, and Clark's Code, at page 773. The bill is good at common law for "uttering and publishing." Arch. Crim. Pl.—Forms of Indictment for Uttering and Publishing. The addition of the words, "and show forth in evidence," did not vitiate the bill, but are mere surplusage if the uttering and publishing by other means was shown, as the jury find. Being only one of the methods of uttering and publishing, this was a mere statement of the transaction in different phases to meet the different aspects of the evidence, and was not the charging of different, distinct offenses, but the same offense by different means. Hence, the bill was not multifarious. *State v. Harris,* 106 N. C., at page 686, citing sundry decisions; 2 Bish. New Crim. Pro., sec. 434; 1 Wharton Crim. Law, sec. 727; *State v. Haney,* 19 N. C., at page 394.

No error.

DOUGLAS, J., dissenting. The defendant was tried upon an indictment, of which the following are the parts material to the question before us: "The jurors for the State, upon their oath present that Joseph F. Jarivs, late of the county of Buncombe, with force and arms, at and in said county, on or

about the first day of April, 1901, of his own head and imagination, unlawfully, wilfully, knowingly, wittingly, falsely and feloniously did utter and publish and show forth in evidence and attempt to employ as true, a certain promissory note * * * with intent to defraud, then and there well knowing that said promissory note under seal was false and forged, against the form of the statute," etc.

The defendant moved in arrest of judgment.

It is well settled that such a motion can be sustained only for error appearing on the face of the record; but I think that the error does so appear under the circumstances of this case. The case states that, "There was no evidence that the note had ever been used, or attempted to be used, as evidence in any judicial proceeding, except as the foundation of this indictment." This evidently was intended to present, and does present, the single question whether the indictment upon its face charges the offense for which the defendant was tried. We think it does not. The indictment confuses two sections of The Code, neither of which applies to the circumstances of this case. It was evidently intended to come under section 1029, and we think it would have been sufficient under that section, if the defendant had been tried for any such offense, inasmuch as it uses the words, "show forth in evidence." It is true it also uses the words, "did utter and publish," which are not in this section, but used only in section 1031, as applying to bank notes and checks. These words, when applied to anything but counterfeit money, are held to be equivalent to the words, "show forth in evidence." *Britt's case,* 14 N. C., 122, is directly in point. There, the third and fourth counts charged the defendant with "uttering and publishing as true" a forged order for the delivery of goods and money. The Court says: "There seems to be no reason to doubt the correctness of any of the opinions pronounced in the Superior Court, except that which relates to the force of the words, 'ut-

ter and publish,' in the third and fourth counts. They were held to be synonymous with 'show forth in evidence.' The former phraseology is that of the statutes relating to counterfeit money; the latter, of the acts for punishing forgery of private instruments. The different subjects may, of themselves, account for the difference of the terms used and seem to require a different meaning. But there is a decisive argument to be drawn from the Statute V Elizabeth, c. 14, from which ours is taken. The words of that statute are, 'shall pronounce, publish or show forth in evidence' (of which this last expression alone is retained by us) 'any such false or forged deed, etc. (except being attorney, lawyer or counsellor, he shall for his client plead, show forth or give in evidence such false or forged deed, etc., to the foregoing whereof he was not party or privy), and shall be thereof convicted,' etc. This plainly restrains the meaning of 'showing forth or giving in evidence' to a giving of the deed in evidence in a court of justice, and is altogether a different thing from the mere exhibition of it *in pais*. * * * A new trial must therefore be granted, although the case seems fully to justify a conviction," etc.

We have quoted so fully from the opinion of Chief Justice Ruffin because it seems to so completely cover every contention in the case at bar. It will be seen that it decides two points: (1) That the words, "utter and publish," when not used in relation to bank notes, are synonymous with "show forth in evidence;" and (2) that *neither* form of expression is sufficient to justify a conviction for a mere exhibition *in pais*. This case has been expressly approved upon this point in *State v. Stanton*, 23 N. C., 424.

It is contended that the words, "show forth in evidence," may be stricken out as surplusage, and the defendant convicted of the common law offense. This contention is contrary to the decision in Britt's case, where the words, "utter

and publish as true," were used by themselves and held insufficient. Moreover, words can never be stricken out as surplusage when striking them out would change the specific nature of the offense.

We must remember that the notice and protection to the defendant of a sufficient bill of indictment are not a matter of grace depending upon the will of the Court, or even that of the Legislature, but is a right expressly guaranteed by the Constitution. Our Declaration of Rights says in section 11: "In all criminal prosecutions, every man has the right to be informed of the accusation against him." Section 12 is as follows: "No person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment."

If a bill of indictment fails to charge a crime, or charges it too indefinitely to put the defendant upon notice, or in the same count contains divers expressions which by subsequent reconstruction and elimination can be made to charge any one of several offenses, it utterly fails to fulfill its constitutional purpose, and becomes worthless in fact and in law.

The essentials of a good bill of indictment are so clearly stated by Chief Justice Taylor, in *State v. Justices of Lenoir,* 11 N. C., 194, that I can not do better than reproduce his language as follows: "There are some rules relative to indictments, which it is indispensable to observe, notwithstanding the relaxation in point of form which is introduced by the Act of 1811. The indictment must still contain a description of the crime and a statement of the facts by which it is formed, so as to identify the accusation; otherwise, the grand jury might find a bill for one offense and the defendant be put on his trial in chief for another. The defendant ought also to know what crime he is called upon to answer, and the jury should appear to be warranted in their conclusion of 'guilty or not guilty' upon the premises to be delivered to them. The

Court should also be enabled to see on the record such a specific crime that they may apply the punishment which the law prescribes; and the defendant should be protected by the conviction or acquittal, from any future prosecution. These are elementary rules which must be substantially observed." The Act of 1811 referred to by the Court, is now section 1183 of The Code.

In the case at bar the defendant was convicted under an indictment using words which this Court has repeatedly construed to mean, using or attempting to use as evidence in a judicial proceeding. It is stated in the record that there was no evidence tending to convict the defendant of such a crime; and it is evident from the entire proceedings that no such crime was contemplated when the indictment was drawn. The defendant is, therefore, entitled to a new trial. This does not mean that he shall go unwhipped of justice if guilty. It simply means that he is entitled to that protection which is thrown around every one charged with crime by the Constitution and the laws of the land. I do not intend in any respect to return to the useless technicalities of the common law, but we must preserve those personal guarantees which lie at the foundation of our system of jurisprudence.

It should not be difficult for the Solicitor to draw a bill of indictment that will fit the facts in this case, if those facts justify a conviction; and thus the ends of justice will be met without infringing upon the rights of the citizen.

New trial.

STATE v. FOSTER.

(Filed December 23, 1901.)

BURGLARY—*First Degree—Acts 1889, Ch. 434.*

Under Acts 1889, Ch. 434, creating two degrees in burglary, a person may be convicted of burglary in the first degree for breaking into a store-house where there is a bed-room attached, and in which one regularly sleeps, and is sleeping at the time, and there is a breaking and entering into the bed-room.

INDICTMENT against Ben Foster, R. S. Gates, Harry Mills and Frank Johnston, heard by Judge *Frederick Moore* and a jury, at June (Special) Term, 1901, of the Superior Court of BUNCOMBE County. From a verdict of guilty and judgment thereon, the defendants appealed.

Brown Shepherd, for *Robert D. Gilmer, Attorney-General,* and *Frank Carter,* for the State.

Thomas Settle and *M. W. Brown,* for the defendants.

FURCHES, C. J. The defendants are indicted and convicted of burglary in the first degree. The facts are substantially as follows: D. J. McClelland is the owner of a store at a place called "Emma," a few miles from the city of Asheville, in the county of Buncombe. Samuel H. Alexander is his clerk, and had been for more than three years boarding in the family of McClelland and sleeping in the store. There was a room in said store building fitted up and furnished with a bed and other furniture as a sleeping apartment, in which said Alexander kept his trunk and other belongings, and slept there, and had done so regularly for three years or more. On the night of the 8th of February, 1901, he closed and fastened all the windows and outer doors of said store

building, and between eight and nine o'clock he went into his bed-room, but, thinking some customer might come, and not being ready to retire, he left a lamp burning in the store-room. There was a partition wall between his sleeping-room and the store-room, in which there was a doorway and a shutter, but the shutter was rarely ever closed and was not closed that night. Soon after he went into his sleeping room, he heard a noise at one of the outer doors of the store building, and, thinking it was some one wanting to trade, he went to the door and asked who was there, when some one answered that we wanted to come in, wanted some coffee and flour. He then took down the bar used in securing the door, unlocked the same, and when he had opened the door about twelve inches, still having the knob in his hand, two men forced the door open, rushed in the house, covered him with pistols, told him to hold up his hands, that they had come for business. With the pistols still drawn upon him, they marched him *into his bed-room,* where they searched him and the things he had in the room, taking his pistol and other things. They then carried him into the store-room and made an effort to break into the postoffice department, there being a postoffice kept there. But not succeeding readily in getting into this, they abandoned it for the present, saying they supposed there was nothing in it, except postage stamps, and they would attend to them later. They then turned their attention to an iron safe and compelled him to assist in opening it, one of them still holding his pistol on him. After the safe was open and one of them going through it, taking what money and other valuables he found, a cat made a noise in the back part of the store, and the man with the pistol bearing on him turned his attention to that; and, as he did so, Alexander seized his own pistol they had taken from his room and which the man who was robbing the safe had laid on the end of the counter, and shot the man robbing the safe, and also shot the

other man, but, in the meantime, the man whose attention had been attracted by the cat shot Alexander. They were all badly shot, but none of them died.

We have made this summary from the testimony of Alexander, who was the only witness examined as to the facts, neither of the prisoners going upon the witness stand, and there being no other witness to the transaction. There were two other persons, Henry Mills and R. S. Gates, indicted as being present, aiding and abetting in committing the crime, and tried at the same time with Ben Foster and Frank Johnston, who were charged as principals. They were all convicted of burglary in the first degree, and the sentence of death being pronounced upon them, they all appealed to this Court.

There are several exceptions, but all of them that seem to require discussion resolve themselves into one question, and that is the only question pressed upon the argument in this Court. Indeed, the learned counsel for the prisoners stated in his argument that the case turned upon this one point. That is this: That under Chapter 434, Laws of 1889, changing the law and establishing two degrees in the crime of burglary, a party can not be convicted of burglary in the first degree for breaking into a store-house where there is a bed-room, and one regularly sleeps there, unless there is a breaking and entering into the bed-room. This is an important question, and it is singular that it has not before been pressed or called to the attention of the Court. The case of *State v. Pearson,* 119 N. C., 871, was called to our attention by the State, but it does not seem to be authority upon the point discussed in this case. Therefore, no case was cited, and we are unable to find any that decides, or even discusses, the point made in this case, and it devolves upon us to construe this statute.

Burglary at common law was the breaking and entering a dwelling-house in the night time with a felonious intent. And

this was the law of burglary in this State until the passage of the Act of 1889. In this definition were included houses used as a part of the dwelling, such as smoke-houses and pantries within the curtilage. It was not the fact alone that they were within the curtilage that made it burglary to break into and enter them, but it was the fact that they were used as a part of the dwelling, as well as being within the curtilage. A store-house or a workshop, though within the curtilage, were not such houses as would make one guilty of burglary to break and enter at night with a felonious intent. *State v. Jenkins,* 50 N. C., 430; *State v. Langford,* 12 N. C., 253. Indeed, to break and enter a store-house, in which no one slept, with intent to steal, was not a criminal offense at common law, nor in this State until made so by statute. *State v. Dozier,* 73 N. C., 117. But it was held in England and in this State that a store-house, or any other house in which one regularly slept, was a *dwelling-house,* and one upon which burglary might be committed. *State v. Williams,* 90 N. C., 724; *State v. Outlaw,* 72 N. C., 598. It is thus seen that it is not the fact that it is a *store-house* that makes it a house in which burglary may be committed; but it is the fact that some one regularly or habitually sleeps there, that makes it a *dwelling-house.* And the law was the same as to any other house in which one regularly or habitually slept. This discussion of the law of burglary in England and in this State prior to the Act of 1889, was necessary to enable us to put a construction upon that act.

It is an act to "change the law in relation to the crime of burglary." It divides the crime into two degrees, first and second. The first is punished with death and the second degree with imprisonment in the penitentiary for life, or a less term, at the discretion of the Court. The first degree is where the crime is committed "in a dwelling-house, or in a *room used as a sleeping apartment in any building,* and any

person is in the *actual* occupation of any part of said dwelling-house or sleeping apartment at the time of the commission of said crime, it shall be burglary in the first degree."

"Second. If the said crime be committed in a dwelling-house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling-house, or in any building not a dwelling-house, but in which there is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of said crime, it shall be burglary in the second degree."

The object of the statute must be taken into consideration and both sections must be construed together, in construing the Act of 1889. It is manifest that the object of the Legislature was to modify the law of burglary as it then existed, and reduce the severity of its execution. At common law, it was not necessary that anyone should be in the dwelling-house at the time the crime was committed. 4 Chitty Blackstone, star page 225. And this was the law in this State, and the penalty was death, until the passage of the Act of 1889. Under that act, which is the law now, to constitute burglary in the first degree and make it a capital offense it is necessary that some one should be in a *dwelling-house* when the crime is committed, and, if there is not, the crime is burglary in the second degree, which is not punished with death; also, at common law, and in this State, until the Act of 1889, buildings within the curtilage and used in connection with the dwelling-house were held to be a part of the dwelling-house, and the crime committed in one of them was burglary and the punishment death. But under the Act of 1889, to break, enter, etc., such a house is burglary in the second degree and the punishment imprisonment. Under the common law and the law of this State until the Act of 1889, to commit the crime in a store-house or other house where there was a sleeping

apartment, regularly or usually occupied as such, it was burglary, and the punishment was death. This was not so because it was a *store-house* or other house, but because it was held to be a *dwelling-house,* and the punishment was death. But under the Act of 1889, to make the offense burglary in the first degree and punishable with death, a breaking and entry into a store-house or other house where one regularly or usually sleeps, does not constitute burglary in the first degree, unless the burglar breaks and enters the *sleeping apartment.* A store-house stands precisely upon the same ground as *any other house* where there is a sleeping apartment, in which the crime of burglary might have been committed before the Act of 1889, and must be given the same meaning.

We are forced to this construction in order to give any meaning to that part of the statute which says, to constitute the crime of burglary in the first degree, it must be "*in a room used as a sleeping apartment in any building,* and any person is in the actual occupation of said dwelling-house or sleeping apartment at the time of the commission of said crime, it shall be burglary in the first degree." Were we not to give the Act of 1889 this construction, it would leave the law of burglary the same as to store-houses and other houses having a sleeping apartment where one regularly or usually slept, just as it was before the Act of 1889. This we are not justified in doing. And the second section provides: "If the said crime be committed in * * * a sleeping apartment not actually occupied by anyone at the time of the commission of the crime, * * * it shall be burglary in the second degree." It is, therefore, seen that the statute makes it necessary that the sleeping apartment should be *actually occupied* by some one at the time the offense is committed, or the crime is burglary in the second degree; and thereby clearly showing that such buildings, as

store-houses and other houses in which there is a sleeping apartment, are no longer regarded as dwelling-houses, as there is a clear distinction made between them and dwelling-houses. In dwelling-houses, the breaking and entry is burglary in the first degree, if anyone is *in any part of the house at the time.* In other houses, where there is a sleeping apartment, *the sleeping apartment* must be broken in and entered, and must be actually occupied.

The question then comes to the facts of this case to determine whether the prisoners are guilty of burglary in the first degree. There was a regular sleeping apartment which had been occupied by the clerk, Alexander, for three years, and he was actually present in his sleeping apartment when the burglarious assault was made. The outer door and windows were securely fastened, and the door to his room, his sleeping apartment, was open. The prisoners by trick and fraud procured him to unfasten the door, when they forced their way into the house against his heroic efforts to prevent them. Upon their gaining an entrance in this way, they covered him with pistols, made him throw up his hands, and marched him into his sleeping apartment, and there, in his presence, they went through his desk and other things, taking his pistol, purse and other property. They then marched him into the store-room at the muzzle of their pistols, where the tragedy related above was enacted. Everything necessary to constitute the crime of burglary in the first degree, under the statute of 1889, is present and pronounced in this case, if there was a breaking into the sleeping apartment. And this is where, if we understand, the prisoners rest their defence. This can not avail them. If the door to the sleeping apartment had been closed and fastened, and they had not broken and *entered into it,* it may be their defence would have availed them. But as this door was not closed (and the evidence is that it rarely ever was), the outer doors and windows were his reliance and protection.

They were the *doors to his sleeping apartment,* and gave him the protection of the law.

We also hold that Alexander's being carried into his sleeping apartment by force, and under the influence of a loaded pistol bearing upon him, was a breaking—a constructive breaking—as we do not understand that the statute of 1889 makes any change in the law as to the mode of breaking. Mills and Gates were charged with aiding and abetting, and were convicted. We have examined their exceptions with care and do not think they can be sustained. So far as we can see, they have had a fair trial.

As we see no error, the judgment of the Court below is

Affirmed.

DOUGLAS, J., concurring in part. I concur in the opinion except in so far as it relates to the defendants Mills and Gates. It appears from the evidence that Alexander's bed-room was not in the main store building, but was in one end of an annex thereto, with a door leading into the other part of the annex, and a door from there leading into the main store-room. There was no opening direct from the bed-room into the store-room, which could be reached only by going through the other part of the annex. Both these doors were open, and in fact were rarely shut. I think that the defendants Foster and Johnston are guilty of burglary in the first degree in view of their entering Alexander's bed-room in the manner they did. This seems to me to amount to a constructive breaking, certainly more so than merely raising a latch or breaking a pane of glass for the mere purpose of reaching something through the window. On the other hand, even in the view taken by the majority of the Court, if there had been no communication at all between the bed-room and the store-room, or if the inner door had been fastened, merely entering the store-room would not have been burglary, but would have been breaking and enter-

ing a store-house, punishable under section 996 of The Code. The defendants Foster and Johnston, were guilty of two crimes, store-breaking and burglary, the latter being in addition to the former and not necessarily dependent upon it. Here comes the point upon which I differ with the Court. I can not recall any evidence connecting Mills and Gates with any crime except breaking into the store. They do not appear to have had anything to do with the murderous assault upon Alexander, or entering his bed-room. Suppose that Alexander had been securely locked up in his bed-room, and that Foster and Johnston, without disturbing him in any way, had merely broken into the store and stolen a piece of meat, would they have been guilty of burglary? If they had not been guilty, those waiting outside could not have been guilty. Can we make aiders and abettors of one crime constructively guilty of another and distinct crime not within the contemplation of their original act? We must carefully distinguish between the essential and the accidental facts of a case. The defendants Mills and Gates were guilty as accomplices in the crime of store-breaking, but I have very grave doubts whether they can be held guilty in law of burglary, and such doubts I must resolve in favor of human life.

There are peculiar circumstances in this case which may tend to swerve our judgment. We are naturally indignant at the outrageous assault upon Alexander, whose splendid courage and manly devotion to duty command our admiration and respect; but we should not let our feelings blind our judgment. Those who committed the assault will pay the penalty of their lives, but those who had nothing to do with it, and who probably never contemplated any crime greater than that of theft, should be punished only for the offense of which they are guilty. If they are *accessories before the fact* to the burglary, and they were certainly not present when the bed-room was entered, then they are punishable under section 980

of The Code, which provides that, "Any person who shall be convicted as an accessory before the fact in either of the crimes of murder, arson, burglary or rape, shall be imprisoned for life in the penitentiary."

MEMORANDA OF CASES DISPOSED OF WITHOUT OPINION.

KILBY *v.* RICHMOND CEDAR WORKS, from Gates. *Bond* and *Smith,* for plaintiff; *Shepherd* and *Aydlett,* for defendant. Appeal dismissed, controversy having been settled by the parties.

KILBY *v.* EGGLESTON, from Perquimans. *Bond* and *Smith,* for plaintiff; *Busbee & Busbee,* for defendant. Appeal dismissed, controversy having been settled by the parties.

PRUDEN *v.* CHAPPELL, from Chowan. *Bond,* for defendant appellee. Motion to docket and dismiss under Rule 17 allowed.

RUMBO *v.* GAY MANUFACTURING CO., from Chowan. *Bond* and *Vann,* for plaintiff; *Pruden* and *Shepherd,* for defendant. Motion of plaintiff to docket and dismiss appeal under Rule 17 allowed.

DUVAL LUMBER CO. *v.* FENTRESS LUMBER CO., from Hertford. *Winborne & Lawrence,* for plaintiff; *Cowper* and *Barnes,* for defendant. *Per Curiam,* affirmed.

STATE *v.* MALLETT and MEHEGAN, from Edgecombe. *Attorney-General* and *Harris,* for State; *F. H. Busbee,* for defendants. Copy of mandate of Supreme Court of United States sent to clerk below, on motion of the State.

BLAKE *v.* RAILROAD CO., from New Hanover. *Russell & Gore,* and *Dunning,* for plaintiff; *Davis,* for defendant. Motion to dismiss plaintiff's appeal for failure to print allowed.

WILLIAMS *v.* RICH, from Lenoir. *Shaw,* for plaintiff; *Shepherd,* for defendant. *Per Curiam,* affirmed.

CHEMICAL CO. *v.* BARBER, from Onslow. *A. D. Ward,* for plaintiff. Motion to docket and dismiss defendant's appeal under Rule 17 allowed.

MEMORANDA OF CASES DISPOSED OF WITHOUT OPINION.

MALLARD *v.* MANUFACTURING Co., from Duplin. *Stevens,* for plaintiff. Motion to docket and dismiss defendant's appeal under Rule 17 allowed.

WILLIAMS *v.* HILL, from Duplin. *Stevens,* for plaintiff. Motion to docket and dismiss defendant's appeal under Rule 17 allowed.

EVERETT *v.* DOARES, from Robeson. *McLean,* for plaintiff. Motion to docket and dismiss defendant's appeal under Rule 17 allowed.

WILKIE *v.* RAILROAD, from Chatham. *Womack & Hayes,* for plaintiff; *Douglass & Simms,* for defendant. *Per Curiam,* affirmed.

UNTHANK *v.* INSURANCE Co., from Guilford. *Scott,* for plaintiff; *King & Kimball,* for defendant. Appeal dismissed, controversy being settled by the parties.

STATE *v.* TURNER, from Randolph. *Shepherd,* for the State. *Per Curiam,* affirmed.

WOOTEN *v.* WHITE, from Iredell. *Long,* for plaintiff; *Armfield,* for defendant. Appeal dismissed, controversy being settled by the parties.

SETZER *v.* STAFFORD, from Catawba. *Witherspoon,* for plaintiff; *Cline,* for defendant. *Per Curiam,* affirmed.

HOUSTON *v.* BERRY, from Burke. *Avery,* for plaintiff; *Ervin,* for defendant. *Per Curiam,* affirmed.

STATE *v.* SHEPHERD, from Macon. *Shepherd,* for State; *Ray,* for defendant. *Per Curiam,* affirmed.

JENKINS *v.* FULLER, from Swain. *Fry,* for defendant. *Per Curiam,* affirmed.

BRENDLE *v.* RAILROAD, from Swain. *Cobb,* for plaintiff; *Bason,* for defendant. Consent judgment filed.

OGDEN *v.* LAND Co., from Cherokee. *Merrimon,* for plaintiff; *Dillard,* for defendant. *Per Curiam,* affirmed.

APPENDIX.

Proceedings in Honor of William McKinley.

SUPREME COURT,

TUESDAY, September 17, 1901.

Many members of the Bar present.

Proceedings in honor of the memory of William McKinley, late President of the United States.

Attorney-General Gilmer said:

MAY IT PLEASE YOUR HONORS:—As this is the first session of the Court since the death of William McKinley, President of the United States, I rise now for the purpose of conveying to your Honors official information of that lamentable event which occurred in the city of Buffalo on Saturday morning, the 14th instant. For the third time the bullet of an assassin has added a tragic chapter to our country's history, and to-day our Nation mourns. As "death levels all ranks and lays the shepherd's crook beside the sceptre," so all the American people at this hour, standing in the shadows of a common grief, lose sight of the passions engendered by political strife as they melt into tender sentiments of a universal sorrow.

It is fitting that this Honorable Court should pause in its deliberations, and with those who minister at these sacred altars consecrated to law and order, at this hour enroll upon our records some memorial of our dead President.

I need not pause to tell the story of his life. It is now the common heritage of all. He was born fifty-eight years ago in Ohio of sturdy Scotch-Irish ancestry. In 1867, he was admitted to the bar in Canton, where he resided until his death. He was, for fifteen years, a member of the

Congress of the United States, twice Governor of his native State, and in 1896 was elected President of the United States, and again in 1900.

During his long journey from the office of a country lawyer to the White House, his pathway was beset with many difficulties. Here the vale bedecked with flowers opened before him, and yonder rose the mountain peak, but beyond all, in the distance he caught the glimmer of the stars, and whether crossing valley or mountain, with a strong courage pressed on to the end. His life was marked by faithful and conscientious discharge of duty, and guided and directed by the religion of the Bible.

On September 6, he stood in the Temple of Music, in the Pan-American city. Thousands gathered around eager to do him honor. In the long line of admiring hosts stealthily crept one, an alien not in birth, but in spirit and sentiment to the commonwealth of free America, carrying concealed beneath the false and lying bandage the weapon of death.

In the pain-racked moments which followed the firing of the fatal shot, the true character of William McKinley exhibited itself. His thoughts were not of himself, but of his wife, upon whom he had showered the wealth of a tender affection. He was borne to the home of a friend, and the clouds gathered. Soon there was a rift, and the dark shadow that fell across the hearthstones of the homes of seventy millions of people vanished, only to return darker and denser than before.

The inevitable was the inevitable. The decree had gone forth, and from it there was no appeal. The President must die. At eventide he looked through the open window upon the trees whose branches were waving in the September breeze. "Let me look upon them. They are so beautiful," exclaimed the dying President. Then slowly crept on the shadows of night and death. The hope comes to us, born of his steadfast faith, that, when the morning came, he had found rest beneath the "fronded palms" of the Eternal City.

A friend stood at the couch of the dying Lincoln. As his life ebbed away, he exclaimed, "He belongs now to the ages." The same may be said of William McKinley. Histories are the pyramids of nations. They entomb in active tradition the virtues of the great and good. Upon these shafts, in imperishable characters, the record of his life is written.

"In the annals of the ages, he who had not thought of fame
(Keeping on the path of duty, caring not for praise or blame),
Close beside the deathless Lincoln, writ in light, will shine his name."

The motion was seconded by Mr. James E. Shepherd (ex-Chief Justice), in approprite remarks.

Chief Justice Furches replied as follows: "William McKinley was a remarkable man—soldier, lawyer, politician, a leader of men, a statesman and a patriot. These qualities, together with his high personal character, enabled him to become President of the United States, to which high and honorable position he was twice elected by the suffrages of the people. In his style and habits he was as simple as a child, and in his feelings as kind and sympathetic as a woman. But with all this he possessed the courage of noble manhood. He managed the affairs of his high office with such ability and fairness as to impress himself upon his people and to gain their respect and confidence, and to-day the whole American Nation mourns his death. But though he is dead, he still lives, and will continue to live, in the hearts of his countrymen.

Out of respect to his memory, this Court will stand adjourned till to-morrow. The Clerk will make a minute of these proceedings and place them upon the records of the Court.

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