ANNOTATIONS INCLUDE 173 N. C.

NORTH CAROLINA REPORTS

VOL. 130

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1902

REPORTED BY

ZEB. V. WALSER.

ANNOTATED BY

WALTER CLARK

(2 ANNO. ED.)

REPRINTED FOR THE STATE
COMMERCIAL PRINTING CO., STATE PRINTERS AND BINDERS
RALEIGH
1918

CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

Inasmuch as all volumes of Reports prior to the 63d have been reprinted by the State with the number of the volume instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor, and Conf.	as	1	N. C.
1 Haywood	"	2	"
2 Haywood	"	3	"
1 and 2 Car. Law Repository and N. C. Term	"	4	"
1 Murphey	"	5	"
2 Murphey	"	6	"
3 Murphey	"	7	"
1 Hawks	"	8	"
2 Hawks	"	9	"
3 Hawks	"	10	"
4 Hawks	"	11	"
1 Devereux Law	"	12	"
2 Devereux Law	"	13	"
3 Devereux Law	"	14	"
4 Devereux Law	"	15	"
1 Devereux Equity	"	16	"
2 Devereux Equity	"	17	"
1 Dev. and Bat. Law	"	18	"
2 Dev. and Bat. Law	"	19	"
3 and 4 Dev. and Bat. Law	"	20	"
1 Dev. and Bat. Eq.	"	21	"
2 Dev. and Bat. Eq.	"	22	"
1 Iredell Law	"	23	"
2 Iredell Law	"	24	"
3 Iredell Law	"	25	"
4 Iredell Law	"	26	"
5 Iredell Law	"	27	"
6 Iredell Law	"	28	"
7 Iredell Law	"	29	"
8 Iredell Law	as	30	N. C.
9 Iredell Law	"	31	"
10 Iredell Law	"	32	"
11 Iredell Law	"	33	"
12 Iredell Law	"	34	"
13 Iredell Law	"	35	"
1 Iredell Equity	"	36	"
2 Iredell Equity	"	37	"
3 Iredell Equity	"	38	"
4 Iredell Equity	"	39	"
5 Iredell Equity	"	40	"
6 Iredell Equity	"	41	"
7 Iredell Equity	"	42	"
8 Iredell Equity	"	43	"
Busbee Law	"	44	"
Busbee Equity	"	45	"
1 Jones Law	"	46	"
2 Jones Law	"	47	"
3 Jones Law	"	48	"
4 Jones Law	"	49	"
5 Jones Law	"	50	"
6 Jones Law	"	51	"
7 Jones Law	"	52	"
8 Jones Law	"	53	"
1 Jones Equity	"	54	"
2 Jones Equity	"	55	"
3 Jones Equity	"	56	"
4 Jones Equity	"	57	"
5 Jones Equity	"	58	"
6 Jones Equity	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
Phillips Equity	"	62	"

In quoting from the *reprinted* Reports, counsel will always cite the marginal (*i. e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FEBRUARY TERM, 1902

CHIEF JUSTICE:

DAVID M. FURCHES.

ASSOCIATE JUSTICES:

WALTER CLARK,
ROBERT M. DOUGLAS,
WALTER A. MONTGOMERY,
CHARLES A. COOK.

ATTORNEY-GENERAL:

ROBERT D. GILMER.

SUPREME COURT REPORTER:

ZEB. V. WALSER.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

OFFICE CLERK:

JOSEPH L. SEAWELL.

MARSHAL AND LIBRARIAN:

ROBERT H. BRADLEY.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

Name.	*District.*	*Residence.*
George H. Brown	First	Washington.
Francis D. Winston	Second	Windsor.
Henry R. Bryan	Third	New Bern.
E. W. Timberlake	Fourth	Louisburg.
Oliver H. Allen	Fifth	Kinston.
W. S. O'B. Robinson	Sixth	Goldsboro.
Thomas A. McNeill	Seventh	Lumberton.
Walter H. Neal	Eighth	Laurinburg.
Thomas J. Shaw	Ninth	Greensboro.
Albert L. Coble	Tenth	Statesville.
Henry R. Starbuck	Eleventh	Winston.
William A. Hoke	Twelfth	Lincolnton.
W. B. Council	Thirteenth	Lenoir.
M. H. Justice	Fourteenth	Rutherfordton.
Frederick Moore	Fifteenth	Asheville.
George A. Jones	Sixteenth	Franklin.

SOLICITORS

Name.	*District.*	*Residence.*
George W. Ward	First	Elizabeth City.
Walter E. Daniels	Second	Weldon.
L. I. Moore	Third	Greenville.
Charles C. Daniels	Fourth	Wilson.
Rodolph Duffy	Fifth	Catherine's Lake.
Armistead Jones	Sixth	Raleigh.
C. C. Lyon	Seventh	Elizabethtown.
L. D. Robinson	Eighth	Wadesboro.
Aubrey L. Brooks	Ninth	Greensboro.
W. C. Hammer	Tenth	Asheboro.
M. L. Mott	Eleventh	Wilkesboro.
James L. Webb	Twelfth	Shelby.
Moses N. Harshaw	Thirteenth	Lenoir.
J. F. Spainhour	Fourteenth	Morganton.
James M. Gudger, Jr.	Fifteenth	Asheville.
James W. Ferguson	Sixteenth	Waynesville.

LICENSED ATTORNEYS

FEBRUARY TERM, 1902

ARMSTRONG, CHARLES ALFRED.....Montgomery.
BUNN, JAMES PHILLIPS.....Nash.
CRANOR, HUGH ARMFIELD.....Wilkes.
DAVIS, FURMAN EAVES.....Rutherford.
DUNCAN, NATHAN GUY.....Sampson.
EDWARDS, MARTIN LUTHER.....Rutherford.
HARRIS, HENRY SPENCER.....Pitt.
JONES, THADDEUS WINFIELD.....Buncombe.
MARION, JOHN HARDIN.....Chester, S. C.
MITCHELL, GEORGE HENRY.....Wake.
NELSON, EDGAR JOSEPH.....Caldwell.
PERKINS, DANIEL WEBSTER.....Pasquotank.
ROSE, CHARLES GRANDISON.....Cumberland.
WORTH, WINFIELD AUGUSTUS.....Norfolk, Va.

CASES REPORTED

CASES CITED

C

D

E

F

G

H

I

M

R

S

Y

Z

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1902

CUTLER v. CUTLER.

(Filed 18 February, 1902.)

1. **Wills—Revocation—Intent—Questions for Jury.**
   Where a testator knows of the defacement and mutilation of his will by vermin, whether he intended it to be revoked thereby is a question for the jury.

2. **Wills—Revocation—Evidence—Burden of Proof—Propounders.**
   Where a will had been in testator's possession and is offered for probate with name of testator torn off or eaten off by vermin, the burden of showing that it had not been revoked is on the propounder.

3. **Evidence—Admissions—Continuances.**
   An admission of fact made to prevent a continuance for absence of a witness can not be used in a subsequent trial, the witness being present.

4. **Wills—Witnesses.**
   It is sufficient if the witnesses to a will sign before the testator, if signed in his presence.

ACTION by Samuel A. Cutler against C. J. Cutler and others, heard by *Allen, J.*, and a jury, at February Term, 1901, of BEAUFORT. From a judgment for the defendants, the plaintiff appealed. (2)

Charles F. Warren for the plaintiff.
Small & McLean and B. B. Nicholson for defendants.

FURCHES, C. J. This is an action of *devisavit vel non* of the will of Nathan C. Cutler. It is not contended but what he at one time intended the paper-writing, offered for probate, as his last will and testament. And while there are other exceptions to other matters, which will be considered, the principal question is as to whether it was revoked or not,

and as this is the main question, we will assume that it was properly executed, and consider the question of revocation first.

There was a motion to nonsuit the plaintiff at the close of the evidence, and the whole evidence is sent up as a part of the case on appeal, including the script offered as the will, and the clerk is instructed in the case on appeal to attach and send this as a part of the record evidence in the case. This script is, therefore, legitimately before us as a part of the evidence, to be considered for whatever it may be worth.

The script was written and, we will say, executed, some ten years or more before the death of Cutler; and his children all having married and left him, he abandoned his home with the purpose of living among his children; and, without moving his household furniture, a few months before he died, he rented to one James Asbury, who moved into his dwelling-house. Asbury, according to his evidence, found this script in an unsealed envelope, in an unlocked drawer of an old safe, belonging to the testator, left by him in said house, in which there were other papers. He said nothing to the testator about finding the will. The will had been seen by others who had been using the house for the purpose of storing grain, before the death of the testator, but they had not mentioned it to him.

(3) The script, as it comes to us, is badly mutilated; the name of the testator, if it was ever there—and we take it that it was—is entirely gone, and it is badly mutilated in other respects. Much of the work of mutilation was the work of moths or vermin, and it is contended by the propounders that it was all done by them. But it looks to us as if it had been torn where the signature of the testator should have been. These were all matters for the jury upon the evidence and proper instructions from the court.

The paper itself showed the mutilations, and, as there was much evidence tending to show that the testator knew of the defaced condition of this paper long before his death, it was contended by the caveator that if he did not tear the paper himself, that there is abundant evidence showing that he accepted it as a destruction of his will, and that he intended to die intestate. And while it was not denied that there was evidence tending to show this to be the fact, the propounders contended that, unless the script had been defaced by the maker, or by some one for him in his presence and by his direction, the will was not revoked; that he could not ratify the obliteration or destruction of the will by the vermin if he wished to do so; that a will properly executed could only be revoked in the manner above stated, or by making another will; and his Honor being of the opinion that the law was as contended by the propounders, so instructed the jury in substance. In this we think there was error.

Revocation consists of two things: the intention of the testator, and some outward act or symbol of destruction. A defacement, obliteration or destruction, without the *animo revocandi,* is not sufficient. Neither is the intention, the *animo revocandi,* sufficient without some act of obliteration or destruction is done. It seems to us that the court placed too strict a construction upon the statute. The will was in the possession of the testator, and it seems from the evidence that he knew of the obliteration, if he did not himself tear his name off the paper. (4) He must have gotten this information by handling and inspecting the same, and, if so, it was done in his presence, or it was done and in his presence. And if he then had the *animo revocandi,* why was this not a compliance with the statute, and a revocation?

We find it stated in Pritchard on Wills, sec. 267, "That every act of canceling imports *prima facie* that it was done *animo revocandi,* yet it is but a presumption, which may be repelled by accompanying or subsequent circumstances." And we find that this quotation is taken from the opinion of the Court, by *Ruffin, C. J.,* in *Bethell v. Moore,* 19 N. C., 311. We also see in Pritchard on Wills, sec. 269, the following: "But it has been held that the failure of the testator, after being informed of the loss or destruction of his will, to execute another, when he has time and opportunity to do so, furnishes a presumption of intention to revoke the lost or destroyed will; but this presumption may be rebutted or explained away by proof of the declarations of the testator, or other evidence." We find these views expressly stated in *Steel v. Price,* 44 Ky., 58. We are, therefore, led to the conclusion that if the obliteration was entirely by vermin, the question of revocation, *animo revocandi,* should have been left to the jury to say, from all the evidence, whether Nathan C. Cutler intended said script to remain his will or not; and it was error in the court to take this question from the jury and to instruct them in effect that, if this was so, it did not amount to a revocation of the will.

The court also instructed the jury that if the testator found the will in its mutilated condition, and, thinking that this was in law a revocation, and for that reason he said he had thrown it away or destroyed it, that would not amount to a revocation. The language of the witness Respass is that Cutler told him that he had destroyed the will. The language of the witness John B. Respass is as follows: "I (5) said to him, 'Your business is all fixed. I wrote your will.' He said, 'No, the will you wrote for me I *have destroyed.* There were such changes in my property that the will would not fit anyway.' " He said nothing about his "opinion of the law," but simply, "I have destroyed" it. But we are unable to see what effect his opinion of the law would have had on the case, if he had destroyed it. The question for the jury

upon this evidence was, Had he destroyed it? Had he purposely torn his name from the will and thereby destroyed it? If he had, it was no longer his will.

But the court instructed the jury that, "if the jury should find that the will was properly executed by Nathan C. Cutler, then the burden of proof shifted to the caveators to show by the greater weight of the evidence that the will had been revoked." This was error. If there had been no evidence of erasure or destruction on the script itself—if the paper had been perfect—this charge would have been correct. But where the name of the testator was gone, torn off by the testator, as the caveator alleges, or destroyed by moths, as the propounder contends, the propounders did not establish it as the will of Nathan C. Cutler by proving that it was originally executed by him. This would not have been so in an action on a note or bond, and is not in this case. And the burden of proof did not change to the caveators at this stage, and place the burden upon them to explain and show how the testator's name came to be off the paper. The will had been in the possession of Cutler; when produced, it had upon it these marks of mutilation, the testator's name being gone. It devolved upon the propounders to account for this, and it was not Cutler's will until he did so to the satisfaction of the jury. When the will was produced without the name of Nathan C. Cutler, this was *prima facie* evidence of a revocation, and the law presumed that it had been revoked. It is true, this presumption might be repelled,
(6) but the burden of doing so was on the propounders. If this were not so, it would be to require the caveator to rebut the presumption that was in his favor. *Bethell v. Moore,* 19 N. C., 311; *Steel v. Price,* 44 Ky., 58; Pritchard on Wills, secs. 267, 269; Underhill on Wills, sec. 225; Theobald Wills, page 45. There was error in this instruction.

Upon the trial of this case at July Term, 1901, the propounders offered the following admission as a part of their evidence: "In the trial of this action the caveator, Samuel A. Cutler, admits the following facts: That John B. Respass, in the presence of the alleged testator, Nathan C. Cutler, signed the script propounded as his will as a subscribing witness thereto, at the request and in the presence of the said Nathan C. Cutler, who, also, signed it in the presence of the said witness, and declared it to be his last will." The caveator objected to this evidence, and C. F. Warren, Esq., made affidavit that he was the attorney of the caveator at February Term, 1898; that when the case was called at that term the caveator announced his readiness for trial, and the propounders stated that they were not ready for trial for the want of the testimony of John B. Respass, a subscribing witness to the will, when the caveator for the purpose of getting a trial at that term made the admission simply

because the witness Respass was absent. At that term the caveator did not know that said Respass knew any other facts material to the execution or revocation of the will; that before the case was called for trial at this term he, as the attorney of the caveator, had notified one of the attorneys for the propounders that Respass was then present, attending court as a witness, and that he should object to the introduction of said admission in evidence.

This testimony of Mr. Warren was not disputed by the other side. But the court admitted this admission as evidence, and the (7) caveator excepted. In this we think there was error. It is not like a solemn admission of a fact in an answer or otherwise, where it is intended by the parties to be permanent, and, in this respect, differs from *Guy v. Manuel,* 89 N. C., 83. In this case it was made on account of the absence of Respass. At this trial Respass was present, and the reason for making it ceased, and the propounders were notified of the fact of his presence and that its admission would be objected to. As the reason ceased, the admission should have ceased. The propounders lost nothing they had before the admission was made. But the admission itself says, "*In the trial* of this action." The admission is in the singular—in *the* trial, and it was used in that trial. The point presented is a singular one, and we have found nothing like it in the practice, and have put what we think is a just construction upon it, and do not think it should have been admitted.

There is one other question presented by the record that should be passed upon, and that is this: It seems that the witnesses signed the will before the testator, Cutler. But it was all done at the same time and in the presence of each other—the witnesses seeing the testator's presence and the testator seeing the witnesses' presence. It therefore differs from *In re Cox,* 46 N. C., 321, where the witness signed the will at home, and not in the presence of the testator. In that case it was held to be an insufficient execution of the will, but it is there intimated that had the witness signed in the presence of the testator, though before the testator, it would have been sufficient. It seems singular that the witnesses should have signed before the testator, as there was nothing at that time for them to attest. It was certainly awkward and illogical for them to do so, and can only be sustained by its being all a part of one and the same transaction. This exception of the caveator is not sustained, and there was no error in the ruling of the court upon this excep- (8) tion. But for the errors pointed out in the opinion there must be a

New trial.

Cited: S. c., 132 N. C., 192; *S. v. Butler,* 151 N. C., 675; *In re Wellborn,* 165 N. C., 639; *Barfield v. Carr,* 169 N. C., 575.

METHODIST PROTESTANT CHURCH v. YOUNG.

(Filed 18 February, 1902.)

Estates—Conditions—Deeds—Wills—The Code, Secs. 2140, 2141.

Where a church receives an absolute fee in land, subject to be defeated only by the breach of a condition, and this condition is not broken until after the death of the grantor and a daughter, neither the grantor nor the daughter have any estate in the land at the time of their death which can be willed or inherited, and upon breach of the condition the estate goes to the heirs at law of the grantor.

ACTION by the Methodist Protestant Church of Henderson and others against Jas. R. Young and others, heard by *Coble, J.*, at May Term, 1901, of VANCE. From a judgment for the plaintiffs the defendants appealed.

T. T. Hicks, A. J. Harris and R. S. McCoin for plaintiffs.
T. M. Pittman and A. C. Zollicoffer for defendants.

FURCHES, C. J. On 21 September, 1880, in consideration of one dollar, W. A. Harris conveyed the land in controversy to "D. E. Young, Geo. A. Harris and John F. Harris, trustees of the defendant church, and to their successors in office, upon which to build a church for the worship of Almighty God," with full warranty against the right and claim of all other persons whatsoever. But he provided that if said church "discontinue the occupancy of said lot in manner as aforesaid, then (9) this deed shall be null and void and the said lot or parcel of ground shall revert to the said W. A. Harris and his heirs and assigns forever."

The defendants erected a church on said lot soon thereafter, and continued to occupy and use the same as a place of worship, until December, 1900, at which time, their church having increased until the building could not afford suitable accommodation for the congregation, the defendants decided to build a new church; and for the reason that the location had become undesirable for a church, and for the reason that the defendants thought the lot would be more valuable to sell it with the building on it than it would be to tear down the building, which they would have to do to build on the same lot, they purchased another lot near by and built a church on that lot.

In December, 1882, the said W. A. Harris died, leaving a last will and testament, and one son, W. C. Harris, and one daughter, Pattie Young, his only children and heirs at law. By his said will he devised and bequeathed his property to his two children, in which he used the follow-

ing language: To Pattie Young, "one-half of all my real and personal estate of every kind and description not hereinbefore disposed of."

Walter C. Harris is still living, but Pattie died in October, 1892, without issue, leaving a last will and testament, in which, after making numerous other dispositions of her property, she willed in Item 19 as follows: "It is my will and desire that all the rest and residue of my property, real, personal and mixed, of which I may die seized and possessed, shall be sold and collected by my executor hereinafter named, upon such terms as to time as he may deem best." She then named the defendant as her executor, and he claims one-half of the property in controversy, under this Item 19 of Pattie Young's will, and the plaintiff, for the purpose of removing this cloud upon its title, brought this action.

It will be observed that the deed from W. A. Harris to the plaintiff is an absolute fee which may have continued forever. But it contains a condition by which this absolute estate may be defeated, which makes it an estate in fee upon condition, or, as it is called in the (10) old books, a base or qualified fee, and is sometimes called a conditional limitation—a condition by which the estate may be defeated, or is limited.

It is admitted that the condition had been broken by the plaintiff, and that W. A. Harris, if living, might enter and revest himself of the estate, and, as he is dead, that his heirs might do so. But it is contended that no one else can do so, and that at the time of the breach, both W. A. Harris (the grantor) and Pattie Young being dead, that Walter C. Harris, being the only heir of said W. A. Harris (and of Pattie Young) is the only one who could enter. Gray's Rules against Perpetuities, page 6, sec. 12 (2). And that since the breach of the condition and before the commencement of this action the plaintiff has received a quitclaim deed of conveyance from said Walter C. Harris, and is now the absolute owner of said property in fee simple; while the defendant contends that although the breach did not take place until after the death of both W. A. Harris and Pattie Young, the said W. A. had a right or interest in said property, which he could will, and did will, to Pattie, and that the will of W. A. gave her an interest which she could and did will to the defendant, and that the deed from Walter C. to the plaintiff only conveys a one undivided half interest therein, and that this defendant is entitled to the other half thereof.

Until the breach of the condition, neither said W. A. Harris nor said Pattie Young had any interest or estate in this property. The absolute estate was in the plaintiff, and, therefore, could not be in any one else. Neither W. A. nor Pattie ever had an estate, an interest, nor even an expectancy, in this property, as an heir may have in the estate of his

ancestor—as by reason of natural causes the ancestor must die,
(11) and the law declares his heirs, to whom his estate will descend.

But in this case there was nothing to limit the estate of the plaintiff, and until the breach the grantee had the same rights as if it were a fee simple. 2 Chitty Bl., star pp. 109, 110, note 15, and pp. 155-6-7; Gray's Rules Against Perpetuities, *supra.* And the grantor having nothing, he could convey nothing by his will, and Pattie had nothing to convey by her will. Suppose that A is the next of kin and heir at law of B, and if A should die, his children would be the next of kin and heirs at law of B. A dies in the lifetime of B, leaving a last will and testament, in which he willed to C—Item 19—as follows: "It is my will and desire that all the rest and residue of my property, real, personal and mixed, of which I may die *seized and possessed,* shall be sold and collected by my executor hereinafter named," and named Y as his executor. After the death of A, B dies intestate. Would it be contended that the estate, coming to A's children from B's estate, passed to C by A's will? It most certainly would not, for the reason that A had no interest in B's estate at the time of his death; and for the same reason the will of W. A. Harris passed no title, estate or interest to Pattie in the property in controversy, because he had no interest in it to convey, and Pattie's will passed nothing to the defendant.

It seems that it is hardly denied by the defendant but what at the common law the estate in the land in controversy would have reverted to the heir at law (Walter C. Harris) upon condition broken. But he contends that this is changed by Laws 1844, ch. 88, which makes the will speak from the death of the testator, and by the provisions of section 2141 of The Code. Other clauses are relied upon by the defendant to sustain his contention, but the following paragraph seems to be most nearly in point and controls the others, if any of them bear upon the question, and that is as follows: "And also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same
(12) estate, interest and rights respectively and other real and personal estate as the testator may be entitled to at the time of his death." This evidently means rights of entry for conditions broken in the lifetime of the testator, and where he had the right of entry while living. This seems to us manifestly the proper construction of this statute—*such rights as he has "at the time of his death."* And, besides, this being manifestly the proper construction of the statute, it puts the statute in harmony with the plainest principles of law governing the rights of property, as it can not be supposed that the Legislature intended to authorize a testator to will what he did not have.

Our opinion, then, is, that at the death of W. A. Harris he had no interest in the property in controversy, and no interest therein passed to

Pattie Young by his will; and, of course, if W. A. Harris had no interest, none passed to her under the will of W. A. Harris, nor could she inherit what her father did not have, and she had nothing to will to the defendant Young, and he has no interest in the same.

Our opinion further is, that upon the breach of the condition in 1900, the right of entry and the estate in the land in controversy reverted to Walter C. Harris, the only heir at law of the grantee, W. A. Harris, at the time of the breach; and that, as plaintiff has acquired the title of W. C. Harris in and to said land, it is the absolute owner thereof in fee simple.

The judgment below is

Affirmed.

MONTGOMERY, J., did not sit on the hearing of this appeal.

DOUGLAS, J., *concurring only in the result.* I can not agree with the opinion of the Court that, until the breach of condition, "the absolute estate was in the plaintiff, and, therefore, could not be in any one else." The deed of W. A. Harris to the plaintiff conveyed (13) a determinable fee, having the incidents of a fee simple except that of alienation, but liable to be entirely defeated. By its very terms it could never be enlarged into a fee simple absolute, except, of course, by the release of the grantor or his heirs. It contained no inherent power of enlargement. It is true, such an estate is sometimes called a fee simple limited or conditional, which always seemed to me a misnomer; but it can never be an absolute fee. If it were, nothing would remain in the grantor, and hence no one could take advantage of the possible defeasance. There must remain in the grantor at least a *possibility of reverter,* which, while not an estate, is in itself a right coupled with the contingent right of entry. This right may be in abeyance, but if it exists at all, actually or potentially, it must exist in the grantor. It seems to me that the possibility of reverter is also an *interest* in the land, and thereby by a double title comes within the provisions of section 2140 of The Code. The word has been thus defined: "Interest means concern; also, advantage, good, share, portion, part, participation; any right in the nature of property, but less than title. Its chief use seems to designate some right attaching to property which either can not or need not be defined with precision." 16 A. & E. Enc. (2 Ed.), 1102.

Coke says: "Interest *ex vi termini* in legal understanding extendeth to estates, rights and titles that a man hath of, in, to, or out of lands; for he is truly said to have an *interest* in them." Co. Lit., 345a.

Interests may be vested, executory or contingent. In *Young v. Young,* 89 Va., 675, 23 L. R. A., 642, it was held that a contingent remainder

was an interest or claim to real estate, and might be disposed of by deed or will under a statute using those terms. In fact, the word seems to be one of extreme elasticity, which may be used to include nearly everything legally connecting the claimant with the subject-matter.

(14) Section 2140 of The Code provides that, "Any testator . . . may dispose of all real and personal estate which he shall be entitled to at the time of his death, . . . and the power hereby given shall extend to *all contingent, executory or other future interest* in any real or personal estate, whether the testator may or may not be the person or one of the persons in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and, also, to *all* rights of entry for condition broken, and other rights of entry," etc.

It would be difficult for one to make the language of the statute any broader, and I can not doubt that it includes and was intended to include *all* contingent, executory or other future interests, as well as *all* rights of entry, whether vested or contingent. The possibility of reverter is a contingent interest which becomes vested upon condition broken. Upon entry the grantor or his heir is remitted to his former estate, and the reversion, of course, becomes merged into the fee.

I see no reason of public policy why the statute should exclude a possibility of reverter, with its contingent right of entry, from the power of testamentary disposition; but a very strong reason why it should be included. In England, the home of the common law, the rule of primogeniture made the entry of the heir a very simple matter, as there was practically but one heir; but here it is different. Determinable fees may last for a very long time, and the grantor may have a large number of descendants scattered over the country. Must they all enter upon condition broken, or can one enter for all and hold as tenant in common? These are questions difficult of solution and inconvenient of application, which may be avoided by testamentary disposition.

(15) I am, therefore, forced to the conclusion that the possibility of reverter could have been devised by either the grantor or his daughter, Pattie; but whether it can be brought within the terms of the will of the latter is a different question. I am not prepared to say that a person "may die seized and possessed" of a possibility of reverter. If it did not pass by Pattie's will, it went to Walter as Pattie's heir, and was by his deed conveyed to the plaintiff. I am thus brought to the conclusion of the Court.

BUTLER v. SOUTH CAROLINA AND GEORGIA EXTENSION RAILROAD COMPANY.

(Filed 25 February, 1902.)

1. **Evidence—Expert Evidence—Opinion Evidence—Examination of Witnesses—Cross-examination.**

An expert witness can not be discredited on cross-examination by reading an opposite opinion from a text-book and asking him whether it is correct.

2. **Evidence—Res Gestæ.**

In an action against a railroad company for personal injuries, a statement as to how plaintiff was hurt, made after the injury, not shown to have been by or in the hearing of the plaintiff, nor to have been a part of the *res gestæ*, is incompetent.

3. **Evidence.**

In an action against a railroad company for personal injuries, sustained by plaintiff while riding in the caboose, evidence that the conductor and brakeman were careful, prudent men was incompetent.

ACTION by P. B. Butler and his wife against the South Carolina and Georgia Extension Railroad Company, heard by *Justice, J.*, and a jury, at September Term, 1901, of RUTHERFORD. The defendant offered as a witness the conductor of the train (one McGuire), who testi- (16) fied he was not in the car when plaintiff was hurt, but went in the car afterwards, and learned then, for the first time, that she was hurt. She was at the time sitting upon a seat at the side of the car. The defendant's counsel proposed to ask this witness whether any one told him when he went into the car, one minute after last coupling, how plaintiff was hurt. The plaintiff objected. The court allowed this question to be asked and answered, provided any statement was made by plaintiffs, or either of them, or any one in their presence or hearing. The witness stated that he did not remember who made the statement, and he did not know that the plaintiffs, or either of them, heard the statement. Witness did not know how long after *feme* plaintiff was hurt it was, as he did not know she was hurt until he went into the car. The court thereupon sustained the plaintiff's objection. Defendant excepted.

From judgment for the plaintiffs, the defendant appealed.

McBrayer & Justice and Justice & Pless for plaintiffs.
Webb & Webb and F. H. Busbee for defendant.

COOK, J. *Feme* plaintiff, accompanied by her husband, was traveling upon defendant company's freight (or mixed train). When she entered

the caboose, with her baby in her arms, the conductor of the train gave her a chair, which she accepted and occupied until the train stopped at one of its stations. At this station, Union Mills, the engine was taken from the freight cars and caboose, leaving them standing on the main track, and went upon the side track to get some cars, and, upon returning, "shunted" two cars back against the cars on the main track with such force that the *feme* plaintiff was knocked out of her chair seven feet, falling upon the floor with her baby in her arms. She was picked up by her husband and placed upon a seat fastened to the side of the car, and afterwards, while sitting there, the engine struck the cars with such violence that she was knocked from her seat and thrown eight or ten feet upon a chair, and her husband again helped her up. From these two falls she received injuries. While helping her up the last time,
(17) her husband testified, upon objection and exception by defendant, that she said to him "that she was hurt; . . . she was flooding from the fall, and had to pull her clothes under her to prevent the blood getting on the floor, before taking her up." Her baby was about three months old, and before the fall, since the birth of the child and before, she had been well; but since the fall, she had been constantly suffering, and her person was lacerated and her womb dislocated, and nervous and sick. A short time before the trial, the doctors examined her and found her in an exceedingly nervous condition, suffering from a dislocated uterus and lacerated perineum; when she stood up the neck of the womb protruded out of the vagina.

The main contention between the parties upon the trial was as to the *cause* of these injuries—whether they resulted from the fall (or falls), or from some other cause. If from the fall (or falls), then defendant company would be liable, as insisted by plaintiff, for having negligently handled its train and thereby throwing the *feme* plaintiff upon the floor, producing this result. As to this cause the doctors (expert witnesses) disagreed. Dr. Downey testified, on behalf of plaintiff, that the injuries could have been caused by a fall, while Dr. Caldwell testified, on behalf of defendant, that they could not have been caused by a fall. Upon the cross-examination of Dr. Caldwell, the plaintiff's counsel asked him "if the text-book and standard authorities in the medical profession from which witness acquired his knowledge did not differ with witness. Counsel for plaintiff further asked him if the editors of a book shown witness, entitled 'American Text-book of Surgery,' and edited by ten or twelve physicians, were men of standing in his profession, and men whose writings were accepted as authority. Witness answered that they were men of such standing and their writings were accepted
(18) as authority, and said book was an authority in the medical profession. Counsel for plaintiff then asked if that

book did not lay it down that the injury he found on the person of *feme* plaintiff could be produced by a fall." Counsel at the time was looking at said book. Defendant objected. The court stated that this was proper upon cross-examination of defendant's witness, if for the purpose of testing his opinion, and not as substantive evidence. Defendant excepted. (Exception 7.) Counsel here showed the witness the book and proposed to read from it in formulating his question, and propounded one question from the book, to which defendant objected, and upon objection, the plaintiff's counsel withdrew the question, and afterwards proceeded without the book to cross-examine the witness as to the injury to the perineum. Defendant objected. The court allowed it, if for the purpose of testing the witness' opinion. Defendant excepted. (Exception 8.) The plaintiff's counsel asked the witness about the "American Text-book of Surgery," and said, "This book (apparently reading from it) says traumatic injury to the perineum may be produced by accidental injury; is that correct?" Objection overruled. (Exception 9.) Answered: "No. I think not; my opinion is as good as that book." The counsel for plaintiff at the time held the open book in his hand, and looking at it where the book said it.

In permitting plaintiff's counsel to state to the witness in presence of of the jury *what* the "book says," his Honor erred, and a new trial must be had. Counsel could not have read the book to the jury in his argument. *Huffman v. Click,* 77 N. C., 55; *S. v. Rogers,* 112 N. C., 874. This being settled, it must follow as a logical sequence that he could not state to the witness, as a fact, in the presence of the jury, that which he could not read or state to them in his argument. In 1 Greenleaf on Evidence, p. 269, sec. 162, K. (16 Ed.), the author says: (19) "It has been thought by some courts that an expert witness may be discredited by reading an opposite opinion from a professional treatise, or by being asked whether opposing views have not been laid down by writers, or whether he agrees with certain opposing opinions then read; and it is generally held that it can not be done, except that where a witness has referred to a treatise or to writers generally, as agreeing with him, the treatise may be shown not to agree with him, just as any other assertion of a witness may be disproved." In the case at bar, counsel said, "This book (apparently reading from it) says traumatic injury to the perineum may be produced by accidental injury; is that correct?" This question could not have the effect of contradicting the witness, for he had not referred to the book to sustain his opinion, or otherwise relied upon it; and the only effect it could have had was to inform the jury of the opinion therein expressed in contradiction of the opinion he entertained, which is in violation of the general rule stated by Greenleaf, and of the principle settled in the two decisions of our own Court, above

cited. In *Fisher v. R. R.*, 89 Cal., 379, on page 409, the learned *Justice De Haren* says: "The court erred in permitting the attorney for the plaintiff, upon the cross-examination of the witness, Dr. Woolsey, to read extracts from certain medical books, and then ask the witness whether he agreed with the same or not." In *People v. Hall,* 48 Mich., 483, 42 Am. Rep., 477, it is held, that the reading of scientific books to the jury, as evidence in itself, is not permissible; which is followed in *Marshall v. Brown,* 50 Mich., 148, wherein the learned *Justice Cooley,* delivering the opinion of the Court, held that counsel could not be allowed to place statements of medical books before the jury by reading therefrom to the witness, and then asking him whether what had been read stated the facts therein set forth. In *Bloomington v. Shrock,* 110 Ill., 219, 51 Am. Rep., 679, the Court held it to be error for counsel to read from
(20) standard authors (medical) to the witness upon cross-examination, and then ask if he agreed with the author—*very* analogous to the case at bar. There are other rulings to the same effect. Plaintiff's counsel cite as an authority *Hess v. Lowery,* 17 Am. St., 355, 7 L. R. A., 90 (an Indiana case), wherein it is held, that it is recognized as a proper method of cross-examination in order to test the learning of the witness, who testified as an expert, to refer to books of approved authority upon the subject under investigation," and cites *Insurance Co. v. Ellis,* 89 Ill., 516; *Pinney v. Cahill,* 48 Mich., 584, and *S. v. Wood,* 53 N. H., 484, as authorities to sustain the position. Upon examination of these authorities we find the first two above referred to in conflict, rather than accord, and the last one relates to a cross-examination upon matters which the witness testified he had learned from certain medical authorities, not from experience or actual observation. The books were put in evidence—were excluded—and the court held that upon the cross-examination, counsel could be allowed to ask if the witness had not found particular theories laid down conflicting with the theory he had advanced as the result of his reading. So this fails to sustain the *Hess case.*

In examining *Rippon v. Bittel,* 30 Wis., 614, also cited and relied upon by counsel, we find that it does not sustain their contention. The Court there says: "The record does not inform us what the purpose or object of the offer of the treatise was. Counsel suggested that it may have been to expose or discredit the medical witnesses, examined as experts, who, founding their opinions upon the same treatises, recognized as standard authority, had testified that the books laid down such and such particular propositions or theories, or sustain such and such particular conclusions, when, in truth and in fact, the books did not do
so, and the witnesses were mistaken. Counsel ask if, under such
(21) circumstances, the books would not be admissible as in the nature of impeaching evidence, or to show that the experts were in error.

We can not say that the admission would be improper, and so must overrule the objection."

After a careful investigation of the authorities, we find no sufficient reason to justify us in departing from the general rule so well settled upon, by what we think to be sound principle.

The third exception can not be sustained, for the reason that the hypothetical question propounded to the expert witness seems to conform strictly to the rule; and the fourth is untenable, for the reason that the conductor was not present at the time of the fall, and did not know how long it was, after the *feme* plaintiff was hurt, before he went into the caboose, and did not know whether plaintiffs, or either of them, heard the statement he then heard made by some one. It is, therefore, not shown to be a part of the *res gestæ,* and was properly excluded.

As to exceptions five and six, we think his Honor properly excluded the evidence as to the reputation of the brakeman, Bladden, and Conductor McGuire, as being careful and prudent. Their reputation was not at issue, nor did the issue depend upon their reputation, nor could it be influenced by it. It was the management of the cars upon this particular occasion which was being inquired into, and not their conduct in general.

We find no error in the charge given to the jury to which specific exceptions were taken, nor to the refusal of his Honor to give the prayers rejected.

For the errors above pointed out there will have to be a

New trial.

Cited: Lynch v. Mfg. Co., 167 N. C., 101; *Tilghman v. R. R.,* 171 N. C., 657, 659; *S. v. Summers,* 173 N. C., 780.

---

(22)

LEHEW v. HEWETT.

(Filed 25 February, 1902.)

Reformation of Instruments—Deeds—Evidence—Questions for Jury.

Whether certain evidence in an action for the reformation of a deed is strong, clear and convincing, is a question for the jury.

ACTION by S. W. Lehew against Frank B. Hewett and others, heard by *Brown, J.,* and a jury, at October Term, 1900, of BRUNSWICK. From a judgment for the defendants, the plaintiff appealed.

Iredell Meares for plaintiff.

Bellamy & Peschau for defendants.

CLARK, J. This is an action for reformation of a deed executed to plaintiff's former wife. The plaintiff testified that he paid the purchase money himself, and directed that the deed should be made to himself; that he did not intend to have the deed made to his wife; that he directed his wife's brother, from whom he bought the land, to have the deed drawn to plaintiff, and that the said grantor had the deed recorded; that he (the plaintiff) did not discover till after the registration that the deed was executed to his wife. One of the defendants testified that the plaintiff paid the purchase money. No fraud was alleged or proved, and his Honor correctly held that, in order to reform a deed for mistake, the proof should be clear, strong and convincing. *Cobb v. Edwards,* 117 N. C., 244. The evidence was sufficient to be submitted to the jury, with the instruction that it must be clear, strong and convincing to warrant a verdict for the plaintiff, but whether it was or was not "strong, clear and convincing" was to be determined by the jury and not by the
(23) court; otherwise, the jury would be useless.

"The judge has no more right, when the testimony, if believed, is sufficient to be submitted to the jury, to determine in the trial of civil actions what is strong, clear and convincing proof, than he has in the trial of a criminal action to express an opinion as to whether guilt has been shown beyond a reasonable doubt." *Cobb v. Edwards,* 117 N. C., at page 253, citing *Hemphill v. Hemphill,* 99 N. C., 436. His Honor should have submitted the case to the jury under a charge that while it required clear, cogent and convincing proof, not merely a preponderance of evidence, in order to reform a deed for mistake, it was for the jury to determine from the evidence whether any mistake had been made in drafting the deed, and, in order to do so, that they should be *fully satisfied* that the mistake had been made, before they could find for the plaintiff. In refusing to submit the case to the jury there was

Error.

Cited: Ray v. Long, 132 N. C., 894; *Jones v. Warren,* 134 N. C., 392; *Avery v. Stewart,* 136 N. C., 431; *Earnhardt v. Clement,* 137 N. C., 95; *Lehew v. Hewett,* 138 N. C., 9, 10; *Davis v. Kerr,* 141 N. C., 19; *Cuthbertson v. Morgan,* 149 N. C., 76; *Taylor v. Wahab,* 154 N. C., 223; *Britton v. Ins. Co.,* 165 N. C., 155; *Archer v. McClure,* 166 N. C., 148.

PIPPEN v. MUTUAL BENEFIT LIFE INSURANCE COMPANY.

(Filed 4 March, 1902.)

Infants—Contracts—Insurance—Life Insurance.

Where an infant surrenders a life policy for its cash value, he and his personal representatives are bound thereby.

ACTION by F. L. Pippen, administrator of J. H. Pippen, against the Mutual Benefit Life Insurance Company, heard by *McNeill, J.*, upon an agreed statement of facts, at June Term, 1901, of HALIFAX. From a judgment for the defendant, the plaintiff appealed.

Day & Bell for plaintiff. (24)
Thomas W. Hill for defendant.

COOK, J. This is an action brought by the administrator of Joseph H. Pippen to recover the sum of $1,000, alleged to be due upon the death of said Joseph by reason of a certain life insurance policy issued by defendant company to said Joseph. It appears from the facts agreed that Joseph was an infant when he applied for and obtained the policy, and died during his infancy. The application was made on 4 February, 1897, and the policy was issued to him on the 10th of said month.

It was agreed in its policy by the defendant company that, in consideration of $40.54 to it in hand paid and of the annual premium of $40.54 to be paid on 10 February in every year until twenty full years' premiums shall have been paid, it would, on 10 February, 1917, pay to the assured $1,000, or should he die before that time, then, upon his death and proof thereof, to pay said amount to his executors, administrators and assigns. After the issuance of the policy, and while the same was in force, plaintiff's intestate, pursuant to a provision contained in said policy, in consideration of the sum of $54.40 (the then cash value of said policy) paid to him by the company, fully surrendered and delivered the said policy to the defendant company, and thereafter, to wit, on 17 February, 1899, died.

The good faith and fairness of these transactions with the infant (intestate) is not questioned; and it is expressly stated in the case agreed that "the said surrender was voluntarily made and executed in writing by the said intestate *bona fide* and without compulsion or undue influence on the part of the defendant."

The main contention of the plaintiff is that the surrender of (25) the policy by his infant intestate was a voidable contract, which he, in this action, seeks to avoid, and sues to recover upon the original

contract of insurance, which he endeavors to affirm. His Honor, upon the facts agreed, rendered judgment in favor of the defendant, and plaintiff appealed.

We sustain his Honor, and hold that the plaintiff is not entitled to recover.

The contract of insurance made with the infant, plaintiff's intestate, was not for necessaries, and was therefore, voidable at his election, but binding upon the defendant company. It was an executory contract (*Lovell v. Insurance Co.,* 111 U. S., 264), relating to personalty (*Conigland v. Smith,* 79 N. C., 303; *Simmons v. Biggs,* 99 N. C., 236; *Hooker v. Sugg,* 102 N. C., 115), 3 L. R. A., 217; 11 Am. St., 717, and could, therefore, be avoided by him during his infancy. *S. v. Howard,* 88 N. C., 650, on page 652; Clark on Contracts, page 244. His disaffirmance could have been made either by refusing to perform his part of the contract, and then pleading his disability in a suit for its enforcement, or by a voluntary annulment or cancellation made by agreement with the company. And it appears that he adopted the latter course by a voluntary surrender of the policy and receiving its cash value.

But it was argued by the learned counsel for plaintiff that the intestate did not receive the full amount to which he was entitled by reason of the terms expressed in a "note" or condition appearing on the policy. Be that as it may, the disaffirmance of the contract by voluntarily surrendering it rendered the contract void *ab initio,* and the intestate then became entitled to be restored to his original status, which is not the subject of this controversy.

It is further insisted by plaintiff that the surrender or delivering up of the policy, in consideration of the sum paid to him by the (26) company, was a *sale* of the policy made by his intestate to the company, and in this action he, having affirmed the contract of insurance, disaffirms the sale, and is therefore entitled to recover upon the policy, although it had been delivered to the company. This contention can not be sustained, because the property, or interest, so vesting in the intestate was a contingency liable to be defeated and incapable of delivery, actual or constructive, and therefore not the subject of sale; or, should it be considered an assignment, the instant the interest of the intestate passed out of him into the company, *eo instanti* the obligations therein imposed ceased and the contract rescinded.

In *Edgerton v. Wolf,* 6 Gray, 453, the defendant, an infant, purchased a horse, which was delivered to him, with the right to return the horse if he could not get the money to pay for him, and, after failing to get the money, returned the horse to the vendor plaintiff; but afterwards took the horse from plaintiff's possession and sold him. The Court there held that the sale made to the infant was voidable at his election, and his

returning the horse voluntarily, intending to give up all his interest in the property, was an avoidance of the contract, and all the rights of the vendor revested in him, and the infant defendant ceased to have any right over the property, and could not retake the same against the will of the vendor plaintiff.

So, it appearing that the surrender of the policy was a disaffirmance of the original contract of insurance, rendering the same absolutely void *ab initio* (Clark on Contracts, page 258), a "disaffirmance can not be retracted. Ratification of a contract, after it has once been disaffirmed, comes too late. . . . When the infant has exercised the privilege to rescind his contract, he can not afterwards abandon or repudiate the rescission and take the other alternative." "The contract (27) having been made void, can not be revived, except by mutual consent," says the Court in *McCarty v. Iron Co.*, 92 Ala., 463; 12 L. R. A., 136.

There is no error, and the judgment of the court below must be Affirmed.

MARTIN v. MARTIN.

(Filed 4 March, 1902.)

1. **Divorce a Mensa et Thoro—Complaint—Sufficiency.**

A complaint for divorce from bed and board that does not specifically state the circumstances of the alleged acts of cruelty, give time and place, and state plaintiff's conduct, and that such acts were without provocation, is not sufficient.

2. **Pleadings—Complaint—Defective—Aider by Verdict.**

A defective complaint can not be cured by verdict.

3. **Verification—Pleadings—Amendment—The Code, Secs. 258, 1286.**

A verification of a pleading, that it was "sworn and subscribed to," is not sufficient.

4. **New Trial—Supreme Court—Pleadings.**

Where an exception is made for the first time in the Supreme Court, that the complaint does not state facts sufficient to constitute a cause of action and the defects can be cured by additional averments, the Supreme Court will not dismiss the action, but will grant a new trial.

ACTION by Julia E. Martin against D. J. Martin, heard by *McNeill, J.*, and a jury, at April Term, 1901, of NORTHAMPTON. From a judgment for the plaintiff, the defendant appealed.

(28) *R. B. Peebles for plaintiff.*
Winborne & Lawrence and D. C. Barnes for defendant.

CLARK, J. The complaint sets out no ground for an absolute divorce, and is insufficient as a complaint for divorce from bed and board, in that it does not specifically state the circumstances of the alleged acts of cruelty, give time and place, and state what was plaintiff's own conduct, and that such acts were without provocation on her part. *O'Connor v. O'Connor,* 109 N. C., 139; *Jackson v. Jackson,* 105 N. C., 433; *White v. White,* 84 N. C., 340; *McQueen v. McQueen,* 82 N. C., 471. And such defective complaint can not be cured by verdict. *Ladd v. Ladd,* 121 N. C., 118; *White v. White, supra.* The allegation of drunkenness was withdrawn on the trial.

The amendment was a nullity, because the only verification is "sworn and subscribed to." This would be defective as a verification, under The Code, sec. 258, to a pleading in an ordinary action, *Cole v. Boyd,* 125 N. C., 496; *a fortiori* this is so in an action for divorce, as to which the law, which does not favor divorce, required a still more specific affidavit. The Code, sec. 1286. The original complaint is thus verified, but is insufficient for reasons above stated. The amendment is insufficient because not thus verified, and this requirement is not a matter of form, but substance, and a defect therein is jurisdictional. This has been too recently decided to require discussion. *Holloman v. Holloman,* 127 N. C., 15; *Nichols v. Nichols,* 128 N. C., 108. The Court, however, will not dismiss, but will grant a new trial, that plaintiff may apply for leave to amend, if so advised. *Ladd v. Ladd,* 121 N. C., 118.

New trial.

Cited: Printing Co. v. McAden, 131 N. C., 184; *Green v. Green, ibid.,* 535; *Hopkins v. Hopkins,* 132 N. C., 24; *Dowdy v. Dowdy,* 154 N. C., 558; *Sanders v. Sanders,* 157 N. C., 233; *Alexander v. Alexander,* 165 N. C., 46.

(29)

FAIN v. SOUTHERN RAILWAY COMPANY.

(Filed 4 March, 1902.)

Appeal—Transcript—Laches of Appellant—Laches of Clerk—The Code, Sec. 551.

Laches of Superior Court clerks in not transmitting transcript of case on appeal will not excuse laches of appellant in failing to have the transcript sent up within the time required.

FAIN *v.* R. R.

ACTION by A. A. Fain, administrator, against the Southern Railway Company. Motion of appellant to reinstate its appeal, the same having been dismissed under Rule 17, is denied.

Dillard & Bell for plaintiff.
George F. Bason and A. B. Andrews, Jr., for defendant.

FURCHES, C. J. The appeal in this case should have been docketed at August Term, 1901, under the rules of this Court; but no transcript having been docketed by the appellant, the appellee caused a certificate of the clerk to be docketed, and the appeal was dismissed, under Rule 17. At the time the plaintiff moved to dismiss the appeal the defendant moved to reinstate the case and for a writ of *certiorari*, and these motions were continued.

At this term, upon notice by plaintiff to defendant, the motions to reinstate the appeal and for the writ of *certiorari* were heard, when the Court refused both motions.

The defendant showed that it had taken an appeal, filed the required appeal bond, and that the case on appeal was settled and filed in the clerk's office in August, 1901; and the call of cases from the Sixteenth District, in which district this action was tried, was not had until December of that year. And the defendant appellant contended that it was the duty of the clerk to make out and forward the transcript, and that it was a laches on his part that the record was not here in (30) proper time; while the plaintiff appellee alleged and showed that the appellant had not paid or tendered the clerk's fees for making out the transcript, and insisted that it was not the duty of the clerk to make out and forward the transcript until this was done. The plaintiff further alleged and showed, by the affidavit of the clerk, that he had applied to the local counsel of the defendant to know whether he should make out the transcript of appeal or not, and got no satisfactory answer as to whether it was desired that he should do so or not. And the clerk further says in his affidavit that if he had been informed by said attorney that he wanted the transcript made out and sent up, he would have done so without the fees being paid. Upon these statements of the clerk, the Court declined to reinstate the appeal, and of course the motion for *certiorari* went with it.

Under section 551 of The Code, it is the duty of the clerk, in cases of appeal from his court, when a proper appeal bond is filed, to make up and transmit to this Court the transcript of the case on appeal within twenty days after the case on appeal is settled and filed in his office. And it is intimated in *S. v. Deyton,* 119 N. C., 880, that if he willfully neglects to do so, he is liable to indictment.

It is true that this Court has held more than once that he need not do so if the appellant neglect or or refuse to pay his fees for making out the transcript. But it is hardly probable that this would excuse him for not making out and forwarding the transcript, unless he had notified the appellant that he would require his fees before sending up the transcript, and the appellant, after this notice, refused or neglected to pay for the same. This does not only seem to be the law, but it is the reasonable view to take of the matter, as the fees can not be
(31) ascertained until the transcript is made out, as they are much greater in some cases than they are in others.

But the laches of the clerk has been held not to excuse the laches of the appellant; that he must be diligent in seeing that the transcript is made out, transmitted to this Court and filed within the time required by the rules of Court. He is the actor, the mover in the matter, and it is his appeal that is delaying the enforcement of the judgment of the Superior Court, which must be presumed to be correct until reversed. And if he were not held to diligence, he might for a long time delay the enforcement of the judgment appealed from, without just grounds of appeal. This the law will not allow. While it provides proper means for having the judgments of the Superior Courts reviewed, the appellant must not use this right as a matter of delay to the prejudice of the appellee. As a general rule, we do not write opinions in matters of this kind. But it seemed to us that neither clerks nor parties fully appreciated their duties and responsibilities, and we have written this opinion hoping that we may have less trouble of this kind hereafter than we have been having.

Motion to reinstate denied.

Cited: Johnson v. Andrews, 132 N. C., 380; *McKenzie v. Development Co.,* 151 N. C., 278; *Hewitt v. Beck,* 152 N. C., 759.

---

(32)

WINBORNE v. ELIZABETH CITY LUMBER COMPANY.

(Filed 4 March, 1902.)

1. **Tenancy in Common—Ejectment—Trespass.**

One tenant in common can recover the entire tract against a third party.

2. **Tenancy in Common—Trespass—Damages.**

In an action for trespass, one tenant in common is entitled to judgment only for his proportionate part of the damages.

ACTION by W. H. Winborne and others against the Elizabeth City Lumber Company, heard by *Brown, J.*, and a jury, at September Term, 1901, of CHOWAN.

From the following judgment the plaintiffs appealed:

"This cause coming on to be heard, all parties being before the court, and the issues having been answered as appears in record, it is adjudged, ordered and decreed that plaintiffs W. H. Winborne and others recover of defendant, the Elizabeth City Lumber Company, the sum of $40, with interest on same from this date until paid, and the costs of this action, to be taxed by the clerk of this court.

"It is further adjudged and decreed that the contract attached to complaint from George Eason and wife, Juda Ann Eason, to Gay Manufacturing Company, registered in office of Register of Deeds of Chowan County, N. C., in book __, page __, is void, and same is hereby canceled and set aside.

"It is further adjudged, that plaintiffs own an undivided one-fifth interest in land described in said paper or contract, and further, that defendant has no interest in said land, nor claim upon said timber.

G. H. BROWN, JR., *Judge.*"

W. M. Bond for plaintiffs.

Shepherd & Shepherd for defendant.

CLARK, J. One tenant in common can recover the entire tract against a third party, for each tenant is entitled to possession (33) of the whole, except against a cotenant. *Yancey v. Greenlee,* 90 N. C., 317; *Lafoon v. Shearin,* 95 N. C., at page 393; *Thames v. Jones,* 97 N. C., 121; *Gilchrist v. Middleton,* 107 N. C., at page 684 (which is full and explicit). When defendant is a cotenant, then only the plaintiff's interest is defined by the judgment. *Foster v. Hackett,* 112 N. C., 546. Here, the defendant being a stranger, the court erred in directing the jury to respond to the first issue, "Yes, one-fifth of the land," if they believed the evidence; whereas, the defendant had no right to have the amount of plaintiff's right to possession determined, for, as against defendant, the plaintiff was entitled to recover possession of the whole. The jury seems to have cured this error by simply answering the issue "Yes."

As to the damages for cutting the timber, the plaintiff was entitled to recover only one-fifth, since this judgment would not be a bar to an action by the other four tenants in common for their *pro rata* part of the damages. Otherwise as to the realty, which cannot be destroyed, and the possession of which by the plaintiff inures to the benefit of his cotenants, since his possession is their possession. The judgment should

be modified by giving plaintiff judgment to recover the entire tract; and, as thus modified, it is

Affirmed.

Cited: Shelton v. Wilson, 131 N. C., 500; *Rowe v. Lumber Co.,* 133 N. C., 445; *Allred v. Smith,* 135 N. C., 451.

(34)

AUSLEY v. AMERICAN TOBACCO CO.

(Filed 4 March, 1902.)

1. **Master and Servant—Negligence.**

The evidence in this case as to failure of defendant to hurdle or box certain cog-wheels, does not show negligence *per se.*

2. **Master and Servant—Negligence—Assumption of Risk.**

Where an employee knows all about the machinery and its defects, if any, before entering upon the work, he assumes the risk incident thereto.

3. **Evidence—Incompetent—Master and Servant—Negligence.**

In an action for injuries caused by failure to box or hurdle a cog-wheel, a subsequent change in the location of the wheels is incompetent.

CLARK, J., dissenting.

ACTION by W. B. Ausley against the American Tobacco Company, heard by *Councill, J.,* and a jury, at March Term, 1901, of DURHAM. From a judgment for the defendant the plaintiff took a nonsuit and appealed.

Manning & Foushee for plaintiff.

P. H. C. Cabell and Winston & Fuller for defendant.

FURCHES, C. J. It seems that plaintiff was in the employment of defendant, a corporation, in November or December, 1899, when he was seriously injured by the machinery in the defendant's dry-house, and brings this action for damages. It appears that there is what is called the dryer, about 18 feet wide, 7 feet high, and 120 feet long, in a large building. This dryer has a number of cross-beams on top of it, and the process of drying seems to be done by means of fans operated by machinery, consisting of shafting, cog-wheels, belt-wheels and
(35) belting. The motive power for operating this machinery was electricity, conveyed to it from a battery across the street. The

plaintiff was injured by having his pants-leg caught in the cog-wheel on top of the dryer. The cog-wheel is placed on top of the dryer, only some six or eight inches above it, and was not boxed or covered. The plaintiff, in attempting to adjust one of the belts for the purpose of starting the fan that had stopped, stumped his toe against one of the cross-beams, or in some way stumbled, lost his balance and fell, and his clothing, as described above, caught in the cog-wheel and he was injured.

The plaintiff was a machinist, knew all about this machinery, helped put it up, was then employed to operate, keep in order and run the same. The plaintiff alleges that it was negligent in defendant not to box or hurdle this cog-wheel, and that negligence was the cause of his injury.

These are substantially the facts of the case, as shown by the testimony of the plaintiff himself, and he introduced no evidence more favorable to his right to recover than his own. The defendant offered no evidence, and the court intimating the opinion that the plaintiff could not recover, taking his evidence to be true, the plaintiff submitted to a nonsuit and appealed.

It is difficult to see the defendant's negligence, and that the negligence of the defendant was the *proximate cause* of the plaintiff's injury, if it can be held that there was negligence. It might have been safer if this cog-wheel had been hurdled, and, if it had been, it may be that the plaintiff would not have been injured. But it can hardly be negligence —negligence *per se*—in the defendant not to have hurdled such a wheel placed on top of the dryer seven feet above the floor of the building, and where no one would have anything to do with it but the machinist in charge, employed to keep it in order and to run it. (36) It seems to us that a man of ordinary prudence would not have done more than the defendant did. But to our minds there is another reason why the plaintiff can not recover, about which there seems to be no doubt.

The plaintiff is a machinist, was employed to assist in putting up this machinery, and did assist in putting it up; says that those engaged in putting it up did not know how to do it. And after it was put up, the defendant employed him to run and keep it in order. He knew everything about it—more, probably, than any one else; after having this *knowledge,* he entered into this *contract* with the defendant, and, in doing so, *he assumed the risks incident to such employment.* There was no hidden or unknown defect—unknown to the plaintiff—about this machinery. This being so, he cannot recover. *Crutchfield v. R. R.,* 78 N. C., 300; *Johnson v. R. R.,* 81 N. C., 458; *Cowles v. R. R.,* 84 N. C., 309; 37 Am. Rep., 620; *Hudson v. R. R.,* 104 N. C., 491; *Pleasants v. R. R.,* 95 N. C., 195; *Coley v. R. R.,* 128 N. C., 534, and *S. c.,* on rehearing, 129 N. C., 407.

This doctrine, we think, is well settled in this State, as well as in many other jurisdictions, where there is no dispute but what the party knew all about the machinery and its defects (if any) before he contracted and entered upon his work, he assumes the risk and can not recover. In this case there is no dispute about this; the plaintiff admits that he knew all about it; and there is no evidence that the defendant was informed of any defect and promised to remedy it. Indeed, there is no evidence that the defendant knew of any defect.

The defendant not being a *railroad,* the act of 1897, ch. 56, Private Laws, does not apply to this case.

(37) There was one exception to the ruling of the court upon the evidence. The plaintiff wanted to prove that the cog-wheel had been moved higher on the shafting since the injury. This evidence was objected to and ruled out by the court. There was no error in this ruling, as it has been repeatedly so held.

As we find no error in the judgment of the court below, it is

Affirmed.

DOUGLAS, J., concurring: I concur in the result only, because I doubt whether there was evidence of negligence to go to the jury; but I can not agree that the court can, under any circumstances, find, or direct the jury to find, the fact of assumption of risk, which has repeatedly been held by this Court to be an affirmative defense in the nature of confession and avoidance. Neither can I fully approve of *Crutchfield's case.*

CLARK, J., dissenting: The plaintiff was put to work where one of his duties was to replace a belt which had been "thrown" by the band-wheel, whereby the fan was stopped. The band-wheel was on a shaft within three inches of the powerful cog-wheels which ran the machinery, and which rose eight to ten inches above the floor. These wheels were not covered or boxed, and in attempting to adjust the belt back upon the wheel, the plaintiff stumped his toe, fell, his clothing was caught in the revolving cogs, and he was injured. All of his clothing was torn off of him, and only by great presence of mind and by a providential dispensation he was saved from being literally ground up.

It was negligence to have such dangerous machinery unboxed in dangerous proximity to a band-wheel in a place where an employee might be called at any moment to replace a belt. *Res ipsa loquitur.* The plaintiff was not allowed, under the rules of law, to show that defend-

(38) ant has since boxed these cog-wheels, but he offered to show it, and if defendant has not yet boxed them, its negligence is certainly very gross. It was in evidence, without objection, that since the plaintiff's injury the band-wheel has been moved up on the shafting, farther away from the cog-wheels.

The court not only erred in refusing to let this evidence go to the jury upon the issue of negligence, but should have told them that if they believed the evidence they should find that leaving unboxed cog-wheels so powerful as to do what the testimony showed that these wheels had done, was negligence.

The law was well stated by *Montgomery, J.,* at last term, in *Myers v. Lumber Co.,* 129 N. C., 252, as follows: "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 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." And to that purport are the numerous and uniform decisions of this Court.

No one can read this evidence and say that the unboxed cog-wheels were safe, or that putting the plaintiff where he must put back a band on a band-wheel revolving in three inches of such uncovered cog-wheels, was providing him a safe place to work in. If the plaintiff was guilty of contributory negligence or assumption of risk, these were affirmative defenses, and the judge could not direct the jury that there was no negligence by defendant because plaintiff had cured liability therefor by his contributory negligence or by assumption of risk.

It is not contended that there is any evidence of contributory negligence, but it is said the plaintiff knew the cog-wheels, if unboxed, were dangerous, and therefore he assumed the risk. But the defendant also knew they were dangerous. Why, then, was it not the defend- (39) ant who assumed the risk? The plaintiff could not box the cog-wheels, the defendant could, and therefore the defendant, not the plaintiff, assumed liability for injury resulting from failure to do so. It should be noted that the injury was not caused by the mode in which the cog-wheels were put up, which work the plaintiff aided as an employee to do, but by not having them boxed up afterwards, which was the work of a carpenter and not of a machinist.

To say that an employer is negligent if he fails to furnish safe machinery or a safe place to work in, but that though the employer is thus negligent, yet, if the employee is intelligent, the court must hold, as a matter of law, that the employer is not negligent, and must instruct the jury to answer the issue of defendant's negligence "No," in spite of the most direct evidence of the machinery being dangerous and the place unsafe to work in—this is to contradict the very reason of the thing and all the decisions heretofore made on this subject. The decisions of the highest court of England are uniform that mere *knowledge* on the part of the employee of the dangerous character of the machinery or of the place to work in does not constitute "assumption of risk" by

the employee. These authorities have been cited and approved by this Court in *Lloyd v. Hanes,* 126 N. C., 359 (cited by *Furches, J.,* in *Coley v. R. R.,* 128 N. C., at page 537). In *Coley v. R. R.,* 129 N. C., 407, *Douglas, J.,* says that the employee does not "assume the risk" of dangerous machinery "unless the apparent risk is so great that its assumption would amount to a reckless indifference of probable consequences." That certainly can not be said of the plaintiff in this case.

That the machinery, unboxed, was dangerous, appears from what happened in this case, and is clear even if no injury had happened, for rapidly revolving cog-wheels capable of driving such machinery would "chaw up" almost anything not hard enough (40) to break them. But the plaintiff may well have thought he could escape being caught in them, and that was a fact for the jury, not for the judge. If he was caught by his own negligence in stumbling, that was contributory negligence, for the jury to decide, and besides there is no evidence of such negligence by the plaintiff. The injury was not due to a mere accident without negligence, for if the cog-wheels had been boxed, as they should have been, and as the evidence shows was customary, the plaintiff could not have been injured.

The doctrine of "assumption of risk" is clearly stated in the English cases cited with approval in *Lloyd v. Hanes, supra,* and by the best courts in this country. It is simple and reasonable, and may be stated in a few words: An employee assumes the ordinary risks of an employment, which are incident to it when equipped with the safest appliances in general use in that employment, in good condition. One who enters the railway, electrical or mining or similar service, knows that it is more hazardous than farming, banking, clerking and similar employments, and he assumes the extra risk of accidents; but he does not assume the risk of injuries caused by negligence of the employer in failing to furnish safe appliances, in general use. Though the employee sees such appliances are not there, the employer knows it too, and the responsibility is not shifted from the employer, whose duty it is to furnish safe appliances (as a box to cover dangerous cog-wheels, or an automatic coupler, or a guard to a mangle). *Harden v. R. R.,* 129 N. C., 354; *Troxler v. R. R.,* 124 N. C., 189; 44 L. R. A., 313; 70 Am. St., 580; *Greenlee v. R. R.,* 122 N. C., 977; 41 L. R. A., 399; 65 Am. St., 734; *Simms v. Lindsay,* 122 N. C., 678. The liability is on him whose duty it is to furnish the safe appliances. Of course, if an (41) appliance becomes defective without the knowledge of the employer, and the employee fails to report the defect, he assumes the risk; but if the employee reports, and the employer does not remedy the defect, the employee does not assume the risk because he does not

leave. This is held expressly in *Yarmouth v. France,* 19 Q. B. D., 660, which is cited with approval by this Court in 126 N. C., at page 363.

In *Simms v. Lindsay,* 122 N. C., 678, it is said by a unanimous Court: "It is not to be held as a matter of law that operatives must decline to work at machines which may be lacking in some of the improvements or safeguards they have seen upon other machines, under penalty of losing all claim for damages from defective machinery. It is the employer, not the employee, who should be fixed with knowledge of defective appliances and held liable for injuries resulting from their use." Such are the principles which, in accordance with rulings of other courts of the highest reputation, we have hitherto applied uniformly to all other cases, and the same principle should be applied in this case. They are sound, just and reasonable.

In *Myers v. Lumber Co., supra,* it was held negligence to allow a saw to run naked near an employee passing by. Powerful cog-wheels (running at 180 revolutions a minute), when uncovered, are equally dangerous and more capable of tearing the flesh off an employee who has to work in their close vicinity to put on a belt. If these cog-wheels had been boxed (as they doubtless now are), *this injury could not have happened.* There was, therefore, evidence of negligence to go to the jury. If the plaintiff contributed to the injury, that is a matter of defense, and certainly there is no evidence of it in the record, and if there had been the judge could not hold that it negatived and destroyed the effect of defendant's negligence.

Cited (without approval): *Mott v. R. R.,* 131 N. C., 236.

Distinguished: Dorsett v. Mfg. Co., 131 N. C., 236; *Marks v. Cotton Mills,* 138 N. C., 408.

Doubted: Pressly v. Yarn Mills, 138 N. C., 424, 433.

(42)

SPRUILL v. BRANNING MANUFACTURING CO.

(Filed 4 March, 1902.)

1. Trespass—Husband and Wife—Administrator—Estates—Per tout et non per my.

Where a husband and wife own land jointly, the administrator of the husband can not bring an action for a trespass committed prior to the death of the husband.

2. Trespass—Husband and Wife—Estates—Per tout et non per my.

Where husband and wife own land jointly, the wife may bring an action for trespass committed prior to death of husband.

3. Limitations of Actions—Married Woman—The Code, Sec. 163.

Where husband and wife own land jointly, the statute of limitation against an action for trespass begins to run as to the wife at the death of the husband.

ACTION by C. W. Spruill, as administrator of T. H. Wilson and Alice Wilson, against the Branning Manufacturing Company, heard by *Allen, J.*, and a jury, at November Term, 1901, of BERTIE. From a judgment for Alice Wilson, the defendant appealed.

B. B. Winborne and St. Leon Scull for plaintiffs.
R. B. Peebles and Pruden & Pruden for defendant.

FURCHES, C. J. In 1895, and before that time, Thaddeus Wilson and Alice Wilson, being husband and wife, were the owners of a tract of land in Bertie County, conveyed to them by deed. In 1895 the defendant committed a trespass on said land by entering upon the same, cutting and removing timber therefrom, and otherwise damaging said land. On 12 January, 1896, Thaddeus Wilson died intestate, and on 16 November, 1896, C. W. Spruill qualified as his administrator. On 7 Feb-
(43) ruary, 1898, said Spruill, as administrator, and the widow, Alice Wilson, commenced this action to recover damages for said trespass. The defendant denied committing the trespass, denied plaintiff's right to maintain this action, and pleaded the statute of limitations. His Honor held that the plaintiff Spruill, as administrator of Wilson, had no cause of action against the defendant, and submitted the following issues to the jury as to plaintiff Alice's right to recover:

1. Were Thaddeus Wilson and his wife, Alice, the owners of the 26-acre tract of land described in the pleadings? Answer: "Yes."

2. If so, did the defendant trespass upon the same, as is alleged? Answer: "Yes."

3. If so, what damages were done the same thereby? Answer: "$80."

4. Is the cause of action therefor barred by the statute of limitations as to Alice Wilson? Answer: "No."

Upon these issues, judgment was given to the plaintiff Alice, and the defendant excepted and appealed.

The defendant tendered other issues that were not submitted by the court, and defendant excepted. But this exception can not be sustained.

We are of the opinion that his Honor was correct in holding that the plaintiff Spruill, as administrator of Thaddeus Wilson, had no right of

action. And it seems to be settled by this Court that the plaintiff Alice had, unless she is barred by the statute of limitations. She and her husband, Thaddeus Wilson, held this land by entirety—not as joint tenants or tenants in common. She and her husband were seized *per tout* and not *per my*—each being seized of the *whole,* and not of a part; therefore, upon the death of her husband she remained the owner of the land. She took no new estate. If she had, she would not have been entitled to recover damages for a trespass (44) committed before her acquisition of said new estate. But this question is so elaborately and so ably discussed by the late *Chief Justice* in *Gray v. Bailey,* 117 N. C., 439, that it seems to be only necessary to refer to that case and the authorities cited.

Nor does it seem to us that the court committed error in refusing to hold and charge that the plaintiff Alice's right of action was barred by the statute of limitations. If the statute commenced to run as to her from the date of the trespass, more than three years had elapsed; and she would be barred. But if it only ran as against her from the death of her husband, three years had not elapsed; and she is not barred. And it seems to be settled that it did not run as to her until the death of her husband. The Code, sec. 163; *Johnson v. Edwards,* 109 N. C., 466; 26 Am. St., 580; *Bruce v. Nicholson,* 109 N. C., 209, 26 Am. St., 562.

We therefore find no error in the judgment, and it is

Affirmed.

Cited: Ray v. Long, 132 N. C., 896.

FINCH v. STRICKLAND.

(Filed 4 March, 1902.)

Appeal—Transcript—Dismissal.

Where the trial judge directs the clerk to include certain matter in the transcript, and the same is omitted by the direction of the appellant, the appeal will be dismissed.

ACTION by N. B. Finch against A. S. Strickland and others, heard by *Timberlake, J.,* at November Term, 1901, of NASH. From a judgment for the latter, the former appealed.

Jacob Battle, F. S. Spruill, and C. M. Cooke for plaintiff. (45)
W. M. Person and T. T. Hicks for defendants.

CLARK, J. In settling the "case on appeal," the appellant insisted that certain affidavits sent up on a former appeal were unnecessary on this appeal, and should be omitted. The appellee contended to the contrary. The judge was of the latter's opinion, and directed the clerk to include them in the transcript. Afterwards, the appellant directed the clerk to omit them, and accordingly that part of the transcript is not sent up, and of course not printed.

This defect in the transcript the appellant contends is immaterial; the appellee insists it is vital. The case must "be settled on appeal" by the judge below, not by this Court. We can not pass upon the materiality of the omitted matter, as that would require us to go through the whole case on such preliminary motion, and, if found material, then a second argument over the same ground would be necessary after they have been supplied. Besides, by such practice an appellant could always prolong litigation, if inclined to delay affirmation of the judgment, by simply omitting part of the "case on appeal."

If appellant thought the unnecessary matter had been included by mistake or inadvertence, he should have applied to the court below, not to resettle the case, but to correct an inadvertence or mistake. *Boyer v. Teague,* 106 N. C., 571. This case differs from *Farrabow v. Green,* 110 N. C., 414, in that here the judge has directed this matter sent up and made it a part of the transcript.

When either party thinks unnecessary matter is sent up, his remedy is prescribed in Rule 22 of this Court, Clark's Code (3 Ed.), Rule 22, page 918, and cases there cited, *i. e.,* the taxation of the costs thereof against the party causing it to be sent up (if adjudged by this
(46) Court unnecessary), regardless of the issue of the appeal.

The appellant has not brought up the entire record, as he is required to do, and has not negatived *laches* which was necessary to obtain a *certiorari* to supply the omission, and, indeed, has not asked for one, but admits the omission was by his order. The appeal must be dismissed. *Allen v. Hammond,* 122 N. C., 754.

Appeal dismissed.

Cited: S. c., 132 N. C., 104.

BRINKLEY v. SPRUILL.

(Filed 4 March, 1902.)

Vendor and Purchaser—Antenuptial Agreements—Bona Fide Purchaser.

A *bona fide* purchaser of land from a child to whom the father had conveyed the land, after having promised to convey the same land to his intended wife in consideration of marriage, acquires a good title.

COOK, J., dissenting.

ACTION by Ellen Brinkley against N. W. Spruill and others heard by *Neal, J.*, and a jury, at October Term, 1901, of WASHINGTON.

Plaintiff's husband agreed to deed certain land to plaintiff if she would marry him, and after her promise to do so, but before marriage, conveyed the land, without consideration, to his children by a former wife; such conveyance being recorded before the marriage. Sixteen years thereafter he made another conveyance of the property to plaintiff, but prior to such conveyance one of the children had sold his undivided interest in the property to defendant Spruill, who paid a full consideration, and took the same without knowledge of the plaintiff's claim. From a judgment in favor of plaintiff, defendants (47) appealed.

W. M. Bond for plaintiff.
A. O. Gaylord for defendants.

FURCHES, C. J. This case was before the Court a year ago, and is reported as *Brinkley v. Brinkley,* 128 N. C., 503, and a full statement of the facts will be found there. But in that case the effect of an innocent purchaser for a full price and without notice of the contract of the plaintiff with W. H. Brinkley from one of the grantees of the said J. H. Brinkley was not considered. The deed the Court declared to be fraudulent and void as to the plaintiff was made to the five children of the said J. H. Brinkley, by a former marriage, and was without consideration. But it appears by the case now before the Court that one of the children and grantees in the deed from J. H. Brinkley has sold and conveyed his one undivided fifth interest in said land to the defendant Spruill; that said sale to Spruill was for a full consideration and made before the deed from the said J. H. to the plaintiff, and before the grantor or the defendant Spruill had any knowledge or information of the plaintiff's claim to any part thereof. And the question is, Does the plaintiff take one-half of the whole tract, or only two-fifths thereof?

The deed from J. H. Brinkley to his children was good as against

him, and would have been good against the plaintiff but for the statute of frauds. But as the plaintiff had an interest, more than a mere equity, it could not be defeated by notice, yet it did not amount to an estate. *Poston v. Gillespie,* 58 N. C., 258; 75 Am. Dec., 437. And the deed of W. H. to his five children, being voluntary and without consider-
(48) ation, was a fraud upon her rights and void as to her to the extent of her rights therein.

But as the plaintiff had no estate in the land, if the said J. H. had sold and conveyed the same, before his deed to the plaintiff, for a full price and without the purchaser having any notice of the plaintiff's claim, the purchaser would have gotten a good title, free from her claim. And while the deed of J. H. did not defeat the plaintiff's rights, for the reasons we have stated, yet it is admitted that the defendant Spruill, before the date of the plaintiff's deed, purchased, for a full price and without notice of the plaintiff's claim, one undivided fifth interest in said land. And it seems to us that this gives him a good title to that fifth interest. The Code, sec. 1548; *Potts v. Blackwell,* 56 N. C., 449; *Triplett v. Witherspoon,* 70 N. C., 589.

If the defendant Spruill had bought the undivided interest of each of the grantees for a full price and without notice, as he did this one-fifth interest, the entire estate of the plaintiff would have been defeated, under the authorities we have cited. And if this would have defeated her entire interest, we see no reason why the sale to Spruill did not defeat her interest to the one-fifth part that he did buy.

We are, therefore, of the opinion that the sale by one of the grantees to Spruill, before the date of the plaintiff's deed, was the same in effect as if W. H. Brinkley had sold and conveyed to Spruill, for a full price and without notice, one undivided fifth interest in his land; which would have left him the owner of only four-fifths undivided interest therein; and his deed to the plaintiff only conveyed one-half of what he had at the date of the deed.

The plaintiff is only entitled to two undivided fifths of the whole tract, and not to one undivided half thereof.

There is error in the judgment appealed from, and upon this
(49) opinion being certified to the Superior Court of Washington County, judgment will be entered there in accordance therewith.

Error.

CLARK, J., concurring in result: The only marital right which a woman has in her husband's realty is to dower of a life estate in one-third thereof, should she survive him. The *feme* plaintiff's claim, therefore, can not be based upon a fraud upon her marital rights, for she is not a widow, and she is suing for a fee simple in one-half of his realty.

The basis of her claim is an oral executory contract alleged to have been made by one, afterwards her husband, to convey one-half of his realty to her, in consideration of marriage—a promise, if made, which was not executed by deed for sixteen years after the marriage. She seeks to make good such oral contract against the children of the first marriage, from whose mother's father the land came, who had no notice of such alleged oral contract, and who besides were minors, and the deed to whom was registered two months before the *feme* plaintiff paid the consideration of the oral contract by marrying the grantor. The *feme* plaintiff had, therefore, two months' legal notice that the intended husband could not pay the consideration. The deed to the children was good against the father or any one claiming under a subsequently registered deed from him, and if a married woman can impeach the transaction at all, she can only do so as a fraud on her marital rights, and this she can only assert when she becomes a widow, and to the extent of dower. For these reasons, among others, I dissented in the original case, *Brinkley v. Brinkley,* 128 N. C., 503. I do not care to repeat all the reasons for the dissent there given, but merely refer to these to sustain my concurrence now, that if the *feme* plaintiff recovers at all, her recovery should be limited to one-half of the four-fifths which still remain in four of the children, the other one-fifth having (50) been conveyed to defendant Spruill for value and without notice, and his deed duly registered long prior to the execution of any deed to *feme* plaintiff.

DOUGLAS, J., concurring: I fully concur in the proposition that if "the question involved in this appeal was expressly decided when the case was first before this Court," it can not now be reviewed. In other words, where a material question has been once adjudicated, expressly or by necessary implication, it remains the settled law of the case unless reversed on a rehearing, and can not be reviewed in another appeal in the same case. But in the case at bar the opinion of the Court expressly states that the essential point now decided was not considered on the former appeal. It so seems to me.

Considering it, therefore, an open question, I concur in the opinion of the Court. When J. H. Brinkley conveyed the land to his children, they acquired an absolute title to one-half of the land, which he had an unquestioned right to convey. They also acquired a valid title to the other half as against the grantor. And it would seem, in the absence of creditors, against all the world except the plaintiff. If the plaintiff had had her deed recorded before Spruill bought the interest of J. H. Brinkley, she could have recovered one-half of the entire tract of land, or one-half of each child's part, if it had been divided. Suppose it had

been divided, she could have recovered one-half of J. H. Brinkley's part before it was sold to Spruill, but not thereafter. She lost her right in that particular part because Spruill bought in good faith and for value, and not from any act done by the other children, who were not parties to that conveyance. What right has she to ask the other children to make good what she has lost by her own *laches* from the part to which they acquired an unquestioned title by their father's deed? She was
(51) not a creditor, nor in the nature of a creditor having a lien upon the entire land, but had a specific claim to only one-half thereof. The other half was rightfully conveyed, and to that half she never had any claim, either legal or equitable. Her present contention seems based upon some supposed right of contribution or exoneration from the other grantees, but I can not perceive any principle upon which they can be held responsible for a loss arising through no fault of theirs. It does not appear that they had any knowledge of the plaintiff's claim, or were guilty of any actual fraud, when they received from their father a deed for land which had come through their own mother.

Whether the plaintiff could follow the proceeds into the hands of J. H. Brinkley, is not before us.

Upon the former appeal, I was doubtful whether the plaintiff could recover at all; but, considering that question as irrevocably settled, I have no doubt that the opinion of the Court gives to her all to which she is justly entitled.

COOK, J., dissenting: There are two reasons why I can not concur in in the opinion of the Court. First, the question involved in this appeal was expressly decided when the appeal was first before this Court (*Brinkley v. Brinkley,* 128 N. C., 503). There have been no new parties made to this action. The parties to this appeal are the *same* ones who appealed in the former. And this is an effort to reverse, in part, our former decision, by an appeal, which we have often ruled can be done only by a petition to rehear. When the case was first before us, it was admitted in plaintiff's complaint (as is likewise shown by the record in this case) that one of the children (James L. Brinkley) had sold his interest to N. W. Spruill, a purchaser for value and without notice, and for that reason he (James L.) was not made a party defendant, and no relief was asked or granted that disturbed the one-
(52) fifth undivided interest thus acquired by said Spruill. We then held that "the plaintiff is entitled to be admitted to the possession of one undivided half of said land." (Page 510 of the concurring opinion of *Furches, C. J.*)

Second, the voluntary deed executed by Joseph H. Brinkley to his five children, in July, 1884, was held to be void as to this plaintiff's

right (following the doctrine laid down in Adams' Equity, 428, 3 Am. Ed., and the decisions of our own Court, and that of *Petty v. Petty,* a case exactly similar to this, 4 B. Monroe (Ky.), 215, 39 Am. Dec., 501. As to the one-fifth interest purchased by Spruill from James L., it remained undisturbed and still vests in him, Spruill. Thus we have four-fifths interest in the tract undisposed of and still vesting in Joseph H. Brinkley, so far as plaintiff's rights are concerned. With this status of the title (one-fifth in Spruill and four-fifths in Joseph Brinkley), Joseph H. Brinkley, in April, 1900, conveyed "unto said Ellen J. Brinkley an undivided one-half interest in and to that tract of land," etc. (describing by metes and bounds the *entire* tract of 116 acres). So we now have left undisposed of three-tenths undivided interest in the entire tract not involved in this controversy.

If Joseph H. Brinkley, in April, 1900, *after* Spruill's purchase of the one-fifth, had conveyed to Ellen, the plaintiff, one-half of his interest (which was then four-fifths) in the tract, as it then stood, then, and in that event, the view taken by the Court in its opinion would be correct. But that is not the case. The record plainly shows otherwise. But having conveyed to plaintiff an undivided one-half of the *entire* tract, and he, at that time holding title to *more* than one-half thereof, surely so much as one-half passed to her. Suppose he had conveyed her *all* of his interest in the tract, would she not have received four-fifths? Would that not be "one-half," plus the difference between one-half and four-fifths (five-tenths, plus three-tenths); leaving one-fifth (equal two-tenths) in Spruill, covering the entire title (five-tenths, plus (53) three-tenths, plus two-tenths, equal ten-tenths)? It is therefore clear to me that plaintiff is entitled to one-half (five-tenths), Spruill to one-fifth (two-tenths), and the residue (three-tenths) remains in the four children who did not dispose of their interests.

It is certain that Spruill can not complain, for he gets all that he claims to have purchased or to now own. The other defendants (appellants) can not complain, for they have no standing in this Court, being precluded by our decision rendered in the former appeal (*Brinkley v. Brinkley, supra*).

GRAY v. WILLIAMS.

(Filed 4 March, 1902.)

1. **Wills—Election.**

A donee can not be put to an election under a will, unless his property, professed to be conveyed by the will, is described in the instrument itself with such sufficient and legal certainty as to enable him to know the property.

2. **Mortgages—Equity of Redemption—Limitations of Actions—The Code, Sec. 152, Subsec. 4.**

When a mortgagee has been in possession more than thirty years since the execution of the mortgage, the right of redemption is barred.

FURCHES, C. J., and DOUGLAS, J., dissenting.

ACTION by John and Margaret Gray against Beulah Williams and others, heard by *Brown, J.*, and a jury, at September Term, 1901, of CAMDEN. From a verdict for the plaintiffs, the defendants appealed.

G. W. Ward for plaintiffs. (54)
J. H. Sawyer and E. F. Aydlett for defendants.

MONTGOMERY, J. The plaintiffs in this action seek to have determined, under the authority of chapter 6, Laws 1893, an adverse claim to their lands set up by the defendants. It is admitted by the defendants that up to the time of the death of her first husband, L. B. Sanderlin, the plaintiff Margaret Gray owned the land in fee simple. Sanderlin died in 1890, leaving a last will and testament, under which the defendants Beulah Williams and Nevada Burgess claim a remainder in fee to the land after the life estate of Mrs. Gray, the basis of the claim being the alleged election on Mrs. Gray's part to take a life estate in her own property, that she might receive property of the testator also, bequeathed to her in the will. The clause of the will material for the present discussion is the first, and reads as follows: "I give and bequeath to my beloved wife, Margaret, and two youngest daughters, Ida and Nevada, she, Margaret, having possession of it during her natural life, then equally divided between the two; but in the event that either one or both die without an heir before or after the decease of my beloved wife, then their share or shares shall be equally divided among my other heirs. But in case of the death of wife, the farm is to remain undivided until they are both free. I also give to my wife, Margaret, all of my household and kitchen furniture, consisting of stocks of all kinds, notes and money, if any; nevertheless, my just debts and burial expenses are to come out of this."

It will be observed that the testator, after writing the words, "I give and bequeath to my beloved wife, Margaret, and two youngest daughters,

Ida and Nevada," fails and neglects to mention any property of any kind which he might have intended to give his wife and daughters. And while it may be that from other sections of the will and the (55) oral testimony to the effect that the testator had devised to others all of his own property, the land described in the complaint might pass under the first clause, if the property had been the property of the testator; yet that is not the question for decision.

The contention of the defendants is that when the plaintiffs had presented to her by the will the alternative either to take her own property reduced to a life estate, together with the legacies bequeathed to her in the same instrument, or to refuse the legacy and thereby prevent the contemplated disposition of her own property by the testator, she elected, chose, to take under the will, and that having received the legacies she, in law, was bound to take the land under the restrictions of the will.

It is true that a donee can not reject and accept under the same instrument, and that the intention of the donor is that the donee shall give full effect to the terms of the instrument of gift by relinquishing all claims which are inconsistent therewith. But it is also true that there are certain rules of law which must be observed before the principles of election can be made to apply to the particulars of given cases. One of these rules of law is, and must be, that before a donee can be put to an election, his own property which is professed to be conveyed must be, as to its identification, described in the instrument itself with sufficient and legal certainty as that the donee may know his own property from that description. If the rule were otherwise, and parol testimony permitted to ascertain and describe the property of the donee, it would be unsafe to take benefits under instruments of gift, especially under wills.

In the case before us it would be impossible to show that the tract of land described in the complaint was the one attempted to be devised in the will without the aid of parol evidence. Does the rule apply to a widow when she is donee? The rule must be universal. (56) There is no presumption against a donee because she may be the widow. But, on the other hand, there "is a *prima facie* presumption, always, that a testator means only to dispose of what is his own and what he has a right to give." The testator, in undertaking in his will to put his wife to an election, took the risk of doing an injustice to his two youngest daughters, if the will in that respect should turn out to be inoperative, and injustice has come to them on that account. We notice, at the conclusion of the will, under the head of "A Special Request," a direction that "No legal counsel shall be called on; but should difference arise, let it be adjusted by disinterested parties chosen on both sides,"

and in that connection it may not be amiss for us to say that if the testator had, when he made the will, secured the services of some one versed in the law the difficulties which have arisen over the script since his death might have been prevented.

But the defendants set up another claim to the land. It appears that in 1867 the plaintiff Margaret and her former husband executed a deed to the tract of land to the defendant S. G. Squires, Squires and his wife at the same time executing a deed of mortgage to the grantors, to secure the purchase money—the mortgage having been duly registered. On 25 January, 1900, Squires and his wife conveyed to the other defendants in this action, by release and quitclaim, all such right and title as they had, or ought to have, in the tract of land, subject to the life estate of the plaintiff Margaret. It appears, however, that Squires has never been in possession of a foot of the land, that he has never paid one cent on the notes secured by the mortgage, and that more than thirty years before the commencement of this suit he made a verbal agreement with Sanderlin that the land should be taken back, and the notes for the purchase money and the mortgage securing them surrendered—
(57) all of which was done. The plaintiff Margaret has been in the actual possession of the land for more than forty years.

The defendants Beulah Williams and Nevada Burgess took nothing under the deed from Squires and wife. Squires had no interest, legal or equitable, in the property. The abandonment of all interest he ever had (an equity of redemption) was complete thirty years before his deed to the other defendants. He had no equity of redemption when he made his deed, and the grantees could take no greater interest than he had. But, besides, the plaintiff Margaret, if she could be treated as mortgagee at this late date, has been continuously in possession before and since the date of the execution of the mortgage in 1867, and under the statute in force at that time a presumption of the abandonment or release in some legal way of the right of redemption would be raised, and, under subdivision 4 of section 152 of The Code, the right of redemption is barred.

His Honor instructed the jury that if they believed the evidence in the case to be true, they should answer the first, second and third issues "Yes," and the fourth "No," and rendered a judgment adjudging the plaintiff's right to the land in dispute to be a fee-simple interest, and that the defendants Beulah Williams and Nevada Burgess had never acquired a reversionary interest in the land, and owned no interest or estate therein.

The judgment further ordered the cancellation on the registry of the office of the Register of Deeds of Camden County of the mortgage from Squires and of his deed to the other defendants.

No error.

(58)

WINSLOW v. BENTON.

(Filed 4 March, 1902.)

1. Limitations of Actions—Action by Administrator—The Code, Sec. 164.

When a person entitled to bring an action dies before the expiration of the term limited for the commencement thereof, and the cause of action survives, his personal representatives may commence an action after the expiration of that time and within one year from his death.

2. Limitations of Actions—Action Against Personal Representatives—The Code, Sec. 164.

If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time and within one year after the issuing of letters testamentary.

ACTION by Jordan Winslow, administrator, against Charles E. Benton and others, heard by *Brown, J.*, at September Term, 1901, of PERQUIMANS. From a judgment for the defendants, the plaintiff appealed.

E. F. Aydlett for plaintiff.
J. H. Sawyer for defendants.

CLARK, J. The Code, sec. 164, is explicit that where the *"person entitled to bring an action* die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time and within *one year from his death."* This is because the law does not encourage remissness on the part of the creditor. (59) *Coppersmith v. Wilson,* 107 N. C., 31.

But the same section, 164, prescribes a different rule where the debtor dies: "If a *person against whom* an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative *after the expiration of that time,* and *within one year after the issuing of letters testamentary or of administration." Dunlap v. Hendley,* 92 N. C., 115; *Coppersmith v. Wilson, supra; Benson v. Bennett,* 112 N. C., 505.

The general rule remains as formerly, that when the statute of limitations has once begun to run, nothing stops it, but The Code does not stop when the cause of action is one which must be brought by or against a personal representative. And for evident reasons it makes this distinction, that where the action must be brought *by* a personal repre-

sentative, the limitation (if it would otherwise expire) is extended one year from the *death of the creditor,* but if the action must be *against* the personal representative, the limitation (if it would otherwise expire) is extended one year from the *issuing letters testamentary or of administration.*

The language of the statute is too explicit to admit of more than one construction. Here, though the debtor died in January, 1883, letters of administration were not taken out till September, 1899, and there being no one to sue till then, an action could have been brought on the notes (none of which were barred by the death of the debtor) within one year after "taking out of letters of administration." If there had been some one to sue, as the debtor or his personal representative, the claims would have been barred as to those creditors for whom action was not brought within the time limited, extended as above stated, not to exceed one year from death of creditor.

Copeland v. Collins, 122 N. C., 619, relied on for a contrary
(60) view, has no application. There the action was not begun till nearly three years after the administration was taken out.

The above-cited cases of *Dunlap v. Hendley,* 92 N. C., 115 (at page 118), *Coppersmith v. Wilson,* 107 N. C., 31, and *Benson v. Bennett,* 112 N. C., 505, as well as *Mauney v. Holmes,* 87 N. C., at page 432; *Burgwyn v. Daniel,* 115 N. C., at page 119; *Person v. Montgomery* (*Furches, J.*), 120 N. C., at page 115, are directly in point in this case, but were not cited either by the Court or the dissenting opinion in *Copeland v. Collins, supra.* This shows that an entirely different proposition was before the Court.

For this error a new trial must be granted; but as this is not an action by creditors, but a petition by the administrator to sell land to make assets, no opinion is here expressed as to whether he should not be held liable to account for such rents and profits of the realty as he may have received and collected since his intestate's death. As between him and the defendants, the heirs at law, certainly this is a proper subject of inquiry. Such receipts are certainly a discharge of his own claim for expenditures for burial expenses, as the court below properly held.

Error.

Cited: Phifer v. Ford, post, 208; *Matthews v. Peterson,* 150 N. C., 133; *Matthews v. Peterson, ibid.,* 136; *Lowder v. Hathcock, ibid.,* 440; *Fisher v. Ballard,* 164 N. C., 329.

(61)

ZIMMERMAN v. LYNCH.

(Filed 4 March, 1902.)

Warranty—Covenants—Vendor and Purchaser.

A complaint stating that defendant sold plaintiff certain standing timber, and that title of defendant was defective, with no allegation of covenant or fraud, does not state a cause of action, as there is no implied warranty in the sale of realty.

ACTION by N. R. Zimmerman against W. Lynch, heard by *Brown, J.*, at Sepember Term, 1901, of PASQUOTANK. From a judgment for the defendant, the plaintiff appealed.

G. W. Ward and E. F. Aydlett for plaintiff.
J. H. Sawyer and W. M. Bond for defendant.

CLARK, J. The first cause of action alleges that the defendant sold the plaintiff a certain quantity of standing timber, but defendant's title proved defective, and plaintiff was prevented from cutting the timber by legal proceedings instituted by the real owner.

The second cause of action is that defendant agreed that plaintiff should put in a tramroad, that the same was built at great expense, which is a loss to the plaintiff, since he can not get the timber.

The defendant answered, denying each of the allegations of the complaint, but further moved to dismiss the action for that the complaint did not state a cause of action in that the complaint did not allege that there was any covenant of warranty nor any breach of said warranty, and there is no allegation of fraudulent conduct or fraudulent and false representation upon the part of the defendant.

The plaintiff's counsel having stated that he could not amend his complaint, the court properly allowed the motion. The (62) standing timber is of the nature of real estate, and in the sale of realty there is no implied warranty. *Foy v. Haughton,* 85 N. C., 168; *Huntley v. Waddell,* 34 N. C., 32.

No error.

Cited: Barden v. Stickney, post, 64.

BARDEN v. STICKNEY.

(Filed 4 March, 1902.)

1. **Appeal—Record—Notice—The Code, Sec. 550.**

That an appeal is not entered on record is immaterial where the fact of appeal is not denied and notice is served.

2. **Warranty—Covenants—Implied Warranty—Foreclosure of Mortgages—Vendor and Purchaser.**

Where a foreclosure sale passes no title to purchaser, the purchaser can not maintain an action against the mortgagee on an implied warranty of title.

ACTION by Maggie S. Barden against J. B. Stickney, heard by *Neal, J.*, at October Term, 1901, of WASHINGTON. From a judgment for the plaintiff, the defendant appealed.

A. O. Gaylord for plaintiff.
H. G. Connor & Son and H. S. Ward for defendant.

CLARK, J. This case was submitted to the judge upon a case agreed, and by consent he was to render his judgment out of term, and the losing party should have ten days thereafter in which to appeal, and notice of appeal was waived. Upon receipt of notice of the judgment, and two days before the judgment was filed in the clerk's office, the appellant gave written notice of appeal, service of which was accepted by
(63) the appellee, as appears from the transcript of such notice and acceptance in the record. The appellant filed a justified appeal bond, and has in all other respects perfected his appeal and sent up a complete transcript. The appellee moves to dismiss the appeal because entry thereof does not appear to have been entered on the record by the clerk.

The requirement that the appeal should be entered on the record is to furnish indisputable proof of the fact, and is immaterial when the fact of the appeal having been taken is not denied, and notice of appeal has, in fact, been served in time, or waived. In *Simmons v. Allison,* 119 N. C., at page 563, it is said: "If the notice of appeal is admitted, or shown to have been given in time, it would avail nothing that the *entry* was not made at all, for it is only made as record proof. *Fore v. R. R.*, 101 N. C., 526; *Atkinson v. R. R.*, 113 N. C., 581." In the last-cited case it is said (at page 588): "Strictly and properly, the record should show that the appeal was duly entered, but that is not imperative, if it appear, as here, affirmatively that the appeal in fact was taken and

notice waived. *Fore v. R. R.*, 101 N. C., 526." The motion to dismiss the appeal must be denied.

It appears from the complaint that the defendant sold, after due advertisement, certain real estate on 30 January, 1888, by virtue of a mortgage executed to him by a married woman to secure her husband's debt; that at said sale the property was bid off by one Ayers, who paid the purchase money, it is alleged, with the money of plaintiff, and that subsequently said Ayers conveyed said realty to her. Subsequently it was held that no title passed by said sale, because the surety had been released by reason of an extension of time, which had been granted by the mortgagee to the principal debtor. *Fleming v. Barden,* 126 N. C., 450; 78 Am. St., 671; 53 L. R. A., 316; and *S. c.,* 127 N. C., 214. The defendant in that case having lost the realty, now brings this action against Stickney, the mortgagee, alleging that his adver- (64) tising the land, making sale, and receipt of the purchase money were an implied warranty of title. There is no allegation of fraud or fraudulent representation, and there is nothing in the facts agreed tending to show that Stickney did not act in entire good faith. The very nature of the transaction forbids any recovery of money as having been paid to the plaintiff's use, and on the ground of implied warranty it is well settled that there is no implied warranty of title in the sale of real estate. *Zimmerman v. Lynch, ante,* 61, and cases cited. There was no covenant of warranty, either of quiet possession or of seizin, in the defendant's deed to Ayers, and there being no allegation of fraud or concealment by him, the action can not be maintained. *Huntley v. Waddell,* 34 N. C., 32. The defendant's motion to dismiss the action because the complaint does not state a cause of action is allowed. The other defenses set up by the defendant it is therefore unnecessary for us to consider.

Action dismissed.

Cited: S. c., 132 N. C., 417; *Peacock v. Barnes,* 139 N. C., 198.

ARMSTRONG v. WILMINGTON AND WELDON RAILROAD.

(Filed 11 March, 1902.)

Negligence—Railroads—Evidence—Sufficiency—Fires.

The facts in this case are not sufficient to establish negligence of a railroad company as to a fire alleged to have been negligently started by the company.

ARMSTRONG *v.* R. R.

ACTION by D. H. Armstrong against the Wilmington and Weldon Railroad Company, heard by *Moore, J.,* and a jury, at December (Special) Term of PENDER. From a judgment for the plaintiff, (65) both plaintiff and defendant appealed.

J. T. Bland for plaintiff.
Junius Davis and H. L. Stevens for defendant.

COOK, J. This action was brought to recover damages to plaintiff's land, alleged to have been caused by defendant on 14 February, 1898, "in running one of its trains, negligently and carelessly threw out and scattered from its steam engine coal cinders and burning substance along its right of way and on the lands adjacent thereto, . . . and ignited and set fire to the straw, grass and other combustible material along said right of way and adjacent lands, . . . and by carelessly and negligently throwing out and scattering the fire as aforesaid, caused the same to spread and burn over a large area of plaintiff's land."

The jury returned a verdict in favor of plaintiff for damages done by the fire, which occurred on the 14th only; while plaintiff claimed damages for fires which sprang up on each of the two succeeding days in addition to that done on the first day, the 14th, and moved for a new trial on the ground of errors assigned to the charge of the court as to damages caused by fire on those two days, which motion was overruled, and plaintiff excepted and appealed.

Upon the close of plaintiff's evidence the defendant moved, under the statute, to nonsuit the plaintiff upon the ground that there was not sufficient evidence of negligence on the part of the defendant to go to the jury, which motion was overruled, and defendant excepted.

Defendant then offered its evidence, and at the close thereof renewed its motion, which was again overruled, and defendant again excepted, and assigned the same as error, and appealed.

The question first requiring our consideration is, Was there (66) evidence to show negligence on the part of defendant company sufficient to be submitted to the jury? And failing to find such, it is not necessary to consider the exceptions taken in plaintiff's appeal. And we think his Honor erred in not allowing defendant's motion.

There is no evidence that the fire originated upon defendant company's right of way, or that it originated on land immediately adjacent thereto. Plaintiff testified that it originated on *his* land, and when he reached the fire it was burning at Walker's fence, three-fourths of a mile from the railroad. His witness, Black, testified that when he got to the fire it was one-half mile from the railroad, and in a direct line about one-quarter of a mile. Witness Bowden testified that "where he first

struck it, it was one-half to three-fourths of a mile from the railroad." Plaintiff's evidence failing to connect the origin of the fire with the engine, we have searched the evidence of defendant to ascertain the exact point at which the fire originated, and find that Hearn and Hayes seem to have been among the first who discovered the fire from the smoke, who went immediately to it. They were at Ashton, two miles away, and testified that they saw the smoke "rise up way in the woods," and when they reached it, it was 300 yards, as estimated by Hearn, and 150 yards as estimated by Hayes, from the right of way.

It appears from the testimony that plaintiff's land lies east from the railroad, and the wind was blowing from the northwest to the southeast, driving the fire a southeasterly direction, and also burning back against the wind, which, as one of plaintiff's witnesses (Bowden) testified, "the wind was blowing at about northwest, and it shifted about a mighty heap that day, turned every which way." And it further appears that later in the day the fire burned back to and upon the right of way.

(67) But none of the evidence connects the *origin* of the fire with any sparks or cinders emitted from the engine. The fact that the engine threw out a spark or cinder at Ashton, about two miles away, which ignited some rotten shingles just off the right of way at that place, and was there throwing out "more than common," as testified to by plaintiff's witness (Batson), can not be evidence to establish negligence against the defendant, when it is shown by plaintiff's own testimony that the fire "broke out" on his land—not the defendant's right of way.

Therefore, the judgment rendered against defendant must be set aside, and for the error pointed out, a new trial must be had.

New trial.

Cited: Johnson v. R. R., 140 N. C., 586; *Williams v. R. R., ibid.*, 626; *Maguire v. R. R.*, 154 N. C., 388.

LAMB v. BAXTER.

(Filed 11 March, 1902.)

1. **Frauds, Statute of—Contract—Brokers.**

The statute of frauds does not apply to contracts by brokers and their principals for the sale of real estate.

2. **Brokers—Commission Merchants—Principal and Agent.**

The rule that an agent can not in the same transaction represent both buyer and seller does not apply where it appears that the agent informed the buyer and seller that he was acting for both of them.

LAMB *v.* BAXTER.

ACTION by E. F. Lamb against W. M. Baxter, heard by *Brown, J.*, and a jury, at September Term, 1901, of PASQUOTANK. From a judgment for the plaintiff, the defendant appealed.

J. H. Sawyer for plaintiff.
G. W. Ward for defendant.

DOUGLAS, J. This is an action to recover compensation as a
(68) real estate broker for services alleged to have been rendered by the plaintiff in effecting an exchange of property between the defendant and one Bartlett. There is conflicting testimony as to what part the plaintiff took in the negotiations, but it is admitted that he brought the parties together, and at least to that extent effected the exchange. The defendant refused to pay the plaintiff on three grounds, (1) that he did not employ him; (2) that such alleged contract was not in writing, and therefore void under the statute of frauds; and (3) that the plaintiff admittedly charged Bartlett for his services in the same transaction and could not lawfully act as agent for both parties where their interests were necessarily antagonistic.

This case seems to have resolved itself down to a mere question of fact depending upon well-settled principles of law. Whether the defendant employed the plaintiff is certainly a simple question of fact. That such a contract need not be in writing was settled by this Court in the recent case of *Abbott v. Hunt,* 129 N. C., 403. It should be borne in mind that this action is not seeking to enforce the sale or exchange of land, nor does it affect any interest in land. It is brought simply to recover compensation for the personal services of the plaintiff alleged to have been rendered under an agreement with the defendant and at his request. The third ground of exception can not be sustained. It is well settled that an agent can not in the same transaction represent both buyer and seller without the full knowledge and consent, express or implied, of both parties. *Mining Co. v. Fox,* 39 N. C., 61; *Sumner v. R. R.,* 78 N. C., 289; *Atkinson v. Pack,* 114 N. C., 597; 2 A. & E. Enc. (2 Ed.), 1073.

To this rule there may be an exception where the agent merely brings together his principals without taking any part whatever in the negotiations of the trade. *Atkinson v. Pack, supra.* In *Mining Co. v.*
(69) *Fox, supra,* this Court says, on page 70, that "The rule applies only to agents who are relied upon for counsel and direction, and whose employment is rather a trust than a service, and not to those who are merely employed as instruments in the performance of some appointed service."

This exception, however, does not appear in the case at bar, as it appears from the plaintiff's own testimony that he took an active part in

negotiating the trade. He further testifies as follows: "Baxter told me he would pay me a good commission if I succeeded in making a trade. I informed Baxter and Bartlett both that I should charge them commissions, to be paid equally by them, and both agreed to pay them." It seems to us that this language will fairly bear the construction that the plaintiff informed both parties that he was acting for both. If it is not as explicit as the defendant desired, he could have made it more so on cross-examination.

If this testimony be true, and the jury seem to have believed it, we see no reason why the parties to the trade should not carry out their agreements entered into with full knowledge of the facts, and apparently resulting in their mutual advantage. It is true, the law regards all such transactions with more or less suspicion, and imposes upon the agent the burden of showing the mutual knowledge of his principals as well as his own good faith; but it goes no further where the parties are *sui juris*.

As we see no error in the trial of the case, we can not disturb the verdict of the jury.

Affirmed.

Cited: Humphrey v. Robinson, 134 N. C., 437; *Swindell v. Latham,* 145 N. C., 151.

---

(70)

VANN v. EDWARDS.

(Filed 11 March, 1902.)

1. **Appeal—Case on Appeal.**

A statement in a case on appeal that the defendant admitted claiming a note by virtue of an indorsement does not preclude defendant from urging in the Supreme Court that his possession of the note was *prima facie* evidence of his ownership thereof.

2. **Negotiable Instruments—Possession—Presumptions.**

The possession of a note by an indorsee of a married woman is *prima facie* evidence of ownership, the note having been in possession of the husband after the indorsement.

MOTION to rehear dismissed. For former decision, see 128 N. C., 425.

Winborne & Lawrence for the petitioner.
L. L. Smith for the respondent

MONTGOMERY, J. An opinion in this case was delivered at the February Term, 1901, 128 N. C., 425. A petition to rehear was filed by the

appellee and granted, and the matter is before us again for consideration. The material facts for the present purposes are these: The defendant, in 1888, executed to his mother his bond in the sum of five hundred dollars. She, in the lifetime of her husband, gave this bond to the defendant by delivery and her endorsement, but without the knowledge or consent of her husband. After the mother's death the bond was in the father's possession, but after his death it was found in the defendant's. The husband of the payee, who was also the father of the defendant and payor, qualified as administrator of his deceased wife, and having died before he had fully administered the estate, an
(71) administrator *de bonis non* was had by the plaintiff, who brought this action for the recovery of the value of the bond.

There are in the petition to rehear two alleged errors: The first is that the court must have overlooked the statement in the case on appeal "that it was admitted by the defendant that he claimed the note by virtue of the indorsement of the same to him by his mother." We were not inadvertent to that statement, but we regarded it not as depriving the defendant of the right to use, in connection with and as a part of that claim, the legal effect of his having in his possession the note at the death of his father—the father having had possession of it after his wife's death. The record shows that the case was tried on the theory that the defendant was claiming the bond both under the gift and indorsement of the mother and the presumption of ownership by possession in himself after the mother's death and after the father had had it in his possession; for the court permitted him to introduce as evidence of his possession of the note after it had been in the hands of the father, declarations of both the mother and the father to the effect that it had been given to the defendant and that he did not owe it.

The other error alleged in the petition to rehear is that the court held that the judge below should have instructed the jury, "If the jury find that the note in controversy was in possession of Darius Edwards at any time after the death of Sarah F. Edwards, and prior to October, 1896, and that afterwards it was in possession of the defendant, from October, 1896, until the commencement of this action, the law presumes that such possession was lawful and that he is the owner thereof; and the burden is upon the plaintiff to satisfy the jury upon preponderance of testimony that such possession is not lawful, and unless the plaintiff so satisfies the jury, you must answer the first issue 'No.'"

The counsel cited to us *Thompson v. Onley,* 96 N. C., 9; *Holly*
(72) *v. Holly,* 94 N. C., 670, and *Robertson v. Dunn,* 87 N. C., 191, on the point to sustain his view of the law. Upon an examination of these cases, it will be seen that they are against his contention. It is decided in them that there is no presumption of ownership in favor of

the holder of an unindorsed note against the *payee*. But the holder of the note in our case was the *payor*, and the presumption is with him.

The petition must be dismissed.

Cited: S. c., 135 N. C., 676.

SKITTLETHARPE v. SKITTLETHARPE.

(Filed 11 March, 1902.)

1. **Husband and Wife—Separation—Maintenance—The Code, Sec. 1292.**

Under section 1292 of The Code the only questions are whether the marriage relation existed at the time of the institution of the proceeding and whether the husband separated himself from the wife.

2. **Husband and Wife—Separation—Maintenance—Judgment—The Code, Sec. 1292.**

In an action by a wife against the husband for maintenance, the husband should be required to secure a portion of his estate for the benefit of his wife and children, but not required to make monthly payments.

3. **Husband and Wife—Separation—Maintenance—Judgment—The Code, Sec. 1292.**

In an action to require a husband to maintain his wife, the judgment should not be final.

ACTION by Neva Skittletharpe against J. H. Skittletharpe, heard by *Neal, J.*, and a jury, at October Term, 1901, of WASHINGTON.

This is a special proceeding instituted by *feme* plaintiff against (73) her husband, the defendant, to recover a reasonable subsistence for herself and the child of their marriage, pursuant to section 1292 of The Code. The plaintiff alleges that the husband, defendant, "left and abandoned her and took from the house all, or nearly all, of the furniture and household goods, and left her without means of livelihood and support," to which the defendant answers "that it is true that . . . he quit living with her, and moved from the house she and he occupied the greater part of the household furniture, which belonged to him," and does not deny that he left her without means of support, and admits that "he refuses to support her." And for his defense he avers that he left his wife, *feme* plaintiff, for the reason that she had been engaging in acts of illicit intercourse with one L. C. Hornthall.

Upon the hearing, his Honor heard affidavits and depositions as to the alleged acts of adultery, the cause for which the defendant separated himself from his wife, etc., and found as facts "that the defendant, with-

out just cause, has separated himself from his wife, the plaintiff, or petitioner, who has at all times been a faithful wife, and has failed to provide her and her child, of which the defendant is the father, with the necessary subsistence according to his means and condition in life," and thereupon rendered a judgment ordering and adjudging that the defendant pay into the office of the clerk of the Superior Court of the county fifteen dollars per month for the maintenance of plaintiff, and eight dollars per month for the maintenance of the child; and that this judgment is made without prejudice to the rights of the petitioner to apply for an increase of this allowance as emergency may require.

The defendant excepted to the finding of these facts by his Honor, and insisted that they be found by a jury upon proper issues submitted; and also excepted to the judgment for that it is not authorized by law, in that it requires the defendant to pay monthly installments to the (74) plaintiff and her child; and because the judge improperly found the facts, and because it was unjust and not warranted by the pleadings and exhibits, and therefore contrary to law in that it required defendant to support a woman as his wife who confessed to him her infidelity. His Honor overruled the exceptions and rendered judgment in favor of plaintiff, and defendant appealed.

H. S. Ward for plaintiff.
A. O. Gaylord for defendant.

COOK, J. Section 1292 of The Code, under which this special proceeding was instituted, provides: "If any husband shall separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, the wife may apply for a special proceeding to the judge of the Superior Court for the county in which he resides, to have a reasonable subsistence secured to her and to the children of the marriage from the estate of her husband, and it shall be lawful for such judge to cause the husband to secure so much of his estate, as may be proper according to his condition and circumstances, for the benefit of his said wife and children, having regard also to the separate estate of the wife." This statute "only applies to independent suits for alimony." *Reeves v. Reeves,* 82 N. C., 348. Under it only two material issues of fact can arise, viz., (1) as to whether the marriage relation existed at the time of the institution of the proceeding; (2) whether the husband separated himself from the wife. Should these issues, or either of them, be raised by the pleadings, then it would be the duty of the judge to have them found by a jury, as is provided by law for the trial of issues (75) of fact in other cases of special proceedings. *Cram v. Cram,* 116 N. C., 288. But in this case neither of those issues is joined. The

answer admits the marriage relation existing and his separation from his wife. Wherefore, his Honor properly refused to submit issues to the jury as to defendant's reasons and excuses for separating from his wife, and erred (though harmless it be) by inquiring into the same himself. They were irrelevant and might have been stricken out upon motion. The Code, sec. 261.

As to the exceptions taken to the judgment rendered, we think his Honor erred in two particulars, viz.: (1) In ordering defendant to make monthly payments; (2) in rendering a final judgment. As to the first, the statute expressly requires that the subsistence shall be *secured* to the wife and children "from the estate of her husband," not that he shall pay, or that he shall assume any further *personal* obligation. The remedy provided is *in rem,* not *in personam.*

The two material issues of fact being admitted, it then became the duty of the judge to ascertain the means and condition in life of the defendant and to cause him to secure so much of his estate as would be proper according to his condition and circumstances, for the benefit of plaintiff and their child; having regard, also, to the separate estate of the wife. *Cram v. Cram, supra.* What were his means, circumstances and condition in life, and the estate of his wife, and a necessary subsistence in accordance therewith were not such "issues of fact" as would necessarily be raised by the pleadings and be material in order to bind and conclude the parties upon the matters in controversy, but "questions of fact" necessary to be ascertained by the judge for his information in determining an equitable allowance for the support of the wife during their temporary alienation and unsettled relations.

As to the second, it is not contemplated by the statute that the judgment should be final and conclusive; for should the hus- (76) band return to the wife and resume his marriage relations and obligations, the necessity for such a provision would cease; or, should defendant institute a suit for divorce (which is not permitted by the statute to be done until six months after obtaining the information for such cause of action) and obtain an absolute divorce, it is certain that he ought to be relieved from her further support, which could not be done with a final judgment binding upon the parties. Therefore, for the errors above pointed out, this case is remanded in order that the judgment may be modified and rendered in conformity with the requirements of the statute and with this opinion. Let the defendant pay the costs of this appeal.

Remanded.

Cited: Clark v. Clark, 133 N. C., 31; *Bidwell v. Bidwell,* 139 N. C., 409; *Ellett v. Ellett,* 157 N. C., 164; *Hooper v. Hooper,* 164 N. C., 2.

PETERSON v. CITY OF WILMINGTON.

(Filed 18 March, 1902.)

Municipal Corporations—Towns and Cities—Fire Department—Negligence.

An employee of the fire department of a city can not recover for injuries sustained by him while in its service.

DOUGLAS, J., dissenting.

ACTION by H. L. Peterson against the City of Wilmington, heard by *Hoke, J.*, at April Term, 1901, of NEW HANOVER. From a judgment of nonsuit, the plaintiff appealed.

L. V. Grady and Stevens, Beasley & Weeks for plaintiff.
Meares & Ruark for defendant.

(77) MONTGOMERY, J. The plaintiff sustained injuries to his person while in the service of the fire department of the defendant, the city of Wilmington, and brought this action for the recovery of damages. The charge on which the recovery is sought is that the defendant permitted, knowingly, a hose-reel belonging to its fire department to be and remain in an unsafe and dangerous condition, and that on a sudden emergency, the breaking out of a fire, the chief of the fire department ordered the plaintiff to mount the reel and repair to the scene of the fire, and the plaintiff, in obeying this order, was hurt by a fall caused by the collapse of the reel.

After the plaintiff had introduced his evidence, the defendant demurred *ore tenus*, and the court sustained the demurrer.

The defendant is empowered by its charter, in order to more effectually provide against damage and danger from fire, to establish and regulate a fire department, and the question to be determined is this: Are the powers and duties enjoined upon that department and upon the defendant as to its formation and regulation for the extinguishment of fires, public and governmental, or are they merely private and municipal? If they are of the former character—for the general good—the defendant is not liable for either its own tort or negligence or the negligence or tort of its officers or agents, unless there is some constitutional or legislative enactment which subjects it to liability therefor; and it is not contended by the plaintiff that there is any such enactment applicable to this case. If, however, the defendant was acting for its own benefit, and purely under its corporate or municipal powers, then, in case of negligence on its part, liability would ensue. *Moffit v. Asheville*, 103 N. C., 237, 14 Am. St., 810; *Pritchard v. Commissioners*, 126 N. C., 908, 78 Am. St., 679.

We have no decided case in our reports upon the particular (78) question whether or not the laws governing the establishment and regulation of fire departments under the charter privileges and rights of our cities and towns, and the acts of those charged with the performance of those rights and duties, are legislative and governmental or merely corporate and municipal. But in our investigation we have found numerous decisions on the subject in the courts of other States. The great weight of authority is to the effect that such duties and powers are legislative and governmental. Some of them are the following: *Jewett v. New Haven,* 38 Conn., 368, 9 Am. Rep., 382; *Fisher v. Boston,* 104 Mass., 87, 6 Am. Rep., 196; *Wild v. Patterson,* 47 N. J. Law, 406; *Mayor v. Workman,* 67 Fed., 347; *Howard v. San Francisco,* 51 Cal., 52. In fact, we found none to the contrary. Upon examination of the one alleged to be to that effect (*LaFayette v. Allen,* 81 Ind., 166, cited by plaintiff's counsel), it is found to be irrelevant. The engine, there, was a fire engine, but at the time of the injury of the plaintiff by its explosion it was not being used in the extinguishment of fire, but for the purpose of pumping water for ordinary city purposes. It is to be remarked, however, that nearly all the cases examined by us were actions brought by persons other than employees of the fire department. But that does not alter the principle. If the powers and duties be legislative and governmental, the city governments are neither liable for their own negligence nor for the negligence of their agents or officers to any one, stranger or employee.

After mature reflection, we think his Honor was correct in his ruling. No error.

DOUGLAS, J., dissenting: I can not concur in the opinion of (79) the Court that there is no difference between a municipal employee and the general public. I do not see how the management of the fire department is in any sense a legislative duty; but, admitting that it is governmental in its general nature, I do not think that the rule can be made to apply to the case at bar. Here, the relations between the plaintiff and the defendant were contractual, being those of servant and master. When the chief of the fire department ordered the plaintiff to mount the reel and repair to the scene of the fire, he was treating him as an employee of the city, and not as a citizen. I do not suppose that such an officer would claim the right to order any citizen he might see fit to mount a hose-cart or climb a ladder, while he would not hesitate to do so where one had expressly agreed to perform such duties. The fact that the defendant was a volunteer fireman, if it is a fact, would not alter the case. It would only give him the greater moral right to demand that the city should exercise reasonable care to furnish

him with safe appliances for the performance of his arduous and dangerous duties. If he is willing to risk his life, without compensation, purely for the good of his fellowmen, he may surely ask that his danger shall not be unnecessarily increased by the negligence or parsimony of a municipal corporation.

Cited: Williams v. Greenville, post, 97, 99; *Scott v. Greensboro,* 131 N. C., 827; *Byrd v. Greensboro, ibid.,* 828; *Metz v. Asheville,* 150 N. C., 750; *Harrington v. Greenville,* 159 N. C., 635; *Hines v. Rocky Mount,* 162 N. C., 412.

(80)

COWELL v. GREGORY.

(Filed 18 March, 1902.)

Appeal—Waiver—Payment of Judgment—The Code, Sec. 886—Justice of the Peace.

A defendant by voluntarily paying a judgment taken against him before a justice of the peace waives his right of appeal.

DOUGLAS, J., dissenting.

ACTION by W. J. Cowell against N. P. Gregory, heard by *Brown, J.,* at September Term, 1901, of CAMDEN. From a judgment for the plaintiff, the defendant appealed.

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

MONTGOMERY, J. At the time of the rendition of the judgment in the justice's court the defendant refused to appeal, and paid the judgment voluntarily to the constable and the recovery to the plaintiff in the action. Within the time allowed by law for appeals, the defendant filed the proper notice of appeal to the Superior Court, and the appeal was sent forward. On the call of the case in the Superior Court the plaintiff lodged a motion to dismiss the appeal, upon the ground that the defendant had waived and renounced his right to appeal, and had voluntarily paid the judgment.

The following were the facts as found by the court: "The justice of the peace heard the cause and rendered judgment upon all the issues for plaintiff, in the sum of $32.63; that at the time, and within an hour after judgment rendered and announced, and in presence of the justice, one Cartwright said to defendant, 'Why don't you appeal?' and

defendant announced to the justice that he did not wish to (81) appeal, that he wished to pay the debt and get rid of it, and asked for the bill of costs; no execution was issued, and no request or demand made on the plaintiff to pay the judgment; that then and there the defendant paid the judgment and costs into the hands of the constable for the plaintiff, and the justice satisfied and discharged the judgment at the request of the defendant."

His Honor dismissed the appeal, and upon his holding the defendant appealed to this Court. There was no error in the proceeding below.

The plaintiff cited the cases of *Suttle v. Green,* 78 N. C., 76, and *S. v. Chastain,* 104 N. C., 900, but they have no application here. In those cases there were notices of appeal, a withdrawal of the same, and then renewals of the appeal. There was no payment or discharge in whole or in part of the judgment, voluntary or involuntary. In the present case the judgment was not only paid, but the defendant expressed his purpose and desire to "pay the *debt* and get rid of it." The judgment had thereafter no existence for any purpose. 2 Cyc., 647, 648.

Section 886 of The Code, from the view we have taken of the case, has reference only to cases where payments have been made involuntarily, as a payment made of a judgment to prevent execution from being issued, with the attendant additional charges, costs and inconveniences.

No error.

DOUGLAS, J., dissenting: I can not concur in the opinion of the Court, because, in my opinion, it is directly opposed to the provisions of The Code, as well as to the great weight of authority. But a single authority is cited by the Court as the basis of its opinion, and that is found, upon examination, to be directly to the contrary. In 2 Cyc., 647, it is said: "That voluntary payment or performance of a judgment is generally held to be no bar to an appeal or writ of error for its reversal, unless such payment was made by way of compromise and (82) agreement to settle the controversy, or unless the payment or performance of the judgment was under peculiar circumstances which amounted to a confession of its correctness."

There is no pretense that the defendant in any way confessed the correctness of the judgment, or that the money was paid by way of compromise.

It is true, 2 Cyc., 648, further says: "There are, however, courts which hold that such voluntary payment is a waiver of defendant's right of appeal," but the text of the work is against the position of the Court. I do not doubt that precedents can be found for almost any side of a question among the forty-five States of the Union, especially on ques-

tions of practice, which are largely governed by local statutes. The fact that only three States and one Territory hold that a voluntary payment is a waiver of the right of appeal might well lead us to conclude that the weight of authority is to the contrary.

The rule is well stated in 2 Enc. Pl. and Prac., 181: "Payment of a collectible judgment rendered by a court of competent jurisdiction is involuntary, and does not bar the appeal of the unsuccessful party below."

It is well known that our Code practice, although greatly changed, was originally modeled after that of New York, which holds, with the vast majority of States, that the payment of a collectible judgment is not voluntary in a legal sense. In *Peyser v. New York,* 70 N. Y., 497, 26 Am. Rep., 624, the principle is thus clearly stated: "Coercion by law is where a court, having jurisdiction of the persons and the subject-matter, has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it.
(83) As he can not resist the execution of it, when execution is attempted, he may as well pay the amount at one time as at another, and save the expense of delay." The Court says that *Suttle v. Green,* 78 N. C., 76, and *S. v. Chastain,* 104 N. C., 900, have no application to the case at bar. I must respectfully differ from the Court. In my opinion, they apply by direct analogy. I do not suppose it will be contended, in the face of section 886 of The Code, that a mere payment of the judgment would have affected the defendant's right of appeal, had it not been for his casual expression that he wanted to "pay the debt and get rid of it." What peculiar legal effect have these words beyond any others expressing a purpose not to appeal? None that I know. They are certainly no stronger than the actual withdrawal of an appeal already taken.

In *Suttle v. Green, supra,* this Court says: "On the trial before the justice, the defendant denied that he owed the plaintiff anything. And when the justice gave judgment against him, he appealed in open court. This was all that he was obliged to do. It then became the duty of the justice, upon his fees being paid, to send the papers to the clerk of the court. As an excuse for not sending up the papers, the justice said that the defendant told him not to do it. Concede that this was a sufficient excuse for delay on the part of the justice, still it did not estop the defendant. He had *locus penitentiæ,* and he did change his mind and filed with the clerk a good bond to cover the plaintiff's claim and costs."

In *S. v. Chastain, supra,* this Court says, on page 905: "E. H. Chastain first withdrew and then renewed and perfected his appeal. He had a right to renew and reinstate it within the time prescribed by law,

if he had no other object to attain but to delay the execution of his sentence."

These authorities might well be deemed conclusive; but let us examine the provisions of The Code regulating appeals from a justice of the peace. Section 875 is as follows: "The party against whom judgment was rendered in any civil action in a justice's court (84) may appeal to the Superior Court from the same; but no appeal shall prevent the issuing of an execution on such judgment or work a stay thereof, except as herein provided." Section 882 provides that execution may be stayed upon giving the proper bond. Section 876 provides that "the appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. . . ." This term of ten days is clearly the *locus penitentiæ* referred to in *Suttle's case,* within which the defendant may "change his mind." He did change his mind, and perfected his appeal strictly according to law. As intimated in *Chastain's case,* it made no difference what caused him to change his mind, if he exercised his right of appeal, within the ten days allowed by the statute. This time is evidently given to enable the defendant to carefully consider the matter, and, if necessary, obtain legal advice. However, in the meantime, execution may be taken out by the plaintiff, regardless of any right of appeal. It may be that the defendant is unable to give bond. If so, why should he wait for the issuing of an execution, with all its extra costs? It is true, he may recover what he has paid, but then again he may not, as the perils of litigation are almost equal to those of the sea, without the benefit of marine insurance. Section 886 of The Code provides that "if the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection." The disjunctive use of the words "paid *or* collected" clearly shows that the statute intended to give to the defendant the privilege of paying before execution, without in any way interfering with his right of appeal.

It should be remembered that the right of appeal is expressly guaranteed by the Constitution, Art. IV, sec. 27, and should (85) not lightly be set aside by implication or presumption. Indeed, so sacred is it regarded that parties can not waive their right of appeal before trial, even by express agreement. *Falkner v. Hunt,* 68 N. C., 475; *Runnion v. Ramsay,* 93 N. C., 410. With all respect for the Court and submission to its decision, I can not concur in an opinion which, in my deliberate judgment, flies in the face of authority and the teeth of the statute.

HOLLEY v. SMITH.

(Filed 18 March, 1902.)

Grant—Public Lands—Evidence—Collateral Attack—The Code, Sec. 2751, Subsec. 1, and Sec. 2755.

Where a grant covers land not subject to entry, or is issued contrary to a statute, it is void, and may be attacked collaterally.

ACTION by Thomas D. Holley against William Smith, heard by *Allen, J.*, and a jury, at November Term, 1901, of BERTIE. From a judgment for the plaintiff, the defendant appealed.

R. B. Peebles for plaintiff.
Pruden & Pruden and Shepherd & Shepherd for defendant.

CLARK, J. The complaint alleges that the plaintiff entered the land "covered by the waters of Chowan River, which was then and is now a navigable river," with boundaries described, within which is the *locus in quo* (which is front of defendant's land), and obtained a grant from the State therefor, and that the defendant daily trespasses thereon (86) by setting dutch and pound nets to catch fish; that this interferes with plaintiff's seining at that place; that defendant has no property above his exemptions, and seeks damages and injunction against further trespass.

At the trial the defendant offered to show that the grant to the plaintiff was null and void because if the dividing line between the plaintiff and defendant were extended in a straight line, run at a right angle to the shore line, the *locus in quo* was in front of defendant's land. The plaintiff objected on the ground that the grant could not be collaterally attacked. Objection sustained, and defendant excepted. Verdict for damages. Judgment therefor, and perpetual injunction.

It is true that a grant for land lying in a county to which the entry laws apply can not be attacked collaterally for fraud or mistake in procuring such grant. *Dosh v. Lumber Co.*, 128 N. C., 84. But it is equally well settled that when the grant covers land not subject to entry, or is issued contrary to a positive prohibition contained in a statute, it is void, and can be attacked collaterally. *Gilchrist v. Middleton*, 107 N. C., 663; *Lovingood v. Burgess*, 44 N. C., 407; *Stanmire v. Powell*, 35 N. C., 312. All of these cases are cited with approval in *Dosh v. Lumber Co., supra.* The land here in question, as was admitted on the trial, is covered by the navigable waters of the Chowan River, and therefore it was not subject to entry, except for wharves by the adjacent riparian

owner in front of his own property (Code, sec. 2751, subsec. 1), and even then subject to restrictions. *Bond v. Wood,* 107 N. C., 139. Section 2755 denounces every entry made and every grant issued in violation of the provisions of that chapter (2 Code, ch. 17) as void. In excluding the evidence offered, there was

Error.

DOUGLAS, J., concurring: I concur in the opinion of the Court (87) upon the grounds therein stated; but I do not understand that it determines in any way the right of the defendant to plant posts or stakes in a navigable stream, as affecting either the right of navigation or of fishery. In other words, it does not conflict with anything said by this Court in *S. v. Baum,* 128 N. C., 600.

Cited: S. c., 132 N. C., 36; *Land Co. v. Hotel, ibid.,* 530; *S. v. Twiford,* 136 N. C., 607; *Call v. Robinett,* 147 N. C., 617; *Bell v. Smith,* 171 N. C., 118; *R. R. v. Way,* 172 N. C., 779.

PITT COUNTY BOARD OF SCHOOL DIRECTORS v. TOWN OF GREENVILLE.

(Filed 18 March, 1902.)

Towns and Cities—Demand—Jurisdiction—The Code, Sec. 757.

Under The Code, sec. 757, a complaint against a town must allege a demand on the proper municipal officers.

ACTION by the County Board of School Directors for Pitt County against the Town of Greenville, heard by *Winston, J.,* at December Special Term, 1901, of PITT. From a judgment for the plaintiff, the defendant appealed.

Skinner & Whedbee for plaintiff.
Jarvis & Blow and F. G. James for defendant.

MONTGOMERY, J. The plaintiff, the County Board of School Directors for Pitt County, brought this action to recover of the defendant, the town of Greenville, certain amounts of money in the nature of fines for the violation of the criminal laws, alleged to have been collected through the duly authorized officers of the town. Section 757 of The Code provides that "No person shall sue any city, county, town or other municipal corporation for any debt or demand whatsoever, unless

(88) the claimant shall have made a demand upon the proper municipal authorities. And every such action shall be dismissed unless the complaint shall be verified and contain the following allegations: (1) That the claimant presented his claim to the lawful municipal authorities to be audited and allowed, and that they had neglected to act upon it, or had disallowed it; or (2) that he had presented to the treasurer of the said municipal corporation the claim sued on, which had been so allowed and audited, and that said treasurer had, notwithstanding, neglected to pay it." If any demand was made by the plaintiff of the defendant for a settlement of the claim, it does not appear in the complaint; and the defendant's prayer (motion) in the answer that the action be dismissed on that ground, should have been allowed. The language of the statute (Code, sec. 657) is clear and, moreover, it is reasonable. The governing authorities of municipal corporations are presumed to be always ready and willing to promptly adjust any and all proper claims and demands against the municipality, and owing to the number and variety of such claims and demands, and to the fact that, as a rule, such governing bodies are generally business men, and not expected to give but a small portion of their time to the public service, it does seem that before they are summoned before the courts to answer for claims of a civil nature on the part of alleged creditors, they should have notice of such claims and a demand for their settlement. But the point has been decided many times by this Court. *Love v. Commissioners,* 64 N. C., 706; *Royster v. Commissioners,* 98 N. C., 148. His Honor, in the judgment, said: "The court is of opinion that the defendant having denied all indebtedness to the plaintiff by reason of the allegation in the complaint, and not having expressed a desire for an opportunity to examine and pass upon the demands
(89) in the complaint, has waived the benefit of section 757 of The Code, and it denies the motion." But the matters required by The Code section to be set out in the complaint are jurisdictional. No cause of action is stated in the complaint, and the court could not proceed with the action. The language is, "No person shall sue any city," etc. And every such action shall be dismissed unless the complaint shall be verified and contain the following allegations, etc. The requirements of section 657 of The Code were conditions precedent to the maintenance of the suit, and not having been set out in the complaint, the action should have been dismissed.

Error.

Cited: Williams v. Smith, 134 N. C., 252.

HARRINGTON v. HATTON.

(Filed 18 March, 1902.)

1. Former Adjudication—Supreme Court—Judgment.

A decision only upon the appropriate form of relief in an action does not pass upon any defense which might be set up to the merits in seeking that relief, and is not *res judicata.*

2. Judgments—Liens—Bona Fide Purchaser—Execution.

Where land subject to a judgment lien is sold to an innocent purchaser, without notice, it can not be sold under an execution, based on the judgment, where the execution is issued after the expiration of the judgment lien.

ACTION by W. H. Harrington against P. E. Hatton, as administrator, and others, heard by *Hoke, J.*, at May Special Term, 1901, of PITT. From a judgment for the plaintiff, the defendants appealed.

A. M. Moore for plaintiff. (90)
Skinner & Whedbee for defendants.

CLARK, J. When this case was here before, 129 N. C., 146, it was held that the administrator of the judgment debtor could not be ordered to sell the land to make assets, because the judgment debtor had conveyed the land (subject, of course, to judgment liens), and there was nothing left in the judgment debtor which could be sold by his administrator, and that the remedy justified by the pleadings, though not prayed for, was a judgment directing the property to be sold under the judgment lien. All the parties being before the Court, the Court refused to dismiss the action, but remanded it, that a proper judgment should be entered. It was expressly stated that "if by lapse of time the plaintiff's judgment lien had been lost, the benefit would have accrued to Hatton's vendee (defendant Davenport), and not to Hatton's heirs at law." That decision was only upon the form of relief, and did not pass upon any defense which might be set up to the merits in seeking that relief.

Upon the cause being called at the first term after the opinion had been certified down, the defendant Davenport relied upon his plea, not before passed upon, that the relief of selling the land under the lien is barred by the lapse of time. The judgment whose lien is here sought to be enforced was docketed 21 December, 1889, the land was conveyed to J. R. Davenport, as has been found by a verdict in this cause between these parties, for value and without notice of any fraud. This proceeding was begun 22 August, 1899, and the lien thereof has long since

expired. A purchaser under a decree of sale, if now ordered, would get no title. The point is expressly decided, *Pipkin v. Adams,* 114 N. C., 201.

The point now presented, as already stated, was not raised in the former opinion, which passed only upon the appropriate form of
(91) relief, and not upon defenses to the merits, and the matter is not *res judicata.*

There is

Error.

Cited: King v. Powell, 131 N. C., 826; *Brick v. R. R.,* 145 N. C., 205; *Blow v. Harding,* 161 N. C., 376.

HARDEE v. WEATHINGTON.

(Filed 18 March, 1902.)

1. Tenancy in Common—Adverse Possession—Ouster—Presumption.

Possession of land for a period less than twenty years under a deed executed by one tenant in common for the entire tract does not raise a presumption of ouster of the other tenants in common.

2. Tenancy in Common—Deed—Registration—Ouster—Adverse Possession.

The registration of a deed from one tenant in common conveying the whole property does not have the effect of an ouster of the other cotenants.

ACTION by W. A. Hardee and others against L. H. Weathington and others, heard by *Winston, J.,* and a jury, at December Special Term, 1901, of PITT. From a judgment for the defendants, the plaintiffs appealed.

Harding & Harding for plaintiffs.
Jarvis & Blow and Fleming & Moore for defendants.

CLARK, J. This was a proceeding for partition, begun before the clerk. Upon the allegation in the answer of sole seizin, the issues were transferred for trial at term time. The Code, sec. 256.

The defendant claims under a deed to Samuel Corey from one tenant in common, purporting to convey the whole. There was evidence
(92) that Corey did not go into possession until 1891 (and evidence by defendant that he took possession prior thereto, but not prior to 1883), and that certain of plaintiffs who are *femes covert* married prior to coming of age.

The ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and appropriation of the profits for a less period than twenty years; and the result is not changed when one who enters to whom a tenant in common has by deed attempted to convey the entire tract. *Roscoe v. Lumber Co.,* 124 N. C., 42, citing *Ward v. Farmer,* 92 N. C., 93, and several other cases. Sole possession under such deed for less than twenty years does not raise a presumption that the cotenant not joining in the deed has been evicted, for one tenant in common can not thus make the possession adverse to his cotenant. Registration of the deed does not have the effect of an ouster. *Ferguson v. Wright,* 113 N. C., 537; *Page v. Branch,* 97 N. C., 97; 2 Am. St., 281.

The rule laid down in *Nelson v. Insurance Co.,* 120 N. C., 302—that the possession of land under a deed, apparently good and sufficient, properly acknowledged and unimpeached, is sufficient evidence of title, and it is not error to instruct the jury, if they believe the evidence, to return a verdict for the grantee—does not apply here, for the deed is impeached by showing that it is executed by one tenant in common purporting to convey the whole. Twenty years' sole pernancy of the profits was not shown, nor was there uncontradicted evidence of seven years' adverse possession as to the plaintiffs. In directing the jury, if they believed the evidence, to answer the first three issues in favor of the defendant, there was

Error.

(93)

WILLIAMS v. TOWN OF GREENVILLE.

(Filed 25 March, 1902.)

Municipal Corporations—Torts—Personal Injury—Injury to Property—Liability.

Where a drain constructed by a municipal corporation through its negligence becomes choked with refuse and overflows the premises of an adjacent landowner, the corporation is liable only for damages to the property, not for bills of physicians, medicines, increase in expenses of his family, loss of time or mental anguish, the result of illness caused by the condition of the drain.

DOUGLAS, J., dissenting.

ACTION by E. C. Williams against the town of Greenville, heard by *Winston, J.,* and a jury, at October Term, 1901, of PITT. From a judgment for the plaintiff, the defendant appealed.

Skinner & Whedbee and A. M. Moore for plaintiff.
Jarvis & Blow and F. G. James for defendant.

FURCHES, C. J. The plaintiff is a resident and citizen of the town of Greenville, and the defendant is a municipal corporation. The plaintiff is the owner of a house and lot in the defendant corporation, upon which he and family reside, and have done so for the last eight or ten years.

The plaintiff alleges that it was the duty of the defendant to make such drains and sewers as were necessary to secure the health and comfort of all its inhabitants, but the defendant has utterly failed and neglected to perform and discharge its duty in this respect; that plaintiff's lot is situate on land much lower than that of a large portion of said town, and that defendant, before the plaintiff became the owner of his said lot, had cut an open ditch from the higher land through an adjacent lot into the street just below his lot, and made a culvert for the water to pass this street into a branch below; and the defendant
(94) had allowed this culvert to become so choked and out of repair that in time of heavy rains it would not carry the water that came down the ditch; that defendant had allowed the open ditch to become the depository of dead fowls and dead animals until it produced a stench both disagreeable and unhealthy; that by reason of the improper construction of this ditch and the obstruction to the flow of the water at the culvert, in times of heavy rains the water would overflow his entire lot; that this overflow water would at times remain upon his lot for a day or more, and when it would recede it would leave a scum upon his lot; that by reason of the negligence of the defendant—the overflow of this water—his home was made and became unhealthy, two of his children became sick and died; that by reason of said sickness and deaths he suffered great pain and anguish of mind; that he lost much time in nursing them; that the expenses of his family were much increased, and he had large doctor's bills and drug bills to pay, to his damage $10,000.

The defendant answered, denying the material allegations of the complaint, and denying its liability to the plaintiff for any damage.

There was much evidence introduced by the plaintiff tending to sustain the allegations of fact in the complaint, and by the defendant to rebut the same.

There were many prayers for special instructions on the part of the defendant, which we will not state or consider here. The court submitted the following issues:

1. Was the plaintiff damaged by the negligence of the town of Greenville in diverting water on his premises, as alleged in the complaint? Answer: Yes.

2. If so, what is the amount of actual damage, outside of mental suffering, caused to him thereby? Answer: $333.

3. If so, what amount of damage did he sustain from mental
(95) suffering, resulting directly from such negligence? No answer.

The entire charge of the court is not sent up, and we take it there was no objection to that part. But from that sent up it appears that he charged the jury on the first issue as follows: "If the town ponded water from a natural watercourse by obstructing the course, then it is the same as if the water was diverted. The law draws a distinction between water within banks, a natural watercourse, and surface water. If the town diverted water, as I have indicated, cut the ditch where there was no natural drain, then it was its duty to keep the ditch clear."

And upon the second issue he charged as follows: "This is the actual amount paid out on account of the sickness and his loss of time incident thereto. If you answer the first issue yes, you will assess, for your answer to the second issue, the amount, in your judgment, the plaintiff actually paid out by reason of such sickness, and what he lost from his work by reason of such sickness, and in this connection you will consider what he paid the doctor, if anything, what he spent for such articles as drugs, medicines, stimulants, and other things in the sickness growing out of these conditions over and above his usual cost of living." The defendant excepted.

There was no evidence that there was a natural watercourse flowing by the plaintiff's lot, or where the old ditch was cut, though it was along or near the natural flow of the surface water. And while it was shown that there were dead fowls and animals in the old ditch, there was no evidence that the defendant put them there or knew that they were there, until they were removed.

We will not set out the special prayers for instruction not given by the court, as we put our opinion upon what we understand to be the law of liability of a *municipality* in cases like this. We say municipality, because we understand the rule of liability as to such corpora- (96) tions to be quite different from the liability of individuals or private corporations. In actions for damage against a municipal corporation, where the act complained of was done in pursuance of its legislative or judicial powers, or in the exercise of its authorized police powers, the doctrine of *respondeat superior* does not apply, except as to property rights. And such defendant is only liable for injuries caused by neglect to perform some *positive duty* devolved upon it by reason of the incorporation, such as keeping the public streets in repair, or damage to property, or when it receives a pecuniary benefit from it. The reason for this distinction, that it is liable for damage, seems to lie in the fact of ownership—vested rights, which no one has the right to invade, not even the Government, unless it be for public purposes, and then only by paying the owner for it. This right to take property does not fall under the doctrine of police power, and the doctrine of *respondeat superior* applies.

This doctrine is sustained in *Hughes v. Auburn* (N. Y.), 46 L. R. A., 636. That case refers to *Allen v. Boston,* 159 Mass., 324, 38 Am. St., 423, as not being in harmony with the doctrine held in *Hughes v. Auburn.* We have examined *Allen v. Boston,* and find expressions in the argument of the case that seem to be in conflict with the doctrine announced in *Hughes v. Auburn,* and the principles announced by us in this case. But we find upon examination that the cases cited in *Allen v. Boston* are not authority for the statement that the plaintiff could recover for injury to his health, as against a municipality, for the reason that they were actions against private corporations which had no governmental or police powers, and where the doctrine of *respondeat superior* applied. It seems to us that the learned Court in *Allen v. Boston* lost sight of the governmental powers of the defendant and its right to exercise police powers, and that the doctrine of *respondeat superior* did not prevail in that case. And we find the great
(97) weight of authority (indeed, all we have been able to examine) sustains the views we have announced in this opinion, and none to the contrary, unless it is *Allen v. Boston.*

For the doctrine announced in this opinion we cite 2 Dillon Municipal Corporations, sec. 983, and the doctrine announced by this Court in *McIlhenny v. Wilmington,* 127 N. C., 146 (50 L. R. A., 470), and *Peterson v. Wilmington, ante,* 76.

As to the right of the defendant to make the ditch, and its liability for the overflow of the water, we cite Gould on Waters (Ed. 1883), secs. 269 and 270; and as to police powers, Dillon on Municipal Corporations, sec. 141.

We are, therefore, of the opinion that the defendant may be held to answer in damages as for a trespass, for any damages the plaintiff may have sustained to his *property* by reason of the wrongful action of the defendant; but not for any sickness that may have been caused to him or his family; nor can he recover damage for his time, the increase in expenses of his family, nor for doctors' bills or medicines, that may have been caused by such sickness. And as his Honor instructed the jury that they should "assess" the defendant for the loss of time, the increased expenses of the family, the doctors' bills and medicines, which, it seems from the findings of the jury, were the only things upon which the jury based the verdict, there was error.

While the announcements in this opinion involve no new doctrine, we consider it an important decision, as it is probably the first time this doctrine has been so distinctly announced by this Court.

We have examined the authorities cited for the plaintiff and fail to see that they are in conflict with this opinion; they are cases
(98) between individuals, or against private corporations, where gov-

ernmental rights and the doctrine of police power are not involved, which distinguishes them from this case.

Error. New trial.

DOUGLAS, J., dissenting: I must confess my inability to appreciate the distinctions drawn by the Court. It is admitted that the plaintiff can recover for any damage done to his property, and it is difficult to imagine a much greater injury to a man's home than rendering it uninhabitable. I can readily see that it is not practical to award damages to the entire community for injuries to health, for two reasons, (1) the extreme difficulty of measuring such damages, and (2) because of the imminent danger of bankrupting the town. The latter is apparently the basic reason in *Hughes v. Auburn* (N. Y.), 46 L. R. A., 636, the case relied upon by this Court, and the only case cited tending to sustain its opinion. Even that case, decided by a divided Court, gives as one of its reasons that the plaintiff's intestate was not the owner of the property. In *Allen v. Boston,* 159 Mass., 324, 337, 38 Am. St., 423, the Court says: "The defendant also argues that the only damage the plaintiff can recover, if any, would be the injury to his property; and that injury to his health or business was wrongly allowed to be included in the damages. Such damages were specially alleged, and are clearly recoverable."

In the case at bar the damages are suffered by the owner of the property, are specially alleged and found, and can be easily and definitely computed, being the actual money paid out, and the value of his time lost on account of the negligence of the defendant. This is clearly stated in his Honor's charge. The opinion of the Court also cites Dillon Mun. Corp., sec. 983. That section is not the one that applies to the case at bar. In section 980, which does apply, the learned author says: "For illustration, if a city neglect its *ministerial duty to cause its sewers* to be kept free from obstructions, to the injury of a person who has an interest in the performance of that duty, it is liable, as we (99) shall see, to an action for the damages thereby occasioned." The italics are those of the author. The cases of *McIlhenny v. Wilmington,* 127 N. C., 146 (50 L. R. A., 470), relating to the misconduct of a policeman, and *Peterson v. Wilmington, ante,* 76, referring to the fire department, are equally devoid of application to the case at bar. In this case the injury was apparently caused by the active negligence of the defendant's officers and agents in diverting water by means of a ditch, and then permitting this ditch to be obstructed not only with sand, but with "dead cats, chickens, pigs, and other dead animals." This seems to me gross negligence, which is clearly actionable. It is true, the town authorities might be indicted either as at common law for maintaining a public nuisance or for neglect of duty under The Code. *S. v. Hawkins,* 77

N. C., 494; *S. v. Hatch,* 116 N. C., 1003; *S. v. Dickson,* 124 N. C., 871. But there are very few private citizens, and especially those dependent upon their daily labor, willing to undergo the trouble, expense and possible danger of antagonizing the governing body of a municipality. Moreover, such a course, while perhaps beneficial to the community, would not afford any personal compensation for the injuries received. As I see no error in the trial of the case, I must dissent from the opinion of the Court.

Cited: Hull v. Roxboro, 142 N. C., 460; *Metz v. Asheville,* 150 N. C., 751; *Little v. Lenoir,* 151 N. C., 418; *Moser v. Burlington,* 162 N. C., 144; *Hines v. Rocky Mount, ibid.,* 412; *Rhodes v. Durham,* 165 N. C., 685.

(100)

SMITH v. INGRAM.

(Filed 25 March, 1902.)

1. **Warranty—Covenants—Real Estate—The Code, Sec. 1334.**

   Where a deed contains a warranty to the grantee, but not to his assigns, such assignees can neither maintain an action on such covenant nor defend under it against the grantor.

2. **Deeds—Married Women—Privy Examination—Lex Loci Sitæ—The Code, Sec. 1256.**

   A deed executed by a married woman in another State, according to the laws of such State, for realty in this State, without privy examination of the wife, as required by The Code, sec. 1256, is void.

3. **Estoppel—Deeds.**

   Estoppel by deed can not arise where the deed is void.

4. **Husband and Wife—Married Women—Personal Liability.**

   A married woman who disaffirms her deed to real property and it is declared void, is not personally liable for the purchase money.

CLARK, J., dissenting.

ACTION by Christian Smith against H. C. Ingram and others, heard by *Coble, J.,* at September Term, 1901, of MONTGOMERY. From a judgment for the plaintiff, the defendants appealed.

McIver & Spence and Douglass & Simms for plaintiff.
Adams & Jerome for defendants.

FURCHES, C. J. On 21 January, 1878, the plaintiff was the owner of the land in controversy, lying and being in Montgomery County,

North Carolina, containing 133 acres, which she agreed to sell to one Lindsay Hursey for $130. The plaintiff, Christian Smith, was at that time a married woman, being the wife of J. L. Smith, and has so remained the wife of said J. L. Smith until since (101) the commencement of this action; that in pursuance of said contract and agreement to sell, she and her said husband made and executed a deed sufficient in form to convey said land to said Hursey in fee simple, with a covenant of warranty of title to said Hursey, but not to his heirs, *nor to his assigns;* that the said Hursey thereafter took possession of said land and claimed to hold the same under this deed from the plaintiff and her husband, J. L. Smith, and the defendants claim under and by *mesne* conveyances from the said Lindsay Hursey.

The plaintiff and her said husband were residents and citizens of the State of South Carolina at and before the date of said transaction, and the plaintiff is still a resident and citizen of said State. That said deed was probated according to the laws of South Carolina, but not according to the laws of this State, in that no privy examination of the plaintiff was ever taken.

It was shown and admitted that under the laws of South Carolina at that time a married woman might sell and convey her own land by and with the consent of her husband, without privy examination. And it is admitted and the deed shows that the husband joined the plaintiff in making and executing said deed.

This action was commenced on 16 September, 1895, for possession of said land and for damages for the wrongful detention thereof; and defendants answer and deny the plaintiff's right to recover, admit they are in possession of said land, and plead the deed of the plaintiff and her said husband, of 21 January, 1878, to the said Lindsay Hursey, under whom they claim title, as an estoppel. And defendants contend that by reason of this deed and the covenant of warranty therein contained, the plaintiff is estopped to claim title to said land, and that she can not maintain this action. Defendants say that as the plaintiff could convey her land under the laws of South Carolina, and as she was a resident and citizen of South Carolina, and as the contract (102) of sale and deed to Hursey were made in South Carolina, it was a South Carolina contract and the deed conveyed the land to Hursey; or, if this is not true, that the warranty is a personal contract that the plaintiff was authorized to make by the laws of South Carolina, that it is binding upon her, and might be enforced there and will be enforced here; that this being so, the plaintiff is estopped and can not maintain this action.

But upon a careful examination of authorities, we find that neither of the contentions of the defendants can be sustained.

Lord Coke says warranty is a covenant real, attached to the land, and runs with the estate, whereby the grantee, upon being ousted by title paramount, may vouch the grantor and compel him to render other lands of equal value. 2 Coke upon Littleton, ch. 13, sec. 697 *et seq.*

In *Southerland v. Stout,* 68 N. C., 446, the grantor conveyed to McQuenn with general warranty, "which warranty the plaintiff acquired as incident to the estate derived from him—a covenant which runs with the estate." Thus it appears that where there is a general warranty to the grantee, his heirs and *assigns,* it is attached to the *land and runs with the estate,* and the heirs or assignee may vouch. But it is a *covenant real* and extends no further than the *terms* of the *covenant* carries it. *My Lord Coke* again says: "If a man doth warrant land to another without this word (heirs), his heirs shall not vouch; and regularly if he warrant land to a man and his heirs, without naming *assigns,* his assigns shall not vouch." 384b and 385b.

So it is seen that if the estate had passed to Hursey under the deed of plaintiff and her husband, the defendants, who are the assigns of Hursey, would have no interest in it, and could not have vouched the plaintiff.

Warranties are now treated as personal covenants. This is so under the statute of Anne, the Revised Code, ch. 43, sec. 10, and sec. (103) 1334 of the Code, and was made so by these statutes and judicial construction, because real actions had been abolished and actions of ejectment had been substituted in their stead and there was no one to vouch. But the action of covenant can only be had where the party could have vouched under an action real. *Southerland v. Stout,* 68 N. C., 446; *Rickets v. Dickens,* 5 N. C., star page 343 (4 Am. Dec., 555). And when suits are brought on such covenant and the grantee had been evicted from the whole of the land, the measure of damage was the amount paid for the land. *Williams v. Beeman,* 13 N. C., 483, approved in *Markland v. Crump,* 18 N. C., 94; 27 Am. Dec., 230; *Nichols v. Freeman,* 33 N. C., 99, and many other cases. The defendants having no right to vouch if this had been an action real, they have no right to sue on the covenant, and no right to defend under it. They have no privity or connection with the warranty, which was to Hursey alone; they have no interest in it, and can take no benefit under it, even if Hursey could have done so.

And we now propose to show that this transaction was absolutely void and no estate passed to Hursey under the deed of 21 January, 1878, and that the plaintiff incurred no obligation that can be enforced in law or equity.

The general rule is that executory contracts are governed by the

law of the jurisdiction where they are to be executed; and if they are repugnant to the established policy of that jurisdiction, they can not be enforced. An executory contract may be made in this State to be executed in New York, and it will be considered a New York contract and subject to the laws of that State. But if such executory contract is made here, and no place named as to where it shall be executed, it is presumed that it was to be executed here—a North Carolina contract. And this doctrine applies only to executory contracts, and not to property.

But there are well-known exceptions to that rule. There (104) are contracts which are localized by the subject-matter of the contract, as this one is. All contracts and deeds for the sale and conveyance of land are local and belong to the jurisdiction where the land lies, and will not be enforced when they are in violation of the laws and settled policy of this State. In other words, such contracts and conveyances are made, by the law, contracts and conveyances of the State where the land is. The law of constructive jurisdiction, or contractual jurisdiction, has never applied to contracts for or conveyances of land. And when the plaintiff made this sale and conveyance to Hursey, she made it as a citizen of North Carolina, that is, she was as much subject to the laws of this State as if she had been living here, and made it here. Hursey was as much bound to take notice of the fact that she was a married woman, as if she had been living here. This doctrine is well stated in Story Conflict of Laws (8 Ed.), secs. 38 and 474, and note A; Wharton Conflict of Laws, secs. 278, 305, 331, and sustained by *Meroney v. B. & L. Association,* 116 N. C., 882 (47 Am. St., 841), and *Armstrong v. Best,* 112 N. C., 59; 25 L. R. A., 188; 34 Am. St., 473, and in *The Kensington,* U. S., decided January, 1902. But the direct question has been passed upon, and it seems to us settled by this Court in *Jones v. Gerock,* 59 N. C., 190. It seems to us this question is settled, treating, as we must, under the authorities cited and many others, and is a North Carolina transaction, unless we overrule the statute (Code, sec. 1256) and the many decisions of this State with regard to the execution of deeds by married women, and that the defendants can take no benefit under the transaction of plaintiff with Hursey. In *Clayton v. Rose,* 87 N. C., 106, the Court uses this language: "In *Scott v. Battle,* 85 N. C., 184, 39 Am. Rep., 694, it is held that a *feme covert's* deed, not executed in the prescribed mode, is wholly inoperative. Abiding these decisions, we do not propose to reopen the question." The case of *Scott v. Battle,* which has been cited with approval in more (105) cases, in all probability, than any other case since it was filed in 1881, is so full and complete in support of this opinion that we can hardly undertake to quote from it without doing injustice to the learned

judge who wrote it. But it holds that, at common law, there was but one way by which a married woman could convey her land, and that was by fine and recovery. That our statute has provided another way, more simple and less expensive—by deed, in which the husband joins, and by privy examination of the wife. "But unless the terms prescribed in the statute are *strictly complied with,* she stands as at common law, and the deed is absolutely void." It is not claimed that this statute has been complied with or attempted to be complied with in this case, and it is, therefore, absolutely void. And it would seem "that the same reasoning must be a full answer to the defendant's demand upon the plaintiff for the restoration of the purchase money, which she has received and used." And "in no case will the law imply a promise on her part, and every one who deals with her is held to do so with a knowledge of her disability." The Court then disposes of the case of *Daniel v. Crumpler,* 75 N. C., 184, and in effect overrules it; and then proceeds to quote from *Askew v. Daniel,* 40 N. C., 321, as follows: "That a deed of a *feme covert,* until she is privily examined by the proper authorities is *mere blank paper,* so utterly void that even if it contains a stipulation in her own behalf, she can not have the benefit thereof." In *Green v. Branton,* 16 N. C., 504, the Court says that a *feme covert* can be bound as to her land in only two ways; first, by her deed executed jointly with her husband with her privy examination thereto, and, secondly, by the judgment of a competent court, and if her deed is not executed as required by law, it is an absolute nullity, under *which no equity*
(106) *whatever can be set up."*

Again the Court says: "Upon principle, too, it seems impossible to conceive that the law will ever permit that to be done indirectly which it forbids to be done directly, or that it will give its countenance to a doctrine which must subvert its whole theory in regard to the contracts of married women. To do so would be equivalent to saying that a *feme covert,* by express deed, without being privately examined thereto, can not convey or charge her lands, and yet, by a mere contract to sell and the acceptance of the purchase money, create such a lien upon it as the *courts of equity* will enforce by a sale against her will."

In *Towles v. Fisher,* 77 N. C., 437, the Court says: "No one can reasonably rely upon the contract of a married woman, or on a representation which at best is in the nature of a contract, and by which he must be presumed to know that she is not legally bound, and it is only in the case of a pure tort, altogether *disconnected with a contract, that any estoppel against her can operate."*

Wood v. Wheeler, 111 N. C., 231, is a case in our own Court directly in point as to the invalidity of the deed from plaintiff to Hursey. The

defendant in that case was a married woman and a resident and citizen of South Carolina. She made a mortgage to a citizen of North Carolina upon lands in North Carolina. The mortgage was executed in South Carolina, where she lived, and was probated according to the laws of that State, as this deed was, and this Court held that it was utterly void.

Having shown that this *deed is utterly void,* it can not be used as an estoppel; and, in addition to the authorities already cited, we cite the following from 11 A. & E. Enc. (2 Ed.), p. 393: "No question of estoppel by deed can arise where the instrument is absolutely void." And in note 1 to this text, it is shown that this is the law in England, Alabama, Arkansas, California, District of Columbia, Indiana, Kentucky, Massachusetts, Minnesota, Missouri, *North Carolina,* (107) Washington and Wisconsin. And *Miller v. Bumgardner,* 109 N. C., 412, is cited in this note, showing that this is the law in North Carolina. There, the deed of a married woman, properly executed by her and her husband except the fact that she had never been privily examined thereto, was offered as an estoppel, and this Court held that it was no estoppel against her. Again, on the same page of 11 A. & E. Enc., it is held: "Where the deed is void, the mere fact that it contains covenants of warranty will not make it operative by way of estoppel, for, to make a warranty binding, there must be some estate conveyed to which the warranty may be annexed.

"A deed void, as being given in contravention of a statute, works no estoppel. Thus, a married woman will not be estopped by a deed not executed in the mode provided by statute." But "if the *feme covert* retain and have actually in hand the money paid her as the consideration for her imperfect and disaffirmed contract, her vendee would be permitted to recover the same at law, or if she had converted it into other property, so as to be traceable, he might pursue it in its new shape by a proceeding *in rem,* and subject it to the satisfaction of his demand. But if she has consumed it, as it is admitted the plaintiff has in this case, the party paying it is without remedy; and this because of the *policy* of the law, which forbids all dealings with *femes covert,* unless conducted in the manner prescribed by the statute, and which throws the risk in every such case upon the party that deals with her."

We hold, therefore, that the plaintiff is not personally liable to a charge for the money paid her by (Hursey), nor is her land in controversy subject to a lien thereon.

It seems to us that the judgment of the court below is fully sustained, and it is

Affirmed.

(108) DOUGLAS, J., concurring: I concur in the opinion of the Court with reluctance, on account of the great and unmerited hardship it inflicts upon so many individuals; but I am forced to concur, because, in my opinion, it is the law. We have no implied warranties as to real estate, and as express warranty is a covenant real running with the land, it can never arise when the deed creating it is absolutely void.

If the warranty could operate at all, it could only be by estoppel *in pais*. An estoppel may at times prevent a person from denying the validity of an act which he might lawfully have done, but not an act which he could not do. In other words, an estoppel can never be used to evade the law by validating an act forbidden by law.

I have given to the law of married women, as laid down in the opinions of this Court, the repeated assent of my deliberate judgment, and can not now undertake to reverse a long line of decisions on account of the exceptional hardships of an individual case.

CLARK, J., dissenting: In 1878 the plaintiff (now a *feme sole*), being then a married woman, residing in South Carolina, united with her husband in the conveyance of the land in question, which has since become valuable, the town of Star being built thereon. She now seeks to recover the land. The deed was executed to one Hursey, his heirs and assigns, and contains a covenant of warranty of title to said Hursey, who has since conveyed by deed with warranty to these defendants and others who have improved the property, which was stated on the argument to be now worth some $40,000.

The deed by plaintiff and husband recited the receipt of the purchase money, some $130, the payment of which is not denied. In South Carolina the wife was then, and is now, fully empowered to make (109) any contract with reference to her separate estate, and the doctrine of estoppel applies to married women. *Crenshaw v. Julian,* 26 S. C., 283; 4 Am. St., 719; *Rigsbee v. Logan,* 45 S. C., 651. In that State a married woman can convey realty or make any contract, not only without privy examination, but without the joinder or assent of her husband. Rev. Stat., 1893, secs. 101, 102, 108; Rev. Stat., 1873, secs. 104, 105, 111, and ch. C, secs. 1, 2, 3, of same. The privy examination not having been taken according to the requirements of our statute, and the land lying in this State, the deed was improperly admitted to registration here, and as, until recently, the statute of limitations did not run against married women, the long undisturbed possession by her grantee and these defendants did not ripen what was a just and honest title.

But while the deed was not legally registered here, the contract of

conveyance and the contract of warranty of title were valid in South Carolina where made, and being valid there, are valid everywhere else. The personal contract is enforcible everywhere if valid where made. 11 A. & E. Enc., 402, 415 (2 Ed.); *Wood v. Wheeler,* 111 N. C., 231; *Taylor v. Sharp,* 108 N. C., 377.

We have express authority that a covenant of warranty by a married woman, which, good as a personal contract, because competent according to the law of the place of contract, is good and enforcible as a personal contract, though the deed was void as a conveyance in the State where the land lay. *R. R., v. Conklin,* 29 N. C., 587; 11 A. & E. Enc., 402 (2 Ed.). In *Basford v. Pearson,* 89 Mass., 504, a deed was executed by a married woman residing in Massachusetts for land lying in New Hampshire. It was properly executed according to the laws of Massachusetts, but not according to the laws of New Hampshire. The Court held that the married woman was estopped by her covenant of warranty, and says: "The covenant may be good and valid and effectual against the party making it, if she is duly authorized to contract in that manner, although the deed in which (110) it is contained might not be sufficient under the laws of another State to convey the lands therein situate."

And such is the universally recognized law. A married woman is estopped by her covenant of warranty in all cases where she is competent to contract according to the law of the place of contract. Harris Contracts of Married Women, page 267, sec. 318; *Kolls v. DeLeyer,* 41 Barb., 208; *Richmond v. Tibbles,* 26 Iowa, 474.

In *Zimmerman v. Robinson,* 114 N. C., 39, *Avery, J.,* says: "The right, with the concurrence of her husband, to execute conveyances as if she were *feme sole* has been held to empower her to create a lien upon her separate real estate (*Alexander v. Davis,* 102 N. C., 17; *Newhart v. Peters,* 80 N. C., 166), and if the courts are to allow her deed to operate to any extent, as if she were not under coverture, it must be conceded that the power to convey carries with it, by implication as an incident, the liability to estoppel by the covenants usually contained in conveyances.

In *Armstrong v. Best,* 112 N. C., 59 (34 Am. St., 473; 25 L. R. A., 188), the married woman was domiciled in this State and made, while temporarily in Maryland, a contract valid there, but invalid here. It was held, when sued in this State, that *being resident* here, she would receive the protection of the disability imposed by our law, but the Court was careful to approve the general rule laid down in *Taylor v. Sharp,* 108 N. C., 377, that the "validity of a contract (of a married woman) is to be determined by the law of the place where the contract is made, and if valid there it is valid everywhere," and further cites

with approval *Robertson v. Queen,* 87 Tenn., 445; 3 L. R. A., 214; 10 Am. St., 690, which held that where a married woman domiciled in Kentucky, made a contract valid there, recovery could be had thereon in Tennessee, though the same contract made by a married woman domiciled in Tennessee would be void. That case is on all fours with (111) this.

Upon the authorities above cited from our own reports and the uniform decisions of other States, the *contract* made by the plaintiff in South Carolina having been valid there, is valid here. The *deed* of conveyance is invalid here, because forms requisite to authorize its registration here are lacking. But the *contract* of conveyance (not contract to convey) is valid, and when the plaintiff seeks to disregard it and take back the land, her valid contract that she "has conveyed" is a complete answer to her in a court of equity, and the defendants claiming under a deed from Hursey are privies thereto. Certainly, when the plaintiff has made an admittedly valid contract that, in consideration of receipt of the purchase money, she has conveyed to Hursey and has put him in possession, and has acquiesced in that possession since 1878, she can not be allowed, by a court of equity to put him and his grantees out and recover by violating her valid *contract,* $40,000 worth of property, when she has stood by so many years and allowed others to build upon and add great value thereto. If the plaintiff had put Hursey into possession with a valid contract reciting she had conveyed and would warrant the title, and acknowledged receipt of the purchase money, she could not, under the present system, combining law and equity, recover possession because she had not executed a deed, and the defendants are in no worse condition because a defective deed was superadded.

This is not the case of such a contract made by a married woman domiciled here, as to whom the *contract* would be invalid. Nor do the cases as to one purchasing with notice of our statutes of disability as to married women apply; for here the purchaser knew that the law of South Carolina rendered valid the conveyance and the contract contained in the deed. The conveyance became ineffectual in this State by reason of our registration laws requiring proof of her assent (112) by a privy examination; but, by all the authorities, the contract of conveyance being valid there, when she seeks to recover the land in our courts by reason of the defect in the deed, a court of equity will refuse her the possession of the land, in violation of her valid contract that she has conveyed it and received the purchase money. The cases as to enforcing an executory contract of a married woman have no application. The deed is defective for the nonobservance of the mode of proof of execution of the deed which is required by our statutes, and which governs the registration of titles to realty in our State;

but the *contract* that she has conveyed and acknowledged receipt of the purchase money is an executed contract, as is also the contract of warranty.

A second ground which also defeats the plaintiff's recovery is, that the execution of the contract, the receipt of the purchase money, the putting Hursey in possession, and the standing by while defendants (in privity with Hursey) have held possession ever since 1878, and built upon and improved the property, constitute an estoppel *in pais* against this plaintiff who was competent to contract, and is estopped by matter *in pais* in South Carolina as fully as if she had remained a *feme sole,* or as if she were a man. (Even if domiciled in this State, a married woman is, by virtue of chapter 617, Laws 1901, responsible for buildings put upon her own land by her consent.) When her conduct would be a complete estoppel upon her, had she sued in her own forum, she can not be relieved from that estoppel by suing in ours.

There is still a third defense: She contracted with Hursey by a perfectly valid and binding contract, that she would warrant and defend this title. Had she sued in South Carolina, that would be binding on her, and she can not shake off and vitiate such personal contract, which our authorities hold to be valid here when valid there, by suing in our courts. To this the technical objection is made (113) that such contract being to Hursey, without the addition of the words, "heirs and assigns," it does not run with the land, and, therefore, the defendants do not take benefit under it. By the statute of Anne, Revised Code, ch. 43, now section 1334 of The Code, warranties are now held personal covenants, and a warranty which would prevent the plaintiff from recovering the realty from Hursey would prevent her getting it back from these defendants who hold under him. This is not an action by the defendants against the plaintiff for breach of her contract with their grantor. But they are sued by her to recover the *rem,* the title to which she had warranted by a contract which she was competent to make, and they set up her warranty to Hursey (under whom they hold) as a defense, being in privity with him, and entitled to the protection of such defenses as would have prevented a recovery against him, had he remained in possession.

"Covenants which run with the land lie for or against the assignee at common law, though not named. *Bally v. Wells,* 3 Wills, 25. . . . Covenants that do not run with the land may be assigned in equity to enforce them by action in the name of the covenantee to use of assignee. 1 Smith Leading Cases, 179; *Willard v. Tayloe,* 8 Wall., 571. . . . If this covenant had not passed with the estate in the land, the conveyance would operate as an equitable assignment of his

(grantor's) interest in it and of his right to enforce it in his name to her." *Hager v. Buck,* 44 Vt., 290; 5 Am. Rep., 368.

"For a covenant which runs with the land, an action lies for or against the assignee at common law, although the assignee be not named in the covenant. Citing Cro. Eliz., 553; 1 Ro. Rep., 359; Cro. Car., 221." *Bally v. Wells,* 3 Wills, 25 (1769). To same effect, *Willard v. Tayloe, supra.*

In *Coleman v. Bresnahan,* 61 N. Y., 622, it is said: "Equity (114) for the purposes of justice repudiates the distinction between covenants which do and do not run with the land." In *Trustees v. Lynch,* 70 N. Y., 449, 26 Am. Rep., 615, it is said: "Whether it was a covenant running with the land or a collateral covenant, or a covenant in gross, or whether an action of law could be sustained upon it, *is not material as affecting the jurisdiction of a court of equity.*"

In *Wead v. Larkin,* 54 Ill., 489, 5 Am. Rep., at page 153, the Court says: "Our conclusion is that where the covenantee takes possession and conveys, the covenant of warranty in the deed to him will pass to his grantee." *Doty v. R. R.,* Tenn., 48 L. R. A., 160, is a recent case where the subsequent grantee of the land was held liable on a covenant in the conveyance, though the covenant did not refer to "assigns." In *Miller v. R. R.,* 132 U. S., 691, it is held that where (as in this case) the *habendum* is to the grantee, his heirs and assigns, this is not restricted by a more limited warranty following, and the grantor and his heirs are estopped to set up an adverse claim against the grantee.

In the more or less distant past there was a highly technical distinction, resting upon feudal reasons long since extinct, between covenants running with the land and not running with the land. As stated in several of the above cases, this distinction is not recognized by courts of equity, when to do so would work injustice. It certainly should not be allowed that effect (even if the defendants' case depended upon that one proposition) in a case like this, where the plaintiff was equally competent by the *lex loci contractus* to make a valid contract of conveyance, a valid contract of warranty and a valid deed, and where she received the purchase money, put her grantee in possession, stood by for seventeen or eighteen years without objection, allowed the defendants to improve the property, and now when it has become worth probably $40,000, seeks to get it back with this enormously increased value, in spite of her enforcible contract to warrant the title. Had she (115) sued in her own courts, this would have been a valid defense, and when she comes into our courts her *contract* made in South Carolina is equally valid against her here as in South Carolina, though the deed proves invalid, because not executed with the formalities as to proof of execution required by our statute as a prerequisite to registra-

tion. The defense is in equity, not at law, and a contrary result would be so unjust as to shock the moral sense.

It must also be noted that, though the deed is invalid because proof of its execution is not as required by our statute, the *contract* of the married woman, even if she had been resident in this State, is valid to affect either her real or personal estate (having been made with assent of her husband) by the very terms of our statute. Code, sec. 1826.

If there is any precedent anywhere which can be construed to countenance the plaintiff's recovery, there is no better time to repudiate it than now. A precedent so mischievous and subversive of every element of natural justice should not be left standing, upon which to ask the judgment of a court which will work such an injustice. In the very recent case of *Thompson v. Taylor,* 66 N. J. L., 253, that Court holds, reversing the Supreme Court of that State, that where a married woman, domiciled in New Jersey, executes a note to her husband, invalid in New Jersey, which is taken by her husband, with her acquiescence, to New York and there indorsed by him and delivered, this became a New York contract, and, such contract being valid in New York, the liability of the wife will be enforced in New Jersey. This case is much stronger than ours and is a full discussion by a very able court, showing how completely the doctrine of the legal nonentity and legal incapacity of women is now discredited, even in those States whose laws still retain some trace of it.

Precedents, even when unbroken and admitted, are not to be preferred or continued when they work a patent and un- (116) deniable wrong.

Upon the facts found, judgment should have been entered for the defendants.

Cited: Hallyburton v. Slagle, post, 487; *Burns v. Womble,* 131 N. C., 178; *Wiggins v. Pender,* 132 N. C., 632; *Smith v. Ingram, ibid.,* 960; *Drake v. Howell,* 133 N. C., 167; *Smith v. Bruton,* 137 N. C., 82; *Wallin v. Rice,* 170 N. C., 418.

WILLIAMS v. SOUTHERN RAILWAY COMPANY.

(Filed 25 March, 1902.)

1. **Negligence—Evidence—Sufficiency—Questions for Jury—Railroads.**

The evidence in this case as to negligence of defendant is not sufficient to be submitted to the jury.

2. Negligence—Evidence—Questions for Court—Railroads.

Where the evidence is uncontradicted, the question of negligence is for the court.

CLARK and DOUGLAS, JJ., dissenting.

ACTION by Williams & Garrett against the Southern Railway Company, heard by *Allen, J.*, and a jury, at Spring Term, 1901, of HERTFORD. From a judgment for the plaintiff, the defendant appealed.

L. L. Smith for plaintiff.
George Cowper and F. H. Busbee for defendant.

FURCHES, C. J. On 19 April, 1897, the defendant company ran a train over the track of the Norfolk and Carolina Railroad Company, between Tunis and Ahoskie, and soon after said train passed, a fire was discovered in the woods near by, which spread rapidly and burned the plaintiff's wood. The evidence all showed that the fire originated beyond the right of way, and the judge so told the jury. Two trains of the Norfolk and Carolina had passed over said track not long (117) before the fire was discovered, and there was a steam sawmill in operation at the time the fire was discovered about the same distance from the fire as the railroad track.

There were several witnesses examined, who testified as to the length of time after the defendant's train passed before the fire was discovered, the direction of the wind, the rapid spread of the fire, and the destruction of the plaintiff's property.

The plaintiff offered no evidence connecting the defendant with the fire, except the passing of the train and the fire, and offered no evidence of negligence, unless the following is such evidence: A. A. Newsome testified: "I was there and saw the train; noticed smoke and sparks; it seemed to be exhausting; at the time I called attention to it and noticed sparks, sparks came over from the railroad toward the store, and then towards me on the east side." And J. M. Walden, who testified that, "I recollect the fire; the wind was west—a little more west; I got to the fire first. It was then the size of a flour barrel. The southbound train passed 15 minutes before I discovered it; railroad west from origin of fire; mill south; 93 yards from origin of fire to mill, and 85 yards to railroad; I noticed the train as it passed; weather very dry and wind rapid; there was much smoke coming out of the smokestack of engine; thought train slowed up, but am not certain about it; smoke was going directly towards woods; saw smoke and sparks going towards woods."

This was the evidence upon which the plaintiff contended that negligence of the defendant was shown.

Among other evidence, the defendant offered the testimony of Jeffries as to the condition of the train, as follows: "I was fireman on train No. 15, engine 945, on the 19th of April, 1897. Its equipment for preventing fire was perfect; so far as I know, no change had been made; engine was in good condition. It had been out of the shop about ninety days. I continued to fire it until July. I can't say whether the engine was inspected or not. Opening the furnace door (118) decreases the draft. Frequent firing causes black smoke, but has no effect to increase the sparks when straining. It was a light train. Heavy trains cause engine to strain. The engine was capable of hauling eight or ten cars easily; on this occasion it was pulling only three. Spark-arrester is not placed in the smokestack of the engine, but over the furnace, and it is stationary. Its effect is to prevent the escape of fire and sparks; does not prevent it entirely; if so, it would wholly cut off draft and engine could not run."

There was no evidence in the case that contradicted or tended to contradict this evidence, unless that offered by the plaintiff and quoted above does.

Among other instructions the defendant requested the court to charge: 1. That upon the whole evidence the jury must find that the defendant was guilty of no negligence and the plaintiff can not recover." The defendant also asked the court to charge that, "If the jury believe the uncontradicted testimony of the defendant's witnesses, the engine from which the damage is alleged to have come was in good condition, and had a proper arrester, and was skillfully operated and managed, and that plaintiff could not recover." These prayers were refused, and the defendant excepted.

The court then charged the jury that there was no evidence tending to show that the fire originated on the right of way. "So the question of negligence need only be considered with reference to the condition of the engine, and its management and operation at the time." The court further charged that, "If the jury find by the preponderance of the evidence that the fire originated from the defendant's engine, then, if nothing else appeared, the plaintiff would be entitled to damages; so that, if it is shown by the preponderance of evidence that the fire originated from the defendant's engine, the burden shifts to the (119) defendant to show by the greater weight of evidence that the engine at the time was in good repair, and was equipped with approved appliances to prevent the escape of fire, and was at the time managed and operated in a careful manner by a skillful engineer. It is as if this was submitted to you in a separate issue, and if this is shown by the greater weight of evidence, then the plaintiff cannot recover, even though the woods caught fire from the defendant's engine." Defendant again excepted.

We think there was error in refusing to charge as requested and in the charge as given.

The exception to the refusal to give defendant's prayers for instruction and the exception to the charge as given, resolve themselves substantially into the same error.

The court properly instructed the jury that there was no evidence tending to show that the fire originated on the right of way, and their only inquiry as to negligence should be as to the train—whether it was properly equipped, manned and managed. *Blue v. R. R.*, 117 N. C., 644. And it seems to us that he should have told them there was no evidence to show negligence in the running and managing of defendant's train. The simple fact that the engine emitted black smoke and some sparks as it passed along the track on schedule time, is not such evidence of negligence, if any evidence at all, as should have been submitted to a jury to prove negligence (*Wittkowsky v. Wasson*, 71 N. C., 451), as it is shown that all engines emit some smoke and sparks. In fact, it is shown that they can not "live" and work without doing so.

But if this is not so, the other prayer of the defendant should have been given, "That if the jury believe the uncontradicted testimony of the defendant, the engine was in good condition, properly manned and managed, and the defendant was guilty of no negligence on that account and the plaintiff could not recover." It is contended that this (120) prayer was properly refused, because it only referred to the *uncontradicted evidence of the defendant*. And while it is admitted that there is a rule of that kind, we do not think it applies to a case like this. That rule applies where there is contradictory evidence —evidence on both sides—and is laid down in *Gaither v. Ferebee*, 60 N. C., 303, and yet the discussion of the rule in that case shows that it should not apply in this case. *Harris v. Murphy*, 119 N. C., 34 (56 Am. St., 656), sustains this prayer of the defendant and shows that it should have been given. It is held in *Anderson v. Steamboat Co.*, 64 N. C., 399; "The facts being ascertained, negligence is a question for the court. When the testimony is all on one side, or is not contradictory, the court can decide whether there is or is not negligence." When it is contradictory, it must be submitted to the jury with proper instructions as to the law, that they may find the facts. So it would seem that as all the evidence in the case, as to the condition of the defendant's train, was one way, it presented a question of law for the court, if true, and the court should have so instructed the jury that if they believed this evidence they should find for the defendant.

The court also erred in submitting this question as to the condition and management of the defendant's train, to be found by the jury upon the *preponderance* of the evidence, and the *greater weight* of the evi-

dence, as there was no evidence on the side of the plaintiff upon that question to preponderate or weigh against the evidence of the defendant.

There was error, for which a new trial is awarded the defendant.

New trial.

DOUGLAS, J., dissenting: I can not concur in the opinion of the Court, because it seems to me to be contrary to well-established rules of evidence. The Court says, in substance, that there was no evidence of the negligence of the defendant, overlooking the rule (121) that the mere fact of the engine having set fire to the land is of itself *prima facie* evidence of negligence. This rule was laid down by this Court as far back as its December Term, 1841, in *Ellis v. R. R.*, 24 N. C., 138, where the evidence is thus stated: "The plaintiff proved that he had a line of fence running parallel with the railroad track belonging to the defendants, at the distance of fifty feet, in the county of Northampton; that on a certain day in the spring of 1839, immediately after the passage of one of the locomotives belonging to the defendants, the fence was discovered to be on fire, and about five hundred panels of fence were burnt before the fire could be stopped. The plaintiff's witness further proved that the engines run on the road usually had the spark-catchers on the funnel, but whether they were on *upon that day* he did not recollect." This is all the evidence there was of negligence, and yet a verdict for the plaintiff was sustained. This Court, speaking through *Gaston, J.*, thus clearly lays down the rule, with the reason therefor: "We admit that the gravamen of the plaintiff is damage caused by the negligence of the defendant. But we hold that when he shows damage resulting from their act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which can not be repelled but by proof of care, or of some extraordinary accident which renders care useless." That case has never been overruled or even doubted, but has been repeatedly cited with approval, and especially in the following cases: *Aycock v. R. R.*, 89 N. C., 321; *Lawton v. Giles*, 90 N. C., 374; *Grant v. R. R.*, 108 N. C., 462; *Haynes v. Gas Co.*, 114 N. C., 203 (26 L. R. A., 810), (41 Am. St., 786). In *Aycock's case, Smith, C. J.*, in discussing "the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only injury is shown, in case of fire from emitted sparks," says, on page 329:

"We prefer to abide by the rule so long understood and (122) acted on in this State, not alone because of its intrinsic merits, but because it is so much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plain-

tiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, 'You have burned my property, and if you are not in default, show it and escape responsibility.' We therefore sustain the judge in this part of his charge. Again, there was negligence in permitting the inflammable material in which the fire began to remain so near the track and liable to ignite from emitted sparks."

The use of the word "again" following the preceding section clearly shows that leaving inflammable matter upon the right of way was regarded as a distinct act of negligence, in addition to the negligence presumed from the mere fact of setting fire to the land. In fact, the Court had already decided in favor of the plaintiff before considering this last act of negligence.

In *Moore v. Parker,* 91 N. C., 275, this Court says, on page 279: "We adhere to the rule laid down in the recent case of *Aycock v. R. R.,* 89 N. C., 321, and enunciated in these words, originally proceeding from the pen of *Judge Gaston:* 'Where he (plaintiff) shows damages from their (defendants') act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence which can not be repelled but by proof of care, or of some extraordinary accident which renders care useless.' "

In *Haynes v. Gas Co.,* 114 N. C., 203 (26 L. R. A., 810; 41 Am. St., 786), *Burwell, J.,* says, for the Court, on p. 208: "Guided by the principle announced in these cases, we come to the conclusion that (123) this plaintiff should have been allowed to say to this defendant, 'The wire you put in the street killed my son while passing along the highway, as he had a right to do. If you are not in default, show it and escape responsibility.' " Citing *Ellis v. R. R., supra; Moore v. Parker, supra; Aycock v. R. R., supra;* Ray on Negligence, Imp. Duties, 145; Wood's Ry. Law, 1079; Whitaker's Smith Neg., 423. It would seem that these home authorities would be sufficient for the purposes of this case, but a very slight investigation will show that we are not alone in our view of the law. It is said, in 13 A. & E. Enc. (2 Ed.), 498: "The English rule, and that supported by a large number of American cases, is, that the mere communication of fire by a railroad engine is of itself sufficient to raise a presumption of negligence against the company"—citing a long list of cases from England, the United States (Federal cases), Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wisconsin.

It is worthy of note that such conservative States as Connecticut, Maine, Massachusetts and New Hampshire, among others, should have provided by statute that, as to fires set out by railroad companies, there shall be an absolute liability for loss, irrespective of the question of negligence on the part of the defendant. 13 A. & E. Enc. (2 Ed.), 419.

It would seem that this was the common law in England as to all classes of fires, until changed by the statutes of 6 Anne, ch. 31, and 14 George III., ch. 73, amended by 7 and 8. Vict., ch. 84.

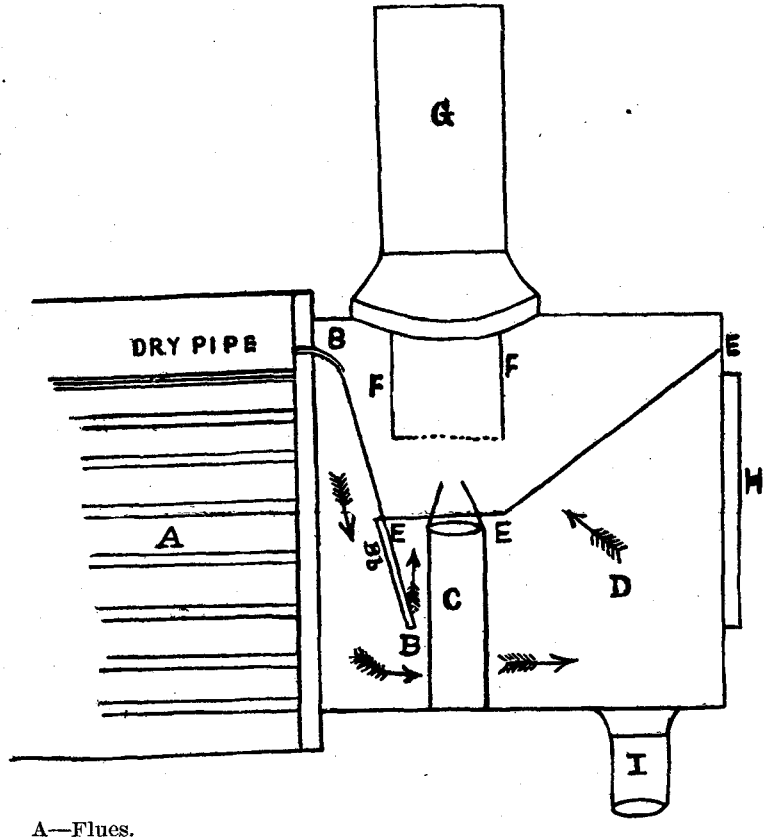
It is well settled that in an action for damages any essential fact may be proved by circumstantial evidence. This rule is supported equally by reason and authority, but time will not permit any unnecessary discussion. If a man may be hanged on circum- (124) stantial evidence, I see no reason why it should not be sufficient in civil actions requiring only a preponderance of the testimony.

The rule laid down in *Ellis' case* is further strengthened by the practically universal acceptance of the principle that where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him rests the burden of proof. *R. R. v. U. S.*, 139 U. S., 560, 567; *Mitchell v. R. R.*, 124 N. C., 236 (44 L. R. A., 515); *Hinkle v. R. R.*, 126 N. C., 932, 938 (78 Am. St., 685), and authorities therein cited.

As the spark-arrester is inside the engine, the ordinary plaintiff would never see it, and probably would not know it if he did see it. It is, therefore, impossible for him to prove its condition by direct evidence, outside of the defendant's own employees, whose negligence was, perhaps, the cause of the injury. It would be almost as difficult for the average witness to a country fire to say whether the emission of sparks was *unusual*. It seems to me that, under the present state of efficiency to which spark-arresters have been brought, any noticeable emission of sparks would be some evidence tending to prove that the arrester was not in perfect condition. We should remember that it is almost impossible to see during the daytime any spark that can come through a mesh running two and a half spaces to the inch, which, I believe, is the usual size. Counsel for defendants frequently insist that it is common knowledge that the escape of sparks can not be entirely prevented without cutting off the draft. I think it is equally common knowledge that the average man knows nothing about a spark-arrester, except that it has holes in it. For this reason I have made a rough drawing, from a printed cut in *Locomotive Engineering*, of the smoke-box of an engine. It is supposed to represent the average locomotive with extension front. Whatever variations may exist (125)

in the different makes of engines, or defects in the drawing, will not, I think, materially affect the principle.

Referring to the drawing, A are the flues; BB, the deflector (126) plate; Bb, the deflector plate adjuster; C, the nozzle stand and tip; D, forward part of smoke-box; EEE, the wire netting or spark-arrester proper; FF, the petticoat or draft pipe, being in effect a downward extension of the smokestack; G, the smokestack; H, the



A—Flues.
BB—Deflector Plate. Bb—Deflector Plate and Adjuster.
C—Nozzle Stand and Tip.
D—Forward part of Smokestack.
EEE—Wire netting.
FF—Petticoat or Draft Pipe.
G—Smokestack.
H—Smoke-arch door.
I—Cinder chute.

smoke-arch door; I, the cinder chute. When the engine is moving, the direct draft is caused by the exhaust steam being forced out of the nozzle directly upward through the smokestack. There is a smaller steam pipe called the blower, to be used in creating a draft when the engine is at rest, but that does not seem to affect the present matter. The sparks coming from the flues strike the deflector plate, and are turned downward, passing under the plate. Some of them may be carried directly upward, and, if small enough to pass through the netting, will go out the smokestack with great force. The large bulk of the sparks passing under the deflector plate are carried forward by their weight and momentum, and dropped in the front of the smoke-box over the cinder chute. Of the sparks that go through the netting, only those that strike within the petticoat, which is an iron pipe about sixteen inches in diameter, can get out. Sometimes the petticoat pipe may be omitted when there is a very long smoke-box; but I think it is universally used in this State.

The next question is, What size sparks can escape if the netting and deflector plate are in good condition. The latter is a solid plate. The netting is usually made of No. 10 wire with meshes averaging two and a half to the running inch. Deducting the thickness of the wire, it is evident that the open spaces can not be more than three-tenths of an inch square. For even a cinder of this size to escape, it must strike directly in the center of the opening. If it strikes obliquely or on one side, it will be deflected by the wire. When, therefore, a large cinder does escape, it is evidence tending to prove that the spark-arrester is not in good condition. The fact that it was (127) once in good condition does not prove that it will always remain so. What is the average effective life of a spark-arrester I do not know. In *Babcock v. R. R.*, 62 Iowa, 593, there was evidence tending to show that the durability of the wire netting used to prevent the escape of sparks does not exceed two months, and is often a much less period. This seems to me too short a time, but it cannot be very long. The heat in the smoke-box is said to vary from 600 to 1,600 degrees Fahrenheit. This intense heat, with the constant abrasion of the flying cinders, must soon destroy the wire and, perhaps, even the deflector plate. The burning out of five or six strands of wire directly under the petticoat or draft pipe, where it would be most apt to burn out, would practically destroy the efficiency of the entire arrangement. Such a hole would be entirely beyond the knowledge of the plaintiff, and could be detected only by a proper inspection. A thorough inspection could, of course, be made only after the engine had cooled off. It would seem that an engine is always working more or less under a forced draft

caused by the exhaust steam, and that this can be regulated to a certain extent by the engineer.

How far sparks, which are simply cinders in a state of combustion, can fly, I do not know; but I presume it would depend upon the size of the cinder, the force of the exhaust and the strength of the wind. These are questions peculiarly for the consideration of the jury.

This description, crude though it be, of the nature and operation of a spark-arrester, will enable us to better understand the testimony of the defendant in the case at bar. Its fireman testifies as follows: "Its equipment for preventing fire was perfect; *so far as I know,* no change had been made; engine was in good condition. It had been out of the shop about *ninety days. . . . I can't say whether the*
(128) *engine was inspected or not.*" What he evidently meant was, that the equipment was *originally* perfect. This is shown by his subsequent testimony. His expression, "So far as I know, no change had been made," was equivalent to saying that he did not know whether any change had been made or not. He expressly states that the engine had been out of the shop about ninety days, and that he did not know whether it had been inspected or not. He does not say that he inspected it. It was no part of his duty to do so. A fireman is not presumed to be an expert, and is not in charge of the engine, that duty belonging to the engineer. It is true, he says the engine was in good condition, but that was only as far as he could see; that is, that the engine was in good running order. An engine can run as well, if not better, without a spark-arrester than with one.

Whatever may have been the condition of the engine as a running machine, I see no evidence whatever that its *spark-arrester,* if it had one, was in good condition on the day of the fire, or at any time sufficiently near thereto to raise any presumption favorable to the defendant. If such had been the fact, it would have been easy for the defendant to have introduced its inspector or engineer to testify that he had personally inspected the engine on the day of the fire, or within a few days before or after, and that he found it provided with a suitable spark-arrester, properly arranged and in good condition. In the entire absence of such testimony, the court can not presume it.

On the other hand, the testimony of Newsome that he saw so many sparks coming from the engine as to make him think it was exhausting, and to cause him to call attention to it, is some evidence directly tending to prove that the spark-arrester was out of order.

Under such circumstances the defendant had no right to complain at the charge of his Honor, nor, in my judgment, can the
(129) opinion of the court be sustained, either on the law or the facts. It cites *Blue v. R. R.,* 117 N. C., 644, but that case is not in point.

There the issue was submitted to the jury with the charge that the burden was on the defendant to show that its road was "properly equipped with modern appliances sufficient to guard against the escape of fire, and . . . the engine carefully operated by skillful and competent men." Here it is sought to take the case from the jury on what appears to be a misconception both of law and of fact.

Owing to the length of this opinion, I have omitted many authorities which would otherwise have been cited. I see no error in the trial of the case.

CLARK, J., concurs in the dissenting opinion.

Cited: Cheek v. Lumber Co., 134 N. C., 231; *Currie v. R. R.*, 156 N. C., 424; *Armfield v. R. R.*, 162 N. C., 28.

SUN LIFE INSURANCE COMPANY v. UNITED STATES FIDELITY AND GUARANTY COMPANY.

(Filed 25 March, 1902.)

1. **Fidelity and Guaranty Insurance—Contracts—Bonds.**

Where a new contract made by an employer with an employee increases the responsibilities of the employee, such new contract discharges a fidelity and guaranty company from liability on its bond.

2. **Fidelity and Guaranty Insurance—Evidence—Instructions—Waiver.**

It is error to instruct that a party waives any difference of its liability under two contracts when there is no evidence that the party knew of the existence of the contracts.

DOUGLAS, J., dissenting.

ACTION by the Sun Life Insurance Company against the United States Fidelity and Guaranty Company, heard by *Robinson, J.*, and a jury, at October Term, 1900, of WAKE. From a judg- (130) ment for the plaintiff, the defendant appealed.

Watson & Gatling for plaintiff.
A. J. Field and Armistead Jones for defendant.

MONTGOMERY, J. The defendant, in January, 1899, by a written agreement, bound itself to make good and reimburse to the plaintiff, to the extent of $300, all and any pecuniary loss that might be sustained by the plaintiff of moneys or other personal property belonging to the

plaintiff in the possession of J. R. Caudle, directly occasioned by larceny or embezzlement on the part of Caudle, in connection with the duties of the position which he held under the plaintiff.

Caudle had been, in December, 1898, appointed by the plaintiff an "assistant superintendent of its Thrift Department, in connection with its Wilmington agency." His duties in that capacity were to procure agents to work under him; to instruct the agents in the details of the thrift business, and to work with them in securing applications for assurance in the plaintiff company. He was also to inspect, canvass and collect, as directed by the company. A statement in writing before the execution of the indemnity bond by the defendant had been made by the plaintiff to the defendant, in which was set forth the duties of Caudle, and that statement was the basis on which the bond was executed. On the following April the plaintiff made another contract with Caudle, and afterwards Caudle became short in his accounts with the plaintiff.

This action was brought to recover of the defendant the amount of the deficiency. The defendant in its answer denies its liability, and especially does so on the ground that the contract made by the plaintiff with Caudle in April was, in its express terms, different from the contract of December, upon the basis of which the indemnity bond
(131) was executed, and was in express terms a cancellation and revocation of the December contract. His Honor instructed the jury that they need pay no attention to the alleged discrepancy between the two contracts between the plaintiff and Caudle, nor to the alleged increased responsibilities and duties of Caudle under the April contract, and that as a matter of law the contract of April did not affect the defendant's liability.

The correctness of that charge depends upon whether there was a substantial increase of Caudle's responsibilities and duties under the April contract, or whether the contract of April expressly revoked and canceled the contract of December. Upon an examination of the April contract it is seen that the name of the position which Caudle held under the December contract was changed. Under the former he was called "assistant superintendent of its Thrift Department, in connection with its Wilmington agency," while under the latter he was designated "district manager," "agent." and his field of operations embraced six counties, including New Hanover.

In the April contract there is a provision in these words: "This appointment will take effect on 1 May, 1899, and will on that day supersede and annul all agreements previously made between the company and the said agent," and a further provision that the agent, Caudle, should "keep deposited with the company a bond in its favor executed by

himself and two sureties satisfactory to the company, for such sum as it may consider necessary for the faithful performance of this agreement and all duties pertaining to said agency." The contract of December did not require a bond from Caudle with two sureties, and the one executed under it had only one, the defendant.

We think that the contract of April increased the business and the territory in which Caudle operated, and his responsibilities and duties as well, and that its legal effect was to absolve the defend- (132) ant from liability on its bond. Besides, the contract of April expressly superseded and annulled all agreements previously made between the plaintiff and Caudle.

And there is another error which will entitle the defendant to a new trial. His Honor instructed the jury that, "The correspondence between the plaintiff and defendant shows that defendant waived all matters except the question of embezzlement," that is, that the defendant waived any difference between its liability under the two contracts. There was no evidence tending to show that the defendant ever had notice of the execution of the April contract until the complaint was filed, six months afterwards. On the trial it is true that Johnson, the plaintiff's agent, said he gave notice in Raleigh to Moye, the defendant's agent, of the execution of the April contract, but Moye denied it emphatically. His Honor told the jury that they need not consider that matter at all, that the April contract did not affect the defendant's liability one way or the other. So, there being no evidence that the defendant had notice of the April contract, the correspondence between the plaintiff and the defendant must have been in reference to the December contract, for upon that the indemnity bond was executed.

New trial.

DOUGLAS, J., dissenting: I have not had the opportunity since receiving the opinion of the Court to examine the record in this case. Hence, I am not prepared to say that there was such a change in the duties and responsibilities of the agent as to invalidate the bond.

This Court has said, in *Bank v. Fidelity Co.*, 128 N. C., 366, 371: "The object of an indemnifying bond is to indemnify; and if it fails to do this, either directly or indirectly, it fails to accomplish its primary purpose and becomes worse than useless. It is worthless as an actual security, and misleading as a pretended one." (133)

I am, therefore, unwilling to permit a guaranty company to avoid the responsibility for which it has received a substantial consideration upon an immaterial variation. The mere change of title of an agent does not of itself change the nature of his duties; and a new contract affecting the nature of his compensation does not neces-

sarily affect his responsibility. It is the faithful performance of his duties as agent that is intended to be secured by the bond, and not the guaranty of any particular contract.

There is another ground upon which I must dissent. The Court says: "There was no evidence tending to show that the defendant ever had notice of the execution of the April contract until the complaint was filed, six months afterwards. On the trial it is true that Johnson, the plaintiff's agent, said he gave notice in Raleigh to Moye, the defendant's agent, of the execution of the April contract, but Moye denied it emphatically." Taken in its literal sense, this means either that Moye should be believed in preference to Johnson, which was a matter exclusively for the jury, or that notice to the agent was not notice to the company, which would be erroneous as a proposition of law.

If the Court intends to say that this evidence was impliedly taken from the jury by the instruction of his Honor that they should not consider the April contract, that might raise a different question, which is, perhaps, identical with the one discussed in the first part of the opinion.

---

(134)

SALLENGER v. PERRY.

(Filed 1 April, 1902.)

Evidence—Negotiable Instruments—Husband and Wife.

Where a note made payable to a husband is attached by his creditors, he having claimed the same as his own, and he claims in the attachment proceedings that it belongs to his wife and was made to him by mistake, this fact must be established by clear, strong and convincing proof, not by a mere preponderance of the evidence.

FURCHES, C. J., and DOUGLAS, J., dissenting.

ACTION by K. and W. B. Sallenger, administrators of B. Sallenger and others, against J. W. Perry and others, heard by *Allen, J.*, and a jury, at November Term, 1901, of BERTIE.

In April, 1893, Mrs. Bettie Sallenger, who was the wife of the plaintiff K. Sallenger, was engaged in mercantile business in Bertie County, under the name and style of B. Sallenger & Co. At that time she was indebted to the defendant J. W. Perry, who was then trading under the firm name of J. W. Perry & Co., in the city of Norfolk, in the sum of $1,000, and for the payment of which indebtedness she, with her husband, the plaintiff, K. Sallenger, executed and delivered to J. W. Perry & Co. their note, securing the same by a deed of trust made to the other

defendant, George B. Henneberry, upon two tracts of land belonging to Mrs. Sallenger. At the same time, or shortly thereafter, the plaintiff K. Sallenger put into the hands of Perry & Co. nine notes, executed by J. B. Willoughby to him (K. Sallenger), amounting to $832. K. Sallenger in his complaint stated that the nine notes were delivered to Perry & Co. with the express understanding and agreement that Perry & Co. would collect them and place the proceeds to the credit of the $1,000 note, and that this agreement was made at the time the note was executed.

K. Sallenger alleged in his complaint and testified upon his (135) examination that the Willoughby notes, though made payable to himself, were by mistake made so, and that they should have been made payable to his wife, Bettie Sallenger; that they were given as the purchase money of a tract of land belonging to her. K. Sallenger alleged that he has paid most of the $1,000 bond and the defendant, J. W. Perry, admits the payment of several hundred dollars on the same. There is an amount of $211.36, which the plaintiffs contend should be applied to the $1,000 note, but which the defendant says should be applied to a debt due by A. Sallenger to the J. W. Perry Company, a corporation formed in September, 1893, upon the discontinuance of the firm of J. W. Perry & Co. The amount, $211.36, was from the proceeds of a lot of peanuts shipped by K. Sallenger to the J. W. Perry Company in February, 1897, and was applied by the consignees to their debt against the consignor. Sallenger in his complaint alleged, and as a witness testified, that he accompanied the shipment of peanuts with written instructions to the consignees to apply the proceeds of sale to the payment of the $1,000 debt due to the old firm of J. W. Perry & Co., by himself and his wife. That was denied by the defendant. In 1900 the J. W. Perry Company attached seven of the Willoughby notes, which were in the hands of J. W. Perry, for the purpose of having them applied toward the payment of the K. Sallenger indebtedness to the J. W. Perry Company, and by proper proceedings the notes were sold and applied to that indebtedness. J. W. Perry is a large stockholder in the J. W. Perry Company, and at his instance the J. W. Perry Company instituted the attachment proceedings. Mrs. Sallenger left several heirs at law, who have been made parties defendant, and she left no other real estate than that embraced in the deed of trust to the defendant Henneberry. The trustee, Henneberry, advertised the sale of the land to pay the balance due on the $1,000 note, and the sale was enjoined until the final hearing of the case. The complaint (136) alleged and the plaintiff K. Sallenger testified that his wife died in 1895, and that she was indebted to various persons at the time of her death. From a judgment for the plaintiffs, the defendants appealed.

Pruden & Pruden and Shepherd & Shepherd for plaintiffs.
Martin & Peebles and B. B. Winborne for defendants.

MONTGOMERY, J., after stating the facts: This action was brought by the plaintiffs, K. Sallenger and W. H. Sallenger, administrators of Bettie Sallenger, against the defendants, J. W. Perry and George Henneberry, to prevent the sale of the land and to have an account taken as to the amount which might be due upon the $1,000 note executed by Mrs. Sallenger and the plaintiff K. Sallenger to J. W. Perry & Co., with a view of declaring whatever balance may be found to be due, and for the return to the plaintiff W. H. Sallenger, administrator of Mrs. Bettie Sallenger, of the Willoughby notes for the purposes of administration.

The contention of the plaintiffs, of course, is that the Willoughby notes, though made payable to K. Sallenger, were nevertheless the property of Mrs. Sallenger; that they were deposited with the defendant J. W. Perry, trading as J. W. Perry & Co., as collateral security to the $1,000 note of Mrs. Sallenger, which was secured by deed of trust on her own land, and, therefore, that after the payment of the balance due on the $1,000 note, the Willoughby notes should be returned to her administrator in order that her debts might be paid and that her encumbered real estate might be relieved and descend to her children; and that the Willoughby notes could not be applied to the indebtedness of K. Sallenger to the J. W. Perry Company. It became the chief question in the case to find out who was real owner of the Willoughby notes. If Mrs. Sallenger
(137) was the owner, then, she not having been a party to the attachment proceedings in Virginia, the plaintiff W. H. Sallenger, her administrator, is still the owner of the notes; or, if they can not be had, is entitled to their value against the defendant J. W. Perry for their misapplication. If the notes were in fact the property of K. Sallenger, then, the attachment proceedings being apparently regular, their proceeds have been properly applied to his debt to the J. W. Perry Company.

Upon this question an issue was submitted to the jury (the fifth in a series), "To whom did the Willoughby notes belong at the time they were assigned to J. W. Perry & Co.?" His Honor charged the jury upon that issue, "That the burden was upon the plaintiff to establish the affirmative of the issue, No. 5, by a preponderance of the evidence; that if the plaintiffs had satisfied the jury by a preponderance of the evidence that the Willoughby notes were by mistake made payable to K. Sallenger, instead of to B. Sallenger, then they should answer the fifth issue, 'B. Sallenger.'"

We think there was error in the instruction. Usually, in civil cases

the issues are determined by a preponderance of the evidence, but there are exceptions to the rule, and it seems to us that this case falls within the exceptions. In the case of a deed, the meaning of the parties is to be found within its terms, and the law refuses to allow parol evidence to alter, add to or vary that meaning, as a general rule. A deed is, between the parties, their agreement and understanding reduced to writing, and itself constitutes evidence of that meaning next to conclusive; and it ought not to be changed, except upon the clearest evidence of fraud or mistake.

Under the former practice the courts of law were not open for the correction of deeds for fraud or mutual mistake, but the complaining party had to seek relief in equity, and in that case, before the chancellor would correct the instrument, the evidence was (138) required to be satisfactory, that is, "clear, strong and convincing," as was said in *Ely v. Early,* 94 N. C., 1, and in *Cobb v. Edwards,* 117 N. C., 244. In the present practice the Court will, in cases where an issue of mistake in a deed is submitted, instruct the jury, "That from the evidence they should be thoroughly satisfied of the mistake alleged before they would be warranted in finding the affirmative." *Ely v. Early, supra.* Why should not the same rule of evidence apply in a case where a bond or note is sought to be corrected for fraud or mistake? Jurisdiction in equity, or rather, with us now, equitable principles would have to be invoked to have the correction made. In England, *Henkle v. Royal Exchange Co.,* 1 Ves., 317, a mistake in an insurance policy was the subject of equitable jurisdiction, and the same rule of evidence was enforced as would apply to the correction of a mistake in a deed. In the case before us the notes upon their face contained express promises to pay the amounts named to K. Sallenger. K. Sallenger used them as his own without disclosing or suggesting any mistake as to the payee until they were seized by process of law by his creditors in attachment proceedings, when he undertakes for the first time to show that they are not his property. Certainly it seems to us that the rule as to the preponderance of the evidence ought not to apply here, but rather the rule which applies to the correction of deeds—that the evidence should be clear, strong and convincing. As analogous, it will be found in our reports that in cases where lost bonds have been set up, whether in the law or equity courts, the proof was required to be of the "strictest and clearest" kind. *Fisher v. Carroll,* 41 N. C., 485. It (the evidence) must be satisfactory. *Deans v. Dortch,* 40 N. C., 331. It is not necessary to discuss the other exceptions of the defendant.

Error.

FURCHES, C. J., dissenting: I agree to the rule laid down as (139) to evidence, but do not think it applies to this case.

DOUGLAS, J., dissenting: I can not concur in the opinion of the Court, because, to my mind, it is erroneous in theory and totally unsupported by authority. There is no analogy between a deed which is sought to be corrected as between the parties, and a note which the payee himself says was erroneously made payable to himself. There is no testimony to the contrary, and if the jury believed the evidence they were compelled to find as they did. The notes were not used by the husband as his own, but were hypothecated as collateral security for the note of the wife. The testimony all tends to show that these notes were the proceeds of the sale of land belonging to the wife. They were, therefore, her property. But it is said that she may have given the notes to her husband. If that is true, it devolves upon the defendant to prove it. There is certainly no presumption to that effect. Suppose that the husband had purchased land in his own name with money belonging to his wife, a resulting trust would at once arise in favor of the wife. She need not prove that there was any mutual mistake in making the deed to the husband. She would simply be required to show that the purchase money was her own, and a resulting trust would at once be created by operation of law. The rule almost universally adopted by text-writers and approved by the courts, is that laid down by *Lord Chief Baron Eyre* in *Dyer v. Dyer,* 2 Cox, 93, which is as follows: "The clear result of all the cases, *without a single exception,* is that the trust of a legal estate, whether taken in the names of the purchaser and others jointly, or in the names of others without the purchaser, whether in one or several, whether jointly or successively, *results* to the man who advances the purchase money." If this rule universally applies to men *sui juris,* with how much greater force should it apply to the defendant and confiding wife, whose noblest
(140) qualities of womanhood would make her but the easier victim of a careless or designing husband? It will scarcely be contended that property conveyed to the husband, but paid for by the wife, can be brought under the rule of advancements. As money turned into land would remain the property of the wife, I see no reason why land turned into money should go in a different direction. As J. W. Perry was not only a large stockholder in the corporation that bore his name, but was also its president, any notice to him would be notice to his company. There is no ground upon which I can concur in the opinion of the Court.

Cited: S. c., 133 N. C., 34, 41; *Carson v. Ins. Co.,* 161 N. C., 446.

THOMPSON v. SOUTHERN RAILWAY COMPANY.

(Filed 1 April, 1902.)

Removal of Causes—Foreign Corporations—Petition for Removal—Sufficiency—Federal Courts.

A petition for removal of an action to the Federal Court must specifically allege that the petitioner is a nonresident of the State, and it is not sufficient to allege that petitioner is a corporation originally created under the laws of another State.

ACTION by Della D. Thompson, administratrix, against the Southern Railway Company, heard by *Allen, J.*, at September Term, 1901, of PENDER. From an order refusing to remove the cause to the Circuit Court of the United States, the defendant appealed.

R. G. Grady and Bellamy & Bellamy for plaintiff.
F. H. Busbee and A. B. Andrews, Jr., for defendant.

DOUGLAS, J. The sole question presented to us is the right of (141) the defendant to remove this cause into the Circuit Court of the United States upon the complaint and petition as they appear in the record.

The plaintiff in her complaint specifically alleges that the defendant is "a corporation duly created and existing under the laws of the State of North Carolina."

The part of the petition upon which the case depends is as follows:

"Your petitioner further states that in the said above-mentioned civil action there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between your said petitioner, which was at the commencement of this action, and still is, a citizen of the State of Virginia, to wit, a corporation *originally* created by and organized under the laws of said State, and the said Della Thompson, administratrix of Major D. Thompson, deceased, who, the said Della, your petitioner avers, was, at the commencement of this action, and still is, a citizen of the State of North Carolina and of the Eastern District thereof." . . .

The court below refused to remove, and in such refusal we see no error. The petition is fatally defective, inasmuch as it does not allege specifically that the defendant is a *nonresident* of the State of North Carolina.

The removal of causes is governed by the act of 3 March, 1875, amended by the act of 3 March, 1887, as corrected by the act of 13 August, 1888. Section 2 thereof provides that, "Any other suit of a civil

nature, at law or in equity (that is to say, any suit other than one arising under the Constitution or laws or treaties of the United States), of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending or may hereafter be brought in any State court, may be removed into the Circuit Court of the United States for the proper district by the defendant or
(142) defendants therein being nonresidents of that State."

In construing this statute we must bear in mind that the admitted purpose of Laws 1887 and 1888 was to *contract* the jurisdiction of the Circuit Courts of the United States, both as to the original causes and those brought therein by removal. *Ex parte Shaw,* 145 U. S., 444, 449; *Hanrick v. Hanrick,* 153 U. S., 192, 197; *Fisk v. Henarie,* 142 U. S., 459, 467; *R. R. v. Brow,* 164 U. S., 277; *Camprelle v. Balbach,* 46 Fed., 81.

In referring to these acts the Court says, in *Tennessee v. Bank,* 152 U. S., 456, 462: "The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this Court, to contract the jurisdiction of the Circuit Courts of the United States."

Another principle equally well settled is that every inference or presumption is against the jurisdiction of the Federal courts, and that as the right of removal is purely statutory, the provisions of the statute must be strictly followed in every essential particular. Every jurisdictional fact must be stated clearly and *affirmatively,* and if not so stated, will be presumed not to exist. *Turner v. Bank,* 4 Dall., 8; *Ex parte Smith,* 94 U. S., 455; *Robertson v. Cease,* 97 U. S., 646; *Insurance Co. v. Rhoads,* 119 U. S., 237; *R. R. v. Swan,* 111 U. S., 379, 388; *Neal v. Pennsylvania Co.,* 157 U. S., 153. In *Grace v. Insurance Co.,* 109 U. S., 278, 283, the Court says: "As the jurisdiction of the Circuit Court is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears."

In *Fife v. Whittell,* 102 Fed., 537, 539, the Court says: "It is also an established rule that parties seeking to remove causes to the
(143) United States Circuit Court are bound to comply strictly with every provision required by the act. One of the provisions of the removal act is that, where a cause of action between citizens of different States pending in the State court involves an amount within the jurisdiction of the United States Circuit Court, it may be removed to that court by the defendant or defendants therein 'being nonresidents of the State.' This restriction to the right of removal, based upon the residence of the defendants, is clearly jurisdictional, and if it does not appear in

the record in the State court, it must be clearly shown in the petition for removal as a right which the defendant has and claims, or it will be presumed not to exist. The fact that it may be inferred argumentatively from any averment in the petition as to other facts is not sufficient." This is a well-considered opinion sustained by ample citation of authority.

In *Wheel Co. v. Mfg. Co.,* 46 Fed., 577, 579, the Court says: "There is one method by which the defendant could have become a citizen and a resident of Connecticut, as well as of Maine, which is by having been incorporated in Connecticut. In this point of view, an averment of the nonexistence of the corporation within this State at the time of the filing of the petition to remove would have been good pleading, for it might be also a corporation and therefore a resident of Connecticut at the same time." The clearest and most succinct statement of the rule we have been able to find is by *Mr. Justice Miller,* sitting in the Circuit Court in *Hirschl v. Machine Co.,* 42 Fed., 803. The following is the entire opinion of that great jurist: "A corporation is a citizen of the State under whose laws it is organized. For the purpose of suing and being sued, it may become a resident of each State in which it does business under State law. The rule of the Removal Act of 13 August, 1888, as to natural persons, is applicable to corporations. When a corporation of one State is sued in the courts of another State a petition (144) for removal by it is not sufficient unless it alleges, in addition to the usual averments as to citizenship, that it is a nonresident of the State in which it is sued. The motion to remand is sustained."

It is true, the contrary is held in *Myers v. Murray,* 43 Fed., 695; 11 L. R. A., 216, and *Shattuck v. Insurance Co.,* 58 Fed., 609, but we can not approve of these cases, as we are equally unable to adopt their reasoning or to see the fitness of their citations. Almost any theory can be constructed by taking from the reports, even of the Supreme Court, disjointed sentences without reference to the facts to which they are intended to apply. For instance, that Court says, in *Ex parte Schollenberger,* 96 U. S., 377, that, "A corporation can not change its residence or its citizenship," but it also says, in *Muller v. Dows,* 94 U. S., 444, that, "A corporation itself can be a citizen of no State, in the sense in which the word is used in the Constitution of the United States." If the latter extract is to be taken literally, then no corporation could ever remove a cause into the Circuit Court, because that right is given by the Constitution and laws of the United States exclusively to *citizens.* For purposes of jurisdiction a conclusive presumption has been created by judicial construction "that all the stockholders are citizens of the State which, by its laws, created the corporation." This presumption, adopted at the time when business conditions were essentially different, is now

at least questionable in theory and generally false in fact. Even ordinary business is being rapidly absorbed by so-called foreign corporations which have no legal existence outside of the State creating them, and no actual existence therein. It is said that one or two States derive a large part of their revenues by chartering corporations for the sole purpose of doing business outside the State. This purpose may not (145) be expressed in words, but is none the less clearly understood.

So great had become the abuse that the State of North Carolina passed an act (Laws 1899, ch. 62) withdrawing all comity as to certain classes of corporations. That act was fully sustained by us in *Debnam v. Tel. Co.*, 126 N. C., 831, wherein this Court used the following language: "Construing the act of 10 February, 1899, now under consideration, as a North Carolina statute, it is clear to us that the legislative intent was, not to grant a mere license under which foreign corporations might do business in this State, but to require all such corporations to become domestic corporations either by reincorporation or adoption. Whatever the process may be called, the intent of the act, as well as its legal effect, was to make all corporations complying with its conditions domestic corporations of the State of North Carolina. *Its effect was to charter and not to license.*" This case has been repeatedly cited and approved, and is the settled opinion of this Court. Under its authority it was held, in *Mowery v. R. R.*, 129 N. C., 351, that the Southern Railway Company, the defendant there as well as in the case at bar, had, by complying with the provisions of the act of 10 February, 1899, become a domestic corporation, and, when sued as such, could not remove its cause into the Circuit Court of the United States.

Recurring to the complaint and petition, it appears that the plaintiff expressly sues the North Carolina corporation. Admitting the truth of the allegation in the petition, that the defendant is "a citizen of the State of Virginia, to wit, a corporation *originally* created by and organized under the laws of said State," it is entirely consistent with the fact of its having *subsequently* become a domestic corporation of this State by voluntarily complying with the provisions of the statute. By reincorporation it has become a resident of this State, and hence, in the absence of a specific denial of this fact, can not remove its cause into the Circuit Court. The reason for its absence is entirely clear to us, as we (146) can not ignore the fact, so repeatedly brought to our attention, that such a denial would not have been true in fact, and that, if true, the defendant would be liable to heavy penalties for doing business in this State contrary to law.

A careful consideration of the decisions of the Supreme Court of the United States, as well as the cases cited above, have led us to the conclusion that, while a corporation is in contemplation of law a citizen and

resident of the State which created it, and can not change its residence simply by doing business in another State, it can acquire a new residence by any act of domestication or adoption which, in law, amounts to reincorporation. Such, we hold, is the legal effect of the defendant's having complied with the provisions of the act of 10 February, 1899. This seems to us the logical result of the practical concensus of authority. Black's Dillon Rem. of Causes, secs. 100, 101, 178; *Debnam v. Tel. Co., supra,* and cases therein cited.

The sole question before us is that of removal, and has no reference to the intrinsic merits of the cause of action. The judgment is

Affirmed.

Cited: Springs v. R. R., post, 192; *Beach v. R. R.,* 131 N. C., 401; *Lewis v. Steamship Co., ibid.,* 653.

(147)

TUCKER v. WINDERS.

(Filed 1 April, 1902.)

1. **False Imprisonment—Unlawful Arrest—Evidence—Punitive Damages.**

Where an unlawful arrest is made, in reckless or wanton disregard of the rights of the person arrested, in an action for false imprisonment the jury may award exemplary damages.

2. **Evidence—False Imprisonment—Unlawful Arrest—Wealth of Defendant.**

In an action for unlawful arrest, evidence of the reputed wealth of the defendant is competent on the question of punitive damages.

ACTION by R. L. Tucker against J. B. Winders, heard by *Hoke, J.,* and a jury, at March Term, 1901, of DUPLIN. From a judgment for the plaintiff, the defendant appealed.

Stevens, Beasley & Weeks for plaintiff.
Marion Butler and Rountree & Carr for defendant.

CLARK, J. This was an action for unlawfully causing the arrest of plaintiff. Evidence of the reputed wealth of defendant was competent in considering the question of punitive damages. *Reeves v. Winn,* 97 N. C., 246; 2 Am. St., 287; *Bowden v. Bailes,* 101 N. C., 612. The plaintiff was not restricted to the tax list. That is by no means the only evidence. The defendant may have property in other counties, and, as to personalty, the list is merely the declaration of defendant. His repu-

tation as to wealth is proper to go to the jury for consideration. It is open to the defendant to go upon the stand and deny the correctness of the general estimate of his wealth. Unless he does, this general reputation may possibly be nearer the mark than the information
(148) derived from the tax lists.

The plaintiff's name was added in the warrant in the original case as one of the defendants by this defendant himself, who cursed the plaintiff and caused him to be arrested. At the hearing the plaintiff in that case (and defendant in this) said he had no evidence against this plaintiff; asked that his name be stricken out, and no testimony was offered against him. The court instructed the jury that if the arrest of the plaintiff as a defendant in the original action was done in reckless or wanton disregard of plaintiff's rights, the jury might, if they saw proper, award, in addition to compensatory damages, exemplary damages, to punish the defendant for the wrong done. *Lewis v. Clegg,* 120 N. C., 292. This was a question arising upon the evidence, and was properly left to the jury.

No error.

Cited: Arthur v. Henry, 157 N. C., 405; *Carmichael v. Telephone Co.,* 162 N. C., 337.

THOMAS v. COOKSEY.

(Filed 8 April, 1902.)

1. **Husband and Wife—Married Women—Sales—Vendor and Purchaser.**

Where a married woman obtains possession of personal property under a conditional sale, and suit is brought therefor after breach of condition, it is no defense that she is a married woman.

2. **Justices of the Peace—Sales—Jurisdiction—Married Women—Action ex Delicto—The Code, Secs. 1274, 1275.**

An action for the repossession of personal property by the seller in a conditional sale is an action *ex delicto,* and may be brought before a justice of the peace where the value does not exceed $50.

(149) ACTION by Thomas & Mercer against L. M. Cooksey, heard by *Allen, J.,* at October Term, 1901, of NEW HANOVER. From a judgment for the defendant, the plaintiff appealed.

L. V. Grady for plaintiffs.

W. J. Bellamy for defendant.

THOMAS *v.* COOKSEY.

FURCHES, C. J. This is an action for the possession of certain articles of personal property, now in possession of the defendant, commenced in a justice's court. The plaintiffs were the owners of this property, which they let the defendant have, or allowed her to retain, under the following written contract:

"Ledger No. ____ Salesman, MERCER.

"THOMAS & MERCER, No. 5 Market Street,
"WILMINGTON, N. C., 11 September, 1899.

"This certifies that I, Mrs. L. M. Cooksey, have rented of Thomas & Mercer (a firm consisting of A. S. Thomas and W. T. Mercer) one oak suit, one spring, one mattress, thirty-five yards matting, four shades, two tables, one sofa, one mattress, amounting to $35, on the following conditions: That I will pay said Thomas & Mercer on said goods $1 per week until the above amount shall be paid in full, and any neglect on my part to pay said rent when due shall entitle said Thomas & Mercer or their assigns to repossess said article or articles without hindrance or process of law. I forfeit all that has been paid on said article or articles as rent for and during the time the said property has been in my possession; and I further agree to protect and keep in good order the above-named article or articles, and I will not move said article or articles without the written consent of said Thomas & Mercer or their assigns. L. M. COOKSEY. (L. S.)"

This contract was made on 11 September, 1899, and this (150) action was commenced on 13 August, 1900; and while it appeared that plaintiffs had often demanded payment thereon, the defendant had paid nothing at the time of the commencement of the action.

The defendant was a married woman at the time she signed the contract, but her husband had left her some time before that, and was in the State of Pennsylvania. He wrote her two or three letters after she signed the contract and sent her some money, but she did not know where he was at the time of the trial.

Upon these facts the court found that she was a married woman and had not been abandoned by her husband, and was not a free trader under section 1832 of The Code; and that if the plaintiffs had any right to recover possession of the property, it was equitable in its nature, and a justice of the peace had no jurisdiction of the matter, and as the justice had no jurisdiction, the court had none on appeal from the justice, and dismissed the plaintiff's action.

Neither the rulings nor the judgment of the court below can be sustained. The plaintiff's right to recover possession of this property did

not depend upon the defendant's right to make the contract of 11 September, 1899. It was not an action upon the contract to enforce the contract, but an action *ex delicto* for the possession of the property. It is true that if the defendant had any defense it was under the contract, as it might bind the plaintiffs, although the defendant might not be able to make a contract that would bind her. But when we examine the contract, it is seen that the defendant expressly authorizes the plaintiffs to take possession of the property upon her failing to comply with the terms and stipulations therein contained; and as it is not claimed or pretended that she had done this, she can claim no protection nor benefit from the contract under which she was allowed to retain the property.

(151) The fact that she has been married, and probably has a husband living, can not protect her. This can not enable her to hold the property of the plaintiffs against their lawful demand. If it could, all that a married woman would have to do would be to get possession of some one else's property, and the owner would be without remedy and helpless. *Heath v. Morgan,* 117 N. C., 504.

So far as the plaintiff's right to recover is concerned, it makes but little difference whether this contract is considered a bailment, as in *Foreman v. Drake,* 98 N. C., 311, or as a conditional sale, as in *Wilcox v. Cherry,* 123 N. C., 79, as the plaintiffs would be entitled to recover, whether it is considered the one or the other.

But we think it is a conditional sale under the doctrine of *Wilcox v. Cherry,* 123 N. C., 79, which in express terms overrules *Foreman v. Drake,* 98 N. C., 311. Being a conditional sale, the title never passed out of the plaintiff to the defendant. This has, without exception, been held to be the law in this State, at least since the case of *Gaither v. Teague,* 26 N. C., 65, including *Brem v. Lockhart,* 93 N. C., 191, and many other cases. The act of 1883, secs. 1274 and 1275 of The Code, providing for the registration of conditional sales, did not change the law as between the original parties. This statute placed them on the same footing as chattel mortgages, which only protects creditors and purchasers. *Brem v. Lockhart,* 93 N. C., 191. This being so, it only remains to be seen whether a justice of the peace had jurisdiction of the matter or not; and this seems to be settled by *Moore v. Brady,* 125 N. C., 35, where it is held that a justice of the peace has jurisdiction in such cases when the property sued for does not exceed $50.

(152) It is true, the defendant says she thought the plaintiffs were giving her this property, and that she thought the paper she signed was a receipt; and while it seems there was abundant evidence, including her own admissions, that she had written to the plaintiffs for further time in answer to their demand for payment, we would hold that this should have been submitted to the jury, but for the fact that she tes-

tified that she could read and write, and admits that she signed the paper. And while she says that she thought it was a receipt for the goods the plaintiffs were giving her, she does not say that the plaintiffs told her it was a receipt, or said anything to her to cause her to think so, and no fraud is alleged, unless her laches in not reading the paper can be construed into a fraud. This will not be done. *Lytle v. Byrd,* 48 N. C., 222; *Sanders v. Hatterman,* 24 N. C., 32; 37 Am. Dec., 404.

New trial.

Cited: Hamilton v. Highlands, 144 N. C., 283; *Hicks v. King,* 150 N. C., 371.

DAVIS SULPHUR ORE COMPANY v. POWERS.

(Filed 8 April, 1902.)

Payments—Acceptance—Check.

Where a creditor receives from his debtor a check, accompanied by a letter stating it was for balance in full, and he cashes the same, it amounts to a payment in full, in the absence of evidence of fraud or mistake on the part of the payer.

ACTION by the Davis Sulphur Ore Company against E. J. Powers and others, heard by *Allen, J.,* and a jury, at October Term, 1901, of NEW HANOVER. From a judgment for the defendants, the plaintiff appealed.

L. V. Grady for the plaintiff.
E. K. Bryan for the defendants.

CLARK, J. The defendants sent to the plaintiffs an itemized (153) statement of the account between them, showing balance due plaintiffs of $3,210.46, for which a check was sent in the same letter, which stated: "We enclose you check for $3,210.46, which balances account with your good self."

The plaintiff received the letter, check and statement, and cashed the check. On this uncontradicted testimony, his Honor instructed the jury, if they believed the evidence, to answer the issue in favor of the defendants. *Harris v. Murphy,* 119 N. C., 34; 56 Am. St., 656.

There was no evidence to show fraud, imposition or mistake, and the charge of the court is in accord with what this Court has said. *Kerr v. Sanders,* 122 N. C., 635; *Cline v. Rudisill,* 126 N. C., 523; *Wittkowsky v. Baruch,* 127 N. C., 313.

Having accepted the check with a statement in the letter that it was for balance in full and cashed the check, the plaintiff is bound thereby in the absence of evidence of fraud or other conduct on the part of the defendants to relieve the plaintiff from the effect of its acceptance of the check in full payment.

No error.

Cited: Thomas v. Gwyn, 131 N. C., 161; *Drewry v. Davis,* 151 N. C., 297; *Aydlett v. Brown,* 153 N. C., 336; *Woods v. Finley, ibid.,* 499.

(154)

HARCUM v. MARSH.

(Filed 8 April, 1902.)

1. Register of Deeds—Marriage—Licenses—Public Officers—The Code, Sec. 1816—Evidence.

The evidence in this case is held to show reasonable inquiry under The Code, sec. 1816, by a register of deeds as to legal capacity of parties to marry.

2. Register of Deeds—Marriage—Licenses—Questions for Court—The Code, Sec. 1816.

In an action against a register of deeds for issuing license for the marriage of a girl under eighteen, the facts being undisputed, it is for the court to say whether the facts show reasonable inquiry.

ACTION by Warren Harcum against S. E. Marsh and others, heard by *Winston, J.,* and a jury, at Fall Term, 1901, of HERTFORD. From a judgment for the plaintiff, the defendants appealed.

D. C. Barnes for plaintiff.

L. L. Smith for defendants.

COOK, J. This is an action by the father of the girl against the defendant register of deeds and his bondsmen upon his official bond, to recover the penalty of $200 imposed by virtue of section 1816 of The Code. Defendant having objected for the first time in this Court that the action was brought in the name of Warren Harcum without having joined the State as a party plaintiff, plaintiff moved for leave to amend so as to make the State a party plaintiff, and to change the title of the action to that of the *"State on the relation of Warren Harcum v. Marsh et al.,"* which motion is allowed. Code, sec. 965; *Grant v. Rogers,* 94 N. C., 755; on page 760.

Of the several exceptions taken and assignments of error, we deem it necessary to pass upon the charge of his Honor only, as that fully disposes of the case, and in it is involved the merits of the (155) case. His Honor charged the jury that "if they believed the defendant's own evidence, he had not made such reasonable inquiry as rendered it probable that there was no legal impediment to the marriage, and they must answer the first issue (Did the defendant, without reasonable inquiry, issue the marriage license as alleged?) 'Yes,' and the second (Has the defendant incurred any penalty, and if so, in what amount?) '$200.'"

The evidence of defendant Marsh, upon which said charge was based, is as follows: "S. E. Marsh, defendant, 1896, register of deeds, recalls when license was issued for Oscar Davidson and Cora Harcum. Davidson came in February, 1898. I think I met him on the street. He spoke to me; said he wanted to see me; that he wanted license. We went to office. I asked the name of the male. He said that it was Oscar Davidson. Asked age, and his answer was 21. Asked color, and his answer was white, and that he was his son. Asked name of parents and place of residence, and he said that place of residence of son was in Virginia. Asked name of female, and he answered Cora Harcum. Asked color; he said white. Being asked name of parents and their residence, he answered that the parents of the girl had their residence in Virginia. Being asked the age of the girl, he said it was 19. Asked Davidson if he knew her and had personal acquaintance to enable him to make oath. I explained the law—that it was 21 for males and 18 for females. Said that he was willing to make oath that he had known her from her youth, and that she was 19. I asked why they came here, and he said that she wanted to get married among her friends in Mauney's Neck Township, and had recently moved from there. I then swore him in the presence of a witness. I placed oath on the license. I read the oath and explained what it meant—21 for males, 18 for females. He held Testament and took oath. Don't remember who was present, except (156) Shaw, Lassiter, applicant and myself. Met Davidson on street. He spoke to me. Nothing was said about a runaway marriage. Davidson's appearance was that of a common farmer."

CROSS-EXAMINED.

"Never knew Mr. Davidson, who was an entire stranger to me. I made no inquiries about him or about the parties, except from him. Said he lived in Southampton County, State of Virginia, and that all lived there. I had no suspicion, except the statement about coming here to marry. (Deposition taken before the clerk was handed to defendant.) This is the paper and this is my signature to it; don't know of David-

son going to the clerk; don't remember that he said he had business with the clerk. I met him on the street and he asked me for the license; did not know any of the parties to the transaction. I had never heard of them, and did not know of them."

REDIRECT EXAMINATION.

"I had no suspicion, but asked Davidson why he wanted to come here to marry, and he gave the same explanation I have given."

The facts being admitted, what is a reasonable inquiry, is a question of law to be decided by the court. *Joyner v. Roberts,* 114 N. C., 389. Upon the facts in the case at bar, as appearing from the testimony of defendant Marsh, his Honor held, as a question of law, that he issued the marriage license without reasonable inquiry concerning the age of the girl, and instructed the jury to so find. In so instructing, his Honor was in error. To issue marriage licenses is a duty imposed by law upon the register of deeds. It is not the policy of the law to obstruct
(157) or retard marriages. But certain requirements are prescribed by the statute to be complied with before a license can be issued for the marriage of a girl *under* 18 years of age. Those requirements do not apply if she be eighteen or over. Before issuing, it must "appear to him probable that there is no legal impediment to such marriage." If the register in this case issued the license, knowing she was *under* eighteen, or without reasonable inquiry as to that fact, then he would be liable to the penalty, otherwise not. It is not contended that he *knew* the fact; so, does it appear from his testimony that he made *reasonable* inquiry? When approached by the stranger on the street, and being told that he wanted a marriage license, he went to his office; there, in the presence of others, Marsh made fully inquiry of Davidson concerning all the facts required by law to be ascertained. The responses were made fully, accurately and positively. The reason given for returning from Virginia to be married at Mauney's Neck, whence the girl had recently moved, among her friends there, was plausible, and not inconsistent with natural sentiment. Defendant explained the law to the applicant, and fully acquainted him with the law as to the required age of an infant *feme.* While Davidson was a stranger to defendant, yet his "appearance was that of a common farmer," which, from common knowledge and general observation, would naturally allay any suspicion, if any existed, and inspire confidence in the truthfulness of his statements. Davidson expressed a willingness "to make oath that he had known her from her youth, and that she was nineteen." Thereupon, defendant Marsh read the oath to him and explained what it meant, and swore him in due form and placed the oath upon the license, which was done publicly, in the presence of the bystanders, and no effort at secrecy or con-

cealment seemed to have been made or desired. Thus confronted with the statement and oath of a man, apparently honest and truthful, applying for a marriage license for his son and a girl whom he (158) said he had known from her childhood, supported by a plausible and probable reason for coming to that county, in this State, for the marriage, which Marsh believed to be true, and being told that the girl's parents lived in Virginia, from whom else could he have inquired? Could it seem probable that he could get any better information by delaying the application until he could go out and inquire among people whom *he* knew, and to whom the parties were, in all probability, strangers? Would the register have been justified in refusing the license under these conditions? The statute does not make the register an insurer of the truth of the statements and information given him, but imposes upon him the duty of inquiry as to their good faith and truthfulness, and, if "it shall appear . . . that it is probable there is any legal impediment to the marriage of any person for whom a license is applied for, the said register shall have the power to administer to the person so applying an oath touching the legal capacity of said parties to contract a marriage." Laws 1887, ch. 331. With his duty in this case, it seems to us that he fully complied. The conditions under which the application was made were such as not to excite suspicion, nor did they suggest that any other information was obtainable.

In *Walker v. Adams,* 109 N. C., 481, the facts are very similar to those in the case at bar. There, the applicant was known to defendant, but he did not know his character, but had heard nothing against him; he stated to the defendant that the infant *feme* was "about nineteen years old," whereupon defendant asked if he would make affidavit to that fact, to which he replied he would, and defendant administered the oath, which affidavit was attached to the license (as was done by defendant in this case), pursuant to chapter 331, Laws 1887; and defendant, believing there was no legal impediment, issued the license. But upon the trial it was shown that she was under the age. The Court held (159) that the inquiry was reasonable, in contemplation of the statute, and that defendant, therefore, did not incur the penalty.

But the facts in *Williams v. Hodges,* 101 N. C., 300; *Cole v. Laws,* 104 N. C., 651, and *Agent v. Willis,* 124 N. C., 29, were very different from those in this case. In *Williams v. Hodges* the plaintiff, father of the girl, lived in the adjoining county, only 25 miles from Kinston. Westbrook, the applicant, was a stranger to the defendant. Defendant asked the applicant as to the residence and names of the parties, names of parents, and if the father was living, "to which he replied in the negative"; and, also, that the mother was living; again he asked "if the father and mother of Ann were living, and her age," to which he (West-

brook) said, "Yes, that they were living, and that Ann was 18 or 19 years of age," and thereupon he issued the license. Westbrook was a white man of fair address and of apparent respectability. The license was issued on 8 March; on 18 March defendant wrote plaintiff that "No one has applied for license to marry your daughter Ann," and the marriage was solemnized on 7 April following. Upon these facts found, the court held that defendant had not made reasonable inquiry as required by the statute. "The questions put to him were very general and vague; not such as to elicit directly material information, except as to the age of Ann Williams. The answer in this respect was uncertain, careless and unsatisfactory; indeed, it suggested further inquiry, but none further was made. He was not even asked if the father of the female resided in the county of Lenoir, and it seems that the defendant did not know that he did or did not. Surely such inquiry in respect to such a matter was not reasonable, nor did the inquiries, and the information so unsatisfactory, make it appear probable that the female was of the age of eighteen years."

(160) In *Cole v. Laws,* 104 N. C., 651, the Court cites *Williams v. Hodges, supra,* and says that in that case "more diligence was shown in finding out the facts and true age of the infant *feme*" than in this (*Cole v. Laws*).

In *Agent v. Willis,* 124 N. C., 29, the defendant was applied to at his residence about *two o'clock in the night,* and he refused to issue the license; but about two hours later the applicant and his companion returned, and he again declined. About two hours later he saw them and asked the applicant if he would swear to the girl's age, which he declined to do, but said "the girl had told him three days before that she was eighteen years old, but that he did not know how old she was. Shortly thereafter one Tolar made affidavit "that the *girl* had told him three days before that she was eighteen years old, and that was all he knew about it." Thereupon the license was issued. Held by the Court, that "those were most suspicious circumstances, and should have put defendant on his guard at every point as to his duties," and that he did not make reasonable inquiry.

It appearing to us from the evidence submitted that the defendant Marsh had made such reasonable inquiry as rendered it probable that there was no legal impediment to the marriage, and his Honor having erred by instructing to the contrary, there was error, and a new trial must be had.

New trial.

Cited: Trolinger v. Boroughs, 133 N. C., 314; *Furr v. Johnson,* 140 N. C., 158; *Robertson v. R. R.,* 148 N. C., 326; *Gray v. Lentz,* 173 N. C., 354.

(161)

VIRGINIA-CAROLINA CHEMICAL COMPANY v. KIRVEN.

(Filed 8 April, 1902.)

1. **Evidence—Admissions—Competency.**

As to whether a person owned personal property claimed by him, it is competent to show that he remained silent when the property was claimed by another in his presence.

2. **Evidence—Admissions—Deceased Witness—Former Trial—Case on Appeal.**

The testimony of a deceased witness contained in a case on appeal, signed by counsel for both parties, is competent evidence in a subsequent trial of the same case, against a party thereto.

ACTION by the Virginia-Carolina Chemical Company against J. P. Kirven, heard by *Allen, J.*, and a jury, at October Term, 1901, of NEW HANOVER. From a judgment for the defendant, the plaintiff appealed.

Rountree & Carr for plaintiff.
Bellamy & Peschau for defendant.

FURCHES, C. J. J. P. Kirven is due the plaintiff by note for guano $2,298, with interest from 25 October, 1898. E. E. Kirven sold Alexander Sprunt & Son 100 bales of cotton, which the plaintiff has attached, or the proceeds thereof, upon the allegation that this cotton belonged to J. P. Kirven, and not to E. E. Kirven. Alexander Sprunt & Son were served as garnishee, came into court and alleged that they bought the cotton in good faith upon the open market in Wilmington from E. E. Kirven, who alleged that it was his cotton, and denied that it belonged to J. P. Kirven. This presented the issue which was formulated by the court and submitted to the jury, as to whether the cotton or the proceeds of the sale thereof belonged to J. P. Kirven or to E. E. Kirven. Alexander Sprunt & Son were served as garnishee, came into court and alleged that they bought the cotton in good faith upon the open market in Wilmington from E. E. Kirven, who alleged that it was his cotton, and denied that it belonged to J. P. Kirven. This presented the issue which was formulated by the court and submitted to the jury, as to whether the cotton or the proceeds of the sale (162) thereof belonged to J. P. Kirven or to E. E. Kirven, as claimed by the garnishee.

During the course of the trial the plaintiff undertook to show that, after the attachment proceedings were commenced J. P. Kirven claimed the cotton as his, and that E. E. Kirven admitted that it was J. P.

Kirven's cotton. There had been a former trial of this case, in which trial one R. L. Dargan had been a witness, but was dead at the time of the second trial; and the plaintiff, for the purpose of proving what Dargan testified to on the former trial, offered one McCullough as a witness, who testified that he was present at the former trial; heard the testimony of Dargan, and that he could give the substance of his testimony. He then testified in substance that he (Dargan) was the agent of plaintiff, and that J. P. Kirven gave plaintiff the note for $2,298 for fertilizers. By permission of the court plaintiff was allowed to ask the witness leading questions, and he asked the following: "Did you hear Mr. Dargan say that he, while riding in a buggy with Dr. Earl, met J. P. Kirven and E. E. Kirven on the road between Darlington and the home of Mr. Kirven, after he had attached these funds in the hands of Alexander Sprunt & Son, and that J. P. Kirven asked me what I meant by attaching his cotton?" Answer: "I did." Question: "What else did he say about that?" Answer: "Dargan asked if it was his cotton, and J. P. Kirven said, 'Most of it is; he had a great mind to say it was all his'; that E. E. Kirven was eight or nine feet distant in his buggy; that J. P. Kirven spoke very loud and that E. E. Kirven said nothing."

The admissions of a party against his interest are competent evidence and admissible on a trial against him, or those claiming under him; and it seems to be that where a party makes a statement in the presence of a party prejudicial to his rights, and he remains silent, or where one claims the property of another in his presence and he remains
(163) silent, this is considered an implied admission of the truth of such claim. So, if J. P. Kirven claimed this cotton as his in the presence of E. E. Kirven, and he heard it and remained silent, it was an implied admission by him that it was J. P. Kirven's cotton, and it was competent for the plaintiff to prove it. *S. v. Perkins,* 10 N. C., 377; *S. v. Bowman,* 80 N. C., 432. The plaintiff had undertaken to prove this by the testimony of Dargan on the former trial, and he undertook on this trial to prove it by proving what Dargan swore on the former trial, by witness McCullough. This evidence was competent for that purpose. 2 Best on Evidence, sec. 496; *S. v. McCourry,* 128 N. C., 594. And where the party is near enough to hear "it is almost a necessary inference that he did hear." And such evidence, while not conclusive, is proper to be left to the jury. *S. v. McCourry, supra.*

The plaintiff, as further evidence of what Dargan swore on the former trial, offered in evidence the following statement of Dargan's testimony as contained in the statement of the case on appeal, made out by defendant's counsel and signed by the counsel for both plaintiff and defendant:

"R. L. Dargan, a witness for the plaintiff, testified as follows:

"I know the defendant, J. P. Kirven. He is indebted to the plaintiff

in the sum of $2,298, and executed a lien on crop to secure it. Debt was contracted in 1898 for fertilizers. I know J. P. Kirven and E. E. Kirven. They are farmers in Darlington County, South Carolina, and own adjoining farms. J. P. Kirven is the much larger farmer. I had a conversation with J. P. Kirven on the road in Darlington, South Carolina, on 25 or 26 November. J. P. Kirven, E. E. Kirven and myself and Dr. J. M. Earl were present. We all got together on the road. I had already attached the funds in the hands of Alex. Sprunt & Son for 100 bales of cotton. J. P. Kirven asked me then in E. E. Kirven's presence what I meant by attaching his cotton. E. E. Kirven was there (164) and could have heard this. I asked, 'Is it your cotton?' J. P. Kirven said, 'Most of it is, and I am almost willing to say it is all mine.' E. E. Kirven was eight or nine feet distant in his buggy. J. P. Kirven was out on the roadside. He spoke very loud. E. E. Kirven said nothing. This is the only conversation I ever had when Dr. Earl and the two Kirvens were present."

This statement was objected to by defendants and ruled out by the court.

The admissions of parties are competent evidence. *Adams v. Utley,* 87 N. C., 356. And the admissions of attorneys of record are also admissible. 1 Greenleaf on Evidence (16 Ed.), sec. 186. There was error in excluding this evidence.

We are of the opinion that there is error, as we have pointed out, for which there should be a

New trial.

Cited: Meekins v. R. R., 136 N. C., 2.

---

(165)

OWENS v. WILLIAMS.

(Filed 15 April, 1902.)

1. **Trusts—Parol—Frauds, Statute of.**
   Trusts may be created by parol, as the statute of frauds does not apply thereto.

2. **Trusts—Trustee.**
   Where land is conveyed in pursuance of an agreement that grantee hold it for another, he becomes a trustee, whether the agreement is made at the time of or before the conveyance.

3. **Trusts—Consideration.**
   Where land is held in trust to be conveyed upon payment of purchase money and other indebtedness, that such indebtedness was included in the consideration does not affect the trust.

4. **Trusts—Limitations of Actions—Express Trusts.**
The statute of limitations does not run against an express trust.

5. **Trusts—Rents.**
A person holding land under a parol trust to convey is liable for rents and profits.

6. **Trusts—Parties—Deeds.**
Where parties to whom realty has been conveyed in violation of a trust are parties to a suit to compel a conveyance to the *cestui que trust*, their conveyance may be declared void and a conveyance pursuant to the trust enforced.

DOUGLAS, J., dissenting.

ACTION by T. E. Owens and others against Edward Williams and others, heard by *Allen, J.*, and a jury, at September Term, 1901, of SAMPSON. From a judgment for the plaintiffs, the defendants appealed.

(166) *F. R. Cooper and Geo. E. Butler for plaintiffs.*
Faison & Grady and Shepherd & Shepherd for defendants.

FURCHES, C. J. This is an action to declare and enforce a parol trust. The record discloses the following facts:

In December, 1886, the land in controversy was sold under execution, as the property of E. B. Owens, by the Sheriff of Sampson County, when Henry E. Faison became the purchaser at the price of $150, this being the amount of the judgment under which it was sold. Faison manifested a willingness to reconvey the land to Owens upon the payment to him of the amount he had paid, to wit, $150. But Owens, not having the money to redeem his land, applied to the defendant Edward Williams, who was his son-in-law, to redeem it for him and to take the title thereto from Faison and hold the same until he (Owens) could repay him, when he would reconvey to Owens. Owens, it seems, had been the guardian of his daughter, the wife of the defendant Edward Williams, and still owed something on said guardianship; and the defendant Williams agreed to redeem the land from Faison, as requested by his father-in-law, and hold the title until his father-in-law should pay him the $150 paid Faison and the balance due on the guardianship of his wife, and he was to convey to Owens when these were paid; with the further provision that if Owens did not repay the said $150 and balance due on the guardianship, the defendant Williams should convey the land to his children, who were also the children of his said wife and the grandchildren of E. B. Owens. Williams paid the $150 to Faison under this agreement and took a deed from Faison for the land, which is shown to have been worth between $1,250 and $3,000 at that time. E. B. Owens remained in the possession and enjoyment of this land until his death, in June, 1890, and after his death the plaintiffs went in possession thereof, and

so remained, until 1896, when the defendant took possession and afterwards put the other defendants in possession of the land (167) who still hold and occupy the same, and to whom he afterwards made a deed.

The defendant Williams testified that said deed was dated 1 January, 1900, registered 11 September, 1900, and was without consideration. And the case states that, "about January, 1900, the plaintiffs requested said Williams to render an account of the rents and profits of said land and permit them to pay any balance that might be due him, and for him to reconvey said land to the heirs of E. B. Owens. The defendant Edward Williams failing to do this, the plaintiffs thereupon offered to repay him the entire amount due, interest and costs, and asked that he reconvey to them said land, which the defendant refused to do," and this action was commenced in September thereafter. The following issues were submitted to the jury and found as indicated:

1. Was there a parol agreement between Edward Williams and E. B. Owens that Williams would buy the land and that Owens might redeem it? Yes.

2. Was it agreed between them that Owens was to repay the purchase money? Yes.

3. Was it agreed that Owens was also to pay the amount he owed Williams' wife, Mary Alice, as guardian? Yes.

4. Was it agreed that if Owens failed to redeem, that Williams was to make a deed to the children of said wife? Yes.

5. If so, has Williams executed a deed to said children accordingly? Yes.

6. Was any time mentioned within which Owens might redeem said land? No.

7. Did the defendant Williams ever demand the purchase money or any other amount from Owens? No.

8. Did said Owens or his heirs ever refuse to pay the purchase money or any other amount? No.

9. Is plaintiffs' cause of action barred by the statute of limi- (168) tations? No.

Upon the facts of the case and the issues found by the jury, his Honor held that the defendant Williams was a trustee for the benefit of the heirs of E. B. Owens, and upon his being paid the purchase money and interest and the amount that E. B. Owens was due defendant's wife, Mary Alice, as her guardian, that he should convey said lands to the heirs at law of the said E. B. Owens. His Honor further held that the defendant Williams was liable to account for the rents and profits of said land since he took possession of the same, in 1896; and the same, or a sufficient amount thereof, should be applied to the repayment of the

purchase money and the amount E. B. Owens owed Mary Alice as her guardian. And for the purpose of ascertaining the amount due the defendant Williams, as purchase money paid Faison, and the amount due Mary Alice as guardian, and the amount and value of rents and profits of said land since the defendant took possession, in 1896, referred the case to C. E. McCullen, to take and state an account. From this judgment the defendants appealed.

We see no error. As the statute of frauds does not apply to the declaration of trusts, they may be in parol. *Shelton v. Shelton,* 58 N. C., 292; *Riggs v. Swan,* 59 N. C., 118. And where one person buys land under an agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land. *Cobb v. Edwards,* 117 N. C., 244.

Wherever land is conveyed to one party under an agreement that he is to hold it for another, he becomes a trustee, whether this agreement is made at the time of the conveyance or is made before, and the land is conveyed in pursuance of said agreement. This is an express trust and an equitable estate. *Holden v. Strickland,* 116 N. C., 185.

(169) As the statute of frauds does not apply to the declaration of trusts in this State, whenever the terms of the parol trust are established they have the same force and binding effect as if they had been in writing. So, the facts found in the case going to establish the trust, have the same binding effect upon the defendant as if they had been incorporated in the deed from Faison to the defendant. And had this been done, it seems to us there could be no ground upon which the defendant could dispute the trust.

The fact that Owens was to pay the defendant Williams a debt he owed his wife, in addition to the purchase money paid Faison, made no difference. This point was involved in *Crudup v. Thomas,* 126 N. C., 333, where the purchaser, Crudup, was to be paid a debt due him, in addition to the purchase money; and the Court held that he was a trustee for the benefit of his brother, for whom he bought, and only held the legal title as security for the purchase money and the amount his brother owed him, and upon this being paid, he was compelled to convey; and, as his brother did not redeem the land before his death, that he, as the *cestui que trust,* had such an estate in said land as his creditors might enforce by having the land sold and the proceeds first applied to the discharge of the purchase money and the amount due Crudup, outside of the purchase money, by his brother, and the residue applied to the debts of the party for whom the land was bought.

As this is an *express trust,* we do not think the statute of limitations runs; and especially is this so, when E. B. Owens and the plaintiffs remained in possession of said land until 1896.

But it is contended that if the defendant Williams is a trustee, he is not liable for the rents and profits since he took possession, in 1896. We think differently. He occupies the position of a mortgagee in possession. *Crudup v. Thomas, supra; White v. Jones,* 88 N. C., 166; *Pearsall v. Mayers,* 64 N. C., 549; *Wellborn v. Simonton,* 88 N. C., 266. And as it is elementary learning, and has been so often held, that a (170) mortgagee in possession is liable for rents and profits, we will cite no authorities to sustain the position that he is so liable.

But it is further contended that if he is liable for what time he occupied the land, he is not liable for the time the other defendants have been in possession. It does not clearly appear from the case how long the defendant Williams occupied the land himself, but this makes no difference, as it does appear that he took possession in 1896, and that he put the other defendants in possession, and has since executed a deed to them. This made him liable for rents and profits, as is expressly decided in *White v. Jones, supra.*

But it is further contended that the defendant Williams has made the other defendants a deed, and can not now make or be compelled to make a deed to the heirs of E. B. Owens. But the parties to whom this deed was made are parties to this action, and it is shown and admitted that said deed was not made until the plaintiffs offered to pay him the purchase money and whatever E. B. Owens owed Mary Alice as guardian, and it is admitted to have been made without consideration. It is, therefore, void as to the plaintiffs, and should be so declared in the judgment in this case, and with this addition to the judgment appealed from, the same is

Affirmed.

DOUGLAS, J., dissenting.

Cited: Sykes v. Boone, 132 N. C., 203; *Avery v. Stewart,* 136 N. C., 434, 437; *Anderson v. Harrington,* 163 N. C., 143; *Brogden v. Gilson,* 165 N. C., 22; *Lutz v. Hoyle,* 167 N. C., 635; *Allen v. Gooding,* 173 N. C., 95.

(171)

SHELL v. WEST.

(Filed 15 April, 1902.)

1. Landlord and Tenant—Estoppel.

A tenant is estopped from denying the title of his landlord.

2. Amendments—Actions.

An amendment making an additional party, which essentially charges the nature of the action should not be allowed.

3. Parties—Nonsuit.

One can not be made a party to an action after nonsuit therein.

4. Executors and Administrators—Rents—Succession—Descent and Distribution.

The rents on devised land may be subjected by the personal representative to the payment of the debts of the deceased.

DOUGLAS, J., dissenting.

ACTION by O. P. Shell, executor of H. C. Avera, against W. C. West, heard by *Robinson, J.*, and a jury, at November Term, 1900, of HARNETT. From a judgment for the defendant, the plaintiff appealed.

McLean & Clifford and Stewart & Godwin for plaintiff.
No counsel for defendant.

CLARK, J. The plaintiff, executor of H. C. Avera, began this proceeding before a justice of the peace to recover the rents on a tract of land rented by him to the defendant, and which had belonged to the plaintiff's testator. The plaintiff recovered before the justice, but upon appeal his Honor intimated that plaintiff could not recover, in deference to which he took a nonsuit and appealed.

(172) It appears from the statement of the case on appeal that the defendant rented the land from the plaintiff; that the estate is largely involved, and that the rents on the land are necessary to be applied to save the creditors harmless. After the case had been heard in the Superior Court, Narcissa Barnes was made a party on allegation that she was the landlord. The record does not state how, but it was agreed on the argument here that she was a devisee of the realty. She did not interplead, but was made a party on motion of defendant.

The defendant being a tenant of the plaintiff, was estopped to deny his title. This is elementary law, and has been reaffirmed in this Court as late as *Pool v. Lamb,* 128 N. C., 1. At the time the court intimated that the plaintiff could not recover, it was error to so hold, and such error could not be corrected and the costs thrown upon plaintiff by making a new party of the devisee, upon the motion, too, of the defendant. If it had any effect, it materially changed the nature of the action, and if the motion could be tolerated at all, justice required that it could only have been allowed upon payment of all costs up to that time. The effect was to change a simple action by a landlord against a tenant for recovery of rent into a totally different controversy, whether rents upon devised lands should be applied to the debts of an insolvent testator. Such amendment should not have been granted (*Merrill v. Merrill,* 92 N. C., 657; *Clendenin v. Turner,* 96 N. C., 416), for it was an entire

change in the nature of the action, making it one of which the justice's court had no jurisdiction. Besides being made after the hearing, and, therefore, after the nonsuit was taken, there was no pending action to which the additional party could be made. It is sufficient to say that there was error, both in granting the nonsuit and in making the additional party after the nonsuit, or when to make such party essentially changed the nature of the action.

The defendant being estopped to deny his lessor's title, the plaintiff was entitled to judgment. It was then open to the devisee, claiming the land, to have brought an action to hold the executor (173) responsible for such rents. But if the facts are as stated in the case on appeal, to wit, that the estate is insolvent, and that the rents are necessary for payment of the creditors, such action, if brought, would be nugatory, for it is well settled that the rents on devised land can be subjected by the personal representative when required for payment of debts. In *Moore v. Shields,* 68 N. C., 332, it is said that inasmuch as the land can be sold to make assets to pay debts, it is the interest of the heir or devisee that the rents should be first so applied and save the land; and on page 331 it is said, "The general rule, that the creditors of the ancestor are entitled to all the rents and profits received by the heir since descent cast, must now be considered established by *Washington v. Sasser,* 41 N. C., 336. It is supported by other authority. 2 Story Eq. Jur., 1216, and *Curtis v. Curtis,* 2 Bro. Ch. Cases, 633." This has been always followed since—among other cases are *Hinton v. Whitehurst,* 71 N. C., 66; *Jennings v. Copeland,* 90 N. C., bottom of page 577, and cases cited: *Coggins v. Flythe,* 113 N. C., 119. The same seems universally held. Woener Admrs., sec. 513; 2 Williams Exrs., 51; 3 Williams Exrs., 182.

Inasmuch as this would be the law, if in regular course the plaintiff had recovered against the defendant tenant, and the devisee of the land had brought her action against the plaintiff to recover the rents, certainly the plaintiff could not be put at a disadvantage and the rents adjudicated not liable to be applied to the debts of the testator because the devisee is made a party to the action in this irregular way. If there can be any criticism for turning an action of claim and delivery by a lessor against a tenant into a proceeding to adjudge rents on devised lands, applicable to debts of the testator, it must be leveled against the defendant, not against the plaintiff. The land having been (174) rented by the plaintiff to the defendant, the only question was as to whether the property taken in claim and delivery was due as rent; and if the devisee can come in at all as a party to that action on the allegation that the rents are due to her, certainly it is open to the plaintiff to show as a defense that the rents are required to pay debts of the testator, which is here admitted.

It is true, the plaintiff might have begun a proceeding in the first instance against the devisee to subject the rents, but why do so when the devisee, apparently aware that the rents were necessary to pay the debts of the testator, has stood aside and acquiesced in the plaintiff renting out the land? To the direct proceeding to recover the rent of the tenant the devisee has not made herself a party nor filed any answer, nor interposed any defense. She has been merely made a party at the instance of the defendant.

Error.

DOUGLAS, J., dissenting.

DAVIS v. BUTTERS LUMBER COMPANY.

(Filed 15 April, 1902.)

Judgments—Findings of Court—New Trial—Trial.

Where the findings of fact of the trial judge are contradictory and irreconcilably conflicting, judgment can not be pronounced, and a new trial will be awarded.

ACTION by Junius Davis, as receiver of the Bank of New Hanover, against the Butters Lumber Company, heard by *Allen, J.*, at October Term, 1901, of NEW HANOVER. From a judgment for the plaintiff, the defendant appealed.

(175) *E. S. Martin, Rountree & Carr and Bellamy & Bellamy for plaintiff.*

Russell & Gore for defendant.

COOK, J. Defendant drew eight several drafts in favor of plaintiff bank, upon one Burgan, residing in the city of Baltimore, and sent them to the bank, and it credited defendant with the amount, less $4.08 discount. They were duly accepted by Burgan, but before they were paid the bank was declared to be insolvent and placed in the hands of its receiver, plaintiff Davis. Plaintiff contends that the bank purchased said drafts for value and became the owner in its own right, while defendant contends that it deposited them for collection *only*, paying the usual discount, ¼ of 1 per cent, $4.08, for collection, and after the failure of the bank, revoked the agency to collect and stopped the payment of the drafts. So the legal title to the drafts is the subject of this

action. A jury trial was waived and the judge tried the case, finding the facts and declaring the law. His Honor, upon the facts found by him, rendered judgment in favor of plaintiff, to which there were several assignments of error and appeal by defendant.

One of the defendant's assignments of error is that the court erred in finding as a conclusion of law that the bank was a purchaser for value and legal owner of the drafts. Whether this assignment can be sustained or not depends upon the facts found; and by referring to them we find them found both ways. If the facts be as set forth in the 6th finding, then this assignment must be sustained; but if they be as stated in the 8th and 9th, then it can not be. The 6th finding is as follows:

"6. That there was no special agreement by the said bank with the defendant . . . that the drafts were taken for collection, but it was agreed to take the drafts and credit them to the defendant's (176) account, and if they came back unpaid the bank would charge back the full amount to said account and return the drafts, and this was an agreement with all depositors of the bank. If these drafts had not been paid according to the course of dealing between the bank and its customers, they would have been turned back to the Butters Lumber Company, but that would have been done because the Butters Lumber Company was liable on the drafts as drawer equally with the drawee Burgan."

Now, then, the general agreement being that if the drafts had been returned unpaid, then it would have charged them back to defendant and returned them to defendant drawer, it is well settled that this constitutes only an agency for collection. *Cotton Mills v. Weil,* 129 N. C., 452; *Packing Co. v. Davis,* 118 N. C., 548; *Boykin v. Bank,* 118 N. C., 566. Surely the bank would not have returned the drafts to the drawer if it had purchased them and intended to acquire title in its own right. If not received for collection, why surrender or return them after obtaining the acceptance by Burgan, which increased their security by reason of his acceptance and making him primarily liable? And so, if taken for collection, then defendant had the right to revoke the agency at any time before the collection was made; which seems to have been done upon learning of the bank's insolvency.

The 8th and 9th findings are as follows: "That the defendant understood that the title to the drafts had passed to the said bank, and that the bank had become its debtor for the net amount of the drafts after deducting the discount." "9. That the Bank of New Hanover and the Butters Lumber Company intended at the time when the said drafts were discounted that the title to the said drafts should pass to the said bank."

So, if it be a fact that the parties intended that the drafts should

become the absolute property of the payee bank, then it could not be a fact that "they would have been turned back to the Butters (177) Lumber Company," if they had not been paid. For it seems certain that the bank would not have voluntarily surrendered and thereby canceled the only instrument upon which it could recover the value of its purchase. Upon these two contradictory and irreconcilable conflicts in the findings of fact, no judgment can be pronounced (*Morrison v. Watson,* 95 N. C., 479), therefore, it is useless for us to discuss the other questions raised. A new trial must be had, and is, therefore, ordered.

New trial.

Cited: S. c., 132 N. C., 233; *Latham v. Spragins,* 162 N. C., 408; *Bank v. Exum,* 163 N. C., 203; *Worth Co. v. Feed Co.,* 172 N. C., 342.

HERRING v. ARMWOOD.

(Filed 15 April, 1902.)

Damages—Breach of Contract—Landlord and Tenant—Remoteness.

Damages resulting from failure of landlord to furnish fertilizers to his tenant are not too remote for consideration.

ACTION by B. W. Herring against W. H. Armwood, heard by *Allen J.,* and a jury, at December Term, 1901, of DUPLIN. From a judgment for the plaintiff, the defendant appealed.

This is an action to recover under claim and delivery proceedings the possession of two bales of cotton, alleged by plaintiff to be his property, and to be worth $81, wrongfully withheld by defendant. Defendant denies plaintiff's ownership and that his withholding possession is unlawful, and alleges that the cotton is worth greatly more than $81. And for a second defense and counterclaim alleges that he rented the farm upon which the cotton was raised from plaintiff in August, 1898, under the following written contract: "I, B. W. Herring, do hereby agree to rent my farm to Henry Armwood for the year 1899, for 5 bales (178) of cotton of the first picking, weighing 500 pounds, or the equivalent in money. I do also agree to dig marl to the amount of 2,000 bushels, more or less, and Henry Armwood agrees to haul the same and scatter on the land." And that it was understood and agreed that defendant was to use the marl, which was a valuable fertilizer, upon the crops in lieu of commercial fertilizers, and for the purpose of in-

creasing the yield of the crops of cotton, corn and other crops, and materially benefit the land, and that it would have increased the yield; that plaintiff failed and refused to dig the marl, and wholly failed to perform his part of the contract in this respect; that he was ready, able and willing to perform his part of the contract at all times; that by reason of plaintiff's breach of contract he lost greatly in the decrease of the yield of his crops, and time and labor spent upon said land in cultivating said crops, to his damage $150. Plaintiff admitted the written contract, but denied the other allegations set up in the second defense and counterclaim.

Upon the trial his Honor submitted the following issues:

1. Is the plaintiff the owner and entitled to the possession of the two bales of cotton claimed by plaintiff?

2. Was the property in the possession of the defendant at the time of the seizure?

And he refused to submit the following issues tendered by defendant:

1. Was it agreed between the plaintiff and the defendant that the plaintiff should dig and furnish 2,000 bushels of marl, more or less, and the defendant should haul the same on the land rented to be used under the crops of 1899?

2. Did the plaintiff fail and refuse to perform his part of the contract?

3. Was the defendant able, ready and willing to perform his part of the contract?

4. What damage has defendant sustained? (179)

To which defendant excepted.

B. W. Herring, the plaintiff, then testified that "the defendant was to pay five bales of cotton as rent for the land, and that he had paid only three bales. The two bales in controversy were raised on the land rented from him by the defendant and were carried by the defendant to Ruffin Cameron's gin to be ginned. The two bales were seized at Cameron's gin, in this action. The defendant was present when the cotton was seized, and forbade Cameron to deliver it to me, and I forbade Cameron to deliver it to him. I did not agree to dig any marl for the crop of 1899. I wanted the marl dug and used, because I wanted to experiment. It takes twelve months for marl to do much good. The defendant did not use guano. He was to cultivate about forty acres of land. The marl was on sixteen acres of the land he rented in the year 1898. The land on which the marl was, was new ground cleared recently, and it only had three crops on it"; and plaintiff rested.

Defendant offered the following evidence, which was objected to by the plaintiff; excluded; defendant excepts:

W. H. Armwood, the defendant, testified: "It was agreed that the two thousand bushels of marl should be hauled on the crop for 1899.

I lived on the plaintiff's land in 1898, and hauled marl on 15 or 16 acres. The crops were increased by the use of the marl 50 to 75 per cent. I hauled the marl from Mr. Dan. Lee Flowers'. He had the bed and furnished Mr. Faison Hicks, Mr. Ab. Herring, Andrew Barfield, and others in the neighborhood. My crop was decreased by a failure to use the marl at least 50 per cent. I demanded of the plaintiff to dig the marl, and it was agreed he would dig it in September, 1898, so that I could use it on the crop for 1899."

All evidence of this witness in reference to the marl and its increase upon the crops was objected to by the plaintiff, upon the ground that it was too remote. Objection sustained. Defendant excepted.

Dan. Lee Flowers testified: "I bargained to sell to the plaintiff
(180) two thousand bushels of marl, to be used by the defendant, and the same was to be dug in 1898. I have used marl from my bed for a number of years, and it always increases the production of my crops from 50 to 100 per cent; in other words, I make twice as much the year I use marl upon the same land as I do without it."

Verdict and judgment for plaintiff. Defendant excepted and assigned the following as error: 1. For that the court failed to submit an issue as to the value of the property. 2. For that the court erred in refusing to submit the issues tendered by the defendant. 3. For that the court erred in excluding the evidence of defendant, Armwood, and Flowers, tending to show the deceased yield of the crop by reason of the failure of the plaintiff to furnish the marl to be used thereon. Defendant appealed from judgment for the plaintiff.

Allen & Dortch for plaintiff.
Stevens, Beasley & Weeks for defendant.

COOK, J., after stating the case. The sole question involved in this appeal, when stripped of its technical paraphernalia, is whether an action for damages will lie for a breach of contract in failing to furnish fertilizers, whereby the yield of the crop was decreased, because such damage or failure in the yield would be too remote.

His Honor held in the negative, which, we think, was error. The rule, as stated in *Hadley v. Baxendale,* 9 Exch., on page 353, is as follows:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, that is, according to
(181) the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the

contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

This rule is substantially repeated, but more succinctly, by *Pearson, J.*, in *Ashe v. DeRosset,* 50 N. C., on page 301, 72 Am. Dec., 552, which is quoted *verbatim* in *Spencer v. Hamilton,* 113 N. C., on page 50, 37 Am. St., 611.

Recognizing the fact that the yield of crops is increased by the use of fertilizers, and applying this rule to the case at bar, the conclusion is irresistible that a lessening in the yield would be the natural result of a failure to use the marl, if marl be beneficial to the growth and development of the crops, and that the lessened yield would be incidental to such breach, and, therefore, plaintiff would be liable.

It is common knowledge that the use of manure, manipulated fertilizers and compost increase the yield of cotton, corn, peanuts, etc., and in some sections are considered absolutely necessary for the production of a profitable yield. It is likewise well known that the use of marl in some sections of the State greatly increases the production. And it appears from the contract set up by defendant and admitted by plaintiff, that he, the plaintiff, in renting the farm, agreed to dig two thousand bushels of marl to be hauled and scattered upon the land; and by his failure to do so, it is alleged that the yield was greatly lessened. And it seems to have been within the contemplation of both parties that the use of the marl would be beneficial in raising the crops; and, if so, then the failure to use it would necessarily lessen the yield, which would be the direct result of the breach of contract in not furnishing it. How much that net additional yield, if any, would have been according to the usual and natural course of things, was a question of fact to be found by the jury; and by the (182) "net additional yield" we mean its value after deducting its necessary expenses in harvesting, etc., as is held in *Spencer v. Hamilton, supra.* In the case last cited our Court held that the tenant could plead, as a counterclaim for damages, a breach of contract upon the part of the landlord in not draining the land as he had agreed to do, thereby decreasing the yield, in an action brought to recover the rent. So, it must necessarily follow that if damages be recoverable for a breach of contract which decreased the yield, they can also be recovered for a breach of contract whereby the yield was not increased. It requires the same time, labor and expense in preparing the land, and in plowing and hoeing crops upon thin and unimproved land as it does upon well-improved, manured and fertilized land; and we know that the products of the former are less than those of the latter, according to the usual and natural order of events.

The defendant had a right to have the issues tendered by him

submitted to the jury; and if he could sustain them by proper proof, he would be entitled to recover such amount of damages as he might show had been done him by reason of the breach of the contract. For the error above pointed out a new trial will be awarded.

New trial.

Cited: *Williams v. Tel. Co.*, 136 N. C., 84; *Owen v. Meroney, ibid.*, 478; *Seawell v. Person*, 160 N. C., 294; *Ober v. Katzenstein, ibid.*, 441; *Tomlinson v. Morgan*, 166 N. C., 561; *Guano Co. v. Live Stock Co.*, 168 N. C., 451; *Carter v. McGill, ibid.*, 510; *Perry v. Kime*, 169 N. C., 541.

(183)

COOK v. AMERICAN EXCHANGE BANK.

(Filed 15 April, 1902.)

Pleadings—Answer—Judge—Discretion—Judgment—The Code, Sec. 274.

The trial court can not permit an answer to be filed after the Supreme Court has decided that judgment should have been entered by default for the plaintiff.

ACTION by P. F. Cook, trustee of Andrew Brown, bankrupt, against the American Exchange Bank and others, heard by *Brown, J.*, at November Term, 1901, of DARE. From an order allowing defendants to file an answer and refusal of judgment for the plaintiff, the plaintiff appealed.

F. H. Busbee and E. F. Aydlett for plaintiff.
Busbee & Busbee and G. W. Ward for defendants.

COOK, J. When this case was before us upon appeal at the August Term, 1901 (129 N. C., 149), the questions therein raised were fully considered, and it was decided that the plaintiff was "entitled to judgment by default and inquiry," and that the court had "erred in not granting the same." When the case again came on for hearing in the Superior Court, and being heard upon the certificate of this Court, defendants, Peoples Bank and Ensign & Son, again "moved to dismiss the action for want of legal service; and at the same time plaintiff moved for judgment by default and inquiry for want of an answer, the complaint having been filed Spring Term, 1900." "The court, in the exercise of its discretion, overruled plaintiff's motion" for judgment, to which he excepted, "and granted the motion of defendants to file

an answer, and the answer was filed," to which plaintiff excepted (184) and appealed.

The time for filing an answer had not only expired, but this Court had decided (*Cook v. Bank, supra*) that the court below erred in not rendering judgment for plaintiff; so the matters in controversy were concluded by a final determination of this Court, and it was not then within the discretion of his Honor to reopen the case for further pleadings, or for any other purpose. Indeed, it was within the province of this Court to have rendered the judgment here (section 957 of The Code; *Alspaugh v. Winstead,* 79 N. C., 526; *Griffin v. Light Co.,* 111 N. C., 428), and a motion to that effect was then made, and is now renewed, but not granted.

Banking Co. v. Morehead, 126 N. C., 279, cited by learned counsel for defendants, is distinguishable from the case at bar. In that case the *amendment* to the *answer* (which had been regularly filed) was not allowed for the purpose of disturbing the status fixed by the decision of the Court between the plaintiff and defendants (which the Court there held could not be done), but for the purpose of enabling the defendants to establish their respective liabilities among themselves, and to preserve a lien upon realty which would be lost if a separate action should be resorted to. In this case defendants asked leave to file an answer *after* this Court had determined that it was the duty of the judge below to have entered judgment for plaintiff. They had had their day in court, and at no time did they plead or ask leave to do so, until after the door was closed against them. Had they entered a *special* appearance for the purpose of obtaining a ruling upon the service, or the effect of their stipulation, it would have been within the discretion of the court to allow them to file their answer after being adjudged to have been brought into court, whether by service or by reason of the stipulation entered into by them. But they chose a different course; and now, after judgment, it is not within the discretion of the court to allow them to file an answer which they failed or refused to do within the time limited for such purpose. It is true, the judgment had not been actually rendered in the court below, but it had been decided by this Court that it should be. (185)

The discretion vested in the judge (The Code, sec. 274) to allow an answer to be *made* after the time limited, terminates with the judgment—that is, after the final judgment has been rendered in the Superior Court, or ordered by this Court to be rendered, it is not within the discretion of the judge to allow an answer to be filed. "Amendments" to such answer as *had* been filed (The Code, sec. 274) are not germane to this case, as no answer whatsoever had been filed before the final decision.

There is error, and this case is remanded to the end that judgment by default and inquiry may be entered in favor of the plaintiff in accordance with this opinion.

Error.

Cited: *S. c.*, 131 N. C., 96; *Corporation Commission v. R. R.*, 137 N. C., 21.

(186)

SPRINGS v. SOUTHERN RAILWAY COMPANY.

(Filed 15 April, 1902.)

1. Removal of Causes—Dismissal.

A State court can not dismiss an action on granting a petition for removal to a Federal court, but can merely stay proceedings pending a determination by the Federal court of the question of jurisdiction.

2. Removal of Causes—Petition—Diverse Citizenship.

A petition by a corporation for the removal of a cause from a State to a Federal court must specifically allege that the petitioner is a corporation created under the laws of another State and is not a domestic corporation.

3. Removal of Causes—Petition—Amendment—Jurisdiction.

A fatal defect in the allegation of diverse citizenship in a petition for the removal of a cause from a State to a Federal court, for that reason, can not be corrected by amendment in the Federal court.

4. Evidence—Railroads—Personal Injuries.

It is competent in an action for personal injuries for plaintiff to show that he had complained of the engine on which he was injured and had been promised a safer one.

5. Evidence—Railroads—Personal Injuries.

In an action by a switchman for personal injuries, evidence that the engineer had a book of rules did not tend to prove that the switchman had any knowledge of such rules.

6. Evidence—Sufficiency.

Under the evidence in this case the trial court properly refused to give instructions which practically amounted to a direction of a verdict in favor of the defendant.

ACTION by Henry Springs against the Southern Railway Company, heard by *Robinson, J.*, and a jury, at March Term, 1901, of
(187) MECKLENBURG.

This is an action for personal injury. The plaintiff, who was

employed by the defendant as a switchman, had been working with a regular switch engine, supplied with footboards on each end, upon which he stood when the engine was in motion. About 1 March, this engine being out of order, was sent to the shop for repairs, and the defendant used road engines instead for the purpose of switching its cars. About 1 April the plaintiff was ordered by one Warren Bull, who had the right to employ and discharge him, to ride on the pilots or cowcatchers of these road engines while they were switching. He had before that time been riding on the gangway behind the engineer, and sometimes behind the fireman, where he was comparatively safe. After receiving the order from Warren Bull, he continued to ride on the pilot of the engine for about ten days, until he was hurt.

There was evidence to the effect that the pilot was not as safe a place to ride as the footboard of the shifting engine. Switchmen had been in the habit of jumping from the engine while in motion, in order to do their work more rapidly, and no objection to this course had ever been made by the officers or agents of the defendant who saw it done. In fact, there was evidence tending to show that it was sometimes necessary to do so in order to get the work done in time. On 10 April, 1899, the plaintiff, in the performance of his duties, attempted to jump from the pilot, as he had been in the habit of doing without objection, when his foot was caught between the ribs or slats of the pilot, and he was thrown to the ground. The engine ran over his legs and crushed them so severely that they had to be amputated. The plaintiff testified that the engine was moving slowly when he attempted to get off, and that he would have alighted safely if his foot had not caught between the slats.

The defendant attempted to have this cause removed into the Circuit Court of the United States, and caused a transcript of the (188) record to be docketed in that court. It then moved in the court below to *dismiss the action,* but the court decided that the cause had not been properly moved, and proceeded with the trial. The jury found all the issues in favor of the plaintiff.

The defendant's assignments of error are as follows:

1. The refusal of the court to dismiss the action because the same had been removed to the Federal court, which is the subject of defendant's first exception.

2. The admission of the testimony of plaintiff as set out in defendant's second and third exceptions.

3. The refusal of the court to admit the testimony of Hillhouse, which is the subject of defendant's fourth exception.

4. The instruction numbered 3, prayed for by the plaintiff, given to the jury, which is the subject of the defendant's fifth exception.

5. The instruction numbered 5, prayed for by plaintiff, given to the jury, which is the subject of defendant's sixth exception.

6. The refusal of the court to give the instructions prayed for by defendant, subject to defendant's exceptions 6, 7, 8, 9, 10, 11, 12 and 13.

7. The refusal of the court to grant a new trial, which is the subject of the defendant's fourteenth exception.

Among other instructions, the court gave the following at the request of the defendant:

1. That the plaintiff must show by preponderance of evidence that he was injured by the negligence of the defendant, as alleged in the complaint, before the jury can find the first issue in his favor. The burden is upon the plaintiff to show this.

(189) 2. That the plaintiff, in entering into the service of the defendant as a switchman, assumed the risk incident to the employment, and before he undertook to use the engine furnished him, it was his duty to inform himself as to its fitness for the use to which it was put, and also as to its safety.

3. That the defendant owed to the plaintiff the duty of furnishing him with a suitable engine for the work he expected to perform, or one reasonably well adapted to the service to which it was to be applied, without exposing the plaintiff to peril not ordinarily incident to such service, but the defendant was not a guarantor of the safety of the plaintiff.

4. The plaintiff's duties correspond with those of the defendant. He was bound to a reasonable care and diligence in the discharge of his duties as a switchman, and to look to his own safety.

12. If the jury find from the evidence that there were steps on the pilot, about four inches wide and twenty inches long, on which plaintiff could have ridden in safety and stepped from without danger, and they should further find that without looking to see whether or not engine No. 24 was equipped with these steps, he assumed, voluntarily, a more dangerous position, to wit, the position described, on top of the pilot, and this was the cause of the injury, the answer to the first issue should be "No," and to the second issue "Yes."

13. It was the duty of the plaintiff to examine and acquaint himself with the engine supplied to him by the defendant, and if the jury find from the evidence that he failed to do this, and that such failure was the proximate cause of the injury, the answer to the first issue should be "No," and the second issue "Yes."

The following instructions, numbered 3 and 5, were given at the request of the plaintiff, and were excepted to by the defendant:

3. If the jury find from the evidence that the plaintiff was employed

by the defendant as a switchman, and as one of the crew (190) that worked with one of its engines at Greenville, S. C., and they further find that the plaintiff was subject to the control and authority of Warren Bull, the conductor of that engine and captain of the crew, and that plaintiff was required to obey his orders, and was liable to be discharged for not doing so, and that Warren Bull ordered him to use the road engine while the switch engine was being repaired, and to ride on the leading end of the engine, or that end nearest the direction in which the engine was going, and they further find that Warren Bull represented to the plaintiff that the switch engine would soon be returned to the road, and that plaintiff, in obedience to the said orders and instructions, and believing that he would be discharged if he did not obey them, and relying upon said representation that the switch engine would soon be returned to the road, the plaintiff did ride on the front end of the pilot of said road engine, and, in doing so, he acted as a man of ordinary prudence would have done under the same circumstances, and also exercised ordinary care and prudence for his own safety while engaged in performing the service under said orders and instructions (ordinary care being the care which an ordinarily prudent man would have exercised under the same circumstances), the jury will answer the second issue "No," as, under such facts and circumstances, the law will not impute negligence to the plaintiff as the proximate cause of injury, but will rather refer the injury to the negligence of the defendant as its proximate cause.

5. That the plaintiff was not bound to observe the printed rules of the company unless they were brought to his attention, or in some way he had knowledge of their contents.

The part of the petition for removal which alleges the diverse citizenship is in the following words: "Your petitioner further states that in the above-mentioned civil action there is a controversy which is wholly between citizens of different States, and which can be (191) fully determined as between them, to wit, a controversy between your said petitioner, which was, at the commencement of this action, and still is, a citizen of the State of Virginia, and the said Henry Springs, who, your petitioner avers, was at the commencement of this action, and still is, a citizen of the State of North Carolina, and of the Western District thereof, and that both the said Henry Springs and your petitioner are actually interested in said controversy."

After the trial of this action in the Superior Court and the rendition of judgment therein, the following words were inserted in the petition under an order of amendment made in the Circuit Court of the United States, to wit: "That petitioner is a nonresident of the State of North

Carolina, and is a corporation created under the laws of the State of Virginia." This averment does not appear in the pleadings. From a judgment for the plaintiff, the defendant appealed.

Burwell, Walker & Cansler and James A. Bell for plaintiff.
George F. Bason for defendant.

DOUGLAS, J., after stating the facts. The court below properly refused the motion of the defendant to dismiss this action on account of its attempted removal into the Circuit Court of the United States. In no event could the court below have *dismissed* the action, even if it had been properly removed. In the latter event it could only have stayed further proceedings, leaving the case upon the docket to await future developments. Even if the State courts, Superior and Supreme, were to recognize the removal of an action, that would not necessarily end the question, as the right of removal is in its ultimate determination essentially a Federal question. The Circuit Court has the
(192) power to remand any case, if in its opinion, it is improperly removed; and such a disclaimer of jurisdiction would at once revest the State courts with all their original jurisdiction, or rather it would conclusively show that it had not been divested. We use the term "improperly" removed merely for convenience, as indicating those cases where the petition to remove is improperly allowed. The removal takes place, if at all, by operation of law *eo instanti* upon a compliance with the Federal statutes.

Aside from the impropriety of this motion to dismiss, the petition for removal as presented to the court below was fatally defective, inasmuch as its only allegation of nonresidence was that the defendant was "a citizen of the State of Virginia." It failed to allege that the defendant was a corporation created under the laws of the State of Virginia, and that it was a nonresident of the State of North Carolina. The necessity for the allegation that the defendant was a nonresident of this State has been fully discussed and determined in *Thompson v. R. R., ante,* 140. That of itself would settle this case; but as we are anxious to aid as far as we can in the final determination of all questions relating to the removal of causes, we will proceed to consider this question as to the jurisdictional necessity for the allegation in the petition that the defendant is a corporation existing under the laws of another State.

That such an allegation is necessary, is clearly settled by the Federal decisions on this subject. In *Insurance Co. v. French,* 18 Howard, 404, 405, the Court says: "This is a writ of error to the Circuit Court of the United States for the District of Indiana. . . . In the decla-

ration the plaintiffs are averred to be citizens of Ohio, and they 'complain of the LaFayette Insurance Company, a citizen of the State of Indiana.' This averment is not sufficient to show jurisdiction. It does not appear from it that the LaFayette Insurance Company is a corporation; or, if it be such, by the law of what State it was (193) created. The averment that the company is a citizen of the State of Indiana can have no sensible meaning attached to it. This Court does not hold that either a voluntary association of persons or an association into a body politic, created by law, is a citizen of a State, within the meaning of the Constitution. And, therefore, if the defective averment in the declaration had not been otherwise supplied (by the pleadings), the suit must have been dismissed."

In *Muller v. Dows,* 94 U. S., 444, 445, the Court says: "The decree made below is assailed here for several reasons. The first is that the court had no jurisdiction of the suit in consequence of the want of proper and necessary citizenship of the parties. This objection was not taken in the Circuit Court, but it is of such a nature that, if well founded, it must be regarded as fatal to the decree. . . . The two original defendants, the Chicago and Southwestern Railway Company and the Chicago, Rock Island and Pacific Railway Company, are averred to be citizens of the State of Iowa. Were this all that the pleadings exhibit of the citizenship of the parties, it would not be enough to give the Circuit Court jurisdiction of the case." The Court here quotes from *Insurance Co. v. French, supra,* and continues as follows: "A corporation of itself can be a citizen of no State in the sense in which the word 'citizen' is used in the Constitution of the United States. A suit may be brought in the Federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the State which, by its laws, created the corporation. It is therefore necessary that it be made to appear that the artificial being was brought into existence by the law of some State other than that of which the adverse party is a citizen." (194)

In *Pennsylvania v. Quicksilver Co.,* 10 Wall., 553, 556, the Court says: "And the question in this case is whether it is sufficiently disclosed in the declaration that the suit is brought against a citizen of California. And this turns upon another question, and that is whether the averment there imports that the defendant is a corporation created by the laws of that State; for, unless it is, it does not partake of the character of a citizen within the meaning of the cases on this subject. The Court is of opinion that this averment is insufficient to establish that the defendant is a California corporation. It may

mean that the defendant is a corporation doing business in that State by its agent; but not that it has been incorporated by the laws of the State. It would have been very easy to have made the fact clear by averment, and, being a jurisdictional fact, it should not have been left in doubt."

After a careful examination, we fail to find any case in which the above cases have been overruled, modified or doubted. In *Drawbridge Co. v. Shepherd,* 20 How., 227, the Court, after drawing the somewhat acute distinction between the allegations that "a corporation *is* a citizen" and "a corporation are citizens" of a State, expressly reaffirms *Insurance Co. v. French.*

In *Frisbie v. R. R.,* 57 Fed., 1, where the petition alleged (in words almost exactly similar to the case at bar) that the petitioner "was at the time of the bringing of this suit and still is a citizen of the State of Virginia," the Court said: "An averment that a corporation is a citizen of a particular State is insufficient. A corporation is not a citizen of a State within the meaning of the Constitution. The averment should be that it was a corporation created by the laws of a particular State."

In *Lonergan v. R. R.,* 55 Fed., 550, it was held that (quoting
(195) the syllabus) "in showing diverse citizenship for the purpose of sustaining Federal jurisdiction, it is not sufficient to merely allege that a corporation is a citizen of a given State, for corporations are not strictly citizens. The averment must be to the effect that the corporation was created under the laws of the State named."

In view of the uniform trend of Federal decisions, it is useless to cite text-books upon a Federal question.

The absolute necessity for an averment that the petitioner is a corporation created under the laws of a certain State clearly appears from the consideration of the grounds upon which the Supreme Court of the United States bases its jurisdiction, and the method of reasoning by which it has arrived at its legal conclusions. The Constitution in defining the extent of the jurisdiction of the courts of the United States makes no allusion whatever to corporations. Section 2 of article III, which is the sole source of Federal jurisdiction, is as follows: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; *between citizens of different States;* between citizens of the same State claiming lands under grants

of different States, and between a State or the citizens thereof and foreign States, citizens or subjects." The first time that the question of Federal jurisdiction in cases of foreign corporations came before the Supreme Court seems to have been in the cases of *Insurance Co. v. Boardman,* 5 Cranch, 57, and *Bank v. Deveaux, ibid.,* 61. These cases were heard and decided together at February Term, (196) 1809, the decision in the former being based upon that in the latter. The Court held that "the right of a corporation to litigate in the courts of the United States depended upon the character (as to citizenship) of the members which compose the body corporate, and that a body corporate as such can not be a citizen within the meaning of the Constitution." *Boardman's case, supra.* It proceeds upon the theory that in such cases it is not the corporation which is the real party, but that "the controversy is substantially between aliens, suing by a corporate name, and a citizen, or between citizens of one State, suing by a corporate name, and those of another State." *Bank v. Deveaux, supra,* page 91. The result of this ruling was that where it did not appear on the record that *all* the stockholders were citizens of a different State from the adverse parties, or the contrary was shown, in spite of the averment, the jurisdiction did not attach. This remained the settled ruling of the Supreme Court until overruled by *R. R. v. Letson,* 2 Howard, 497, decided at January Term, 1844. The opinion in this case is remarkable not only from its radical departure from long-standing precedents, but also from its great influence upon future decisions, as well as certain allusions to *Chief Justice Marshall,* which we are compelled to say are rather at variance with our estimate of his character. That case sustained the jurisdiction upon two grounds. It first holds, perhaps rather inferentially, that all the stockholders of a corporation will be conclusively presumed to be citizens of the State under whose laws the corporation was created. This is the doctrine that has since been uniformly followed, and is now too firmly settled to admit of controversy.

The Court also said, on page 557: "But there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by and doing business in a particular State is to be (197) deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person. Like a citizen, it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue

and be sued, it is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the purposes of suing and being sued." This doctrine appears to us to be the more tenable of the two, but seems to have been subsequently abandoned. Both, however, lead to the same result. The result of that and subsequent decisions is to substitute in place of the citizenship of the stockholders, which can not now be inquired into, the averment of the particular State under whose laws the corporation is created and existing, as the essential jurisdictional fact, which must affirmatively appear either in the petition or the pleadings. Being jurisdictional and not modal in its nature, the want of its proper averment leaves the cause completely within the jurisdiction of the State courts.

But it is contended that the amendment to the petition, subsequently allowed by the Circuit Court of the United States, cured this defect. We do not think so. The Superior Court could pass only on what was before it; and if the record and petition, as presented to it, did not make out a proper case for removal, it was its duty to retain the cause and proceed therein according to law. If the Superior Court had allowed the petition to be amended, or a new petition had been filed within the time prescribed by law, a different question would be presented;

but neither of these things was done. After the Superior Court
(198) had acted upon the petition in due course of procedure, the question of removal was then settled, one way or the other; and no subsequent amendment could affect it. Certainly, an amendment made in the Circuit Court, after the cause had been carried to a final judgment in the Superior Court, could not invalidate all that had been lawfully done. That a substantial amendment to a jurisdictional averment can not be made in the Circuit Court appears to be well settled by the Federal decisions. In other words, an amendment can not be allowed in the Circuit Court so as to show jurisdiction where it does not already affirmatively appear. If it were permitted, it would result in the intolerable confusion so clearly pointed out by *Sawyer, J.*, in *MacNaughton v. R. R.*, 19 Fed., 883, of having two distinct cases between the same parties and involving the same subject-matter, carried on simultaneously in two independent courts, and resulting in distinct and separate judgments. The method of procedure, with its underlying principles, is so clearly stated by *Waite, C. J.*, in *R. R. v. Dunn*, 122 U. S., 513, 516, that we quote from it at some length. The Court says: "The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents, then, to the State a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of

the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the State court has a right to decide for itself, and if it errs in keeping the case, and the highest court of the State affirms its decision, this Court has jurisdiction to correct the error, considering, for that purpose, only the part of the record which ends with the petition for removal. But even though the State court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his (199) petition, in the Circuit Court, and have the suit docketed there. If the Circuit Court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount. In that case, as in the writ of error to the State court, the question will be decided on the face of the part of the record of the State court which ends with the petition for removal, for the Circuit Court can no more take a case until its jurisdiction is shown by the record than the State court can be required to let it go until the record shows that its jurisdiction has been lost. The questions in the two courts will be identical, and will depend on the same record, namely, that in the State court ending with the petition for removal. The record remaining in the State court will be the original, that in the Circuit Court an exact copy."

In *Cameron v. Hodges,* 127 U. S., 322, 326, *Miller, J.,* speaking for the Court says: "In this instance there has been a removal from a tribunal of a State into a Circuit Court of the United States, and there is no precedent known to us which authorizes an amendment to be made, even in the Circuit Court, by which the grounds of jurisdiction may be made to appear which were not presented to the State court on the motion for removal."

In *Crehore v. R. R.,* 131 U. S., 240, it was held, quoting the syllabus, that "a fatal defect in the allegation of diverse citizenship in the petition for the removal of a cause from a State court for that reason, can not be corrected in the Circuit Court of the United States."

In *Jackson v. Allen,* 132 U. S., 27, 34, *Fuller, C. J.,* speaking for the Court, says: "It appears from the record that the citizenship of the parties at the commencement of the actions, as well as at the time the petitions for removal were filed, was not sufficiently shown, and that therefore the jurisdiction of the State court was never di- (200) vested. This being so, the defect can not be cured by amendment."

In *Gerling v. R. R.,* 151 U. S., 673, 690, the Court says: "The incidental suggestion in that opinion (*Ayers v. Watson,* 113 U. S., 594)

that the petition for removal might be amended in the Circuit Court as to the form of stating the jurisdictional facts, assumes that these facts are already substantially stated therein, and accords with later decisions by which such amendments may be allowed when, *and only when,* the petition, as presented to the State court, shows upon its face sufficient ground for removal."

In *Powers v. R. R.,* 169 U. S., 92, the Court, while holding that the petition may be amended in certain particulars where sufficient grounds for removal are shown upon the face of the petition and record as presented *to the State court,* decides that it can not be amended in the Circuit Court where jurisdictional facts are not so shown. It says, on page 101: "A petition for removal, when presented to the State court, becomes part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and, if it does, the Circuit Court of the United States can not allow an amendment of the petition, but must remand the case." The decisions of the Circuit Court of the United States are, of course, to the same effect. The rule is clearly stated in the recent case of *Fife v. Whittell,* 102 Fed., 537, 540.

We wish to be clearly understood. We hold, upon what we believe to be the authority of the Supreme Court of the United States, that the petition, *when passed upon by the State court,* must contain in
(201) an affirmative form *all* the jurisdictional averments necessary for removal; that the State court has the right, subject to review, to pass upon the sufficiency of the petition as a question of law; that the simple averment, that a corporation was created under the laws of another State, does not negative the fact that it may have been reincorporated under the laws of this State; and that there must be an affirmative averment or admission, somewhere in the record, that a corporation seeking to remove a cause is not a domestic corporation of the State of North Carolina.

We think these requirements are lawful, and are certainly not unreasonable, in view of the fact that the records and decisions of this Court show that the defendant now seeking to remove its cause has become a domestic corporation by complying with the provisions of the act of 10 February, 1899, known as the "Domestication Act."

We are not seeking jurisdiction, but simply prescribing for ourselves the rule of conduct laid down by *Chief Justice Marshall* in *Bank v. Deveaux,* 5 Cranche, 61, where he says, on page 87: "The duties of this Court, to exercise jurisdiction where it is conferred and not to

usurp it where it is not conferred, are of equal obligation. The Constitution, therefore, and the law are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws."

The merits of the case have nearly been lost sight of in the dominating question of removal. In fact, the recent cases of *Coley v. R. R.*, 129 N. C., 407; *Thomas v. R. R.*, 129 N. C., 392, and *Cogdell v. R. R.*, 129 N. C., 398, all decided since the case at bar was tried in the court below, practically answer the defendant's exceptions. We see no error in the admission or rejection of evidence. It was competent for the plaintiff to show that he had complained of the road engines, and had been promised a safer engine on which to work. On the other hand, to show that the engineer had a book of rules does not of itself tend to prove that the plaintiff had any knowledge of (202) its contents.

All the defendant's prayers for instructions that were not given were properly refused or modified, as they practically amounted to a direction of the verdict.

In the absence of error, the judgment of the court below is

Affirmed.

Cited: Mott v. R. R., 131 N. C., 236; *Beach v. R. R., ibid.*, 401; *Lewis v. Steamship Co., ibid.*, 653; *Biles v. R. R.*, 143 N. C., 87; *Bissell v. Lumber Co.*, 152 N. C., 125; *Herrick v. R. R.*, 158 N. C., 311; *Cox v. R. R.*, 166 N. C., 662.

COOPER v. ROUSE.

(Filed 15 April, 1902.)

Chattel Mortgages—Lien.

Where a mortgage stipulates for a lien on all goods purchased within twelve months after its date, it is a lien on all goods purchased within the twelve months, although the original stock was destroyed by fire.

ACTION by W. B. Cooper against H. W. Rouse, heard by *Allen, J.*, and a jury, at December Term, 1901, of DUPLIN. From a judgment for the defendant, the plaintiff appealed.

Rountree & Carr, Russell & Gore and Robert Ruark for plaintiff.
Stevens, Beasley & Weeks for defendant.

CLARK, J. The defendant executed to the plaintiff, on 31 October, 1898, a mortgage on "the following articles of personal property, to wit,

all of my entire stock of merchandise in store at Magnolia, N. C., *or that I may have from time to time,* until all my account is paid in full; also all my store fixtures, including desks, seats, lamps, showcases, etc. . . . But the condition of these presents is such that, whereas, the said W. B. Cooper has agreed to advance to the said H. W.
(203) Rouse goods, wares and merchandise from time to time, extending over a period of twelve months from the date of these presents, but at no time to exceed the sum of $100, each purchase of said goods, wares and merchandise to be due and payable thirty days after date of said purchase." On 9 March, 1899, the store and all the goods in it were burned. The defendant then moved into another store in the same town, but continued to buy goods of plaintiff. None of the goods in the second store were goods that were in the store at the time the mortgage was executed.

The defendant testified that he paid up all that was due plaintiff up to the fire, out of insurance money, but that he subsequently bought goods of plaintiff, and that by verbal agreement these last were bought on his individual credit, and the debt was not subject to the lien of the mortgage. To this evidence the plaintiff excepted, it having been admitted in the answer that these goods were bought under the original contract.

The plaintiff in this action sued out, on 30 May, 1899, claim and delivery on the defendant's stock of goods by virtue of the aforesaid mortgage, for a balance due of $76.71, which sum the defendant admits he owes, but denies the plaintiff's lien thereon.

Though the court admitted, over plaintiff's exception, defendant's evidence of oral contract that the mortgage should not apply to the debt for goods bought after the fire, the court charged, without regard to the evidence, doubtless by reason of the admission in the answer, "If the jury find that the goods in stock and in possession of defendant at the time the instrument was executed were burned, and the defendant paid up his then indebtedness and procured other goods from the plaintiff for the additional debt claimed and admitted to be due, none of which were any part of the stock in store at the time of the execution of the instrument, but a new stock, the plaintiff can not recover." To this the plaintiff excepted, and the verdict and
(204) judgment being in favor of the defendant, the plaintiff appealed.

In *Perry v. White,* 111 N. C., 197, it is held, after a full discussion and citation of authorities, that a mortgage upon subsequently acquired property, other than crops, is valid, certainly as between the parties. It is unnecessary to repeat the authorities there quoted. To the same effect are *Brown v. Dail,* 117 N. C., 41, and *Kreth v. Rogers,* 101 N. C.,

263, both of which cite and distinguish *Cheatham v. Hawkins,* 76 N. C., 335. The validity of such mortgage is well settled. 20 A. & E. Enc., 916, n. 11; *Holroyd v. Marshal,* 10 H. L., 189; *Coombe v. Carter,* 36 Ch. D., 348.

There is no question in this case either as to fraud or the rights of third parties. The mortgage stipulates for a lien on all goods purchased after its date, within twelve months, and this being valid, it is immaterial whether the stock of goods existing at the date of the mortgage was partially or entirely exhausted, and if the latter, whether such exhaustion was due to their having been sold or burnt, or otherwise disposed of. The contract was for a lien on the subsequently acquired goods, if bought within twelve months, and, indeed, this debt was contracted for goods bought after the fire.

The goods taken by legal process in this case come within that description in the mortgage, and the defendant is bound by his mortgage thereon. There was error in the charge of the court for which there must be a

New trial.

Cited: Lumber Co. v. Lumber Co., 150 N. C., 286.

(205)

EZZELL v. ROWLAND LUMBER COMPANY.

(Filed 15 April, 1902.)

1. **Arbitration and Award—Evidence—References.**
   Arbitrators can not be required to report the evidence offered before them.

2. **Arbitration and Award—Resubmission.**
   The report of arbitrators can not be recommitted to allow the introduction of evidence not offered at the original hearing.

3. **Arbitration and Award—Arbitrators—Functi Officio.**
   After arbitrators have reported their award to the court they become *functi officio.*

4. **Arbitration and Award—Report.**
   The report of arbitrators will not be set aside on the ground of excessive award of damages where there is no allegation of fraud or corruption.

ACTION by H. H. Ezzell against the Rowland Lumber Company and the McMillan-Miller Lumber Company, heard by *Allen, J.,* at August Term, 1901, of DUPLIN. From a judgment for the plaintiff, the defendants appealed.

Stevens, Beasley & Weeks for plaintiff.
Allen & Dortch for defendants.

MONTGOMERY, J. All matters in controversy in this action were, by consent, ordered to be submitted to the decision of arbitrators, their decision or that of any two of them to be final and to be made a rule of court. The arbitrators agreed upon $534.96 as the amount of damages to which the plaintiff was entitled for the injury to his land ($50 per acre), and upon the award being reported to the court, the defendant excepted thereto upon the ground that the damages
(206) allowed were grossly excessive, and moved the court, first, to recommit the award of the board of arbitration in order that the arbitrators might report the evidence offered before them; second, to recommit the award that the board of arbitration might consider other evidence as to damages; and, third, to set aside the award. The court overruled the exceptions and denied the motion, assigning as a reason for the denial of the motion "the want of authority to set aside the award for the causes stated in the said exceptions and the affidavits adduced thereon." The affidavits of probably seventy-five persons, in which it appeared that, in affiant's opinion, the lands, before they were injured, were not worth more than $12 per acre, were filed with the motion, as were also a half dozen for the plaintiff, in which the affiants gave it as their opinion that the lands were worth $50 per acre, the amount agreed upon by the arbitrators.

The second prayer in the motion was not noticed in the judgment, nor was it argued here, and we suppose it was abandoned. However, it could not have been allowed, for there was no statement or charge that the arbitrators had refused to examine any witness offered by either plaintiff or defendant.

As to the first prayer, that the award should be recommitted to the end that the evidence offered might be reported, it is sufficient to say that it has been decided by this Court that arbitrators are not required to find the facts, and consequently they would not be required to make notes of the evidence, even though requested to do so. *Keener v. Goodson,* 89 N. C., 273; *Lusk v. Clayton,* 70 N. C., 184. And further, that when the award, which covered the whole of the matter submitted to the arbitrators, was reported to the court, the arbitrators became *functi officio,* and had no more connection with the matter than would a jury who had rendered their verdict and been discharged.
(207) *Patton v. Baird,* 42 N. C., 255; *Eaton v. Eaton,* 43 N. C., 102; 2 A. & E. Enc., 698.

The third prayer, asking that the award should be set aside on the ground that the amount allowed by the arbitrators was grossly excessive,

was also properly denied by his Honor. So far as we can see from the record, no fault is found with the award except that the amount allowed the plaintiff was alleged to be grossly excessive. Neither the exceptions, nor the motion, nor any of the affidavits, alleged or charged that the arbitrators were influenced by motives of either corruption or partiality. The matter comes to us, then, in the form of a mistake in judgment on the part of the arbitrators as to the value of the lands of the plaintiff, and the extent of the injury to the same by defendant. Unless corruption or partiality was alleged and proved, such an error or mistake of judgment can not be corrected by the courts. And, in such cases, the award would not be corrected, or recommitted, or reviewed, but it would be set aside on the ground that it would be against conscience to seek to have it enforced, and the parties would be left as if no submission had ever been made. *Eaton v. Eaton, supra; Gardner v. Masters,* 56 N. C., 462; *Patton v. Garrett,* 116 N. C., 487. It might be that in a case where the damages awarded or the amounts allowed were so grossly excessive as to show corruption or fraud on the face of the proceedings, the courts would set aside the award upon a proper motion of the aggrieved party, but in such cases the direct charge of fraud or corruption should be made and not left to the court to find of its own motion. Until such charge is made, the award would stand, error in judgment, however serious, not being sufficient in itself to vitiate the same.

No error.

Cited: Mangum v. Mangum, 151 N. C., 271; *Millinery Co. v. Ins. Co.,* 160 N. C., 141.

---

(208)

PHIFER v. FORD.

(Filed 22 April, 1902.)

Limitations of Actions—Action Against Personal Representative—The Code, Sec. 164.

If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time and within one year after the issuing of letters testamentary.

ACTION by W. H. Phifer administrator of John Ford, against Leander Ford and others, heard by *Robinson, J.,* at January Term, 1901, of UNION. From judgment for the defendants, the plaintiff appealed.

Armfield & Williams for plaintiff.
Redwine & Stack for defendants.

CLARK, J. This is a special proceeding, begun before the clerk, to sell land to make assets to pay debts of intestate. The only debt alleged is a note under seal, executed 9 February, 1874, due one day after date. The statute of limitations is pleaded, and is the only question presented by the appeal. The maker of the bond died September, 1877, three years and six months after the cause of action accrued, but there was no administration taken out on his estate until 26 May, 1898, and this action was begun within twelve months thereafter. By the express terms of The Code, sec. 164, the debt is not barred. *Dunlap v. Hendley,* 92 N. C., 115; *Winslow v. Benton, ante,* 58.

The appellee relied upon *Copeland v. Collins,* 122 N. C., 620, but that case has no application, for the action there was not begun within twelve months after letters of administration were taken out. (209) The court below was doubtless misled by the fourth headnote to that case, which is not correct unless read in connection with the facts therein. Further discussion is here unnecessary, as a case "on all fours" with this (*Winslow v. Benton, ante,* 58) has already been decided at this term on this point.

Upon the facts agreed, judgment should have been entered for the plaintiff.

Reversed.

BAILEY v. CITY OF RALEIGH.

(Filed 22 April, 1902.)

Municipal Corporations—Licenses—Police Power—Intoxicating Liquors—Refunding Taxes—Laws 1901, Ch. 327.

Under Laws 1901, ch. 327, requiring municipal corporations to refund the amount of any tax or assessment collected from persons doing business outside the corporate limits, a city, having legislative authority to regulate the sale of liquors within a mile of its corporate limits and to receive the license taxes paid therefor, may not be required by the Legislature to refund such taxes.

ACTION by A. L. Bailey, administrator, and others, against the city of Raleigh, heard by *Robinson, J.,* at October Term, 1901, of WAKE. From a judgment for the plaintiff, the defendant appealed.

D. L. Russell and E. J. Best for plaintiff.
W. L. Watson for defendant.

FURCHES, C. J. The plaintiff's intestate resided within one mile of the corporate boundaries of the city of Raleigh, and during 1888, 1892, 1893 and 1894, carried on the business of a retail liquor dealer within one mile of the city limits. In 1888 he paid the city $50 for license to carry on said business, and in 1892 he paid $300; in 1893 he paid $300, and in 1894 he paid $150—making, in the aggregate, (210) $800.

The Legislature of 1901 passed an act (chapter 327), which the plaintiff contends authorizes him to recover back from the defendant city this amount ($800), and interest thereon. The statute provides that where any city, town or municipality has collected any tax or assessment upon property "outside of the actual charter or incorporate limits of such town, city or municipality, or where any town, city or municipality shall have collected a privilege tax or assessment upon any person or persons doing business outside of the actual charter or incorporate limits or boundaries as aforesaid upon such business, said town, city or municipality shall refund to such person or persons, or their proper representatives, the amount of such tax or assessment." It is not denied but that the city charter and the acts of the Legislature, in terms, authorized the city to issue the licenses and collect the tax.

This presents the question; and there is no doubt but the act in terms is sufficiently comprehensive to cover the case (as it was in all probability intended to do), and to enable the plaintiff to recover, if it was within the legislative power to give him this right.

As a general rule, the Legislature may give a remedy, but not a right; that is, where there is a cause of action the Legislature may provide a means by which such cause of action may be enforced; but it can not make a contract for parties, nor can it take the property of one person and give it to another. No man shall be "disseized of his property except by the law of the land"; that is, by the judgment of a court of competent jurisdiction, in which he is a party and afforded an opportunity to defend his rights. These propositions are too elementary to require citation of authority. The Legislature, for the public good, may require certain things to be done, and it may prohibit the doing of others, and it may provide a penalty for their violation. But this is for the public good, and not *between parties,* and (211) these can never be retroactive. And, as the Legislature can not determine the rights of parties, and has no means of enforcing its judgments, if it could be said to have any, all that chapter 327 can be understood to mean is that the Legislature opens the doors of the courts to the plaintiff to prosecute his claim, and, by this statute, says if the city has collected this money *wrongfully,* you shall have it back.

Municipalities being a part of the State, the rule laid down above as

applying to individuals is somewhat modified in its application to municipal corporations. The principle is not abandoned, but slightly modified, so as to allow such legislation to this extent, that if the plaintiff has a just and meritorious demand against the city, in which the city has *wrongfully* received his money, labor or property, but for some technical reason he is not able to recover it back, the Legislature may specially provide for his relief, as in chapter 327; as in *Bank v. Guthrie,* 173 U. S., 528, where parties had acted as officers of the defendant before it was incorporated, and had been given certificates of indebtedness for their services, which had been transferred to the plaintiff. After the defendant was incorporated it refused to pay these certificates, upon the ground that they were issued before the defendant was incorporated. This was held to be a legal technical ground of defense, but the fact remained that the defendant had received the services of these officers, policemen and others, and the Legislature passed an enabling act similar to chapter 327. The Court held that the city had received the benefit of these services, sustained the validity of the act, and the plaintiff recovered. But the same opinion held that this could not be done unless there is a moral obligation to pay. The same doctrine is held in *New Orleans v. Clark,* 95 U. S., 644, and the same in many other opinions and by leading text writers. Indeed, it seems to be the general
(212) rule, and, so far as we have seen, it is almost without exception.

But all the text-books and decisions declare in express terms that this doctrine does not obtain except in cases where there is a moral obligation to pay, or a legal or equitable right exists that can not be enforced for some technical reason.

Black's Constitutional Law, on page 380, after announcing the doctrine above stated, says: "But the Legislature can not compel a municipal corporation to pay a claim which it is under no obligation, legal or moral, to pay; nor can it require a court to render judgment on proof of the amount thereof."

Dillon's Municipal Corporations, on page 130, after announcing the doctrine that where there is a legal or moral obligation to pay, but which can not be enforced, proceeds to say: "The cases on this subject, when carefully examined, seem to the author to go no further, probably, than to assert the doctrine that it is competent for the Legislature to compel municipal corporations to recognize and pay debts or claims, not binding in strict law, and which, for technical reasons, could not be enforced in equity, but which nevertheless are just and equitable in their character, and involve a *moral obligation.* To this extent, and with this limitation, the doctrine is unobjectionable in principle, and must be regarded as settled, although it asserts a measure of control over muni-

cipalities, in respect to their duties and liabilities, which probably does not exist as to private corporations and individuals."

In a leading note of Mr. Freeman, in *Hasbrouck v. Milwaukee,* 13 Wis., 37, 80 Am. Dec., on page 733, it is said: "But it (the Legislature) can not compel the payment of the claim which the city is neither under a legal nor a moral obligation to pay." For this he cites *Blanding v. Burr,* 13 Cal., 343; *Smith v. Morse,* 2 Cal., 524; *Nevada v. Hampton,* 13 Nev., 441; *Thomas v. Leland,* 24 Wend., 65; *Guilford v. Supervisors,* 13 N. Y., 144; *New Orleans v. Clark,* 95 U. S., 644, and a great many other cases.

This money was not levied or assessed against the plaintiff's intestate, nor his property. But it was paid by him (213) voluntarily, upon his own application and request, and he received from the city a privilege that he did not have—a license to retail liquor. And we are unable to see that the plaintiff has any legal or equitable right to recover it back, even if the city had no right to grant the license, and certainly he has none if the city had this right. The plaintiff's right to recover, if he has such right, must rest upon the *moral obligation* the city is under to repay his money. And we would hold that if the city had no right to issue these licenses, but did so without authority, and they were of no value to the intestate, the money was wrongfully paid and there would be a *moral obligation* to return it.

This presents the question as to whether the defendant was authorized to issue licenses to parties to carry on the business of a *retailer of spirituous* liquors outside of the corporate limits.

The manufacture and sale of spirituous liquors are looked upon with disfavor, if not regarded as the enemy of public morals and good government, and, being so regarded, they are held to be subject to the police power of the Government, and may be suppressed or regulated by the legislative authority. It has been so held by this Court in *S. v. Barringer,* 110 N. C., 525, and many other cases. And where it is not entirely prohibited, it may be *taxed* as a means of regulating and controlling its sale and use. *Emerich v. Indianapolis,* 118 Ind., on page 279. And while the general taxing power, exercised for the purpose of raising money for the purpose of government, does not fall under the police power, yet the right to *tax* may be resorted to as a means of enforcing the police powers of the Government. The fact that it is thus taxed makes it none the less a police regulation. The State having the right to prohibit or regulate this traffic, it has the right to authorize its municipalities, which are subdivisions and a part of the State, to do so. This is the settled doctrine in this State, and (214) every town has this taxing power (where the sale is not prohibited), and the most, if not all of them, are exercising this power.

Its sale is entirely prohibited by means of special legislation in many towns and localities. This is done under the exercise of the police power, owing to the evil tendency of the business, and could not be done to other legitimate businesses which have no evil tendencies.

It, therefore, only remains to be seen whether the fact that the intestate's business was outside of the corporate limits, but within one mile of them, makes any difference; or, in other words, whether the Legislature could restrict the sale for one mile around the city limits, unless the party engaging in it procured a license from the city authorities. It seems to us that the statement of this proposition affords the answer, in the affirmative. The Legislature may prohibit such sales in the whole State, or any part of its territory. It had the right to have absolutely prohibited the intestate, or any one else from selling liquor within one mile of the corporate limits of the city of Raleigh. *This it did,* unless the party selling obtained a license—permission to do so—from the city authorities. And instead of this right to do so with the permission of the city authorities being a restriction, its effect was to relax the prohibitory rule, and to grant him a right he did not otherwise have. The law allowing him to get a license from the city took nothing from him, imposed no duty upon him; it only gave him an *option,* a right to take the license and pay the tax, or not. How he was damaged by having this privilege, this option, which he chose to accept, we are unable to see. But it seems to us that there were good reasons for this provision in the law requiring those carrying on this business within one mile of the city limits to pay the tax. The liquor traffic was restricted in the city by the imposition of a tax and a
(215) license; and it would have been a poor protection to the city to regulate and restrict its sale in the city, when by crossing the line it could be sold without restriction. It was probably thought to be too stringent not to allow any sales to be made within the suburban territory, and this provision put them on the same footing with those doing business within the city limits.

It was contended that it was unjust, because the intestate did not have the protection of the city government. But it does not seem to us that this argument helps the plaintiff, when it is seen that the object of the restriction was to protect the city. It is said, in *Emerich v. Indianapolis,* 118 Ind., 279: "It is now established law that the Legislature has power to impose restrictions upon the sale of intoxicating liquors, and to empower municipal corporations to lay a *special license tax* upon persons engaged in the business of dram selling—citing *Lutz v. Crawfordsville,* 109 Ind., 466; *Frankfort v. Aughe,* 114 Ind., 77. The Legislature has powor, as was demonstrated, to determine *over what territory* the jurisdiction of a municipal corporation shall extend. The

liquor sellers are subject to the payment of a *special tax,* because the object of this class of legislation is to restrict the business, and not because its object is to secure to the liquor sellers the *benefit of protection of municipal government.* The liquor seller is compelled to pay a *special tax* in the form of a *license fee,* in order that the business may be restricted to fewer persons. . . . The theory of the legislation on this subject is that the business is one which requires restraint, because it is *harmful to society.* . . . There is, therefore, no just reason for affirming that a person who can secure *no benefit from the municipal government* should be exempt from the special tax imposed upon those who engage in the business of selling liquor." (The italics in the above quotation are ours.)

Black on Intoxicating Liquors, sec. 229, says: "A license ordinance is effective as against one selling liquor within the territorial jurisdiction of the municipality, *though outside its corporate* (216) *limits.*" (Italics ours.)

In *Lutz v. Crawfordsville,* 109 Ind., 467, where the Legislature authorized that city to tax dealers in intoxicating liquors in said city and for two miles outside of its corporate limits, the act was held to be valid, the Court saying: "The grant of authority to regulate is generally construed as conferring an *incidental power, the authority to exact a license tax,* . . . and the Legislature has power to determine what the territorial jurisdiction of the political subdivisions of the State shall be. *Judge Dillon* says, with the exception of certain constitutional limitations presently to be noticed, the power of the Legislature over such corporations is supreme and transcendent; it may erect, change, divide, and even abolish them at pleasure, as it deems the public good to require. And it is certainly within the power of the Legislature to declare that no unlicensed dram-shops shall be kept within a designated distance of a few feet of the corporate limits. . . . If the Legislature has any power at all to designate limits over which the restriction of municipal corporations shall extend, then, necessarily, the subject must be within its discretion, and if this be so, *its judgment upon the question shall be conclusive.*" These authorities are in harmony with *Broadfoot v. Fayetteville,* 121 N. C., 418, 39 L. R. A., 245, 61 Am. St., 668.

We think we have successfully shown by reason and authority that the city of Raleigh had power to grant the plaintiff's intestate the license it did to sell liquor outside the corporate limits, and to receive from him the taxes he paid therefor; and that the defendant is under no legal, equitable or moral obligation to return or pay them back. The defendant, in our opinion, had the same authority and right to receive this tax from the plaintiff's intestate, upon issuing license to him, that

it had to receive the tax from any liquor dealer within the corporate limits, upon issuing to him a license. If the Legislature can require the city to pay this claim of the plaintiff, it might be required (217) to return to every liquor dealer in the city every dollar it has received from them for liquor licenses, if the Legislature should so direct, by passing a similar statute to that effect. We are, therefore, of the opinion that the plaintiff has no cause of action and can not recover. The judgment of the court below is reversed.

DOUGLAS, J., *dubitante.*

Cited: *S. v. Ray,* 131 N. C., 817; *Paul v. Washington,* 134 N. C., 371, 386.

ARMSTRONG v. STEDMAN.

(Filed 22 April, 1902.)

Taxation—Restraining Collection—Injunction—Laws 1901, Ch. 558, Sec. 30.

Where a complaint alleges a tax is illegal and no answer is filed thereto, the collection of the tax should be restrained until the final hearing, under Laws 1901, ch. 558, sec. 30.

ACTION by J. S. Armstrong and others against F. H. Stedman, sheriff, and others, heard by *Allen, J.,* at December Term, 1901, of NEW HANOVER. From judgment for the defendants, the plaintiffs appealed.

E. K. Bryan for plaintiffs.
Rountree & Carr for defendants.

MONTGOMERY, J. This is an action in which the main relief sought by the plaintiffs is an injunction to perpetually restrain the defendant Stedman, Sheriff of New Hanover County, and collector for the city of Wilmington, from collecting certain taxes assessed by the proper authorities of New Hanover County, and by those of the city of Wilmington, for 1891.

In the first cause of action, the relief is sought because of (218) alleged invalidity of the entire Revenue Act of 1901; in the second cause of action the assessment of the taxes therein mentioned was alleged to be void because the taxing authorities refused to allow the plaintiffs a deduction of their indebtedness against shares of

bank stock owned and held by them; and in the third cause of action it is made a matter of complaint that the refusal of the taxing authorities to allow plaintiffs' deduction on account of their indebtedness from the value of their shares of bank stock, was an unjust discrimination against their stock, the result being that the assessment of their property was at a greater rate than that assessed on the money capital, which was employed in competition with the banks in which the plaintiffs held their stock, and from which deductions were allowed for the indebtedness of the owners.

The plaintiffs further alleged that they have tendered to the sheriff and tax collector such taxes as might be due and as were assessed in 1900, or to pay on the basis of the assessment for 1901 if they should be allowed to deduct their indebtedness from the assessed value of their shares of stock.

At the return term of the summons an application for a restraining order was made by the plaintiffs' attorney, and the same was heard on the complaint, treated as an affidavit—no answer having been made by the defendant, nor any affidavits filed. The following judgment was rendered: "This cause coming on to be heard upon the complaint filed herein, which is exhibited to the undersigned as an affidavit, and it appearing to the court that plaintiffs seek to restrain the Sheriff of New Hanover County, and the city of Wilmington, from collecting certain taxes upon the ground, first, that they are required to list their own shares of bank stock without being allowed to deduct from said shares debts due and owing by them, and second, that the Revenue Law was not passed in accordance with the provisions of the Consti- (219) tution. And it appearing to the court that the requirements complained of are neither unreasonable, unjust, nor against conscience, and being of opinion that the courts of the State should not interfere by injunction with the collection of taxes which are necessary for the subsistence of the Government, when it would tend to serious and grave consequences, therefore, without passing upon the legal questions involved, it is considered that the said application for a restraining order be and the same is refused."

There was error in the judgment. An order should have been made restraining the defendant from proceeding further until the hearing of the matter embraced in the plaintiffs' first cause of action. The legal question embraced in that cause of action was a matter which the laws of the State gave the plaintiffs the right to have determined in the courts; and in that determination it was also given the right to bring to their aid relief by injunction. The Revenue Acts from 1889, including those of 1901 (ch. 558, Laws 1901, being considered a part of the Revenue Law), provided that injunctive relief might be had if the tax should be "illegal

or invalid," or the "assessment be illegal or invalid." Was the tax on the assessment of 1901 illegal or invalid? The plaintiffs, in their complaint, allege that both were invalid and illegal, because the Revenue Act of 1901 was not passed as required by the Constitution, Art. II, sec. 14. The allegation of the complaint on that point is clear and without qualification, to wit: "Third. That the plaintiffs are informed and believe, and so allege, that the said Revenue Law under which the county commissioners of the county of New Hanover and the city of Wilmington proceeded to levy taxes against the property of these plaintiffs, was not passed by the Legislature of North Carolina in session for 1901, as required by the Constitution and laws of the State of North Carolina,

(220) in that the said Revenue Law was not read three several times on three several days in the House of Representatives and in the Senate of North Carolina, and the yea and nay vote taken and recorded on the journals of said Senate and House, and the plaintiffs are informed, advised and believe that the action of the county commissioners of the county of New Hanover and the authorities of the city of Wilmington, in levying the tax upon the property of these defendants, was absolutely null and void and of no effect." There was no denial, as we have said, of that allegation, by answer or affidavit, and under all the precedents, the restraining order should have been granted.

If there had been a denial of the matters stated in the complaint, either by answer or affidavit, the judgment of his Honor refusing the restraining order would have been a correct one. It could not be expected that any judge would restrain the collection of taxes in a case where the allegations of the complaint had been met by full and complete denial on the part of the defendant.

The importance of collecting taxes for the support of government is known and acknowledged by every one, but in all cases where the statutory law gives a right and a clear remedy to those who pay the taxes and support the Government to question the validity of the taxes and their assessment, the courts must protect those rights by administering the remedy. Of course, if the Revenue Act of 1901 was not passed according to the constitutional requirements it contains no power to tax, and any assessment of taxes under it would be a nullity.

In the brief of the counsel of the appellee defendant, it is stated that the right of injunctive relief when the tax was "illegal or invalid," or the "assessment be illegal or invalid," was omitted by the act of 1901, and that, therefore, it must be assumed that the omission was intentional, and for the purpose of preventing an injunction. Upon examination,

(221) however, we find that provision, in the exact words of all the acts since 1889, in section 30, chapter 558, Laws 1901, entitled "An act to provide for the sale of property for taxes."

Hall v. Fayetteville, 115 N. C., 281, cited by counsel of appellee, has no bearing on this case. The judge who wrote that opinion, it is true, referred to the case of *R. R. v. Reidsville,* 109 N. C., 494, but that opinion was founded on the Revenue Act of 1887, which did not contain the rights and remedies given under all the acts from 1889 to the present.

Error.

Cited: Ins. Co. v. Stedman, post, 223; *Purnell v. Page,* 133 N. C., 129; *Sherrod v. Dawson,* 154 N. C., 529.

WILMINGTON UNDERWRITERS INSURANCE COMPANY v. STEDMAN.

(Filed 22 April, 1902.)

Taxation—Privilege Taxes—Gross Receipts—Laws 1901, Ch. 9, Sec. 78.

Under Laws 1901, ch. 9, sec. 78, the tax on the gross receipts of an insurance company is a privilege tax, and a county may levy an *ad valorem* tax on the property of such company.

ACTION by Wilmington Underwriters Insurance Company against F. H. Stedman, sheriff, heard by *Allen, J.,* at chambers at Lillington, N. C., 12 February, 1902. From a judgment for the defendant, the plaintiff appealed.

E. S. Martin for plaintiff.
Rountree & Carr for defendant.

MONTGOMERY, J. The plaintiff, a corporation doing a fire insurance business in Wilmington, with a capital stock of $50,000, had, on 1 June, 1901, $42,000 thereof invested in notes, bonds and mortgages, and, under protest, listed for taxation, for State and county purposes, the notes, bonds and mortgages as its personal property. The county commissioners of New Hanover were afterwards requested by the plaintiff to strike from the tax list the property, or the assessment made upon it, which request was refused, and the sheriff was proceeding to (222) collect the same when this action was commenced to have the assessment and tax declared invalid or illegal, and for injunctive relief. The restraining order which had been granted on the application of the plaintiff was dissolved and an injunction refused, from which order and judgment the plaintiff appealed to this Court.

The plaintiff's contention is that the whole and all of the taxes, which were authorized to be levied or assessed against it for the year 1901,

were embraced in section 78 of chapter 9 (Revenue Act) of that year, and that the tax complained of was not only not authorized by that section, but was contrary to its provisions.

That section provides that for each license issued to a fire insurance company, the company shall pay a certain specific amount—a privilege tax.

It is also therein provided that a tax of two and a half per centum upon the amount of its gross receipts in this State shall be paid. Then follows a proviso reducing both the tax on gross receipts and the license tax, or fee, in case the company should show to the Insurance Commissioner that it had invested certain portions of its assets in municipal bonds, or any property situated in this State and taxable therein, and declaring that it should not be liable for tax on its capital stock, and that no county or corporation should be allowed to impose an additional tax, license or fee.

The defendant insists that the proper construction of section 78, it being under Schedule B, is that all of the taxes mentioned therein constitute a privilege or license tax; that no tax can be collected or assessed against the capital stock of the company, because the section prohibits such a tax; and that no county or corporation can assess or collect any other privilege tax, but that the personal and real property of the company is taxable.

(223) We are of opinion that the defendant's position is the true one. The tax complained of is not a tax on the capital stock. The capital stock of a corporation is the aggregate sum subscribed and paid in, or to be paid in by the shareholders, with the additional profits on the residue after the deduction of losses. *People v. Commissioners,* 23 N. Y., 192.

Our construction of section 78 is consistent with the Constitution, Art. VII, sec. 9: "All taxes levied by any county, city, town or township, shall be uniform and *ad valorem* upon all property in the same, except property exempted by this Constitution." Our construction is also supported by and meets the requirements of section 3 of the Revenue Act (Laws 1901, ch. 9), which directs the levying and collection annually of an *ad valorem* tax of certain rates on real and personal property in this State required to be listed in the Machinery Act, ch. 7, sec. 23. The last-mentioned section requires the owner of property to list all his real and personal property, money, credits, investments in bonds, stocks, etc. Taking all the foregoing sections of the Revenue Act of 1901 together, we are satisfied that their true construction is that in case insurance companies perform the requirements and take the benefits of section 78, they are released and relieved of a tax on their capital stock, which not infrequently is to a considerable extent artificial in that it stands for

larger amounts than have ever been paid in, or probably may ever be, or, if paid in, have become worthless as a true investment. The Legislature is presumed to have knowledge of such not unlikely conditions, and to favor insurance corporations to the extent mentioned in section 78, and that, too, without the least intention to relieve them from the payment of taxes *ad valorem* upon their real and personal property, uniformly with other taxable property, as required by the Constitution.

In *Armstrong v. Stedman, ante,* 217, we held that injunctive relief may be invoked by a taxpayer in cases where the tax or the assessment is invalid or illegal, and our reasons were given in that case. (224)

We have decided this case on the merits, as they appear to us from the complaint treated as an affidavit and not denied by answer or affidavit.

No error.

Cited: Sherrod v. Dawson, 154 N. C., 529.

BRINKLEY v. SMITH.

(Filed 22 April, 1902.)

Appeal—Transcript of Record—Marginal References—Numbering Exceptions—Supreme Court Rules—Rule 19, Subsecs. 2, 20 and 21.

There must be printed on the margin, or as subheads, of each transcript of record a brief statement of the subject matter contained therein, and such marginal references or subheads embrace also the duty of numbering the exceptions.

ACTION by B. W. Brinkley against Henry Smith, heard by *McNeill, J.,* and a jury, at May Special Term, 1901, of COLUMBUS. Referred to clerk of Superior Court to make marginal references.

C. C. & H. L. Lyon for plaintiff.
J. B. Schulken for defendant.

CLARK, J. The rules of this Court require that marginal references shall be made to the subject-matter necessary to be considered in the discussion or decision of the appeal, Rule 19 (2); that if this is not done the case may be dismissed or put to the end of the district or end of the docket, or continued, as the Court may deem best, and if not dismissed the record shall be referred to the clerk, or some one else to put it

(225) in proper shape, with an allowance of $5 therefor, for which execution against the appellant may immediately issue, Rule 20; and that a case will not be heard till the marginal references to such parts of the text as are necessary to be considered in the decision of the case have been inserted, Rule 21. It is further required that such marginal references shall be printed, though for economy they can, if desired, be printed as subheads, Rule 28; *Baker v. Hobgood,* 126 N. C., at page 152. Such marginal heads embrace the duty of numbering the exceptions. These marginal references, including numbering the exceptions, are essential to the proper consideration of appeals, and to facilitate the labors of the Court amid the constantly growing volume of business. The Court found this requirement indispensable, or it would not have been formulated as a rule. This requirement it is to the interest of appellants to observe for the more intelligent consideration of their appeals, independently of the penalty prescribed for failure to do so. It was well said by *Merrimon, J.,* in *Walker v. Scott,* 102 N. C., 490: "The impression seems to prevail to some extent that the *Rules of Practice* prescribed by this Court are merely directory—that they may be ignored, disregarded or suspended almost as of course. This is a serious mistake. The Court has ample authority to make them (Constitution, Art. IV, sec. 12; *Rencher v. Anderson,* 93 N. C., 105; *Barnes v. Easton,* 98 N. C., 119). They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Court will certainly see that they have effect and are duly observed whenever they properly apply."

In the present case the exceptions are not numbered, nor is there reference to them either in the margin or as subheads, nor are there any other marginal references. The cause will be referred to the clerk of this Court to insert the necessary marginal references, for which (226) he will be allowed $5, and (as the record is already printed) the same will be printed at the cost of the appellant and attached to the record already printed, making references to the printed pages where each subject-matter is to be found. Notice of the expenditure thus necessitated, including the $5 allowance, will be issued to the appellant, and if not paid in time to have the corrections made and printed before the cause is reached in regular course at next term, it will then stand dismissed.

If it is made to appear to the Court in any case that the failure to comply with the Rules is not a mere inadvertence (as in this case), but is done purposely for delay, the appeal will be dismissed, as the rule permits.

In *Alexander v. Alexander,* 120 N. C., 474, the Court gave notice that compliance with this rule would be exacted, and this was reiterated at

next term in *Lucas v. R. R.*, 121 N. C., 508. In fact, it is generally observed, and the failure to do so in this instance is doubtless an inadvertence, and therefore the lightest penalty is imposed. The Court having found it necessary to prescribe the rule, it is necessary to exact its observance in every case. This requirement must be observed in pauper appeals as well as others, for the exemption in pauper appeals is only from the requirement of printing the record. The cause is continued.

Referred to the clerk.

Cited: S. c., 131 N. C., 130; *Purnell v. Page*, 133 N. C., 129; *Sigman v. R. R.*, 135 N. C., 182; *Sherrod v. Dawson*, 154 N. C., 529.

(227)

HYBART v. JONES.

(Filed 22 April, 1902.)

Dower—Waste—Heirs—Counterclaim—The Code, Sec. 629.

In a suit by a widow against the heirs to recover payments allotted to her as dower and made a charge on the land, the heirs can not set up by way of counterclaim damages for waste committed by the widow, but must proceed under the statute.

ACTION by Delia J. Hybart against Eliza A. Jones and others, heard by *Robinson, J.*, at February Term, 1902, of CUMBERLAND. From a judgment for the defendants, the plaintiff appealed.

Sinclair & Bolton and T. H. Sutton for plaintiff.
J. W. Hinsdale & Son for defendants.

MONTGOMERY, J. The dower of the plaintiff was allotted to her in 1889, in proceedings *ex parte* by her and the heirs at law of her deceased husband. The commissioners, in their report, allotted to her a small farm of her husband, and, to make up her full dower, further charged upon the balance of the real estate of her husband the payment of all the taxes to become due on the entire estate and the payment to her of $5 per month, to be a charge on certain storehouses belonging to the estate. The defendants, the heirs at law, are now nonresidents of the State of North Carolina.

The monthly payments were made regularly for some time, but for nearly two years past nothing has been paid on that score, and this action was brought to subject the realty in the possession of the heirs to the

payment of the amount due. There was a prayer for a receiver to take possession of the property, for the purpose of renting it and applying the rents to the amount due, and also to those amounts which may (228) become due in the future during the life of the plaintiff.

In their answer the defendants set up a counterclaim, in the nature of damages for alleged waste committed by the plaintiff on the premises allotted her as dower. There was a demurrer on the part of the plaintiff, which being overruled by the court, the plaintiff appealed.

We think the demurrer should have been sustained. The manner of the allotment of dower was unusual, but, as all the parties interested were satisfied with it, we will not disturb it. The amount charged monthly on the storehouses to make up the deficiency in dower is in reality as much a part of the estate in dower as the land which she was put in possession of; and we think the heirs at law, who are in possession of the storehouses upon which the monthly payments are charged, should promptly pay the same under the provisions of the allotment. If waste has been committed by the plaintiff, they have their remedy under section 629 of The Code. *Sherrill v. Conner,* 107 N. C., 543.

The widow's right to her dower in the manner and form as it was allotted should not be contested under the plea that she has committed waste on a part of the dower premises.

We are not deciding this case on the question whether or not the counterclaim, as set up in the answer, is strictly a counterclaim under The Code, but upon the ground that a sound public policy will not permit any claim of the heir at law for waste against a widow to be made, except in proceedings in an action instituted for that purpose under the statute. Code, sec. 629. Judgment should have been rendered for the plaintiff according to the prayer of the complaint. Probably it would be best to provide, in the judgment, that unless the amount due to the plaintiff should be paid within a reasonable time, to be determined by the court, then that the receiver should proceed under the judgment. This is merely a suggestion to the court below, to be followed or not, as may (229) appear best under facts that may be brought to the attention of his Honor who may preside.

Error.

MOORE v. NAVASSA GUANO COMPANY.

(Filed 29 April, 1902.)

1. Findings of Court—Affidavits—Appeal.

Where the trial judge sends up with his findings of fact affidavits, such affidavits will be taken as a part of the findings of the court.

2. Jury—Array—Challenge—Verdict.

A failure to sustain a proper challenge to the array renders the verdict void.

3. Jury—Drawing—County Commissioners—Panel—The Code, Sec. 1727.

Section 1727 of The Code, requiring persons named on the scrolls drawn from the jury box to constitute the jury, is mandatory.

ACTION by Francis M. Moore against the Navassa Guano Company, heard by *McNeill, J.*, and a jury, at September Term, 1901, of BRUNSWICK. From a judgment for the plaintiff, the defendant appealed.

Meares & Ruark and Bellamy & Peschau for plaintiff.
Russell & Gore and Rountree & Carr for defendant.

FURCHES, C. J. The Court being of opinion that the defendant's challenge to the array (which is defendant's first assignment of error) should be sustained, no other exception will be considered.

The defendant's challenge and motion to dismiss the panel is based on two affidavits—one by C. E. Taylor, register of deeds (230) and clerk of the board of county commissioners, and the affidavit of T. L. Vines. The judge finds but one fact: "That the commissioners in drawing the jury, and in acting as set out in the affidavits, did not have any corrupt intent, and counsel for defendant in arguing on the challenge stated that they did not charge any corrupt intent." But the court in this finding refers to the affidavits, "*in acting as set out in the affidavits,*" and transmits them to this Court as a part of the record on appeal. They are not contradicted, and therefore must be taken as true and as a part of the findings of the court.

We, then, have the findings of the court in substance to be: That the county commissioners of Brunswick County, in August, 1901, met and proceeded to draw the jury, now objected to by the defendant; that the register of deeds, who was clerk of the board, and the sheriff of the county, and a boy under ten years old, and T. L. Vines were present. The drawing then proceeded—the boy drawing the scrolls from No. 1 of the jury box and handing them to the chairman. The names were then discussed, as to whether they should be jurors or not, and as many as ten or more of the names so drawn were rejected and returned to box No. 1.

The affidavit of Taylor states that the object seemed to be to distribute the jurors to the different townships, and not to have them too near those already drawn. The affidavit of Vines states "that said S. J. Stanly, commissioner, objected to a number of names in Shallotte Township, which were drawn from the box, and said names were discarded and

returned to box No. 1, and Sheriff Walker objected to several from Town Creek Township; when the name of Monroe Hickman was drawn, some one said, 'He is right there among the rest,' meaning that he was from the same community or neighborhood as others whose names had
(231) been drawn, and Commissioner Stanly replied, 'I want him,' and his name was placed on the list; that Stanly's own son was selected because he (S. J. Stanly) said he wanted to come to Southport so bad we had better take him." These are to be taken as the facts connected with drawing the jury, and that there was no "corrupt intent."

A challenge to the array is a challenge to the entire panel summoned and returned by the sheriff as jurors, and, if allowed, the entire jury or panel is discharged; if not allowed when it should have been, it vitiates and renders void the trial by a jury selected from this improper array. This objection to either the panel or challenge to the array "can only be taken (sustained) when there is partiality or *misconduct* in the sheriff, or some irregularity in making out the lists." *S. v. Speaks,* 94 N. C., 865. Section 1727 of The Code provides for drawing juries, and is as follows: "At least twenty days before the regular fall and spring terms of the Superior Court in each year, the commissioners shall cause to be drawn from the jury box, out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls, and the persons whose names are inscribed on said scrolls shall serve as jurors at the fall and spring terms of the Superior Court to be held for the county respectively ensuing such drawing, *and the scrolls so drawn to make the jury shall be put into the partition marked No. 2.*" It can not be contended, and was not contended, that there were not manifest *irregularities* in drawing this jury, and, under the rule stated in *S. v. Speaks,* the defendant's motion should have been sustained and the panel discharged.

But the plaintiff says this statute is only directory—not mandatory—and this being so, the court should not have sustained the defendant's challenge to the array, and cites *S. v. Haywood,* 73 N. C., 437; *S. v. Martin,* 82 N. C., 673; *S. v. Hensley,* 94 N. C., 1021; *S. v. Stan-*
(232) *ton,* 118 N. C., 1182; *S. v. Smarr,* 121 N. C., 669; *S. v. Fertilizer Co.,* 111 N. C., 658; *S. v. Perry,* 122 N. C., 1018. We have examined these cases, and several of them state that this statute is directory, and irregularities of the commissioners in drawing the jury will not sustain a challenge to the array. *S. v. Haywood,* first cited by plaintiff, is decided upon the ground that the motion was not made in time; and while it speaks of section 229 of the Code of Civil Procedure not being mandatory, it seems to put this upon the terms of that section, which is said to expressly provide that irregularities in drawing the jury shall not vitiate the jury. And to leave no doubt as to this, he quotes the statute as follows: " 'In all cases where the county commis-

sioners of any county may have revised the jury lists or corrected the same, or drawn a jury at a time or in a manner different in form from that prescribed by law, shall be valid as if drawn at the proper time and in the proper manner: *Provided,* said action has been in all other respects conformable to law.' This proviso does not cover our case. If a person not on the jury list should be summoned, or one not qualified as a juror, such irregularity could not be 'conformable to law,' and would fall within the provision, and, if objected to in apt time, would probably be fatal to the indictment found." It clearly appears that what the learned judge said, as to irregularity not vitiating, is put upon the provisions of the statute at that time, which seems to have been omitted in The Code of 1883. And it is said in that opinion that such irregularities, as were included in the proviso, would not be "conformable to law," and would vitiate the jury.

The statute in force when the opinion in *S. v. Haywood* was written seems to have been still in force when the opinion in *S. v. Martin,* 82 N. C., 673, was written; and it is probable that that statute and the opinion of the Court in *S. v. Haywood* influenced the Court, in that case, to say what it did as to the statute being directory—as it was not necessary to the decision of the case to have discussed the (233) statute, and this is shown in the opinion. This case (*S. v. Martin*) is the strongest case in support of the plaintiff's contention of any of the cases cited. But this case goes a bowshot beyond that case. It is true that the statement of facts in that case shows that the commissioners undertook to equalize the jurors in the different parts of the county. This we do not approve, and think the commissioners in that case exceeded their legal authority, and if the case had depended upon that fact, the motion should have been allowed.

But in this case, while the commissioners professed to do what they did for the purpose of distributing the jury over the county, they violated this rule which they had officiously adopted, and took two jurors from the same locality, from which they had rejected other jurors who had been previously drawn. S. J. Stanly, who was one of the commissioners, objected to a number of names, drawn by the boy, who lived in Shallotte Township, and the scrolls containing their names were put back into box No. 1, and Sheriff Walker objected to several names from Town Creek Township. When the name of Monroe Hickman was drawn, some one said: "He is right there among the rest"—that is, others who had been drawn and rejected—when Commissioner Stanly said, "I want him," and his name was listed as one of the jurors. Stanly's son was selected and taken because Stanly said, "He wants to come to Southport so bad we had better take him."

In every case cited for the plaintiff in which the court had refused

the motion to discharge the jury on account of irregularities on the part of the commissioners in drawing the jury, the action of the commissioners has been severely criticised and condemned. But this has done no good, and, instead of their improving, they have grown from bad to worse, until, in this case, they have in effect done
(234) away with the ten-year-old boy and selected the jury themselves, allowing the sheriff to put in his objection. *Cui bono* to have a boy under ten, if the names he draws are to be rejected, or sorted from, by the commissioners?

The plaintiff says that the court has found that there was no corrupt intent on the part of the commissioners; and that being so, the motion of the defendant was properly refused. It is true that in all the cases cited where a challenge to the array was made on the ground of irregularity and refused, the court has said there did not appear to have been any corrupt intent. But this does not show that the motion should not be allowed unless there is a corrupt intent found, as we can not think that any court would refuse such a motion where a corrupt intent was found to exist on the part of the commissioners in manipulating the drawing of the jury. This is shown by what is said in *S. v. Haywood,* where the Court says that if one was summoned who was not on the jury list, or one not qualified as a juror, such irregularity would not be "conformable to law," and would probably vitiate their action. And yet this might be done without any corrupt intent. In *Boyer v. Teague,* 106 N. C., 576, the plaintiff challenged the array, and the judge sustained the motion and discharged the panel. In doing this, *Brown, J.,* found the facts upon which he acted; and upon the facts found it appeared that the defendant, Teague, was sheriff of the county, and the commissioners were in regular session, when Teague entered the commissioners' room with the jury box and a boy under ten years of age, when the commissioners proceeded to draw the jury—the boy drawing the scrolls one by one from box No. 1, handing them to the sheriff, and he read out the names, and the commissioners wrote them down. This was so, with the exception of a few of the names drawn, when the sheriff could not read them, and handed them to some of the commis-
(235) sioners to read. They had been drawing the jury out of box No. 1 for some years without its becoming exhausted, Forsyth being a large county. A short time before this a part of Davidson County had been added to Forsyth and erected into Clemmonsville Township, and the names of jurors from that new territory and township had been put in box No. 1; and the result was that in drawing the jury a large number of them were from that township. The plaintiff, Boyer, had been sheriff of Forsyth County for four years preceding the defendant, and he used to be present generally with the commissioners when the

jury was drawn, and sometimes read out the names on the scrolls and sometimes the commissioners read them, but plaintiff stated that he then had no suit in court or case on docket; and the court stated in sustaining the plaintiff's challenge to the array, that he did not find any actual intentional fraud, but that it was very irregular and gross negligence for the commissioners to allow the defendant, Teague, to participate in the way he did—that is, to allow Teague to read the scrolls and put them in box No. 2, without examining the scrolls to see if they had been correctly read. And this Court, in considering the case on appeal, said his Honor did not proceed upon the idea that there was fraud, but that there might have been. We only cite the case to show that this Court has sustained a challenge to the array where there had been no fraud shown, and where the judge, in sustaining the challenge to the array, stated that he had found none, but found "gross negligence and irregularity in the action of the commissioners."

So it appears to us, after a careful examination of the authorities, that so far as the action of the commissioners, as to time and place of drawing the jury or revising the jury list is concerned, the statute is considered directory; and while it is their duty to do these things at the time and place the law directs them to be done, still, if they are not done when and where they should be, but are *properly done* at another time and place, they will be treated as irregularities. (236) This is because the law directs the commissioners to perform these duties, and to prevent delay in the administration of justice such acts are held to be directory, and where no injustice appears to have been done by such irregularity, the court will, it seems, not make such irregularity a cause for discharging the panel. But where they *assume to do things that they have no right nor authority to do,* whether at the time appointed by law or at any other time, such acts will not be held to be an irregularity, but officious, unauthorized acts on their part, and will, if properly objected to, vitiate the panel so drawn. *It was no part of the duty of the commissioners to draw the scrolls from the box.* In fact, the law did not allow them to do this, as it provides that it should be done by a person under ten years of age. But had they not as well draw the scrolls from the box as to pass upon and reject such as they saw proper to reject after they were drawn? Indeed, it was worse than if they had drawn them. It was a selection by them of such jurors as they wanted. When a juror was drawn from a locality that they had decided was getting too many jurors, and a proposition was made to discard him on that account, one of the commissioners said, "I want him," and his name was put on the list. And when a son of one of the commissioners was drawn and taken, "because he wanted to come to Southport so bad." Even the sheriff of the county was allowed to make

such objections as he thought proper. These acts go far beyond what can be termed irregularities, further than any reported case goes—further than *S. v. Martin,* further than *Boyer v. Teague.*

In *Boyer v. Teague* the jury seems to have been regularly drawn in every respect except that the defendant, who was sheriff and had a suit pending involving his office, was allowed by the commissioners to read the scrolls drawn by the boy, and put them in box No. 2 without (237) the commissioners reading them. The court found that this was "gross negligence" on the part of the commissioners, for which he sustained plaintiff's challenge to the array and discharged the panel. If that was sufficient cause, and the action of the judge below was sustained by this Court, should not the motion have been sustained in this case? Is not this a much stronger case for the defendant than *Boyer v. Teague?* This kind of business on the part of commissioners must stop somewhere.

The motion of defendant should have been allowed, and the panel discharged.

Error.

Cited: S. v. Dixon, 131 N. C., 810; *S. v. Daniels,* 134 N. C., 651; *S. v. Teachey,* 138 N. C., 591.

EX PARTE WATTS.

(Filed 29 April, 1902.)

1. **Wills—Alienation—Limitation.**

Where a woman devises a house and lot to her four children as "a common home, with equal rights to the same until twenty-one years after the death of herself and husband," and that "then they and their heirs are to own said house and lot in fee simple," the restriction is valid and the property can not be sold until time limited has expired.

2. **Curtesy—Husband and Wife—Married Woman—Constitution 1868, Art. X, Sec. 6.**

Where a wife dies testate, the husband has no interest in her real estate.

ACTION by R. H. Watts and others against W. H. Godwin, heard by *Robinson, J.,* at September Term, 1901, of WAYNE.

This is a proceeding to compel the purchaser at a sale made by order of the court to comply with the terms of his purchase. He declines to do so on the ground that he can not get a good title.

Fannie Watts, wife of the petitioner R. A. Watts, Sr., and mother

of the other petitioners, except Jack Hedrick, who joins in (238)
behalf of his wife, died leaving a will, of which the following are
parts material to this controversy:

"1. I give and devise to my beloved children, Frank Watts, Eugene Watts, Florine Watts and Sam Watts, the house and lot whereon I now live, to own in the following manner:

"They shall own said house and lot as a common home for themselves, and with equal rights to and in the same, until twenty-one (21) years after the death of both their parents; then said Frank Watts, Eugene Watts, Florine Watts and Sam Watts, and their heirs, shall own the said house and lot in fee simple. The room in the aforesaid house known as the Andrew J. Flanner room I reserve for the use of my son Andrew J. Flanner until twenty-one (21) years after the death of my husband and myself. During such time my son Andrew shall have the personal use only of the said room.

"My will is that in the event that the house and lot should be destroyed by fire, the insurance on same shall be used to build another house on said lot.

"IX. I devise and bequeath that when my $1,000 stock in the Old Dominion Building and Loan Company, of Richmond, Va., is matured or collected, that my executor shall purchase from the proceeds of same a house and lot in the city of Goldsboro, and the rents of same shall be used to pay the insurance and taxes on the dwelling in which I now live until twenty-one (21) years after the death of myself and husband, R. A. Watts; then the said lot and interest so purchased shall go to my daughter Florine and my sons Eugene Watts and Sam Watts, they being my youngest children.

"X. Should my sons Frank, Eugene and Sam at any time marry common women, or either of them marry a common woman, then in such event they shall not have any interest in the house and lot devised in paragraph first of this will."

Among the allegations in the petition are the following: (239)

"5. That said house and lot is the only property of any description owned by said petitioners, and is now occupied by said petitioners and father, R. A. Watts, Sr., as a home.

"R. A. Watts, Sr., is a man of limited means; that said lot is a very valuable one, and the house thereon a large and expensive one, much too large and expensive lot for the petitioners to occupy solely as a home; that a much smaller and less expensive house would be better suited to their condition and estate; that the interest of said petitioners would be greatly enhanced and subserved by a sale of said lot; that W. H. Godwin has offered to buy said lot at the price of forty-three hundred dollars ($4,300), which is a fair and reasonable price for same; that owing

to the character of the property and the number of the owners, it is impracticable to divide said land in specie.

"Wherefore, your petitioners pray that they may be allowed to sell the said lot to W. H. Godwin, at said price, and that a commissioner be appointed to convey the same in fee simple to W. H. Godwin upon payment of said price; that the purchase price be paid into the office of the clerk of the Superior Court, to be held for the use of the devisees of said will, on the same terms and with the same limitation as said lot is now held, until further orders herein, and your petitioners ever pray that the petitioners be allowed to take their shares in said proceeds in severalty."

In his answer refusing to take the land, Godwin, among other things, alleges:

"III. That he is advised and believes that said deed from E. A. Humphrey, commissioner, would not convey a title in fee to said lot, for the following reasons:

"(5) Because it appears by the petition that the petitioners derived their interest in said lot from the first item of the will of Fannie Watts, deceased, and it appears from said item that said lot was to (240) be kept as a common home until twenty-one (21) years after the death of both their parents, and it not only fails to allege that such time has expired, but it appears from the petition that one of the parents, R. A. Watts, Sr., is now living.

"(6) Because it appears from the petition, upon the construction of the will of the said Fannie Watts, that the petitioners have not now a present interest in the said land which is subject to sale.

"Because it appears from the tenth item of the will of Fannie Watts that the interest of Frank, Eugene and Sam is a contingent interest, subject to be defeated.

"(7) Because the petitioner R. A. Watts, Sr., on 24 December, 1897, executed and delivered to A. J. Flanner, executor of Fannie Watts, deceased, a mortgage, whereby he conveyed to said Flanner, executor, all his right, title and interest in the lands described in the petition, to secure the sum of twenty-four hundred dollars ($2,400), therein recited to be due said executor, and said mortgage remains unsatisfied of record and is an encumbrance upon the lands, which mortgage was on said day duly proved and registered in Wayne County, N. C.

"(8) Because, on 24 December, 1897, the said R. A. Watts, Sr., executed an assignment of all his property, including his right, title and interest in said land, to M. E. Robinson, for the payment of the creditors of said R. A. Watts, Sr., which is unsatisfied of record, and, the said W. H. Godwin is informed and believes, and so alleges, that the said trust has not been closed, and that the existence of the same is an

encumbrance upon the said land, which said deed was on said day duly proved and registered in said county."

It appears that the petitioners Sam Watts and Florine Watts are infants, and it is found that the price offered for the land is its full value. The court below ordered Godwin to pay the purchase price into the office of the clerk of the Superior Court. From a judgment for the plaintiffs against Godwin, the latter appealed. (241)

W. C. Munroe and E. A. Humphreys for plaintiffs.
Allen & Dortch for defendant.

DOUGLAS, J., after stating the facts. We think there was error in the judgment of the court below. In construing wills, the object is to ascertain the intentions of the testator, and carry them into effect as far as it may lawfully be done. The evident intention of the testator was to provide a common home for her four younger children, two of whom are still infants, for a period limited to twenty-one years after the death of herself and her husband. While in general we do not approve of the needless tying up of land, we can not ignore entirely the *jus disponendi* inseparable from the right of property, nor can we say that the time herein limited is so long as to be contrary to public policy. There may be cases in which conditions may so change as to bring about hardships, which could never have been within the contemplation of the testator, and which might call for judicial intervention; but none such appear to us in the case at bar. The testatrix has been dead but a few years, and apparently nothing has occurred that would have changed her intention, unless it were the attempted mortgaging of the land by her husband, which she may have foreseen. She knew her own family, their wants and dispositions, and may have provided for the future better than may now appear. In any event, she was the owner of the property, and we must give effect to her lawful intent. Can there be any doubt as to her intention? She devised the property to the four children, Frank, Eugene, Florine and Sam, to be held in common, until twenty-one years after the death of their surviving parent, and then to vest in severalty in fee simple. She evi- (242) dently intended it as a common home, as she reserved the use of one room for her son Andrew J. Flanner. She provided that if the house should be burnt, the insurance money should be used to build another house on the same lot. She also provided a fund for protection of the home by directing the investment for that purpose of certain building and loan stock. What has become of that stock does not appear.

It seems that the petitioner R. A. Watts, Sr., executed a mortgage

upon the land in question after the death of his wife. So far as we can see, he had no interest whatever in the land, not even the right of curtesy, as that was destroyed by the will of the wife, the property having been acquired since 1868. *Tiddy v. Graves,* 126 N. C., 620; same case, 127 N. C., 502.

We do not mean to say that the children, or any of them, are required to live in the house. Nor are we passing upon the effect of a joint deed executed by all the children after they become *sui juris.* Such a question is not before us in any shape. In the meantime, we see no reason why the house may not be rented out for the benefit of the children to whom it was devised.

Error.

Cited: S. v. Jones, 132 N. C., 1048; *Watts v. Griffin,* 137 N. C., 574; *Rea v. Rea,* 156 N. C., 535; *Jackson v. Beard,* 162 N. C., 115.

---

(243)

OLMSTEAD v. CITY OF RALEIGH.

(Filed 29 April, 1902.)

1. **Pleadings—Reply—New Cause of Action—The Code, Sec. 248.**
   A reply can be made only to new matter brought out in the answer.

2. **Master and Servant—Fellow-servant—Negligence—Personal Injuries.**
   A person employed by a city to do mason work and one to do carpenter work, engaged in their respective departments, are fellow-servants.

ACTION by A. E. Olmstead against the city of Raleigh, heard by *Robinson, J.,* and a jury, at February Term, 1902, of WAKE. From a judgment for the defendant, the plaintiff appealed.

J. C. L. Harris and Douglass & Simms for plaintiff.
W. L. Watson and J. N. Holding for defendant.

MONTGOMERY, J. The defendant, the city of Raleigh, purchased a tract of land near the city to be used for sanitary purposes, and also for the site of a smallpox hospital. To further utilize the property, the defendant determined to build a large barn upon it, in which its horses were to be stabled and its crops, grown upon the same to feed its stock, were to be stored; and, to superintend the farm, a man of the name of Leighton was employed by the year. The plaintiff was

employed through the sanitary officer of the defendant, by the day, to superintend the building of the woodwork or carpenter's work on the barn, and Leighton was instructed by the same officer to do the rock-work—the underpinning. The plaintiff raised the barn, using temporary braces nailed at one end to the upright pieces, and at the other end to the foundation sills, the end of the braces projecting a little over the sills. Leighton, described as a rock mason in the complaint, while engaged in doing the underpinning, knocked off (244) these temporary braces from the sills, thereby causing the building to collapse, and in its fall the plaintiff was injured.

This action was brought to recover damages for the injuries sustained, and in the complaint the negligent and careless knocking off of the temporary braces was alleged to be the direct and immediate cause of the fall of the building, and the proximate cause of the injury to the plaintiff.

In the answer the defendant averred that these braces were in the way of Leighton, and were knocked off by him and the carpenters in the proper discharge of their duty.

The plaintiff replied and added another cause of action, in which it was declared that Leighton was incompetent to do his work. But that cause of action could not be engrafted on the case by the reply, for the reason that the answer contained nothing about the competency of Leighton as a rock mason. A reply can only be made to new matter brought out in the answer. Code, sec. 248. If the reply could be made to add a new cause of action, it would not help the plaintiff, as he introduced no evidence that the defendant knew of his incompetency. *Hagins v. R. R.*, 106 N. C., 538; *Boyette v. Vaughan*, 85 N. C., 363. So the case is before us on the cause of action set out in the complaint. Upon the evidence of the plaintiff, the action was dismissed and judgment entered as of nonsuit.

The defendant's counsel, in their brief, argued that the judgment should be sustained, first, on the ground that the plaintiff contributed to his own injury by his negligence; second, that the defendant can not be held liable for any negligence on the part of the officers of its health department; and, third, that the plaintiff and Leighton were fellow-servants of the defendant. In the evidence we saw nothing going to show contributory negligence on the part of the plaintiff. The work in which the plaintiff was engaged was work purely for the benefit of the city in its municipal and business interest. The (245) contract with the sanitary arrangements of the city was only incidental to that department, as it was not concerning the public health, but concerning the protection of the city's property and the storage of the produce of the farm.

But we think the plaintiff and Leighton were fellow-servants of the city. The different department limitations is not recognized in this State. In *Kirk v. R. R.*, 94 N. C., 625, 55 Am. Rep., 621, the Court adopted the recognized rule in England and generally prevailing in this country, "that the term 'fellow-servant' includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it." In that case the plaintiff was a carpenter sent out by the defendant to inspect cars and report upon their condition for immediate use. An assistant yardmaster gave a premature order to the engineer, who thereupon moved his engine and caused the car under which the plaintiff was inspecting to crush his arm—no notice having been given him of what was about to be done, and he not seeing or hearing of the approach of the engine until the impact took place. In *Keith v. Iron and Coal Co.*, 81 Ga., 49, 12 Am. St., 296, a carpenter was killed by the fall of masonry which was defective, the two workmen being coemployees of the defendant and coöperating in their respective departments of labor for the erection and completion of a magazine for the storage of defendant's ammunition for use in blasting, were held to be fellow-servants; and in *Dier v. R. R.*, 132 Ind., 78, the same doctrine was held—the two colaborers being, one a carpenter and the other a stonemason, who were engaged in their respective departments in the building of a bridge.

No error.

---

(246)

ROBINSON v. McDOWELL.

(Filed 29 April, 1902.)

1. **Principal and Surety—Judgment—Contribution—Estoppel.**

In an action on a judgment for contribution a party is not estopped from setting up that he was a surety on the note upon which judgment was taken, because he failed to set up his suretyship in the original action or in the revival of the judgment.

2. **Principal and Surety—Judgment—Contribution.**

Where the administrator of a surety on a note, judgment having been obtained thereon, sues another surety for whose benefit the judgment has been transferred, to have it canceled as satisfied, the relation of the parties on the note may be shown without producing the note.

3. **Witness—Interest—The Code, Sec. 590.**

In an action by an administrator of a deceased surety on a note on which judgment has been secured, to restrain its enforcement against his intestate's estate, a defendant surety can not testify that the intestate was a coprincipal on the note so as to entitle him to contribution.

ROBINSON *v.* MCDOWELL.

ACTION by Newton Robinson, administrator of John A. McDowell, against John McDowell, Jr., and others, heard by *McNeill, J.*, and a jury, at October Term, 1901, of BLADEN. From a judgment for the plaintiff, the defendant appealed.

John D. Shaw, Jr., for plaintiff.
R. S. White and T. B. Womack for defendants.

FURCHES, C. J. In 1885, T. D. McDowell, John A. McDowell and John McDowell, Jr., executed their promissory note to D. G. Robinson for $1,000, on which judgment was rendered in favor of Robinson at Spring Term, 1888. In August, 1892, Robinson assigned said judgment to A. E. McDowell, wife of John McDowell, Jr., in consideration of a policy of insurance on T. D. McDowell. In the assign- (247) ment of the policy of insurance Robinson agreed to pay to John McDowell, Jr., any excess that he might collect on said policy over and above the amount of said judgment, principal and interest, at the time he should recover or receive the money on said policy of insurance, and such costs and premiums as he might pay. John A. McDowell was a brother of T. D. McDowell, and John McDowell, Jr., a son of T. D. McDowell.

T. D. McDowell has since died. Robinson has collected the policy of insurance, and, after deducting the amount of said judgment, etc., has paid the residue to the defendant John McDowell, Jr.

T. D. McDowell left a last will and testament, willing and devising his whole estate, real and personal, to his son John McDowell, Jr., amounting to more in value than the Robinson debt, in which he made his son John McDowell, Jr., executor, and provides that he shall pay all his just debts.

John A. McDowell has also died, and the plaintiff, Newton Robinson, has administered on his estate; but, just before his death, execution was issued upon the said D. G. Robinson judgment, and levied on the property of John A. McDowell, and the Sheriff of Bladen County was proceeding to sell the same thereunder; and this action was brought by Newton Robinson, administrator of John A. McDowell, to restrain said sale and to have said judgment declared satisfied as to the estate of his intestate. He alleges that T. D. McDowell was the principal in said note to D. G. Robinson, and that John McDowell, Jr., and his intestate, John A. McDowell, were his sureties; that said judgment was assigned to A. E. McDowell, wife of John McDowell, Jr., in trust and for the benefit of her husband; that D. G. Robinson has been paid by the insurance money, and has no further interest in said judgment; that John McDowell, Jr., being one of the defendants in said (248)

judgment, an assignment to him would have been a discharge of the judgment, and, for that reason, although he furnished the consideration which paid the judgment, he had it assigned to his wife.

The defendants John McDowell, Jr., and wife, A. E. McDowell, answer and say that said judgment was not assigned to the wife for her husband's benefit, and that she is the absolute owner thereof. They also deny that John A. McDowell was a surety of T. D. McDowell on the Robinson note, but that he was a coprincipal with T. D. McDowell, and the defendant John McDowell, Jr., was the only surety on said note; and that the estate of John A. McDowell is liable for one-half thereof at least.

The defendants further allege that since said judgment was assigned to A. E. McDowell, more than three years having elapsed without execution having been issued, the same was revived before the clerk, and this is an estoppel on the administrator of John A. McDowell.

This action was brought by the administrator of John A. McDowell to restrain the defendants from enforcing the Robinson judgment, assigned to Mrs. A. E. McDowell; and this presents two questions:

First. Was the judgment assigned to Mrs. McDowell in trust and for the benefit of her husband; and, second, was John A. McDowell a coprincipal in the Robinson note, or only a surety of T. D. McDowell?

If the judgment was assigned to Mrs. McDowell in trust for the benefit of her husband, John McDowell, Jr., he is the equitable owner thereof. The jury have found that the assignment to her was for his benefit, and this finding must stand unless there was error in the trial. Besides, the jury found that T. D. McDowell was the principal in said note and John A. McDowell was only surety; and this must stand unless there was error committed on the trial. If these findings
(249) stand, it seems to us that they virtually dispose of the case.

It appears that the defendant John McDowell, Jr., has received property of greater value than the amount of this judgment, under the will of his father, T. D. McDowell, with the express injunction to pay his debts; and although the administrator of John A. McDowell is the plaintiff in this action, it involves the doctrine of contribution. If there had not been property enough of T. D. McDowell to satisfy the Robinson judgment, the defendant John McDowell, Jr., would have been entitled to contribution out of the estate of John A. McDowell to the extent of one-half of the amount that T. D. McDowell's estate would not pay. But, as T. D. McDowell is found to have been the principal and John A. McDowell a surety, and T. D. McDowell being dead and John McDowell, Jr., being his executor, with property enough in his hands to pay the judgment, his right to contribution is that of a principal who has paid the debt, suing his surety for contribution.

As the claim of the defendant John is in the nature of contribution, neither judgment nor the renewal of the judgment is any estoppel upon the parties to show the relations they occupy, whether principals or sureties. Indeed, this is the usual way in which this question is presented. And as this is a question collateral to the note, it may be shown without producing the note, and it may be shown when it contradicts the note. *Williams v. Glenn,* 92 N. C., 253, 53 Am. Rep., 416. So there is nothing in the objection that the note was not present, or the manner in which its absence was accounted for. Nor can the exception to the exclusion of the evidence of John McDowell, Jr., under section 590 of The Code, be sustained, as the object of his testimony was to show that John A. McDowell was a coprincipal in the Robinson note; and if he could have established this, as he is the owner of the (250) Robinson judgment, it would have entitled him to recover one-half of the judgment out of the estate of John A., although he had property enough in his hands coming to him under the will of his father to pay the judgment. He was directly interested in this issue. Nor did the introduction of his affidavit entitle him to prove this fact. That was only as to the assignment of the Robinson judgment. Nor is there anything in the opinion of the Court (*Robinson v. McDowell,* 125 N. C., 337) that estops the administrator from claiming the relief he demands in this action. Indeed, so far as that case is authority, it is against the defendants' contention.

Affirmed.

(251)

ROSSER v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 6 May, 1902.)

1. Evidence—Instructions—Presumptions.

Where evidence is admitted for some purpose other than bearing upon the amount of damages and the trial judge instructs the jury to disregard it upon the question of damages, it is to be presumed that they followed the instructions, and the admission of such evidence was not error.

2. Telegraphs—Mental Anguish—Instructions.

Where, in an action against a telegraph company to recover damages for mental anguish caused by failure to deliver a telegram, the defendant requests the court to instruct the jury to use great care to distinguish the suffering caused by the death and that caused by failure of plaintiff to be able to attend the funeral, it was not error in trial judge in giving such instruction to omit the word "great" in connection with the word "care."

3. **Negligence—Telegraphs—Messages—Delivery.**
The failure of a telegraph company to deliver a message on which the charges are prepaid is *prima facie* negligence.

4. **Negligence—Telegraphs—Messages—Delivery.**
It is the duty of a telegraph company to make diligent inquiry whether a person to whom a prepaid message is addressed is within its delivery territory.

ACTION by B. F. Rosser against the Western Union Telegraph Company, heard by *Neal, J.*, and a jury, at September Term, 1901, of MOORE. From a judgment for the plaintiff, the defendant appealed.

Seawell & Burns and Black & Adams for plaintiff.
R. C. Strong for defendant.

COOK, J. Plaintiff's brother delivered a message to defendant (252) company's agent at Sanford, to be transmitted and delivered to him (plaintiff) at West End, in these words: "Come home quick. Father is dead." The charges (40 cents) were prepaid. The message was never delivered. Inferentially it appears that the defendant company's line terminated at Aberdeen, and the line of another company extended thence to West End.

Plaintiff alleges in his complaint that by reason of the gross negligence, carelessness and willful conduct of the defendant in not transmitting and delivering the message to him, he was prevented from being present to see his father, before the interment and from being present at the funeral, and thereby suffered great damage, both in body and mind, to the extent of $1,900.

Defendant, in its answer, admits receiving the message, alleges that it was transmitted promptly to Aberdeen and there given to another and independent telegraph company, and that it, by special contract, was made the agent of the sender, without liability, to forward it over the line of said other company.

Upon the issues submitted, to wit: "1. Did plaintiff, within sixty days after he had learned that said message had been sent, present to the defendant company a claim in writing for damages for the alleged failure to deliver said message? 2. Was the message set out in the complaint sent under the contract set out in the answer, that defendant was made the agent of the sender to forward without liability said message over lines of other company when necessary to reach destination? 3. Did defendant negligently fail to deliver the message sent by C. K. Rosser to the plaintiff? 4. What damage, if any, is plaintiff entitled to recover?" The jury answered the first and third "Yes."

There was no testimony bearing on the second, and that was answered by consent of the parties "No"; and to the fourth they answered $500. Defendant moved for a new trial for errors assigned in the record; the motion was overruled, and defendant appealed.

The first exception is to the admission by the court of plaintiff's (253) evidence that he "saw him (his father) last time 8 January, 1898," and defendant insists that the court erred in admitting it, upon the grounds that the jury should not permit that to enter into the question of damages; that it is foreign to the case, and may have been considered by the jury in increasing the amount of damages, as the shock would be greater in being the more unexpected; and that this could not have been in the contemplation of the parties in making the contract. But we can not sustain this exception, for that the "court specially instructed the jury that they should not permit that evidence to enter into the question as to the amount of damages, if any, they should award the plaintiff; that it had been stated by plaintiff's counsel that the evidence was brought out simply to show that he was in good health when last seen." And the evidence shows that plaintiff testified, without objection, that "his health was tolerably fair." Whether the jury *may have considered* this evidence in increasing the damages, after receiving the instructions from the court, would be only a matter of speculation, and nothing appearing to the contrary, we must assume that they observed their instructions. This testimony was introduced for some purpose other than bearing upon the amount of damages, and the jury were bound under the instructions given not to consider the same in that connection.

The fifth exception (as numbered in the brief of defendant's counsel) is to the modification of their sixth instruction asked to be given, to wit: "That great care should be used by the jury to distinguish the suffering caused by the death of plaintiff's father, for which defendant is in nowise responsible, and that caused by plaintiff being unable to attend the funeral." His Honor gave the instruction as asked, but omitted the word "great," and charged the jury that "care should be used," etc. In making this modification there is no error. The court having called the attention of the jury to the difference (254) between the suffering caused by the *death* of the father and that caused by the *inability* to attend upon interment and funeral, and instructed them that they should use *care* to distinguish them in making up their verdict, fully meets the requirements of the law. No greater care was incumbent upon the jury in considering this element of the case than any other. It was their duty to be careful in the consideration of each fact material to be found and the evidence bearing upon each. The "great care" or "caution" referred to in *Young v. Tel. Co.*, 107

N. C., 383, 9 L. R. A., 669, 22 Am. St., 883, and *So Relle v. Tel. Co.*, 55 Tex., 308, 40 Am. Rep., 805, relates to the *duty* of the *judge* in the trial of the case, in calling "the attention of juries . . . to the fact" that damages are recoverable for the *disappointment and regret occasioned by the fault or neglect* of the company, and *not* for the grief *occasioned* by the *death* of the parent. From the charge given by his Honor, it appears that the attention of the jury was specially called to this distinction, and they were instructed to use "care" to distinguish them. This shows that the *court* did use "great caution" in the trial, and had it appeared to his Honor that the jury had disobeyed his instructions, it would have been within his discretion to set the verdict aside and order a new trial, which he has refused to do.

The other exceptions relate to the liability of the defendant in not delivering the message, and can not be sustained. If there was any evidence tending to show that the message ever reached West End, or that it reached Aberdeen, or that it was ever transmitted from Sanford, it does not appear in the record certified to this Court; and if there was such, the defendant obtained the full benefit of it in the following part of the charge: "If you find from the evidence that the message was delivered to the defendant, with the charges prepaid, and you
(255) further find from the evidence that the defendant failed to deliver the message, a *prima facie* case is made out, and the burden would then rest on the defendant to show matter to excuse its failure." The message having been shown by the testimony, and also admitted in the answer, to have been received by defendant and the charges prepaid, it then became its duty to deliver to the addressee at the point to which it was addressed. If, however, that could not be done, then it was incumbent upon defendant to show that it had performed its part of the contract in exercising due diligence in endeavoring to do so. The fact that plaintiff lived several miles from West End does not excuse the defendant from making prompt and diligent inquiry to see if he were not within its delivery at that point when the message arrived; or, if defendant delivered the message promptly to its connecting and independent line, then it was its duty to have shown it, in order to excuse itself from the alleged negligence, provided that would be a legal excuse. All of the facts relating to the transmission of the message were within the possession of the defendant, and it did not choose to disclose them to the court and jury. From the very nature of telegraphy, neither the sender nor sendee could personally know what became of the message, or why it was not received at its destination, or, if received, why not delivered.

We see no error in the rulings of his Honor, and the judgment of the court below is

Affirmed.

Cited: Cogdell v. Tel. Co., 135 N. C., 434; *Harrison v. Tel. Co.*, 136 N. C., 381; *Green v. Tel. Co., ibid.*, 492; *Helms v. Tel. Co.*, 143 N. C., 395; *Woods v. Tel. Co.*, 148 N. C., 5; *Shaw v. Tel. Co.*, 151 N. C., 642; *Hoaglin v. Tel. Co.*, 161 N. C., 395, 396.

(256)

McNEILL v. DURHAM AND CHARLOTTE RAILROAD COMPANY.

(Filed 6 May, 1902.)

1. **Negligence—Personal Injuries—Passengers—Derailment—Carriers.**

Where, in an action by a passenger for injuries caused by the derailment of a train, the defendant admits the derailment and its counsel admits such derailment to be a *prima facie* case of negligence, the burden is on the defendant to show that the derailment was not caused by the negligence of the defendant, and the allegations of the complaint as to the manner and cause of the accident become immaterial.

2. **Instructions—Evidence.**

In an action by a passenger for injuries caused by the derailment of the train, an instruction that defendant was liable, if the accident occurred by reason of an insufficient crew, there being no evidence tending to show that the derailment occurred from a want of a sufficient train crew, is harmless error.

3. **Evidence—Personal Injuries—Negligence.**

In an action by a passenger for injuries caused by the derailment of a train, it is error to admit testimony that wrecks had occurred on trains in charge of the engineer having charge of the train in question.

CLARK and DOUGLAS, JJ., dissenting.

ACTION by W. H. McNeill against the Durham and Charlotte Railroad Company, heard by *McNeill, J.*, and a jury, at January Term, 1902, of MOORE. From a judgment for the plaintiff, the defendant appealed.

Black & Adams, Douglass & Simms and U. L. Spence for plaintiff.
Guthrie & Guthrie, Murchison & Johnson and Seawell & Burns for defendant.

MONTGOMERY, J. There were two issues submitted to the jury (257) in this case: "1. Was the plaintiff injured by the negligence of the defendant, as described in the complaint? 2. What damage, if any, is the plaintiff entitled to recover?"

The plaintiff, in the complaint, alleged that his injuries were caused

by the derailment of the coach in which he was seated; and the causes of the derailment were specifically set out in the following language: "That the derailment of said car and the injury of the plaintiff were caused by the careless, negligent and rapid running of said train, the defendant's negligent construction of said road and negligent failure to keep the same in proper and safe repair, and the defendant's negligent failure to provide for said train a sufficient crew, and its negligent failure to provide and use such air-brakes and other machinery and appliances as were necessary to the safe and proper operation of said road."

The defendant, in its answer, admitted the plaintiff's injuries, but not to the extent claimed, and also admitted that they were caused by the derailment of the car. For a defense against the allegation of negligence, the defendant averred in its answer that the occurrence was an accident, and that it was due to other causes than either or all of those set out in the complaint.

On the trial the defendant introduced evidence tending to show that in the train was a box car belonging to the Chesapeake and Ohio Railway Company, which was just in front of the derailed car, and that the C. and O. car had a defective bolster connected with its rear truck; that the defect consisted in a fracture of long standing, and so situated that it could not be discovered by ordinary inspection, nor without taking the truck from under the car to which it was attached; and that the breaking of said bolster under the C. and O. car was the cause of the derailment of the aforesaid truck under the box car next behind the C. and O. box car.

(258) On the trial the defendant's chief purpose was to hold the plaintiff to the specific allegations in his complaint as to the causes of the derailment upon the trial of the issue, and the principal and chief prayers for special instructions were directed to hold the plaintiff to proof of the allegation as described in his complaint. The defendant, through its counsel, insist that that contention involves a very old and familiar question of pleading as well as evidence: that is, that a plaintiff is held to the proof of the material allegations in his complaint. But is either one of these specifications of the causes of the derailment, as set out in the complaint, material to the proper determination of the first issue in this case? The derailment, as we have seen, was admitted by the defendant, and its counsel further admitted that that constituted a *prima facie* case of negligence and put the burden of proof on the defendant to show that the derailment of the car was not caused by defendant's negligence. That admission was the law of the case, and what difference does it make by what means or in what manner the car was derailed, unless the defendant is able to show that the derailment

was not caused by a negligent act of the defendant—any negligent act of the defendant?

The defendant, as we have seen, undertook to show that the occurrence was an accident, and that it was caused by a hidden defect of a foreign car, which could not be detected by the ordinary and usual inspection. The derailment having been admitted, then, and the *prima facie* negligence of the defendant established, the specifications in the complaint as to the manner of the derailment became immaterial. The matters set up by the defendant as to how the derailment occurred, and according to the proof introduced, were submitted to the jury in a full and fair aspect. This case involves a number of important legal questions, and in the main his Honor's instructions to the jury were correct.

One immaterial error probably ought to be noted. The court instructed the jury: "If the jury shall find from the evidence that on 6 April, 1900, the defendant received the plaintiff as a pas- (259) senger on its passenger train, to convey him as such from Hallison to Gulf, and if the jury shall further find from the evidence that the defendant failed to provide said train with such number of competent employees as was necessary for the safety of the passengers thereon, and that in consequence thereof said train was derailed and thrown from the track, and that the plaintiff was injured thereby, the jury should answer the first issue 'Yes.'" We find no evidence in the record tending to show that the derailment occurred from a want of sufficient train crew to manage and operate the train. That instruction constituted the fifteenth exception of the defendant, and was well taken. It was, however, not material error, for the reasons already stated in this opinion.

There is, however, one error in the ruling of his Honor on a question of evidence so substantial and serious that a new trial will have to be granted on account of it. The witness Jones, superintendent of defendant's road, testified for the defendant that the general character of the engineer, who had charge of the defendant's engine at the time when the plaintiff was injured, was good, and that he was a competent locomotive engineer. On cross-examination the witness was asked (the case states, as affecting the competency of the engineer): "How many wrecks have occurred on the defendant's road when Marshburn (the same in charge of engine at time of accident) was acting as engineer?" The court admitted it as affecting the competency of Marshburn as an engineer, and the jury was instructed to consider it in no other light. The witness answered that there were three—one of them the Tyson Creek wreck. The plaintiff's counsel then asked the witness to state the character of that wreck and the number of people killed in it, if any, with a view, so the case states, of showing that Marshburn was

reckless and incompetent as a locomotive engineer. It was ad-
(260) mitted over the objection and exception of the defendant, the court instructing the jury to consider it only as bearing upon the competency of Marshburn as an engineer. The witness answered, "There were three persons killed or drowned in the Tyson Creek wreck, when said Marshburn was engineer on the wrecked train." The answer was objected to, and an exception filed to its being allowed. The witness, on redirect examination, testified that the Tyson Creek wreck was caused by an unusual freshet in the creek, which washed out the foundation of the benches which supported the trestle over said creek, and on account of the high water the engineer could not have discovered it until the locomotive got on the trestle and went down. It was not the fault of the engineer Marshburn that the Tyson Creek wreck occurred. After all this evidence was in, what light did it shed on the engineer's competency or incompetency? It was admitted for no other purpose, and it had no bearing on the matter of the skill of the engineer or his fitness in any respect for his position. It might have been competent, after the defendant had undertaken to prove the engineer's competency, to show by evidence, if such evidence existed, that the engineer, through his carelessness or incapacity, caused other wrecks; but the evidence should have been confined to those wrecks caused by the engineer's fault. As it was, after the evidence was in, the jury had before them the fact that three wrecks had occurred in which the engineer was in charge of the engine, and in one of which there had been loss of life; the whole of it, and especially that part of it concerning the Tyson Creek wreck and its attendant circumstances, was damaging to the defendant, and prejudicial. It probably had considerable weight upon the question of defendant's alleged negligence, and if that was clear beyond question from the other undisputed facts in the case, it may have had weight on the question of the amount of damages.

And although it is true that the court instructed the jury that
(261) they should not award exemplary damages, yet we know how difficult a matter it was for the jury to draw the line between exemplary or punitive damages and damages purely compensatory, when there was evidence allowed, over the objection of defendant, calculated to arouse a feeling of resentment or prejudice against the defendant and to divert their minds from the true issue.

New trial.

CLARK and DOUGLAS, JJ., dissent.

Cited: Skipper v. Lumber Co., 158 N. C., 324.

PEEBLES v. GRAHAM.

(Filed 6 May, 1902.)

ON PETITION for rehearing. Petition dismissed. For former opinion and headnotes thereto, see *Peebles v. Graham,* 128 N. C., 222.

Winston & Fuller and Shepherd & Shepherd for petitioner.
Graham & Graham and Manning & Foushee in opposition.

FURCHES, C. J. This is a petition to rehear this case, decided at February Term, 1901, and reported in 128 N. C., 222. The facts may be found in the case then reported; and as we are of the opinion that it was correctly decided when here before, and as we see no reason for sustaining the petition to rehear, it will be dismissed.

While the review of the case, in considering the petition to rehear, has led us to believe that we might strengthen the opinion as written before with additional authorities, we are content to let it stand as then written, and will only undertake to answer such of the (262) objections or reasons assigned in the petition as seem to merit our consideration.

The first of these seems to be the introduction on the trial of a map made by Ramsey, and not signed by Lyon, the other surveyor. Lyon seems to have been examined as a witness, and he testified that he helped to make the survey, and, it seems, would have continued to act but for the fact that the plaintiff wrote him not to do so, and says that Ramsey asked him to do so; that the map contains matter that he does not know of. We suppose this is because the plaintiff stopped him from going on with Ramsey until the survey was ended. But he does not contradict anything in the map, and says the lines seem to be stated correctly. We do not think the plaintiff should have objected to the map simply because Lyon did not sign it. The map was competent for the purpose of aiding the jury to understand the location of the land and to show more clearly the *locus in quo,* and that was all it was used for. It might have been considered, in degree, higher evidence if Lyon had signed it, but still it was competent for the purpose for which it was used. *Justice v. Luther,* 94 N. C., 793.

But the plaintiff further complains, and assigns it as a ground of error, that during the progress of the trial, under the direction of the judge, there was written in red ink under the word "Alston," "as claimed by defendant." The map was a very large one, containing more than a dozen tracts or boundaries of land, and this was done to further identify the land in dispute; and we can not see that it preju-

diced the plaintiff, or that it could have had that effect. It seems to us that it was calculated to aid the jury, and not to confuse or mislead them. These matters were not overlooked by the Court in considering the case when here before, but were not considered of sufficient materiality to deserve a separate discussion, as we have not the time to discuss what we consider immaterial matters in the case.

We think there was other evidence tending to sustain the
(263) defendant's contention—for instance, that of Benehan Cameron. But we did not refer to it in the opinion, for the reason we did not think it necessary to do so, as we thought the location and description given, or pointed out in the will, were sufficient to show that the land claimed by the defendant was intended to be and was given to him. We undertook to show this by the authorities cited for that purpose, and we are satisfied with that part of the opinion.

While the errors assigned in the petition are not treated separately and in the order stated, we think what has been said, in substance, covers them all, and the petition will be dismissed. *Weathers v. Borders,* 124 N. C., 610; *Capehart v. Burrus, ibid.,* 48; Clark's Code, page 945—"Judgment will not be reversed on a rehearing, when."

Petition dismissed.

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

Cited: Britt v. R. R., 148 N. C., 39.

FAIRCLOTH v. BORDEN.

(Filed 6 May, 1902.)

Husband and Wife—Separate Property of Wife—Rents—The Code, Sec. 1837—Wills.

A husband who, without objection by the wife, receives the income from her separate estate, is liable only for the receipts for one year preceding the action brought to recover such receipts, although they were received as agent.

ACTION by E. E. Faircloth against E. B. Borden, executor of W. T. Faircloth, heard by *Robinson, J.,* at chambers, in Goldsboro, as of November Term, 1901, of WAYNE. From a judgment for the plaintiff, the defendant appealed.

(264) *W. C. Munroe for plaintiff.*
F. A. Daniels and Allen & Dortch for defendant.

FURCHES, C. J. The plaintiff is a daughter of the late Council Wooten, of Lenoir County, and was married to the defendant's testator, William T. Faircloth, on 10 January, 1867. Her father died intestate on 22 August, 1872, from whom the plaintiff inherited valuable real estate in Onslow County, as tenant in common with her sister, Mary L. Wooten. Soon after the death of plaintiff's father, defendant's intestate took charge of said property, rented or leased the same, collected the rents and paid over and accounted to the said Mary L. for one-half thereof; that he finally effected a sale of said property upon time, taking note and mortgage on said land as security for the purchase money. That the deeds to purchasers were executed by defendant's testator and wife, the plaintiff E. E. Faircloth, and the said Mary L., and the mortgage to secure the same was executed to the plaintiff and her sister, the said Mary L. From time to time defendant's testator collected and *received* the interest due on the note given for said lands, and finally *received* all the purchase money remaining due thereon, principal and interest, and accounted for and paid over to the said Mary L. one-half thereof, but never accounted for or paid any part of the rents, interest or principal, to the plaintiff. In these transactions, in making leases and in receiving rents, interest and principal money, defendant's intestate signed his own name, adding the word "agent." In his last will and testament he devised to the plaintiff certain real estate, in which is said, "This devise is in lieu of all moneys I *received* from her property in Onslow County, North Carolina."

The plaintiff in due time dissented from said will and brought this action, in which she claims one-half of all the money the intestate received from the Onslow property, whether it was *received* as principal, interest, or rents. The defendant answers and denies (265) her right to recover the same, especially that part his intestate *received* as rents and interest, and specially pleaded and relied on section 1837 of The Code as a bar to her right of action thereon.

The case was, by consent, referred to George Rountree, Esq., to take and state an account of the matters involved in the controversy, which he did, and reported that defendant's testator had *received* as rents $8,568.24; as principal on purchase of said land, $20,568.15; as interest on purchase money, $7,833.16—making in the aggregate $36,969.55, of which sum the plaintiff and Mary L. Oliver (*nee* Wooten) were each entitled to one-half; but the defendant's testator had *received* said money *without objection from plaintiff*. From the facts so found, he concluded, as matters of law, that the plaintiff was not entitled to recover any part of the $8,568.24 *received* as rents, nor any part of the $7,833.16 *received* as interest, but was entitled to recover

half of $20,568.15 received as principal money, this representing the corpus of the estate inherited by the plaintiff from her father.

But plaintiff not being satisfied with referee's findings of fact, nor his conclusions of law, excepted to both, and upon a hearing upon report and exceptions before *Robinson, J.*, he found, instead of the sixth finding of the referee, as follows: "Instead of the finding of the referee, it is found as a fact that the defendant's testator received said sum of money as the agent of the plaintiff and her sister. It is further found, at the request of the defendant, that there was no evidence of any express agreement on the part of defendant's testator, to account for any part of the same, except such as was embraced in the fact that he received it as agent."

If it were necessary to account for defendant's testator signing himself as agent, it might be said that he was the agent in fact of his sister-in-law, Mary L., and it was altogether proper that he
(266) should so sign his name, for that reason, but we do not think it necessary to do this, as we think by law he was the legal agent of his wife, the plaintiff, to receive these rents and the interest on the purchase money, unless she *objected* to his doing so.

These rents and interest belonged to the plaintiff under the Constitution of the State and section 1837 of The Code, which is as follows: "The savings from the income of the separate estate of the wife are her separate property. But no husband who during the coverture has received, without objection from his wife, the income of her separate estate, shall be liable to account for such receipt for any greater time than the year next preceding the date of a summons issuing against him in an action for such income, or next preceding her death." This section anticipates the *receipt of such income by the husband.* It is not his, but the statute anticipates that he will *receive* it—not as his, because it is not his, but as the agent of his wife, in fact or in contemplation of law. In *Baker v. Jordan,* 73 N. C., 145, the Court, in speaking of the relations of husband and wife, under the Constitution of 1868 and the statutes enacted since its adoption, say the wife's property is no longer the husband's; but as to her property, "he is bound to account for profits *received* out of her estate if called as such overseer or *bailoff* . . . to account and pay over within one year." The words overseer and agent are used as convertible terms in section 161 of Wells' Separate Property of Married Women. They are so used, we think, in section 1837 of The Code, and we do not think it made any difference whether defendant's testator *received* these rents and interest by plaintiff's express direction or by that implied by the statute; for if he received them either way, it did not make them his money. They still belonged to the plaintiff, and she might have re-

covered them if she had brought suit in time. But section 1837 is a statutory bar to her recovery, if her husband *received them without her objection,* and she did not bring suit in one year for the same. This is too plain to admit of argument, and is sustained by what is said in *Battle v. Mayo,* 102 N. C., 439, and *George v. High,* 85 N. C., 103, cases cited by plaintiff. But we do not understand plaintiff to dispute this being the law where the money is *received* without objection; but she contends that the fact that defendant's intestate received this money as *agent* shows that she *objected* to his receiving it at all. This is what it must prove to enable her to recover; and in our opinion it does not prove or tend to prove this, but if it prove anything, it proves that she was willing for him to *receive* it, and did *not object to his doing so.* As we have said, *Battle v. Mayo,* 102 N. C., 413, sustains the views of the defendant, while it sustained an action on several notes given by the husband for the *incomes* of the wife's property. This is sound law; the *incomes* were the wife's, and furnished a good consideration for the notes, and that action was to enforce the collection of the notes. The question as to whether she *objected* to her husband's receiving the money or not was in no way involved, and is not authority for the plaintiff in this case. As we do not think it makes any difference how defendant's intestate *received* this money, the plaintiff can not recover it (that is, rents and interest), unless she *objected* to his *receiving* it, and as we are of opinion that the fact that he signed his name as *"agent"* is no evidence that she *objected* to his *receiving* it, and as it is found as a fact there was no other evidence that she *objected,* we do not think she can recover anything but the principal and such interest as has accrued since the commencement of this action. There is error, and the report of the referee should have been confirmed.

Error.

Cited: Perkins v. Brinkley, 133 N. C., 161; *Stout v. Perry,* 152 N. C., 313.

(268)

REIGER v. WORTH.

(Filed 6 May, 1902.)

Warranty—Contract—Sales—Representations.

Representations by a vendor that rice is excellent seed rice amounts to a warranty.

REIGER *v.* WORTH.

ACTION by A. W. Reiger against the Worth Company, heard by *McNeill, J.*, and a jury, at September Term, 1901, of BRUNSWICK. From a judgment for the plaintiff the defendant appealed.

E. K. Bryan for plaintiff.
Bellamy & Peschau for defendant.

MONTGOMERY, J. The defendant company offered for sale in the Wilmington newspapers a quantity of rice, represented to be excellent seed rice, and the plaintiff having seen the advertisement, called at the company's place of business, and after looking at the rice to see if there was any of a red color amongst it, and finding none, purchased 125 bushels to plant his crop. At the same time one of the company's managers, or agents, assured the plaintiff that the rice was good seed rice. The plaintiff testified that he bought it, relying solely upon the defendant's representations, and not knowing himself whether it was good seed rice or not. The defendant's agent admitted on the trial that the rice was advertised as excellent seed rice, and at the time of the sale to the plaintiff he made the representation to the plaintiff that it was good seed rice, and that it was known that the plaintiff wished to buy it to plant. The rice failed to sprout after it was properly planted and treated, and the plaintiff brought this action to recover damages, alleging that the representations made by the company's agent constituted a warranty that the rice was good
(269) seed rice, and would germinate if properly planted and cultivated. That is the main question involved. Were the representations made by the defendant merely affirmations of description, or did they constitute a warranty? The defendant's contention was that whether the words were a warranty or not, was a question to be submitted to the jury upon the intention of the defendant in making the representations. The defendant had offered evidence to the effect that good seed rice only meant rice free from red rice, and of good, sound, plump grain. But the evidence also was that if rice did not sprout it was not good seed rice. His Honor instructed the jury as a matter of law that the defendant's representations amounted to a warranty, and that they should answer the issue on that question "Yes." We think there was no error in the instruction. In *Love v. Miller*, 104 N. C., 582, there was a contract to sell and deliver a quantity of cotton in bales, "to be of the average grade of middling," or above—none to grade below "low middling" and nice good stains or tinges; and the Court held that those words constituted a warranty that the cotton should be in fact of that quality, and not that it should be so according to any particular method of inspection. The Court referred with approval to *Lewis v. Rountree*, 78 N. C., 323, in which the following language of *Miller, J.*, in *Jones v. Just*, L. R. 3 Q. B., 197, was approved:

"In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not it is unnecessary to put any other question to the jury." "It is not meant," said the Court, "that words of description are always a warranty. But the cases in which that is held have something special to take them out of the rule, and to show that in those cases it was not so intended." We see nothing in this case which forms an exception to the rule. The first error alleged by the defendant is not in the case on appeal. (270) The testimony of the witnesses which was objected to nowhere appears in the record, but, on the contrary, the question put to the witness was not allowed by the court. And the second exception stands on the same footing. It is an exception to the testimony of Joseph Gay, and in the case made out by his Honor no such witness was examined. The defendant's third, fourth, fifth, sixth, and seventh exceptions bear upon the question we have already discussed, and they are against the defendant. Prayers four and five constituted the defendant's eighth and ninth exceptions, and they were substantially given. The defendant's tenth exception was made to the refusal of his Honor to instruct the jury that if they should find from the evidence that the plaintiff was a rice planter of experience and knowledge, and that his information and knowledge of the quality of seed rice was superior to that of the defendant, and the plaintiff bought the rice after a thorough examination of the same, and that the defendant did not know that the seed were defective and would not sprout, the plaintiff can not recover, and they should answer the second issue "No." The exception is without merit, and for the reasons we have already given in this opinion.

No error.

Cited: *Woodridge v. Brown,* 149 N. C., 304; *Underwood v. Car Co.,* 166 N. C., 460; *Tomlinson v. Morgan, ibid.,* 560.

---

(271)

GRAHAM v. CARR.

(Filed 6 May, 1902.)

1. Corporations—Directors—Stockholders—Trustee—Sale.

A sale by a trustee of an insolvent corporation of bonds and capital stock belonging to it to one of its directors, is valid if made in good faith and for full value.

2. Corporations—Payment of Debts—Directors.

A director of an insolvent corporation, being a surety for the payment of corporate debts, can not apply the proceeds derived from the sale to him of corporate property to the payment of such debts.

3. Corporations—Payment of Debts—Directors—Creditors—Stockholders.

A director of an insolvent corporation, having signed a bond to indemnify a corporate creditor for the purpose of protecting the corporate property, may, from funds derived from the sale to him of corporate property, pay such creditor.

4. Pleadings—Judgment—Corporations.

A complaint in an action by a receiver of an insolvent corporation against a director to recover corporate bonds and stocks sold to him, authorizes a money judgment equal to the corporate debts improperly paid by such director from the proceeds of such sale.

ACTION by Paul C. Graham, as receiver of the Golden Belt Hosiery Company, against J. S. Carr and J. S. Manning, trustee, heard by *Shaw, J.*, at September Term, 1901, of DURHAM. From a judgment for the plaintiff, the defendants appealed.

W. P. Bynum, Boone, Bryant & Biggs, and J. W. Graham for plaintiff.
Guthrie & Guthrie, H. A. Foushee, and Burwell, Walker & Cansler for defendants.

(272) FURCHES, C. J. On 13 December, 1895, a corporation was organized in the city of Durham with J. W. Smith, J. S. Carr, T. M. Gorman, and W. A. Guthrie as stockholders, Smith and Carr holding the greater part of the stock—Smith holding $7,000 and Carr $6,000, Guthrie and Gorman holding $100 each. These stockholders were incorporated under the name of the "Golden Belt Hosiery Company," and elected J. W. Smith president and T. M. Gorman secretary and treasurer. Smith continued to be its president for a time, when he resigned and Carr was elected. It was not a financial success under the administration of either Smith or Carr, and in February, 1898, it was admitted to be insolvent and the mill shut down, and negotiations commenced to sell out to the "Durham Hosiery Mills." At a meeting of the stockholders and directors of the Golden Belt Hosiery Company, on 17 February, 1898, a sale was effected to the Durham Hosiery Mills, which company was to reorganize under the name of the "Durham Hosiery Company," and the Golden Belt Hosiery Company was to receive for its property, good-will, etc., so sold, $20,000 of first-mortgage bonds to be issued by the new company, and $19,000 par value of stock in said new company. The Golden Belt Hosiery Company having no other means of paying its large outstanding indebtedness, which was ascertained to be over $50,000, J. S.

Manning was appointed a trustee, and this $20,000 in bonds and $19,000 of stock in the new company were put in his hands, and he was authorized and empowered to sell the same and apply the proceeds to the payment of the debts of the old company. Manning, acting under this authority given him at the meeting on 17 February, 1898, sold the defendant Carr $14,000 of these bonds in payment of a debt due the Bank of Durham to that amount. Carr and Smith were both liable as sureties for this debt. But the judge held this sale to have been properly made, and it is out of the case, as plaintiff did not appeal.

But the question remains as to the validity of the sale of the (273) other $6,000 bonds and the $19,000 par value of the stock of the new company. We have found that Manning, trustee, had the right to sell, and it is found as a fact that these sales to Carr were for a fair and full price; that the bonds were only worth par value at the time of the sale of them; and the stocks in the new company at the time they were sold were only worth 50 per cent of their par value; that these sales were fair, open, and in *good faith,* and the money was paid and applied to the payment of the admitted indebtedness of the Golden Belt Hosiery Company.

Why this was not a valid sale that carried the property in these bonds and stocks to Carr, we are unable to see. An insolvent party has a right to sell his property for a fair price, and he may sell to one creditor in preference to another, so it is done in good faith, and to pay an honest debt; or, he may sell his property and, out of the proceeds, pay one creditor in preference to another, if the debt he pays is an honest debt; and so may an insolvent corporation; and its creditors have no right to complain, as they have no lien on the property of the corporation for the payment of their debts. And the corporation in that respect stands on the same footing that an insolvent individual would have stood. *Bank v. Cotton Mills,* 115 N. C., 507.

Suppose Manning had sold these bonds and stocks to John W. Fries, as he tried to do, for the same price he sold them to the defendant Carr: could it be contended that Fries would not have acquired a good title to them and they would not have been his property? And if so, why did not the title pass to Carr, and these bonds and stocks become his property? He had the same right to deal with the corporation (and certainly with Manning, its trustee) as any one else had, and if the transaction was fair, open, honest and without fraud, it was valid. *Langston v. Imp. Co.,* 120 N. C., 132; *Howard v. Warehouse Co.,* 123 N. C., 90; *Mfg. Co. v. Bradley,* 105 U. S., 175. (274)

The trouble is not in these sales, which are found to have been *bona fide* and without fraud, if there be trouble, but it is in the application of the money received from these sales of the $6,000 of mortgage

bonds and the $19,000 of stock, amounting to $10,612.93. The debts paid were all *bona fide* debts due by the Golden Belt Hosiery Company, and the corporation had no right to complain at their application, nor did the stockholders, as stockholders, have any right to do so, as they were entitled to nothing until all the debts of the corporation were paid.

But creditors, whether they are stockholders or not, sustain a different relation to the assets of the corporation and the corporation sustains a different relation to them, and they have rights, with regard to the payment of debts, that stockholders as such do not have. As they have no lien on the assets of the corporation for the payment of their debts, and no right to have their debts preferred to those of other creditors, nor to object to the payment of other creditors in preference to the payment of their debts (if they are just debts), if such payments are made in good faith and without fraud, unless the debts so paid are due to a stockholder or officer of the corporation. When this is the case, the law will not allow the stockholders and officers of the corporation to take advantage of their knowledge of the insolvent condition of the concern, and their power to *use and control the assets,* to pay their own debts, or to relieve them from special liabilities to the injury of other creditors. *Bank v. Cotton Mills,* 115 N. C., 507; *Hill v. Lumber Co.,* 113 N. C., 173, 21 L. R. A., 560, 37 Am. St., 621, as explained in *Bank v. Cotton Mills, supra;* 5 Thompson on Corporations, sec. 6503; 7 *ibid.,* sec. 8497.

Neither was the Mitchell debt, the New Bern Bank debt, nor the Mayo Needle Company debt due to the defendant Carr, and he
(275) seems not to have had any special interest in the payment of the Mayo debt over that of any other creditor of the Golden Belt Hosiery Company. The bond of indemnity he signed was for the benefit of all of the stockholders and creditors, to protect their common property. We therefore see no reason why the defendant Carr should be held to an account for anything because he signed that bond.

But as he was *specially* and personally liable for the Mitchell debt and for the New Bern Bank debt, the law will not allow him to retain the advantage he got in having the Mitchell debt paid out of the proceeds arising from the sale of the $6,000 mortgage bonds, nor the advantage he got by having the application of a sufficient amount of the proceeds of the sale of the stocks applied to pay the New Bern Bank debt, to discharge it.

While these sales were valid and the title to the bonds and stocks passed to him, the plaintiff, who represents the creditors, should have judgment for the amount of the New Bern Bank debt and the amount

of the Mitchell debt, and the defendant Carr will become a creditor, to these amounts, of the Golden Belt Hosiery Company, and entitled to prove the same and pro rate in the funds so collected, and any other funds the receiver may have collected, as he will be as to any other debt he has paid for the Golden Belt Hosiery Company, or any other debt it may be due to him. And this will not prevent him from claiming contribution against any cosurety on any residue that may remain unpaid.

We have not considered all the exceptions, nor have we considered them in the order presented. We have not discussed the positions taken by counsel as to the various meetings stated to have been held by the directors at Carr's office, though we have considered them. We do not think they were such meetings as conferred any authority, but tended to show good faith in the transaction. We do not think it necessary to rely upon them for authority to sell, and (276) do not rely upon them. We derive the power in Manning to sell from the meeting on 17 February, 1898. Nor have we felt called upon to consider the interesting and *novel* question presented by the defendant's exceptions and motion for a jury trial. The view we have taken of the case eliminated that question. It could have been of no benefit to the defendant.

The plaintiff's pleadings seem to be framed with a view to recovering the bonds and stocks mentioned. And while we hold he is not entitled to recover them, we think the facts stated entitled him to recover the price paid for them; and as he is in the right jurisdiction to recover that, as well as the bonds and stocks themselves, if he had been entitled to recover them, we direct judgment as above indicated.

Error.

Cited: S. c., 133 N. C., 449, 453; *McIver v. Hardware Co.,* 144 N. C., 484; *Edwards v. Supply Co.,* 150 N. C., 172; *Whitlock v. Alexander,* 160 N. C., 482, 483.

MARKHAM v. SOUTHERN CONSERVATORY OF MUSIC.

(Filed 13 May, 1902.)

Taxation—Education—Opera House—Laws 1901, Ch. 9, Secs. 33, 36—Theaters.

Under Revenue Act 1901, ch. 9, secs. 33 and 36, a musical conservatory, owning a hall in which it gives musical entertainments for the special benefit of its pupils and teachers, charging for admission thereto, is not liable for the opera-house tax therein provided.

MARKHAM *v.* CONSERVATORY.

ACTION by F. D. Markham, sheriff, against the Southern Conservatory of Music, heard by *Neal, J.*, at chambers, in Durham, N. C., on 22 January, 1902. From a judgment for the defendant, the plaintiff appealed.

(277) *Robert D. Gilmer, Attorney-General, and Shepherd & Shepherd for plaintiff.*

Guthrie & Guthrie for defendant.

MONTGOMERY, J. The object of this action was to hold the defendant, Southern Conservatory of Music, a duly incorporated institution, liable for the opera-house tax imposed by the Revenue Law of 1901, Schedule B, sec. 33. The institution was established for the musical training and instruction of students in all departments of the science, and power was given it to grant diplomas and issue such other certificates of merit as might be deemed advisable. The defendant, acting under its charter, owns a building in Durham, in which there is a music-hall furnished with musical instruments of various kinds and other equipment, dormitories, etc., for the use of its teachers and pupils. As an incident to the training and instruction of students, on occasions, distinguished specialists in the various departments of musical science are contracted with at an agreed and fixed price by the defendant to give, in its hall, entertainments in which their skill and proficiency in their special branches of musical culture are exhibited for the special benefit of the pupils and teachers, and incidentally for the pleasure of others, who are admitted by ticket. It is also further agreed by the parties "that the aforesaid performances and entertainments are not given for profit, or with any expectation of making a profit out of them, but, on the contrary, the institution has lost, and expected to lose, money by them. But in order that the loss on such entertainments might not fall so heavily upon the institution, and in order that the teachers and pupils, and especially the pupils, might, by paying a very small admission fee, get the valuable benefits to be derived from such performances and entertainments, the institution has allowed the public admission to such entertainments, and sold tickets to the public therefor, it being always understood that such perform-
(278) ances and entertainments were always given for the sole benefit of the educational objects connected with the institution, and if at any particular entertainment the receipts should exceed the disbursements for actual and incidental expenses, the surplus would go towards buying new music and music books, etc., for the use of the pupils of the institution. His Honor below held, upon the case agreed, that the defendant was not liable for the tax, for the reason that under section 36

of the same act it is provided that "all exhibitions or entertainments given for the sole benefit of religious, charitable or educational objects shall be exempt from taxation."

We see no error in the ruling. Music may not be of divine inspiration, as many believe in their souls, and it may not be, as the great poet has said, that—

"The man that hath no *music* in himself,
Nor is not moved with concord of sweet sounds,
Is fit for treasons, strategems, and spoils."

Yet the day has long past since it was denied a part in many of the educational systems of the age. It may not be so necessary to the practical side of life as is a knowledge of the "three Rs," but from the standpoint of æsthetics it is regarded as probably the most beautiful in its effects of all the works of nature or of art.

The purpose and object of the defendant institution, then, being educational at least, is it true that these entertainments are solely educational? We think it can be so said without any stretching of the law. It is agreed that they are held at a loss to the institution, and anticipated loss is counted on; that the admission price demanded of the pupil is very small, and that if in any case the receipts should exceed the disbursements for expenses, the surplus would go towards buying music and music-books for the pupils of the school. We see no means by which the stockholders of the company can be financially benefited by such entertainments. The advantages and benefits (279) seem to be altogether with and for the pupils; and the pleasure enjoyed by others than pupils is merely incidental. The institution is a home concern; it is in good faith engaged in the teaching of music; it owns valuable real and personal estate used in connection with the school; it has a good number of pupils actually in attendance, and its stay in the community, as far as we can see, is permanent. There is nothing in the case as presented in the facts agreed on to warrant even a well-founded suspicion that the entertainments spoken of are given for other purposes than for the real benefit of the pupils of the institution.

No error.

FRITZ v. SOUTHERN RAILWAY COMPANY.

(Filed 13 May, 1902.)

1. **Evidence—Sufficiency—Negligence—Personal Injuries.**
There is no evidence in this case showing negligence on the part of the defendant for personal injuries to plaintiff.

2. **Appeal—Exceptions and Objections—Nonsuit.**
A defendant whose motion for a nonsuit is overruled, who does not appeal, is not entitled to the benefit of such motion on appeal by plaintiff.

ACTION by Bertha Fritz against the Southern Railway Company, heard by *Shaw, J.*, and a jury, at September Term, 1901, of GUILFORD.

(283) *John A. Barringer for plaintiff.*
King & Kimball for defendant.

FURCHES, C. J. This is an action to recover damages for injuries sustained by the negligence of the defendant. The defendant (284) offered no evidence, and, at the close of the plaintiff's evidence, moved to nonsuit the plaintiff. The court refused this motion, and submitted the following issues to the jury:

"1. Was the plaintiff injured by the negligence of the defendant?

"2. What damage, if any, is plaintiff entitled to recover?"

The first issue was answered "Yes" and the second issue "$2,000." After the verdict was returned, on motion of the defendant, the court set aside the verdict of the jury on the first issue, as being against the weight of the evidence; but refused to set aside the verdict on the second issue, and awarded the defendant a new trial as to the first issue. The plaintiff being dissatisfied with the ruling of the court in setting aside the verdict on the first issue, appealed to this Court.

After a careful examination of the evidence, we are of the opinion that the defendant's motion, at the close of the plaintiff's evidence, to nonsuit the plaintiff, should have been allowed. There is no evidence, in our opinion, showing negligence on the part of the defendant. But as the defendant did not appeal, it cannot have the benefit of this motion. In view of the order of the court in setting aside the verdict on the first issue, which destroyed the plaintiff's right to any judgment, it is singular that the finding on the second issue was allowed to stand. But as we do not think the plaintiff was entitled to any judgment against the defendant, we cannot say that there was error in setting aside the finding of the jury on the first issue. And that is all that is presented by this appeal, and there is no error in that part of the judgment appealed from. No error is presented by the case on appeal.

No error.

Cited: *S. c.*, 132 N. C., 829, 831.

HUTCHINS v. PLANTERS NATIONAL BANK OF RICHMOND.

(Filed 13 May, 1902.)

Guaranty—Guarantor—Time of Accrual of Liability.

Under the contract of guaranty in this case, the bank, being an absolute guarantor, may be sued immediately upon default of the principal.

ACTION by J. W. Hutchins against the Planters National Bank of Richmond, heard by *Shaw, J.*, and a jury at September Term, 1901, of DURHAM. From a judgment for the plaintiff, the defendant appealed.

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

COOK, J. This action was brought to recover the price of a lot of hides shipped to Chalkley & Co., at Richmond, Va., by the plaintiff. Pursuant to the correspondence between plaintiff and Chalkley & Co., defendant bank wrote to the First National Bank, Durham, N. C. (plaintiff's agent): "Draft drawn by J. W. Hutchins on B. D. Chalkley & Co. for green salted hides at 8¼ cents, hides to be thoroughly cured and swept clean of salt and water before being weighed, no green or half-cured hides to be shipped. Amount not to exceed $300 will be paid." Thereupon plaintiff shipped the hides to Chalkley & Co., and drew upon them for the price, $288.75. Chalkley & Co. received the hides and kept them; but claimed that they did not come up to the contract as to quality; and refused to pay the draft, which was protested. Plaintiff sued the bank upon its written promise or guaranty. Verdict and judgment for plaintiff, and defendant appealed.

The exceptions taken by defendant to the admission of evidence can not be sustained. The questions to which exceptions were taken were asked Chalkley upon cross-examination, and affected (286) his credibility as a witness, and his Honor instructed the jury that his answers should only be considered in determining what weight they would give to his evidence. These exceptions are without merit, and were not pressed by the learned counsel for defendant; so we deem it unnecessary to discuss them. The exception most earnestly relied upon was to the refusal of his Honor to give the third prayer asked to be given to the jury, viz.: "The bank having guaranteed the payment of the draft, upon the condition that the hides come up to the specifications, and the draft was to be paid in Richmond. It was the duty of the plaintiff to have sued the principal in the contract, to wit,

B. D. Chalkley & Co., and it not appearing that the said company is insolvent, the plaintiff can not recover of the defendant, and the jury will answer the issue 'No.'"

We think his Honor properly refused to give this instruction. Whether an action will lie against a guarantor immediately upon default of his principal, depends entirely upon the terms expressed and intended in the guaranty. A guarantor is not bound with his principal as an original promisor (or obligor); he is not a debtor (or obligor) from the beginning. But he makes his own separate contract, is not a joint contractor with his principal, and is not bound to do what his principal has contracted to do, except in so far as he has bound himself by his separate contract; the original contract is not his contract unless he makes it so in his guaranty. And this contract of guaranty, like all others, must be construed so as to give effect to the intent of the parties, which is to be ascertained from the whole tenor and subject of the agreement. This contract being in writing, expressed in plain and certain language, there can be no doubt about its meaning. It is obvious

(287) that it was the intent of the parties that defendant bank would pay the plaintiff's draft immediately upon the shipment of the hides as required in its letter, if default thereof should be made by Chalkley & Co. The verdict establishes the fact that plaintiff complied with the conditions imposed upon him by shipping the hides agreeable to the contract, and drawing the draft. Thereupon his obligations ceased. Defendant's principal refused to pay, and then its liability arose and the cause of action accrued to plaintiff against it. The time then arrived when, according to the contract, the "draft . . . will be paid." Paid by whom? By Chalkley & Co. primarily, upon whom it was drawn, or bank upon their default. Had they intended otherwise, should they not have so said in their contract? If the bank had intended to guarantee the solvency of Chalkley, or to pay the debt if the plaintiff should fail to collect his money after exhausting the remedies provided for that purpose, then it could have been so stated in the contract; but plaintiff might not have agreed to such a condition, and refused to sell the hides to Chalkley & Co., as he would have had the right to do. The guaranty here made was absolute, and the right of action accrued against the guarantor immediately upon default of the principal; it is not dependent upon any extraneous event beyond the mere default by which the guaranty would have become binding. 14 A. & E. Enc. (2 Ed.), 1141; *Jenkins v. Wilkinson,* 107 N. C., 707, 22 Am. St., 911; *Jones v. Ashford,* 79 N. C., 173.

Defendant's counsel contends in his argument that the contract sued upon was to be performed in Richmond, and is therefore a "Virginia contract," and must be construed according to the laws of Virginia;

and insists that under the laws of Virginia an action will not lie against a guarantor until the remedy against the principal has been exhausted.

There was no evidence introduced upon the trial to sustain this contention. But he cites as an authority, to sustain his position, *R. R. v. Morris,* 86 Va., 941, which we have carefully examined. It does not hold that an action should be *first* prosecuted against (288) the principal in a case like the one at bar. The action in that case was brought upon a *conditional* guaranty to hold the guarantor primarily liable. The defendant was the agent of plaintiff to sell its fertilizers to *good* and *trustworthy* buyers on a credit, and to take lien notes upon forms furnished him; and to guarantee their payment—and "should any of the buyers fail to pay their notes at maturity, you (defendant) are, if requested, to proceed to collect them without delay for our account and remit proceeds." The plaintiff took the notes and kept them long after maturity, until they became worthless, and then undertook to collect upon the guaranty. The Court there held that plaintiff could not recover, and based its decision upon the instruction given the jury by the court relating to the negligence of plaintiff in failing to exercise due diligence in collecting the notes. The instruction given and sustained is, "That if the jury believe from the evidence that the plaintiff took possession of the fertilizer notes on which this action is brought, before they became due, and never returned them to defendant, or directed the defendant to take possession of and collect them, and that while in the possession of said plaintiff they could have been collected by due diligence, and that such diligence was not used by the plaintiff, then the plaintiff can not recover as to any notes which were solvent and could have been collected by them by the use of due diligence." The guaranty was that the buyers were *good* and *trustworthy,* and was limited to the *collecting* of the notes given by them; the default thereof was occasioned by the plaintiff's negligence, and not the collectibility of the notes at maturity.

There is no error in the refusal to give the prayer asked; so the judgment of the court below is

Affirmed.

Cited: Voorhees v. Porter, 134 N. C., 601.

(289)

ZACHARY v. PERRY.

(Filed 13 May, 1902.)

1. **Mechanic's Lien—Notice—Contractor.**

Only the original contractor can file the notice of a mechanic's lien.

2. **Husband and Wife—Married Women—Separate Estate—Mechanic's Lien.**

A draft drawn on a man and his wife by a contractor and accepted by them in writing, with privy examination of the wife, the contractor having agreed to build house on land of wife, does not constitute a charge on the separate estate of the wife.*

CLARK, J., dissenting.

ACTION by Zachary & Zachary against D. R. Perry and Katie D. Perry, his wife, heard by *Starbuck, J.*, at April Term, 1901, of WAYNE.

This case was brought by appeal from the court of a justice of the peace to the Superior Court of Wayne County, and was heard upon the following agreed facts:

1. That at the times hereinafter mentioned the defendant Katie D. Perry was a married woman, and was not a free trader.

2. That on 10 October, 1898, the defendants, D. R. Perry and Katie D. Perry, signed and delivered to one J. W. Robinson the paper-writing hereto annexed and made part of this statement, marked "A," which paper-writing was afterwards registered in Wayne County. This admission is made subject to the objection that said paper is not admissible in evidence on account of alleged defective probate and registration.

3. That the house referred to in said paper-writing was to be erected upon the lands of said Katie D. Perry.

4. That on 16 November, 1898, the said J. W. Robinson was (290) indebted to the plaintiffs in the sum of $84.98, and on that date he executed and delivered to the plaintiffs paper-writing hereto annexed and made part of this statement, marked "B," which paper-writing was registered in Wayne County.

5. That on said paper-writing is written, "Accepted and payable on 17 December, 1898," which indorsement was signed by the defendants, D. R. Perry and Katie D. Perry.

6. That on 8 March, 1899 the plaintiffs filed in the office of the Clerk of the Superior Court of Wayne County, for the purpose of establishing a lien, paper-writing hereto annexed and made a part of this statement, marked "C," which paper-writing was filed within twelve months from the time the said Robinson completed the work that he did on said house.

*NOTE.—It is otherwise now. Rev., 2016; *Finger v. Hunter, post,* 529.

7. That the materials furnished by the plaintiff were used by the said Robinson in the construction of the building referred to in paper-writing marked "A," upon the land of the defendant Katie D. Perry.

8. That no part of said sum of $84.98 has been paid to the plaintiffs; that at the time paper marked "A" was executed, defendants owed to Robinson $84.98 under their contract with him; that after said paper marked "A" had been delivered to plaintiffs, said Robinson abandoned his contract with the defendants, and on account of his breach of contract there would be nothing due by the defendants to Robinson. This admission is made by the defendants without admitting or intending to admit any liability, personal or otherwise, upon the part of the *feme* defendant.

There was a judgment for defendants, and plaintiffs appealed.

Douglass & Simms for plaintiffs.
Allen & Dortch for defendants.

MONTGOMERY, J., after stating the case: The attempt to file (291) notice of a lien by Zachary & Zachary against the property of the *feme* defendant must fail of its purpose. Only Robinson, the original contractor, could file the notice of lien, and then only after he had completed the work and completed his contract, and within the time provided by law. But he abandoned his contract, and therefore himself could file no lien. The acceptance by the defendants of the draft drawn by Zachary & Zachary is as follows:

$84.98. MOUNT OLIVE, N. C., 16 November, 1898.

Mr. D. Perry and wife, K. D. Perry, will please pay to Zachary & Zachary the sum of $84.98, and charge the same to my account as a payment on the contract price for building a dwelling-house about two miles north of the town of Mount Olive, N. C.

Probate of the paper and acceptance was had as to both, and the private examination of the *feme* defendant was taken. The paper (draft) contains no express charge upon the land mentioned in it, nor can it be considered as a lien by way of mortgage, and is therefore not effectual to bind the real estate of the *feme* defendant. *Farthing v. Shields,* 106 N. C., 289; *B. and L. Assn. v. Black,* 119 N. C., 323.

Affirmed.

CLARK, J., dissenting: The *feme* defendant contracted for the erection of a building on her land, in writing, with written assent of her

husband and privy examination duly taken. Subsequently, she accepted an order drawn by the contractor upon her, the acceptance being in writing, with written assent of her husband and privy examination. If this constitutes a valid, binding obligation upon the *feme covert* for the betterments on her land, then a mechanic's lien can be filed to secure it. If, with all these formalities, a married woman can not get work done or obtain credit, no one dare trust her or do work
(292) for her, and she is a Pariah as to all business transactions.

It is true, we are referred to *Flaum v. Wallace,* 103 N. C., 296, for the doctrine that there must be a "charge in equity" (whatever that may be) on the *feme covert's* land; but with the utmost and most diligent research, both bench and bar have been unable to discover any statute or previous decision which requires such "charge," and this Court has distinctly repudiated that doctrine. *Brinkley v. Ballance,* 126 N. C., 396.

The statute enacted by the proper lawmaking authority, Code, sec. 1826, provides that a married woman can make a contract affecting her real estate "with the written assent of her husband." The plaintiff certainly ought to have the benefit of the law of the land. Several recent statutes show that such is still the mind of the lawmaking power, such as the statute allowing the statutes of limitations to run against a married woman, allowing her to vote her stock in corporations, and the recent act providing that a married woman is liable for improvements put upon her property, even when she makes no contract, but merely stands by and sees the work done without objection. Independent of the statute, the Constitution gives a married woman the same control over her property "as if she remains single," and responsibility always goes with the power to control.

Cited: *Ball v. Paquin,* 140 N. C., 99.

NOTE.—Changed by Rev., 2016; *Finger v. Hunter, post,* 529.

---

(293)

RODMAN-HEATH COTTON MILLS v. TOWN OF WAXHAW.

(Filed 13 May, 1902.)

1. **Statutes—Towns and Cities—Charter—Taxation—Constitution, Art. 2, Sec. 14—The Code, Sec. 3800—Laws (Private) 1889, Ch. 119—Municipal Corporations.**

Where a town charter is not passed in accordance with Art. II, sec. 14, of the Constitution, such town can not levy any tax under said charter, but it may under The Code, sec. 3800, levy taxes for necessary expenses.

2. Statutes—Part Valid—Part Invalid—Laws (Private) 1889, Ch. 119—Municipal Corporations.

The Laws (Private) 1889, ch. 119, incorporating the town of Waxhaw, is valid, though the provisions thereof relating to the power of taxation are invalid.

ACTION by the Rodman-Heath Cotton Mills against the Town of Waxhaw, heard by *Robinson, J.*, at chambers, on 3 April, 1901. From a judgment for the defendant, the plaintiff appealed.

Adams & Jerome and J. H. Pou for plaintiff.
Redwine & Stack for defendant.

DOUGLAS, J. This is an action to enjoin the defendant from selling certain property belonging to the plaintiff, seized for nonpayment of taxes, and to further enjoin the defendant from collecting any taxes under its present charter, on the ground that said charter was not passed in accordance with the provisions of section 14 of Article II of the Constitution.

It being admitted that the said charter (Private Laws 1889, ch. 119) was not so passed, it becomes a question of law as to the necessity of such a compliance. We see no reason why cities and towns may not be incorporated by an act passed in the ordinary legislative method. Article II, sec. 23, of the Constitution provides that "All bills and resolutions of a legislative nature shall be read three times (294) in each house before they pass into laws, and shall be signed by the presiding officers of both houses." This Court has repeatedly held that the ratification of an act by the presiding officers of the two houses of the General Assembly, declaring it to have been read three times in each house, is conclusive evidence of such fact. *Carr v. Coke,* 116 N. C., 223, 28 L. R. A., 737, 47 Am. St., 801; *Bank v. Commissioners,* 119 N. C., 214, 222; *Commissioners v. Snuggs,* 121 N. C., 394, 400, 39 L. R. A., 439; *Commissioners v. DeRosset,* 129 N. C., 275; *Black v. Commissioners,* 129 N. C., 121.

It is equally settled by these and other cases that while such ratification is conclusive evidence of a compliance with Article II, sec. 23, of the Constitution, it neither proves nor tends to prove any compliance with the provisions of section 14 of the same article. This section is as follows: "*No law* shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, *or to impose any tax* upon the people of the State, *or to allow the counties, cities or towns* to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings

shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal." We have repeatedly held that this section is mandatory and not directory, and that a failure to comply with its provisions is fatal to any statutory authority to levy a tax or create a debt. *Bank v. Commissioners* and *Commissioners v. Snuggs, supra; Thrift v. Elizabeth City,* 122 N. C., 31, 44 L. R. A., 427; *Charlotte v. Shepard,* 122 N. C., 602; *Mayo v. Commissioners,* 122 N. C., 5, 40 L. R. A., 163; *Commissioners v. Call,* 123 N. C., 308; *Commissioners v. Payne, ibid.,* 432; *Commissioners v. DeRosset* and *Black v. Commissioners, supra.*

(295) This section of the Constitution makes no distinction whatever between "necessary expenses" and unnecessary or extraordinary expenses, and we have no power to create any such distinction by judicial construction. Such a distinction is made only in Article VII, sec. 7, which is as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, *except for the necessary expenses thereof,* unless by a vote of the majority of the qualified voters therein." (The italics are ours.)

We are therefore compelled to hold that no city or town can levy any tax or incur any debt for any purpose whatever, unless the act authorizing such tax or debt is passed in accordance with the provisions of Article II, sec. 14, of the Constitution. Therefore, the charter of the town of Waxhaw, not having been so passed, confers no power of taxation.

As, however, this power of taxation can be eliminated from the act without destroying its validity as a charter (*Green v. Owen,* 125 N. C., 212, and cases therein cited), we are of opinion that said act incorporated the town of Waxhaw, which, by virtue of such incorporation, became at once subject to all the provisions and endowed with all the powers conferred generally upon towns and cities by chapter 62 of The Code. It is settled that The Code was passed in accordance with the provisions of Article II, sec. 14, of the Constitution. The defendant has, therefore, for the purpose of meeting its necessary expenses, the powers of taxation set out in section 3800 of The Code, subject, however, to the restrictions contained in its charter. Such charter, while incapable of conferring the power of taxation, may *restrict* such general power in accordance with Article VII, sec. 4, of the Constitution,

(296) which is as follows: "It shall be the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent

abuses in assessments and in contracting debts by such municipal corporations."

Some of the decisions of this Court have assumed the power of taxation for necessary expenses possessed by counties and towns without pointing out the provisions of the Constitution and of The Code, whence came such power; but all such decisions were rendered in contemplation of existing law.

The judgment of the court below is

Affirmed.

FURCHES, C. J., concurring in conclusion: I concur in the conclusion reached in the opinion of the Court, that the judgment appealed from should be affirmed. But I do not agree to the argument by which that conclusion is reached. And as it involves a question of constitutional law, it seems proper that I should state some of the reasons for my disagreement.

I will not enter into an argument of the question, but it seems to me that the Court has failed to distinguish the difference between an act of incorporation and an act to levy taxes. One is an act to subdivide the political powers of the State—to create an entity, clothed with a part of sovereign powers of the State. It is nothing, and can do nothing, until it is created. But when it is thus erected into a county or a city or a town, it then becomes a sovereign to a limited extent, clothed with its powers and subject to its obligations and duties to the public. It can not lawfully disregard either. It was created for a public good, and, as a sovereign (in its limited extent) it has the power of self-preservation. And it can not continue to exist without means to pay its *necessary expenses.* These can only be had by the levy and collection of taxes. (297)

There is no provision of the Constitution requiring or providing that the Legislature shall give a municipal corporation power to levy and collect taxes. But it seems to be assumed that such corporations have the power of taxation. And wherever taxation is mentioned in the Constitution, with reference to municipal corporations, it is to *restrict their powers,* and not to grant them. This is so in Article VII, sec. 7, and it is so in Article VIII, sec. 4, which provides for the organization of cities and towns, "and to restrict their powers of taxation." Can it be that the framers of the Constitution intended that such bills, as are provided for in these sections, should be read on three several days and the yeas and nays called and recorded on the two last readings? If so, why did not the Constitution say so? Because they are not bills to raise revenue.

Section 14, Art. II, of the Constitution, in my opinion, has nothing

to do with the legislation to create a municipal corporation. If the views expressed in the opinion of the Court are correct, I venture to say that not a county, city or town in the State has been properly incorporated. And if what is said is true as to towns and cities, it must be true as to counties. If the views of the opinion are correct, no county, city or town had any right to levy any tax until The Code of 1883.

I am in favor of sustaining the provisions of the Constitution where they properly apply to taxation, but I am not willing to carry it to legislation to which it does not apply, and to my mind makes it an absurdity.

CLARK, J., concurring: The authorities as to the power of county taxation are thus analyzed and summarized in *Tate v. Commissioners,* 122 N. C., 815, and *Herring v. Dixon, ibid.,* 424, which have been often cited on this point and approved:

(298)

A. For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.

B. For necessary expenses, the county commissioners may exceed the constitutional limitation by special legislative authority, without a vote of the people.—Constitution, Art. V, sec. 6.

C. For other purposes than necessary expenses, a tax can not be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority.—Constitution, Art. VII, sec. 7.

This being a city, there is no constitutional limitation, and the only restriction is legislative; hence, only the third clause of the above summary applies, and when no legislative restriction is violated, the city or town can levy for necessary expenses. When the object is for other than necessary expenses, no debt can be incurred or tax levied except by a vote of the people under special legislative authority.

The act of incorporation of a city or town does not come within the requirements of section 14, Art. II, of the Constitution, but *eo instanti* that a municipal corporation is created, it has the power of taxation for necessary purposes conferred by The Code, in the absence of any restrictions imposed by the act creating it.

Cited: Lowery v. Trustees, 140 N. C., 43; *R. R., v. Comrs.,* 148 N. C., 251; *Lutterloh v. Fayetteville,* 149 N. C., 67; *Comrs. v. Bank,* 152 N. C., 389; *Pritchard v. Comrs.,* 160 N. C., 478; *Cottrell v. Lenoir,* 173 N. C., 145; *Claywell v. Comrs., ibid.,* 659.

MORTON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 13 May, 1902.)

1. **Abatement—Revival—Actions—Personal Injuries—Mental Anguish—Telegraphs—The Code, Sec. 1491, Subsec. 2.**

   Under The Code, sec. 1491, an action against a telegraph company to recover damages for mental anguish caused by failure to deliver a telegram, abates upon the death of the person injured.

2. **Actions—Misjoinder—Parties—Personal Injuries—Mental Anguish—Telegraphs—The Code, Sec. 267.**

   Under The Code, sec. 267, an action against a telegraph company for damages for mental anguish, for failure to deliver a telegram, brought by a husband and wife individually and the wife as administratrix of her mother, is a misjoinder of causes of action and of parties.

3. **Parties—Actions—Misjoinder—The Code, Sec. 272.**

   Under The Code, sec. 272, the trial judge is not authorized to divide misjoined causes of actions when there is also a misjoinder of parties.

ACTION by Eliza P. Morton, administratrix of Josephine Pelletier, C. C. Morton and wife, Eliza P. Morton, against the Western Union Telegraph Company, heard by *Allen, J.*, at October Term, 1901, of ONSLOW.

The plaintiff administratrix is a daughter of the deceased, and the wife of her coplaintiff. The deceased, Josephine Pelletier, was, at the time the telegram was sent, residing with the plaintiffs in the town of Jacksonville, N. C., and was very ill with pneumonia. Among other allegations, the complaint contains the following:

"6. That on 21 February, 1901, the defendant transmitted to the plaintiff C. C. Morton, at Jacksonville, N. C., the following message: 'Wire me Aunt Joe's condition. Shall I send physician? P. H. PELLETIER.'

"10. That upon the advice and request of her attending physician that Dr. Primrose, of New Bern, be called into consultation, the plaintiff C. C. Morton, upon behalf of himself and wife and (300) her mother, delivered to defendant's agent at Jacksonville a dispatch for P. H. Pelletier.

"11. That the said message was delivered to the agent at Jacksonville, N. C., upon the opening of the office at that place on the morning of 22 February, 1901, as follows: '22 February, 1901. To P. H. Pelletier, New Bern, N. C.: Send Primrose this morning. Condition critical. C. C. MORTON.' And the charges for delivery of same were prepaid and received by defendant.

"13. That the defendant negligently failed to perform this duty and failed to deliver the said message to P. H. Pelletier promptly.

"14. That by reason of the failure to deliver the said message promptly, the same did not reach the said P. H. Pelletier until after the departure of the train from New Bern for Jacksonville, and there was not another train for twenty-four hours, whereby the plaintiff's intestate was deprived of the benefits of the professional services of Dr. Primrose.

"15. That the said Josephine Pelletier was greatly disappointed and shocked at the failure of the arrival of Dr. Primrose, and began to sink, and died before the arrival of the next train from New Bern.

"16. That by defendant's failure to deliver the said message as per contract, and its negligence and breach of duty as aforesaid, the said Josephine Pelletier and the plaintiffs in this action were greatly damaged by reason of her failure to have the desired and necessary medical attendance, and the consequent disappointment, loss and suffering, in a great sum to them and to each of them, to wit, $1,999, wherefore plaintiffs pray for judgment for damages $1,999 and the costs of this action."

"The defendant, the Western Union Telegraph Company,
(301) demurs to the complaint, for matter appearing on the face thereof, on the following grounds:

"I. That several causes of action have been improperly united in said complaint, to wit: A cause of action in favor of Eliza P. Morton, administratrix of Josephine Pelletier, for mental and physical suffering on the part of the said Josephine Pelletier, deceased, and a cause of action in favor of Eliza P. Morton individually, and a cause of action in favor of C. C. Morton for mental anguish suffered by him.

"II. That the complaint does not state a cause of action in favor of Eliza P. Morton, administratrix of Josephine Pelletier, deceased, as said cause of action, if any, arose in favor of said decedent in her lifetime and did not survive to her administratrix.

"III. In that there is nothing to show that the message was sent for the benefit of either Eliza P. Morton or C. C. Morton, but that it does appear it was not sent for her benefit or his, but for the benefit of Josephine Pelletier.

"IV. That it does not appear, nor is it alleged, either from the terms of the message, or otherwise, that a failure to deliver must reasonably cause mental anguish to Eliza P. Morton.

"V. That it does not appear from the message, nor is it alleged, that the company had notice that C. C. Morton would suffer mental anguish for a failure to deliver the message."

The court below sustained the second ground of demurrer and overruled the others. Both sides appealed.

W. D. McIver and Duffy & Koonce for plaintiffs.
Bellamy & Peschau for defendant.

DOUGLAS, J., after stating the facts. We will consider both appeals together, as the questions are so intimately connected.

We think the second ground of demurrer was properly sustained. Section 1491 of The Code provides that: "The following (302) rights in action do not survive: 2. Causes of action for false imprisonment, assault and battery, or other injury to the person, where such injury does not cause the death of the injured party." *Harper v. Commissioners,* 123 N. C., 118. Viewed as an actionable injury, mental anguish must be taken to be an injury to the person within the meaning of the statute. It is certainly not an injury to property, and in the state of union which we call life, we are not aware of any way by which the mind or soul can be reached except through the physical organs. These organs alone convey to the mind the concrete impressions upon which it acts, and without which it would be incapable of intelligent thought. Certain bodily diseases produce insanity, while any sudden shock to the mind reacts upon the body, sometimes even to a fatal extent.

In law, the word "person" does not simply mean the physical body, for if it did it would apply equally to a corpse. It means a living person composed of body and soul. Therefore, any mental injury is necessarily an injury to the person. Personal injuries may be either bodily or mental, but whether one or the other, they infringe upon the rights of the person and not of property. A learned author has said that "the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. Indeed, the sufferings of each frequently, if not usually, act reciprocally upon the other." 3 Suth. Dam., 260; *Young v. Tel. Co.,* 107 N. C., 370, 9 L. R. A., 669, 22 Am. St., 883.

This disposes of the plaintiff's appeal, and to that extent the judgment must be affirmed.

Upon the defendant's appeal, we are of opinion that the first ground of demurrer should also have been sustained. In this (303) case there are three different plaintiffs, each apparently suing in a separate right, the legal entry of the administratrix being entirely distinct from that of the individual, whether suing as distributee or for her own mental anguish. If the plaintiffs are suing jointly for the same cause of action, that is, the mental anguish suffered by Mrs. Josephine Pelletier, they can not recover, as the cause of action does not survive. If they are suing severally for the mental anguish suffered by themselves respectively, then there is a misjoinder of parties as well as of

causes of action. Code, secs. 239 and 267; *Cromartie v. Parker,* 121 N. C., 198, and cases therein cited.

We are not prepared to say that one person can recover for mental anguish suffered by another; and therefore the husband and wife, suing severally for their own anguish, are different parties suing upon distinct causes of action. As was said in *Cromartie v. Parker, supra:* "As in this case there is not only a misjoinder of distinct causes of action, but also a misjoinder of parties having no community of interests, the action can not be divided under section 272 of The Code, which permits division only where the causes alone are distinct."

The demurrer should therefore have been sustained and the action dismissed. This disposes of the case and renders unnecessary any discussion of the other grounds of demurrer, as it is probable that the complaint would be essentially different if a new action were brought.

In plaintiff's appeal, affirmed.

In defendant's appeal, reversed.

Cited: Green v. Tel. Co., 136 N. C., 496; *Helms v. Tel. Co.,* 143 N. C., 394; *Thigpen v. Cotton Mills,* 151 N. C., 98; *Ayers v. Bailey,* 162 N. C., 212; *Cooper v. Express Co.,* 165 N. C., 539; *Campbell v. Power Co.,* 166 N. C., 489; *Watts v. Vanderbilt,* 167 N. C., 568.

---

(304)

SMITH AND WIFE v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Filed 13 May, 1902.)

1. **Damages—Negligence—Carriers—Railroads—Passengers—Evidence.**
In an action against a railroad company for putting off a passenger beyond her destination, there being no evidence of any actual damages or bodily harm, a judgment of nonsuit was properly entered.

2. **Damages—Mental Anguish—Passengers—Personal Injuries—Evidence.**
In an action against a railroad company for damages for carrying a passenger beyond her destination, evidence of mental anguish is incompetent.

CLARK and DOUGLAS, JJ., dissenting.

ACTION by D. H. Smith and wife against the Wilmington and Weldon Railroad Company, heard by *McNeill, J.,* at September Term, 1901, of ROBESON. From a judgment for the defendant, the plaintiffs appealed.

Patterson & McCormick for plaintiffs.
McLean & McLean for defendant.

MONTGOMERY, J. At the close of the plaintiffs' evidence the defendant's motion for judgment as of nonsuit was allowed, and the plaintiff appealed.

The gravaman of the action—indeed, the only cause of action set out in the plaintiffs' complaint—was the alleged reckless, careless and negligent conduct on the part of the defendant's conductor in carrying her past and beyond the point to which she had bought her ticket, and putting her off in the rain and in an unsuitable place. The exact language of the complaint in respect to the alleged negligence is as follows: "That the conductor on said train recklessly, carelessly, negligently and unlawfully, and in absolute disregard of his duties (305) to her, carried said plaintiff past and beyond her destination about three-fourths of a mile, and despite remonstrance on her part, stopped the train and put off said plaintiff and her children in a low, wet and swampy place, and in the midst of a steady rain and at a considerable distance from any shelter or other protection from said rain, and where it was neither likely nor probable that any one would meet said plaintiff and her children; all of which was done to the serious inconvenience, annoyance, damage and injury to said plaintiff and children to the amount of $10,000."

There was no evidence that she suffered any bodily harm, or that she was put to any expense in reaching her home from the point at which the conductor helped her to alight. It is true that she said she got wet and was laid up for several days, and was exhausted and very much fatigued; but her physician, who prescribed for her that very morning, testified that for some time she had been suffering from nervous prostration and functional disorder of the heart, and that her condition was such that she would have been sick anyway. Just immediately before the occurrence, a summer thunderstorm was approaching, and all of her evidence showed that she would have become wet from the rain if she had stopped at the point where the conductor had agreed to stop the cars for her to get off. And besides, there was no house or building at the agreed point of her destination, and no one awaiting her upon her arrival. In fact, the plaintiff not only did not claim in her complaint, as we have seen, any damages other than such as were alleged to have arisen by reason of the conductor having put her off at the place and in the manner he did, but in her testimony also, in answer to a question on her cross-examination, she said: "I sued for damages for being put off out there where there was no one to meet me and away from any house or protection of any kind, and in the rain." It is signifi- (306) cant, too, in this connection, that although she testified that she had consulted counsel with reference to bringing suit in this matter, the summons was not issued until the March following the time of the

occurrence—4 July, 1899. She testified herself, also: "I was not put to any additional financial expense by reason of being put off at Cameron instead of at Stewarts." In the course of the trial the plaintiff undertook to show that she suffered mental suffering, and she was asked this question by her counsel: "State whether or not there was any mental suffering by reason of the treatment of the defendant?" And his Honor very properly, in our opinion, refused to allow the question. We do not intend to extend to that extent the doctrine of mental anguish. So far as we now recall, that doctrine has only been allowed in this Court in cases where there has been personal injury, except in cases where telegraph companies have been negligent in their failure to send and deliver messages concerning personal or domestic affairs, such as the illness or death or something equally as serious, between persons who are near of kin.

Neither do we think that there was any evidence tending to prove that the defendant's conductor, in his conduct, did or said anything which would justify the plaintiff's attempt to recover as for punitive or exemplary damages. Dr. McKenzie, a witness for the plaintiff, testified that the conductor was considered "a very gentlemanly conductor." On the present occasion he told the plaintiff that he was unable to stop the train, a long freight train with one passenger coach in the rear, at the point he had agreed to stop for her benefit; that he was unable to communicate with the engineer the signal to stop. He gathered together her parcels or bundles, and, in her own language, "helped me and the children off the train by lending his hand to us, and when we got to the end of
(307) the car Captain Lockamay went out ahead of us." She also said that the conductor stood at the end of the car on the ground and remained there during the entire time the train was at Cameron, and that he was talking with her some of the time. It was also in evidence that very near the point where the cars were stopped were residences and homes, and in one of them (Mr. Cameron's) the plaintiff and her children found shelter and protection.

So it appears from the evidence that while the conductor may not have measured up to the standard recognized by the plaintiff in point of politeness, he yet in law fulfilled every duty imposed upon him as conductor of the defendant's train in the acts of helping her to alight from the car and in attending upon her after she alighted and before the train moved off.

If it were admitted that the plaintiff was wrongfully put off the train, she would be entitled to recover only the actual damages that she would have sustained therefrom, and if the act was accompanied with unnecessary force or other circumstances calculated to humiliate her, or to wound her pride, or with a reckless indifference to consequences, insult or

rudeness, showing malice, such damages might have been allowed by the jury as they should think were warranted by the facts in the way of punitive damages. *Rose v. R. R.*, 106 N. C., 168; *Hansley v. R. R.*, 117 N. C., 565, 32 L. R. A., 543, 53 Am. St., 600. The evidence discloses no such conduct on the part of the conductor It is true that the plaintiff said that "the conductor treated me in a rough, indifferent manner, was mad and spoke in a harsh tone," but that evidence, when taken together with what the conductor actually did under all the surroundings, makes it perfectly clear to us that what she complained of was a matter of taste and not of substance. In the confusion of the storm, the downpour of rain, the fright of the children, probably, and her own weak and nervous condition, combined to cause her to take an extreme view of the situation and to do the conductor an injustice in her censure of (308) him.

No error.

DOUGLAS, J., dissenting: I must again dissent from the opinion of the Court. That this Court can say as a matter of law that a common carrier is not guilty of negligence when it sells tickets to a woman, contracting to carry her to Stewart's Siding, and then carries her beyond her destination, and over her protest puts her and her four little children out in the rain, can never receive my assent. Let us examine a part of the evidence:

Dr. J. C. McKenzie, witness for plaintiff: "I live in South Carolina. I saw the plaintiff on 4 July, 1899, at Tatum, S. C., on the railroad to Stewart. I purchased one and one half ticket for them. I saw them take passage on the train. There were four children. I do not know their ages, but think the youngest one is about nine months old." Cross-examination: "I bought the tickets on the Yadkin Valley Railroad. I did not see the conductor on that day. It was a freight train."

Redirect: "The train had a passenger car attached, and carried passengers."

Mrs. M. J. Smith, plaintiff: "I was at Tatum station on 4 July, 1899. I left there on the northbound freight train. I do not know who was the conductor. I had one ticket and one half ticket. I had my four children with me, one nine months old, one two years old, one four years old, and the other ten years old. I gave the tickets to the conductor. Dr. McKenzie saw me get on the train; he also helped me on the train. I was to get off at Stewart's Siding, and when the conductor passed through the car, I called it to his attention, and asked him if he was going to stop at Stewart's Siding; and I told him I was to get off there and not at Cameron's sawmill; and he said all right, he would have the (309) train stopped. I did not see him any more until I got out in the

bay where he put me off near Cameron. He came to me and began to pick up my bundles and said, 'Here is the place where you will have to get off.' I told him at John Station that I would have to have help. He came and picked up my bundles and I followed after him. There was a fearful looking cloud, and it was raining, thundering and lightning. The place he put me off at was down in a pond in a low, wet place, with railroad ditches on each side. I stayed there for five or ten minutes. There was no shelter, and it was raining. The conductor stood out on the ground until the train left. This was between one-half and three-quarters of a mile from the station to which I bought my ticket. The conductor treated me in a rough, indifferent manner, and was mad and spoke in a harsh tone. It was after I passed Stewart's that I was put off. It was in a low, wet rough place, and I could not go on until the train left. When he put me off, I crossed on the other side where there were no bushes and stood there until the train left. The train was in the way, and as I had my children, I could not go along until the train left. When the train left, I started up the road towards the postoffice. I went to Phil. Cameron's house after it slacked raining. Miss Pearlee Jernigan was at Mr. Cameron's, and she brought an umbrella and came to meet me. She took my baby and carried it to the house. When it slacked raining, I sent one of my children over home to tell them I was there without any way to get home, and to come after me. I was wet, and remained in that condition for about two hours."

"State what was the condition of these children at the time you reached Mr. Cameron's house." "They were as wet as I was, and had to stay wet as long as I did."

"State, Mrs. Smith, whether or not you experienced any suffering on this occasion by reason of the conduct of the defendant, and if (310) so, what?" "It laid me up for several days, and I was exhausted and very much fatigued. I was sick any way that morning, and had been under the treatment of Dr. McKenzie for several years."

She again says, on cross-examination: "I would have gotten wet very little had I gotten off at Stewart's, because there was a shelter and my conveyance would have been there to meet me. There was no conveyance there when I passed Stewart's, but one would have been there in a few minutes."

There is much other testimony, some of which is conflicting, but that does not justify taking the case from the jury. We must remember that this is a compulsory nonsuit, which is equivalent to a demurrer to the evidence. The evidence of the plaintiff is therefore admitted to be true, and must be construed in the light most favorable to her. This has been held in a long and uninterrupted line of decisions. *Cox v. R. R.*, 123

N. C., 604; *Cogdell v. R. R.*, 124 N. C., 302; *Moore v. R. R.*, 128 N. C., 455; *Coley v. R. R.*, 129 N. C., 407, and cases therein cited.

In *Springs v. Schenck*, 99 N. C., 551, 555, 6 Am. St., 552, *Merrimon, J.*, speaking for the Court, says: "As the Court in effect intimated upon the trial that in no reasonable view of the evidence could the appellant recover, it must, for the present purpose, be accepted as true and taken in the most favorable light for him, because the jury might have taken that view of it, if it had been submitted to them."

In *Purnell v. R. R.*, 122 N. C., 832, *Furches, J.*, 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."

If this remains the law, I see no principle of law upon which this case can be taken from the jury. Giving to the plaintiff's (311) testimony its proper weight, it is evident that the defendant broke its contract of carriage, and further injured the plaintiff by putting her off in the rain at an unsuitable place. Merely carrying the plaintiff beyond her destination was actionable negligence for which she was entitled to at least nominal damages, giving her costs both in this Court and the court below.

In *Cable v. R. R.*, 122 N. C., 892, 899, it is said by a *unanimous* Court: "There is another point in the case at bar on which the plaintiff was clearly entitled to go to the jury. He testified without contradiction that he was on the train as a passenger, had paid his fare to Benaja, a regular station of the defendant company, and was carried beyond his destination by the failure of the conductor to stop his train. This of itself was negligence on the part of the defendant, and entitled the plaintiff to at least nominal damages. This is a well-settled rule of law, even in the absence of a local statute. Fetter Carriers of Passengers, sec. 66, 300, and cases therein cited; Schouler Bailments and Car., sec. 661; Thompson Car. of Pass., page 581; Hutchinson on Car., secs. 612, 614; 5 A. & E. Enc., 565, 566, 572, and notes thereunder. In this State, the liability is directly imposed by statute. The Code, sec. 1963, provides that 'Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall within a reasonable time previous thereto be offered for transportation at the place of starting, and the junction of other railroads, and at *usual* stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and *discharge* such

passengers and property *at,* from and *to* such places on due pay-
(312) ment of the freight or fare legally authorized therefor, and shall be *liable* to the party aggrieved in an action for damages for any neglect or refusal in the premises.' As to the quantum of damages, the rule may be found in *Purcell v. R. R.,* 108 N. C., 414, 12 L. R. A., 113, and in *Hansley v. R. R.,* 117 N. C., 565, 32 L. R. A., 543, 53 Am. St., 600."

I am not aware of any change in the statute, and it would seem that, if it was the law then, as was said by a unanimous Court, it would be the law now. So she was entitled to at least nominal damages in the court below, and to a new trial for refusing to allow them. I think she was entitled to substantial damages.

Returning to the evidence, there are some things in the opinion of the Court that I can not understand. It says: "There was no evidence that she suffered any bodily harm." She says she did, and the truth of her evidence is admitted by the demurrer. Being asked the distinct question whether she experienced any suffering on this occasion *by reason of the conduct of the defendant,* she answers as follows: "It laid me up for several days, and I was exhausted and very much fatigued."

The opinion also says, after referring to this testimony: "But her physician, who prescribed for her that very morning, testified that for some time she had been suffering from nervous prostration and functional disorder of the heart, and that her condition was such that she would have been sick anyway." Even if we were permitted to compare and weigh the evidence, and draw our own deduction from conflicting inferences, it seems to me quite a natural inference that a woman already suffering from such dangerous diseases would be made worse by being rudely put out in the rain with a nine-months child in her arms. To my mind her sick and helpless condition should have been an
(313) additional protection to her instead of a mere shield to protect the defendant from the consequences of its own wrong.

There are in the opinion other inferences of fact which seem equally unsustained by the testimony and unwarranted by law. In my opinion, there should be a new trial.

CLARK, J., concurs in the dissenting opinion.

Overruled: Hutchinson v. R. R., 140 N. C., 127; *Williams v. R. R.,* 144 N. C., 503; *Sawyer v. R. R.,* 171 N. C., 16.

(314)

COGDELL v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Filed 13 May, 1902.)

1. **Evidence—Opinion Evidence—Negligence.**

In an action against a railroad company for the death of a person while unloading goods from its car, due to the unsoundness of an apron covering the space between the car and the platform, evidence that a sound apron would have borne a person of the weight of the deceased is incompetent as an expression of opinion, but is not prejudicial if the jury finds that the railroad company was negligent in maintaining the defective apron.

2. **Evidence—Incompetent—Negligence.**

In an action against a railroad company for the death of a person while unloading goods from its car, due to the unsoundness of an apron covering the space between the car and platform, evidence that the apron, if sound, would have held the weight of the deceased, is incompetent where there is no evidence tending to show that the deceased stood upon the apron.

3. **Contributory Negligence—Evidence—Burden of Proof—Laws 1887, Ch. 33.**

The evidence in this case warrants the jury in finding the deceased guilty of contributory negligence, although the burden of proving such negligence is on the defendant.

4. **Pleadings—Contributory Negligence—Laws 1887, Ch. 33.**

Where an answer alleges that the death of intestate of plaintiff was caused by the negligence and fault of the intestate himself, the allegation is sufficient to raise the question of contributory negligence.

5. **Evidence—Written Statements.**

In an action for the death of intestate of plaintiff, written statements not signed, made by impeaching witnesses as to what witness of plaintiff told them, are incompetent.

6. **Contributory Negligence—Intoxication—Voluntary.**

In an action against a railroad company for the death of a person while unloading goods from its car, where the deceased voluntarily became intoxicated and was killed in consequence thereof, he would thereby be guilty of contributory negligence.

7. **Contributory Negligence—Negligence—Railroads.**

In an action against a railroad company for the death of a person while unloading goods from its car, an instruction that if deceased fell from the car on an apron and did not know of the unsoundness thereof, he would not be negligent, was properly modified by adding, "unless the fall was the result of want of care."

8. Contributory Negligence—Negligence—Proximate Cause.

It was proper to refuse to instruct that if intestate of plaintiff, by reason of intoxication, fell from a car on an apron covering the space between the car and platform, and the apron would have sustained his weight if built of sound material, defendant would be liable.

9. Contributory Negligence—Presumptions—Burden of Proof—Laws 1887, Ch. 33.

In an action against a railroad company for the death of a person while unloading goods from a car, it was proper to refuse an instruction that the law presumes that a person killed by the negligence of another has exercised due care himself, the burden being on the defendant to prove the intestate of plaintiff guilty of contributory negligence.

CLARK and DOUGLAS, JJ., dissenting.

(315) ACTION by Mariah Cogdell, administratrix of Samuel Cogdell, against the Wilmington and Weldon Railroad Company, heard by *Allen, J.*, and a jury, at February Term, 1901, of BEAUFORT. From a judgment for the defendant, the plaintiff appealed.

Charles F. Warren for plaintiff.
Small & McLean for defendant.

COOK, J. Defendant company delivered at Washington, upon its track at the wharf, a carload of coal consigned to the Stryon Transportation Company. According to the agreement between them, it was the duty of the consignee to unload the coal from the car. Plaintiff's intestate was employed by the consignee to unload the coal, and, while undertaking to do so fell into the river and was drowned, on account of which this action was instituted.

The contention of plaintiff is that defendant company was negligent in the construction of its premises provided for delivering this freight, and in leaving an open space between the car and platform two or three feet wide over the water of the river, and in covering said space with an apron made of cedar-hearted, or unsound, timber, and while her intestate was using said apron by standing thereon, in unloading coal from the car, it broke, and intestate fell through into the water and was drowned; or that, if not using the apron to stand upon, he slipped and fell on the same, which, by reason of its unsoundness, broke, and he fell through into the water and was drowned. Defendant, after denying its negligence, avers in its answer "that the death of intestate was not caused by any negligence of defendant, but was caused by the negligence and fault of plaintiff's intestate himself," and insists and relies upon its plea of contributory negligence.

There were three issues submitted to the jury: "1. Did Samuel Cog-

dell come to his death by the negligence of defendant, as alleged? 2. If so, was he guilty of contributory negligence? 3. What dam- (316) ages, if any, is the plaintiff entitled to recover?" The jury answered the first two in the affirmative, and therefore did not respond to the third. Judgment was rendered in favor of defendant, and plaintiff appealed.

Of the thirty-eight exceptions taken by plaintiff, those which relate to the negligence of defendant company and to the damages are not material to this decision.

The evidence relating to the accident shows that intestate, when last seen alive, was upon the car of coal throwing off lump coal with his hands upon the platform; and a few minutes thereafter he was missed, search made and his body found in the water. When taken from the water, his body was still warm, and bruises were found upon his left knee, shoulder, back of his head and about his right eye. Upon the side of the coal car, about six inches from the top, were found finger prints of both hands ranging straight down, and the print of the toe or heel of a shoe near the finger prints. The prints raked about one-half way down the side of the car, or a little more. The "scrape took the paint off," and the apron was broken immediately below the finger and toe (or heel) prints. The apron was made of plank an inch or an inch and a half thick, sixteen feet long, and nailed together with battens across the underside and was fastened to the platform with hinges and folded over, so that the other side rested against the coal car; and the breaks in the planks revealed their unsoundness. This apron had been used to keep the coal from falling through into the water, and also by the laborers in standing upon while engaged in unloading coal. It was covered over with coal dust, and had been in use three or four months, so that if any defect existed in its make or material it was not apparent. Defendant contends that plaintiff, notwithstanding its negligence, can not recover, for that intes- tate was negligent in voluntarily putting himself in a drunken (317) condition, and while so drunk and unfitted undertook to do the work, and in doing so fell off, and that his drunken condition was the immediate or proximate cause of his death, and his negligence, coexisting with defendant's, defeats a recovery.

The evidence as to intestate's general condition, as well as that relating to his condition on the morning of the accident, is very conflicting. That introduced by plaintiff tends to show that he was a sober, energetic, industrious, able-bodied laborer and good provider for his family, and that he was sober at the time he went to the car to unload it; while that of defendant tends to show that he was a barroom loafer, rarely ever sober, a chronic drunkard, and was so drunk when he started to the car, 15 or 30 minutes before he was found drowned, that he could not walk

straight, but staggered as he went along; that he took a "short" in Dudley's bar, and went out and then came back and took another "short," and after taking the second one, his son treated him to another; that he bought a half pint of whiskey at Simmons' bar and drank half of it, and put the balance in a bottle.

The second exception (which also covered exceptions 4, 5, 8 and 14) is to the exclusion of evidence. Plaintiff proposed to ask the witness, "If this plank of the apron had been sound and not cedar-hearted or rotten, could a man of Cogdell's weight and size have stood upon it with safety and thrown off the lump coal, or fallen on it from the top of the car without its breaking under him?" This question was directed to the inquiry as to the negligence of defendant company in providing an unsound and unsafe apron, and is immaterial to this decision, since the jury found that issue in favor of plaintiff. It could not relate to the alleged contributory negligence or assumption of risk by intes-
(318) tate, because all the evidence shows that the rottenness or unsoundness of the timber was *latent* and not discoverable until *after it was broken.* However, we see no error in its exclusion. The weight of Cogdell, quality and condition of the lumber of which the apron was made and height of the car above the apron, were shown to the jury by the evidence. With these facts fully described before them, the jury could judge for themselves as to the strength of the plank and effect of a fall, equally as well as the witness, and then his "opinion" would have been superfluous, and therefore should be excluded. "The opinion rule is a rule based on the thought that when all the data of drawing an inference are before the jury . . . it is superfluous to add, by way of testimony, the inference which they can equally well draw for themselves, . . . the witness's opinion is excluded, not because inferences as such are objectionable, but because the inference under the circumstances is superfluous, ... and adds nothing to the essential data before the jury." 1 Greenleaf Ev., sec. 441b. "The general rule undoubtedly is that witnesses are restricted to proof of facts within their personal knowledge, and may not express their opinion or judgment as to matters which the jury or the court are required to determine." 1 Rice on Evidence, 325; 3 Taylor on Ev., sec. 1414. The opinion here sought does not come within any of the exceptions to the general rule, such as identification of persons, tracks, handwriting, etc., the opinion about which is formed from comparison in the mind of the observer, or as to sanity or insanity of a person where the opinion is formed from the expression, tone, look, gestures, temper, etc. (*Clary v. Clary,* 24 N. C., 78), which can not be, from their very nature, described by the witness to the jury; nor is it contended that it comes within the rule as to experts.

Exceptions 3, 7, 12 and 13 are taken to the exclusion of evidence offered to show for what purpose the apron was useful and (319) convenient; and if constructed of sound plank and securely fastened, a man could stand on it and throw off lump coal from the edge of the car. Primarily, this evidence tends to show negligence by defendant company, which is not under consideration; and, secondarily, to justify intestate in using it for such purposes, if he did so; but, as we have already said, there is no evidence tending to show that he did stand upon the apron at all, or that he was using the apron for such purpose at the time of the accident, and, if he had been doing so, there was no evidence to show that he knew or could have known of any defects in the apron. So we do not sustain these exceptions.

Whether intestate's death resulted from his own negligence in going upon the coal car after becoming so drunk that he could not take care of himself, was a question for the jury to determine upon the evidence submitted, and the burden of proving the same is imposed by law (Laws 1887, ch. 33) upon the defendant. There was evidence, if believed by the jury, to establish such negligence. But plaintiff insists that the plea of contributory negligence was not raised by the answer, and the second issue should not have been submitted to the jury, which was ruled against her, to which she excepted. (Exception 17.) We think his Honor properly submitted such issue.

In its answer, defendant avers "that the death of intestate was not caused by any negligence of defendant, but was caused by the negligence and fault of plaintiff's intestate himself." This is a strict compliance with the statute (Laws 1887, ch. 33), and put plaintiff upon notice as to that defense, as fully appears from the fact of her being prepared with evidence to meet the charge of going upon the car in a drunken condition. However, if plaintiff had not anticipated, and could not with reasonable certainty have anticipated the defense, it would have been proper for the court, upon application, to have ordered (320) that a bill of particulars be furnished as prescribed in The Code (Clark's Code, sec. 259, and cases there cited).

Exceptions 15 and 16 are taken to the admission by the court of the testimony of Dr. Nicholson and Cordon, in contradiction of plaintiff's witness Nelson. Upon the trial Nelson testified that he saw intestate when he was upon the car, and that he seemed to be sober; and to impeach him, Dr. Nicholson and Cordon were introduced to show that Nelson told them that Cogdell was so drunk he looked curiously out of his eyes on the morning of the accident. Dr. Nicholson testified that he reduced to writing and read over to Nelson that which Nelson told him concerning intestate's condition, and, after hearing it read, said it (the statement) was all right, but did not sign it. And Cordon testified that

he wrote down what Nelson told him to the same effect. His Honor permitted the witnesses to testify from their recollection, and allowed them to refresh their memories from the writings. Plaintiff insisted that the written statements should be introduced as the best evidence, and objected to the oral testimony. We think his Honor properly excluded the writings or memoranda, and allowed the witnesses to testify from their recollections thus refreshed. The writings, or written statements, were not signed by Nelson; they were simply declarations made by them, and, being hearsay, could serve no purpose except as memoranda from which it was permissible for them to refresh their memories.

The record fails to show any evidence that intestate used the apron to stand upon, or that he used it in any way, or that it was needful or useful for any purposes other than to prevent coal from falling overboard and for laborers to stand upon. Therefore, it is not necessary to discuss the charge or prayers for instruction concerning its use or the assumption of risk by intestate with reference to it. No defect
(321) was apparent, and its unsoundness was only discoverable after it had been broken. But we have carefully reviewed the charge and prayers as to those matters, and fail to find any error prejudicial to plaintiff.

Defendant contends that intestate's death was caused by his own negligence in going upon the car of coal in an intoxicated condition, by reason of which he was unable to maintain himself upon the car and fell upon the apron and broke through into the river, which resulted in his death, and his negligence being concurrent with it, plaintiff can not recover. Relating to the charge of his Honor upon this contention (and his refusal to give instructions prayed for), we fail to find any error. The substance of the charge upon this phase of the case is contained in the following part thereof: "If the jury should believe from the evidence that Cogdell was intoxicated and fell from the car, then his condition would not necessarily affect plaintiff's right to recover in this case, unless such intoxication substantially and essentially contributed to his death. Intoxication is not negligence of itself, but is only evidence of negligence. . . . If deceased voluntarily drank liquor and thereby became intoxicated so that his usual faculties were temporarily impaired, or his capacity to perform his ordinary work with safety was impaired, then such condition was due to himself, and if injured by reason thereof it would be negligence. If the deceased voluntarily incapacitated himself from exercising ordinary care by drinking liquor, and while in this condition got on the coal car for the purpose of unloading the same, and by reason of his intoxicated condition fell off the car, you will find that the deceased was negligent and contributed to his own death, and you will answer the second issue 'Yes.' That the evidence

in this case does not present any element of the 'last clear chance' on the part of the defendant to have prevented the deceased from falling into the water." (Exceptions 26, 27 and 28.) (322)

Plaintiff requested his Honor to charge the jury, "The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself." Which was refused, but in lieu thereof his Honor charged, "That an inference arises from the instinct of self-preservation that a person killed has exercised due care himself," to which plaintiff excepted. (Exception 38.) Also, "That if the deceased did not know, or could not have discovered by ordinary inspection, that the apron was constructed of unsound planks, and if apparently it was strong enough to bear his weight, if he fell from the car, and to roll him off on the platform, then it would not be contributory negligence for him to have gone on top of the car to unload it, or to have fallen therefrom. The deceased was not required to know an unseen and hidden defect in the apron not discernible by ordinary inspection." This prayer his Honor gave, but inserted after the word "therefrom" and before "The," "unless the fall was the result of want of care." To which insertion or modification the plaintiff excepted. (Exceptions 21 and 34.) Plaintiff further asked the court to charge that, "If the jury should believe, from the evidence, that deceased was intoxicated, and by reason thereof fell from the car on the apron, and that the apron would have sustained his weight and rolled him upon the platform if it had been built of sound material, and the deceased did not know of such unsoundness, and could not by reasonable inspection have discovered the same, then his intoxication and his fall from the car would not be the proximate cause of his death, but the proximate cause would be the defective apron," which was also refused, and excepted to. (Exception 34.)

The exceptions taken above can not be sustained. It is contended with great zeal that his Honor erred in refusing to instruct (323) "that the law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself." (Exception 38.) This would be true as an abstract proposition of law, in casting the burden of proving *want of care* upon the defendant. But that presumption is now incorporated in our statute (Laws 1887, ch. 33), which *expressly* imposes the burden of proof upon the defendant who sets up contributory negligence as a defense; and it appears from the case on appeal that his Honor properly instructed the jury as to this burden: "After recapitulating the evidence and *stating the rule as to the burden of proof* and the contentions of the parties, the jury were instructed by the court as follows." (The italics being ours.) Having stated the rule (which must have been correctly done, as there is no

exception), it was unnecessary for the court to give any instruction as to the presumption.

Failing to find any substantial error prejudicial to the plaintiff, the judgment of the court below must be

Affirmed.

DOUGLAS, J., dissenting: This case is before us the second time, having been reported in 124 N. C., 302.

As the jury has found the defendant guilty of negligence, and the defendant has not appealed, we need not consider that phase of the case.

The contributory negligence of the intestate, with the evidence bearing thereon, and the instructions relating thereto, is alone before us. The general construction of the wharf, platform and apron are set out in the former opinion.

The witness Langley testified that he was familiar with the locality, having worked there at one time, and that he went there immediately after the accident. He then fully described the condition of the (324) apron; how it was constructed and used; the length, breadth and thickness of the plank composing it; how and where it was broken; and its general appearance, both before and after the accident. He further stated that he had known the intestate for twenty years; that they usually worked together; that he saw him just before he was drowned, and saw his body when it was taken out of the river. All this was of his own personal knowledge.

He was then asked by the plaintiff: "If this plank of the apron had been sound, and not cedar-hearted or rotten, could a man of Cogdell's weight and size have stood on it with safety and thrown off the lump coal or fallen on it from the top of the car without its breaking under him?" This question was excluded upon objection of the defendant. In such exclusion I think there was error. The plain object of the question was to show that it was not contributory negligence for a man of ordinary prudence to trust his weight to an apron which would have been entirely safe but for a hidden defect which he had no means of ascertaining. This is not expert testimony. It is the conclusion of the witness as to a matter of common knowledge, based upon facts within his personal observation immediately after the accident. Therefore, I think it comes within the rule laid down in *S. v. Reitz,* 83 N. C., 634, where this Court, by *Ashe, J.,* says: "The first exception to the admissibility of evidence was to the admission of the testimony of a witness who testified it was his best opinion that certain tracks found near the site of the burnt building were those of the prisoner. The reception of this evidence was objected to on the ground that the witness was not an expert. It is not necessary that a witness should be an expert to testify

to the identification of tracks. The correspondence between boots and footprints is a matter requiring no peculiar knowledge to judge of, and as to which any person who has seen both may testify. His testimony in such case can amount to nothing more than his opinion as to the correspondence. Though the opinions of witnesses are, in (325) general, not evidence, yet on certain subjects some classes of witnesses, as, for instance, experts, may express their opinions; and on certain other subjects any competent witness may express his opinion or belief. . . . The bare opinion of a witness as to the identity of the tracks should have no weight with a jury; but when a witness gives his reasons for entertaining the opinion, the whole of the testimony should be allowed to go to the jury for them to say whether the grounds of the opinion are reasonable and satisfactory." This case is evidently not in conflict with *Phifer v. R. R.,* 122 N. C., 940, nor intended to be overruled thereby, as in that case this Court says, on page 942: "We have no direct authority in our own Reports on the question raised here." The Court, stating the point involved, further says on page 941: "It seems to us that whether the plaintiff was careful was the very question which the jury were impaneled to determine, the defendant having pleaded contributory negligence and introduced testimony tending to prove it." In the later case of *Burney v. Allen,* 127 N. C., 476, it was held competent, upon an issue of *devisavit vel non,* for a witness to give his opinion that, from his personal knowledge of the room and the location of the furniture, the testator could have seen the subscribing witnesses as they signed the will, if the testator was lying in the position testified to by other witnesses on the trial. This Court says, on page 479: "This is rather the statement of a physical fact than the expression of a theoretical opinion, and seems clearly to come within the rule laid down in *Arrowood v. R. R.,* 126 N. C., 629, 632."

In the case at bar the safety of the apron was not the essential fact at issue, but was in the nature of a circumstance or relative fact, tending to prove or disprove the principal fact of contributory negligence. 1 Greenleaf Ev., secs. 440, 440a. Of the same general nature was the defendant's testimony as to the intoxication of the (326) intestate. Witnesses for the defendant testified that they thought the intestate was drunk, but none of them saw him drinking and some of them did not even give any reasons for their opinion. This, however, does not appear to have been excepted to.

The general rule is that the opinions of witnesses are not admissible, but there are many exceptions to this rule, both as to expert and non-expert testimony, arising from necessity and the increasing tendency of

modern courts to keep in view rather the ascertainment of the truth than the mere exclusion of error in the admission of evidence.

A nonexpert witness was permitted to give his opinion in the following cases, among others: As to insanity, in *Clary v. Clary,* 24 N. C., 78; *Barker v. Pope,* 91 N. C., 165; *McRae v. Malloy,* 93 N. C., 154; *S. v. Coley,* 114 N. C., 879; *Smith v. Smith,* 117 N. C., 326. As to the presence of negro blood, in *Hopkins v. Bowers,* 111 N. C., 175; *Hare v. Bd. Education,* 113 N. C., 9. Under the circumstances of this case, I think the question was competent.

There are a large number of exceptions, the majority of which refer to the first and third issues, and are therefore not essential. Of those referring to the second issue, some come under the rule herein laid down and are governed thereby; of the others, many may not occur on a second trial, and need not be now discussed.

I think that the issue as to contributory negligence was properly submitted; but there is one exception to the charge relating thereto that should be sustained.

The plaintiff requested the court to charge: "That the law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself." This instruction should have been substantially given, but was refused. In lieu thereof, the court charged as follows: "An *inference* arises from the instinct of self-preservation that a person killed has exercised due care himself." There is an (327) essential difference between "inference" and "presumption." An inference may be drawn from almost any competent evidence, but a presumption carries with it the burden of proof. No one saw the intestate fall, and there is no direct evidence, positive or circumstantial, tending to prove contributory negligence. It is true, there is evidence pro and con as to the alleged intoxication of the intestate; but intoxication is not contributory negligence *per se,* and becomes so only when it directly contributes in causing the injury. Of this there was no evidence. The most that can be said is that the intoxication of the intestate, if believed by the jury, was a mere circumstance from which contributory negligence might possibly be inferred. Whether such a possible inference, of whose existence and weight the jury alone could determine, was sufficient to overcome the legal presumption against the existence of contributory negligence, was a question for the jury; but they should have been instructed that there was such a presumption.

Whatever doubt may have formerly existed as to the burden of proving contributory negligence was completely settled by chapter 33, Laws 1887, of which section 1 is as follows: "That in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the

answer and proved on the trial." This act, which is generally regarded as having been caused by the decision of this Court in *Owens v. R. R.*, 88 N. C., 502, lays down the law as followed by the courts of the United States, of England, and of thirty-five out of the forty-five States of the Union. Shear. and Red. Neg. (5 Ed.), sec. 109; Thompson Neg., 1176; Thompson Car. of Pas., 257 *et seq.;* Wharton Neg., sec. 423; Redfield on Railways, sec. 253, and notes; *Prideaux v. City,* 43 Wis., 513; 28 Am. Rep., 563, Browne's Note; 62 Am. Dec., Freeman's Note.

It is generally recognized that the burden of poof carries (328) with it the presumption. Lawson Pres. Ev., page 133, Rule 19d.

Of the numerous cases, I will quote only a few, italicizing such parts as peculiarly emphasize the point in question:

In *Cox v. R. R.*, 123 N. C., 604, 610, this Court says: "The negative *presumption* necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof."

In *Norton v. R. R.*, 122 N. C., 910, 928, this Court says: "There is never any presumption of contributory negligence, as self-preservation is the first instinct of humanity. Where there is no evidence of the fact, the *presumption is against contributory negligence,* even in the absence of any statute like our own, making it a matter of affirmative defense."

In *R. R. v. Gentry,* 163 U. S., 353, the Supreme Court of the United States says, on page 366: "As already stated, no one personally witnessed the crossing of the track by the deceased, nor the running of the flat car over him. Whether he did or did not stop, and look, and listen for approaching trains, the jury could not tell from the evidence. *The presumption is that he did,"* citing *Continental Imp. Co. v. Stead,* 95 U. S., 161, 164, and *R. R. v. Griffith,* 159 U. S., 603, 609.

In *R. R. v. Chisholm,* 83 Fed., 652, the Court (U. S. Circuit Court of Appeals) says, on page 656; "The law does not presume negligence, but it *presumes,* until the contrary is shown, that every one in a given situation *will act, and has acted, prudently,* and with due regard for his own safety."

In *Schum v. R. R.*, 107 Pa. St., 8, 52 Am. Rep., 468, the Court says, on page 12: *"The common-law presumption is that every one does his duty until the contrary is proved,* and in the absence of all evidence on the subject, the presumption is that decedent observed (329) the precautions which the law prescribed."

In *Crumpley v. R. R.*, 111 Mo., 152, the Court says, on page 158: "Contributory negligence is an affirmative defense, which the party alleging it is required to prove; and in this case the burden was on defendant to show that deceased did not exercise care. In the absence

of proof to the contrary, *the presumption* is that he was at the time in the exercise of care and diligence."

In *Smith v. R. R.*, 4 South Dakota, 71, the Court says: "In the absence, therefore, of any evidence upon the subject, it would be the duty of the court to *assume* that the plaintiff was *not* guilty of contributory negligence."

In *McBride v. R. R.*, 19 Ore., 64, the Court says, on page 58: "In the case at bar, no witness was called who saw the occurrence. There is no evidence whatever whether the decedent in fact did stop and look and listen. *The presumption is that he did;* proof of that fact was no part of the plaintiff's case."

In *Mynning v. R. R.*, 64 Mich., 93, 8 Am. St., 804, the Court says, on page 102: *"The presumption of law* is that the person killed at a crossing did stop and look and listen, and *will prevail in the absence of direct testimony on the subject."*

It will appear from the above quotations, each taken from a different State, and representing a line of authorities, that there is a uniform legal presumption, not only that the decedent was not guilty of any *active* negligence, but also that he took all the precautions for his own safety required by law.

This presumption is rebuttable, but, as was said in *Cox v. R. R., supra,* it "remains until the burden is lifted or shifted by direct admissions or a preponderance of proof." There was clearly error in the court below refusing to give the instruction as requested by the plaintiff.

The above opinion was written tentatively as my view of (330) the law.

There is another serious error in the opinion of the Court. It practically admits that the plaintiff was entitled to his prayer as to the presumption of due care on the part of the intestate, but intimates that this has become an abstract proposition, because the statute of 1887 *expressly* imposes the burden of proof of contributory negligence upon the defendant. It clearly seems to me that the statute is an additional reason why the prayer should have been given. Again, the Court seems to hold that because the record states inferentially that the judge below "stated the rule as to the burden of proof," that there is a presumption that he stated it correctly, and that this presumption cures all exceptions to his refusal to give prayers which are in themselves correct. In other words, the judge below can, in his discretion, properly refuse all prayers, and justify such refusal upon the bare statement in the record that he had "stated the rule" or "properly charged" upon the points raised by such prayers. This rule would practically destroy the value of an appeal, as it would take away from this Court the power of passing upon the essential question. When there is an excep-

tion to the charge, or the refusal to charge, of the court below, it is for this Court to say whether there is error; and when a material prayer is refused, it must appear to us affirmatively from the record, either that such prayer was in itself erroneous or that it was substantially given in the charge. This has been expressly decided.

The Court seems to take it for granted the jury found the issue of contributory negligence on the ground of intoxication. Where have the jury said so? Not in their verdict, for they found simply that the deceased was guilty of contributory negligence. This finding may have been based upon the deceased standing upon an apron that was not intended for any such purpose, as was strenuously con- (331) tended by the defendant. His Honor, after charging upon the first issue as to the assumption of risk, in case the apron was constructed and used solely to prevent coal from falling overboard, added the following words to his charge upon the issue of contributory negligence: "These instructions are also given subject to the instructions just given with reference to the apron's sole use." This would naturally lead the jury to believe that they must consider the question of assumption of risk upon both issues. Hence arises the importance of the excluded evidence discussed in this opinion, but not alluded to by the Court. If we must find the facts, there seems to be but one rational conclusion to be drawn from the evidence as to the manner of intestate's death. He was evidently letting himself down from the car, and scraped the side of the car with his toe as he swung down. He let go his hold when he landed upon the apron, which immediately broke beneath him. He then grabbed for the top of the car, but failed to reach it, and scratched the side of the car with his finger-nails as he went down. He must have been facing the car, or he could not have scratched it with his finger-nails, and he could not have scratched it with both his fingers and his heel at the same time. He must have gone down in an upright position or he could not have gone through the narrow opening between the platform and the car. He could not have gone down head foremost, as there is no conceivable way by which he could have gotten into that position. Therefore, he must have gone down feet foremost. If he had rolled off the car he could not have scratched the car so far down the side, and, in all probability, would have rolled over onto the platform without touching the car. If he had "pitched off" the car, either backwards or forwards, his hand would have been away from the car and he would necessarily have fallen on the platform. A man six feet high falling *across* an opening only two feet wide can not possibly go through it. The greater part of his body would inevitably strike the platform. The fact (332) that the apron was broken off only at one end shows that his

weight must have been concentrated at that point. This idea was evidently in the mind of the coroner, Dr. Tayloe, who was a very intelligent witness. He testified, in part, as follows: "I saw marks on the side of the car beginning within a few inches of the top and going down perpendicularly the full extent of the car. They looked like the man had tried to catch as he went down. . . . The scratches showed that the man must have been grasping at the car as he slipped from it. . . . The same impressions might have been made by a man accidentally falling off or by a man getting down from the car." Taking all the circumstances together, the scratches upon the car, the breaking of the apron at one end, and a large man falling through the small opening, all tend to prove that he fell in the manner I have described. No other theory would be consistent with *all* the admitted facts. If this is true, the breaking of the apron was the proximate cause of the injury, and hence the vital importance of the excluded testimony as to the condition of the apron, and the direct application of the prayer as to the presumption of care. Moreover, the above undisputed facts are inconsistent with the theory of drunkenness. It is common knowledge that when a drunken man falls he does so from a *relaxation* of the muscles. The extreme muscular tension necessary to hold a man's fingers against the car with sufficient force to scrape it from top to bottom would be impossible in a state of intoxication.

I can not concur in the opinion of the Court.

CLARK, J., concurs in the dissenting opinion.

Cited: Frazier v. R. R., post, 358; *Harris v. Quarry Co.,* 131 N. C., 561; *Cogdell v. R. R.,* 132 N. C., 852; *Marks v. Cotton Mills,* 135 N. C., 289; *Britt v. R. R.,* 148 N. C., 41; *Hodges v. Wilson,* 165 N. C., 327.

(333)

MOORE v. MOORE.

(Filed 17 June, 1902.)

1. **Divorce—Alimony Pendente Lite—Notice—Venue.**

A motion for alimony *pendente lite* may be heard anywhere in the judicial district, five days' notice being required when heard out of term-time.

2. **Divorce—Affidavit—Amendment.**

It is discretionary with the trial judge to allow an amendment to the affidavit in an action for divorce.

3. Divorce—Residence—Domicil—Husband and Wife.

Where husband and wife establish a residence in the State, the wife, by leaving the State for a temporary purpose, without any intention of changing her residence, does not thereby lose her citizenship.

4. Divorce—Alimony—Appeal—Review—Questions for Court.

Whether the wife is entitled to alimony is a question of law upon the facts found, and is reviewable upon appeal by either party.

5. Divorce—Alimony—Amount—Discretion.

The amount of alimony in an action for divorce is discretionary with the trial judge.

6. Divorce—Alimony—Allowance—When.

Alimony *pendente lite* may be allowed before the return term if the complaint has been filed.

MONTGOMERY, J., dissenting.

ACTION by J. G. Moore against J. H. Moore, heard by *Councill, J.*, at LENOIR, N. C., on 25 December, 1901. From a decree allowing alimony *pendente lite,* the defendant appealed.

Long & Nicholson for plaintiff.
Armfield & Turner and A. C. McIntosh for defendant.

CLARK, J. Prior to the statute of 1852, *alimony pendente* (334) *lite* was unknown in this State. *Wilson v. Wilson,* 19 N. C., 377; *Earp v. Earp,* 54 N. C., 118. Its evident purpose was "to afford the wife present pecuniary relief pending the progress of the action." *Morris v. Morris,* 89 N. C., 109. The present statute (The Code, sec. 1291) provides that the motion may be heard and determined in or out of term, and certainly the wife in such case ought not to be left to starve till the judge, or his successor, shall come to the county. The motion is ancillary and not a motion for judgment on the merits, or a motion in the cause, strictly speaking, and hence it can be heard anywhere in the district. *Parker v. McPhail,* 112 N. C., 502; *Fertilizer Co. v. Taylor, ibid.,* 141; *Ledbetter v. Pinner,* 120 N. C., 455. The five days' notice is required only when the motion is heard out of term (*Zimmerman v. Zimmerman,* 113 N. C., 432), and it was duly given in this case. The parties being in court by the notice, the continuance of the motion did not make necessary a renewal of the notice.

The language of the affidavit annexed to the complaint, that "the complainant became a resident of this State more than two years next preceding this cause of action, with her husband, at Liledown, in October, 1898, and she is advised that her legal residence has been there since said time," is a substantial compliance with the statute. But

to avoid any controversy, the petitioner asked leave and amended the above to conform literally to the statute, to wit, "the complainant has been a resident of the State for two years next preceding the filing of the complaint." The amendment was in the discretion of the court. Clark's Code (3 Ed.), sec. 273, and cases there cited.

The principal contention of the defendant, however, is that the residence of the complainant, the wife, must be an actual one, in the sense that she must be physically present in the State continuously for
(335) two years in order to confer jurisdiction, and, as such is not the case here, the decree and proceedings are void. The defendant resides here and has been personally served with summons, but it is contended that the wife is not qualified to sue in our courts for above reasons. But if she could not sue here, where could she sue? She could not sue elsewhere, because she could not get personal service on her husband. *Harris v. Harris,* 115 N. C., 587, 44 Am. St., 471. This is in effect held in *Arrington v. Arrington,* 102 N. C., 491, and *Harris v. Harris, supra,* where the wife left this State and resided in another State and brought suit there, and this Court held the decree valid only because the husband had voluntarily entered an appearance in such action. Besides, she avers, and the Court finds as a fact, that she has not acquired residence elsewhere and had no intention to abandon the residence she had acquired here.

In *Smith v. Morehead,* 59 N. C., 360, the Court held, what is the general rule, that "the domicil of the husband draws to it the domicil of the wife." The defendant relies upon *Schonwald v. Schonwald,* 55 N. C., 367. But that case was an exceptional one in that the wife had never been a resident of this State, but, retaining the residence she had, came into this State after her husband had been residing here for eight years, and, without acquiring residence here, began her action. In the case at bar, the plaintiff came here in 1898 with her husband, and acquired residence, and in 1899 left for another State for a temporary purpose without intention of changing the residence acquired here, and, returning here, was disavowed by her husband, and brings this action more than two years after her residence had begun here.

The judge finds the following facts: "The plaintiff had been a resident of North Carolina for more than two years next preceding the filing of her complaint; that her residence began with her husband at
(336) Liledown, N. C., in the fall of 1898, at which place the appellant has since permanently resided; that in going to California under protest, and at the instance of her husband, the plaintiff never intended to make that State her residence, nor to sever her residence from that of her husband; that the plaintiff's residence has always been that of her husband." Thus, the residence of the plaintiff for the required

period is not only averred in the complaint and affidavit affixed thereto, but is found as a fact by the court below upon the evidence, and we are bound by such finding of fact for the purposes of this appeal.

Alimony *pendente lite* was first allowed, as already said, in this State, by chapter 53, Laws 1852. Thereafter, in *Earp v. Earp,* 54 N. C., 118, the Court held that an appeal would not lie from such interlocutory decree granting alimony, upon the ground that it would defeat the purpose for which the statute was enacted. But in *Taylor v. Taylor,* 46 N. C., 528, it was held that an appeal would lie from a refusal to grant alimony *pendente lite.* Revised Code, ch. 39, sec. 15, amended the statute to allow an appeal from granting or refusing the allowance. The present statute is section 1291 of The Code, which provides that the complainant must set forth such facts as, when found to be true by the judge, shall entitle her to the relief.

Whether the wife is entitled to alimony is a question of law upon the facts found, and that is reviewable on appeal by either party. The court below must find the facts. "In his findings of fact, the judge is not confined to the sworn complaint. He may be aided by affidavits offered on the part of the plaintiff and the defendant." *Morris v. Morris,* 89 N. C., 109. We can not look into the affidavits.

As to the amount of alimony to be allowed, the statute says: "The judge may order the husband to pay her such alimony during the pendency of the suit as *shall appear to him* just and proper, having regard to the circumstances of the parties." This makes the amount discretionary, and not reviewable on appeal unless there has been (337) an abuse of discretion. *Miller v. Miller,* 33 Fla., 453, 24 L. R. A., 137; 1 A. & E. Enc., 476, 477. In this case, it is found as facts upon the testimony that the appellant is worth $80,000 to $100,000; that the reasonable income of his property is from $8,000 to $10,000 per year; that the plaintiff is absolutely without means of subsistence and unable to meet the expenses of her suit. The litigation requires, and will require, doubtless, from the tenor of the affidavits, attorneys and other expenses not only here, but in Kentucky, Ohio, Indiana and California, to prepare her case. Still, an allowance of $4,000 seems to us a large one to be made before the jury has passed upon the issues, at the trial of which it may possibly be found that the plaintiff is not entitled to any relief. If those issues shall be found in her favor, then the court below could act with greater freedom. We can not say, however, that the amount adjudged by his Honor was so gross as to be an abuse of the discretion reposed in him by the statute. As the statute provides "such order may be modified or vacated at any time on the application of either party, or of any one interested," the defendant has still his remedy by application to the proper judge, who

may affirm the present allowance or modify it, as to him "shall appear just and proper," but the judgment, if modification is refused, would not be appealable, as we have just held the allowance is not reviewable on appeal, unless when an abuse of discretion is shown, and besides such course would prevent any settlement of this preliminary matter by successive appeals intervening.

After complaint filed, there was no reason why, upon notice, the motion should not be made for alimony *pendente lite* before the return term. The urgency of plaintiff's needs for subsistence and for means to prepare her case may have required it.

(338) Upon consideration of all the exceptions, we find

No error.

MONTGOMERY, J., dissenting. This Court said in *Nichols v. Nichols,* 128 N. C., 108: "It is necessary, in order that the courts may take jurisdiction of the matter of divorce, that each and all of the requisites mentioned in the affidavit required by The Code, sec. 1287, shall be set out and sworn to by the plaintiff." The requirements are mandatory. The matter of divorce not only affects the parties immediately concerned, but the whole fabric of our social life; and the courts, before they will act, must see that a strict case is before them to be heard, and that can not be seen under our statute unless all the matters required by section 1287 of The Code are set out in the affidavit accompanying the complaint, as well as that the complaint should set out a good cause of action." That part of the affidavit of the plaintiff in this case concerning the plaintiff's residence does not comply with our statute. The language of the statute is: "And that complainant has been a resident of the State for two years next preceding the filing of the complaint." That requirement is set out in plain words, and any confusion of its terms by the use of technical and complex phraseology ought to be regarded by the courts as an effort on the part of the pleader to allege residence by construction. That part of the affidavit in this case is as follows: "That the complainant became a resident more than two years next preceding *this cause of action* (italics mine), with her husband, at Liledown, in October, 1898, and she is advised that her legal residence has been there since that time." That she became a resident of this State with her husband in October, 1898, and that she was a resident more than two years next preceding the *cause of action,* does

(339) not mean necessarily that she was a resident two years before the complaint was filed. She may have left the State after 1898 with the intention and purpose never to return, and have remained an actual resident of another State until a time within two years before the *complaint was filed;* and that is precisely what was affirmed in

some of the papers and affidavits filed by the defendant on the motion for alimony. If it should turn out upon the trial of the action that such was the case, it was most prudent in the counsel who drew the affidavit that he prepared it so as to aver a legal conclusion as to affiant's residence, instead of a direct affirmation that she had been a resident in fact for two years next preceding the filing of the complaint. There must have been an actual residence in this State for two years next preceding the filing of the complaint before an action for divorce can be commenced. And by that is not meant that the plaintiff should have actually "had her physical body in this State for two years in order to confer jurisdiction upon the courts in this State" (in the brief of plaintiff's counsel), but that she should have had her recognized domicil here, with the present intention to remain. The domicil of the husband is not for every purpose the domicil of the wife. The maxim that the domicil of the wife follows that of the husband can not be applied to oust the court of its jurisdiction; neither, from parity of reason, can it give jurisdiction. *Schonwald v. Schonwald,* 55 N. C., 367. It is said in the brief of plaintiff's attorneys that in *Smith v. Morehead,* 59 N. C., 360, this Court held that "the domicil of the husband draws to it the domicil of the wife," and the case of *Schonwald v. Schonwald* was cited in *Smith v. Morehead* "in support of that doctrine." It is true that in *Smith v. Morehead* the Court cited the *Schonwald case* and approved of the reason given in that case for the enactment of the law concerning residence in divorce proceedings, which reason was as follows: "The principal reason of the enactment was to prevent our courts from being made the easy instruments for obtaining (340) divorces by persons not residing in the State—to prevent citizens of other States from using our courts for the purposes they could not attain in their own; in other words, to prevent frauds in these matters." That is, that nonresidents of the State could not procure valid divorces in their own State from a resident of this State without acquiring jurisdiction of the defendant by a personal service in the State of the nonresident; and, therefore, it is deemed fraudulent to allow nonresidents of the State to use our courts for their convenience and to procure decrees that they could not have in the courts of their own State."

In *Schonwald's case* it was affirmed in the affidavit of the petitioner that "her husband has resided in Wilmington for more than eight years, and although she has not been living with him three years, in all, in this State, yet she is advised that the domicil of her husband is her domicil, and therefore she has been a resident of this State for more than the last three years preceding the present time." The Court said there: "The counsel who drew the petition was well apprised of the difficulty in the way of his client, and, therefore, instead of recklessly

making her swear to a fact, has made her aver a conclusion which does not necessarily follow the fact." There can be no difference between a plaintiff, in an action for a divorce, who has never resided in the State, and a plaintiff in such a suit who once resided here, but who had left the State with the determination never to return, and who, upon returning, has not resided within the State for two years next preceding the filing of the complaint. It is a mistake to say that in *Smith v. Morehead, supra,* this Court said "that the domicil of the husband draws to it the domicil of the wife," in the sense that that declaration had reference to nonresident wives. The bill in equity in that
(341) case showed that the complainant was, and always had been, a resident of Wake County, and that the defendant was a resident of Guilford County. The bill was filed in Wake County. Upon a demurrer to the bill for want of jurisdiction in the Court of Equity for the county of Wake, the demurrer was sustained—the Court holding that as both plaintiff and defendant were residents of the State, the complainant, upon her marriage with the defendant, became a resident of Guilford County, the county in which her husband resided. The Court was only stating the general rule when it said in *Smith v. Morehead, supra,* that "the domicil of the husband draws to it the domicil of the wife," for the Court further said there: "It was undoubtedly competent for the Legislature to enact that the actual residence of the wife, out of the State, should not be considered as a legal residence with her husband, in the State, for the purpose of enabling her to sue him in the courts of this State. That was the intent of the Legislature in the act to which reference is made, and the effect of the decision in *Schonwald's case* is to carry out that intent. In other respects, the rule remains unchanged, and where the parties reside in the State the residence of the husband still remains the residence of the wife."

The amendment to the affidavit ought not to have been allowed. It was in the very words of the statute, but it did not show jurisdiction. It conferred jurisdiction, and that was not permissible. *Gilliam v. Ins. Co.,* 121 N. C., 369.

My conclusion is that the court had no jurisdiction of the action, because of the defective affidavit in the respect I have pointed out.

Cited: S. c., 131 N. C., 371; *Clark v. Clark,* 133 N. C., 30; *Barker v. Barker,* 136 N. C., 319, 320; *Page v. Page,* 166 N. C., 91; *Garsed v. Garsed,* 170 N. C., 674; *Jones v. Jones,* 173 N. C., 283, 285.

(342)

IN RE DREWRY.

(Filed 17 June, 1902.)

Grants—Entries—Caveators—Protests—Public Lands—The Code, Sec. 2765.

A person who claims title to an interest in land covered by an entry made under The Code, sec. 2765, may file his protest against the issuance of a warrant of survey thereon.

PETITION to rehear this case, reported in 129 N. C., 457, is granted.

S. J. Erwin and J. T. Perkins for petitioner.
Avery & Erwin contra.

MONTGOMERY, J. This case, decided at August Term, 1901, and reported in 129 N. C., 457, is before us again on a petition to rehear. The alleged error of law complained of by the petitioner is that the Court construed that part of section 2765 of The Code relating to caveats in the matter of land entries to be a mere reference to the old statutes of 1777 and 1779, now passed into disuse, instead of being a substantial law connected with the subject of land grants by the State, and intended for present application. After a careful revision of the whole matter, we are convinced that there was error in our former decision.

Upon a review of the statutes of 1777 and 1779, we have found that they referred, first, to such persons as had entered or settled on vacant lands of the State with the intention of becoming proprietors thereof; second, to those persons who had been prevented from obtaining warrants of survey by which their entries might be identified by metes and bounds, or grants for the land so settled upon or entered, on account of the discontinuance of the land offices of the State during the Revolution; and, third, that it was for the settlement only of such disputes as had originated in consequence of the discontinuance (343) of the land offices. Those statutes, in clear terms, were confined to those who had not obtained a legal title to the lands. In addition to that, those statutes were not brought forward in the Revised Code in the chapter (42) on Entries and Grants, and were therefore repealed. Rev. Code, ch. 121, sec. 2.

But that part of section 1765 of The Code to which we have referred, was introduced in The Code at the time of the adoption of The Code, and its provisions, so far as they refer to those who may become caveators, are for the benefit of persons who own the title to the land, or any interest in the same infringed upon by subsequent entries. The language of the new law is very clear, and the purposes for which the same were enacted are equally as clear. It offers a preliminary and

safe remedy to landowners who are holding their lands under legal or equitable titles against subsequent entries that might be fraudulent or mistaken. For, in such last-mentioned cases, irreparable damage might be done to the landowner's estate, without the protection of the statute, before an injunction could be procured in a civil action to prevent trespass.

It might be well to mention, as an aid to this construction which we put upon the statute (Code, sec. 2769), that the same was repealed by chapter 132, Laws 1885, but that the repealing act itself was repealed by chapter 70, Laws 1889, and the section is in full force today, except as to Lincoln and Macon counties.

As there was error in the former decision of the case, it is remanded to the Superior Court of BURKE, to be proceeded with according to law.

Petition allowed. Case remanded.

---

(344)

SMITH v. ATLANTA AND CHARLOTTE RAILROAD COMPANY.

(Filed 17 June, 1902.)

1. Negligence—Personal Injury—Contributory Negligence.

In an action against a railroad company for injury to an employee, it appearing that such employee was painting a switch target within three feet of the rail and was struck by a switch engine, the engineer of such engine had the right to assume that the person injured was in possession of all his faculties and, not being hampered by any obstructions that would prevent his instantaneous avoidance of danger, would step out of danger.

2. Railroads—Lessor—Lessee—Negligence.

The lessor of a railroad is liable for the negligence of the lessee in the operation of the road.

DOUGLAS, J., dissenting.

ACTION by Fred Smith against the Atlanta and Charlotte Railroad Company, heard by *Hoke, J.*, and a jury, at October Term, 1901, of MECKLENBURG. From a judgment for the plaintiff, the defendant appealed.

Burwell, Walker & Cansler for plaintiff.
George F. Bason for defendant.

MONTGOMERY, J. According to the plaintiff's evidence, he was engaged in painting what is known as the "switch target" on one of the

tracks of the defendant in its depot yard at Charlotte—the target being about four feet off from the rail—and that in doing his work he was compelled at times to put himself in danger of passing trains; that the track where he was at work was straight for several hundred feet, and there was no obstruction to the view in either direction along the track; and that while he was engrossed in his work and inadvertent to one of defendant's shifting engines, the engineer, without signal or bell or whistle, ran him down and injured him. His Honor (345) thought, upon the plaintiff's own evidence, that the plaintiff contributed to his own injury, and so instructed the jury; but at the same time said that such contributory negligence would not prevent the plaintiff's recovery if the jury should find that the engineer knew or could have seen that the plaintiff was in danger and inadvertent to the approach of the engine, and ran the engine down the track and upon the plaintiff without giving notice of the approach by proper signals.

The imputed negligence of the defendant is clearly stated by his Honor, and as the charge on that contention of the plaintiff is the vital point of the case, we will give the whole of it: "A breach of duty that was imputed to defendant in this case was that plaintiff was engaged in performing his work; that he was in a position of danger, and so near the track that he was liable to bring about a position of danger; that he was in a position of danger; that he was absorbed in his work in which he was engaged, and that that must have been evidence to the employees of the defendant on that engine; and while he was in a dangerous position and evidently unaware of the approach of the engine, that this defendant, through its agent, ran that engine on him without giving any warning or signal of its approach, and that he was knocked down and injured severely by it, and that was the proximate cause of the injury. If the jury find by the greater weight of the evidence that that is true; if you find that plaintiff was there in what you find was a dangerous proximity to that rail, and that, being engrossed in his work, he was inattentive to the approach of that engine as it came down the track, and you further find that the employees of the defendant who were on the engine knew, that it was evident to them, that plaintiff was in that condition, and, being evident to them, they ran the engine on down the track without giving proper signals in (346) order to let him escape, and injury followed, and if you find that this was the proximate cause of it, you will answer, 'Was the plaintiff injured by the negligence of the defendant?' 'Yes,' otherwise, 'No.'"

The case was tried by his Honor with his usual ability and painstaking care, and we find no error in any of his rulings, except in this one. We have no precedent in our reports, nor have we been able

to find one anywhere, upon a state of facts like those present in this case. And we have been slow, therefore, to declare as erroneous the conclusion reached by his Honor. The plaintiff labored under no infirmity, he was sober, intelligent, occupied a position where he could do his work with entire safety, if he would only keep watch for the passing trains. There was no obstruction of any sort to prevent him from seeing the engine which struck him, nor to prevent him stepping out of danger instantly.

In *McAdoo v. R. R.*, 105 N. C., 140, and in *Meredith v. R. R.*, 108 N. C., 616, it was decided that an engineer who sees a person walking along the track in front of a moving engine, may act upon the assumption that the person will step off the track in time to avoid injury, if such person is unknown to him, and is apparently old enough to understand the necessity for care and watchfulness. It seems to us that such an assumption was lawful on the part of the engineer in the present case. The fault, then, with his Honor's charge, as we see it, is that he allowed the jury to consider, under the first issue, the continuing of his work by the plaintiff as evidence that he was engrossed in his work, and on that account was inadvertent to the approach of the train. The engineer, it appears to us, had the right to assume that the plaintiff, in possession of all his faculties and not hampered by any obstructions that would have prevented his instantaneous avoidance of danger, would have stepped out of danger. It would be a difficult matter in-
(347) deed for any important railroad system to carry on its business, if each engineer of a switch engine is to stop his engine whenever he sees an employee continuing his work upon the approach of the engine, or the employee is to stop his work, except for the second to step out of the way of the train.

The defendant's contention that it is not liable for such acts as are set out in the complaint—it being alleged in the complaint and admitted in the answer that the defendant is a lessor and the Southern Railway Company the lessee of the defendant railway, and that the injury of the plaintiff occurred while the road was being operated by the lessee—can not be entertained, and his Honor's ruling was correct in refusing to dismiss the action on that ground.

Error.

DOUGLAS, J., dissents.

Cited: *S. c.*, 131 N. C., 617; *Phelps v. Steamboat Co., ibid.*, 13; *Snipes v. Mfg. Co.*, 152 N. C., 45; *Meeder v. R. R.*, 173 N. C., 60.

TOMPKINS v. DALLAS COTTON MILL.

(Filed 17 June, 1902.)

Damages—Measure of—Contract—Breach.

Where a cotton mill has capital invested in its plant and other machinery, such capital being kept idle during the time a machinery company fails to deliver certain machinery according to contract, the measure of damages for such delay is interest on such idle capital and such losses and expenses as are incidental to the delay, such as insurance, idle labor, deterioration in its machinery, etc.

ACTION by the D. A. Tompkins Company against the Dallas Cotton Mill, heard by *Hoke, J.*, and a jury, at July Term, 1901, of MECKLENBURG. From the judgment allowing the counterclaim, the plaintiff appealed.

Plaintiff brought this action to recover a balance of $15,789.61 (348) and interest, for machinery, materials, work and labor furnished and done for defendant under a contract, which is admitted in the answer. For a counterclaim, defendant alleges that plaintiff made default in the compliance with its contract, in that it failed to furnish the machinery at the time agreed upon, and delayed the delivery thereof for several months, to its damage $5,000. There is no allegation or proof that defendant had made any contracts with third parties, securing to itself a determinate profit, which was known to plaintiff and contemplated by the parties at the making of the contract.

Burwell, Walker & Cansler for plaintiff. (351)
Jones & Tillett for defendant.

COOK, J., after stating the case. It certainly appearing that the witness's estimate was based upon the profits growing out of circumstances then existing, we think his Honor erred in not striking out his entire answer, as moved for by the plaintiff's counsel. And there being no evidence that witness based his estimate or calculation upon any data other than those of profits, his statement, or estimate, should not have been submitted to the jury for consideration. The witness estimated the monthly rental value of the machinery to be $1,500, being the profits derivable from a rising market both as to the raw material purchased and the manufactured goods sold. But if the price of the manufactured goods had gone down with the rise in the raw material remaining, the result would necessarily have been different. So, it is clear to us that his estimate was based upon speculation and uncertain profits, depending upon a variety of contingencies, the failure of any

one of which would subvert his whole calculation, and which are too remote and indeterminate to enter into and become the measure of damages. *Manufacturing Co. v. Rogers,* 19 Ga., 416. While it appears from his estimate that the market went in favor of defendant, and that it would have made a handsome profit if it had obtained its machinery, and gotten the same in good working order, and had had a sufficient number of competent employees and laborers and an ample supply of material, and met with no reverses, yet if the market had gone *contra,* and reverses had befallen it, then instead of having a profit, it might have incurred a loss, in which event the default of plaintiff would have been a benefit rather than an injury. Nevertheless, as the injury can not be estimated by the standard of profits, the law will not allow it to go unredressed. The measure of damages is a fair rental value
(352) of the mill for the loss of time caused by plaintiff's wrong—that is, the portion of the mill this machinery would have equipped. If this can not be otherwise accurately determined by certain and determinate data, which were contemplated by the parties and entering into their contract, then the law will allow the legal rate of interest upon the capital invested to be the measure (*Rocky Mount Mills v. R. R.,* 119 N. C., 693, 56 Am. St., 682), not because it is an accurate criterion, but for the reason that it is approximately just. The party injured by reason of a breach of contract should be, so far as money can do it, placed in the same situation with respect to damages, as if the contract had been performed. *Robeson v. Harman,* 1 Ex. Ch., 855-6. In the case at bar there is no *certainty* as to what would have been defendant's situation if plaintiff had performed its contract; but it is shown that it had capital invested in its plant and other machinery which was kept idle during the time plaintiff was delaying the fulfillment of its contract, upon the value of which it is entitled to recover the legal rate of interest; and it may have incurred losses and expenses which were incidental to such delay, such as insurance, idle labor, deterioration in its machinery, etc., which could be considered if properly put in issue. The charge and rulings of his Honor, with respect to which other exceptions are taken, are sustained.

For the error above pointed out, a new trial is awarded.

New trial.

(353) FURCHES, C. J., concurring. I agree in the conclusion that there should be a new trial. As I remember the facts in the case, the defendant owned a cotton mill, which he was operating, and had been operating for some time. But thinking it would be profitable to do so, he concluded to enlarge his mill, and for that purpose built an addition to his mill-house, in which to place new machinery. He also

made a contract with the plaintiff to furnish the new machinery necessary for this addition to his mill. The machinery was to be furnished at a specified price, to be delivered by a specified time, and to be *paid for when delivered.* The plaintiff furnished the machinery, but did not deliver it at the time specified in the contract, nor for some months afterwards. The defendant failing to pay for the machinery after it had been delivered by the plaintiff, this action was brought for the agreed price of the machinery bought by the defendant and delivered to him by the plaintiff. The defendant answered and admitted the contract and the receipt of the machinery, but alleged that it was not delivered at the time it was to have been delivered, whereby and by reason of which he sustained great loss and damage, which defendant set up by way of counterclaim and recoupment.

On the trial, the defendant undertook to prove speculative damages, and was allowed to introduce evidence to that effect, over the objection of the plaintiff. This was error. The evidence of Wilson, as reported in the case, should not have been allowed, and the opinion of the Court so states.

But I do not understand that the old mill, as I will call it to distinguish it from the new mill or addition, was stopped on account of not receiving the new machinery. So I think the opinion of the Court erroneously allows the defendant damages for that. The defendant had no money invested in the machinery sued for, as he was to pay for it *when delivered,* and has never paid for it yet. He is, therefore, it seems to me, not entitled to any damages on that account, unless (354) he is entitled to speculative damages upon an estimate of what he *could have made* if the machinery had been delivered on time, as he claims he is.

Not being entitled to speculative damages, nor to damages for money invested in the machinery, as he had none invested, the only damages I can see that he is entitled to is the interest on the money invested in putting up the addition to his mill, preparatory to putting in the new machinery; for the reason that such a structure, without any machinery in it, could not be rented for any price.

The opinion of the Court allows the defendant to recover for *"insurance,* idle labor, *deterioration* in machinery," which he had not received nor paid for. This Court expressly held in *Alpha Mills v. Engine Co.,* 116 N. C., 797, that the plaintiff in that case could not recover for *insurance.*

MONTGOMERY, J., concurs in the concurring opinion.

Cited: Machine Co. v. Tobacco Co., 141 N. C., 293; *Bell v. Machine Co.,* 150 N. C., 112.

(355)

FRAZIER v. SOUTHERN RAILWAY COMPANY.

(Filed 17 June, 1902.)

1. Contributory Negligence—Questions for Jury—Evidence—Verdict—Directing.

Where there is conflicting evidence whether there was contributory negligence, the trial judge can not direct a verdict upon it against the plaintiff.

2. Contributory Negligence—Presumptions—Burden of Proof—Laws 1887, Ch. 33.

In an action for personal injuries, the burden of proving that the person injured did not exercise due care in going upon railroad track is upon the defendant.

ACTION by C. P. Frazier, administrator of Henderson James, against the Southern Railway Company, heard by *Neal, J.*, and a jury, at February Term, 1902, of GUILFORD. From a judgment for the defendant, the plaintiff appealed.

John A. Barringer for plaintiff.
King & Kimball for defendant.

COOK, J. Upon the following issues, viz.: "(1) Was intestate of plaintiff killed by wrongful act and negligence of defendant, as alleged? (2) Did intestate of plaintiff contribute to his death by his own negligence? (3) What damage, if any, is plaintiff entitled to recover?" his Honor charged the jury that if they believed the evidence they would answer the first issue "Yes," the second "Yes," and the third "Nothing"; and the verdict was so entered.

The uncontradicted evidence shows that plaintiff's intestate was killed at a public crossing on East Washington Street, a main thoroughfare over which there is a great deal of travel in the city of Greensboro, about sunrise in the morning. The railroad track of defendant
(356) company runs from north to south, but in approaching that crossing from the north, the direction from which the train was coming which killed the intestate, the track makes a sharp curve to the southwest in a cut; so that the train approaching from the north can be seen from the crossing only about 100 yards. The street, East Washington, crosses the railroad track from east to west, and it is a difficult matter to see a train coming from the north on account of the houses on the east side and the embankment on the west.

On the east side, from which the intestate approached the crossing, Wilson's store is situate about 25 feet from the track, and is the nearest

house to it. From this point, at Wilson's store, the approaching train could have been seen only about 100 yards.

By the charter of the city of Greensboro, sec. 233, "All railroad trains are prohibited and forbidden to run faster than 4 miles per hour between north and south switch, and at a faster rate than 10 miles per hour anywhere in the corporate limits of the city."

The testimony of plaintiff shows that the intestate was struck by the engine after he had crossed the east rail and just as he was stepping across the west rail out of the track, and was knocked 25 feet and thrown on the embankment on the west side; while that of defendant, the engineer, shows that he was in the middle of the track when the engine struck him. Plaintiff's evidence shows that the train was running 25 or 30 miles an hour; while defendant's evidence shows that it had been running a mile in the corporate limits at the rate of 25 or 30 miles an hour, and was running 20 miles an hour when he, the engineer, first saw intestate, who was then 10 or 12 steps from the track, coming from the east towards the crossing, and that it was running about 10 or 12 miles an hour at the *time the train struck him;* that the train was 75 or 100 yards from the crossing when the engineer first saw the intestate going towards it. (357)

The evidence was also contradictory as to the signals. Plaintiff's evidence is to the effect that no whistle or bell was heard until the engine was immediately upon intestate, and then three blows, "toot, toot, toot," were given in rapid succession, as fast as a man could pull the cord, and as the third one sounded the engine struck him; while the evidence of defendant shows that the engineer sounded the whistle at the whistle-post for this crossing, and upon seeing intestate approaching the crossing had the bell rung, and seeing him "keep on coming towards the track," commenced sounding the whistle and trying to stop the train.

Now, then, upon this evidence his Honor instructed the jury to find that defendant was guilty of negligence (as to which defendant does not appeal), and that intestate was, upon that evidence, guilty of contributory negligence, to which plaintiff excepted and appealed. What is contributory negligence upon a *given state of facts* is a question of law to be decided by the court. But if the facts are controverted, then it is the duty of the jury to find such and apply the law as charged by the judge. The evidence in this case upon which contributory negligence is undertaken to be proved is conflicting, and his Honor erred in directing a verdict upon it. *Bogan v. R. R.*, 129 N. C., 154. Intestate was not a trespasser; he had an equal right of way across the track with defendant company along the track, subject to the prior right of passage in the defendant company on account of the momentum of its train,

confinement of its movement to the track, and the necessities and public nature of railway traffic; so he should wait until the train passes, the coming of which he should expect and ought to look out for. The prior right of the defendant, however, did not impose upon intestate the whole duty of avoiding the injury. They both should have
(358) exercised care and diligence in regard to their respective duties, and were charged with a mutual duty of exercising reasonable care. 3 Elliott R. R., sec. 1153.

When intestate reached Wilson's store, from which point a train coming from the north could be seen 100 yards, it was his duty to there look and listen before undertaking to cross the track only 25 feet ahead of him; should he then have failed to see one, or if he had heard one, though not in sight, he may then have had the right to assume that he could cross over safely, and it may not have been negligence for him to have undertaken it, as the train was not permitted by law to run faster in that part of the city than 10 miles an hour. The burden of proving that he did not exercise such care is upon defendant, and the presumption that intestate did exercise due care, when confronted by danger, is raised and enforced by such burden of proof. Laws 1887, ch. 33; *Cogdell v. R. R., ante,* 313. So that, presuming that he did look and saw no train, or that he listened and heard one, could he not then have safely crossed before the train could reach the crossing, running at the rate of 10 miles an hour? Or, if, seeing the train coming, and presuming that it was running at the lawful rate of speed, he undertook to cross ahead of it, but in fact it was running 25 or 30 miles an hour, then what would have been the immediate proximate cause of the injury? These were material questions of fact to be found by the jury, not the judge. Whether his going upon the crossing at the time he did, or the high and unlawful rate of speed, was the proximate cause of his death, was not within the province of the court to decide. Was the train running 10 or 12 miles, as testified to by defendant's witness, or 25 or 30 miles an hour at the time the train struck him, as testified to by plaintiff's witness? Surely, the triers of fact, as required by the Constitution, should have passed upon such questions.

(359) A further material fact was, whether the train could have been stopped in time to prevent the accident, if it had been running only 10 miles an hour, *after* the engineer saw intestate was going upon the crossing without heeding his signals, if he made such. "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 danger." *Edwards v. R. R.,* 129 N. C., 81. Again, whether the intestate, after being upon the track and seeing or ought to have seen the train coming,

could have extricated himself from his peril, was also a question of fact for the jury. The testimony shows him to have been an old man—some saying 55 or 60 years of age, others 60 to 70, and others 75 to 80; so if, by reason of his old age, he could not escape, and his injury would not have been inflicted if the train had been going its proper and lawful speed, then the jury ought to have been allowed to so find. If the evidence of plaintiff be true, then, under the statute imposing the burden of proof upon defendant, the plaintiff was entitled to recover; but if the evidence of defendant be true, then intestate recklessly and heedlessly walked upon the track in front of a moving train, and plaintiff would not be entitled to recover.

For the error in directing a verdict in the face of conflicting evidence as to material and essential facts, a new trial is awarded.

New trial.

Cited: *Stewart v. R. R.*, 136 N. C., 389.

---

(360)

PINNIX v. CITY OF DURHAM.

(Filed 17 June, 1902.)

1. **Negligence—Contributory Negligence—Concurrent Negligence—Personal Injuries—Damages.**

   In an action for personal injuries, the injury being caused by the concurrent negligence of the plaintiff and defendant, the person injured is not entitled to recover.

2. **Negligence—Contributory Negligence—Proximate Cause.**

   Where a city negligently fails, as required by ordinance, to keep a red light on a pile of brick on side of a street, and a person negligently rides a bicycle against the obstruction, such negligence of the injured party is the proximate cause of his injury.

3. **Nuisances—Cities and Towns—Negligence.**

   It is not a nuisance for a city to pile brick along the side of a street for the purpose of repairing it if a reasonably wide passageway remains.

ACTION by A. W. Pinnix, by his next friend, Alexander Walker, against the city of Durham, heard by *Neal, J.*, and a jury, at January Term, 1902, of DURHAM. From a judgment for the defendant, the plaintiff appealed.

Winston & Fuller for plaintiff.

Manning & Foushee and Jones Fuller for defendant.

FURCHES, C. J. On 23 November, 1900, about 9 o'clock at night, the plaintiff received an injury which, he alleges, was caused by the negligence of the defendant, and this action is brought to recover damages therefor. The evidence discloses the fact that the defendant was engaged in paving its sidewalks on one of the main streets of the city of Durham, and was using brick for that purpose. For that pur-
(361) pose it had piled brick on the side of the street next to the sidewalk that was being paved. One of these piles, and the one where the plaintiff was injured, was about 4 feet high and about 5 feet square. This pile of brick had been piled there two or more months, but the work of paving the sidewalk had not been completed. The street was lighted with electric lights, and one of these lights, an arc light, was within about 150 yards of the place where the injury occurred; and the evidence shows that it lighted the street for 150 yards, and the pile of brick could be "seen good for 15 feet," and the plaintiff testified that if he had seen the brick 8 or 10 feet before the collision he could have avoided it.

There is an ordinance of the city requiring a *red* light to be kept at night on material left in the streets, and there was no red light on this pile of brick that night.

The plaintiff was a young man 19 years old at the time of the injury, was reared in the city of Durham, and had lived there all his life, and his boarding-house was in 30 yards of this pile of brick, but he had only gone to that house to board that day; and he testified that he had never seen that pile of brick. He was riding a bicycle at the time he received the injury, which was caused by his running into the pile of brick; he testified that he was looking and did not see the pile of brick.

The plaintiff, in his argument, contended that the defendant's leaving the brick in the street for so long a time was a nuisance, and the defendant could not defend itself against an injury caused by a nuisance. However that may be, we do not think it was a nuisance for the defendant to pile bricks along the side of its streets for the purpose of repairing them; and the evidence is that the work of repairing had not been completed, and it was then at work paving the street a short distance from where the injury occurred. But the defendant was guilty of negligence in not having a red light on the pile of brick
(362) that night, and the jury so found. They also found that the plaintiff was guilty of contributory negligence. This street was 40 feet wide between the curbstones, which leaves 30 or 35 feet of clear street outside of the pile of brick.

The arguments in the case were able and elaborate, with a citation of many authorities; and the range of the arguments was broad, covering many phases of the case that we do not think it necessary to discuss.

The defendant is found guilty of negligence because it did not have a *red* light on the pile of bricks that night. Upon an examination of the case, we see no other ground of negligence that the defendant had been guilty of. This was negligence, and, as we have said, the jury so found. But was this negligence the proximate cause of the plaintiff's injury? Suppose the city ordinance had required a *red* light to be kept on this pile of brick in the daytime, and the defendant had not kept it there, and the plaintiff carelessly ran his bicycle into the pile of brick and was injured. The defendant might have been negligent in not having the red light on the brick, but would any one say that was the cause of the plaintiff's injury? Then take this case: A pile of brick 4 feet high and 5 feet across, so big that it looks like one could hardly keep from seeing it; an arc electric light in 150 yards that lighted the street to the pile of brick to such an extent that one could see the brick plainly for *fifteen feet,* and the plaintiff says that he could have averted the injury if he had seen the pile of brick *eight or ten feet* before he ran into it; can it be that it was the want of the *red* light that caused the injury? It seems to us that any reasonable man would say that his injury was caused by his own negligence in running his bicycle into the pile of brick, and that defendant's negligence was not the proximate cause of the injury. The defendant's negligence was passive, inactive, while the plaintiff was the moving, active agency in producing the injury. He had, so to speak, the last clear chance. But the (363) jury have found that the plaintiff was guilty of contributory negligence; that is, the plaintiff was guilty of negligence that contributed to his injury. This is sufficient to prevent him from recovery, without showing that his negligence was not the proximate cause, as we think it was. The injury was the concurrent negligence of the plaintiff and the defendant. *Walker v. Reidsville,* 96 N. C., 382; *Manly v. R. R.,* 74 N. C., 655; *McAdoo v. R. R.,* 105 N. C., 140; *Rigler v. R. R.,* 94 N. C., 604.

While we can not say there was no error committed on the trial of this case, we see none that affects the rights of the plaintiff; and it seems to us that the plaintiff has had a fair trial as to the merits of the case.

The exceptions of plaintiff have all been examined, but we do not enter into a discussion of them, as none of them that affects his rights can be sustained. And it would not be profitable to the parties or the profession that we should do so.

The judgment appealed from is

Affirmed.

Cited: *Hamilton v. Lumber Co.,* 160 N. C., 51.

(364)

AGRICULTURAL AND MECHANICAL COLLEGE v. B. R. LACY, STATE TREASURER.

(Filed 17 June, 1902.)

Statutes—Repeal by Implication—Laws 1891, Ch. 549—Laws 1893, Ch. 252—Laws 1895, Ch. 146—Laws 1897, Ch. 486—Laws 1901, Ch. 737.

Laws 1895, ch. 146, do not repeal Laws 1891, ch. 549, sec. 110, relative to the appropriation of money for the Agricultural and Mechanical College for the Colored Race, as they are not repugnant nor inconsistent.

CLARK and MONTGOMERY, JJ., dissenting.

ACTION by the board of trustees of the Agricultural and Mechanical College for the Colored Race against B. R. Lacy, State Treasurer, heard by *Shaw, J.*, at December Term, 1901, of GUILFORD.

The facts stated in the controversy without action are as follows:

I. That the General Assembly of the State of North Carolina, during the session of 1891, passed an act, reference being made to the entire act, known as "An Act to establish an Agricultural and Mechanical College for the Colored Race," being chapter 549, Laws 1891, the material portion of which, pertinent to this controversy, being embraced in section 10 of said act, and is in the following words, to wit:

"That for the purpose of carrying out the provisions of this act, the sum of $2,500 is hereby annually appropriated to the said college, and the Treasurer of the State is hereby authorized and directed to pay the said amount out of any funds in the treasury not otherwise appropriated, upon the warrant of the board of trustees or such other officer or officers as the board may designate."

II. That the General Assembly of the State of North Carolina, during its session of 1893, passed an act known as chapter 252,

(365) Laws 1893, which is in the following words:

"That the sum of $5,000 per year for the years 1893 and 1894 is hereby appropriated from funds in the public treasury of this State not otherwise appropriated, for the purpose of completing, erecting and furnishing said buildings for the use of the North Carolina Agricultural and Mechanical College for the Colored Race."

III. That the General Assembly of the State of North Carolina, during its session of 1895, passed an act known as chapter 146, Laws 1895, which is in the following words:

"That the sum of $5,000 annually be and is hereby appropriated for the support, maintenance, equipment, enlargement and extension of the North Carolina Agricultural and Mechanical College for the Colored Race, to be paid on the first days of April and October of each year out of funds in the treasury not otherwise appropriated."

IV. That the General Assembly of the State of North Carolina, during its session of 1897, passed an act known as chapter 486, Laws 1897, which is in the following words:

"That the sum of $5,000 be and the same is hereby appropriated for the maintenance and equipment of the Agricultural and Mechanical College for the Colored Race for each of the years 1897 and 1898, to be in installments of $2,500, on the first days of April and October of each year 1897 and 1898."

V. That the General Assembly of the State of North Carolina, during its session of 1901, passed an act known as chapter 737, Laws 1901, the material portion of which pertinent to this controversy is embraced in section 7 thereof, and is in the following words:

"That $5,000 be appropriated to the Colored Agricultural and Mechanical College, of Greensboro, for each of the years (366) 1901 and 1902, in addition to its standing appropriation. This appropriation shall not be paid if the said board of education shall transfer to said schools an equal amount of the appropriations for the Colored Normal Schools of the State."

VI. That the board of education has not transferred to said school an equal amount of the appropriation for the Colored Normal Schools of the State.

VII. That the foregoing embraces all the acts granting appropriations to the said Agricultural and Mechanical College for the Colored Race since its institution, in 1891, by the State of North Carolina.

VIII. That from and after the date of the appropriation made by the General Assembly during its session held in 1895, the Treasurer and the Auditor of the State of North Carolina have construed the standing appropriation to the said institution to be $7,500 annually, and this sum has been paid to the said institution annually as a standing appropriation.

IX. That the Treasurer and the Auditor of the State of North Carolina have construed the act of 1897 hereinbefore set out as a special appropriation to the said Agricultural and Mechanical College for the Colored Race, to be paid it in addition to its standing annual appropriation of 1891 and 1895.

X. That the construction placed upon said acts by the said State Treasurer and the Auditor of the State of North Carolina was reported to the Governor of said State by the Auditor in his annual reports, showing the amounts paid out each year, and the Governor in turn transmitted these as a part of his biennial message to the General Assembly for their consideration during 1897, 1899 and 1901.

XI. That since 1895 the Treasurer of the State of North Carolina has paid to the said institution the sum of $7,500 annually as

(367) its standing appropriation, $2,500 of which has been paid at the beginning of the fiscal year, which begins on 1 December, $2,500 being paid on the first day of April, and $2,500 on the first day of October, and that the former Treasurer has paid to the said Agricultural and Mechanical College the sum of $2,500 as a part of its appropriation for the year 1901. That the $2,500 warrants issued by the Treasurer, during the year 1898, aggregating the sum of $12,500, cited as authority for their issuance laws of North Carolina, Laws 1891, 1895 and 1897. That the $2,500 warrants issued by the Treasurer during the year 1899, aggregating the sum of $7,500, cited as authority for their issuance laws of North Carolina, Laws 1891 and 1895, and that the warrant issued on 1 December, 1900, for 1901, cited as authority for its issuance Laws 1895.

XII. That by virtue of the act of 1895 the payments thereunder were to be due and payable on 1 October and April of each and every year, and the said payment due thereunder on 1 April has been paid, but that on 1 October, 1901, the Treasurer of the Board of Trustees of the Agricultural and Mechanical College for the Colored Race demanded of the Treasurer of the State of North Carolina the remaining sum of $2,500 due on said date as aforesaid, which said sum the said Treasurer of the State of North Carolina refused to pay.

That the points of difference between the parties plaintiff and the party defendant are as follows:

(*a*) The Board of Trustees of the Agricultural and Mechanical College contend that the act of 1895 was merely cumulative, making the standing appropriations of the Agricultural and Mechanical College for the Colored Race $7,500.

(*b*) That the Treasurer of the State of North Carolina has (368) not the legal right to withhold a sum the payment of which is admitted to be authorized under laws 1895 to offset a payment made by his predecessor in office, which he, the present Treasurer, believes to have been paid under wrong construction of law.

On the other hand, the Treasurer of the State of North Carolina contends—

(*c*) That the act of the General Assembly passed during its session of 1895 repealed the act of 1891 by implication, and that the standing appropriation to the said Agricultural and Mechanical College for the Colored Race is only $5,000 per annum.

(*d*) That the former Treasurer having made a payment of $2,500 at the beginning of the fiscal year, to wit, 1 December, 1900, under a misconstruction of the law, that his successor has the right to retain this sum out of an appropriation which is admitted to be authorized under the act of 1895.

Upon said facts his Honor rendered judgment in favor of plaintiff, holding that the act of 1895 was cumulative, and defendant appealed, assigning as error the findings of the court "(1) That the act of 1895 was simply cumulative, and that the standing annual appropriation for the Agricultural and Mechanical College for the Colored Race is $7,500. (2) That the Treasurer of the State has not the legal right to withhold the sum of $2,500, authorized under Laws 1895, to offset a payment made by his predecessor in office, paid under the wrong construction of the law. (3) The signing of the judgment for $2,500 and costs against the defendant." From judgment for the plaintiff, the defendant appealed.

J. N. Wilson and Z. V. Taylor for plaintiff.
Robert D. Gilmer, Attorney-General, and Shepherd & Shepherd for defendant.

COOK, J., after stating the case: Was section 10 of chapter (369) 549, Laws 1891, repealed by chapter 146, Laws 1895? This is the issue raised by the facts agreed and presented for our decision by the case on appeal. Defendant contends that while the repeal is not in express terms, yet it is by necessary implication. This contention is handicapped in the outset with the presumption against it. A statute will not be construed as repealing a prior one on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede the prior one upon the subject and to comprise in itself the sole and complete system of legislation on that subject. Black on Interpretation of Laws, page 112; Endlich on Interpretation of Statutes, sec. 210; Sutherland on Statutory Construction, sec. 138. The two acts now being construed being *affirmative,* and the subject being such that both may stand together, they both should have concurrent efficacy (1 Blk., 90), unless they be repugnant or inconsistent, or it should appear that the Legislature intended to cover the whole subject embraced in both and to prescribe the only rule in respect of that subject in the later act. *S. v. Davis,* 129 N. C., 570.

Bearing in mind this rule of construction, a careful perusal of the act (chapter 549, Laws 1891) creating and incorporating the plaintiff college, and construing the subsequent acts by which appropriations of money were made for its use, with reference to it, leads us to the conclusion that it was not intended by the Legislature to repeal any provision therein made.

The general purpose for which it was created, the duties imposed upon its board of trustees, and the expenses necessary and incidental to

its management, clearly show that the sum of $2,500 therein annually appropriated was intended for organization expenses "in carry-
(370) ing out the provisions of this act," and not for the general purpose of supporting, maintaining and developing the institution. Its management and control, and the care and preservation of all its property, are vested in the board of trustees. For their services they "are entitled to the same per diem and mileage as compensation for attendance upon the meetings of the board as are now allowed by law to the members of the General Assembly." (This compensation was changed by chapter 389, Laws 1899, to traveling expenses and hotel fare.)

There is imposed upon them the power of prescribing rules for the management and preservation of good order and morals, the appointment of its president, instructors and other officers, servants, etc.; to fix salaries, have charge of the disbursement of funds, and to have general and *entire* supervision of the *establishment and maintenance;* to receive any donation of property, real or personal, and to *invest* or expend the same for the benefit of the college, to locate the college, to make temporary provision pending the furnishing of the site, buildings, etc. For none of these expenses do we find any provision made in any of the subsequent acts. The act of 1893 appropriated $5,000 per year for 1893 and 1894, "for the purpose of completing, erecting and furnishing said buildings." The act of 1895 appropriated $5,000 annually "for the support, maintenance, equipment, enlargement and extension, . . . to be paid on the first days of April and October of each year." The act of 1897 appropriated $5,000 "for the maintenance and equipment . . . for each of the years 1897 and 1898, to be paid in installments of $2,500 on the first days of April and October." The act of 1901 appropriated $5,000 "for each of the years 1901 and 1902, in addition to its standing appropriation, . . . if the board of education shall transfer," etc. (which has not been done).

The *entire* act of 1895 is quoted in the case (except the enact-
(371) ing and ratification clauses). It has no repealing clause; it makes no reference to the organic act; it makes no provision for the necessary organization expenses; it appoints specific days (first days of April and October) for the payments of its appropriations, while payments of the other appropriation (in common with others of like kind) are made with reference to the beginning of the fiscal year, 1 December.

If it was the intent of the Legislature of 1895 to appropriate $5,000 annually for the purpose therein declared, *in addition* to the amount appropriated in the organic act, then it has done so clearly and without doubt. But if it intended to make this to cover and in substitution for

and to repeal the other, then we fail to find any expression or suggestion to indicate such intent. There is no revisal of the organic act. The two acts are not inconsistent nor repugnant, but are in harmony. The former would be totally inadequate to meet the future needs of the institution, and the latter makes no provision for paying the trustees for their services, nor for other necessary expenses in managing its affairs. Its rapid growth and increasing needs are shown by the special appropriation of $5,000 per annum for each of the years 1893, 1894, 1897 and 1898 for completing, erecting and furnishing the buildings, maintenance and equipment, and also the one for 1901 and 1902 "in addition to its standing appropriation."

With this increase of property and progress in promoting one of its institutions of learning and usefulness, accompanied with a like increase of responsibilities and cares, we would not be justified in holding that the Legislature intended to deprive it of that sum of money, which it had provided for carrying out the provisions of the act in preserving and caring for its property, and in utilizing beneficially the means obtainable in giving force and effect to the aims and pur- (372) poses for which the institution was created. We find no error in the ruling of his Honor in holding that the appropriation made under the act of 1895 was auxiliary, or in addition to the sum appropriated by section 10 of the act of 1891, and the judgment is

Affirmed.

MONTGOMERY, J., dissenting: A strong sense of duty, after a careful investigation of the matter in dispute, compels me to dissent from the opinion of the Court. If I had a reasonable doubt on the question involved, I would gladly acquiesce in the conclusion arrived at by the Court, but to my mind the error in the judgment of the court below is so clear that I am forced to say so for myself.

The plaintiff institution owes its existence to chapter 549, Laws 1891. An annual appropriation was made, under that act, of $2,500, "for the purpose of carrying out the provisions of the act." It is enacted in section 3, "That the leading object of the institution shall be to teach practical agriculture and the mechanic arts and such branches of learning as relate thereto, not excluding academical and classical instruction." There was at the time not a foot of ground for a building of any kind that belonged to the college, nor was there any authority conferred on the board of trustees to purchase a site. In fact, it was made the duty of the board of trustees to receive propositions from the various localities of the State offering inducements for the locating of the college, in the shape of gifts of land or money. In the meantime, and until the site and buildings should have been furnished for the location of the college, the board of trustees were authorized to make temporary

provision for the industrial and mechanical education of the colored youth of the State at some established institution of learning within the State.

(373) The General Assembly, at its session of 1895, chapter 146, made an annual appropriation, the language of the act being as follows: "That the sum of $5,000 annually be and is hereby appropriated for the support, maintenance, equipment, enlargement and extension of the North Carolina Agricultural and Mechanical College for the Colored Race, to be paid on 1 April and October of each year, out of the funds of the treasury not otherwise appropriated."

The Legislature, at its session of 1901, chapter 737, made an annual appropriation for this institution of $5,000, "in addition to its standing appropriation."

What was its standing appropriation? Beyond question, in my opinion, the $5,000 appropriated by the act of 1895. The act of 1895 was an implied repeal of the act of 1891, in so far as the amount of the appropriation was concerned. The law, it is true, does not favor implied revocations; but whenever a statute in a different manner makes provision for the same thing provided for in a former statute, the former statute is repealed. Every affirmative statute is a repeal by implication of a prior affirmative statute so far as it is contrary to it. *S. v. Woodside,* 31 N. C., 496. The amount appropriated annually in the act of 1891 was $2,500; the amount appropriated annually in 1895 was $5,000 —both having been for the same purpose in different amounts—the last act repeals the first. I can not agree in the statement in the opinion of the Court that the amount—$2,500—of the appropriation under the act of 1891 was intended for "organization expenses" in carrying out the provisions of the act. The only expense of organization that could have arisen under the act of 1891 was that of the per diem of members of board of trustees on account of meetings of the board of trustees. The appropriation, as we have seen, was to be used in the education of the colored youth of the State at some established institution of learning within the State, until the site and buildings should be fur-

(374) nished. The buildings were provided by appropriation for that special purpose by the act of 1893, chapter 252, of $5,000 for each of the years 1893 and 1894. The act of 1895 embraces the same objects and purposes of the act of 1891—the support and maintenance of the college, as well as an additional amount for the equipment, enlargement and extension of the college. For these reasons I think there was error in the judgment of the court below.

CLARK, J., concurs in the dissenting opinion.

Cited: Sanatorium v. State Treasurer, 173 N. C., 813, 814.

(375)

RICE v. NORFOLK AND SOUTHERN RAILROAD.

(Filed 17 June, 1902.)

1. **Waters and Watercourses—Diversion—Acceleration—Increase—Damages—Drains.**

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

2. **Evidence—Damages—Waters and Watercourses.**

In an action for damages for diverting waters upon the land of another, it is not competent to ask party seeking damages, on cross-examination, what he would take for the land.

3. **Evidence—Damages—Waters and Watercourses.**

In an action for damages for diverting water upon the land of another, it is not competent to ask witness for party seeking damages whether water could have been turned in another direction without great and unusual expense.

4. **Evidence—Damages—Waters and Watercourses.**

In an action for damages for diverting water upon the land of another, it is not competent to show that the land of another situated as the land of the party seeking damages was not damaged.

5. **Damages—Waters and Watercourses—Laws 1895, Ch. 224.**

In an action for damages for diverting water upon the land of another, the party seeking damages may recover for any damages sustained between the bringing of the action and the trial thereof.

ACTION by J. D. Rice and wife against the Norfolk and Carolina Railroad Company, heard by *Allen, J.*, and a jury, at November Term, 1901, of BERTIE. From a judgment for the plaintiffs, the defendant appealed.

B. B. Winborne and St. Leon Scull for plaintiffs.
George Cowper for defendant.

DOUGLAS, J. This was an action brought to recover damages (376) for injury to the plaintiff's land, caused by the alleged collection and diversion of surface water. It appears from the evidence that the defendant's track ran through a depression in the surface of the land of considerable extent, in which water became ponded and which had no natural outlet. By saying there was no natural outlet, we presume the witnesses meant that there was no such outlet for the water in the pond below a certain level, as several of them testified that the water ran in different directions before the railroad ditches were cut. It would be difficult to find even a natural basin which does not empty its surplus water in some one direction when it becomes full. It is alleged that

the defendant, in draining this basin, cut through a ridge and diverted the water from its natural direction into ditches or artificial drainways too small to hold it. There is evidence to this effect to sustain the issues found by the jury. It does not appear that any of the ditches or canals were natural watercourses; but this would make no difference in a case of diversion; and as this action seems to have been tried practically upon that issue, we will confine ourselves principally to its consideration. Whether water has been diverted is an issue of fact for the jury, while the effect of such diversion is a question of law for the court. The rule has become too well established in this State to need further discussion. It has been generally stated in the following words: "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. R. R.,* 124 N. C., 214; *Mizzell v. McGowan,* 125 N. C., 439; *S. c.,* 129 N. C., 93; *Lassiter v. R. R.,* 126 N. C., 509; *Mullen v. Canal Co., post,* 496. If a natural basin has absolutely no outlet, either at bottom or top, that is, that the water never ran out of it in any particular direction, we can not see how any natural servitude could (377) rest upon the adjoining lands. Under such circumstances, we see no recourse, open to the owner of the basin except to proceed under chapter 30, vol. I of The Code, as indicated in *Porter v. Armstrong,* 129 N. C., 101. Even surface water can not be collected into artificial channels and thrown upon the land of another where there is no natural watercourse nor adequate means for its reception.

In Gould on Waters (3 Ed.), sec. 271, the author says: "An owner of land has no right to rid his land of surface water, or superficially percolating water, by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor. This is alike the rule of the common and civil law."

In Angell on Watercourses (7 Ed.), sec. 108J, the author says: "But one proprietor of land has no right to cause a flow of the surface water from his own land over that of his neighbor, by collecting it into drains or culverts or artificial channels; he can not thus, by his own act merely, convert a flow of surface water into a stream, passing from his own over his neighbor's land, with all the legal incidents of a natural watercourse." The subject is clearly discussed in the remainder of this and in the following section, 108K, and also in Washburn on Easements, 353.

We find two cases very similar to that at bar, both relating to the drainage of a natural basin. In *Butler v. Peck,* 16 Ohio St., 335, 344, 88 Am. Dec., 452, the Court says: "The sole question . . . is this: Whether an owner of land having upon it a marshy sink or basin of water, which basin, as to a considerable portion of the water which collects within it, has no natural outlet, may lawfully throw such water,

by artificial drains, upon the lands of an adjacent proprietor. We are clear that no such right exists. It would sanction the creation, by artificial means, of a servitude which nature has denied. The natural easement arises out of the relative altitudes of adjacent surfaces as nature made them, and these altitudes may not be artificially (378) changed to the damage of an adjacent proprietor. And it makes no difference that, in the hypothetical case on which the charge of the court below complained of is based, in times of high water a portion of the waters of the basin would overflow its rim, and find their way along a natural swale to and upon the lands of the plaintiff below; for, as to those waters which could not naturally surmount nor penetrate the rim of the basin, but were compelled to pass off by evaporation or remain where they were, the case is the same as if the basin had no outlet whatever."

In *Miller v. Laubach,* 47 Pa., 154, 155, 86 Am. Dec., 521, the Court says: "No doubt the owner of land through which a stream flows may increase the volume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation reasonably used as the stream may give him. But that is an entirely different thing from draining the water standing on the lands of one, through artificial channels, onto that of another. That can not be done without his consent."

There is an essential difference, which must be borne in mind, between drainage into natural watercourses and that into canals or other artificial drainways. This difference is illustrated in the cases of *Mizzell v. McGowan* and *Porter v. Armstrong, supra.*

In the application of these principles we see no error in the charge of his Honor of which the defendant can complain. His refusal to charge was equally proper. We see no error in the exclusion of testimony. The male plaintiff was asked "if he would take $200 for the whole land. The witness then said that the land was not his, but his wife's." The question was incompetent in form and substance. The witness did not own the land, and could not sell it. Whether (379) he would have taken $200 for it, if he had owned it, might depend upon various contingencies, as, for instance, how badly he needed the money, and whether the price had been offered to him before or after the damage caused by the defendant, or included the damage. There must be some direct relevancy in the question to the fact at issue before it can become competent. The second question, as to whether the witness would join in a deed with his wife for $200 is of the same general nature, and falls under the same objection.

Another witness was asked "If water could have been turned in any other direction without great and unusual expense." This was properly excluded. The question at issue was not what a different system of drainage would have cost the defendant, but what damage was done to the plaintiff. The legality of the work does not depend upon its cheapness, and it is no defense for an unlawful act to say that it was cheaper than obeying the law. If this had been an action for injunction to compel the defendant to close up its ditches, the question might, perhaps, have been admissible, as tending to show the necessity for the system of drainage adopted, or the easement claimed; but the plaintiffs, in their complaint, express their entire willingness for the assessment of permanent damages. The question, therefore, is not whether the defendant shall have its easement, but whether it shall pay for it. The necessity of compensation, as an inherent requisite for the exercise of the power of eminent domain, has been recently considered in *Phillips v. Tel. Co., post,* 513.

The defendant asked another witness, "How his own lands were located with reference to those of plaintiff's, and stated to the court that his purpose was to show that the land of the witness is of the same nature as that described in the complaint, and they are so located, adjoining plaintiffs' land, that the effect of defendant's ditches (380) would be the same on both tracts, and that witness's land was not hurt." This question bringing in a collateral matter that might itself be disputed, was properly excluded under the line of decisions represented by *Warren v. Makeley,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 361; *Hinton v. Pritchard,* 98 N. C., 355, and *Cline v. Baker,* 118 N. C., 780.

As the issue as to permanent damages was submitted without objection, it was proper to submit also the fourth and fifth issues. In cases where *permanent* damages are allowed, that is, where the easement is acquired by the defendant, "the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property," should be assessed in the same action, under chapter 224, Public Laws 1895. This, of course, includes the damages sustained between the bringing of the action and the rendition of the judgment.

The judgment of the court below is

Affirmed.

Cited: S. v. New, post, 737; *Bullock v. Canal Co.,* 132 N. C., 181; *Dale v. R. R., ibid.,* 708; *Craft v. R. R.,* 136 N. C., 51; *R. R. v. Land Co.,* 137 N. C., 331; *Clark v. Guano Co.,* 133 N. C., 73, 76; *Briscoe v. Parker,* 145 N. C., 17; *Roberts v. Baldwin,* 151 N. C., 408; *Land Co. v. Traction Co.,* 162 N. C., 507; *Cardwell v. R. R.,* 171 N. C., 366.

(381)

BALK v. HARRIS.

(Filed 17 June, 1902.)

1. **Pleadings—Supplemental—Puis Darrein Continuance—Judge—Discretion.**

Where a petition to be allowed to file a plea *puis darrein continuance* does not set forth facts which, if true, would be a bar to a recovery, its allowance is discretionary with the court.

2. **Pleadings—Presumption—Supplemental Pleadings—Puis Darrein Continuance—Judge—Discretion.**

Where a trial judge refuses to allow a plea *puis darrein continuance*, without assigning any reason, it will be presumed that it was refused as a matter of discretion.

ACTION by B. Balk against I. H. Harris, heard by *Allen, J.*, at May Term, 1901, of BEAUFORT. From a judgment for the plaintiff, the defendant appealed.

Small & McLean for plaintiff.
Charles F. Warren for defendant.

FURCHES, C. J. This is an action commenced before a justice of the peace, to recover $180, carried from the justice's court to the Superior Court, and from that court to this by successive appeals.

This is the third time it has stood upon the docket of this Court for hearing and review of the court below, and of this Court. The opinion of the Court when it was first here is reported in 122 N. C., 64, and the opinion when here the second time on petition to rehear is reported in 124 N. C., 467, 45 L. R. A., 257, 70 Am. St., 606. It has been since tried in the Superior Court, and is here again on appeal.

There is but one point presented in this appeal, if we adhere (382) to our former opinion rendered on the petition to rehear. But we are now asked to abandon the ground upon which that decision rests, and put the opinion in this appeal upon the ground stated in the first opinion, "that it may present a Federal question." This we can not do without reversing our judgment and adopting the arguments in the first opinion, which we have admitted were not tenable, and were expressly abandoned in the second opinion—124 N. C., 467, 45 L. R. A., 257, 70 Am. St., 606.

The other question presented by the record is an application by the defendant to plead his discharge in bankruptcy, which was refused by the court. At Spring Term, 1901, before the case was tried, the defendant presented to the court the following motion in writing: "The defendant, Isaac H. Harris, and L. B. Suskin, surety upon defendant's under-

taking to stay execution pending the appeal from the justice of the peace, respectfully represent that since this action has been pending in the Superior Court of Beaufort County, the defendant, Isaac H. Harris, has been adjudged a bankrupt, and has been discharged under the act of Congress from all debts and claims which are made provable by said act against his estate, and which existed on 7 April, 1899; that this defendant and his surety pray that the defendant be permitted to plead the said discharge in bankruptcy as a defense and bar to this action." The court, in refusing this motion, gave no reason for doing so, and the plaintiff contends that the court refused to allow the motion as a matter of discretion; while the defendant contends that it was not a motion appealing to the discretion of the court, and that he was entitled to have it allowed as a matter of legal right.

It has been often decided by this Court that the right to allow or refuse to allow an amendment, by setting up a new defense or otherwise, was a matter of discretion with the court, and while this discretion should be liberally exercised, that it was not reviewable on
(383) appeal to this Court. Clark's Code (3 Ed.), sec. 273; that it was discretionary whether the court would allow an amendment setting up the statute of limitations, *Smith v. Smith,* 123 N. C., 229; though it is said in that case that there are some exceptions to this rule. And while our attention has not been called to any authority directly upon this point, and in the limited time we have we have not been able to put our hands upon any.

But it seems to us that "a plea since the last continuance" is not what would strictly be termed an amendment, but more in the nature of a supplemental pleading—something more than was pleaded before. Such pleas must be made by leave of court, that is, they must have the sanction of the court, and the opposing party must have an opportunity to be heard. This is and should be so, whether it is a matter of discretion with the court or a right the party has to insist on its being filed as a matter of law.

It therefore seems to us that in many cases, as in this case, the court had the discretion to allow the defendant to file his answer setting up his new defense, and the plaintiff would have had no right of appeal. But the defendant, on the trial, would have been compelled to show that defendant's discharge was a discharge from this debt under the bankrupt act. The court may have had the discretion to allow this plea to be made, as that would not be a determination of the rights of the parties. But to entitle the defendant as a matter of law to file such plea, it must appear from the petition that the facts stated, if true, would be a good defense and a bar to the plaintiff's action. The court is to be the judge of this, and if the court should hold that the facts set

forth, if true, would not be a bar to the plaintiff's action and refuse to allow the plea, when the facts alleged, if true, would be a bar to the action, this Court would review its action. But if the petition does not set forth facts which, if true, would be a bar to the plaintiff's recovery, then the court is not bound to allow the plea to be filed; (384) and if it is refused without assigning any reason, it will be presumed that it was refused as a matter of discretion, and this Court will not review its action. 21 Enc. Pl. and Prac., 59, and note 1.

We do not think the facts stated in this petition are sufficient to make it the duty of the court, as a matter of law, to allow the plea. It does not state that the defendant has obtained his discharge since the last continuance of the action; nor does it show that this debt or claim of the plaintiff was scheduled in the bankrupt proceedings; nor does it show that the plaintiff had knowledge of the proceedings in bankruptcy in time to have proved his debt and shared in the distribution of the assets of the defendant's estate in bankruptcy.

We do not see that the cases cited by the defendant are in point. *Saunderson v. Daily,* 83 N. C., 67, and *Dawson v. Heartsfield,* 79 N. C., 334, are applications to revive dormant judgments, and it has been often held by this Court that, in such cases as those, the defendant may plead anything that has occurred since the rendition of the judgment. *Bank v. Swink,* 129 N. C., 255. And *Paschal v. Bullock,* 80 N. C., 329, was a motion to recall an execution, that the defendant might plead his discharge in bankruptcy; but the motion was not allowed, and, upon appeal to this Court, the ruling of the court below was affirmed. And in the discussion of that case, it is observed by this Court that the defendant had, before that, the opportunity to plead his discharge, and did not do so. It does not appear in this case that the defendant had before had the opportunity to plead his discharge. But, as he is asking to plead what he does not have the right to do without the permission of the court, we think, to make it the legal duty of the court to allow the plea, it should have affirmatively appeared in the petition that he had not had —that is, facts should have been stated showing that he had not before had such opportunity. (385)

As we see no error, the judgment is

Affirmed.

Cited: Martin v. Bank, 131 N. C., 123; *Balk v. Harris,* 132 N. C., 11; *Laffoon v. Kerner,* 138 N. C., 285; *Wright v. R. R.,* 141 N. C., 169; *Hardin v. Greene,* 164 N. C., 102.

Reversed (two judges dissenting): Harris v. Balk, 198 U. S., 215.

JACKSON v. CORPORATION COMMISSION.

(Filed 19 June, 1902.)

Taxation—Railroads—Franchise—Laws 1901, Ch. 7, Secs. 42, 43, 48, 50.

Under Laws 1901, ch. 7, the North Carolina Corporation Commission is not required to assess for taxation the intangible property of railroads, to wit, the franchises, separately from the assessment of the tangible property before 1903.

CLARK and DOUGLAS, JJ., dissenting.

ACTION by W. J. Jackson against the North Carolina Corporation Commission, heard by *Robinson, J.*, at September Term, 1901, of WAKE. From a judgment for the defendant, the plaintiff appealed.

A full statement of the facts may be found in the dissenting opinion of *Judge Douglas,* which appears to have been originally written as the opinion of the Court.

H. S. Ward for plaintiff.

Robert D. Gilmer, Attorney-General and Burwell, Walker & Cansler for defendant.

MONTGOMERY, J. The question for decision in this case is this: Was it the duty of the defendants to assess for taxation, in 1901, the franchises of the railroad companies in this State separately from the assessment of their tangible property? The failure of the defendants to
(386) make such separate assessments (admitted in their answer) is the matter complained of by the plaintiff, and as a support for the correctness of the view expressed above as to what the question for decision is, allegation three of the complaint is inserted: "That the defendants, as members of the said North Carolina Corporation Commission, have failed and refused to assess for taxation and determine the value of the intangible property of the railroad companies in this State, to wit, the franchises, separately from the assessment of the tangible property, as they are directed to do by sections 43 and 50, ch. 7, Public Laws, 1901, and have failed and refused to attempt to make such valuation and assessment, and have failed and refused to determine, or attempt to determine, the market value of the capital stock, certificates of indebtedness, bonds and other securities of said companies in their assessment of the properties of said companies."

The defendants, in their answer, do not admit that the pertinent sections of the Machinery Act of 1901 require them to make assessments of franchises of railroad companies separately in any year before or after 1903, and in the brief of their counsel it is argued at length that

the writ of mandamus should not be granted because the alleged duties, the performance of which was sought to be enforced against the defendants, were discretionary in their character and required the exercise of judgment on their part. There is no room for such an argument here. No discretion is given the defendant by the General Assembly in sections 43, 48 and 59, chapter 7, of the Machinery Act of 1901, as to the manner and method of assessing the physical property and the franchise valuation of railroad companies.

The rules by which they are to be guided in making these assessments are clearly prescribed, their judgment and discretion being allowed only in one instance, viz., when they are to consider of the actual cost to replace the property with a just allowance for depreciation on (387) rolling stock, and also of other conditions to be considered, as in the case of private property, when they come to value the physical or tangible properties of the companies. All else is mandatory.

The Machinery Act of 1899 gave to the defendants discretion in the matter of assessing the taxes on the property of the railroad by authorizing them, in making their assessment, to consider the value of the franchise, without formulating any rules by which that valuation and assessment should be discovered. But the Legislature of 1901 put an end to that discretion, and laid down special and particular rules by which the real property shall be valued and the franchise shall be estimated, and required separate assessments. There can be no doubt about the power of the State to have levied a franchise tax on corporations. Const., Art. V, sec. 3. And there can be no doubt that the franchise tax may be assessed separately from the tangible property assessment.

As we have seen, the State has done those things in the Machinery Act of 1901, and the question arises, When did, or do, these assessments go into effect? That is the only uncertainty about the matter in dispute, and the answer to the question, of course, depends upon whether section 50 of the Machinery Act was in force in June, 1891, or whether its operation was postponed by clear implication, deduced from the language of section 48 of that act. Without doubt, the assessment or valuation for taxation upon the tangible property and that upon the franchise, is to be made at the same time. The language of the statute, as to the time, being: "The said commissioners shall first determine the value of the tangible property, . . . and they shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public, the value of the physical property being (388) deducted as evidenced by the market value of all capital stock, . . . and the aggregate value of the physical or tangible property and

the franchise as thus determined shall be the true value of the property for the purpose of an *ad valorem* taxation, and shall be apportioned," etc.

By our laws for generations, there have been stated periods and times at which, under oath, owners of property were required to list, as it is commonly called, or return a schedule of their property, real and personal, for assessment for taxation by officers appointed for that purpose. All real estate, except that belonging to railroad companies, up to 1899, was assessed quadrennially (railroad property, real and personal, having been listed annually), and all personal property was listed and assessed in June, annually. By section 12 of chapter 7, Machinery Act, Laws 1901, the next assessment of real estate is to take place in June, 1903, and by section 48 of the same chapter, the real estate, rolling stock and such personal property of railroad companies, necessary for the construction, repairs or successful operation of such railroad lines, is to be listed or returned for taxation and assessment at the same time that other real estate is to be returned for assessment and taxation. Section 50 of the Machinery Act furnishes the manner and method of determining the value of the tangible property of railroad companies, and also of the franchises. The aggregate value of both, determined according to the prescribed method and manner, constitutes the true value of the entire property for the *purpose of an ad valorem taxation.* Now, can an *ad valorem* taxation be fixed upon the entire property of a railroad company, under section 50, except at the time fixed by law for the return of the real and personal property of the company for taxation and its assessment by the defendant commissioners? The answer seems to be found in the opening sentence of section 42 of the same act:

"Upon the meeting of the Corporation Commission for the pur-
(389) pose of assessing railroads and other property, they shall thereupon value and assess the property of each association, company, copartnership and corporation in the manner herein set forth, after examining such statements (statements made under section 40 of the same act), and after ascertaining the value of such properties thereupon, and upon such other information as they may have or obtain." As we have seen, the real and personal estates of railroad companies are to be returned, under oath, for assessment and taxation to the commission at such dates as real estate is required to be returned and assessed for taxation, and there is to be no further assessment of real estate until June, 1903. Then, if any assessment of the tangible property of the railroad companies should be made by the commission except at the time when by law that property is to be returned and assessed for taxation, would such assessment be legal? It would seem not. If, then, there can be no valid assessment of the tangible property of railroad corporations until 1903, how can a franchise tax be arrived at under

section 50? They stand or fall together. Without a knowledge of what the assessment of the tangible property amounts to, you could not discover what the franchise tax would be; for the franchise tax is "the market value of all the capital stock, certificates of indebtedness, bonds and other securities, due consideration being given to the gross earnings as compared with the operating expenses," *less the physical or tangible property.*

The contention of the plaintiff, that under section 49 of the same act the assessments made by the defendants of the real estate of the railroad companies in 1900 remains the assessment until June, 1903, and should be taken by the defendants as a valuation of the tangible property in determining the value of the franchise under section 50, can not be maintained, for the simple reason that that assessment was made on the real and personal property, and included in its value the (390) value of the franchise, and was therefore a different assessment from the one ordered to be made on the tangible or physical property in section 50 by the rule of determining its value by a consideration of the actual cost to replace the property, with a just allowance for depreciation on rolling stock, etc. Nor can an assessment be made by the commission upon the information contained in section 49, and that which that section authorizes the commission to secure, for the reason that such an assessment would be at a time different from the time fixed for the assessment of the property, of the tangible property, of railroads under section 48 of the same act.

If it should be objected to this opinion that, to be consistent, it embraces impliedly the view that there is no statute which fixes the assessment of the real and personal property of the railroad companies in this State, upon which taxes can be levied and collected, until the assessment provided for in June, 1903, by Laws 1901, ch. 7, sec. 12, it would have to be admitted that that is a fact. The act of 1899, ch. 15, sec. 43, required railroad companies to report, under oath, for assessment and taxation their real and personal property annually—on 1 June of each year; and in 1900 the railroad companies made such returns of their property, thereby complying with the law then in force in that respect. The act of 1901 repealed section 43 of chapter 15, Laws 1899, and required quadrennial assessments thereafter, to begin on 1 June, 1903, and did not continue the assessment of 1900 or that of 1899, or fixed any other to be the basis of taxation on railroad property until the assessment of 1903. This view does not conflict with the rule that the Revenue Laws of the State are to be considered as a series of laws, and to be construed together as a whole, when necessary to find out the meanings of doubtful provisions in the one last enacted. Section 12, ch. 7, Laws 1901, provides *quadrennial* assessments of railroad property, to

(391) begin 1 June, 1903; while section 43, chapter 15, Laws 1899, provides for *annual* assessments to be made on 1 June of each year. These two sections are palpably contradictory of each other, and so inconsistent that the last enacted repeals that of 1899. But that is none of our responsibility. It may have been a part of that compromise and settlement with the railroad companies of the State mentioned in the message of the Governor, and which message was filed by the defendants with their answer; but the General Assembly, in the act of 1901, as we have seen, did not incorporate it in that act. We have no evidence, as we have said before, that the assessment of 1899 or 1900, or any other, was adopted as the assessment that should prevail until 1903.

We have not invoked the aid of the Governor's message in coming to a conclusion in this case. The acts of Assembly which we have been considering were free from doubt, except as to the time when the franchise tax should be assessed separately from the tax on property; and it certainly would be a dangerous expedient for this Court to adopt as a rule of interpretation of a statute the consideration of a communication to the Legislature on the subject-matter of the statute.

It may not be that legislative bodies always carry out, or ought to carry out, the suggestions and recommendations addressed to them in messages by the Chief Executives of States.

We see no error in the action of the judge in dismissing the case.

No error.

FURCHES, C. J., concurring: Plaintiff alleges that he is a citizen of the State, a taxpayer, and is sheriff of his county, and as such sheriff is interested in his commissions; that defendants are members of (392) the North Carolina Corporation Commission, whose duty it is to assess the property of the railroads of the State for taxation; that defendants have failed, neglected and refused to assess said railroads according to *"sections 43 and 50, ch. 7, Laws of 1901"*; that he is reliably informed and believes, and avers, that said defendants are in possession of reliable information to the effect that the value of the property of said railroads in this State is as much as *$150,000,000*; that it is found by defendants that the tangible or physical property of said companies is about $42,000,000, and that the value of the *franchises* is approximately *$108,000,000*, which it is the duty of the defendants to assess for taxation, in addition to their assessment of the tangible or physical property of said railroads. And plaintiff, therefore, asks for a writ of mandamus compelling defendants to assess said franchises.

The defendants answered and admitted that they are members of the Corporation Commission, and that it is their duty to assess the property of said railroads for taxation, which they allege they have

done according to law as they understand it. And defendants say they have assessed the entire property of said railroads, *including the franchises,* but say they did not assess the franchises separately from the other property of said companies, as they were advised and believed that it was not their duty to so assess said franchises; and they deny the fourth paragraph of the complaint, in which it is alleged that *the franchises* of said railroads are approximately *of the value of one hundred and eight millions of dollars.*

While I think the plaintiff's right to bring and maintain this action is too broadly stated in the opinion, I do not expect to put my opinion on that, as that would be putting it upon technical grounds, which I do not wish to do; but I do not think the Illinois case, principally relied upon in the opinion of the Court for that purpose, sustains the right of plaintiff to bring and maintain this action; that action (393) was brought by the Attorney-General in the name of the State of Illinois, while the plaintiff in this case proceeds alone, upon his own rights, and without the aid of the State. Would it be the plaintiff's right, if he conceived the idea that my property was not assessed, for the purposes of taxation, high enough, to bring mandamus against the commissioners of Iredell to compel them to reassess and increase its value? If he can do this, every taxpayer in the State may do so, and litigation would be interminable. If this is the law, it seems to me that it would be well to regulate it. But why discuss a matter that I shall not rely upon in my opinion?

I shall endeavor to put my opinion upon the merits of the question presented by the record, as to whether *the franchises* of the railroads of the State shall be assessed separately for taxation for 1901 and 1902, or not until 1903. This is the question as I understand it, and not whether they *"can be so taxed."* Nor do I understand the question to be as to whether the railroads "shall pay *any* tax upon their intangible property before the year 1903."

And while this is stated to be the question in the opening sentence of the opinion of the Court, it is stated further on in the opinion that, "It should be borne in mind that the sections under consideration do not impose any additional tax upon railroads, as section 45 of the Machinery Act of 1899 expressly directs that the value of franchises shall be included in the assessment of railroad property." So I do not think the question under consideration is correctly or fairly stated in the opinion of the Court.

The Court, further on in the opinion, speaks of the great importance of this question to railroads on the one side and to the State on the other, and says: "We would have preferred that the parties whose real interests are at stake should have been directly represented in this

(394) action; they would have been heard had they seen fit to become parties hereto." It is true, this is an action for mandamus for the purpose of compelling the Corporation Commission to increase the taxes on railroads. This, I admit, they have the *power* to do, but the railroads have no such power. They can not levy or assess taxes, and it seems to me they would have been improper parties to this action. And it also seems to me that it is sufficiently understood that the interests of the railroads are involved.

It will be seen that the act of 1899 taxed everything that is taxed by the act of 1901, including *franchises*. So it is not a question of omission to tax, and whether the Legislature had the right to do this—that is, omit to tax the franchise—it has not done so; and the question is, Was it the duty of the commissioners, in 1901, to assess the *franchise* separately from the other property of the railroad companies?

The Constitution of the State does not require the *franchise* to be taxed. Article V, section 3, of the Constitution is as follows: "Laws shall be passed taxing, by uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and also all real and personal property, according to its true value in money. The General Assembly may also tax trades, professions, *franchises* and incomes: *Provided,* that no income shall be taxed when the property from which the income is derived is taxed."

It, therefore, appears that there is no constitutional provision requiring the Legislature to tax *franchises*. This is admitted in the opinion of the Court. We have seen they were taxed by the act of 1899, but if they had not been, this would have given the plaintiff no right of action.

It is admitted that the Legislature of 1901 did not increase the subjects of taxation; that *franchises* were taxed by the act of 1899; and the only thing contended for by the plaintiff is that the *franchises* are to be assessed *separately* from the property of the railroads, (395) which, he alleges, has not been done, and this allegation is admitted by the defendants. It is true, the plaintiff contends that if this had been done, it would have shown these *franchises* to be "worth approximately *one hundred and eight millions of dollars.*" That is, a property, *including the franchises,* now assessed at *forty-two millions,* would have been increased to more than three times its present assessed value. The plaintiff offered no evidence to support this contention, and, to my mind, the contention is erroneous, and I can not accept it as true without any evidence to support it. My own mind rejects this contention, and, besides, I can not accept it without finding that the railroad commissioners were either too stupid to discharge their duty, or too corrupt to be worthy to hold their positions, as the plaintiff alleges that the commissioners had reliable information of facts that would have led

to this result. I do not believe that the commissioners are either stupid or dishonest.

The act of 1901 was not a new act—not original legislation. It was only amendatory of the act of 1899, and the act of 1901 effected substantially but two changes in the act of 1899; and these are the manner of assessing the property for taxation and the *time when this new method of assessment shall go into effect*. As to the manner of assessing the property under the act of 1901, there is no controversy; the only controversy is as to when this new mode of assessment goes into effect. Upon examination, it will be seen that section 48 of the act of 1901 is section 43 of the act of 1899, and that section 50 of the act of 1901 is section 45 of the act of 1899, with only one change which is necessary to be stated and considered in order to determine this controversy, as I think.

Section 43 of the act of 1899 is as follows: "The president, secretary, superintendent or other principal accounting officer within this State of every telegraph and railroad company, whether incor- (396) porated by any law of this State or not, shall return to the said commissioners, *for assessment and taxation,* verified by the oath or affirmation of the officer making the return, all the following-described property belonging to such corporation on the first day of *June of each year,* within this State." Then naming the same property and subjects of taxation that are named in section 48 of the act of 1901.

Section 48 of the act of 1901 is as follows: "The president, secretary, superintendent, or other principal accounting officer within this State of every railroad, telegraph, telephone, street railway companies, whether incorporated by the laws of this State or not, *shall, at such dates as real estate is required to be assessed for taxation,* return to said commissioners, for *assessment and taxation,* verified by the oath or affirmation of the officer making the return, all the following-described property belonging to such corporations within this State"—then describing the articles subject to taxation, being substantially the same as in section 43, act of 1899—*changing June of each year,* in the act of 1899, to such time as real estate shall be required to be listed for taxation in the act of 1901.

By every rule of interpretation known to the law, these two acts—that of 1899 and that of 1901—must be considered together. The language and meaning of the act of 1899 must first be determined and then the language used in the act of 1901; and, if the act of 1901 differs from the act of 1899, in what respect, and then determine what is the meaning of the act of 1901. There has been a change in the language of the two acts, which, in my opinion, materially affects and changes their meaning. It would have been folly in the Legislature of 1901 to have changed the language in section 43 of the act of 1899, unless it had intended to

change the meaning of section 43 of the act of 1899, when the Legislature of 1901 reënacted section 43, in every other substantial part.

Section 43, act of 1899, provides that said property shall be (397) returned "to said commissioners for *assessment and taxation . . . on the first day of June of each year.*" This is plain, unmistakable language that the assessment and taxation should *be every year.*

Section 48, act of 1901, reënacting section 43 of act of 1899, in other respects, uses this language, in lieu of the *"first day of June of each year," "shall, at such dates as real estate is required to be assessed for taxation,* return to said commissioners, *for assessment and taxation,* verified by the oath or affirmation of the officer making the returns, all the following property," etc.

Reading and construing these sections together, it is manifest—indeed, to my mind, "it is perfectly clear," that these franchises were not intended to be, and are not to be, *assessed for taxation until 1903.*

If it was intended they should be assessed *each year,* why was this language, already in section 43 of the act of 1899, changed in the act of 1901 so as to read, "shall be assessed for taxation *at such dates as real estate is required to be assessed for taxation"?*

It will be noted that the language used in section 43, act 1899, and in section 48, act of 1901, is not only that the officers therein named shall make returns of the property therein named, but it shall be made by them *for the purpose of assessment and taxation.* This language is not used in either of the other sections quoted and relied on in the opinion of the Court. In those it is provided that the officers shall make returns.

Section 49 of the act of 1901 is the same in substance, if not in very words, as section 45 of the act of 1899, including the reference to section 1959 of The Code. Section 50 only provides for the manner of assessment, and has no reference to the time when the assessment shall (398) be made. As to this, the time of assessment depends upon section 48, act 1901, construed in the light of section 43, act 1899.

If the language of section 48, act 1901, is to prevail, and the assessment is to take place *when real estate* is required to be assessed for taxation, this assessment will be in 1903, as that will be the time, under former legislation, when such assessments will take place. But Laws 1901, ch. 7, sec. 12, expressly provide that such assessment shall take place in 1903.

It seems to me that by every rule of construction, without any aid outside of the statute, it should be held that there should be no *new* assessment of these *franchises, for the purpose of taxation,* until 1903.

But if the act itself does not plainly show that no new assessment of these franchises is to be made until 1903, it would seem that the act,

taken in connection with the Governor's message, puts it beyond all doubt. The Legislature of 1901 was elected at the same time Governor Aycock was elected, and was composed of more than two-thirds of his political friends. This being so, on the first of February he transmitted to the Legislature the special message set out in defendant's answer and quoted in the opinion of the Court.

This message commences as follows: "I transmit herewith the second annual report of the North Carolina Corporation Commission. You will observe from said report that the cases known as the Railroad Taxation Cases, pending in the Circuit Court of the United States for the Eastern District of North Carolina, have been compromised and settled. Under the provisions of law, the Corporation Commission, in 1899, assessed the property of the Atlantic Coast Line at $12,885,775, the Southern Railway at $14,713,850, and the Seaboard Air Line at $7,980,-245—making a total assessment of $35,579,870, which was a total increase on the three systems over the assessment of 1898 of $9,022,678. The assessment of the three systems named in 1900 (399) was $36,373,382." The message further states that the railroads were unwilling to pay this increased assessment of $9,022,678, and were resisting its payment in the Federal courts. But finally they agreed to pay it, provided the assessment should not be increased until 1903; and inasmuch as it was costing the State as much as $20,000 a year to carry on this litigation with these railroads, the proposed compromise was accepted by him (the Governor) under the advice of his counsel. He then says that he considers this settlement just, and recommends its ratification by the Legislature, and says: "If such a law shall be passed, the railroads will not again be assessed until 1903." It is contended, in the opinion of the Court, that this message is ambiguous and uncertain as to what it recommends. But whether there is ambiguous language contained in it or not, there is not, and can not be, any ambiguity in the closing sentence in the recommendations (though not in the message), which says if such a law is passed, "the railroads will not again be assessed for taxation until 1903." This message was sent to the Legislature 1 February, and the act under consideration was passed and ratified 15 March following, changing the language from "each year" to such time as "real estate shall be required to be assessed for taxation."

The opinion of the Court does not admit that the message militates against the construction contended for by the plaintiff and adopted by the Court; but, for some reason, the Court undertakes to show that its consideration as a means of interpretation is incompetent and improper. But I propose to show by high authority that its consideration is not only competent, but proper.

It is the spirit and purpose of the act that gives it life, and is to be

observed and control in its construction, if this can be ascertained,
(400) where there is doubt as to the meaning of the language used, unless such intention conflicts with provisions and requirements of the Constitution. In such cases, to carry out the supposed or ascertained intent, this intent will have to yield to the higher law, if in conflict with the Constitution, as in *Wilson v. Jordan,* 124 N. C., 685; *Wood v. Bellamy,* 120 N. C., 212. But nothing of that kind appears in this case to interfere with the Court ascertaining the meaning of the act; and nothing could be more pertinent for that purpose than the message of Governor Aycock to the Legislature of 1901, for reasons I have given, and the legislation passed in pursuance thereof, as we must suppose this act was.

It is said by Endlich on the Interpretation of Statutes, sec. 27, "Lord Coke's Rule": "The literal construction, then, has in general but a *prima facie* preference. To arrive at the real meaning, it is always necessary to take a broad general view of the act, so as to get an exact conception of its aim, scope and object. It is necessary, according to *Lord Coke,* to consider, first, what was the law before the act was passed; second, what was the mischief or defect for which the law had not provided, and, fourth, the reason of the remedy. According to another authority, the true meaning is to be found not merely in the words of the act, but from the cause and necessity of its being made, from a comparison of its several parts and from extraneous circumstances, or by an examination of and comparison of the doubtful words with the context of the law, considering the reason and spirit and the inducing cause of its enactment. The true meaning of any passage is to be found not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining, also, what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances which the Legislature had in view,
and what were the causes and occasion of the passage of the act
(401) and the purpose intended to be accomplished by it in the light of the circumstances at the time and the necessity of its enactment." And to the same effect are sections 29 and 30. The same doctrine is laid down in Black on Interpretation of Law, ch. 7, secs. 85 and 87, and, in fact, in all the works on this subject that I have been able to examine. But I will not consume the time of the Court by making further quotations. I take it that these authorities have fully sustained me in referring to the message of Governor Aycock, which gives the reason and the object for changing the statute of 1899, which provided for an assessment *for taxation every year,* to a provision for an assessment for the purposes of taxation *when it is required that real estate shall be assessed for the purposes of taxation.*

It is admitted in the opinion of the Court that the Governor and Legislature had the right to compromise with railroads, but it is contended that there was no compromise. The Governor says there was a compromise, and I must believe he knew whether there was a compromise or not, and I do not believe he would have said there was if there had not been. I do not understand the Court to say, or even to intimate, that the Governor would say what was not so if he knew it; but that he does not know a compromise when he sees it; that he only claims that there was something over nine millions a year involved in the controversy, which the roads yielded, upon condition that their property (the assessment of which had increased $9,000,000 since 1898) should not be assessed for taxation again until 1903. The Court seems to think this was no compromise, because the plaintiff has alleged that the *franchises* alone are worth approximately *one hundred and eight millions of dollars,* without offering one particle of evidence to support this disputed allegation, and which seems to me to be large enough to fall of its own weight. But if the Governor and the Legislature had the right to enter into this compromise, and this is admitted in the opinion of the (402) Court, and there was no fraud in it, I do say that I think good faith requires that it should be kept. I do not understand it to be our duty to revise this action of the Governor and Legislature, and whether they made a good compromise or not, is not for this Court to say. It may not have been a good compromise, but if there was no fraud in the transaction, I do not consider that this Court has any right to revise their action.

In the opinion of the Court the question is asked: "Will it be contended that a *franchise* is real estate?" I might ask if it contended that, *for the purpose of taxation,* a franchise is *personal* property? If it is personal property, it is already taxed, as the Constitution *requires* the Legislature to pass laws taxing all property, personal and real, by a uniform rule, and the Legislature has done this. But it is manifest that a franchise is not considered property for the purposes of taxation in the Constitution. If it had been so considered, it would not have been classed among trades and professions, which the Legislature might or might not tax, at its option. It is thus seen that if the Legislature does tax a franchise, it taxes it as it would a profession or trade, and *not as property.* It is taxed as a lawyer and doctor are taxed, for practicing their professions. There can not be anything, in my opinion, in the argument advanced in the opinion of the Court that another Legislature will assemble before 1903, and the Legislature of 1901 knew they could not pass a law that the next Legislature could not repeal. And that it can not be supposed they would have been guilty of the vain thing of attempting to do so. If they have passed such a law, then it is

passed whether it was a vain thing or not. But I maintain that they have not done a vain thing in attempting to forestall the succeeding Legislature. The succeeding Legislature does not assemble until 1903, and the new mode of assessment goes into effect that year without (403) any further legislation. It is true, the Legislature may repeal this act and restore the *old mode of assessing franchises and property altogether,* but I do not understand that is what the plaintiff wants.

It is said in the opinion of the Court that "Great stress is laid upon the fact that section 48 of the act of 1901, which is substantially a reënactment of section 43 of the act of 1899, changes the latter section by omitting the words 'on the first day of June of each year,' and inserting the words 'at such dates as real estate is required to be assessed for taxation.' From this it is argued that the Legislature intended that *franchises* should be assessed for taxation only once in four years, like real estate, and therefore should not be assessed until 1903. The fallacy of this argument lies in the fact that section 48 of the act of 1901, and section 43 of the act of 1899, are both, by their express terms, limited to the *tangible or physical* property of the railroads, and do not pretend to relate to the assessment of the franchise."

If I understand the above-quoted paragraph, it is a virtual admission that *"tangible or physical* property is not to be *assessed for taxation until 1903.* To my mind, it is susceptible of no other construction. It admits that the statute of 1899 has been changed from *"the first day of June of each year,"* to read as follows: *"at such date as real estate is required to be assessed for taxation."* And it is not denied that section 12 of the act of 1901 *fixes that time in 1903.* But it is argued that this change only applies to "tangible or physical" property, as the word *franchise* is not mentioned in either section 43 of the act of 1899 or in section 48 of the act of 1901. This argument, if true, would make the "tangible or physical" property of the railroads—that is, everything they owned—except *franchises,* assessable for taxation in 1903, and every four years thereafter, but that *franchises* must be *assessed for taxation every* (404) *year.* If that proposition can be maintained, I admit that I have neither the power to comprehend language nor to construe the same.

It is not denied that section 50 of the act of 1901 (as did section 45 of the act of 1899) provides for making reports to the commissioners. These reports are to enable them to make the reports they are required to make to the Governor and the county commissioners, and not for the purpose of *assessments for taxation, as it is stated to be in section 43, act of 1899, and section 48 of the act of 1901.*

The property and franchises of the railroads are taxed under the act of 1899, sec. 45, as is admitted in the opinion of the Court, and this

assessment is continued to 1903, and reports of such taxes have to be made to the Governor and the board of county commissioners, that they may levy the county taxes. These are the purposes for which the reports mentioned in section 49 and section 50 are to be made to the Corporation Commission.

In my opinion, the judgment appealed from should be affirmed. *Justice Cook* concurs in this dissenting opinion.

This was written as a dissenting opinion to the opinion of *Justice Douglas,* which was written as the opinion of the Court. It expresses my views of the case, and is now filed as a concurring opinion to the opinion of *Justice Montgomery.* I concur in the conclusion at which he arrives, that there was "no error in the action of the judge in dismissing the action." *Justice Cook* now concurs in this as a concurring opinion.

DOUGLAS, J., dissenting: This is an action for *mandamus,* heard upon the verified complaint and answer, to the latter of which is attached the message of Governor Aycock. These papers are as follows:

"The plaintiff complains of the defendant, and alleges:

"1. That Franklin McNeill, Samuel L. Rogers and D. H. Abbott are the duly constituted members of the North Carolina (405) Corporation Commission, and are and have been since 1899 exercising the duties of said office.

"2. That by virtue of section 47, chapter 7, Laws 1901, the said North Carolina Corporation Commission is constituted a board of appraisers and assessors for railroad, telegraph, telephone, street railway, canal and steamboat companies, and other companies exercising the right of eminent domain, and is required by law to assess the property of said companies for taxation.

"3. That the defendants, as members of the said North Carolina Corporation Commission, have failed and refused to assess for taxation and determine the value of the intangible property of the railroad companies in this State, to wit, the franchises separately from the assessment of the tangible property, as they are directed to do by sections 43 and 50 of chapter 7, Laws 1901, and have failed and refused to attempt to make such valuation and assessment; and have failed and refused to determine, or attempt to determine, the market value of the capital stock, certificates of indebtedness, bonds and other securities of said companies in their assessment of the properties of said companies.

"4. That he is informed and believes, and avers, that said Corporation Commission is in possession of reliable evidence to the effect that the market value of the capital stock, certificates, bonds and other securities of the railroad companies in this State is as much as $150,000,000. The value of the tangible or physical property of said companies is

found by said commission to be about $42,000,000—so that the assessment of the said franchises, as above set out, and as the law directs, would find the value thereof to be approximately $108,000,000, which it is the duty of said commission to assess for taxation in this
(406) State in addition to their assessment of the said physical property.

"5. That the plaintiff is a citizen and taxpayer of this State with his residence in the county of Washington, and is also sheriff of said county, and is therefore interested in this action.

"6. That he has demanded of the said Franklin McNeill, Samuel L. Rogers and D. H. Abbott that they proceed to perform the duty set out in section 3; that they still refuse to do so, without legal or just excuse.

"Wherefore, he prays that a peremptory writ issue from this court to the said commissioners, commanding them to proceed without delay to assess, and make due return thereof, the said franchises, and to so perform their official duties as above set out and as defined in section 50, chapter 7, Laws 1901, and to perform such other and further duties as may be necessary to that end." (Duly verified.)

"The defendants, answering the complaint of the plaintiff, say:

"1. That paragraph one of the plaintiff's complaint is true.

"2. That paragraph two of the plaintiff's complaint is true.

"3. That the facts set forth in paragraph three of the plaintiff's complaint are not true, except that the defendants have not determined the value and assessed for taxation the intangible property of railroad companies in this State, to wit, the franchise, separately from the assessment of the tangible property. Defendants deny that it was made their duty so to do by sections 43 and 50, chapter 7, Laws 1901, or any other law, as they are advised and believe.

"4. That paragraph four of the plaintiff's complaint is not true.

"5. That paragraph six of the plaintiff's complaint is true, as
(407) defendants are informed and believe.

"6. Answering paragraph six, the defendants admit that they received a letter purporting to be written by plaintiff, by H. S. Ward, attorney, which was dated 31 August, 1901, and was received by defendants 2 September, 1901, demanding that defendant assess the tangible and intangible property of railroads separately, but defendants deny that they refused to comply with such demand without legal or just excuse.

"Answering further, defendants allege, as they are advised and believe, that plaintiff has no right to make such demand.

"The defendants, further answering the complaint of the plaintiff, allege, as they are advised and believe, that they have discharged the

duties required of them by law in the matter of the assessment of railroad property, and that on 30 July, 1901, they certified to the Auditor of the State and to the chairmen of the boards of county commissioners of the several counties in North Carolina interested therein, the assessment upon which State, county and town taxes should be computed; and that they are informed and believe that the railroad companies have paid their State taxes thereon, and that the county and school taxes have been computed in accordance therewith, and entered upon the tax duplicate of the said counties, and that said tax duplicates are now, or should be, in the hands of the sheriff or tax collectors for collection.

"That these defendants did not make a separate assessment of the tangible and intangible property of the railroad companies for 1901, because, as hereinbefore alleged, they were advised and believed that the laws of North Carolina did not require them to do so.

"Further answering, the defendants allege that in 1899 they assessed the value of the railroad property, including franchises, as required by law, and that in 1900 they again assessed the value of the railroad property, including franchises, at the same value as in 1899; and, in accordance with law, they adopted the assessment for 1900, which is the same as the assessment for 1899, for 1901, as they understood and (408) construed the law to direct.

"That these defendants are advised and believe that the laws in force in 1899 and 1900, and for several years prior thereto, required an annual assessment of railroad property, but that the time for the making of said assessments, by the provisions of section 48, chapter 7, Laws 1901, was postponed to 'such date as real estate is required to be assessed for taxation,' which time is fixed by said chapter 7, section 12, in 1903, and every fourth year thereafter; and the said defendants are further informed and believe that the said change in the time for the assessment of railroad property was made for the reason communicated to the General Assembly of 1901 by the message of His Excellency, Governor Aycock, a copy of which is hereto attached, marked Exhibit 'A,' and made a part of this answer.

"Wherefore, the defendants pray judgment of the court:

"1. That the plaintiff's prayer for a writ of mandamus be denied, and that his action be dismissed.

"2. For their costs in this behalf incurred, to be taxed by the clerk of this court."

EXHIBIT "A."

To the Honorable the General Assembly:

I transmit herewith the second annual report of the North Carolina Corporation Commission. You will observe from said report that the

cases known as the Railroad Taxation Cases, pending in the Circuit Court of the United States for the Eastern District of North Carolina, have been compromised and settled. Under the provisions of law, the Corporation Commission, in 1899, assessed the property of the Atlantic Coast Line at $12,885,775, the Southern Railway at $14,713,850, and the Seaboard Air Line at $7,980,245—making a total assessment
(409) of $35,579,870, which was a total increase on the three systems over the assessment of 1898 of $9,022,678. The assessment of three systems named in 1900 was $36,373,382. In a short time after these assessments were made, the three systems named secured an injunction from the Circuit Court of the United States for the Eastern District of North Carolina, restraining the collection of taxes on the assessment over and above the assessment of 1898. During the pendency of these suits much evidence was taken on both sides—that on the part of the railroads tending to show a considerable and systematic undervaluation of the other property of the State, and that on the part of the State, while showing undervaluation in many instances, tending to show that the undervaluation was erratic and not systematic.

During the pendency of the investigation, and while evidence was being taken at Wilmington early in January of this year, I received a telegram from Hon. H. G. Connor, of counsel for the State of North Carolina, asking me to come to Wilmington. Upon my arrival in Wilmington, I found that propositions of settlement were being discussed between those representing the railroads and those representing the State. The railroads insisted upon a reduction of the assessment made in 1899, but were willing to pay on the assessment of 1900, provided their assessable property should not again be assessed until there was another assessment of other property in the State. Upon conference with Chairman McNeill, of the Corporation Commission, Hon. H. G. Connor and Col. J. W. Hinsdale, representing the State, we came to the conclusion that no abatement in the assessment for either the year 1899 or 1900 could, under any circumstances, be made. We, therefore, declined to assent to any reduction in the assessment for either year, but were willing that the property of the railroads subject to assessment should only be assessed as often as other property in the State is or shall
(410) be assessed. Upon consideration, those representing the railroad companies decided to accept our view of the matter, and withdraw their suits, and pay the taxes assessed against them in accordance with the assessment made by the Corporation Commission both for the years 1899 and 1900, and they have paid into the State Treasury the full amount of taxes due the State, to wit, $44,561, and are now ready to pay, as soon as the Clerk of the Corporation Commission can

make out the necessary statements, $32,084 into the school fund, and $101,559 to the counties, cities and towns, aggregating $178,244.

This settlement appears to me to be just, and I, therefore, recommend to the General Assembly to place the railroads as to the time of assessment of their property upon terms of equality with all other assessable property in the State. If such a law shall be passed, the railroads will not again be assessed until 1903.

There are many good men, I am aware, who would have preferred to continue the litigation, and to pass other and more stringent tax laws against the railroads; but to do so involves continued litigation, which so far has cost the State $18,273.25, with a considerable sum still due for services already rendered, and which can not be continued at less than the cost of $20,000 per year to the State. The railroads constitute a considerable and valuable part of the property of North Carolina, and they are of great importance to its industrial development. No fair-minded man desires in any way to hamper their growth and development. On the other hand, no just man can assent to their having an advantage in taxation. They ought to bear the burdens of the State in proportion to their ability to meet them, but it is not a violation of this rule to act upon the assessment made by our Corporation Commission, who have conscientiously and earnestly striven to do justice in the matter of taxation. In the settlement of a lawsuit, it never (411) happens, so far as my experience and observation go, that either side is perfectly satisfied with the settlement; but it is frequently wiser to settle litigation than to continue it. I am persuaded that this is one instance in which it would be wise, both for the State and the railroads, to come to an agreement. It rests with the General Assembly to carry out or not the terms upon which the settlement has been made. The question is no longer for me, further than to say that, in my judgment, what has been done is both just and wise.

By the Governor: CHARLES B. AYCOCK.

P. M. PEARSALL,
Private Secretary.

The following are the sections of chapter 7, Public Laws of 1901, whose construction is essential to the determination of this action:

"SEC. 48. *Railroads.* The president, secretary, superintendent or other principal accounting officers within this State of every railroad, telegraph, telephone, street railway companies, whether incorporated by the laws of this State or not, shall, at such dates as real estate is required to be assessed for taxation, return to the said commissioners for assessment and taxation, verified by the oath or affirmation of the officer making the return, all the following-described property belonging to such corpora-

tion within this State, viz., the number of miles of such railroad lines in each county in this State, and the total number of miles in the State, including the roadbed, right of way and superstructures thereon, main and sidetracks, depot buildings and depot grounds, section and tool-houses, rolling stock and personal property, necessary for the construction, repairs or successful operation of such railroad lines, including, also, if desired by the North Carolina Corporation Commission, Pullman or sleeping-cars owned by them or operated over their lines."

(412)

"SEC. 49. *Railroads.* The movable property belonging to a railroad company shall be denominated, for the purpose of taxation, 'rolling stock.' Every person, company or corporation owning, constructing or operating a railroad in this State shall (in the month of June, annually) return a list or schedule to the commissioners, which shall contain a correct detailed inventory of all the rolling stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping and dining cars, express cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, hand cars, and all other kinds of cars, and the value thereof, and a statement or schedule as follows: (1) The amount of capital stock authorized and the number of shares into which such capital is divided; (2) the amount of capital stock paid up; (3) the market value, or, if no market value, then the actual value of shares of stock; (4) the length of line operated in each county, and total in the State; (5) the total assessed value of all the tangible property in the State; (6) and, if desired, all the information heretofore required to be annually reported by section 1959 of The Code. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the commissioners, and with reference to amounts and values, on the first day of June of the year for which the return is made."

(413)

"SEC. 50. *Tangible and intangible property assessed separately.* (*a*) The said commissioners shall first determine the value of the tangible property of each division or branch of such railroad, or rolling stock, and all other physical and tangible property. This value shall be determined by a due consideration of the actual cost to replace the property, with a just allowance for depreciation on rolling stock, and also of other conditions to be considered as in the case of private property. (*b*) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds or other securities,

the value of which is based upon the earning capacity of the property. (*c*) The aggregate value of the physical or tangible property and the franchise, as thus determined, shall be the true value of the property for the purpose of an *ad valorem* taxation, and shall be apportioned in the same proportion that the length of such road in each county bears to the entire length of such division or branch road in each county bears to the entire length of such division or branch thereof; and the commissioners shall certify to the chairmen of the county commissioners and the mayor of each city and incorporated town, the amount apportioned to his county, city or town, and the commissioners shall make and forward a like certificate to the Auditor of the State. All taxes due the State from any railroad company, except the tax imposed for school purposes, shall be paid by the treasurer of each company directly to the State Treasurer within thirty days after the first day of July of each year, and upon failure to pay the State Treasurer as aforesaid, he shall institute an action to enforce the same in the county of Wake, or any other county in which such railroad is located, adding thereto 25 per centum of the tax. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed by the State for school purposes and those imposed for county purposes."

"SEC. 51. *Railroads.* When any railroad has part of its road (414) in this State and part thereof in any other State, the commissioners shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the Corporation Commission of such company, as provided in the next preceding section, and divide it in the proportion to the length of such main line of road in this State bears to the whole length of such main line of road, and determine the value in this State accordingly."

The court below denied the motion for a writ of *mandamus* and dismissed the action. Plaintiff appealed.

The above is the statement of facts on which the following opinion is based:

The vital question involved in this action is whether the railroad corporations in this State shall pay *any* tax upon their intangible property before 1903. The *form* of the question is whether, considering the legal relation between sections 48, 49 and 50 of the Machinery Act of 1901, the assessment of the intangible property contemplated in section 50 can be made before the next assessment of real estate belonging to private individuals. Of course, if the intangible property can not be assessed, the taxes thereupon imposed by law can neither be collected nor ascertained. We are aware of the great importance of this case to

the railroads on the one hand, and on the other to the State and its citizens; and we would have preferred that the parties whose real interests are at stake should have been directly represented in this action. They would have been heard, had they seen fit to become parties hereto. However, we must decide the case as it is brought before us, and, as the questions have been clearly presented, we find no substantial difficulty in their determination. This is suggested to us by the contention of the defendant that this action can not be maintained by the plaintiff, but could have been brought only by some officer of the State upon whom is imposed the legal duty of enforcing its laws and collecting its revenues.

(415) It is contended that the action, if proper, should have been brought by the Governor or the Attorney-General, or at least by leave of the latter; but the Governor has not brought any such action, while we find the Attorney-General appearing for the defendants. We do not mean to reflect upon these high officers in the slightest degree, and state these facts merely in answer to the contention of the defendants that they alone could act.

It is true, this Court said, in *Russell v. Ayer,* 120 N. C., 180, 185, 37 L. R. A., 180, "There can be no serious question concerning the power of the Governor to bring an action in the nature of this one"; but it does not say that he alone can bring it. On the contrary, it cites *Carr v. Coke,* 116 N. C., 223, 47 Am. St., 801, 28 L. R. A., 737, where the opinion of the Court opens with the following statement: "The plaintiff, *as a citizen and taxpayer of the State,* brings this action against the defendant, as Secretary of State, who, by virtue of his office, is the custodian of all acts passed by the Legislature, or which purport to have been passed, whose duty it is to deliver certified copies of said acts to the Public Printer for publication." It is true, in that case the mandamus was refused on constitutional grounds, but the right of the plaintiff to bring the action in his private capacity was not questioned. It does not appear that Elias Carr, "as a citizen and taxpayer," had any greater interest in the result of that action than the plaintiff has in that at bar.

At the threshold of this opinion we desire to eliminate whatever contingent interest the plaintiff may have in his commissions as sheriff, and to place our decision upon the broad ground that every citizen has the right to demand that every other property holder shall pay his lawful taxes. This doctrine is, in our opinion, founded upon reason and authority, and is thoroughly consistent with the highest principles of public policy. In High Ext. Rem., the learned author says, in section

(416) 431: "When the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at

whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such interested in the execution of the laws." This doctrine is sustained by a decided preponderance of American authority, but among so many cases few can be cited. Among those peculiarly appropriate as relating directly to taxation are the following, selected from different States and running through a long period:

In *S. v. Hamilton,* 5 Ind., 310, where a mandamus was granted compelling the county auditor to return railroad property for taxation, the Court says, on page 319: "The objection has been made that this *mandamus* could not issue on the relation of John P. Dunn, Auditor of State. The assessment of the taxes for State purposes is a matter of public concern in which all the citizens of the State are interested; and hence, according to the cases of *Hamilton v. State,* in this Court, November Term, 1852 (3 Ind., 452), any citizen of the State might have been the relator. At the same time, it was peculiarly appropriate that the prosecution should be upon the relation of the Auditor of State, he being the officer more specifically charged with the management of the finances of the State."

In *People v. Halsey,* 37 N. Y., 344, 346, the Court says: "The writ of mandamus may, in a proper case, and in the absence of an adequate remedy by action, issue on the relation of a private individual, to redress a wrong personal to himself, or on the relation of one who, in common with all other citizens, is interested in having some act done of a general public nature, devolving as a duty upon a public officer or body who refuse to perform it. The collection of a tax, legally assessed, in which all the inhabitants of any particular division of the State (417) have a common interest, is an instance of this character, and such collection may be enforced by any one of such citizens." And again, on page 348: "Inasmuch as the people themselves are the plaintiffs in a proceeding by mandamus, it is not of vital importance who the relator should be so long as he does not officiously intermeddle in a matter in which he has no concern. The office which a relator performs is merely the instituting a proceeding in the name of the people and for the general benefit. The rule, therefore, as it is sometimes stated, that a relator in a writ of mandamus must show an individual right to the thing asked, must be taken to apply to cases where an individual interest is alone involved, and not to cases where the interest is common to the whole community."

In *Ford v. Mayor,* 44 Ga., 213, 216, in an action brought by "Ford *et al.,* citizens, freeholders and taxpayers of the city of Cartersville," the Court held that "If the mayor and aldermen have illegally exempted the waterworks company from taxation, and refuse to levy a tax upon

the property of said corporation, the citizens can compel them to do so by writ of mandamus."

In *Hugg v. Camden,* 39 N. J. Law, 620, where the city solicitor applied for a mandamus to compel the City Council of Camden to sell lands for taxes, on the ground that he would be entitled to certain fees for selling such lands, the Court doubted whether such contingent interest would entitle him to the writ, but held that he could sue as a *taxpayer,* saying, on page 624: "But it is not necessary that he should show such interest as a public officer, to prosecute this writ. He is not a mere volunteer, interfering in a public or private matter. He has the right, as a citizen and taxpayer in the city of Camden, to be the relator in a mandamus when seeking the enforcement of a duty by the common council (418) of the city, which is a public right, affecting the whole community, and also his interest as such taxpayer." On page 622 the Court also uses the following significant language, in reply to the contention that such sale was within the *discretion* of the common council: "But these words, 'It shall and may be lawful,' in this statute, are mandatory, not directory and discretionary. The power conferred by them must be exercised. It is the settled construction that where a public or municipal corporation, or body, is invested with powers to do an act which the public interests require to be done, and has the means for its complete performance placed at its disposal, not only the execution, but the proper execution of the power may be insisted on as a duty, though the statute conferring it be only permissive in terms."

The case of *R. R. v. Hall,* 91 U. S., 343, while not relating to taxation, seems directly in point.

The last case we shall cite upon this point is the recent Illinois case of *State Board of Equalization v. People,* 191 Ill., 528, which, in the nature of the suit, the manner in which it was brought, and the results sought to be obtained, are almost identical with the one at bar. Quoting the opinion in that case: "This is a petition for a writ of mandamus, filed in the Circuit Court of Sangamon County by the State's attorney of said county, upon the relation of Catherine Goggin and Robert C. Steele, against the State Board of Equalization and the members thereof (naming them), to coerce said board and the members thereof forthwith to value and assess, in the manner provided by law, the capital stock, including franchises, of each of the following named corporations." A large number of corporations were included, principally street railway companies, the aggregate value of whose intangible property over and above the assessed value of their tangible property was alleged to be $235,000,000. Neither the Attorney-General nor any other (419) State officer was a party. The relators were school teachers, suing as taxpayers, and yet the mandamus was granted. It is true, in

that case the Court went further than we have any reason to anticipate being compelled to go. It declared the assessment made by the State Board of Equalization to be so grossly inadequate as to be fraudulent upon its face. We doubt not that the members of our Corporation Commission will be glad of an authoritative declaration of the law, and will follow our decision in letter and spirit.

As the plaintiff has the legal capacity to maintain this action, it remains to be considered to what relief he is entitled.

There seems to be no question as to the power of the Legislature to impose the taxes in form and substance as contemplated in section 50 of the Machinery Act of 1901. Section 3 of Article V of the Constitution of this State is as follows: "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise, and, also, all real and personal property, according to its true value in money. The General Assembly may also tax trades, professions, franchises and incomes: *Provided,* that no income shall be taxed when the property from which the income is derived is taxed." The power to tax franchises, including the intangible property of a corporation, seems to be optional; but it is fully given, and does not seem to be in conflict with the Federal Constitution. This principle is ably and elaborately discussed in *State Railroad Tax Cases,* 92 U. S., 575. The Court therein says, on page 602: "It is obvious, however, that while a fair assessment under these two descriptions of property will include all the visible and tangible property of the corporation, it may or may not include all its wealth. There may be other property of a class not visible or tangible which ought to respond to taxation, and which the State has a right to subject to taxation." Again, the Court says, on page 605: "It is, therefore, obvious that when you have ascertained the current cash value of the whole funded (420) debt, and the current cash value of the entire number of shares, you have, by the action of those who, above all others, can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are represented by the value of its bonded debt and of the shares of its capital stock." Later cases are to the same effect; generally citing this case. *Railroad Tax Cases,* 115 U. S., 321, 339; *Tel. Co. v. Mass.,* 125 U. S., 530; *Ins. Co. v. N. Y.,* 134 U. S., 594; *Car Co. v. Penn.,* 141 U. S., 18; *Mass. v. Tel. Co.,* 141 U. S., 40; *R. R. v. Wright,* 151 U. S., 470; *R. R. v. Backus,* 154 U. S., 421; *R R. v. California,* 162 U. S., 91; *R. R. v. California,* 162 U. S., 167. These cases sustain not only the fairness and legality of the method of assessment prescribed by our statute and approved in *State Railroad Tax Cases, supra,* but also the further principle that (quoting headnote in *R. R. v. Backus*) "when a railroad runs into or through two or more

States, its value for taxation purposes, in each, is fairly estimated by taxing that part of the value of the entire road which is measured by the proportion of the length of the particular part in that State to that of the whole road."

The capacity of the plaintiff to sue, and the power of the Legislature to impose the tax having been determined, it remains for us to ascertain the intention of the Legislature as expressed in the act. That the Legislature intended to assess and collect *at some time* the taxes referred to in section 50 does not admit of question. To that extent the act is clear and explicit, neither requiring nor permitting interpretation. The only point susceptible of doubt is as to the *time* when such assessment should be made. This point, we must confess, gave us some trouble. And yet, if we give effect to all parts of the act, we can come to but one conclusion. It seems clear to us that the General Assembly
(421) intended sections 49 and 50 of the act in question to go into immediate operation. If otherwise, why should they have been put into the act at all?

We must take judicial notice that under our Constitution and laws, another Legislature will be elected and in session before the month of June, 1903. It is common knowledge, appearing from our public statutes and legislative journals, that each Legislature passes its own Revenue and Machinery Acts, which are intended to be, and usually are, complete in themselves. It can scarcely be presumed that the Legislature of 1901 deliberately did so vain a thing as either to attempt to bind that of 1903 by anticipatory legislation on the one hand, or, on the other, to pass an act which it did not intend to be operative. Moreover, it is obvious that the assessment required by section 50 is to be based upon the statements prescribed in section 49, and yet those statements are, by the very terms of said section, to be made "in the month of June *annually.*" Why should they be made annually if they are to be acted upon only quadrennially? Why have four separate and distinct sets of annual statements when only one can be of any possible use? These statements must necessarily vary, as does the value of all personal property, as times are good or bad. The value of railroad property especially is peculiarly susceptible to the changes produced by the contraction and expansion of the general business of the country. Therefore, what might be a fair valuation for one year might be grossly excessive or inadequate for the remaining three years. Real property is not subject to such sudden and violent fluctuations, or at least to a far less degree. Hence, it is the long-established rule in this State to assess the real property of individuals only once in every four years, while their personal property is assessed annually. The value of intangible property is much more liable to fluctuation than even tangible personal property,

and hence the greater propriety of an annual assessment. These (422) reasons, with none apparently to the contrary, force us to the conclusion that the act intended that sections 49 and 50 should apply to the assessment of 1901, and annually thereafter.

Great stress is laid upon the fact that section 48 of the act of 1901, which is substantially a reënactment of section 43 of the act of 1899, changes the latter section by omitting the words, "on the first day of June of each year," and inserting the words, "at such dates as real estate is required to be assessed for taxation." From this it is argued that the Legislature intended that the franchise should be assessed for taxation only once in four years, like real estate, and therefore should not be assessed until 1903. The fallacy of this argument lies in the fact that section 48 of the act of 1901, and section 43 of the act of 1899, are both, by their express terms, limited to the *tangible or physical* property of the railroads, and do not pretend to relate to the assessment of the franchise. Section 48 says: "The president . . . shall, *at such dates as real estate is required to be assessed for taxation,* return to the said commissioners, *for assessment and taxation,* verified by the oath or affirmation of the officer making the return, all the *following described property* belonging to such corporation within this State, viz." [Then follows a specific description of the different kinds of *physical or tangible* property, without the slightest allusion to the franchises or intangible property. *Inclusio unius est exclusio alterius.*]

If the Legislature had intended section 48 to apply to franchises, it could very easily have said so. In fact, it would have been easier to have said "all property, both tangible and intangible, including franchises," than to have said, as it does say, "all *the following-described property,*" followed by a long list of specific kinds of *tangible* property alone. The fact that neither section 48 nor its prototypes has ever alluded to the assessment of the *franchise,* which has always been regulated by other sections, seems conclusive. Those sections, both (423) in the act of 1901 and that of 1899, which refer to the *franchises,* all provide for *annual* returns.

But one question remains: Does the act, exclusive of section 48, provide sufficient machinery for annual assessments of the intangible property of railroad corporations? We think it does. Section 49 expressly provides that all railroad companies shall report annually to the Corporation Commission "(5) The total assessed value of all the tangible property in the State." This obviously refers to the present assessment of the tangible property that has already been made. We can not suppose that the Legislature intended to say that the railroad companies should report in the years 1901 and 1902 an assessment that would not be made until 1903. The gift of prophecy is not of legislative origin.

Moreover, section 49 also provides that railroad companies shall, if required by the Corporation Commission, furnish *annually,* in the month of June, all the information set out in section 1959 of The Code. This latter section contains fifty different questions, completely covering in detail the total cost of the road and equipment, with its characteristics, transactions, cost of maintenance, operation and repair, the amount of capital stock permitted, subscribed and paid in, and total floating and funded debt, with average rate of interest. We see no reason why these three sections, 49 and 50 of the Machinery Act of 1901 and section 1959 of The Code, taken together, can not be enforced without reference to section 48 of said act.

It is not alleged that there is any repugnance in the sections of said act, but rather that their interdependence is so great as to forbid any separation. As they relate to different subjects of taxation, to wit, tangible and intangible property, and are shown to be capable of
(424) independent execution, we can not concur in the objection.

It should be borne in mind that the sections under consideration do not impose any additional tax upon railroads, as section 45 of the Machinery Act of 1899 expressly directs that the value of the franchise shall be included in the assessment of railroad property. A comparison of sections 49, 50 and 51 of the Machinery Act of 1901 with sections 44, 45 and 46 of the act of 1899, will show that the only changes relate to certain details in the method of assessment. The principal change made by the act of 1901 (aside from section 48) was the insertion of the following provision: "And particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds or any other securities, the value of which is based upon the earning capacity of the property." This is simply the rule so repeatedly approved by the Supreme Court of the United States, as shown above, and was evidently suggested to the Legislature by the great disparity between the assessed value of railroad property and its real value as shown by the market value of the stocks and securities based thereon.

It is suggested in behalf of defendants that the Legislature, by the provisions of section 48, intended that the franchise or intangible property should not be taxed until 1903. That would be a very long and circuitous way of saying what might have been said in a few plain and explicit words. As the tax had already been imposed by existing law, such an interpretation would be, in legal effect, an *exemption* from taxation for the years 1901 and 1902. Can we suppose that the Legislature intended to create a practical exemption from taxation of valuable property under the guise of a mere change in the method of its assessment? We think not.

It is a well-settled rule of interpretation, here and elsewhere, (425) that there can be no exemption unless the deliberate purpose of the State to create such exemption is declared in words too plain and explicit to require construction. The mere existence of a doubt is its legal determination in behalf of the State. This question is fully discussed in *R. R. v. Allsbrook,* 110 N. C., 137, which expresses the settled rule of this Court. In affirming that case, on writ of error, the Supreme Court of the United States says (146 U. S., 279, 301): "We concur with the State Court in the conclusions reached, as sustained by reason and authority." A few quotations from the numerous decisions of that Court, running through a long series of years, show how firmly the rule is established.

In *Bank v. Billings,* 4 Peters, 514, 561, *Chief Justice Marshall,* speaking for the Court, says: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it can not be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

In *R. R. v. Maryland,* 10 How., 376, 393, *Chief Justice Taney,* speaking for the Court, says: "And certainly there is no reason why the property of a corporation should be presumed to be exempted, or should not bear its share of the necessary public burdens, as well as the property of individuals. This Court, on several occasions, has held that the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous (426) terms."

In *Bailey v. Maguire,* 89 U. S., 214, 226, 227, the Court says: "It is manifest the legislation which it is claimed relieves any species of property from its due proportion of the general burdens of government should be so clear that there can be neither reasonable doubt nor controversy about its terms. The power to tax rests upon necessity, and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment. While it were better for the interest of the community that this power should on no occasion be surrendered, this Court has always held that the Legislature of a State, unrestrained by constitutional limitation, has full control over the subject, and can make a contract with a corporation to exempt its property from taxation, either in perpetuity or for a limited period of time. If, however, on any fair

construction of the legislation, there is a reasonable doubt whether the contract is made out, this doubt must be solved in favor of the State. In other words, the language used must be of such a character as, fairly interpreted, leaves no room for controversy. . . . It is never for the interest of the State to surrender the power of taxation, and an intention to do so will not be imputed to it unless the language employed leaves no other alternative."

In *R. R. v. Commissioners,* 112 U. S., 609, 617, the Court says: "This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirement of the grants construed *strictissimi juris.*"

In *R. R. v. Guffey,* 120 U. S., 569, 575, the Court says: "For it is the settled doctrine of this Court that an immunity from taxation by the State will not be recognized unless granted in terms too plain to be mistaken."

(427) In *R. R. v. Allsbrook,* 146 U. S., 279, 294, *Chief Justice Fuller,* speaking for the Court, says: "The taxing power is essential to the existence of government, and can not be held to have been relinquished in any instance unless the deliberate purpose of the State to that effect clearly appears. The surrender of a power so vital can not be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power."

It is earnestly contended by the able counsel for the defendants that we should construe the statute in the light of the Governor's message, presuming that the Legislature intended to carry fully into effect the recommendations contained therein. We approach this question with much hesitation, because we gravely doubt the propriety of considering any outside matter when an act, viewed in all its parts, is on its face capable of intelligent construction. Black on Interpretation of Laws, sec. 25; Endlich on Int. of Statutes, secs. 2, 4, 8; Sutherland on Stat. Const., sec. 237; Potter's Dwarris on Stat., page 193.

In *Sturges v. Crowninshield,* 4 Wheat., 122, 202, the Court says: "Although the spirit of an instrument, especially of the Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempted from its operation."

In *Alexander v. Worthington,* 5 Md., 485, the Court has lucidly expressed the rule applicable to the present discussion in the following words: "The language of a statute is its most natural expositor; and

where its language is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations. The construction is to be on the entire statute; and where one part is susceptible (428) indifferently of two constructions, and the language of another part is clear and definite, and is consistent with one of the two constructions of which the former part of the statute is susceptible, and is opposed to the other construction, then we are to adopt that construction which will render all clauses of the statute harmonious, rather than that other construction which will make one part contradictory to another."

However, as the message is made a part of the answer and is embodied in the case on appeal, we will give it that courteous consideration due to the supreme executive power of the State. Much stress is laid by the defendants upon the expression that, "If such a law shall be passed, the railroads will not be again assessed until 1903." But to ascertain the true meaning of the message, we must construe it as a whole, and not in its disjointed sentences. This sentence is immediately preceded by the following statement: "This settlement appears to me to be just, and I therefore recommend to the General Assembly to place the railroads, as to the time of assessment of their property, *upon terms of equality with all other assessable property in the State.*" This can be done only by assessing the property of a railroad in the same manner as that of the citizen. His real property is assessed quadrennially, while his personal property is assessed annually. Intangible property is surely personal property. We are not aware of any principle under which it could be classified as real estate. If, therefore, we give any effect to the declared purpose of the message to place the railroads and the citizens of the State upon an equality in bearing the just burdens of taxation, we must conclude it to mean that the railroads will not be again assessed until 1903 on their real property. Keeping in view the just equality of taxation, this construction becomes the more important, as any other would result in the practical exemption of railroad franchises from all taxation until 1903.

Again, it is urged that the faith of the State is pledged to the (429) maintenance of the compromise entered into by the Governor and the General Assembly with the railroad companies. What were the terms of such compromise, if there was any compromise? The act makes no allusion to any compromise, nor is it alleged that any compromise is shown by the records of the Federal Court. The message thus alludes to the transaction: "The railroads insisted upon a reduction of the assessment made in 1899, but were willing to pay on the assessment of 1900, provided their assessable property should not again be assessed until there was another assessment of other property in the State." . . .

"We therefore declined to assent to any reduction in the assessment

for either year, but were willing that the property of the railroads subject to assessment should only be *assessed as often as other property in the State is or shall be assessed.* Upon consideration, those representing the railroad companies decided to accept our view of the matter and withdraw their suits," etc.

Giving to these words their fullest legitimate meaning, there is no allusion to any *exemption* from taxation such as would result from the construction we are asked by the defendants to place upon this act. In fact, such a construction would destroy all idea of a compromise. It appears from the message that the entire amount involved in the litigation in the Federal Court was an increased assessment of a little over nine millions of dollars; while it is evident from the report of the Corporation Commission, compared with the reports of current market values, that the value of the intangible property of the three railroad corporations which were parties to said litigation, after deducting the assessed value of their tangible property, was many times the amount involved. The essential nature of a compromise supposes mutual concessions, and can not be applied to an inconceivable transaction
(430) wherein one party is supposed to bind himself to give up a sum largely in excess of that in litigation simply to settle a lawsuit. We do not think the message of the Governor, even if it could affect our interpretation of the statute, can, upon its face, justly require any such construction.

We see no merit in the contention that the defendants are *functi officio,* either individually or as a commission. The Corporation Commission appears to be a continuing body, and, in fact, there has been no change in its *personnel* since the passage of the act. We see no constitutional objection to the method of assessment, as the corporations affected thereby will have the fullest opportunities to be heard. Indeed, it appears that the assessments will be based upon reports furnished by themselves. How far such reports will be binding upon the commission is not before us; but we doubt not that the commission will give to such companies a full and fair hearing before taking any final action affecting their interests.

The writ of mandamus will issue in accordance with the prayer of the complaint, requiring the defendants to proceed forthwith, under the provisions of chapter 7, Laws 1901, as construed in this opinion, to assess the intangible property of all persons or corporations referred to in sections 49 and 50 of said act for 1901.

The above opinion, written more than a month ago under different circumstances and for a different purpose, is now filed as my dissenting opinion, embodying the views I still entertain as to the law. This I say in justice to myself, as my opinion, professedly dissenting from

the opinion of the Court, does not allude thereto. As I have just received the opinion of the Court, it is impossible for me, in the few remaining hours of the session, to rewrite my opinion, or even to materially change it without endangering its logical connection. In specifically dissenting from the opinion of the Court, I scarcely know where to begin, as I dissent from it *in toto,* both in its (431) conclusion and the reasoning by which it is reached. There is one part, containing the dominating principle of the opinion, which I can not ignore. It is the following: "If it should be objected to this opinion that to be consistent it embraces impliedly the view that there is no statute which fixes the assessment of the real and personal property of the railroad companies in this State upon which taxes can be levied and collected, until the assessment provided for in June, 1903, by the act of 1901, chapter 7, section 12, it would have to be admitted that that is a fact." This is simply saying in substance that no species of railroad property, real or personal, tangible or intangible, can be assessed for taxes until June, 1903. In this view I could never concur, as it would drive me to one of two inevitable conclusions, either that the Legislature intended to grant to the railroads a total exemption from all taxation for the years 1901 and 1902 or that the act is so utterly insensible as to be incapable of any reasonable interpretation. If this be the opinion of the Court, I must again enter my respectful but most earnest dissent.

If, however, the able opinion of the *Chief Justice,* which, I understand, receives the concurrence of *Justice Cook,* holds, as it seems to me it does hold, that the railroads are liable for the years 1901 and 1902, at least to the amount of their assessment of 1900, then to that extent I concur in the concurring opinion. This would eliminate from the opinion of the Court its vital principle, leaving practically only its conclusion concurred in by a majority of its members. Hence, it seems needless for me to go into any further discussion beyond what is contained in the body of my opinion, from which the elaborate opinion of the *Chief Justice* was written in dissent.

CLARK, J., concurs in the dissenting opinion of DOUGLAS, J.

(432)

HARDWOOD LOG COMPANY v. COFFIN.

(Filed 19 June, 1902.)

1. Contracts—Parol Evidence.

Where it appears that a written instrument was not intended to be a complete and final statement of the whole contract, parol evidence is competent to establish a separate oral agreement as to which the instrument is silent and which is not contrary to its terms nor their legal effect.

2. Parties—Deceased—Personal Representatives—Partnership.

Where a firm is a party plaintiff and a member of the firm dies, his personal representative should be made a party.

PETITION to rehear this case as reported in 126 N. C., 1153, is allowed.

Shepherd & Shepherd and Dillard & Bell for petitioners.
Merrimon & Merrimon contra.

COOK, J. This case was heard at February Term, 1900, upon an appeal from the judgment affirming the report of the referees. The judgment in the court below was affirmed (*126 N. C., 1153*), and it is now before us upon a petition to rehear. The errors assigned upon which a rehearing is asked are:

1. That the contract of 15 September, 1894, was partly written and partly unwritten, and was so found by the referees, and that the error consists in their conclusions of law, in that, as they held, "the evidence upon which the finding of fact is based is incompetent, as its effect is to allow parol testimony to vary, contradict and add to the written contract (of 15 September, 1894), which, in the judgment of the referees, was a complete contract, containing no latent ambiguity, which parol evidence is admissible to explain."

(433) 2. For error in rejecting the evidence to prove the verbal agreement relating to furnishing additional machinery to the defendants, which plaintiff testified was made in addition to the written contract.

3. For error in holding that the damages based upon the findings of the referees would be speculative merely.

4. For error in allowing defendants credit for $825, for the cost of the storehouse, which was built in the prosecution of the work under the contract, and also for new machinery to the amount of $500.

5. For error in not remanding the case in order that the personal representative of George Hagemeyer might be brought into court, as said deceased was a party to the contract.

Considering 1 and 2 together, we find from the written contract of 15 September, 1894, under which both parties admit the work was performed (and plaintiff's attorneys agreed that plaintiff would be bound by it), it to be therein stated and provided that "and in the event the parties of the second part (defendants) not having enough funds to make the necessary improvements required to manufacture said lumber, the parties of the first part (George Hagemeyer & Son) agree to advance to said parties of the second part such sums of money as may be required, the necessity of such advance is to be subject at all times to the approval of the parties of the first part. The said advances, if any are made, are to be raised in the manner following: The parties of the second part are to make their negotiable promissory notes for the amount or amounts required, the said notes to be made payable to the order of the parties of the first part, and discounted by the parties of the second part, the said notes to be secured by the amounts then due and to become due from the parties of the first part to the parties of the second part." This part of the contract is alleged to have been by parol, changed and modified, to wit, by defendants drawing draft on Hagemeyer & Son, instead of by giving notes (434) and the amounts thereon advanced are found to have been made without giving the notes. And the referees find therein that "according to the written contract of 15 September, 1894, the plaintiffs were to furnish the defendants a reasonable amount of money to facilitate the work mentioned in said contract, and the referees find that $10,000 would have been a reasonable amount." But the amount actually furnished in cash, merchandise and drafts was only $4,997.22, as found by the referees.

So it appears from the report of the referees (findings of fact No. 1) that they did find the facts to be that plaintiffs did agree, by parol, to furnish defendants the sum of $10,000, as alleged by them, but that the evidence (parol) upon which it was found was incompetent, and (No. 2) that plaintiffs did not agree to furnish defendants any machinery, and this finding is based upon the same ground as finding No. 1, that is, that parol evidence was not competent to prove the same.

The questions herein raised are: First, Is parol evidence competent to explain or show what amount of money was agreed upon to be advanced? Second, Is parol evidence admissible to show that the entire contract was not reduced to writing and incorporated in the contract of 15 September, 1894, and that an "additional" contract was made?

Defendant Coffin testified that there was an "additional contract made, which had not been reduced to writing, outside of what was written."

"They were to furnish us $10,000, or the required amount for us to

cut and saw 50,000 feet of lumber a day; . . . this money matter was all opinion, but it was thought it would take at least $10,000 to do it; they agreed to furnish $10,000 or more if it should be required."

"By the court: 'What parol contract was not reduced to writing?'

Ans.: 'The furnishing of the money and the amount, and the
(435) amount of lumber to be produced every day, and some other items, and drafts were agreed to instead of notes, as the contract called for, and the machinery was to be furnished to us. . . . They were also to furnish the required machinery in addition to what we had on hand."

Hagemeyer testified that there was no agreement by which they were to furnish $10,000 or more money—none whatever—nor to furnish any machinery for the mill, nor concerning the amount of lumber to be sawed per day, but "agreed verbally that if we should receive the trusteeship of this property and could sign that proposed contract (the one of 15 September, 1894), as trustees, we would advance them, after they had expended the moneys they had at that time for the lumber they had on hand, from $4,000 to $5,000, within 60 or 90 days."

Upon exceptions by plaintiffs, the *entire* evidence as to the "additional agreements" and as to that part of the contract alleged to have been made and not reduced to writing, was excluded, and the findings of fact by the referees, upon which their final report was based, were made without reference to the same; and in excluding and refusing to consider such evidence there was error.

The rule, as stated in Abbott Trial Evidence, page 294, and cited with approval in *Colgate v. Latta,* 115 N. C., 127 (on pages 134 and 135), 26 L. R. A., 321, is: "A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude evidence tending to show the actual transaction in the following cases: . . . (6) Where it appears that the instrument was not intended to be a complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement in the matter as to which the instrument is silent, and which is not contrary to its terms nor to their legal effect."

(436) So, also, in *Cumming v. Barber,* 99 N. C., 332, it is held that, if the entire agreement was not reduced to writing, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement of the parties. And to the same effect is *Twidy v. Saunderson,* 31 N. C., 6; *Manning v. Jones,* 44 N. C., 368.

In the case at bar, defendants allege, and offer evidence to show, that the sum to be advanced under the contract was to be afterwards settled upon, and that the contract did not contain all of their agreement, but that a part, as to the machinery and quality of yield of

lumber to be made per day, was not incorporated in it, and was an additional contract. If this be so, then it was proper to be shown under the above-cited authorities; and there was error in excluding such evidence.

As the findings upon damages and the items of $850 and $500, embraced in the third and fourth assignments, are involved in and dependent upon the terms of the contract, in the establishment of which there was error, and the same will hereafter have to be ascertained, we will not rule upon them in their present shape.

As to the fifth assignment: It appears from the summons that "George Hagemeyer and Caster Hagemeyer, together with the estate of George Hagemeyer, deceased, partners under the firm name of George Hagemeyer & Sons," were plaintiffs, and it inferentially appears that the deceased, George Hagemeyer, was alive at the time of the execution of the contract and a party to it; and if this be so, then his personal representative is a necessary party and should be so made.

For the errors above pointed out, the petition is allowed.

Cited: *Brown v. Hobbs,* 147 N. C., 76.

---

(437)

CURTIS v. SOUTHERN RAILWAY COMPANY.

(Filed 19 June, 1902.)

1. **Negligence—Contributory Negligence—Last Clear Chance—Issues—Evidence—Opinion on Evidence.**
   Where there are three issues submitted, one as to negligence of defendant, one as to contributory negligence of plaintiff, and one as to last clear chance, it is error to charge that the third issue, notwithstanding the negligence of the plaintiff, is the main issue in the case, and the first issue should be answered like the third.

2. **Negligence—Last Clear Chance—Issues.**
   Where there are three issues submitted, one as to negligence of defendant, one as to contributory negligence of plaintiff, and one as to the last clear chance, it is error to charge that the third issue depends upon and follows the finding upon the first issue.

ACTION by J. L. Curtis against the Southern Railway Company, heard by *Justice, J.,* and a jury, at August Term, 1901, of BURKE. From a judgment for the plaintiff, the defendant appealed.

Avery & Avery and J. T. Perkins for plaintiff.
George F. Bason for defendant.

DOUGLAS, J. This is an action for the recovery of damages for personal injuries, alleged to have been caused by the negligence of the defendant. There are twenty-two exceptions, but we think that the consideration of two only will be sufficient for the purposes of this opinion.

The issues and answers thereto were as follows: "1. Was plaintiff injured by the negligence of defendant? 'Yes.' 2. Did plaintiff, by his own negligence, contribute to his injury? 'Yes.' 3. Notwithstanding plaintiff's negligence, could defendant, by exercising ordinary care, have prevented the injury? 'Yes.' 4. What damage is plain-
(438) tiff entitled to recover? '$300.' "

The defendant excepts to the following portion of his Honor's charge: "So far as I can see, the third issue, notwithstanding the negligence of the plaintiff, could the defendant, by ordinary care, have prevented the injury, is the *main issue in this case,* and the first issue will be answered as you answer the third issue." We think this instruction was erroneous in a double aspect: In the first place, it seems to us a clear intimation of the opinion of the court that the defendant was guilty of negligence, since, if the first issue were answered in the negative, the third issue would never be reached. That would end the case. If the defendant is not primarily negligent, the issue of contributory negligence is immaterial, and the doctrine of the last clear chance is eliminated. It was, therefore, erroneous as a principle of law.

This Court has said in *Cox v. R. R.,* 123 N. C., 604, 610: "Had the question not been again presented by counsel, it would almost seem needless to repeat what we have so often said, that the burden of proving negligence rests upon the plaintiff, while the onus of showing contributory negligence rests upon the defendant. In both cases this must be shown by the greater weight of the evidence, and of this relative weight the jury alone can determine. A negative presumption necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. Each issue bears its own burden, and it rarely happens that the burden of all the issues rests upon the same party. In cases of negligence like the present, it changes with each successive step, it being necessary for the plaintiff to prove the negligence of the defendant; the defendant, the contributory negligence of the plaintiff; and again, for the plaintiff to show the last clear chance of the defendant, if that issue becomes
(439) material. Each of these issues depends upon the one preceding.

The plaintiff must first prove that he was injured by the negligence of the defendant. If he fails to prove it, that is an end of the case, and the defendant is not then required to prove contributory

negligence. Properly speaking, there is no contributory negligence unless there is negligence on the part of the defendant.

"This distinction is important as affecting the burden of proof and the consequent direction of a verdict. If the negligence by which the plaintiff is injured is entirely his own, as in *Mesic's case,* where, instead of the train running into the horse, the horse ran into the train, then there is no evidence to go to the jury on the first issue, and the question of contributory negligence becomes immaterial."

It will thus be seen that the question of the last clear chance is in the nature of a relative or secondary issue. If it is found that the defendant has not been negligent, that ends the case in favor of the defendant, and no other issues are necessary or material. If it is found that the defendant's negligence caused the injury, and that plaintiff was not guilty of contributory negligence, then the only material issue remaining is that of damages. If it is found that the negligence of the defendant caused the injury, and that the negligence of the plaintiff contributed thereto, then, and then only, the issue as to the last clear chance becomes material.

Considering the above as the three first issues, it is never proper for the court to charge the jury that they must find the first and third issues the same way. The third issue should not be considered until after the first issue is found in the affirmative; and yet such a finding as to the first does not by any means presume an affirmative finding as to the third.

The defendant further excepted to the following portion of his Honor's charge: "This is a question of negligence, and is a question of fact for you. Now take this testimony, and if the plaintiff has satisfied you that the railroad company failed to exercise (440) due and ordinary care, as I have explained it to you, then you will answer the first issue and third issue 'Yes.'" In this there is error, not only because it again confuses the issues, but also because it makes the third issue, as to the last clear chance, depend upon the simple negligence of the defendant. Even if the defendant is negligent, it is not liable unless such negligence was the cause of the plaintiff's injury. It is not liable, then, if the plaintiff is guilty of contributory negligence, unless the last clear chance to avoid the injury rested with the defendant. *Edwards v. R. R.,* 129 N. C., 78.

For these reasons we think the defendant is entitled to a new trial.

Among the defendant's assignments of error is the following: "To the giving of the instructions prayed for by plaintiff, as covered by defendant's exceptions 14 to 18, inclusive." We can not find any such exceptions in the record, and in fact it does not appear which, if any, of the nine instructions asked by the plaintiff were given by the

court. Therefore, we will not discuss the novel and difficult questions therein involved, and will only say that, as to the use of air-brakes and other safety appliances, we are not yet prepared to hold a railroad company to the same degree of responsibility to a trespasser as to a passenger or employee. What is its measure of duty under such circumstances must await determination until properly presented.

New trial.

Cited: Harris v. R. R., 132 N. C., 164; *Gordon v. R. R., ibid.*, 569; *Butts v. R. R.*, 133 N. C., 85; *Graves v. R. R.*, 136 N. C., 9; *Holland v. R. R.*, 137 N. C., 380; *Hamilton v. Lumber Co.*, 160 N. C., 51.

(441)

JOHNSON v. MACHINE WORKS.

(Filed 19 June, 1902.)

Contracts—Breach—Salesman.

Where a company employs a salesman for one year and he is to report each day his whereabouts and send in expense account at the end of each week, the failure to comply in this respect is such a breach of the contract as to justify his discharge, and his continuance for a while after the breach does not affect the right to discharge him.

MONTGOMERY, J., dissenting.

ACTION by G. S. Johnson against E. Van Winkle Gin and Machine Company, heard by *Starbuck, J.*, and a jury, at January Term, 1902, of MECKLENBURG. From a judgment for the plaintiff, the defendant appealed.

Maxwell & Keerans for plaintiff.
Burwell, Walker & Cansler for defendant.

FURCHES, C. J. The plaintiff was employed by defendant as a traveling salesman of machinery, for one year. The terms of the contract were that the defendant was to pay the plaintiff $75 per month and necessary expenses; and the defendant was to furnish the plaintiff with addressed postal cards and blanks for the purpose, and the plaintiff was to write every day on one of the postal cards, showing the defendant where he was. And at the end of each week the plaintiff was to report, on the blanks furnished him, his past week's expenses. The defendant furnished the postal cards and the blanks,

but the plaintiff failed to write and mail the postal cards showing his whereabouts, and failed to make the weekly reports, as he was to do under the contract. The contract time was to commence on the first of February; and on 20 February we find him writing to the defendant, in answer to a letter from the defendant de- (442) manding that the plaintiff should comply with his contract by writing the postals and sending in the reports, saying that he (plaintiff) had never had to do this before, and that it was not necessary that he should do so.

The next correspondence we have between the plaintiff and the defendant is a letter of 16 March, from the defendant, demanding that the plaintiff should write the postals and send in the reports as he contracted to do. But the plaintiff still refused to write the postals or to make the weekly reports of expenses, etc. And on 20 April the defendant discharged the plaintiff, saying it would pay him up to 1 May, which it did.

But the plaintiff brings this action to recover $75 per month from 1 May to 1 October, when he says he got other employment.

These conditions in the contract were important to the defendant, that it should know where the plaintiff was, that it might communicate with him, and that it might know what his expenses had been.

This action is not brought to recover for work and labor done, but for work and labor *not* done—for a breach of the contract on the part of the defendant in wrongfully discharging the plaintiff. In order to enable the plaintiff to recover, he must show two things: (1) That he has complied with the contract; (2) that the defendant has violated the contract by wrongfully discharging him.

On the argument it was admitted that the plaintiff had not kept the contract; that he had not written the postals, nor made the weekly report, as he contracted to do; and the defendant would have had the right to discharge the plaintiff, if the defendant had not condoned or waived the breach. But the plaintiff contends that the defendant has done this, and therefore he is entitled to recover for services *not performed,* upon a contract that he had broken. The (443) grounds alleged by plaintiff for this contention are, that the defendant paid the plaintiff's salary for March, and paid his expenses up to that time. It seems to us that the plaintiff is making mighty poor return for the favor the defendant did in paying him for more time than he had served. But the defendant did right in paying the plaintiff for the time he served, though it might have discharged him sooner. And we think that continuing the plaintiff in the service of the defendant was a waiver of the breach to that extent, but no further. The breach of the contract by the defendant was a *continuing* breach—

was persisted in and *continued by the plaintiff after the payment* on the first of March; and how such payments, made the first of March, can be a waiver of the breach made *after that time* is more than we are able to see.

The case, then, is this: The plaintiff has brought an action to enforce a contract that he has broken, against the defendant, when it has not broken the contract. We can not see how the plaintiff is entitled to recover, on his own showing. There is

Error.

DOUGLAS, J. I concur in the opinion of the *Chief Justice*. I do not see any waiver on the part of the defendant, either express or implied, of the terms of the contract requiring daily and weekly reports by the plaintiff. On 13 February the defendant wrote to the plaintiff, insisting upon such reports. On 20 February the plaintiff answered, objecting to making such reports, stating his reasons and expressing the hope that his course would be satisfactory to the defendant. Upon 16 March the defendant again wrote to the plaintiff, insisting upon daily reports. Upon the continued refusal or neglect of the plaintiff to make such reports, the defendant, on 20 April, discharged him, offer-
(444) ing to pay him up to 1 May. I do not think this was an unreasonable delay on the part of the defendant. It had admittedly the right to discharge the plaintiff immediately upon receipt of his letter of refusal, but it took the fairer course of giving him an opportunity to mend his ways if he saw fit to do so. It does not appear that the plaintiff was damaged in any way by the failure to discharge him at an earlier date, either by incurring any additional personal expense or losing the opportunity of obtaining other employment. The mere fact that the defendant did not discharge him immediately upon the receipt of his monthly report of 1 April, to my mind, means nothing. The defendant was, doubtless, glad to get the report, and accepted it probably upon the theory that one-thirtieth of a loaf was better than no loaf. The plaintiff was receiving its money as salary and spending its money as expenses, apparently without corresponding benefit, and it is natural that it should wish to be kept advised as to where he was and what he was doing.

MONTGOMERY, J., dissenting: The jury found, under instructions not excepted to by defendant appellant, that the plaintiff was employed by defendant to sell machinery for the term of a year, beginning on 1 February, 1901, at a salary of $75 per month. On 20 April the defendant discharged the plaintiff, but offered to pay him his salary for that month. This action was brought to recover the balance of the

salary up to 15 October, when the plaintiff received other employment. It is not denied that on 13 February the defendant sent out to the plaintiff, by mail, a lot of self-addressed postal cards, with instructions to the plaintiff to write daily reports as to where he might be, and also to send in a weekly expense account in the books which had been sent to the plaintiff for that purpose. They were reasonable instructions and requirements, and the plaintiff admits that if another agreement, and a different one, had not been made, or, at least, if (445) those instructions had not been subsequently waived by the defendant, his discharge would have been lawful. But he contends that such waiver was made, impliedly at least, by a subsequent and different arrangement made between the defendant and himself. He introduced a letter of date 20 February, written by himself in answer to that of defendant of date the 13th of the same month, in which he said: "Yours of the 13th to hand and contents carefully noted. Referring to expense account, would say that I have always kept my expense account in a plain blank book, and at the end of each month transfer it to a sheet, take a copy in letter book and send it in. I have done this with all the concerns I have ever traveled for, and I find it more satisfactory for them and far more so for myself, as I have an exact copy of every item. Whereas, if I send it every week in the book, I will either have to keep two books or be without any record for myself. I think when I send in my report for this month you will agree with me. The same way about letter-writing. I like to keep a copy of everything of importance, but in future will try to keep you better posted as to my whereabouts. Rest assured I will always look after your interest. I will be glad if you will give me some information as to prices per ton on oil mills. While I have no orders for you thus far, I am satisfied we will have a good trade. I will be around Charlotte for several days. Hoping this will be satisfactory, I am," etc. And the plaintiff further testified that he made monthly statements according to the tenor of his letter, on the first days of March, April and May, and that the defendant received the same without objection or exception. On 15 March, however, the defendant wrote to the plaintiff as follows: "We have written you at different times in regard to hearing from you daily, and sent you self-addressed postal cards, and respectfully insist on the same having your attention. We hear very seldom from (446) you, and know very little of what you are doing, all of which is very unsatisfactory." Up to the 15th of March, then, there was no change in the instructions which had been given to the plaintiff when he was first employed, to the effect that he would write daily as to where he might be, and the plaintiff was on notice that he would be required to comply with that request. Afterwards, the plaintiff failed

to make such daily reports as were required, and on the first of April a monthly one was made, according to the plaintiff's letter of 22 February, which the defendant received, and to which it made no objection. That the plaintiff was not dismissed immediately upon the making of the report of 1 April, but was retained in the defendant's service afterwards, was not a waiver of the right to discharge, but his retention under such circumstances was evidence amounting to a presumption of waiver, and unless it was rebutted by facts sufficient to show a reasonable cause for the delay in dismissing the plaintiff at an earlier day, it was the duty of the court to instruct the jury that there was a waiver. Wood on Master and Servant, secs. 121 and 123; Rogers on Domestic Relations, 760.

The defendant offered no evidence on that point, and his Honor gave a proper instruction when he told the jury that if the plaintiff failed to comply with the defendant's instructions to him as to the daily reports and monthly report, or either of them, the defendant had the right to discharge him, and they should answer the third issue (Did the defendant wrongfully discharge the plaintiff?), "No," unless they found that the conduct of the defendant was such as to make the plaintiff reasonably believe that the instructions were not relied on; in which case there was a waiver by the defendant of compliance with the instructions.

(447) The other exceptions are embraced in the one to that part of the charge I have thus discussed, and I see no error in the instructions upon which they were made.

Cited: *Ivey v. Cotton Mills,* 143 N. C., 198.

SPARKMAN v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 19 June, 1902.)

Telegraphs—Mental Anguish—Damages.

Where a person, in response to a telegram announcing the death of his brother, in a distant State, sends a telegram inquiring as to place of burial, the failure to deliver the telegram does not make the telegraph company liable in compensatory damages, the message being intended only to relieve mental anxiety then existing in the mind of the sender.

DOUGLAS, J., dissenting.

ACTION by S. B. Sparkman against the Western Union Telegraph Company, heard by *Neal, J.,* and a jury, at January Term, 1901, of DURHAM. From a judgment for the plaintiff, the defendant appealed.

Guthrie & Guthrie for plaintiff.
F. H. Busbee for defendant.

MONTGOMERY, J. The plaintiff, who resided in Durham, N. C., received on 11 March, 1901, at 2:10 P. M., a telegram, by the defendant's system, in these words: "Little Rock, Ark., 11 March, 1901. S. B. Sparkman, 216 Glenn Street, Durham, N. C.:—Your brother, E. Sparkman, died on the 10th. S. Johnson." About two hours later of the same day the plaintiff delivered to the defendant, at its office in Durham, a message in the following words: "Durham, N. C., 11 March, 1901. S. Johnson, Little Rock, Ark. Shall we look for him, or what are you going to do? S. B. Sparkman." (448)

There was a failure on the part of the defendant to deliver the telegram to Johnson, and this action was brought by the plaintiff to recover damages for alleged mental anguish. The following is a copy of that part of the complaint which sets out the nature of the claim:

"That if the defendant had discharged its aforesaid duty and obligation to plaintiff, and complied with its aforesaid contract, as it should have done, the aforesaid message from plaintiff could and would have been transmitted and delivered to said S. Johnson at Little Rock, Ark., within a few hours after its acceptance for delivery at Durham, N. C., and the plaintiff would, in that event, have been relieved of much anxiety as to whether or not his brother's remains would be buried in Little Rock, Ark., or sent to Durham, N. C., for burial, and whether or not it was necessary to make arrangements for his brother's burial in Durham, N. C., and plaintiff could have also determined (as he contemplated doing) whether or not to take a trip to Little Rock, Ark., to attend his brother's funeral; but, owing to the aforesaid negligence and want of due care, and failure on the part of the defendant to comply with its aforesaid contract and to discharge its aforesaid duty, as hereinbefore alleged, the aforesaid message from plaintiff to said S. Johnson was not transmitted and delivered to said Johnson at all, and no response by telegraph was ever received by plaintiff from said S. Johnson to plaintiff's inquiry contained in said telegram, and the plaintiff was thus left without the information he sought to obtain, and without the consolation and comfort such information would have been to him, if he could have obtained it, in that sad and distressful hour; that the information sought for concerning the funeral arrangements and disposition of the remains of his deceased brother, if the same could have been obtained as aforesaid, would have been of great com- (449) fort to the plaintiff, and would have relieved him of much anxiety on that account; that by reason of the aforesaid negligence, breach of duty and violation of contract on the part of the defendant, the plain-

tiff has suffered great mental pain, anguish and anxiety, his feelings have been greatly outraged, and plaintiff has been greatly wronged and damaged, to wit, in the sum of $1,999.99."

In all the decisions of this Court in which the doctrine of mental anguish has been involved, from *Young v. Tel. Co.*, 107 N. C., 370, 22 Am. St., 883, 9 L. R. A., 669, down to and including *Darlington v. Tel. Co.*, 127 N. C., 448, it has been held that in addition to nominal damages for the breach on the part of a telegraph company to transmit a message in good time, the damages ought not to be increased by any circumstances which could not readily have been anticipated as probable from the language of the written message—the rule taken from Shear. and Red. Neg., sec. 605. Now, if that rule is to be applied here—to the language of the telegram to Johnson—there is nothing in that language which could lead the defendant to believe that mental anguish would result to the plaintiff by reason of a failure to transmit the same. Johnson had answered on the 11th, late in the day, by a telegram received through the defendant to the plaintiff, that plaintiff's brother had died on the day before in Little Rock, Arkansas, and the plaintiff's dispatch to Johnson was a simple inquiry as to the place of burial of his brother—whether in Durham or Little Rock. Surely, the distance between Durham and Little Rock, in connection with the brother's death the day before the telegram was delivered to the defendant, would preclude any idea of a desire or purpose on the part of the plaintiff to go to Little Rock to attend the funeral services. There was no
(450) intimation in the telegram that embalmment would be expected, that he might attend the burial.

The mental anguish which the plaintiff alleges that he suffered was the remaining in doubt and uncertainty as to where the burial would take place, because of defendant's failure to deliver his message to Johnson, and to hear from Johnson. He does not claim that he suffered mental anguish from the failure to deliver the telegram to Johnson, simply. His uncertainty arose from not hearing from Johnson. The rule in such a case is well settled in *Akard v. Tel. Co.*, 44 S. W., 538, and we adopt it. It is: "A telegraph company is not to be held liable in compensatory damages for its failure to forward or deliver a message intended to relieve mental anxiety then existing in the mind of the sender."

Rowell v. Tel. Co., 75 Texas, 26, seems to be a leading case. The head note is: "Anxiety caused by the failure of a telegraph company to deliver a message conveying information of the improved condition of a sick relative furnishes no ground for recovery against the telegraph company on account of its negligence. Such mental anxiety can not of itself constitute an element of damage." The Court said: "The

damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases, but the cases are rare in which such emotion can be held an element of damages resulting from the breach. For injury to feelings in such cases the courts can fix no redress. Any other rule would result in intolerable litigation."

We think, in this case, the court should have given the defendant's prayers for instruction: "That if you believe the evidence in this case, you can only give to the plaintiff as damages 57 cents, amount charged by defendant for message, and your answer to the issue will be 57 cents. The jury can not in this case assess any damages for (451) mental anguish."

Error.

DOUGLAS, J., dissents.

Cited: Dayvis v. Tel. Co., 139 N. C., 86, 91, 92, 94; *Lawrence v. Tel. Co.,* 171 N. C., 246.

JONES v. COMMISSIONERS OF FRANKLIN COUNTY.

(Filed 19 June, 1902.)

1. **Counties—Municipal Corporations—Suability—County Commissioners.**
   A county can not be sued unless such authority is expressly given by statute, and such authority, if given, would extend only to actions ordinarily incidental to its operations.

2. **Jurisdiction—Highways—Laws 1901, Ch. 581.**
   Under Laws 1899, ch. 581, providing for the assessment of damages for taking land for road purposes, a petition to the county commissioners is the proper procedure, and not an action in the Superior Court.

DOUGLAS and COOK, JJ., dissenting.

ACTION by J. F. Jones against the Board of Commissioners of Franklin County, heard by *Justice, J.,* at January Term, 1902, of FRANKLIN. From a judgment for the defendants, the plaintiff appealed.

F. S. Spruill for plaintiff.
W. H. Yarborough, Jr., for defendants.

MONTGOMERY, J. The plaintiff, for his first cause of action, complains that the defendants, the Board of Commissioners of Franklin

County, through the superintendent of public roads for the county, under the provisions of chapter 581, Laws 1899, against the
(452) protest of the plaintiff and without condemnation proceedings, negligently, wrongfully and tortiously cut and blasted away a strip of his land 12 or 15 feet in width, by which the plaintiff's pathway around the end of his house was destroyed, to his great injury, and his warehouse endangered; and also that the defendants, through their agent, carried away and removed large quantities of the stone and granite thus blasted, to his further injury. That cause of action is clearly laid in tort, and his Honor properly sustained the defendants' demurrer thereto.

This Court has repeatedly held that counties are instrumentalities of government, and are given corporate powers to execute their purposes, and are not liable for damages in the absence of statutory provisions giving a right of action against them. *White v. Commissioners,* 90 N. C., 437; *Manuel v. Commissioners,* 98 N. C., 9; *Pritchard v. Commissioners,* 126 N. C., 908, 78 Am. St., 679; *Moody v. State's Prison,* 128 N. C., 12. In the last-mentioned case it was further decided that even if such authority was given, it could cover only actions ordinarily incidental to its operations, and would not extend to causes of action in tort. The same doctrine had been announced in *Pritchard v. Commissioners, supra,* and in other cases also.

In *Gibbons v. U. S.,* 75 U. S., 269, the Court said: "No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers or agents"; and in Story on Agency, sec. 319, it is said: "The Government does not undertake to guarantee to any person the fidelity of any of its officers or agents whom it employs, since that would involve it in all its operations in endless embarrassment and difficulties and losses, which would be subversive of the public interests."

For this second cause of action, the plaintiff complains that the defendants, through the same agent, without the plaintiff's con-
(453) sent and without condemnation proceedings, took, for the use of the county and for the convenience of the traveling public, a strip of land 10 or 12 feet in width off one end of his land of great value, and, in addition, cut and blasted away and removed a large quantity of building granite off the property of considerable value. The defendants demurred also to that cause of action, the first specification being that the court has no jurisdiction of the subject-matter of the action. As to that part of the plaintiff's demand for the value of the strip of land alleged to have been taken by the defendants for the public use, the defendants were compelled to order a jury to assess the value of the same under section 12, chapter 581, Laws 1899. Upon

their declining to do this upon demand made upon them for that purpose, an appeal lay to the Superior Court on the part of the plaintiff.

In reference to the plaintiff's demand in his second cause of action for the value of the rock or granite blasted and carried away by the defendants, the defendants were not required to order a jury to assess the value. They could have made the assessment and allowance themselves. Upon their refusing to make any allowance for the value of the granite taken, an appeal lay from their ruling to the Superior Court, the appeal "to be governed by the law regulating appeals from the courts of justices of the peace." The county commissioners, by the act of 1899, were given original jurisdiction of the matter embraced in the plaintiff's complaint, and the Superior Courts could exercise only appellate jurisdiction.

It has been often held by this Court that in cases involving the right of eminent domain the common-law remedy is superseded by the statutory remedy, and that aggrieved parties must therefore seek redress under the statutory remedy. *McIntyre v. R. R.*, 67 N. C., 278; *Gilliam v. Canady*, 33 N. C., 106; *Gillett v. Jones*, 18 N. C., 339; *Dargan v. R. R.*, 131 N. C., 623. In *McIntyre v. R. R.*, (454) the action was in trespass for the recovery of damages for an injury sustained by the building of defendant's railroad on plaintiff's land. The Court affirmed the judgment below, that the plaintiff could not bring the action as at common law, but should have proceeded under the provisions of the charter of the company, which contained a method and manner of the assessment of damages. The Court said, in part: "But the decisions (*Gillett v. Jones*, 18 N. C., 339; *Gilliam v. Canady*, 33 N. C., 106) do not go so much on the words of the act as upon its evident policy. If the owner of land overflowed by a milldam could bring his action on the case for damages every day, no public mill could be established. In like manner, if the owner of land taken by a railroad for its track could bring his action for trespass every day, no railroad could be built. In such case, the law considers the property, though taken for an individual, or for a private corporation, for the public use. *R. R. v. Davis*, 19 N. C., 451. It is not forbidden by the Constitution if compensation be made, and compensation is provided for. The mode of obtaining it may not be so easy or satisfactory to the owner, but it is not illusory; a substantial and just compensation may be obtained. There can be no doubt but that the Legislature had the right to take away the common-law remedy; the only question possible is as to their intention."

We can see no difference between the points discussed and involved in those cases and the point involved in the present case, in so far as the

remedy of the plaintiff is concerned. The county of Franklin appropriated for the public use the property of the plaintiff, under chapter 581, Laws 1899, and the manner of compensation was fixed in precise terms by the act. The common-law remedy was superseded by that of the statute.

It appears in this case that the plaintiff made his demand for compensation before the proper tribunal, and upon his application (455) having been refused, he should have appealed under the provisions of the act. If it had been that the plaintiff had not, at the time prescribed in the act, presented his claim because of the impossibility of his having received notice of the taking of the property before the time when demand had to be made under the statute, we would have no hesitancy, while upholding the main features of the statute, in deciding that a reasonable time, within which to make the application for compensation after the property was taken, should have been allowed, because under the terms of the act it is apparent that there might be a taking of property by the county authorities for public purposes, under the act, at a time which would not admit of an interval of thirty days intervening between the taking and the next regular meeting of the board. *Darby v. Wilmington,* 76 N. C., 133; *Broadfoot v. Fayetteville,* 128 N. C., 529. The language of the statute is as follows:

"If the owner of any land, or the agent or agents of such owner having in charge land from which timber, stone, gravel, sand or clay was taken as aforesaid, shall present an account of the same, through the county road superintendent, at any regular meeting of the county commissioners, within thirty days after the taking and carrying away of such timber, stone, etc., it shall be the duty of the said commissioners to pay for the same a fair price."

No error.

COOK, J., dissenting: I think there was error in sustaining the demurrer as to the second cause of action. The sacred regard which the law has for the rights of private property is such that it will not permit it to be taken for public use without just compensation, and an adequate remedy for that purpose must be provided. The rem- (456) edy provided in this act (chapter 581, Laws 1899) is to be found in sections 11 and 13; "If the owner of any land . . . from which timber, stone, gravel, sand or clay were taken . . . . shall present an account of the same through the county road superintendent at any regular meeting of the county commissioners, within thirty days after the taking and carrying away of such, . . . it shall be the duty of the said commissioners to pay for the same a fair

price; and before deciding upon this, they may cause to be appointed an impartial jury, . . . which jury shall report in writing to the board of commissioners their decision for revision or confirmation: *Provided,* said landowner . . . shall have the right of appeal," . . . (section 13) to the Superior Court if the landowner shall be dissatisfied with the *finding* of the jury and decision of the county commissioners, which shall be governed "by the law regulating appeals from the courts of justices of the peace, and the same shall be heard *de novo.*" The landowner is not only entitled to just compensation for the property taken from him, but he is also entitled to an adequate remedy by which he can establish and recover the value of his property. By this act he is only allowed thirty days *after* the "taking and carrying away" to present his account, which must be done "at a regular meeting of the county commissioners," and "through the county road superintendent." So his opportunities for asserting his rights may be dependent upon the caprice or favoritism of the superintendent to perform the act *within* the time limited, or his good fortune to learn of the completion of the taking and carrying away *in time* to make and present his account, or upon both. Should he be so situated that he could not find the superintendent, or should the superintendent refuse to present the account, or should the time be so short that he could not prepare and present it, or should he be prevented from doing so by sickness or other unavoidable cause, then his property (457) would become confiscated—if this be the only remedy. The "taking" by the superintendent raises an adverse relationship between the landowner and the superintendent, and the landowner might object to acting through an agent not appointed or selected by him, and whose interest in the subject-matter might be hostile. I think the remedy is inadequate for general practice, and that the Superior Court had jurisdiction to administer the rights of the parties, and that the demurrer should have been overruled. I do not think that this act was intended expressly, or by necessary implication, to repeal the common-law remedy. And while it does not *require* this remedy to be pursued, yet should the convenience of the claimant justify him in resorting to it, he is at liberty to do so. Its machinery is ample, and a determination can be speedily obtained. The act gives the landowner the right to have his claim adjusted under its remedy, if he should desire to select that method. I can not believe that the Legislature intended by this act to repeal the remedy already in force, and subject a private right to the hazard of uncontrollable circumstances. Compensation is not required to be paid in advance, nor is there any great haste required in making the appropriation by the county officer. Then why should the unoffending, law-abiding citizen be required to "run the chances"

of getting his own, when no harm could happen to either party by resorting to the usual remedy? I therefore think that the remedy provided in the act is only an additional and not the sole one intended by the Legislature.

DOUGLAS, J., dissenting: I can not concur in the opinion of the Court, either in its theory or its result, because it seems to me that a substantial injury is being done to the plaintiff by a construction of a statute purely technical in its nature, and justified neither by public policy nor common right. I agree with the opinion in so far as it holds that a county is not responsible for a pure tort committed
(458) by one of its officers or employees; but we must remember that a tort can never confer a right upon the wrongdoer. If the county ratifies the act and keeps the property thus wrongfully taken, it becomes responsible to the owner for its value. If it repudiates the act, it must relinquish the property, of which the owner may at once take possession without let or hindrance. When, therefore, the board of commissioners took wrongful possession of the plaintiff's land, they became *personally* responsible to him for the injury, without acquiring any right thereto, either for themselves, the county or the public. This latter proposition, I understand, is not disputed by the Court. While it does not say so in so many words, I presume that the Court intended to hold that the board of county commissioners has *exclusive* original jurisdiction of all claims arising from the taking of private property for the use of the county. Where is such *exclusive* jurisdiction conferred upon the board? Not by the act of 1899, as stated by the Court, which nowhere says so. If the act does not say so, why should we say so, especially when the only result of such interpolation is to deprive the plaintiff of his lawful remedy for an admitted wrong? The act does not profess to make the remedy exclusive, and, in fact, provides that it shall apply only when the plaintiff sees fit to resort to such a tribunal.

In the case at bar the plaintiff did present to the county commissioners his claim for damages within thirty days, as provided by the act, but the board refused to entertain the claim because it was not presented through the superintendent of roads. This would seem to me to be purely directory, and could not affect the merits of the claim. But perhaps I am mistaken. Perhaps the road superintendent is a court, having *exclusive* original jurisdiction of all such claims, no matter how great they may be in amount. If so, and he should refuse to act, I presume the injured party would be compelled to bring an action
(459) for a mandamus, which would probably come to this Court on appeal. Suppose the board of commissioners should then refuse

to entertain the claim, another action for another mandamus would be necessary, and another long and expensive litigation through all the courts. Perhaps then the board might pass upon his claim, and allow nominal damages, which would force him to appeal. Thus, after perhaps four or five years of litigation, and necessary expenses greater than the value of his claim, the plaintiff would succeed in getting into the Superior Court, where his claim could be tried upon its merits. He is there now. Why put him out, and make him take this long and roundabout journey with the simple result of getting back to where he started?

It will be said that this is an extreme case; but it would be entirely possible under the opinion of the Court, which puts it in the power of the county authorities to wear out any unwelcome claimant, even if they did not succeed in putting him out on some technicality during the progress of the trial. In the present case, when the plaintiff goes back to the county commissioners or the road superintendent, whichever has exclusive original jurisdiction, he will be met with the objection that more than thirty days have elapsed since the injury.

Can we suppose that the Legislature intended any such hardship and injustice? Then, why not give the act the reasonable construction of saying that the remedy therein provided is simply cumulative? We so hold in criminal actions; why not in civil actions? We are constantly told that while a man may not be guilty under the statute, he is guilty at common law. Why should we not also say that while an injured party has not an adequate remedy under the statute, he retains his right to appeal to the courts of general jurisdiction to redress his wrong?

In the further discussion of this case I shall cite but few authorities, as my time is short; but I shall revert to this subject, and incidentally to this opinion, when the principle comes again (460) before us.

My objection to this decision is that its ultimate tendency is to undermine the foundations of private right. It is well settled that private property can not be taken, even for a public purpose, without compensation. The act under consideration provides that when an account is presented for material taken, "it shall be the duty of said commissioners to pay for the same a fair price." This the defendants have refused to do. Even if the statutory remedy were intended to be exclusive, it would be totally inadequate, and therefore unconstitutional and void. The only provision for compensation is when the owner of any material so taken, or his agent, "shall present an account of the same, through the *county road superintendent,* at any *regular* meeting of the county commissioners within *thirty* days after the *taking* and carrying away of such timber," etc. There is no provision for notifying

the owner of the taking of such material. It may be taken during his absence, or from back part of his plantation, and he may not know it until the thirty days have elapsed. Moreover, he is required to present his claim at a *regular* meeting of the commissioners. Suppose that only one regular meeting is held during the thirty days, as is usually the case, and the material is taken the day before such meeting; under the statute the owner would have less than twenty-four hours in which to find out that his property had been taken, to find the superintendent, to get his claim into shape, and to present it to the commissioners. If he failed to do this within the time limited, he would lose all remedy. Again, suppose the commissioners should fail to hold a *regular* meeting within the thirty days, the owner would have no opportunity whatever of presenting his claim under the statute. Surely, this can not be the law, and yet it will become the law if the statutory remedy (461) is held to be exclusive.

Let us briefly examine the Constitution of this State and see what are some of the rights of the individual. The Declaration of Rights declares (Const., Art. I, sec. 1): "That we hold it to be self-evident that all men are created equal; they are endowed by their Creator with certain *inalienable* rights; that among these are life, liberty, *the enjoyment of the fruits of their own labor,* and the pursuit of happiness." Section 17: "No person ought to be . . . in *any manner* deprived of his life, liberty or property but by the law of the land." Section 35: *"All courts shall be open;* and every person for an injury done him in his *lands,* goods, person or reputation shall have remedy by *due course of law,* and right and justice administered without sale, denial or delay."

In the case before us the plaintiff has admittedly suffered an injury to his land, and the Superior Courts are open and have general jurisdiction of all such subjects. If we take away such jurisdiction without leaving the plaintiff an adequate remedy, justice is denied to him, and he is deprived of his property contrary to the law of the land.

This Court has said, in *Dargan v. R. R.,* 113 N. C., 596, 598: "The right of the State to take private property rests upon the ground that there is public necessity for such appropriation, and can be exercised only where the law provides the means of giving *adequate* compensation to the owner."

In *R. R. v. Commissioners,* 127 Mass., 50, the Court says: "It has long been settled by the decisions of this Court that a statute which undertakes to appropriate private property for a public highway of any kind, without adequate provision for the payment of compensation, is unconstitutional and void, and does not justify an entry on the land of the owner without his consent."

In *Brickett v. Aqueduct Co.,* 142 Mass., 394, 396, the language of the Court was that "a statute which attempts to authorize the appropriation of private property for public uses, without making (462) adequate provision or compensation, is unconstitutional and void."

Both these cases are cited with approval by the Supreme Court of the United States in *Sweet v. Rechel,* 159 U. S., 380, where the Court says, on page 399: "When, however, the Legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner." In *Gamble v. McCrady,* 75 N. C., 509, it was held, quoting the syllabus, that "Every one is entitled to notice in any judicial or *quasi*-judicial proceeding, by which his interest may be affected; hence, an order by county commissioners appointing appraisers to assess the value of the benefits and damages which would accrue to the owners of land on account of a certain canal sought to be cut through his land, upon the petition of other parties, filed under the provisions of chapter 39, Battle's Revisal, *is void,* unless said landowner be made a party to the petition. Sections 9 and 12, ch. 39, Battle's Revisal, are unconstitutional."

In *Sawyer v. Hamilton,* 5 N. C., 253, concerning the laying out of a turnpike, the full opinion of this Court is as follows: "Let the report of the commissioners be set aside, on the ground that Enoch Sawyer, through whose lands the road is laid off, had not notice."

In *R. R. v. R. R.,* 29 Fed., 728, 731, *Justice Brewer,* then a Circuit Judge, referring to condemnation of a right of way, says: "Though a special, it is a judicial proceeding, and a vital element of judicial proceedings is notice to a party against whom a right is asserted before a final determination of that right."

In *Nield's Road,* 1 Pa. St., 353, the Court says: "The law abhors all *ex parte* proceedings without notice. Notice in this (463) case to the owners of property was absolutely necessary. To take a man's property and assess his damages without notice of it is repugnant to every principle of justice, and such a proceeding is utterly void."

Mills on Eminent Domain, sec. 88, says: "*Where the statutory remedy is not complete, the common-law remedy remains.* For an entry on land, or the taking or destruction of property, of another, the common law gave the injured party the remedies of trespass, trespass on the case, or ejectment. These remedies gave the owner complete compen-

sation for the invasion of his rights of property. The statutory remedy which is provided must be complete in ascertaining the damages and securing their payment, or the common-law remedy may be pursued. The provision of a specific mode of ascertaining damages confers no right which did not exist before. The omission of a specific mode leaves the party his common-law right. If the statute only provides a partial remedy, there is a remedy for the remainder at common law. The payment of damages must be secured; and if, after condemnation, there is a refusal to pay, trespass or ejectment, with *mesne* profits, may be maintained." For each of these propositions the learned author cites authorities of the highest respectability. See, also, Randolph Em. Domain, secs. 227, 228, 229, 230, 231; Lewis Em. Dom., secs. 364, 365, 366, 456; Enc. Pl. and Prac., 481, 486, 528, 544, 545, 623, and especially pages 691, 694, 715, 716; Black's Const. Law, sec. 130; Cooley Const. Lim., 449, 664, 665, 692; Thompson on Corp., secs. 5590, 5621.

Among all the cases that I have examined, the one that perhaps more clearly represents my views is *Stuart v. Palmer,* 74 N. Y., 183, 30 Am. Rep., 289, where it is held, quoting the headnotes, that:

"A law imposing an assessment for a local improvement
(464) without notice to, and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, has the effect to deprive him of his property without 'due process of law,' and is *unconstitutional.*

"The Legislature may prescribe the kind of notice and the mode in which it may be given, but it can not dispense with all notice.

"It is not enough that the owner may, by chance, have notice, or that he may, as a matter of favor, have a hearing; *the law must require notice* and give a right to a hearing.

"So, also, it is immaterial that the assessment has been in fact fairly apportioned; the constitutional validity of the act is to be tested, not by what has been, but by *what may be done under it.*"

The ability and learning in this celebrated case prompt me to make a long quotation, which will take the place of anything I am capable of saying. The Court says, beginning on page 189:

"What one pays for taxes and assessments is taken for the public good, and can be justified upon no other theory. Private property can not be taken for private purposes, even under the legislative power of taxation. Taxation and assessment imply apportionment. Each person must share the burdens of taxation and assessment equally with all others in like situation. Property may also be taken by the right of eminent domain, where the public good requires. In such case what one parts with is just so much more than his share of contribution to

the public good, and hence for such property he must receive compensation in money or its equivalent.

"It must be conceded that property can not be taken by the right of eminent domain, without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard, as to the compensation to be awarded him. An act of the Legislature, arbitrarily taking property for the public good, (465) and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that 'due process of law' which both the Federal and the State Constitutions guarantee to every citizen. Can it be that when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard? The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold than it can render judgment against the person without a hearing. It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty and property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. This provision is the most important guarantee of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the Legislature can not do nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.

"It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by *Mr.* (466) *Justice Miller,* of the United States Supreme Court, to leave the meaning to be evolved 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an op-

portunity to be heard, and to defend, enforce and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. We can not conceive of due process of law without this. In his argument in the *Dartmouth College case* (4 Wheat., 519), Webster defined 'due process of law' as a proceeding 'which proceeds upon inquiry and renders judgment only after trial.' *Mr. Justice Edwards,* in *Westervelt v. Gregg* (12 N. Y., 209, 62 Am. Dec., 160), defines it as follows: 'Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' *Judge Cooley,* in his work on Constitutional Limitations, at page 355, after saying that 'due process of law' is not confined to ordinary judicial proceedings, but extends to all cases where property is sought to be taken or interfered with, says that 'due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.' "

In this long extract I have omitted, for the sake of time and space, the cases which were merely cited and not quoted. As therein shown, it makes no difference whether a man's land is taken under the form of condemnation or assessment, or, as in the case at bar, without the pretense of either. In any event it can be taken only by "due
(467) process of law," giving to the owner just compensation, with an adequate remedy for obtaining it.

An examination of this act (Laws 1899, ch. 581) discloses some singular features. It is by its terms operative in only seven counties and parts of three other counties. It further provides that it shall *not* apply to fifty counties therein named, but may be adopted by thirty-nine other counties, also named. It also contains the following most remarkable provisos: *"Provided,* that in any county or township *not coming under the provisions of this act,* but otherwise providing funds for road improvement, the commissioners of such county may, at any regular meeting, at their discretion, *adopt any of the sections* (except section 1, levying a tax) of this act that in their judgment may be specifically adapted to the needs of their county, and *incorporate the same in the road law of the said county."*

I can not remember ever having come across any such provision in any statute. I do not question the power of the Legislature to pass an act which may be ratified or rejected in its entirety by a vote of the people, and perhaps of the county commissioners; but I am not aware of any principle or precedent authorizing the Legislature to delegate its lawmaking power to a board of commissioners by empowering them to

amend an existing statute by "incorporating" therein, at their pleasure, any one or more of twenty-seven different sections of a distinct act, which, by its very terms, does not apply to their county. I am glad this question has not been directly raised.

Some changes in the opinion of the Court, made since the above was written, may make certain parts of this opinion seem inapplicable, but I have no time to change them, and can add but little to what I have already said. The opinion of the Court seems to be based principally upon *McIntyre v. R. R.*, 67 N. C., 278, and quotes therefrom as follows: "But the decisions do not go so much on the words of the act as upon its evident policy. If the owner of land overflowed (468) by a milldam could bring his action on the case for damages every day, no public mill could be established. In like manner, if the owner of land taken by a railroad for its track could bring his action for trespass every day, no railroad could be built." This quotation seems singularly inappropriate to the conclusion of the Court.

In the case at bar there is no ground whatsoever for supposing that actions will be brought "every day," when from its very nature this action would end the controversy. Therefore, the "evident policy" referred to in *McIntyre's case* has no application whatever to the one before us. If this case comes neither within the words of the act nor the *policy* of our decisions, why should this Court write into the statute provisions which are not there? The only effect of such interpolation, required neither by the spirit of the act nor the policy of the law, is to deprive the citizen of his property without compensation. If the laws are ever stretched, it should be for the fuller protection of personal liberty and private property. In the case at bar the plaintiff is not seeking to recover anything the county has taken, but simply to get compensation one time and in one final action. The question is not whether the county shall have what it needs, but whether it shall pay for what it takes. Hence, the dangers of interminable litigation, so strenuously relied upon by the Court, have no visible relevancy to the case at bar.

In *Johnston v. Commissioners,* 70 N. C., 550, 556, in an opinion written by the same learned *justice* who wrote *McIntyre's case,* the Court says: "The proceedings were irregular and void, because the sheriff did not proceed with the jury to view the lands and assess the damages on the day named in the notice to plaintiff, but on a subsequent day, of which the plaintiff had no notice. If this objection had not been waived by the plaintiff's appeal from the assessment of damages, it would have been good. The sheriff had no jurisdic- (469) tion to enter on the lands until the plaintiff was made a party to

the proceedings by service of notice. The neglect to proceed on the day named, without notice of the postponement to the plaintiff, operated as a discontinuance as to him, and put him out of court. He might *perhaps* have regarded all after-proceedings as trespasses, being under a warrant which was void as to him for want of notice, or he might have brought up the proceedings to the Superior Court by *recordari* and had them quashed, and then, at least, have brought his action for the trespass." This case shows that there are some cases at least in which an action for the trespass may be brought, even when the statute provides a special and summary proceeding. The same is held in the well-considered case of *White v. R. R.,* 113 N. C., 610, 621, 37 Am. St., 639, 22 L. R. A., 627.

Another objection to such a construction of the statute is that it would be in violation of the Fourteenth Amendment to the Constitution of the United States, inasmuch as it does not provide for any notice to the plaintiff, nor any adequate remedy for his compensation. *R. R. v. Chicago,* 166 U. S., 226. In *Simon v. Craft,* 182 U. S., 427, 436, the Court says: "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied, we are governed by the substance of things, and not by mere form."

The last proposition of the opinion is startling to me. It is, in substance, that if it were impossible under the circumstances of a particular case for the landowner to receive notice of the appropriation of his property in time to present his demand, this Court would extend the time. It cites *Darby v. Wilmington,* 76 N. C., 138, and *Broadfoot v. Fayetteville,* 128 N. C., 529; but neither of these cases is any authority for the position. I am well aware of the principle that
(470) part of an act may be constitutional and a part unconstitutional if they are capable of separation, but in this case no such principle arises. The opinion of the Court does not declare any part of the act unconstitutional. This it clearly has the power to do, but to declare an act constitutional, and then to claim the right to suspend its operation if, in the judgment of the Court, it should at any time work a hardship, is entirely a different matter.

Article I, section 9, of the Constitution says: "All power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

I am also aware of the line of decisions represented by *Culbreth v. Downing,* 121 N. C., 205, 61 Am. St., 661, to the effect that statutes of limitation can not be shortened so as to bar *existing* rights of action without allowing reasonable time thereafter for the bringing of

the action. The statute under consideration has no retroactive operation whatever, but operates only in *future,* and solely upon rights of action which itself creates. A reasonable interpretation of the act to the effect that the imperfect remedy therein provided is merely cumulative, would avoid all these difficulties and meet the ends of justice without violating any established rule of construction.

I deeply regret feeling compelled so often to dissent from the opinion of the Court, but I must follow my convictions. We are not merely deciding isolated cases, but are establishing general principles, more far-reaching, perhaps, than we can foresee. I can not entirely ignore the dangers that are ahead of us, and which, in my opinion, can be met only by the equal enforcement of the law in its letter and spirit, and especially in the fullest protection of individual rights.

Corporate monopoly and socialism are twin children of despotism. Hating each other, they are of common parentage, and equally demand the sacrifice of private right, on the one hand on the (471) claim of public convenience, and on the other on the plea of public service. So far as private property may be actually necessary for public use, it may be taken; but no ground of public policy or of natural right will justify or excuse the refusal of just compensation, or, what is equivalent thereto, the refusal of an adequate remedy for obtaining such compensation. One of England's greatest statesmen has said: "The poorest man may in his cottage give defiance to all the forces of the Crown—it may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement." Of course, he meant that the King could not enter except by the law of the land. Why should our ancestors have abolished the kingly office if more than kingly powers remain vested in a county road superintendent?

Cited: Hitch v. Comrs., 132 N. C., 577; *Brinkley v. R. R.,* 135 N. C., 660; *Barker v. R. R.,* 137 N. C., 223; *Graded School v. McDowell,* 157 N. C., 319; *Luther v. Comrs.,* 164 N. C., 243; *Keenan v. Comrs.,* 167 N. C., 358; *Snider v. High Point,* 168 N. C., 610.

(472)

HOOKER v. TOWN OF GREENVILLE.

(Filed 17 June, 1902.)

1. **Constitutional Law—Public Schools—Discrimination Between Races—Taxation—Laws (Private) 1901, Ch. 121—The Constitution, Art. IX, Sec. 2—Laws 1901, Ch. 497.**

The General Assembly may not discriminate in favor, or to the prejudice, of either the white or colored races in the distribution of money for public schools.

2. **Injunction—Findings by Court—Province of Supreme Court.**

The Supreme Court may, on an appeal from an order granting or refusing an injunction, review the findings of fact as well as of law of the trial court.

3. **Statutes—Enactment—Taxation—Yeas and Nays—Journal—Constitution, Art. II, Sec. 14.**

An act to levy a tax by a town 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 Senate and House of Representatives journals.

ACTION by S. T. Hooker against the Town of Greenville, heard by *Winston, J.*, at Fall Term, 1901, of PITT.

From a judgment for the defendant, the plaintiff appealed.

Skinner & Whedbee for plaintiff.
Fleming & Moore and Simmons & Ward for defendant.

FURCHES, C. J. The defendant, the town of Greenville, believing it was authorized by chapter 121, Private Laws 1901, to raise, by the issue and sale of $75,000 par value of coupon bonds, money for the purposes stated in said act, proceeded to hold an election as provided in said chapter; and after said election, at which it was found and declared
(473) that a majority of the qualified voters of said town had voted for the issue of said bonds, the defendant proceeded to advertise and was offering said bonds for sale. And it alleges in its answer that it had agreed upon a sale of the same, and had levied a tax for the purpose of paying the accruing interest thereon; and the defendant being of the opinion that chapter 497, Public Laws 1901, had established a graded school within the corporate limits of the town of Greenville, had levied a tax of 10 cents on the 100 worth of property, and 30 cents on the taxable polls for the support of said graded school.

But the plaintiff, a citizen and taxpayer of the town of Greenville, believed that said act providing for the issue of bonds was void for

irregularity in its submission to the voters for their approval, and alleged that the act for the purpose of establishing the graded school was void for the reason that it discriminated in the distribution of the money collected by taxation between the white and colored races. And he further contends that they are both invalid for the reason that they were not passed by recording the yeas and nays on the second and third readings, as the Constitution requires such laws for raising money and taxing the people and their property should be, and are void on that account.

This action is brought to restrain and perpetually enjoin the defendant from issuing and selling said bonds, and from levying any tax for the payment thereof, or the interest thereon; and to enjoin the defendant from paying the $5,000 provided therein to the trustees of the graded school, and from levying and collecting any tax for the support and maintenance of said graded school. Upon a hearing before *Winston, J.*, the injunction was refused, and the plaintiff appealed.

There were many affidavits and orders offered on the hearing, as to the alleged irregularities in the manner of the registration and holding the election, and as to the manner in which the defendant (474) performed its duty, and as to the best place to get a water supply. But we will not enter upon a discussion of these, further than to say that where the defendant has the *power to act,* the courts will not interfere unless fraud or bad faith is alleged and shown, but will leave these matters to be corrected by the people at the next election, if there is cause of complaint.

But the next ground alleged is a matter of which we must take notice, to wit, that the act establishing the graded school discriminates in its provisions against one race and in favor of the other. If this is so, it is in violation of Article IX, section 2, of the Constitution, which provides as follows: "And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of or to the prejudice of either race." That is, one white child of the school age shall have the same amount of money *per capita* as a colored child, and no more; and the colored child shall have the same amount *per capita* as any white child, and no more; that both races shall have equal opportunities for an education, so far as the public money is concerned. If this bill discriminates against *either race* to the prejudice of the other race, it is unconstitutional. *Riggsbee v. Durham,* 94 N. C., 800; *Puitt v. Commissioners,* 94 N. C., 709. And the law will not allow that to be done by indirection that can not be done directly. The act establishing this graded school (chapter 479, Public Laws 1901) has fifty calls, that is, fifty corners and fifty lines, in its boundary, which seem to us to be remarkable, and we were not

able to understand what are the boundaries from the calls in the act. Therefore, for the purpose of explaining the calls in the act, we had a map of the town of Greenville, including the school district, furnished us for the purpose of enabling us to understand the calls in the act. *Blue v. Ritter,* 118 N. C., 580; *Foster v. Hackett,* 112 N. C., 546. The boundaries are as follows:

(475) "SECTION 1. That all the territory embraced within the following limits in the town of Greenville, Pitt County, to wit, beginning on Tar River at the river bridge, foot of Pitt Street, thence up said river to the first branch commonly called Skinner's Ravine, thence with said ravine or branch to the eastern boundary line of the W. and W. Railroad where it crosses said branch, thence with said eastern boundary of right of way of said railroad to Tar River, thence up Tar River to the present corporate limits of said town, thence with said corporate limits of said town to the river road, at a point where Fifth Street extended would cross said line, thence with said river road for Fifth Street to J. L. Suggs' northwest corner on said street, thence his line so as to include his lot to the western line of the right of way of the W. and W. Railroad, thence across said railroad to John Flanagan's southwestern corner on said right of way, thence his back line and N. H. Bagwell's, Miss Martha O'Hagan's, and Dr. C. O. H. Laughinghouse's back line to Pitt Street, thence across Pitt Street an air-line to S. T. Hooker's back line, thence his line to Miss McKenny Perkins' and J. A. Andrews' back lines to C. D. Rountree's corner on his back line, thence C. D. Rountree's line to Greene Street, thence down Greene Street to the Methodist parsonage's southern corner on said street, thence with said parsonage line to R. N. King's line, thence his line to Frank Tyson's, thence with B. F. Tyson's back line, including said Tyson's lot, to Dickeson Avenue, thence with northern side of Dickeson Avenue to R. A. Tyson's first corner on said street, thence his back line, including said lot, to Greene Street, thence across Greene Street to C. D. Rountree's northeast corner, thence his line so as to include his lot and R. A. Tyson's line to Pitt Street, thence up said Pitt Street to B. C. Shepperd's northeast corner, thence his line to a point one-half distance between Pitt and Clark streets, thence from this point a line parallel with Pitt Street an air-line to Zeno Moore's line, thence his line
(476) to Clark Street, thence with Clark Street to Dickeson Avenue, thence with Dickeson Avenue in a westerly direction to the first ditch crossing said street, thence up said ditch to the W. and W. Railroad trestle over said ditch, thence an air-line from said trestle to the northeast corner of old college lot, thence with old college line in a westerly direction and southerly direction, including said college lot, to old plank road, thence along and across in a southwesterly direction old plank

road to E. A. Moye's northeast corner, thence his line to a point 60 feet north of Broad Street, thence a line parallel with Broad Street and 60 feet north of said street to the western boundary of the right of way of the W. and W. Railroad, thence along said right of way to a point where Eleventh Street extended would cross said railroad, thence with the line of Eleventh Street to a point where an air-line drawn from the eastern side of Liberty Warehouse would cross said street, thence a line made by extension of eastern side of Liberty Warehouse to Ninth Street, thence Ninth Street 200 feet in an easterly direction, thence a line parallel with the eastern side of Liberty Warehouse to Twelfth Street, thence with Twelfth Street to the road leading from Greenville to Green's Mill-Run, thence with said road in a northerly direction to Alfred Forbes' northeast corner of the lot on which he now lives, thence his line to the livery-stable lot of G. M. Tucker and Rickey Moore, thence this eastern line to Fifth Street, thence with Fifth Street in an easterly direction to a point midway between Cotanch and Read streets, thence a line from this point parallel with Cotanch Street to Second Street, thence with Second Street to Evans Street, thence with Evans Street to a point midway between First and Second streets, thence a line midway between First and Second streets to eastern line of Washington Street, thence with Washington Street to a point midway between Second and Third streets, thence this line parallel with (477) Third Street 165 feet, thence an air-line parallel with Washington Street to Second Street, thence with Second Street to Washington Street, thence with Washington Street to a point midway between First and Second streets, thence an air-line parallel with Second Street to Pitt Street, thence with Pitt Street to the beginning."

The territory inside the red lines is the school district, and that part of the territory outside the red boundary is excluded from the benefit of this school.

There is another provision in the act that seems to be explanatory of the gerrymandering of the territory of the town for the purposes of this school. The eighth section provides "that if there shall be so few of *either race* in the district that the board of trustees shall deem it inadvisable to organize a school for that race, then they shall have power to arrange for the children of the race which shall be represented to receive their *pro rata* proportion of the fund so raised by the special tax herein provided for, in some other manner, or they may give such *pro rata* proportion to the public schools for that race adjoining the district herein described."

The Constitution says both races shall fare equally in matters of public schools, though they shall be taught in separate schools. If there "shall be so few of *either race,* the *pro rata* of that race may be given

to an adjoining school district." Without ascribing any reason the draftsman may have had for using the term "either race," we will suppose it was the *white race* he thought would be so small that it would not be worth while to organize a school for them, and if not, to give their money to some adjoining *white* district; would this be fair treatment to the *white* children in the district, and would it be treating them equally with the colored race? Would it not be a discrimination against them?

But if we are in error in supposing that it was the *white race*
(478) that this section had reference to, and it was the *colored race,* the rule would be the same. We do not think that the act could authorize giving the money of "either race" to some other district. The Constitution has given it to them, and the Legislature can not take it away from them and give it to someone else. Therefore, as we are only considering this appeal on a motion for injunction to the hearing, as there are many disputed facts which we will not undertake to decide, we will only say that it appears to us now that this act is unconstitutional. But, if it should be made to appear on the trial that this map is not correct, and the territory bounding the school district is not as therein represented; or that there are no negroes in said district to be discriminated against, or that there are no white children in said district to be discriminated against, and that neither race was so small but what a school should be *organized* and taught for the term free schools are to be kept open; then it may not be unconstitutional on account of its discriminations. This being an application for an injunction, this Court has the right to review the findings of fact by the court below, as well as the law. *Jones v. Boyd,* 80 N. C., 258.

But upon examining the supplemental statement of case on appeal, certified by the Secretary of State, we find that neither of these acts was passed as they were required to be passed by the Constitution, to authorize the defendant to create any debt by issuing bonds, or to raise money by taxation. They both seem to have been properly passed in the Senate —the yeas and nays having been called and recorded on the second and third readings, and on different days; but this was not done in the House, and of course, this being so, if it is so, and it appears to us that the yeas and nays were not recorded in the House on either the second or

third reading, and this appearing to us to be so, both acts are
(479) unconstitutional for the purposes for which they were intended. *Commissioners v. DeRosset,* 129 N. C., 275; *Black v. Commissioners,* 129 N. C., 121. There was error in refusing the injunction.

Error.

Cited: Debnam v. Chitty, 131 N. C., 678; *Lowery v. Trustees,* 140 N. C., 47; *Smith v. Trustees,* 141 N. C., 159.

Distinguished: Bonitz v. School Trustees, 154 N. C., 380.

BANK v. CARR.

(Filed 13 June, 1902.)

1. **Negotiable Instruments—Payee—Indorsers—Makers.**

The owner of a promissory note, indorsed by the payee for the accommodation of the maker, may sue any one of the indorsers without joining the maker or any other indorser.

2. **Negotiable Instruments—Bills and Notes.**

A promissory note made in another State need not be protested before the owner may sue an indorser, there being no evidence that this is required in the State where the note was executed.

3. **Depositions—Evidence.**

It is not error to take deposition in place of business of one of the parties if such place is named in the notice and there is no suggestion that the other party suffered any prejudice thereby.

4. **Depositions—Leading Questions—Evidence.**

It is discretionary with the trial judge whether or not answers to leading questions shall be stricken out of deposition.

ACTION by State Bank of Chicago against J. S. Carr, heard by *Neal, J.*, and a jury, at January Term, 1902, of DURHAM. From a judgment for the plaintiff, the defendant appealed.

Manning & Foushee for plaintiff.
Guthrie & Guthrie for defendant.

CLARK, J. It was not error, to refuse to submit the issue ten- (480) dered, whether the defendant was accommodation indorser and surety. That inquiry should have no bearing in this action, for the plaintiff could sue any indorser without joining the maker or other indorser. *Bank v. Carr,* 121 N. C., 113; *Moore v. Carr,* 123 N. C., 426; *Bank v. Lumber Co.,* 123 N. C., 26; and as there is only one defendant, the principle in *Parish v. Graham,* 129 N. C., 230, does not apply, for that was an adjustment of the rights of defendants as between themseves, as provided by The Code, sec. 424.

Exceptions 2 and 3 are to the sufficiency of the protest. This action is upon a promissory note in which the defendant was payee and indorser. The defendant admits that if this had been a North Carolina note, protest would not have been necessary, but contends that the note, bearing date Richmond, Va., and payable at no particular place, it was a Virginia contract, and notice of protest was necessary. But there was no allegation nor evidence as to the Virginia law, and that

being lacking, the common law is presumed to prevail (*Moody v. Johnson,* 112 N. C., 798), under which it was not necessary to protest this note, and the issue on this point was immaterial and irrelevant.

Exceptions 4 and 5 are that the evidence was not sufficient to show that the plaintiff was a corporation. There was in evidence a properly certified copy of an amended charter, 1900, to plaintiff as a corporation to do a banking business, signed by the Auditor of Illinois, said copy being certified by the recorder of deeds of Chicago as a true copy from the records in his office, and further the deposition of the cashier that the bank had been duly organized and acting under said charter, and had been for ten years previous doing business under the previous charter of 1891; that from its first organization he had been connected with it; that it had regularly paid taxes as a bank, had never been dis-
(481) solved, and was still doing business as a bank. This witness also appended to his deposition a copy, as he testified, of the minutes of the meeting at which the plaintiff bank organized under said charter, of which meeting said witness was secretary, and said minutes contained a copy, under seal, of the original charter of 1891. This evidence was uncontradicted, and was sufficient to justify the court in charging that if the jury believed the evidence, to find the first issue, "Was the plaintiff a corporation duly organized and existing and acting under the laws of Illinois?" in the affirmative. There was certainly *prima facie* evidence at least of the corporate existence of the plaintiff.

Exception 6 is because the depositions were taken at the banking-house of the plaintiff, in which the witnesses were employees, but that was the place named in the notice, and it is not suggested that the defendant suffered any prejudice thereby. There was no error in refusing the motion to quash on that ground.

The other exceptions are for refusal of the court to strike out answers to certain questions in the deposition, because they were leading. This, like the permission to put leading questions to a witness before the jury, is a matter of discretion in the trial judge (*Ducker v. Whitson,* 112 N. C., 50), and we do not see that the defendant has in anywise been injured by the form of these questions.

No error.

Cited: Woods v. Tel. Co., 148 N. C., 7; *S. v. Cobb,* 164 N. C., 422; *Steel Co. v. Ford,* 173 N. C., 195.

(482)

HALLYBURTON v. SLAGLE.

(Filed 13 June, 1902.)

Deeds—Estoppel—Fraud—Bankruptcy.

Where a person, to defraud his creditors, conveys land, afterwards becomes a voluntary bankrupt, and the trustee in bankruptcy sells the land, and the bankrupt, through another, becomes the purchaser, whatever title he gets by the deed of the trustee accrues to the benefit of the original grantee.

ACTION by W. E. Hallyburton and wife against J. L. L. Slagle, heard by *Justice, J.*, and a jury, at March Term, 1902, of BUNCOMBE. From a judgment for the plaintiffs, the defendant appealed.

Zebulon Weaver and Charles A. Moore for plaintiffs.
Merrimon & Merrimon for defendant.

FURCHES, C. J. This is an action of ejectment, and two lots or parcels of land are embraced in the complaint, called the first and second lots. The wife of the defendant being admitted to be the owner of lot number two, the defendant only claimed a life estate in that lot as tenant by the curtesy. But the wife having made a will devising it to the plaintiff, this defeated the husband's right to curtesy. *Tiddy v. Graves,* 126 N. C., 620; *Walker v. Long,* 109 N. C., 510. And his Honor so charged and the jury so found; and we do not understand that there is any contention as to the correctness of this charge, or the plaintiff's judgment to this lot (number two), but the contest is over lot number one.

The defendant is admitted to have been the fee-simple owner of this lot on 18 April, 1868, on which day he made a deed in fee simple to N. W. Woodfin for the expressed consideration of one dollar, in trust for Winnie Slagle, wife of the defendant, for her life, and at her death to her heirs. A month after making the deed to Wood- (483) fin, the defendant went into voluntary bankruptcy, and a year later received his discharge from the bankrupt court. One Reynolds was elected his assignee, and took charge of the defendant's estate and administered it under the bankrupt law as it existed at that time; and although the defendant did not schedule the land conveyed a month before to Woodfin, the assignee advertised and sold the lot called number one, and a man by the name of Long became the purchaser at said sale at the price of $80, which he paid. He afterwards assigned his bid to the defendant, and the assignee Reynolds made him a deed therefor. This deed was never registered, but the jury found that it had been made and delivered to the defendant, and had been lost or stolen. There was evi-

dence tending to show that the defendant had given information to the assignee of the condition of the conveyance to Woodfin, and that he procured Long to buy it for him, and the defendant was to repay Long the purchase money, and take the deed, which he did.

The deed from the defendant to Woodfin was not probated and registered until 1894, and there was evidence tending to show that it was found among Woodfin's papers (he being dead), not being before it was registered. The wife of the defendant died in 1896, leaving a last will and testament, by which she devised both the lots involved in this action to the *feme* plaintiff, Maggie Hallyburton. The said Maggie and her brother, John Slagle, were the only children and heirs at law of the said "Winnie Slagle," wife of the defendant.

The plaintiff claims the whole of lot number one under the will of her mother, and, secondly, under the deed of her father, the defend-
(484) ant, dated 18 April, 1868, to Woodfin, trustee. It is clear that the plaintiff acquired no title under the will of her mother, who, at most, only had a *life estate,* and had nothing to will. And the matter depends on the deed to Woodfin and the deed from Reynolds, assignee in bankruptcy, to the defendant.

The deed from defendant to Woodfin was not registered until 1896, and the defendant contends that it could not then be registered, and was improperly admitted in evidence. It is contended that section 1245 of The Code, extending the time to register deeds, is expressly repealed by chapter 147, Laws 1885, and, had it not been repealed, it did not extend the time to 1896. It is also contended that neither this section of The Code nor any other section, extending the time to register, applies to the deed from the defendant to Woodfin. This, we think, is so, unless chapter 147, Laws 1885, does. It was held in *Cowan v. Withrow,* 116 N. C., 771, that section 1245 was continued by chapter 147 to 1 January, 1896. In *Spivey v. Rose,* 120 N. C., 163, it was held that the time was extended for registering deeds of gift, but neither of those cases applies to this case, as they were registrations before the act of 1885 went into effect. So, this registration depends upon the construction given to chapter 147, Laws 1885, and we are clearly of the opinion that act authorized its probate and registration. That act expressly provides for registration. It expressly repeals section 1245 of The Code, and it contains no limitation as to the time when any instrument required or allowed to be registered shall be registered. The provisions of chapter 147, Laws 1885, are as follows: "No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor, but *from the registration thereof,* within the county where the land lieth." It is seen that there

is no limitation as to the time when the deed or other instrument shall be registered. But it shall only be good against the pur- (485) chasers for a valuable consideration, creditors, etc., *from the date of its registration;* and for us to put a limitation in the statute would be to write something in the statute that is not there, and in our opinion should not be there.

The deed from the defendant to Woodfin was properly admitted to probate and registration in 1896, and was properly admitted in evidence.

There was a lengthy discussion and many authorities cited upon the question of possession. The plaintiff contended that it was in the wife, Winnie, while the defendant contended it was in him. But we do not think it necessary to discuss this question, as the *feme* plaintiff is only entitled to the remainder after the life estate of her mother Winnie, if that much; and if she is entitled to that, under the deed of the defendant to Woodfin, no statute of limitation or presumption ran against her until the termination of the life estate, which took place in 1896. The question, then, is, Is she entitled to recover under the deed to Woodfin, which is a fee-simple deed with a covenant of general warranty?

It is found by the jury that the deed from the defendant to Woodfin was made in fraud of the defendant's creditors, and that it was also made in fraud of the bankrupt law. This being so, upon the defendant's going into bankruptcy a month after making the deed, it became absolutely void as to the creditors of the defendant. Bump. Law and Practice of Bankruptcy, page 382. A voluntary conveyance by one who is insolvent is fraudulent. *Ibid.,* page 386. And the assignment of the register in bankruptcy to Reynolds, assignee, conveyed this land to the assignee, though it was not named in the defendant's schedule. *Glenny v. Langdon,* 98 U. S., 20. The assignee, Reynolds, being the representative of the defendant's creditors, had the right to sell without any special order to do so, and the purchaser got a good (486) title, and the defendant had the right to buy in person or through another. *Gibbs v. Taylor,* 6 Cranche, 30; *Guthrie v. Bacon,* 107 N. C., 337; Bump Law and Practice of Bankruptcy, 429; and the defendant got the title to this lot number one under the bankrupt sale and the deed of the assignee.

The deed to Woodfin was a naked trust for the benefit of the *cestuis que trust.* He had not a thing to do, not even to receive rents and pay them over. But the *cestuis que trust* were to occupy, use and enjoy it in their own way without being accountable to any one. This gave them the entire estate. *Johnson v. Prairie,* 91 N. C., 159; *Shannon v. Lamb,* 126 N. C., 38. And but for the bankruptcy proceedings, the sale of the assignee, and the purchase thereat by the defendant, it seems clear that, after the death of the life tenant, Winnie, the plaintiff would be entitled to recover.

But, the defendant says, while that may be so, the deed he made to Woodfin has been declared void as to creditors by the bankrupt act and the proceedings in bankruptcy, and that he purchased at the bankrupt sale, got a good title, and claims under that title.

The plaintiff admits that he bought at the bankrupt sale and got the title, but she says that the title inured to her benefit; that the deed to Woodfin contained a full general covenant of warranty of title, and while the deed was void as to the creditors, it was not void as to the defendant, who can not take the benefit of his own fraud. *York v. Merritt,* 80 N. C., 285; *Peterson v. Brown,* 17 Nev., 172, 45 Am. Rep., 437; Bump on Fraudulent Conveyances, 450. The title the defendant acquired from the assignee in bankruptcy under the warranty in the deed to Woodfin inures to her benefit.

It is a case where the after-acquired title "feeds the warranty," and estops the defendant from claiming under his new title. The defendant had the right to make the deed to Woodfin, and the title passed (487) from him under that deed, and the warranty went with it; and this distinguishes it from *Smith v. Ingram, ante,* 100, where the plaintiff had no capacity to convey, no estate passed, and as no estate passed under her deed, no warranty passed, as warranty is a covenant real and runs with the estate; and where no estate passed—did not run —the warranty did not run.

It has been found by the jury that the deed from the defendant to Woodfin was made in fraud of the defendant's creditors, and also in fraud of the bankrupt law. The general rule is that one can not take the benefit of his own fraud; that whatever effect it may have upon creditors and others, he is bound by such transactions; that as to him they are as *good and binding* as if there had been no fraud. Then, suppose the defendant, in good faith, and without intending to defraud his creditors, had conveyed this property to Woodfin with warranty, and his title turned out to be defective, and he afterwards acquired a good title; can there be any doubt but what this new title would have inured to the benefit of the plaintiff, under the doctrine of "feeding the estoppel"? And if the defendant can not take advantage of his own fraud, but stands as between him and the plaintiff as if there had been no fraud, can there be any reason why this doctrine should not apply in this case? The authorities, as well as the reason, seem to sustain this view of the case. *Gibbs v. Thayer,* 6 Cush., 30; *Jones v. King,* 55 N. C., 463; Bump on Fraud. Con., 445. His indebtedness seems to be treated by some authorities as an encumbrance, which it was his duty to remove, and that this is the reason of the rule of estoppel. But whether this be so or not, we find it to be the established doctrine.

The fact that he can not take advantage of his own fraud, and that he

sustains the same relation to the plaintiff as if the deed had been made in good faith and the title had turned out to be defective, and he had afterwards acquired a good title, is sufficient to give the plaintiff the benefit of the estoppel. (488)

The judgment appealed from must be affirmed.

Cited: *S. c.*, 132 N. C., 947; *Cozad v. McAden,* 148 N. C., 11; *Brown v. Hutchinson,* 155 N. C., 208; *Harris v. Bennett,* 160 N. C., 347; *Jackson v. Beard,* 162 N. C., 115; *Mining Co. v. Lumber Co.,* 170 N. C., 277; *Olds v. Cedar Works,* 173 N. C., 165.

JOHNSON v. ATLANTIC AND NORTH CAROLINA RAILROAD.

(Filed 13 June, 1902.)

Evidence—Contributory Negligence—Personal Injuries—Damages—Railroads.

The evidence is sufficient to justify the jury in finding that the plaintiff was not guilty of contributory negligence in stepping from the train while it was moving.

MONTGOMERY, J., dissenting.

ACTION by Richard Johnson against the Atlantic and North Carolina Railroad Company, heard by *Allen, J.,* and a jury, at January Term, 1902, of WAYNE. From a judgment for the plaintiff, the defendant appealed.

F. A. Daniels and Allen & Dortch for plaintiff.
W. C. Munroe and I. F. Dortch for defendant.

CLARK, J. The defendant, in his brief, says "the defendant does not deny that there was evidence of negligence, but insists that the plaintiff, on his own showing, was guilty of contributory negligence, and the action should have been dismissed," and that is the only point relied on therein. The statute (Laws 1887, ch. 33) provides that the defense of contributory negligence "shall be set up in the answer and proved on the trial." Clark's Code (3 Ed.), page 237. The contention, therefore, that the action should be dismissed can not be sustained. *Neal v. R. R.,* 126 N. C., 634; 49 L. R. A., 684, is put (489) upon the ground that, taking all the plaintiff's evidence to be true, he had proved his own contributory negligence. But such is not the case here.

As the court told the jury: "The general rule is that a person who

gets off a train while it is in motion is guilty of contributory negligence. It is the duty of the passenger, when he sees the train in motion, to ask for it to be stopped, and if it is not done, he ought not to get off. To this general rule there are some exceptions, one of which is that if a passenger is commanded or invited by the conductor to get off while the train is in motion, and the train is going so slow that the danger of stepping or jumping off is not apparent to a reasonable man, and he does so and is injured, it would not be contributory negligence."

"If the jury find from the evidence that the plaintiff alighted from the train while it was in motion, and that in doing so he passed by the conductor on the steps, after asking him to let him pass by, and the conductor stood aside for the purpose of letting him pass by, knowing at the time that he was a passenger and that his destination was La-Grange, and that he was alighting from the train as a passenger, then the jury may consider these facts for the purpose of determining if the conduct of the conductor was such as to reasonably lead the plaintiff to believe that it was safe for him to alight from the train, and for the purpose of determining if the conduct of the conductor was equivalent to an assurance that it was safe to so alight, and an invitation to do so; and if the jury find from the evidence that the conductor, by his conduct, meant to assure the plaintiff that it was safe to alight from the train, and they further find that the train was moving at such a speed that to a reasonable man it was not apparently dangerous, they will answer the second issue 'No,' otherwise 'Yes.'

(490) "If the conductor did not mean by his conduct to assure him that it was safe to alight, or, if he did so, and it was apparently unsafe to alight, to a reasonable man, it would be a case of contributory negligence." The court further told the jury that the burden of proof that the plaintiff stepped from the train on invitation of the conductor was upon the plaintiff. *Browne v. R. R.*, 109 N. C., 34.

Was there evidence to justify thus leaving the issue of contributory negligence to the jury? There was evidence that the time allowed at the station was too brief to permit plaintiff alighting before the train started, and defendant frankly admits there was evidence of its negligence sufficient to be submitted to the jury. The plaintiff's testimony is that he had bought a ticket to that station (LaGrange), and the conductor had taken it up; that before reaching there the station was called, and that when the train stopped he left the car as quickly as he could; that the train did not stop at the station as long as usual, and as he was proceeding to alight he found the conductor standing on the steps; that he asked him to let him pass, and the conductor stepped aside in order that he might get off the train. The plaintiff

further testified that "the train was moving slowly when I stepped off, and I thought I could step off safely."

When the plaintiff asked the conductor to let him pass, and the conductor stepped aside in order that he might get off, and did not make any movement to stop the train, this was evidence tending to show an invitation to alight, a tacit assurance that the plaintiff could do so safely, and if, upon such invitation, the plaintiff did alight, the speed of the train not being such as to put him on guard not to act on such invitation—if the jury believed that state of facts—contributory negligence was not so clearly proved that it could be adjudged that the plaintiff was guilty thereof. On the contrary, there was sufficient evidence to justify the jury in finding that it was disproved. Certainly the court could but leave the issue to the jury. The other exceptions are not pressed in defendant's brief, and are, besides, without merit. (491)

No error.

Montgomery, J., dissents.

Cited: *Denny v. R. R.*, 132 N. C., 345; *Gordon v. R. R., ibid.*, 570; *Morrow v. R. R.*, 134 N. C., 98; *Whitfield v. R. R.*, 147 N. C., 238, 241; *Owens v. R. R., ibid.*, 359; *Credle v. R. R.*, 151 N. C., 51; *Reeves v. R. R., ibid.*, 320; *Owens v. R. R.*, 152 N. C., 440; *Roberts v. R. R.*, 155 N. C., 90; *Carter v. R. R.*, 165 N. C., 250, 254.

McCORD v. SOUTHERN RAILWAY COMPANY.

(Filed 13 June, 1902.)

1. **Negligence—Contributory Negligence—Personal Injuries—Damages.**

The evidence in this case as to negligence of railroad in injuring person who was assisting in digging a well for the railroad company, is sufficient to be submitted to the jury.

2. **Evidence—Pleadings—Complaint.**

Where part of the complaint in an action is put in evidence, the party making the complaint is entitled to have the whole complaint introduced.

3. **Appeal—Case on Appeal—Assignment of Error.**

It will not be assumed that an assignment of error is a correct statement of facts therein recited, where such facts do not appear in the case stated by the trial judge.

ACTION by W. E. McCord against the Southern Railway Company, heard by *Hoke, J.*, and a jury, at July Term, 1901, of MECKLENBURG. From a judgment for the plaintiff, the defendant appealed.

McCall & Nixon for plaintiff.
George F. Bason for defendant.

(492) CLARK, J. The plaintiff was employed by the defendant to assist in digging a well 20 feet square for the use of its road. There was a crosspiece over said well, used as a crossway by those digging the well. The plaintiff objected that this crosspiece was not secure, whereupon the defendant's "boss" in charge of the work made a show of fixing said crosspiece, and assured plaintiff that said crosspiece was all right, in consequence of which assurance, and relying upon it, the plaintiff attempted to go out upon said crosspiece to turn off the steam jet, which was part of his duty; but said crosspiece having been insecurely fixed, it turned and threw him into the well, whereby he was injured.

At the close of the plaintiff's evidence, and again at the close of all of the evidence, the defendant moved for a nonsuit, and the refusal to do so is the ground of the defendant's first and third exceptions.

There was much evidence in support and in contradiction of the above, but as on this motion the evidence must be taken most strongly in favor of the plaintiff, it is clear that the court could not hold that there was no evidence sufficient to go to the jury. The plaintiff testified that it was his duty to turn off the steam jet, and the earth being banked, mud knee-deep all around the piling except at the place where the crosspiece was laid, and that there was no appliance or means provided by the company to reach the jet except by going out on this crosspiece, which was provided for that purpose, and that he was careful to observe and test that crosspiece, and at his instance it was worked upon, and he was assured by the "boss" that it had been made safe; that it was, in fact, an unsafe appliance, and he was injured in consequence. It being the plaintiff's duty to go out on the crosspiece, it was negligence in the defendant to give him an unsafe place and appliance for his work. Upon this evidence, the court could not do otherwise than to submit the issues as to negligence and contributory negligence to the jury.

(493) The defendant put in evidence a paragraph of the plaintiff's complaint as an admission against him. Whereupon the court allowed the plaintiff to put in evidence the other paragraphs of the complaint which referred to the same matter, and which he contended explained it. It is elementary that when part of a declaration or admission is put in evidence, the party making it has a right to have the

whole of the declaration brought out. Whether it explains or modifies the other part already in evidence is for the jury. This disposes of the second exception.

The fourth exception is to "giving prayers asked by the plaintiff," but the case as settled by the judge shows none, and that must govern, even if the appellant had set out the alleged prayers, which he does not. *Patterson v. Mills,* 121 N. C., 258, and other cases cited in Clark's Code (3 Ed.), page 762. There is no exception to the charge of the court, which, besides, is very full and clear, and entirely fair to the defendant.

The fifth and last exception is to the refusal of a new trial upon the foregoing exceptions.

No error.

---

(494)

FAULKNER v. KING.

(Filed 13 June, 1902.)

1. Evidence—Opinion on Evidence—Judge—The Code, Sec. 403.

In an action of claim and delivery for a horse, an instruction by the trial judge that in passing upon the credibility of the plaintiff as a witness the jury should consider the fact that he had $50 of money of defendant in his pocket and refused to give it to him, and that he is insolvent, amounts to an expression of an opinion upon the facts.

2. Evidence—Record—Justices of the Peace—Former Proceeding.

The record of an action between the same parties and about the same property is competent in a subsequent action.

ACTION by J. F. Faulkner against J. N. King and another, heard by *Robinson, J.,* and a jury, at October Term, 1901, of WAKE. From a judgment for the defendants, the plaintiff appealed.

B. C. Beckwith for plaintiff.
No counsel for defendant.

CLARK, J. This was an action to recover a horse. The defense was that the matter had been litigated in a former action by this defendant against this plaintiff before a justice of the peace, in which the present defendant had recovered judgment and the present plaintiff had surrendered the horse, and did not appeal. The present plaintiff, the defendant in the former action, testified that he surrendered the horse and did not appeal because the justice had threatened to put him in jail if he did otherwise, and the next day, when he offered to appeal and tendered the 30 cents fee for the return to the appeal, the justice refused to

send up the appeal. This is denied, except that the justice stated he did not send the appeal up because he considered the case at
(495) an end.

It would seem that the justice erred in not sending the case up, for the court above should have passed upon the validity of the appeal, and that the plaintiff, after the refusal of the justice, erred in not applying to the next term of the Superior Court for a writ of *recordari,* but these points are not before us, because it is the plaintiff, not the defendant, who is appealing, and the plea of *res judicata* and its validity are not presented.

The judge charged the jury: "There is but one thing for you to consider in this matter, and that is, Did the plaintiff voluntarily surrender the horse to Mills? If he did, then you will answer the issue 'No.' If he did not voluntarily surrender the horse, but was coerced or intimidated by the threats at the trial before Nichols, the justice of the peace, into giving him up, you will answer the issue 'Yes.' But you should consider, in passing upon the plaintiff's credibility as a witness, the fact that he has $50 of defendant's money in his pocket and refuses to give it to the owner; that he is insolvent."

The plaintiff excepts to this as an intimation of an opinion upon the facts, prohibited by the act of 1796, now Code, sec. 413. We think the point is well taken. The former action had been brought for the horse by the present defendant, on the ground that he had paid the plaintiff $50 for a black horse, which he had lost by reason of the title proving defective, and that this plaintiff had admitted he had used $40 of that money in buying the sorrel horse, which was the subject of that suit and of this. The plaintiff had denied that admission on the witness stand, but the court, in effect, intimated to the jury that as plaintiff owed the defendant, they might find that defendant had a right to retain the sorrel horse by finding in his favor the issue just submitted, whether the plaintiff had voluntarily surrendered the horse or had been coerced and intimidated into surrendering him.

(496) It was also error to exclude the record in the former action. *Hodges v. Wilkinson,* 111 N. C., 56, 17 L. R. A., 545.

Error.

MULLEN v. LAKE DRUMMOND CANAL AND WATER COMPANY.

(Filed 13 June, 1902.)

1. Eminent Domain—Damages—Canals.

In condemnation proceedings for a canal no damages are contemplated except such as necessarily arise in the proper construction of the work.

2. **Negligence—Damages—Evidence—Sufficiency—Canals.**
The evidence in this case is sufficient to show negligence on the part of the canal company in damaging the lands of the plaintiff by widening the canal and thereby filling up ditches leading from land of plaintiff.

3. **Damages—Permanent—Laws 1895, Ch. 224—Canals.**
Permanent damages may be awarded a landowner along a canal if he is injured by the widening of the canal.

ACTION by F. N. Mullen against the Lake Drummond Canal and Water Company, heard by *Allen, J.*, and a jury, at March Term, 1901, of CAMDEN.

This is an action for damages to plaintiff's land by the discharge thereon of diverted water and the obstruction of a ditch by which it had been previously drained. The defendant owns and operates what is known as the Dismal Swamp Canal, between the Pasquotank River in North Carolina and Elizabeth River in Virginia. The plaintiff owns the land in question, which is situated in Camden County, adjacent to and bordering on said canal for about three-quarters of a mile. The water in said canal was artificially brought and maintained therein by locks and banks at an elevation several feet higher (497) than the surrounding land. The banks of the canal not being sufficient to prevent the water from leaking through them and running upon the lands of adjacent owners, the defendant had constructed and maintained, prior to 1898, ditches parallel with its canal, and adjacent thereto, to catch and carry off the water percolating through its banks or falling thereon. These were called "sweat ditches," and emptied into a natural watercourse known as Joyce's Creek. The ditch adjacent to the plaintiff's land was also the "lead ditch" to his farm, being the only practical outlet for the drainage of about 135 acres of his land. In 1898 and 1899 the defendant widened and deepened its canal, and raised its banks and the water therein. In doing so it threw large quantities of mud and sand into the sweat and lead ditch, whereby it was obstructed to such an extent as to flood and injure the plaintiff's land. The complaint is as follows:

"The plaintiff, complaining of the defendant, alleges:

"1. That he is a resident of Camden County, State of North Carolina.

"2. That the defendant is a corporation duly incorporated under the laws of the State of Virginia, as he is informed and believes, and operating a canal business in the State of Virginia and the State of North Carolina, and it owns what is known as the canal property, formerly known as the Dismal Swamp Canal, which runs from Elizabeth River, State of Virginia, to Pasquotank River, State of North Carolina, by way of Deep Creek and South Mills.

"3. That the defendant, during 1898, made a change in the width of

this canal, and in doing so filled up what is known as the sweat ditch to the canal, and also the lead ditch of this plaintiff, leading from his farm, hereinafter described, to the creek, being the only practical way by which he can drain said farm.

(498) "4. That the plaintiff is the owner of and in possession of that certain tract of land known as the 'old tract,' containing 250 acres, more or less, and being a part of the old farm. That the plaintiff is now in possession of the adjoining lands of the Isaac Burnham heirs, Mrs. H. C. Pinnix, William Eason, S. O. Mullen main road, and others.

"5. That the defendant, its agents and employees and contractors, negligently and carelessly threw dirt and water in the lead ditch aforesaid, draining said farm, and threw water and mud upon the lands of said farm, and in this manner seriously damaged both the crops upon said lands and the lands themselves.

"6. That by said unlawful conduct the defendant caused the lead ditch to be insufficient to carry off the water from said lands, and banked the water and forced it back upon the farm, and in this manner drowned and seriously injured and destroyed the crops growing upon said lands during the years 1898 and 1899.

"7. That said unlawful conduct of the defendant not only damaged the crops, but, by forcing the water back upon the lands and ponding same upon the lands, has seriously and greatly damaged said lands, causing the water to lie upon same and the lands to sour and seriously injure its yielding power and greatly damage same.

"8. That it was the duty of said canal company to keep said sweat ditch cleared out and of sufficient capacity to carry off all the water, and it was their duty to protect same against the carelessness and wrongdoings committed by its agents and employees, as aforesaid.

"9. By reason of said unlawful and negligent acts and doings of the defendant, the plaintiff has been damaged in the sum of $900, according to his best judgment and belief. Wherefore," etc.

(499) The defendant, answering the complaint, says:

"1. That section 1 thereof is true.

"2. That section 2 thereof is true.

"3. That section 3 thereof is untrue.

"4. That he has no knowledge or information sufficient to form a belief as to the matters and things in section 4 thereof, and therefore denies the same.

"5. That section 5 thereof is untrue.

"6. That section 6 thereof is untrue.

"7. That section 7 thereof is untrue.

"8. That section 8 thereof is untrue.

"9. That section 9 thereof is untrue.

"Wherefore, defendant demands judgment that he go without day and recover his costs."

The issues submitted and answers thereto were as follows: "1. Did the defendant wrongfully and negligently damage the lands and crops of the plaintiff as alleged? 'Yes.' 2. What permanent damage has the plaintiff sustained to his lands? '$100.' 3. What damage has he sustained annually to his crops for 1899 and for 1900? '1899, $353.50; 1900, $226.75.'" From a judgment for the plaintiff, the defendant appealed.

E. F. Aydlett and P. H. Williams for plaintiff.
Shepherd & Shepherd and Pruden & Pruden for defendant.

DOUGLAS, J., after stating the facts. This case has given us much trouble, and has been most carefully considered, not on account of its intrinsic value to the parties, but from the great importance and wide application of its underlying principles. There are some things that we do not clearly understand, and yet we must decide the case as it is presented to us, as was recently said in *Trimmer v. Gorman,* 129 N. C., 161. It seems strange that the damage to the crop should amount to $353 for 1899 and to $226 for 1900, while the *permanent* damage to the land is only $100; and yet the jury have so found (500) under proper instructions and upon substantial evidence. There are some expensive crops of much greater value than the land on which they are raised.

It does not appear when or how the original right of way was acquired by the defendant, nor what was its extent. Under the circumstances, we must presume that it was a mere easement, and that it was limited to the extent of its use prior to the widening of the canal in 1898. We do not mean to say that there is any presumption of a right of way in a foreign corporation as such, but that the existence of the right being practically admitted, the presumption arises as to its extent.

The defendant introduced no testimony, but objected to nearly everything that was said or done, except the issues, and at the close of the evidence made the usual motions for nonsuit and direction of the verdict. These were properly refused, as there was ample evidence to go to the jury.

The ditch in question appears to have been constructed by the defendant at some past time, adjoining and parallel to its canal, for the purpose of catching and carrying the "sweat," or water percolating through the banks of the canal, and also as an outlet for the surface water dammed up by the construction of the canal. This ditch seems to have accomplished its double purpose until 1898, when the defendant deepened and widened its canal, and in so doing threw mud and sand into the ditch to such an extent as to practically obstruct the flow of water.

Among other things, the plaintiff testified "that he cut part of the ditch in June, 1900, at a cost to him of $50; that he did not complete it; that it would cost $200 to cut the whole ditch; that if he had cut the whole ditch it would not have stood, as every (501) big rain would wash the sand and mud in it and fill it up, which was piled on the banks by the defendant; that the only way to keep a ditch there, since the defendant has piled up the mud and sand on the bank, would be to log it, and that he did not know what it would cost to do so." The plaintiff was referring to cleaning out the old ditch, and by "logging" we presume he meant building a wall of logs against and as high as the embankment of the canal. This would evidently have been a work of considerable magnitude and expense, as the canal bounded the plaintiff's land for three-quarters of a mile; and its necessity was probably the foundation for the issue of permanent damages, which was submitted without objection. Such an issue is, in effect, a statutory condemnation of the additional easement, and can not be demanded by either party where the injury can be remedied at reasonable expense without interfering with the operation of the defendant company in the performance of its public duties. *Lassiter v. R. R.*, 126 N. C., 509; *R. R. v. Wicker*, 74 N. C., 220. Where the issue is submitted by consent it is equivalent to a grant of the easement, the value of which alone remains to be determined by the jury.

Two important questions are presented to us: 1. Has the plaintiff been injured by the legal negligence of the defendant? 2. If so, were such damages included in the original condemnation of the defendant's right of way? In the present case the plaintiff occupies the singular position of being the upper and lower landowner by virtue of the same piece of land. The canal is constructed across the lower end of the plaintiff's farm, thus damming up the natural outlet for his surface water; while the canal itself is so much higher than the surrounding land as to cause its percolating waters to run down upon the defendant. It appears that the water soaking through the banks of the canal was brought (502) there by artificial means. This is diversion, and it is now well 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. R. R.*, 124 N. C., 214; *Mizzell v. McGowan*, 125 N. C., 439; and the same case, 129 N. C., 93; *Lassiter v. R. R.*, 126 N. C., 509. That a lower owner can not obstruct a natural waterway so as to flood the lands above him has long been settled. *Pugh v. Wheeler*, 19 N. C., 50; *Overton v. Sawyer*, 46 N. C., 308; *Cagle v. Parker*, 97 N. C., 271; *Ridley v. R. R.*, 118 N. C., 996; *R. R. v. Wicker*, 74 N. C., 220; *Porter v. Durham*, 74 N. C., 767.

The extent of the defendant's right of way, and how and when

acquired, does not appear; nor is it clear whether the ditch is on the land of the plaintiff or defendant; but the presumption of an easement carries with it the counter-presumption that the fee of the land is in the plaintiff. The plaintiff testified that it was dug by the defendant, but that "said ditch was also the *lead* ditch and the only means or way of draining about 135 acres of his land." Thus it would appear either that the ditch is in the same place as the old waterway, or that the waterway running in the same general direction was closed up by the construction of the canal and the ditch substituted therefor. In either event the ditch would be considered as the waterway, the obstruction of which would render the defendant liable for the resulting injury. We are now treating the ditch as the "lead" ditch of the plaintiff, a service it rendered in addition to being the "sweat" ditch of the defendant. Considered in its latter character, the negligence of the defendant was not so much in stopping up the ditch as in its failure to perform the positive duty resting upon it of taking care of its own percolating waters.

In the case at bar it appears that the defendant owed the duty to the plaintiff in respect to the ditch in consequence of its closing the original waterway, and hence it does not come within (503) the doctrine discussed in *Porter v. Armstrong,* 129 N. C., 101.

At times different principles come so near together in their practical application that it is almost as important to state what the Court does not decide as what it does decide. The issues made no distinction as to the damage resulting from the ponding back of surface water and the flooding by percolating waters; and as there was no exception to the issues and no tender of additional issues, we presume the defendant was content to regard them as on an equal footing.

We deem it better to discuss the general principles applicable to the facts of this case than to consider separately the twenty-three exceptions filed by the defendant.

The defenses relied on are practically the following: 1. That the damages recovered were contemplated in the original condemnation of the right of way. 2. That there is no evidence of negligence in the widening of the canal in 1898. 3. That the plaintiff can not recover more than it would have cost to remove the cause of injury by cleaning out the ditch. 4. That the plaintiff can not recover for the crop of 1900.

We do not think that any of these defenses can be maintained in view of the evidence and the resulting verdict of the jury.

It is well settled that no damages are contemplated in the original condemnation, except such as *necessarily* arise in the *proper* construction of the work. Any other rule would be contrary to public policy

as well as private right, and could never receive the sanction of the courts. The rule, with its underlying principles as applicable to the case at bar, is clearly stated in *R. R. v. Wicker,* 74 N. C., 220, as follows: "In the first of these cases (the obstruction of a natural or artificial drainway), it is the duty of the company in constructing its roadbed to leave a space sufficient for the discharge of the (504) water through its accustomed drainway, whether natural or artificial. If it fails to do so, any owner whose land is injured, whether he be one a part of whose land is taken for the road or not, may compel the company to discharge its duty by opening the drain to its previous capacity. And so, if the obstruction causes a nuisance, the corporation may be compelled to abate it. If the damage to the land of the defendant should be assessed to him, the corporation would acquire against him a right to pond his land perpetually, but not against any adjoining or other person injured, or against the public if it creates a nuisance. These might deprive the corporation of its use of the defendant's lands by reason of their right to compel it to open the drain. Under a rule which should subject the corporation to damages in cases of this sort, it would pay for a right which it could never get. And even if the ponding were entirely on the land of the defendant, so that this result would not follow, and the corporation would obtain a perpetual right to flood the land, yet it is contrary to public policy to give to one not the owner of the soil a right to reduce any land to perpetual uselessness, without necessity and without a corresponding benefit to any one." This case has been repeatedly cited with approval, and on this point especially in *Brown v. R. R.,* 83 N. C., 128, and *Knight v. R. R.,* 111 N. C., 80.

We have already said there was evidence of negligence to go to the jury. There is no evidence tending to show that the ditch could have been permanently repaired by the plaintiff at a cost less than his injury, even if it had been his duty to do so. On the contrary, the plaintiff testifies that it would have cost him a large amount to clean out the ditch, and that he could not have kept it clean without logging the bank of the canal, which would evidently have entailed great expense. This is not like a fence on the plaintiff's own land, which he might have permanently repaired at little trouble or expense. The defend- (505) ant not only failed to perform its positive duty of keeping the ditch open, but caused the injury by a direct act of negligence or of willful indifference. As this action is not simply for the recovery of yearly damages, but includes a legal condemnation of the resulting easement, it is proper that all damages should be included. *Beach v. R. R.,* 120 N. C., 498; *Lassiter v. R. R.,* 126 N. C., 509. While chapter 224 of the Public Laws of 1895 applies only to railroads, yet, as

this Court has extended the rule of permanent damages to water companies and telegraphs, under the principle laid down in *Ridley v. R. R.*, 118 N. C., 996, we see no reason why it should not equally apply to canals. *Geer v. Water Co.*, 127 N. C., 349; *Phillips v. Tel. Co., post*, 513.

As the issue of permanent damages was submitted without objection, we must assume its propriety under the circumstances of this case. The judgment of the court below is

Affirmed.

Cited: Rice v. R. R., ante, 376; *S. v. New, post*, 737; *Ferebee v. Water Co. post*, 745; *Williams v. Water Co., post*, 746; *Briscoe v. Young*, 131 N. C., 388; *Pinnix v. Canal Co.*, 132 N. C., 125; *Bullock v. Canal Co., ibid.*, 180; *Norris v. Canal Co., ibid.*, 183; *Dale v. R. R., ibid.*, 708; *Jones v. Kramer*, 133 N. C., 448; *Craft v. R. R.*, 136 N. C., 51; *R. R. v. Land Co.*, 137 N. C., 335; *Cherry v. Canal Co.*, 140 N. C., 424, 426, 427; *Parks v. R. R.*, 143 N. C., 295; *Briscoe v. Parker*, 145 N. C., 17; *Davenport v. R. R.*, 148 N. C., 291; *Roberts v. Baldwin*, 151 N. C., 408; *Bost v. Cabarrus*, 152 N. C., 537.

(506)

ELMORE v. SEABOARD AIR LINE RAILROAD.

(Filed 13 June, 1902.)

1. **Negligence—Master and Servant—Railroads.**

Where an automatic coupler is out of repair for a length of time reasonably sufficient to have it repaired, and an employee is injured in coupling the car, the railroad is liable, whether such employee was negligent in the manner of making the coupling or not.

2. **Contributory Negligence—Negligence—Continuing Negligence—Master and Servant.**

Where the negligence of the railroad is a continuing negligence there can be no contributory negligence which will discharge its liability to an employee for injuries caused thereby.

MONTGOMERY and COOK, JJ., dissenting.

ACTION by H. J. Elmore against the Seaboard Air Line Railway Company, heard by *Allen, J.*, and a jury, at January Term, 1902, of WAYNE. From a judgment for the plaintiff, the defendant appealed.

Allen & Dortch and I. F. Dortch for plaintiff.

Day & Bell, J. B. Batchelor and T. B. Womack for defendant.

CLARK, J. This case is simply a repetition of *Greenlee v. R. R.*, 122 N. C., 977, 41 L. R. A., 399; *Troxler v. R. R.*, 124 N. C., 191, 44 L. R. A., 313, 70 Am. St., 580, and the several cases affirming the doctrine therein laid down. It was in evidence that the defendant's cars were equipped with automatic couplers, but where the plaintiff was injured in making a coupling there was evidence that the automatic coupler had been out of repair five months or more, to the (507) knowledge of defendant. The plaintiff testified that he was ordered to make a coupling and was injured in so doing. He testified: "If the coupler had been in perfect condition I would have been able to couple without putting my foot between there" (the cars); "if the link had been in perfect condition I would not have had to kick it," and much other evidence to the same purport, that he used his foot instead of his hand because the coupler, being out of order, and no stick being furnished him, he could only make the coupling which the conductor ordered him to make by using his foot or hand, and he had more power in his foot; that he had seen his conductor use his foot to couple in that way and the conductor had seen him and others do so. The judge charged the jury substantially that if the coupler was in repair the defendant was not guilty of negligence, or if the lack of repair of the coupler did not necessitate the plaintiff going between the cars to couple there was no negligence on the part of defendant, but that if the coupler was out of condition for such length of time that defendant could have had it repaired, but failed to do so, and that plaintiff would not have been injured but for the condition of the couplers, and that in the condition in which the coupler was that it was necessary, in order to couple, to use the hand or foot, and that the plaintiff was under the orders of the conductor, who directed him to couple the cars, and in so doing plaintiff was injured, and if the jury further find that he would not have been injured but for the condition of the couplers, then the jury should find the first issue "Yes."

On the second issue the court instructed the jury that if the coupler was out of repair and had been for such length of time that the defendant knew, or should have known it, and with the exercise of reasonable diligence could have had it repaired, and the plaintiff coupled the cars under the direction of the conductor, and that it was plaintiff's duty to obey the conductor, and he would not have been injured (508) but for the condition of the couplers, to answer the second issue (contributory negligence) "No."

The charge was much fuller and put every phase of the evidence which was favorable to the defendant, but the above presents the real point involved in the numerous exceptions. This proposition is settled in the cases above cited, to wit, it is the duty of the defendant to use

automatic couplers, and if, on failure so to do, injury occurs to an employee, which would not have happened if there had been a coupler, this is a continuing negligence on the part of the employer, which cuts off the defense of contributory negligence, such failure being the *causa causans*. If the automatic coupler was out of repair for a length of time reasonably sufficient to have it repaired, and this was not done, it was the same thing as the failure to have the automatic coupler on that car. Without reiterating the reasoning which has induced the Court to make and abide by this ruling, and applying it to the case in hand, the judgment below must be

Affirmed.

DOUGLAS, J., concurs in result.

COOK, J., dissenting: I do not concur with the opinion of the Court. Plaintiff was instructed by the conductor to go back and couple the cars while he went to the office to get orders. The caboose was standing upon the main track; the box cars to be coupled to the caboose were upon the sidetrack. Afterwards the box cars were put in motion by being "kicked," and had rolled from the sidetrack upon the main track, and approaching the caboose to which they were to be coupled. The couplings upon these cars were "automatic." Upon the caboose car the link which connected the drawer pin to the lever had been taken out, so that, if the lip were shut, it had to be opened with (509) the hand. Plaintiff, as well as defendant, knew that this link was out. As the box cars approached the caboose, plaintiff saw that the lip was closed and knew that the coupling could not be made until the lip was opened, and to do this he would have to raise the drawer pin with one hand, and then open the lip. "I (he) looked at the other cars (the ones approaching) and saw that the bumper on them (it) was not open, but was closed. . . . I *did not know* these cars were coming *so fast*. I put my foot down there, and as the cars came up with such rapidity they caught my foot. . . . It was caught on the rebound." It is not contended that it was negligence in giving the plaintiff the order to couple the cars. At the time the order was given the cars had not been "kicked" or put in motion. The conductor did not know, nor did the plaintiff at that time, that the lip was closed. So plaintiff was not ordered to do a dangerous act, or to assume the risk of any danger. When plaintiff discovered that the coupling could not be made, because the lip was closed, the box cars were approaching very near to the caboose; it was not his *duty then* to go in between the moving cars—it was against the rules. Upon a failure to make the coupling, the cars would have been stopped, and then the couplers could have been properly adjusted and the coupling made with safety. The

conductor's order to go back and couple the cars did not impose upon plaintiff an obligation to do so at a hazard, or to take any risk. Had the lip been open—its usual condition—the coupling would have been made; but being closed, and discovered so to be just as the cars were coming together, plaintiff should have waited until the cars stopped and then adjusted the couplers. But he chose to do the foolish rather than the prudent thing, which could not have been anticipated or prevented by defendant. Therefore, I think the court erred in not instructing the jury that upon the whole evidence they should answer the second issue, to wit, "Did the plaintiff, by his own negligence,
(510) contribute thereto?" (to his injury) "Yes." Had the conductor been present, and seeing the conditions that existed, and then ordered the plaintiff to make the coupling, then, and in that event, I would concur in the opinion; but such was not the case.

It was the duty of plaintiff to look and see the conditions that existed, and, from his own testimony, it appears that he would not have taken the risk if he had looked and seen, for he says he "did not know these cars were coming so fast." Then, can defendant be responsible for such negligence?

MONTGOMERY, J., concurs in the dissenting opinion.

Cited: S. c., 131 N. C., 569; *Dermid v. R. R.,* 148 N. C., 193.

MILLHISER v. MARR.

(Filed 13 June, 1902.)

Payment—Attorney and Client—Agency—Contracts.

Where the attorney of the plaintiff comes into the possession of money belonging to the defendant and the jury finds that the defendant and attorney agreed that the money should be paid on the debt of the plaintiff, this agreement constitutes payment to the plaintiff.

ACTION by H. Millhiser & Co., against L. Lee Marr & Co., heard by *Jones, J.,* and a jury, at October Term, 1901, of SWAIN. From a judgment for the defendant, the plaintiff appealed.

A. M. Fry for plaintiff.
Bryson & Black for defendant.

COOK, J. During 1895 plaintiffs sold and delivered to defend-
(511) ants goods to the amount of about $1,000, and afterwards defendants paid something like $200 or $300 upon the debt. About March, 1896, the account was placed by plaintiffs in the hands of Mr.

Leatherwood, an attorney, for collection. W. T. Conley (husband of M. E. Conley, one of the members of defendant firm) held some liens against the lumber of Coffin & McDonald and caused the sheriff to levy the same upon a quantity of lumber lying in the lumber yard of said Coffin & McDonald. Said lumber so levied upon was claimed by one Ladd as his property. Mr. Leatherwood was also the attorney of said Ladd. Defendants contend that an agreement was entered into between W. T. Conley and Leatherwood, attorney for Ladd (and also for plaintiffs), by the express terms of which Leatherwood, attorney for Ladd, would pay off Conley's liens upon the lumber, and Conley would release them and allow the proceeds to be retained by Leatherwood and applied to the payment of plaintiff's account; that Leatherwood told Conley that Ladd had placed to his credit in bank $1,000 with which to pay off said liens. Conley then released his liens, and Leatherwood said, instead of giving you (Conley) his check and having Conley to indorse it back to him, he would send a check or the money to plaintiffs. Next morning when Conley applied to him for a receipt for the plaintiff's debt, he said he was busy at that time, but would give the receipt later; and in a few days afterwards Leatherwood said they had drawn out the money and left him in a hole for $800 and never gave the receipt.

Plaintiffs contend that this is not true; that Leatherwood did not say that he had the money in bank; and that he did not have the money in bank to his credit so placed by Ladd for such purpose, and that the money did not go into Leatherwood's hands as their attorney.

There was evidence, if believed by the jury, to establish plain- (512) tiff's contention; and, also, evidence upon behalf of defendants to establish theirs. So it was a question of fact to be found by the jury, and for their verdict they found that defendants owed plaintiffs nothing, thus establishing defendants' contention.

His Honor committed no error in holding at the close of the evidence that all there was in the case was whether or not the $1,000 had been placed in the bank to the credit of Mr. Leatherwood to pay off the liens. There is no suggestion that Mr. Leatherwood misapplied the fund, but it is admitted that he did not do so. Under the decision of this Court (*Millhiser v. Marr,* 128 N. C., 318) it is held that plaintiffs' debt against defendants was settled when W. T. Conley released his liens and agreed that his money in Leatherwood's hands should be applied to that purpose.

We will not further discuss the case, as the same principle is now presented which was there decided. The exceptions taken by plaintiffs were properly overruled, and the judgment of the court below is

Affirmed.

Cited: Millhiser v. Leatherwood, 140 N. C., 236, 237.

(513)

PHILLIPS v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 13 June, 1902.)

1. **Eminent Domain.**

Private property may not be taken for public use, directly or indirectly, without just compensation.

2. **Eminent Domain—Damages—Due Process of Law.**

Due process of law as applied to judicial proceedings, instituted for the purpose of taking private property for public use, means such process as recognizes the right of the owner to just compensation for the property taken.

3. **Eminent Domain—Due Process of Law—Fourteenth Amendment—Constitution of United States.**

The essential element of due process of law is the opportunity to defend.

4. **Telegraphs—Eminent Domain—Rev. Stat. U. S., Sec. 5267.**

Act of Congress, entitled "An act to aid in the construction of telegraphs and to secure to the Government the use of the same for postal, military, and other purposes," approved 24 July, 1866, does not give authority to enter private property without consent of owner, but provides that where consent is obtained, no State legislation shall prevent the use of such post-roads for telegraph purposes by such corporations as avail themselves of its privileges.

5. **Eminent Domain—Easements—Railroads.**

Railroad companies by condemnation proceedings acquire only an easement over the lands condemned, with the right to use so much as is necessary for the operation of its road.

6. **Telegraphs—Easements—Damages—Right of Way—Railroads.**

Telegraph line along a railroad and on the right of way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation.

7. **Eminent Domain—Parties—Telegraphs.**

Condemnation proceedings by telegraph company against railroad company to condemn right of way, to which landowner is not a party, gives no rights against the landowner, but gives rights only against the parties before the court.

8. **Telegraphs—Eminent Domain—Easements—The Code, Ch. 49, Vol. II.**

Under chapter 49 of The Code, vol. II, sec. 2010, telegraph company alone has the right to file petition in condemnation proceedings. The landowner is not given such right.

9. **Eminent Domain—Trespasser—Continuing—Damages—Permanent—Easements.**

A purchaser of land subsequent to the taking and erection thereon of a telegraph line may recover permanent damages for the easement taken, and the telegraph company thereby acquires the easement and right to maintain its line thereon.

10. Verdict—Damages—Excessive—Supreme Court—Appeal.

The Supreme Court will not review refusal of court below to set aside verdict for excessive damages.

11. Damages—Permanent—Telegraphs—Laws 1895, Ch. 224.

Permanent damages may be awarded a landowner who is injured by the putting of telegraph poles on his land.

MONTGOMERY, J., dissenting.

ACTION by H. T. Phillips against the Postal Telegraph-Cable (514) Company, heard by *Brown, J.*, and a jury, at March Term, 1901, of DAVIDSON.

This is an action in the nature of trespass to recover damages caused by the appropriation by the defendant of a part of the plaintiff's land, for the purpose of erecting and maintaining a telegraph line. The following are the material parts of the complaint and answer:

The complaint alleges the incorporation of the defendant and the plaintiff's ownership of the land. It then proceeds as follows:

"3. That the defendant has caused to be placed in and upon said land, and extending across the same the length of a mile or more, a row of posts, and has sunk anchor-wires from some (515) of the posts into the ground, and has strung wires over and across the said premises, and unlawfully and wrongfully continues to keep up and maintain the said posts and wires, going upon and over said lands to attend to the same, and have thereby taken and appropriated plaintiff's said lands to its own use; the said posts and wires are an obstruction to the plaintiff in the cultivation and use of his farm, interfering with the use of machinery thereon, and constitute a continual nuisance to plaintiff, and that plaintiff has been and will be damaged by the maintenance of said posts and wires and the appropriation of his lands therefor in the sum of $800."

The answer denies each and every material allegation in plaintiff's complaint.

And for further answer says:

"1. The said defendant is a telegraph company, chartered and organized under the laws of the State of New York; that it has, prior to the acts complained of by plaintiff in his complaint in said cause, accepted the provisions of an act of Congress, entitled 'An act to aid in the construction of telegraph lines, and to secure to the Government the uses of the same for postal, military and other purposes,' approved 24 July, 1866 (sections 5263-5268, Revised Statutes), and by virtue of said act and section 3964 of the Revised Statutes, and of the laws of the State of North Carolina, and its charter, it had the right to construct, maintain and operate its telegraph line along and upon the

right of way of the Southern Railway through the State of North Carolina; that the defendant is an interstate telegraph company, and all its lines in the State of North Carolina are engaged in interstate commerce, by their connection with other lines of said company, extending to and through all the States of this Union, and the principal towns and cities therein, and cable lines extending across the Atlantic Ocean, into the principal cities of all nations of the earth, and (516) all of its lines in said county of Davidson are upon the said railway right of way.

"2. Defendant says that all the holes dug in the ground and the posts planted therein, as well as the anchor-wires sunk in the ground and connecting with said posts, which are complained of by the plaintiff in the third cause of action of his complaint filed in this cause, were dug and said posts planted, and anchor-wires sunk, etc., upon the right of way of the Southern Railway Company, for a public use, and said right of way, under the statutes of this State, was acquired for the public use. Defendant denies that the construction and maintenance of any of the poles and wires upon the lands claimed by the plaintiff in his said complaint at all interferes with his lawful right to the use of said lands, and denies that the construction and maintenance of said telegraph line was and is unlawful, and a nuisance, and that plaintiff has been or will be damaged thereby in the sum of $800, or any sum whatever.

"3. Defendant says the lands claimed by plaintiff in the third cause of action in his complaint, upon which it constructed its telegraph poles and strung its wires and planted its anchors, are a part and parcel of the right of way of the Southern Railway Company, which, by virtue of section 3964 of the Revised Statutes of the United States, is a 'postroad,' and, by authority of sections 5263, 5268, Revised Statutes, it had the right to construct its lines thereon, and that said telegraph poles, wires and guy-wires were constructed thereon by the consent of the Southern Railway Company, and by the payment of just compensation to the Southern Railway Company.

"4. For further plea, the defendant says:

"If the posts and guy-wires which plaintiff, in third clause (517) of his said complaint, says were placed and are extending across his lands, for the length of a mile or more, with wires strung thereon, are upon the lands of the plaintiff, as alleged in said third cause of action, plaintiff is entitled to receive in this action the actual cash value of the land actually occupied by such poles and guy-wires, and nothing more, as damages for the construction and maintenance of said telegraph line thereon."

By permission of the court, defendant filed the following amendment to its answer:

"And before the construction of the said telegraph line along and upon the said right of way, defendant company procured such right of way by regular condemnation proceedings, instituted in the Superior Court of the county of Guilford, State of North Carolina, which proceedings were removed by the defendant, the said Southern Railway Company, from said court into the Circuit Court of the United States for the Western District of the State of North Carolina, and by virtue and authority of the orders, judgments and decrees of said court the right of said defendant telegraph company to condemn so much of the right of way of the said Southern Railway Company was adjudged, to construct, maintain and operate its telegraph line along and upon the right of way of the said Southern Railway Company from Charlotte, North Carolina, to the State line between the States of North Carolina and Virginia, where said right of way crosses the same, and from the city of Greensboro, in said county of Guilford, to the city of Raleigh, in said State, and from said city of Greensboro to the city of Winston in said State, which includes the lands along and upon the right of way of said Southern Railway Company in the county of Davidson, claimed by plaintiff in his declaration as his property. And on 20 and 21 April, 1900, by authority of said court, damages were duly assessed by commissioners appointed by said court, to the said (518) Southern Railway Company for such right and privileges, whose award was reported to said court and filed in the office of the clerk of said court on said 21 April, 1909, to which award no exceptions were filed by the said Southern Railway Company within the time authorized by the statutes of the State of North Carolina, in conduct of said proceedings, for the filing of the same, and at the time of filing the same the said defendant company paid into the office of the clerk of said court for the said railway company the amount of said award, together with the costs in said cause."

The following judgment was rendered:

"This cause coming on to be heard upon the facts admitted in the pleadings and upon the facts admitted by counsel upon the trial and hereto annexed, and the jury having found the issue as follows:

"What permanent damages does plaintiff's land sustain by reason of the existence of defendant's telegraph line across said land within the right of way of the railroad company?

"Answer: '$190.'

"It is adjudged that plaintiff recover of defendant the sum of $190, together with costs of action."

The following facts were admitted by the parties to the action: That the land described in the complaint is the land of plaintiff, subject to the rights and titles of the North Carolina Railroad Com-

pany by virtue of the charter, Laws of North Carolina, 1848-'49, ch. 82, and its lessee, the Southern Railway Company, and that plaintiff acquired his title by deed in May, 1900, which deed covers the land described in the complaint; that in January, 1900, the defendant company constructed a telegraph line across said land within and upon the right of way of the said North Carolina Railway Company, by placing 31 or 32 poles thereon, with telegraph wires overhead thereon;
(519) that so far as the said North Carolina Railroad Company and its lessee, the Southern Railway Company, are concerned, defendant company acquired by condemnation proceedings under the statutes of North Carolina, The Code, ch. 49, the right to construct its telegraph line along and upon the right of way of the said North Carolina Railroad Company and its lessee, the Southern Railway Company, but that neither plaintiff nor those under whom he holds were parties to the said condemnation proceedings; that the said telegraph line was constructed with and by the consent of the Southern Railway Company; that the Southern Railway Company is the lessee of the North Carolina Railroad Company to the entire right of way, property and franchise of said railroad in Davidson County, which lease was made and entered into on __ day of ____, 18__, for a period of 99 years, which lease is properly recorded in the office of the register of deeds for Davidson County; that the North Carolina Railway Company was chartered under the laws of North Carolina, Laws 1848-'49, ch. 82, which act is hereby made a part of this case on appeal; that the defendant company is a corporation duly incorporated under the laws of the State of New York, with authority to construct its telegraph line through the United States, including the State of North Carolina, and along and upon the way of the Southern Railway Company; that the defendant company had, prior to the construction of its line upon the right of way of the Southern Railway Company through Davidson County, duly accepted the provisions of an act of Congress entitled, "An act entitled an act to aid in the construction of telegraph and secure to the Government the use of the same for postal, military and other purposes," approved 24 July, 1866.

From a judgment for the plaintiff, the defendant appealed.

(520) *E. E. Raper for plaintiff.*

J. R. McIntosh, F. H. Busbee and Walser & Walser for defendant.

DOUGLAS, J., after stating the case. The sole purpose of this action is to recover compensation for the appropriation of the plaintiff's property by the defendant under the color of eminent domain. The plaintiff does not seek to eject the defendant, nor to interfere in the slightest

degree with the fullest enjoyment of the easement it claims. He does not threaten or intend to annoy the defendant by a multiplicity of suits, but, on the contrary, he asks the Court, in the exercise of its equitable jurisdiction, to award him such permanent damages as will compensate him for the appropriation of the easement. This being done, the defendant ceases to be a trespasser, and will thereafter remain in the lawful enjoyment of the easement thus acquired. There is, therefore, no question as to whether the defendant shall have the easement, but simply whether he shall pay for it. There is no pretense that the plaintiff, or any former owner of the land, has received any compensation whatever, or that any agreement, or attempt to agree, with such owner was ever made by the defendant, as required by sections 1943 and 2010 of The Code.

It is so well settled that private property can not be taken directly or indirectly, even for a public purpose, without just compensation, that it seems a work of supererogation even to restate the principle. *R. R. v. Davis,* 19 N. C., 451; *S. v. Glen,* 52 N. C., 321; *Cornelius v. Glen,* 52 N. C., 512; *Johnston v. Rankin,* 70 N. C., 550; *Staton v. R. R.,* 111 N. C., 278, 17 L. R. A., 838.

In *Johnston v. Rankin, supra,* this Court says, on page 555: "Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although the clause to that effect in the Constitution of the United States applies only to acts (521) by the United States, and not to the government of the State, yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina."

The learned judge who wrote that opinion was correct in saying that the Fifth Amendment to the Constitution of the United States, to which he evidently referred, was a restriction only upon the power of the United States, and not that of the States; but he overlooked the Fourteenth Amendment, then of recent adoption, under which it has been expressly held that a State can not appropriate private property to public use without compensation. *R. R. v. Chicago,* 166 U. S., 226. In that case the Court says, on page 236: "But if, as this Court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The Legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is

not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, can not convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

(522) Again, the Court says, on page 234: "But a State may not, by any of its agencies, disregard the prohibition of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This Court, recurring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation.'" Citing *Davidson v. New Orleans,* 96 U. S., 97, 102.

It is well settled that the denial of an adequate remedy for enforcing the right is the denial of the right itself, and the adequacy of the remedy must be determined by its practical results.

In *Henderson v. Mayor,* 92 U. S., 259, the Court says: "In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect."

In *Simon v. Craft,* 182 U. S., 427, 436, the Court says: "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied, we are governed by the substance of things, and not by mere form."

These Federal citations become the more important in view of the defendant's claim to its right of way by virtue of its acceptance of the provisions of an act of Congress entitled, "An act to aid in the construction of telegraphs and secure to the Government the use

(523) of the same for postal, military and other purposes," approved 24 July, 1866. For this contention it relies on *Telegraph Co. v. Telegraph Co.,* 96 U. S., 1. Bearing in mind that the question before us is, not whether the defendant shall have its right of way, but whether

it shall pay for it, the case it cites becomes an authority against it. That Court, construing the act, says, on page 11: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of postroads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." And again, on page 12, the Court says: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only National privileges are granted."

So broad a disclaimer should seem to settle the question, and on reason and authority we concur in the effect of the Federal decisions that the act of Congress referred to gives the defendant no right to any part of the land of the plaintiff, or to any use therein. *Tel. Co. v. R. R.*, 6 Bissell, 158; *Tel. Co. v. Tel. Co.*, 9 Bissell, 72.

The defendant again contends that as its poles are located on the right of way of the railroad company, that is, its potential right of way, and as it has acquired its easement from the railroad company by condemnation proceedings under The Code, it owes no further duty to the owner of the land. We can not concur in this view. The land on which the poles are situated is not in the *actual* posses- (524) sion of the railroad company, and apparently never has been. On the contrary, it has been in constant cultivation by the plaintiff and those under whom he holds. The nature of the easement acquired by railroad companies under condemnation proceedings has been too recently considered by this Court to require further discussion. *Shields v. R. R.*, 129 N. C., 1. In that case the Court says, on page 4: "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 is not contended that the lines of the defendant are in any degree essential to the operation of the railroad. On the contrary, it is stated in the opinion of the Court, in the proceedings under which the defendant claims to have acquired its easement, that "the railroad company denies altogether that any benefit or advantage

can arise to it in the erection of the telegraph lines, and, on the contrary, avers that it is detrimental to it in the last degree." *Tel. Co. v. R. R.*, 89 Fed., 190, 196. Under the circumstances, it is clear that the additional easement claimed by the defendant is an additional burden upon the land, for which the owner is entitled to just compensation. *Tel. Co. v. R. R., supra; Dailey v. State,* 51 Ohio St., 348; *Tel. Co. v. Pearce,* 71 Md., 535; Keasbey on Electric Wires, sec. 185.

The Maryland case is an able and elaborate discussion of the entire question.

The kindred question, involving the same principle, of railroads upon streets is fully considered in the well-known cases of *Story*
(525) *v. R. R.*, 90 N. Y., 122, 43 Am. Rep., 146, and *Lahr v. Same,* 104 N. Y., 368, in which it was held that the abutting owners were entitled to compensation for the additional burden imposed upon the streets by the elevated roads. *White v. R. R.*, 113 N. C., 610, 22 L. R. A., 627, 37 Am. St., 639, is also a well-considered case in our own Reports.

The plaintiff was not a party to the condemnation proceedings, nor have any proceedings been instituted against him by the defendant to acquire an easement or any other right. The defendant relies upon that part of section 2010 of The Code which says: "And if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant." Here the defendant stops, but The Code immediately proceeds to say: *"Provided,* that only the interest of such parties as are brought before the court shall be condemned in any such proceedings." By the very terms of the statute, the plaintiff now stands as if no condemnation proceedings had ever been brought.

Again, the defendant contends that the plaintiff should have proceeded to have his damages assessed under chapter 49 of The Code; but section 2010 gives the right to file a petition in condemnation proceedings to the telegraph company alone, and, with section 2011, specifically provides how the proceeding shall be commenced. Section 2012 evidently refers to the proceedings subsequent to the filing of the petition and the service of the required notices. In other words, it refers to the proceedings *after* the parties are all before the court. This is so held, and, we think, correctly held, in *Tel. Co. v. R. R., supra,* wherein the Court says, on page 192: "Inasmuch as section 2010 sets forth all the necessary statements for the petition of the telegraph company, and section 2011 provides for its service, only so much of the
(526) railroad law as directs proceedings after the petition is before the court is made applicable to telegraph companies.

. . . For the same reason, section 1944 can not be made to apply to telegraph companies."

Again, the defendant contends that, as the plaintiff did not own the land when the poles were planted, he can not recover for the appropriation of the easement. This point was directly decided in *Beach v. R. R.*, 120 N. C., 498, a decision which has since been uniformly followed by this Court. A subsequent purchaser can not recover for a *completed* act of injury to the land, as, for instance, the unlawful cutting down of trees; but if the trespasser unlawfully remains upon the land after the sale, or returns and carries away the trees, he becomes liable to the then owner, in the first case as for a continuing trespass, and in the latter for a fresh injury. If, in addition to this, the trespasser seeks to acquire the right to remain, he can do so only by the consent of the owner or under the principle of eminent domain. This is not the perpetration of a wrong, but the lawful acquisition of a right, and the damages incident thereto must be paid to the owner from whom the right is acquired. Aside from this action, the defendant has acquired no easement whatever as against the plaintiff, and if it takes that easement now, it must pay the man from whom it takes it. To say that one may acquire an easement in the land simply by an unlawful entry is an attempted extension of the doctrine of Squatter Sovereignty to an extreme which we feel entirely unable to concede. *Liverman v. R. R.*, 109 N. C., 52; *S. c.*, 114 N. C., 692.

In the case at bar the sole issue of permanent damages was submitted, without objection, and it is evident the parties intended that the case should so end if the plaintiff could maintain this action.

We see no material error in the admission of evidence.

This case does not come under the act of 1895, ch. 224, which applies exclusively to railroads, but we think that permanent damages can be awarded in this action, and the easement (527) thereby conveyed under the principle enunciated in *Ridley v. R.*, *R.*, 118 N. C., 996. This Court has said in *Lassiter v. R. R.*, 126 N. C., 509: "Railroads are *quasi*-public corporations charged with important public duties, which in their very nature necessarily invoke the power of eminent domain; and therefore the courts, with practical unanimity, have created a species of legal condemnation by the allowance of so-called 'permanent damages.' Our leading case upon this subject is *Ridley v. R. R.*, 118 N. C., 996, 22 L. R. A., 708, where, apparently for the first time in this State, the rule is distinctly enunciated and defined. It is further developed and affirmed in *Parker v. R. R.*, 119 N. C., 677; *Beach v. R. R.*, 120 N. C., 498; *Nichols v. R. R.*, 120 N. C., 495; *Hocutt v. R. R.*, 124 N. C., 214. The provision in the act of 1895 incidentally providing for a statutory easement, rather by implication than direct

terms, seems to us to be in effect but little more than a legislative affirmation of the rule already enunciated in other jurisdictions and adopted in *Ridley's case,* which was decided a year after the act was passed."

A parity of reasoning would extend this principle to telegraph companies, as it has already been extended to water companies in *Geer v. Water Co.,* 127 N. C., 349. In that case the Court says, on page 354: "Although not a railroad company, we think that the defendant is a *quasi*-public corporation in its fullest sense, and that neither the public interest nor the public safety would permit its abatement as a nuisance. We see no reason why permanent damages can not be assessed under the general principles in equity, and, in fact, we do not understand that this right is questioned by either party. The awarding such permanent damages is equivalent to the acquisition of an easement by condemnation."

(528) The refusal of the court below to set aside the verdict on account of excessive damages can not be reviewed in this Court. *Goodson v. Mullen,* 92 N. C., 211; *Edwards v. Phifer,* 120 N. C., 405; *Norton v. R. R.,* 122 N. C., 910.

In its answer the defendant alleges "that the defendant is an interstate telegraph company, and all its lines in the State of North Carolina are engaged in interstate commerce, by their connection with other lines of said company, extending to and through all of the States of the Union, and the principal towns and cities therein, and cable lines extending across the Atlantic Ocean into the principal cities of all the nations of the earth." We do not know that we fully comprehend the extent of this allegation, but we can perhaps do no better than to quote the words of *Judge Simonton* in *Tel. Co. v. R. R., supra,* on page 192, as follows: "It is true that the purposes of the petitioner are greatly for the public benefit, that it is an important factor in interstate commerce, one of the agencies—and a most valuable agent—in interstate commerce, and that it is of most essential service to the citizen in time of peace and to the Government in time of war. But the underlying proposition in our civilization and in Anglo-Saxon liberty is the protection of the citizen in the safety of his person and in the undisturbed enjoyment of his property. And when he is called upon to surrender that property against his will for a public purpose, he is entitled to all the safeguards which the law has thrown around the exercise of the tremendous, though wholesome, right of eminent domain." In the absence of material error, the judgment is

Affirmed.

MONTGOMERY, J., dissents.

Cited: *Rice v. R. R., ante,* 379; *Mullen v. Canal Co., ante,* 505; *S. v. New, post,* 737; *Phillips v. Tel. Co.,* 131 N. C., 225; *Hodges v. Tel. Co.,* 133 N. C., 232, 234; *Beal v. R. R.,* 136 N. C., 299; *R. R. v. Land Co.,* 137 N. C., 334; *Brown v. Electric Co.,* 138 N. C., 538; *Brown v. Power Co.,* 140 N. C., 347; *Wade v. Telephone Co.,* 147 N. C., 226; *Staton v. R. R., ibid.,* 435; *Abernathy v. R. R.,* 159 N. C., 344; *Land Co. v. Traction Co.,* 162 N. C., 504; *Caveness v. Tel. Co.,* 172 N. C., 308; *Teeter v. Tel. Co., ibid.,* 785.

(529)

FINGER v. HUNTER.

(Filed 13 June, 1902.)

1. **Husband and Wife—Married Women—Separate Property—Mechanics' Lien—The Code, Secs. 1781, 1826, 1827, 1832—Laws 1901, Ch. 617—The Constitution, Art. X, Sec. 6.**

   Laws 1901, ch. 617, amending The Code, sec. 1781, so as to allow a laborer's lien to be taken on the property of a married woman, is constitutional.

2. **Jurisdiction—Justices of the Peace—Mechanics' Liens—Married Women—Laws 1901, Ch. 617.**

   An action against a married woman for less than $200 for material used in building a house must be brought before a justice of the peace.

ACTION by Finger & Pickens against H. L. Hunter and wife, heard by *Starbuck, J.,* at February Term, 1902, of MECKLENBURG. From a judgment for the defendants, the plaintiffs appealed.

Clarkson & Duls and Plummer Stewart for plaintiffs.
McCall & Nixon for defendants.

CLARK, J. The *feme* defendant, a married woman, bought of plaintiffs certain locks, hinges and sash-cords for the improvement of her house. They were so used and a lien therefor was regularly filed against her said house and lot, and this action is brought against her (her husband being joined) for enforcement of the same. The sole question raised is whether the General Assembly had the power, under the Constitution, to enact chapter 617, Laws 1901. That statute reads as follows:

"Section 1781 of The Code of North Carolina is amended by adding to said section the following: And this section shall apply to the property of married women, when it shall appear that such build- (530) ing or buildings were built or repaired on her land, with her consent or procurement, and in such case she shall be deemed to have contracted for such improvements."

The Constitution, Art. X, sec. 6, provides that a married woman shall retain the same rights over her property as if she were unmarried, the only restriction being that she can not "convey" without the written assent of her husband. The restraints upon her power to "contract" rest upon the statute, not upon the Constitution, and of course can be removed by statute. There is no prohibition upon the Legislature to do so, and, indeed, the Court in many instances has indicated to the Legislature that justice might be facilitated by more liberal legislation in that regard. In *Weir v. Page,* 109 N. C., 220, where the work was done on the wife's house, the contract being made by her husband without her authority, but she saw the work done without objection and appropriated the increased value, the Court said that in justice she ought to be made to pay, but for the statute. The Court, *Davis, J.,* added that a married woman "having in relation to her separate estate all the rights of a *feme sole,* whether and to what extent her protecting disabilities ought to be removed and her liabilities in dealing with her separate estate as to all persons other than her husband, made commensurate with her rights, and whether such alterations in the law would not prevent much injustice and many frauds, are questions to be addressed to the wise consideration and sound discretion of the lawmaking power."

In *Pippen v. Wesson,* 74 N. C., 437, it is said: "The Legislature may abolish all the incapacities of married women and give them full power to contract as *femes sole.*" This is cited with approval in (531) *Bank v. Howell,* 118 N. C., 273, where the Court sets out in full the brief New York statute which confers upon married women the unrestricted power to contract, and broadly intimates to the General Assembly that the passage of a similar statute here "might cure many abuses which now exist, and would be more in accord with the liberal intent of the constitutional provision as to married women. Constitution, Art. X, sec. 6."

The Code, sec. 1827, authorizes a married woman to contract fully, as to all matters, by complying with certain requirements, thus making her a free trader. Section 1832 gives her the same full power without complying with those requirements in certain cases, and this was held constitutional. *Hall v. Walker,* 118 N. C., 377; *Brown v. Brown,* 121 N. C., 8, 38 L. R. A., 242. Section 1826 disables her to make certain contracts without the written assent of her husband, thus recognizing her full power to contract if not thus restrained. These and other sections all show that the restriction upon a married woman's power to contract is statutory, and the General Assembly, when it has moved at all, has gone in the direction of greater freedom to contract.

The defendant contends that, as the Constitution forbids a married woman to "convey" without the written assent of her husband, therefore,

if the General Assembly can empower her to "contract," without the husband's written assent, she can be made liable on her contract (as here), and thus "she can do indirectly what she could not do directly." But the Constitution makers knew the broad distinction between "contracts" and "conveyances," and the Legislature can not be held under inhibition to permit the former because there is a prohibition of the latter. For near two and a half centuries the law has invalidated oral conveyances of land, but it has never been conceived that an oral contract (unless otherwise made invalid) could not be enforced, because to do so might subject the debtor's real property and thus "do indirectly what can not be done directly."

The power of the General Assembly to remove all disabilities upon married women and give them as full power to contract as if single, is stated in *Pippen v. Wesson, supra,* and has been uni- (532) formly recognized down to the present. When the Court has divided on the subject, it has only been whether the Legislature, in a given case, had restricted the power to contract, or, in view of the constitutional provision, had the authority to restrict it.

The proceeding being for a lien under $200, was properly brought in the justice's court. *Smaw v. Cohen,* 95 N. C., 85. Besides, the statute making a married woman in these circumstances liable for her contract, she is liable to an action before a justice of the peace just as she would be if a free trader, or for an antenuptial debt. *Neville v. Pope,* 95 N. C., 346.

Upon the facts found, judgment should have been entered for the plaintiffs.

Reversed.

DOUGLAS, J., concurring in result: I concur in the result of the opinion of the Court upon the understanding that it does not conflict with the previous opinions of this Court, in some of which my own views are fully expressed.

However, there are some expressions in the opinion which do not seem necessary to a decision of the case, and which may be capable of misinterpretation in the future. Hence my motive for concurrence only in the result.

Cited: Smith v. Ingram, 132 N. C., 967; *Harvey v. Johnson,* 133 N. C., 359, 362; *Ball v. Paquin,* 140 N. C., 96, 98; *S. v. Robinson,* 143 N. C., 630; *Witty v. Barham,* 147 N. C., 482; *Bank v. Benbow,* 150 N. C., 785; *Scott v. Ferguson,* 152 N. C., 348; *Payne v. Hack, ibid.,* 601; *Council v. Pridgen,* 153 N. C., 452; *Kearney v. Vann,* 154 N. C., 314; *Stephens v. Hicks,* 156 N. C., 243; *Bachelor v. Norris,* 166 N. C., 508; *Finch v. Cecil,* 170 N. C., 74.

(533)

COBLE v. BEALL.

(Filed 13 June, 1902.)

Banks and Banking—Directors—Stockholders—Fraud—Parties.

Where a shareholder individually sues the directors of a bank for fraudulent and wrongful mismanagement of bank property, the complaint must show that a demand had been made on the directors, or a receiver, if one has been appointed, to bring the action, and they had refused to do so.

ACTION by L. M. Coble against W. P. Beall and others, heard by *Shaw, J.*, at September Term, 1901, of GUILFORD. From a judgment for the plaintiff, the defendants appealed.

Bynum & Bynum for plaintiff.
C. M. Stedman, Scales & Scales and King & Kimball for defendants.

MONTGOMERY, J. This action was brought by the plaintiff, a stockholder in the now insolvent Bank of Guilford, against the defendants, who were formerly directors of the bank, to recover $500 and interest. Upon a careful reading of the complaint it will be seen that only one cause of action is therein set out. It is true that in allegation 15 of the complaint the plaintiff declares that he was induced to take stock in the bank because of statements made by the directors and her confidence in the officers and directors, but she does not allege that the loss of her investment was caused by the falsity and fraudulency of those statements. In fact, the contrary appears, for in allegation 17 she states that upon a subsequent examination of the books of the bank it was disclosed that from 1894, if not earlier, the bank had been insolvent and running at a loss. Her stock was subscribed for in 1891.

(534) The learned counsel for the plaintiff in his brief nowhere alludes to or discusses the case of one fraudulently induced by an officer of a corporation to subscribe to its stock, and who was injured by such fraud. In such a case the offending officer must be liable individually, as well as would the corporation, for such conduct.

The case presented, then, is that of a stockholder in a corporation, who, having an action against the directors of the concern for fraudulently, carelessly and negligently managing its affairs, and by reason of which pecuniary loss was suffered in the deterioration in the value of the stock. A demurrer was filed by the defendants, the second ground of which is as follows: "For that it appears that this action is brought by a single shareholder, and it is not alleged that the plaintiff or other stockholder or shareholder ever applied to the bank or the receiver thereof to bring action for the causes set out in the complaint,

nor that the bank nor the receiver thereof ever refused or declined to bring such action, and that the action is for the alleged negligence and failure of duty of defendants as directors of said bank in the complaint mentioned, which duty the defendants as directors owed to the bank as a corporation and not to this plaintiff or other stockholders as such, and any failure of duty or neglect on the part of the directors as such, as set out in the complaint, does not give the plaintiff or other stockholder a right of action on his or her own behalf alone."

Can the action in its present form be maintained? The directors of the corporation are not the agents of the stockholders, but they are the agents of the corporation, and because there is no privity between directors and stockholders, the latter, whether individually or collectively, could not, under our former practice, through the law courts, have any remedies against the directors for wrongful dealings with the corporate property. 3 Thompson on Corp., 4090. The cause of action stated in this case is one primarily in behalf of the corporation against the directors. The plaintiff alleges that (535) the wrongful conduct of the defendants in the management of the corporate property affected the interest of all stockholders alike, that it was not peculiarly injurious to her individually. But for all wrongs, there was then, as well as now, a remedy, and upon all courts of law refusing to hear such complaints, courts of equity open their doors to to them—construing the directors to be trustees in equity, though not in law. "A court of equity opens its doors to receive him on the ground that unfaithful directors are his trustees, and for the further reason that he has been turned out of a court of law." Thompson, *supra.* Such complainants have the same rights in our present law courts as they then had in the courts of equity. There is one prerequisite, however, and that is that the plaintiff shall show in his complaint that he has demanded of the corporation that it should bring the action, and that the directors had refused to do so, thereby continuing to show their unfaithfulness.

The rule is stated in 3 Thompson on Corp., sec. 4132, to be: "Because the action can not be brought by a depositor or creditor, but must be brought by the corporation or receiver, or at least that it must appear that application has been made to them to bring such action, and that there had been a failure to do so." The same rule is stated in Pomeroy Eq. Jur., sec. 1095: "Wherever the cause of action exists primarily in behalf of the corporation against the directors, officers and others for wrongful dealings with the corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit in the name of the corporation, and the corporation either actually or virtually refuses to institute or prosecute such a

suit, then, in order to prevent failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others."

(536) The reason why the stockholder can not maintain such suit against the directors is that the duties, the breaches of which constitute the ground of action, are duties to the corporation, considered as a legal entity, and not duties to any particular stockholder. 4 Thomp., *supra,* 4476.

The counsel of the plaintiff, in his brief, admitted the correctness of that rule as a general one, but at the same time said that there are a good many exceptions to it, and that this case presents one of the exceptions, because a majority or all of the directors were involved in the charge made by the plaintiff, and it would be useless to ask them to sue themselves. All, or a majority of the directors, it is true, are defendants in this action, and the law, of course, would not require so vain a thing as to require the plaintiff to have demanded of them to bring this action against themselves. But that fact would have to appear in the complaint. "If the facts as alleged show that the defendants charged with a wrongdoing, or some of them, constituted a majority of the directors or managing body at the time of commencing the suit, or that the directors, or a majority thereof, are still under the control of the wrongdoing defendants, so that a refusal of the managing body, if requested, to bring suit in the name of the corporation, may be informed with reasonable certainty, then an action by a stockholder may be maintained without alleging or proving any notice, request, demand or express refusal."

But in this case the complaint shows that the corporation is in the hands of a receiver appointed by the court, and that makes it necessary that demand should have been made on him and that he refuse to bring the suit before the commencement of the present one. "If the corporation is in the hands of a receiver, before the stockholders can maintain such an action it should appear that they have requested the receiver to bring it, and that the request had been refused or neglected. The refusal of the receiver must be averred and proved."

(537) The counsel of the plaintiff relied on the decisions of this Court in *Solomon v. Bates,* 118 N. C., 311, 54 Am. St., 725; *Tate v. Bates, ibid.,* 287, 54 Am. St., 719; *Townsend v. Williams,* 117 N. C., 330; *Houston v. Thornton,* 122 N. C., 365. There may be expressions in those opinions which, if taken in detached sentences, might seem liable to the construction put upon them by the counsel of the plaintiff; but the matter for decision in this case, to wit, the right of a stockholder individually to sue the directors of a corporation for fraudulent and wrongful mismanagement of the corporate property,

without first having made a demand on the directors to bring the action, and their refusal to do so, was not the question before the Court for decision in the cases last above referred to. In the first three of those cases the actions were brought by individual depositors against the officers of the defendants for fraudulently inducing the plaintiffs to make deposits of money in the banks of the defendants, the banks being insolvent at the time; and in the last-mentioned case the plaintiff was induced to take stock in the defendant corporation by the device of circulars issued by the defendant, containing statements false and fraudulent. Those causes of action were founded upon injuries peculiar to the plaintiffs themselves, and any recovery in them could not have passed to the directors for the benefit of the corporation, and indirectly for the benefit of the other depositors.

For the reasons mentioned, the action can not be maintained, and his Honor erred in not sustaining the demurrer.

Error.

---

(538)

HARPER v. ANDERSON.

(Filed 13 June, 1902.)

1. **Boundaries—Description—Deeds—Questions for Jury.**
   Where a person wills two tracts of land, as the "Dickens" and "Micajah Anderson" tracts, and there is contradictory evidence as to what land is covered by these two tracts, such evidence should be submitted to the jury.

2. **Evidence—Partition Proceedings—Boundaries.**
   Where there is a dispute as to the boundaries of a tract of land, the survey and plat of the land, in a partition proceeding, is not competent evidence in another action in which one of the parties was not a party to the partition proceedings.

3. **Evidence—Sufficiency—Verdict—Directing.**
   A trial judge may say to a jury there is no evidence tending to prove a fact, but he can never say a fact is proved.

ACTION by Adrian Harper and wife against J. H. Anderson, heard by *Timberlake, J.*, and a jury, at October Term, 1901, of EDGECOMBE. From a judgment for the plaintiffs, the defendant appealed.

John L. Bridgers for plaintiffs.
G. M. T. Fountain for defendant.

CLARK, J. Thomas Anderson bought two adjoining tracts of land, the "Dickens tract" and "Micajah Anderson tract," at different times and under distinct deeds, describing each tract by metes and bounds. At

his death in 1898 he devised the "Dickens" land to plaintiff and her brother, Micajah Anderson, and by decree in partition proceedings the same was afterwards divided, the defendant not being a party. The "Micajah Anderson tract" was devised to the defendant, who has remained in possession of the *locus in quo*. It was in evidence that
(539) Thomas Anderson cleared up the *locus in quo*, and cut a canal, which differed from the boundary between the aforesaid tracts, and there was evidence by the defendant that, thereafter, Thomas Anderson always called the land south of and up to the canal the "Micajah Anderson" land, and the land north of the canal and up to the canal the "Dickens land." The *locus in quo* is eight acres on the south side of the canal, and the survey made under the order of the court showed that it was within the boundaries of the original "Dickens" land, as described in the deed therefor. There was also evidence tending to show that it was within the bounds of the original "Micajah Anderson" tract, as described in the deed therefor.

It was in evidence both by plaintiff and defendant that Thomas Anderson (their father) put the plaintiff in possession of the Dickens land up to the canal thirteen years before his death, and put the defendant in possession of the Micajah Anderson tract up to the canal eighteen years before his death, and they remained on the opposite sides, cultivating the land up to the canal, as their common boundary, up to Thomas Anderson's death, neither being required to pay rent.

The plaintiff introduced in evidence a survey and plat of the division of the Dickens land between the plaintiff and her brother, to show title in the plaintiff, and that the description in the Dickens deed covered the *locus in quo*. Defendant's objection was overruled, and he excepted. There was error, for defendant was not a party to that proceeding, and is in nowise bound by it.

At the close of the evidence, "the judge was of the opinion that plaintiff was entitled to recover, and charged the jury to find for the plaintiff, which was done by the judge answering the issue for the jury." This was error. The question for the jury was not that of two parties claiming under distinct deeds, where the boundaries of the deeds must govern, but here the title came from the same source, the will of their
(540) father. The question is, What did he mean when he spoke of the "Dickens" land and the "Micajah Anderson" land? Whether the *locus in quo* was intended by him to be embraced in one or the other, was not to be determined solely by whether it was included within the bounds of the one or the other deed, but that fact must be taken into consideration, together with the admission that he had made the canal a new boundary, putting one devisee in possession up to the canal on one side for eighteen years before his death, and the other on the other side

up to the canal for thirteen years, thus treating it as a new boundary, and the evidence that, after digging the canal, Thomas Anderson always termed the land on one side thereof the "Dickens" land, and that on the other the "Micajah Anderson" land. *Peebles v. Graham,* 128 N. C., 222. This, if found true by the jury, would be very pregnant, if not conclusive, evidence that the testator had that division in mind in writing his will, especially taken in connection with the admitted long possession of the respective devisees up to the canal as the dividing line. Where the boundary is, is a fact to be decided by the jury. *Clark v. Wagoner,* 70 N. C., 706. Besides, "A judge may say to a jury there is no evidence tending to prove a fact, but he can never say a fact is proved." *Cox v. R. R.,* 123 N. C., 604.

Error.

Cited: S. c., 132 N. C., 89; *Gaylord v. McCoy,* 158 N. C., 327.

---

(541)

LEWIS v. COVINGTON.

(Filed 20 May, 1902.)

1. **References—Findings by Court—Exceptions and Objections.**
   Where the exceptions to the findings of fact of a referee are that the findings are contrary to the weight of evidence, or not supported by the evidence, the Supreme Court will not review them.

2. **Adverse Possession—Color of Title.**
   The adverse possession of a portion of a tract of land to which claimant has a good title is not adverse as to another part of the same tract included in the deed, but not actually occupied, and to which he claimed title by possession under color of title.

ACTIONS by Abraham Lewis and James Overby against J. R. Covington and M. F. Overby, and R. W. George against heirs of James Overby, heard by *Starbuck, J.,* at October Term, 1901, of STOKES. The cases were consolidated, and from the judgment for the plaintiffs in the first action and the defendants in the second action, defendants in the first action and plaintiffs in the second appealed.

Glenn, Manly & Hendren, J. T. Morehead, and E. L. Gaither for appellants.

Watson, Buxton & Watson for appellees.

FURCHES, C. J. This is an action of ejectment and has been here before—reported in 126 N. C., 347, as *Lewis v. Overby.* When here before a new trial was awarded the defendant, which resulted in a

judgment for the plaintiff, and the defendant again appealed. The case, by consent, was referred to commissioners, and was tried upon their report and exceptions thereto. When the case was here before a (542) new trial was granted because it was held below that the defendant's possession and that of those under whom he claimed must have been continuous in order to take the title out of the State. After the opinion of this Court was certified to the court below the case was recommitted to the same referees, and they filed another report, which was again excepted to by the defendant. But the court overruled the exceptions, adopted the findings of fact by the referees, and also adopted the rulings of the commissioners upon the questions of law arising upon the facts so found. The exceptions of the defendant to the findings of fact by the referees are, that said findings are contrary to the weight of evidence, or that they are not supported by the evidence. But none of the exceptions are put upon the ground that there was *no evidence* to support them. And this being so, we have no right to review them, and must take them as found by the referees and the presiding judge. *Gudger v. Baird,* 66 N. C., 438; *Battle v. Mayo,* 102 N. C., 413.

In 1795 Gotlieb Shober obtained two grants from the State, one for 1,280 acres and the other for 1,920 acres. These lands he sold to "Tim" Pickering, and afterwards, in 1815, they were sold by Banner, sheriff, for taxes and bought by A. D. Murphy. The deed from Banner, sheriff, to Murphy, contained but one boundary, and included a large quantity of land not included in either of the grants from the State to Shober. The plaintiff contends that the land in controversy had never been granted until December, 1888, when it was granted to him. The commissioners find that the defendant has acquired the title conveyed by Banner, sheriff, to Murphy; that the deed from Banner to Murphy and the mesne conveyances from Murphy to the defendant cover the land in controversy. But the grant for 1,280 acres covers no part of the land in controversy, and the 1,920-acre grant covers only a very small border on one side of the land in controversy. They further find that the (543) defendant and those under whom he claims have had actual possession of the lands included in the 1,280-acre grant for more than twenty-one years. But they have not had actual possession of any part of the land contained in the Banner deed to Murphy, *outside* of the two grants to Shober, for as much as twenty years, and that the plaintiff's grant of 1888 covers the land in dispute. From these facts they conclude as a matter of law that the plaintiff is entitled to recover.

The defendant contends that there is error in the finding; that the plaintiff and those under whom he claims have not had the actual possession of the land in controversy for more than twenty years, under the rule laid down by this Court; and that this error appears from the

finding of fact No. 9, which is as follows: "That the defendants and those under whom they claim have had adverse possession for more than twenty-one years of the lands embraced in the 1,280-acre grant to Gotlieb Shober." And defendant claims that the land in controversy and the 1,280-acre grant to Shober are both within the boundary of the Banner deed and the other deeds of mesne conveyances to him; that the possession of any part of the land included within the boundary of the Banner deed is the possession of the whole. And, therefore, while the commissioners *say* they find that he has not been in possession of the land in controversy for as much as twenty years, *the facts they find* show that he and those under whom he claims have been in actual possession for twenty-one years.

In this contention the defendant is in error. If the defendant had had no title, except that derived from the sheriff's deed, his contention would have been correct; but the trouble is he had a good title to that part of the boundary of which he had the actual possession. And the rule is, to ripen a colorable title into a good title, there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action of ejectment. *This is said to be the test.* (544) *Everett v. Newton,* 118 N. C., 919; *Osborne v. Johnson,* 65 N. C., 22; *Worth v. Simmons,* 121 N. C., 357. Suppose the defendant had been sued for the possession of the land in dispute, the action would have failed, as it would have been necessary to show that the defendant was in possession of the land sued for, and this could not be done, as the defendant was in possession of land to which he had a good title. Suppose the complaint had included the whole boundary embraced by the defendant's deeds from Sheriff Banner, and the plaintiff had shown that the defendant was living on the 1,280-acre Shober grant, the action would have again failed, for the reason that the defendant was the rightful owner of this grant and had the right to occupy and use the same. The State is in legal contemplation in possession of all ungranted lands, not in the actual possession of some one.

It is, therefore, seen that the defendant has never been exposed to an action of ejectment, which is laid down as *the test.* And, singular as it may appear to laymen, it seems that the defendant would have been better off if he had not had a good title to the 1,280 acres and the 1,920 acres granted to Shober, or any of the land he claims, than he is. Or, to express it in other words, he did not become the owner of the land in controversy because he was the owner of the other two tracts.

There is no error and the judgment is

Affirmed.

Cited: Dargan v. R. R., 131 N. C., 634; *Williams v. Hyman,* 153 N. C., 167; *Jeffords v. Waterworks Co.,* 157 N. C., 13; *Elliott v. R. R.,* 169 N. C., 396.

(545)

LACY v. WEBB.

(Filed 20 May, 1902.)

Parties—State Treasurer—The Code, Sec. 3359.

Where a State Treasurer goes out of office pending a suit by him in his official capacity, the incoming Treasurer is entitled to be made a party in his stead.

ACTION by B. R. Lacy against T. M. Webb and others, heard by *Justice, J.*, at October Term, 1901, of BURKE. From a judgment for the defendant, the plaintiff appealed.

F. H. Busbee for plaintiff.
J. T. Perkins and Justice & Pless for defendant.

CLARK, J. This was an action brought by W. H. Worth in his official capacity on a bond given by the Piedmont Bank to E. S. Walton, deputy treasurer, to secure certain moneys of the State deposited in said bank, to be drawn out in favor of the Deaf and Dumb School and Western Hospital. The matter was referred to Armistead Burwell, referee, who ascertained and reported the balance due. B. R. Lacy, who had succeeded to the office of Public Treasurer, came into court at August Term, 1901, of BURKE, and made himself party plaintiff, and adopted the pleadings theretofore filed in the cause. The defendant excepted to this order, and at the next term of said court defendant moved to dismiss this action, which motion was allowed, and the Public Treasurer appealed.

The money belonged to the State of North Carolina. The bond given to E. S. Walton, deputy treasurer, was given to secure its safe
(546) custody and payment to the State or under its direction. The State Treasurer is authorized (The Code, sec. 3359) "to demand, sue for, collect and receive all money and property of the State, not held by some person under authority of law." The bond to E. S. Walton, deputy treasurer, to secure the safe-keeping of the State's funds inured to the benefit of the State, and being the "real party in interest," the State could maintain an action thereon in the name of its Public Treasurer for the time being. Neither Walton, nor Worth, nor Lacy has any personal interest in the matter, and the latter can maintain the action only as representative of the State. The authorities prior to The Code, sec. 177, have no bearing, for that section was enacted to cure the technicalities of the former law and rulings, and give the action in every case to "the real party in interest," which is here the State. Somewhat analogous cases are *Speight v. Staton,* 104 N. C., 44, and *Peebles v. Boone,* 116 N. C., 57, 44 Am. St., 429. If the State had been nothing

more than the beneficiary of the bond, it could maintain this action. *Gorrell v. Water Co.,* 124 N. C., 328, 46 L. R. A., 513, 70 Am. St., 598. But this case is stronger, for the bond to Walton, deputy treasurer, was a bond to secure the State, as the party in interest, and as such it can maintain this action in the name of its Public Treasurer for the time being. It is not a case either of subrogation or substitution. There is but one party, the State, who appears in the name of its successive agents, as provided by statute.

Error.

Cited: Gastonia v. Engineering Co., 131 N. C., 368; *Voorhees v. Porter,* 134 N. C., 604; *Jones v. Water Co.,* 135 N. C., 554; *Wood v. Kincaid,* 144 N. C., 395; *Morton v. Water Co.,* 168 N. C., 585, 591.

---

(547)

CLINARD v. BRUMMELL.

(Filed 20 May, 1902.)

1. **Partition—Commissioners—Report.**

The report of commissioners in partition proceedings, dividing land, when filed, approved, confirmed, recorded and registered, becomes muniment of title, and the commissioners, without the order and approval of the court, have no right to alter or change the same.

2. **Partition—Commissioners—Report.**

When commissioners to partition land make and file their report, their duties are ended, and they are *functi officio,* unless they act under a new order of the court.

ACTION by Alexander Clinard and others against Jane Brummell, heard by *Shaw, J.,* and a jury, at February Term, 1902, of DAVIDSON. From a judgment for the defendant, the plaintiffs appealed.

E. E. Raper for plaintiffs.
J. R. McCrary for defendant.

FURCHES, C. J. This is an action of ejectment for the following-described tract or parcel of land: "Beginning at a stone, The Widow's corner, thence S. 28 W. 14.75 chains to a stone in the lane, her corner; thence E. 16.50 chains to a white oak, formerly Philip Ball's corner; thence N. 12.75 chains to a stone, formerly Milton Sledge's corner; thence W. 50 links to a white oak, Riggan's corner; thence N. 88 W. 9.86 chains to the beginning corner, containing 15 9-10 acres, more or

less." Defendant answered, denied that the plaintiffs were the owners of the land, and pleaded specially the statute of limitations. It was shown that this land belonged to Alexander Clinard, who died in
(548) 1845. In 1856 the lands of the said Alexander Clinard were partitioned between his heirs at law under an order of the Court of Pleas and Quarter Sessions, reported to November Term, 1856, and confirmed. The plaintiffs, for the purpose of making out their title, introduced this report in evidence; and it shows that this tract or parcel of land sued for was allotted and assigned to the plaintiff Philip Clinard as lot No. 5, and lot No. 7, which is a different tract and boundary, was allotted and assigned to Franklin Eberhardt.

There appears to be an affidavit filed in February, 1857, alleging that No. 5 should have been assigned to Franklin Eberhardt, and No. 7 to the plaintiff Philip Clinard, asking for a rehearing. And on the back of this affidavit is the following entry: "Affidavit for rehearing of report of division of lands, Alexander Clinard's heirs." On the same sheet of paper appears the following entry: "We, the undersigned commissioners, make the following amendment to this report: That lot No. 5 be assigned to Franklin Eberhardt, and that lot No. 7 be assigned to Philip Clinard, all of which is respectfully submitted under our hands and seals, this 12 February, 1857. (Signed) B. F. Stone, Seal. John Delap, Seal. Chas. Hoover, Seal." The original report was signed by Chas. Hoover, Seal. Richard Jiams, Seal. B. F. Stone, Seal. John Delap, Seal.

The report as originally made was properly recorded and registered, and there is nothing to show that what is claimed as the amended report was ever acted upon by the court or recorded or registered.

The plaintiff's theory is that Franklin Eberhardt only took a life estate as tenant by the curtesy, and plaintiff had no right of action until the death of Franklin Eberhardt in 1890, and no statute of limitations or presumption of title ran against them until that time.

This is so, if Franklin Eberhardt acquired title to it as tenant
(549) by the curtesy. But to do this the plaintiff must show that it was his wife's land. This they have failed to do, unless they have shown it by what they termed the amended report, as the original report gives the land sued for to Philip Clinard. We do not think the amended report, as it is called, can be sustained. The affidavit asking for the amendment certainly did not have the effect to change the report already made and confirmed; nor do we think the fact that three of the commissioners got together and undertook to make the amendment—to change the report without the order and approval of the court—can have the effect to amend or alter the report that had been made, filed, affirmed, recorded and registered. When the commissioners made their report and filed the same, their duties were ended and they were *functi officio,* unless

they acted under a new order of the court. And the original report, when made, approved, confirmed, recorded and registered, became a muniment of title, and the commissioners, without the order and approval of the court, had no more right to alter or change it than they would have had to change a deed without authority to do so. And if Franklin Eberhardt had no *estate* in this tract of land, there was nothing to prevent the statute from running; and as it is admitted that the defendant and those under whom he claims have held possession of the same under color of title for thirty years or more, his title has ripened into a perfect title, and the plaintiff can not recover.

The judgment of the court below is

Affirmed.

---

(550)

BARGER v. CITY OF HICKORY.

(Filed 27 May, 1902.)

1. Municipal Corporations—Sewer—Nuisance—Negligence—Damages.

Where, in an action against a city for a nuisance caused by a sewer, put in some years before by the employees of the city, the damages claimed arise solely from its use by a private person, the city is not liable.

2. Municipal Corporations—Ultra Vires—Nuisance.

The putting in of a sewer by a board of aldermen of a city for the use of a private person, unauthorized by the charter, is *ultra vires*, and the aldermen individually, and not the city, are liable for a nuisance arising therefrom.

DOUGLAS, J., dissenting.

ACTION by Simeon Barger against the city of Hickory, heard by *Hoke, J.*, and a jury, at February Term, 1902, of CATAWBA. From a judgment for the plaintiff, the defendant appealed.

No counsel for plaintiff.
Self & Whitener and Thomas M. Hufham for defendants.

CLARK, J. This action, begun before a justice of the peace, is for damages from a nuisance caused by a sewer leading from the Hickory Inn, a private enterprise. The plaintiff testified that there was no drainage of filth through the pipe from the city, but only from the Hickory Inn—"nothing bothers witness that comes from the city, and only damage done to witness is the drainage that comes from Hickory Inn." It

is apparent from this that the plaintiff's remedy is against the owners of Hickory Inn for damages, or by injunction, or both, and the court should have granted the motion to nonsuit plaintiff at the close of the evidence. In the language of the late *Chief Justice Pearson,* the plaintiff "has the wrong sow by the ear."

(551) The only evidence offered against the city is that some of its employees, with authority of its board of aldermen, put in, or aided to construct, the sewer years ago. But the damage arises not from putting the sewer in, but from its use now by the Hickory Inn. Besides, the putting in a sewer to the hotel was an *ultra vires* act of the aldermen, unauthorized by the charter of the city, and if that were the cause of action, the liability, if any, would rest upon the aldermen individually and not upon the taxpayers of the city, from whom the aldermen had no authority to act in putting in a sewer to a hotel in which the city had no interest. Dillon Mun. Corp. (4 Ed.), secs. 89-92, 457, 969-970, the last-named sections more especially.

Error.

DOUGLAS, J., dissenting: I concur in the opinion of the Court as to the individual liability of the aldermen, but I do not see why the city of Hickory should not also be liable under the circumstances of this case. It appears that some years ago the board of aldermen, in order to provide for the sewage from Hickory Inn, constructed a sewer through the hotel lot, across the street, and through the lots of several parties, including the plaintiff, into a branch. A part of this sewer was constructed of terra-cotta pipes, and the remainder of wooden boxes or trunks. These latter naturally rotted out in course of time, causing the dirt to cave in and ponding the sewage on the plaintiff's land, thus creating an intolerable nuisance. This nuisance is the direct and natural result of the improper construction of the sewer by the city authorities, as well as their failure to keep it in proper repair. In other words, the city created the nuisance.

The opinion of the Court says, quoting *Chief Justice Pearson,* that the plaintiff "has the wrong sow by the ear." If a man's garden is rooted up and destroyed, he has the right to take some sow by

(552) the ear, and it seems to me that the proper sow to catch is the sow that has done the rooting. The Court cites sections 969 and 970 of Dillon on Municipal Corporations, but it seems to me that it is the following section (971) which directly applies to the case at bar. This section says: "Cases such as those thus mentioned are to be *distinguished from others* which resemble them in the circumstance relating to wrongful acts, but which arise out of matters or transactions *within the general powers* of the corporation, and in respect of which

there may be a corporate liability. Thus, if in exercising its power to open or improve streets, or to make drains and sewers, the agents or officers of a municipal corporation, under its authority, or direction, *commit a trespass upon or take possession of private property* without complying with the charter or statute, the corporation is liable in damages therefor. In such cases, also, an action will lie against a city corporation by the owner of land through which its agents have unlawfully made a sewer, or for trees destroyed and injury done by them." In section 1045 it is said: . . . "And, therefore, the city is liable for an injury to the premises of the plaintiff by flooding it with water, not only where such injury is caused by neglect to keep the sewer in repair, but as well where it is the negligent or necessary result of the constructing of the sewer." In both sections the italics are those of the author.

In Wood's Law of Nuisance, sec. 748, it is said: "A municipal corporation is liable to indictment for a public nuisance maintained by it, and is also liable for damages at the suit of an individual who sustains special damages therefrom."

In *Harper v. Milwaukee,* 30 Wis., 365, 372, the Court says: "The general rule of law is that a municipal corporation has no more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corpora- (553) tion for injuries occasioned by a nuisance for which it is responsible in any case in which under like circumstances, an action could be maintained against an individual." Numerous authorities are cited.

In *Ashley v. Port Huron,* 35 Mich., 296, 301, in an able and elaborate opinion by *Chief Justice Cooley,* the Court says: "It is very manifest from this reference to authorities that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual

taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other."

Among the cases cited by *Judge Cooley* is *Pumpelly v. Green Bay Co.*, 13 Wallace, 166, where an elaborate opinion is delivered by *Justice Miller*.

The recovery in the case at bar was only $25, and I am at a loss to understand why the city did not abate the nuisance, which could (554) apparently have been done at little cost, instead of incurring the expense of defending the case through all the courts. It is evident that the plaintiff has suffered a substantial injury, for which some one should be liable, and I see no reason why the city, whose agents created the nuisance and caused the damage, should not be liable as a joint tort feasor.

Cited: Graded School v. McDowell, 137 N. C., 319.

FULLER v. JENKINS.

(Filed 27 May, 1902.)

Mortgages—Redemption—Deeds—Fraud—Mistake—Undue Advantage.

Where it is agreed between the grantor and grantee at the time a deed is delivered that it should operate as a mortgage, the grantor is entitled to have the deed declared a mortgage, although the redemption clause was not omitted by ignorance, mistake, fraud, or undue advantage.

ACTION by Lee Fuller against H. T. Jenkins, heard by *Jones, J.*, and a jury, at July Term, 1901, of SWAIN. From a judgment for the defendant the plaintiff appealed.

A. M. Fry for plaintiff.
No counsel for defendant.

CLARK, J. This was an action to have a deed declared a mortgage to secure a loan for $30. The issues were found as follows:

1. Was it understood and agreed between the plaintiff and the defendant, at the time the deed was delivered, that the defendant should hold the same to be a security for the money paid by the defendant for the plaintiff? Answer: Yes.

2. Was the clause of redemption omitted from said deed by reason of ignorance, mistake, fraud or undue advantage? Answer: No.

3. What amount, if any, is the defendant indebted to the (555) plaintiff for rent of said property? Answer: $30.

Upon these findings the court entered judgment in favor of the defendant. In this there was error.

In the recent cases of *Watkins v. Williams,* 123 N. C., 170; *Porter v. White,* 128 N. C., 42, and *Waters v. Crabtree,* 105 N. C., 394, it was held that the facts found in the first issue above would entitle plaintiff to a decree irrespective of the finding as to the state of facts presented by second issue above. Both issues are presented by the pleadings, and the issues were submitted without objection. There is no exception to the charge, nor as to sufficiency or intensity of the proof. There was evidence that the land conveyed was worth $200, and that its annual rental value was $33. There was other evidence sufficient to be submitted to the jury. The only question before us, however, is as to the judgment upon the verdict.

Upon the issues found a decree should have been entered for the plaintiff that upon repayment of the original loan of $30, with interest, after deduction of the rent found to be due the plaintiff by the third issue, the defendant should reconvey, and in default of payment by plaintiff of balance due by a day named, there should be a foreclosure.

Reversed.

Cited: Helms v. Helms, 135 N. C., 176; *Evans v. Brendle,* 173 N. C., 156, 160.

(556)

SIMS v. NORFOLK AND WESTERN RAILROAD COMPANY.

(Filed 27 May, 1902.)

1. **Licenses—Taxation—Interstate Commerce—Sewing Machines—Laws 1901, Ch. 9, Sec. 52.**

   Where sewing machines are shipped into the State to be delivered to the consignee upon payment of the purchase price, the seller is liable for the license tax due under Laws 1901, ch. 9, sec. 52.

2. **Licenses—Taxation—Collection—Levy—Laws 1901, Ch. 9, Sec. 101.**

   A sewing machine shipped into the State on bill of lading, to be delivered to the consignee upon the payment of purchase money, may be levied upon by the sheriff before delivery to the consignee, for failure to pay license tax due under Laws 1901, ch. 9, sec. 101.

ACTION by J. R. Sims, sheriff, against the Norfolk and Western Railroad Company and Mrs. O. L. Satterfield, heard by *Neal, J.,* at chambers, at Durham, N. C., 7 January, 1902. From a judgment for the plaintiff, the defendants appealed.

Robert D. Gilmer, Attorney-General, and Shepherd & Shepherd for plaintiff.

Guthrie & Guthrie for defendants.

CLARK, J. Laws 1901, ch. 9, sec. 52, provides that "Every manufacturer of sewing machines, and every person or persons or corporation engaged in the business of selling the same in this State shall, before selling or offering for sale any such machine, pay to the State Treasurer a tax of $350 and obtain a license," and makes the failure to do so a misdemeanor.

By the "facts agreed" in this case it appears that Sears, Roebuck & Co., of Chicago, have not paid said tax nor obtained a license, (557) and that prior to this transaction they had made several deliveries at various points in North Carolina on the lines of other interstate railroads running into this State, and that all these shipments, like the one here in question, were made on bills of lading providing that the sewing machine should not be delivered till it was paid for by the person named as consignee.

Thus the title could not pass till such payment was made to the common carrier, acting as agent of the shipper. This was an executory contract in Illinois, but there was no sale till the payment was made, and thus the sale was executed in North Carolina, and the shippers are liable to the above tax. The title to this machine having remained in the shipper until such payment (Tiedeman on Sales, secs. 95, 97), the machine was properly levied on before such payment for the license tax due by the shippers. Laws 1901, ch. 9, sec. 101 (last paragraph of section).

The well-known case of *O'Neal v. Vermont,* 144 U. S., 324, is decisive of the point. There, in the shipment of liquor from New York into Vermont, c. o. d., it was held that the completed executory contract was in New York, but the completed sale was in Vermont—as here.

Ober v. Smith, 78 N. C., 313; *S. v. Groves,* 121 N. C., 632, relied on by defendants, were cases of an unconditional delivery to the common carrier, and of course the title passed to the consignee upon delivery to the carrier. *S. v. Wernwag,* 116 N. C., 1061, 28 L. R. A., 297, 47 Am. St., 873, is much like the present case.

No error.

Cited: Collier v. Burgin, post, 635.

Reversed: On writ of error, *R. R. v. Sims,* 191 U. S., 441.

(558)

PERRY v. COMMISSIONERS OF CHATHAM COUNTY.

(Filed 27 May, 1902.)

1. **Stock Law—Fences—Animals—Laws 1901, Ch. 531.**

Under Laws 1901, ch. 531, providing for the establishment of a stock law upon petition of a majority of the landowners, persons living in stock-law territory included in the district covered by the petition may join in the petition.

2. **Public Officers—County Commissioners—Mandamus—Appeal—Stock Law.**

Where county commissioners refuse to grant a petition to establish a stock law, as required by Laws 1901, ch. 351, and no appeal provided, writ of mandamus may be brought in Superior Court to compel them to grant the petition.

3. **Parties.**

Where a complaint avers that the petitioners for a stock law are resident landowners in the territory named, and that the petition was signed by a majority of the landowners in the proposed stock-law territory, the petitioners are the proper parties to compel the granting of the petition.

4. **Mandamus—Alternative—Laws 1901, Ch. 531.**

A mandamus to compel county commissioners to establish stock law under Laws 1901, ch. 531, should be peremptory.

5. **Pleadings—Demurrer—Answer—The Code, Sec. 272.**

Where a demurrer, being interposed in good faith, is overruled, the defendant is entitled to plead over, if the request to do so is made at that term, and may also appeal from overruling the demurrer.

ACTION by T. H. Perry and others against the Board of Commissioners of Chatham County, heard by *McNeill, J.*, at chambers, at Pittsboro, N. C., 8 February, 1902. From a judgment for the plaintiffs, the defendants appealed.

H. A. London for plaintiffs.
Womack & Hayes for defendants.

CLARK, J. It is enacted by chapter 531, Laws 1901, that "the (559) Board of Commissioners of Chatham County, upon the petition of a majority of landowners residing in any part or territory of said county, are hereby directed to establish the stock law in such territory, to take effect at such time as may be designated in such petition."

The complaint in this action, brought by Theodore H. Perry and others, avers that such petition for the territory designated therein was signed by a majority of the landowners residing in said territory and was presented to the defendants, commissioners of said county, at their regular meeting in January, 1902, and that the defendants in their order

refusing the petition adjudged that said petition was signed by a majority of the landowners residing in said described territory, but refused to establish the stock law therein because, in part of said territory, the stock law had already been established, and, without the signatures of landowners residing in that part of the territory, the petition would not have a majority of landowners resident in said territory. The plaintiffs ask for a mandamus to the defendants forthwith to establish the stock law in said territory. The reason given by defendants for their refusal is invalid, and has already been so adjudged in *Smalley v. Commissioners,* 122 N. C., 607. If there is anything inequitable in this, it is due to the wording of the statute, which was passed after the same construction had been placed on similar language in that case, and its enactment must be taken to have been with knowledge of that decision. For that reason, probably, the defendants who demurred rested their argument on the additional grounds:

1. That plaintiffs' remedy was by *certiorari.* There being no appeal provided, the plaintiffs might have elected to take the case up by *certiorari,* and have asked for a *procedendo* to the commissioners. *Hillsboro v. Smith,* 110 N. C., 417. But this is not imperative, like an appeal (560) when one lies, and plaintiffs could, if they so elect, bring this action and ask, as in all similar cases, for mandamus to compel public officers to obey a plain duty prescribed by statute.

2. That the court could not control the exercise of judicial powers, and it is the duty of the commissioners to pass upon the petitioners and ascertain whether they are adult landowners resident in said limits, and not infants, idiots and lunatics. But the order made by defendants, set out in the complaint and admitted by the demurrer, adjudged that the petition was "signed by a majority of the landowners residing within the following-described territory in Chatham County, asking for the establishment of a no-fence law therein."

3. That the plaintiffs were not interested, as it does not appear they were resident landowners. The action is in the name of Theodore H. Perry and others, resident landowners in two townships named, and while these township limits may perhaps not be identical with those of the proposed stock-law territory, the complaint avers that the petition was signed by a majority of the resident landowners in said proposed stock-law territory. This is admitted, and as the petition of Perry and others is in behalf of themselves and such landowners of the territory who have been adjudged a majority of the landowners resident therein, it sufficiently appears that the action is prosecuted *bona fide* in behalf of such petitioners.

It is objected that an alternative mandamus should first issue. This is true where the adjudication of the plaintiff's rights is not conclusive

that the mandamus should issue, as where, though an indebtedness is adjudged valid, on return to the alternative mandamus, it may appear that the county or municipality can not raise the funds, after paying necessary current expenses, without special legislative authority, which has not been obtained. Here, the decision of the right to the order is on the whole merits, and no other defense, from the nature of things, can be set up to an alternative mandamus than is already raised.

The last objection is that, after the decision of the demurrer, (561) the court should have allowed the defendants to answer. This is true, if the defendant had so requested at that term and the court had found that the demurrer had been interposed in good faith. *Bronson v. Insurance Co.*, 85 N. C., 411; *Gore v. Davis,* 124 N. C., 234. Upon the demurrer being overruled, the defendants should (if they so desired) have asked leave to answer over, and could also have appealed from overruling the demurrer. When the judgment overruling a demurrer is sustained on appeal, then on the case going back the defendant can file an answer. But here the defendants did not ask such leave, and doubtless the whole defense is the propositions of law presented by the demurrer, for all the facts essential to the plaintiffs are found and adjudged by the defendants in their order refusing the petition, which order is set out in full in the complaint in this action.

In adjudging that a peremptory mandamus issue there was
No error.

Cited: Dickson v. Perkins, 172 N. C., 362.

---

(562)

BROOM v. BROOM.

(Filed 27 May, 1902.)

1. Evidence—Incompetent—Exceptions and Objections—Husband and Wife—Witnesses.

Exceptions to evidence made incompetent by statute may be taken after verdict.

2. Witnesses—Evidence—The Code, Sec. 588—Divorce.

Under The Code, sec. 588, a wife, sued for divorce for adultery, is competent to deny the evidence of witnesses that she was guilty of adultery with them.

3. Evidence—Divorce—Fornication and Adultery.

In an action for divorce, the want of issue after the alleged adulterous intercourse is a slight circumstance for the jury going to disprove the adultery.

BROOM *v.* BROOM.

ACTION by A. H. Broom against Almetta V. Broom, heard by *Robinson, J.*, and a jury, at January Term, 1901, of UNION. From a judgment for the defendant, the plaintiff appealed.

Adams & Jerome and R. L. Stevens for plaintiff.
Redwine & Stack and Burwell, Walker & Cansler for defendant.

CLARK, J. This is an action by the husband for divorce. Two witnesses introduced by plaintiff testified each for himself that he had had sexual intercourse with the defendant since her marriage. The defendant testified that this was untrue. No objection was made to her testifying, but after verdict plaintiff excepted because, it being testimony prohibited by statute, consent could not make it competent and no exception at the time was necessary. *S. v. Ballard,* 79 N. C., 627; *Presnell v. Garrison,* 121 N. C., 366. This presents the question whether such testimony is prohibited.

(563) The Code, sec. 588, makes husband and wife competent and compellable witnesses in all cases, except that in three cases named, *i. e.,* in criminal actions, in any action for divorce on account of adultery, or action for criminal conversation, it is provided that the husband and wife shall not be competent or compellable "to give evidence *for or against* the other." Even in these excepted instances the statute makes either competent for or against the other to prove the fact of marriage; and section 1354, as to criminal actions, merely prohibits the wife or husband as a witness *against* the other, except in certain cases in which the wife is allowed to be a witness against the husband.

The plaintiff contends that the above exceptions in The Code, sec. 588, to the general rule, which is that the husband and wife are competent as other witnesses, prohibited the wife, when faced with testimony accusing her with adultery, from disproving it by the only possible evidence—her own. If this were so, it is a startling anomaly in our law. If she were charged with murder or any other crime in the calendar, she is a competent witness to deny it. So fair is the law that, as to any other transaction, if the mouth of one party is closed by death the other can not testify thereto. In an action for divorce against the wife, proof of one act of adultery is sufficient. If, therefore, a witness can go on the stand to give evidence, however false, that he has had sexual intercourse with the wife, and the law seals her mouth and forbids her to deny it, this would be a cruel injustice, and the statute would be "an act to facilitate divorces in all cases in which the wife is defendant." The judge could but charge the jury, "If you believe the evidence you will find the issues in favor of the plaintiff."

If the statute were so worded, the courts could but so construe it, leav-

ing it to the lawmaking power to make any needed correction. But we think the statute does not bear the construction which the plaintiff, since the verdict went against him, seeks to place upon it. If (564) the intention had been to exclude the husband and wife absolutely as witnesses in such cases, the proviso in section 588 as to these classes of cases would have been that, as to them, the husband and wife were "not competent or compellable as witnesses." The lawmaking power was wiser, and restricted the prohibition by adding *"for or against* the other." The meaning is clear that in such cases neither the husband nor wife is competent or compellable *for* the other to prove the adultery, which might encourage collusive divorces or compel one to be a witness against him or herself, nor is either competent or compellable *against* the other to prove the adultery, which might be conducive to perjury in view of the strong feeling incident to contested divorce proceedings.

Here, when these two men testified that they had each had sexual intercourse with the defendant, and she went upon the stand and denied it, she did not testify *for* the husband so as to enable him to obtain a collusive divorce, nor did she testify *against him* to prove anything against him. Her evidence was in defense of herself, and not "for or against" the other party, and the statute disqualifies neither as a witness in his or her own behalf, except only when it is for or against the other.

Any other construction would be "sticking in the bark," would be an anomaly in our law when one is charged with an offense against law or morality, and would ignore the restrictive words, after the words prohibiting wife or husband from being witnesses in such cases, adds, "for or against each other." These words mean something, and when given their natural signification simply prevent either party proving a ground of divorce *against* the other or *for* the other by his or her own testimony. It must be noted, as already stated, that neither is made incompetent to testify in his or her own behalf, but only when it is for or against the other. It is urged that, indirectly, the (565) woman testified against her husband, because, while it was not as to his conduct, it indirectly threw a bill of costs upon him. If we could consider that in construing the meaning of these restrictive words, still they do not have even that effect, for in such actions the husband, whether successful or unsuccessful, is liable for his own costs, and whether he shall pay the wife's costs is in all cases in the discretion of the court. Code, sec. 1294.

The charge of the judge that the fact that there was no issue after the separation, notwithstanding the alleged adulterous intercourse with the witnesses, was a circumstance for the jury to consider, can not be said to be error. It may be, probably was, a very slight circumstance; but whether the jury should give it any weight was for them. Their common

sense and knowledge of the ordinary things in life were doubtless equal to this weight laid upon them.

No error.

Cited: Grant v. Mitchell, 156 N. C., 17; *Powell v. Strickland,* 163 N. C., 401; *Hooper v. Hooper,* 165 N. C., 608, 610.

---

(566)

McKENZIE v. HOUSTON.

(Filed 27 May, 1902.)

1. **Evidence—Parol Evidence—Deeds—Descriptions—Plat—Courses—Distances.**

A grantor can not change by parol agreement a description of a lot in a deed about which there is no uncertainty, either in the deed or a plat referred to in the deed.

2. **Deeds—Presumptions—Estoppel—Husband and Wife.**

Where a wife joins her husband in a deed, the presumption, if any, is that the title is a joint one, and not that she joined merely to release her dower and homestead.

DOUGLAS, J., dissenting.

ACTION by Ellie McKenzie against M. E. Houston, heard by *Neal, J.,* and a jury, at October Term, 1901, of UNION. From a judgment for the plaintiff, the defendant appealed.

Redwine & Stack for plaintiff.
Adams & Jerome for defendant.

MONTGOMERY, J. Some time prior to 1885 a survey and plat were made dividing a parcel of land into lots and streets which were afterwards embraced, or were then within, the town of Monroe. The plat was known as the "B. F. Houston plat," and B. F. Houston was the husband of the defendant. He and his wife retained lot No. 4. They conveyed, by deed, to the plaintiff lot No. 3, which lies just immediately north of lot No. 4, describing the lot by metes and bounds, as well as by courses and distances, the courses and distances being exactly as they appeared in the plat, and referring to it as "known as lot No. 3 of the plat of B. F. Houston." The plaintiff brought this action to recover a strip of a few inches lying along the entire southern line of lot No. 3, as described in the plat, which strip she alleges the defendant is unlawfully in the pos-

session of. The defendant knowing that she had joined her husband (567) in the conveyance to the plaintiff of lot No. 3, and that she had conveyed it by metes and bounds, and also by courses and distances mentioned on the plat, deemed it prudent in her evasive answer to set up the matter which is the real defense relied on by her against the plaintiff's action. That defense is that at the time of the execution of the deed the line between lots Nos. 3 and 4 was fixed and determined by parol agreement by the parties to the deed, that that line was a different one from the line in the survey and plat and in the deed, and that the agreed line gave to the defendant the title and possession to the strip in dispute. The answer sets up the defense in the following language: "That she admits that the plaintiff at one time owned a lot lying immediately north of the lot now occupied by and in possession of the defendant, with a dividing line distinctly known and marked by a fence between plaintiff's lot and that of the defendant, which said line was fixed and determined by the parties to the deed executed to plaintiff, at the time of its execution." That we have properly interpreted the answer is seen from a perusal of the testimony of the defendant offered on the trial and refused by his Honor. She proposed to testify as follows: "That she had been in the open, notorious and adverse possession of the strip of land in dispute ever since 1849, under a partition proceeding dividing the land inherited from her grandfather, duly and regularly instituted, concluded and recorded. The lot or tract of land assigned and allotted to her in said proceeding consisting of 30¼ acres, embracing and covering the entire lot of the plaintiff; that said strip of land in dispute has been cultivated as a part of her garden ever since the execution of the deed from her to the plaintiff, and for many years prior thereto; that at the time of the execution of the deed to the plaintiff, under which she claims the land in dispute, it was agreed between the parties to said deed (568) that the first line called for in said deed extended only to the corner of defendant's garden on Church Street, and that the second line, running in a westerly direction, ran with the garden fence then standing and running between the lots of the plaintiff and defendant, and that said fence still stands in the same place; that by mistake the first call in plaintiff's deed calls for 170 feet on Church Street, instead of stopping at the corner of the garden; that said corner of the garden was marked by a stone permanently located; that the mistake in the deed making the first call was made by following the courses and distances in an old plat of town lots, made by B. F. Houston, but that it was agreed and understood between the parties of said deed, at the time of its execution, that the line of plaintiff's lot on Church Street extended only from the intersection of Houston and Church streets to the corner of defendant's garden on Church Street, and the corner of plaintiff's lot on Church Street

was, at the same time, definitely located at the corner of defendant's garden, and the line west from the corner of garden was definitely located and fixed to be and run with the garden fence then dividing the lots of plaintiff and defendant; that the lot sold plaintiff, at the time of the execution of the said deed, was entirely surrounded by a fence, and its boundaries were well known, and it was well understood and agreed that only the lot included by said fence was sold to plaintiff; that the corner of defendant's garden on Church Street is an old and well-located corner, having been marked by a stone placed there more than twenty-five years ago; that the fence dividing the lots of plaintiff and defendant has been standing where it now stands, and where it was at the execution of the plaintiff's deed, for more than twenty-five years; that the defendant is not in possession of any of the lot north of the dividing fence between the lots of plaintiff and defendant."

(569) His Honor refused to receive the evidence, and an exception to the ruling brings up the only substantial matter on the appeal for consideration. The question for decision is not whether the first call in the deed "beginning at a stone, corner of Houston and Church streets and running thence S. 170 feet to a stone at the corner of the garden," should end at the stone or continue to the full distance of 170 feet. If that was the point in the case we would be called on to decide whether a stone recognized and agreed upon at the time of the execution of the deed as a corner, in a city or town lot, would control course and distance as would a tree, rock, creek or other natural object in a rural section. That might depend upon the size and texture of the stone, its depth in the earth, and the manner in which it had been planted; in other words, upon whether, upon consideration of the evidence, it was sufficient as to those matters for the court to say as a matter of law that the stone was or was not a properly constituted and permanent landmark, a monument of description. But the case before us is one in which the grantor undertakes to change, by parol agreement and evidence, a line about which there is no uncertainty either in the deed or in the survey and plat. It will be seen from a reading of the rejected testimony of the defendant that she did not offer to show that the stone at the corner of her garden was pointed out or referred to and agreed upon by her and the plaintiff as the corner on Church Street between lots 3 and 4; that there was no description of the stone as to its size, or its manner of erection; that, in fact, one of her witnesses, who was introduced to testify as to the corner, would have said, if his testimony had been received, that there was no stone at the time of the trial at the corner of the garden, it having been removed or covered by dirt so that it could not be seen.

But, besides, the fact that the description in the deed concludes with the further description, "and known as lot No. 3 of the plat of

B. F. Houston," has the effect in law of fixing the line between (570) the lots just as it was defined and located in the survey and plat. In the survey and plat only course and distance from an agreed beginning was used as a description, no mention of a stone at the corner of a garden on lot No. 4 having been made. The case is like that of *Davidson v. Arledge,* 88 N. C., 326. There the former owners of two lots in Charlotte had verbally agreed upon a change in the dividing line, and had for years each used his separate lot under the terms of the agreement. Afterwards, the plaintiff's grantor having become the owner of both lots, conveyed to the plaintiffs one of them, with a description taken from the plan of the town by number, and also "as designated in the plan thereof," and it was held that the same boundaries that were mentioned in the original laying off and platting of the town were to locate and define the lot. The distance, then, in our case must control, and the word "stone," used in the deed, be regarded as imaginary only. The construction of the deed, then, being a question of law, his Honor was right in declaring to the jury *what were the* boundaries called for in the deed and instructing the jury that, if they believed the evidence, to answer the first and second issues "Yes," and the third issue, "That part on the southern boundary of lot No. 3, having a width of 1 6-10 feet on Church Street and 2 7-10 feet on Alley E, as shown by official plat."

The counsel of the defendant agreed in this Court that the defendant was not estopped to deny the plaintiff's title, for the reason, as he contended, that the deed to the plaintiff was made by B. F. Houston and wife (the defendant), and there was a presumption that the defendant joined in the deed only to release her dower and homestead, no title to the lot having been shown to be in her. The deed itself, it would seem, would be a sufficient answer to that argument, for she joins with her husband in the words of conveyancing; she acknowledges the joint receipt of the purchase money, and she joins her husband (571) in the covenant of warranty. If the doctrine of presumptions is to be invoked it would seem that the title was a joint one. It is not necessary to discuss the effect of the admission in evidence of the award, as from the view we have taken of the case it could not have been injurious to the defendant, even if the evidence was incompetent.

No error.

DOUGLAS, J., dissenting: I can not concur in any phase of the opinion of the Court, either in its view of the law, its construction of the deed, or its conclusions of fact. It is evident, to my mind, that the defendant never intended to convey anything south of the garden fence. The deed specifically calls for a stone, *corner of B. F. Houston's garden.* Even if we take the stone as merely indicating a point, that point is expressly

located by the deed itself at the "corner of B. F. Houston's garden." This was the corner of a marked line. I can not imagine how a line could be much better marked than by a fence, which was on the line at the time the deed was made, and has been there ever since. Let us take a plain, common-sense view of the matter: Two women go out to trade for a lot. They agree that the lot shall run 170 feet and shall stop at the corner of the garden. It turns out that 170 feet runs a foot beyond the garden fence. Which is more likely, that they should have made a mistake of one foot in the length of the line, or that they should be mistaken as to the location of the fence, which was in full view? The answer seems to me too plain for argument. They could see the fence, but could not see an imaginary point where a given number of feet would end. This is not an attempt to *change* by parol the description in the deed, but simply to locate the point called for by the deed, to wit, the corner of the garden.

The Court says that "the grantor undertakes to change by parol agreement and evidence a line about which there is no uncertainty, (572) either in the deed or in the survey and plat." I can not see any such attempt whatsoever. It is true, there is no *patent* ambiguity in the deed, because the deed assumes that the distance called for will stop at the corner of the garden. A *latent* ambiguity is developed because, in fact, the two points do not coincide. Hence, the question arises whether the grantor intended the line to stop at the garden fence or to continue the full 170 feet, no matter where it went. If we follow the settled rule of interpretation, it seems that we have no alternative but to stop at the corner of the garden, which was a well-known line of another lot then and now marked by a fence, which has never been changed. I have time but for few citations.

In the old and leading case of *Person v. Rountree,* 2 N. C., 378, note, repeatedly cited and approved, the course of the first line was "north" from a creek, so as to put the entire tract on the *north* side. The marked line ran south from the creek, so as to put the entire tract on the *south* side of the creek. It was held that the *marked* line controlled.

In *Cherry v. Slade,* 7 N. C., 82, it was held, quoting from the head-notes: "2. Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed."

"3. When the lines or courses of an adjoining tract are called for in a deed or patent, the lines shall be extended to them, without regard to distance." . . .

"4. Where there are no natural boundaries called for, no marked trees or corners to be found, nor the places where they once stood ascer-

tained and identified by evidence, or where no lines or courses of an adjoining tract are called for, in all such cases we are of necessity confined to the courses and distances described in the patent or deed; *for however fallacious such guides may be, there are none other left for the location.*" (573)

In *Houser v. Belton,* 32 N. C., 358, 51 Am. Dec., 391, *Judge Pearson* gives the reason for the rule as follows: "Marked lines and corners control course and distance, because a mistake is less apt to be committed in reference to the former than the latter. Indeed, the *latter* is considered as the most uncertain kind of description; for it is very easy to make a mistake in setting down the course and distance, when transcribing from the field book, or copying from the grant or some prior deed, or a mistake may occur in making the survey by losing a stick, as to distance, or making a wrong entry as to course. For these reasons, when there is a discrepancy between course and distance and the other descriptions, the former is made to give way."

Does not this case settle that at bar? There is a discrepancy between the distance and the call for the corner of the garden, which is in the marked and well-known line of another lot. Therefore, the distance must give way, and the line stop at the garden fence.

Two more citations and I am done:

In *Deaver v. Jones,* 119 N. C., 598, it is held by a unanimous Court that, quoting from the headnotes:

"1. When a grant is located by contemporaneously marked lines, those lines govern and control its boundary and fix the location so as to supersede other descriptions.

"2. Where there is conflicting testimony as to the true location of a corner forming a boundary of tract of land, *the highest evidence is proof of the consent of the parties* to the deed that certain marked lines or corners *should constitute the boundary,* and the identity of the corner is a question for the jury."

Again, it is said by a unanimous Court, in *Bowen v. Gaylord,* 122 N. C., 816, 820: "That an inconsistent course and distance must give way to a natural object or the well-known line of another tract when called for in the deed, was settled as far back as *Witherspoon v. Blanks,* 1 N. C., 157, and *Bustin v. Christie, ibid.,* 160. It would (574) be useless to cite the long line of decisions to the same effect, ending in *Deaver v. Jones,* 119 N. C., 598."

In the case at bar the defendant offered to prove that at the time the deed was made it was "agreed and understood between the parties to the said deed at the time of its execution that the line of plaintiff's lot on Church Street extended only from the intersection of Houston and Church streets to the corner of defendant's garden on Church Street, and

the corner of plaintiff's lot on Church Street was at the same time definitely located at the corner of defendant's garden, and the line west from the corner of the garden was definitely located and fixed to be, and run with the garden fence, then dividing the lots of plaintiff and defendant; that the lot sold to plaintiff at the time of the execution of said deed was entirely surrounded by a fence, and its boundaries were well known, and it was well understood and agreed that only the lot included by said fence was sold to plaintiff; that the corner of defendant's garden on Church Street is an old and well-located corner, having been marked by a stone planted there more than twenty-five years ago; that the fence dividing the lots of plaintiff and defendant has been standing where it now stands, and where it was at the time of the execution of plaintiff's deed, for more than twenty-five years; that the defendant is not in possession of any of the lot north of the dividing fence between the lots of plaintiff and defendant."

This testimony should have been admitted under proper instructions from the court, and in its exclusion I think there was error.

Davidson v. Arledge, 88 N. C., 326, has no application to that at bar, because in *Arledge's case* the deed in question appears to have described the lots simply by reference to the plat and number, with no mention whatever of any marked line or adjoining tract. As there was nothing but the plat to go by, of course it controlled the description.

Cited: Warehouse Co. v. Ozment, 132 N. C., 851.

---

(575)

JOHNSON v. ARMFIELD.

(Filed 3 June, 1902.)

1. **Improvements—Betterments—Burden of Proof—Contracts—Wills.**

   In an action for services rendered and for improvements under a contract with the owner that she would will land to plaintiff, the burden of proof is on plaintiff to show performance of his part of contract.

2. **Improvements—Contracts—Rents—Profits—Wills—Evidence.**

   In an action to recover for services, improvements put on land by plaintiff, under a promise to will it to plaintiff, and rents, profits and payments made to plaintiff should be considered.

3. **Improvements—Contracts—Parol Contracts—Betterments.**

   A person is not entitled to pay for betterments placed on land before the contract to convey is made.

4. Evidence—Declarations—Competency.

A personal representative can not introduce declarations of the deceased unless they are a part of the same conversation or statements proven by the opposite party.

ACTION by Albert Johnson against G. W. Armfield, executor of Charlotte Gardner, heard by *Shaw, J.*, and a jury, at September Term, 1901, of GUILFORD. From a judgment for the plaintiff, the defendant appealed.

J. A. Barringer for plaintiff.
Bynum & Bynum and King & Kimball for defendant.

FURCHES, C. J. This case is not in a condition to have a final disposition made of it in this appeal without risk of doing injustice to the parties. Neither the complaint nor answer is furnished by the record, and while this is accounted for by a statement that they had been lost, this does not supply the need of them, as we are unable to see what were the grounds of plaintiff's complaint—whether for bet- (576) terments put upon land, under a parol promise to convey, or for the value of improvements put upon land under contract, or promise to pay the plaintiff for his labor in so doing, or for supporting defendant's testatrix. The case on appeal seems to have been made out by the appellant, to which there was no countercase or exceptions filed. And while such a case, under The Code, becomes the case on appeal, and will be so considered by the Court, this may account for the fact that no charge of the court is given and only defendant's exceptions and prayers for instructions. In the absence of the complaint and answer and the information they would have given, it is difficult for us to see the relevancy of the exceptions. The case on appeal gives a great deal of evidence, but it is not stated that all the evidence is given, and it may not be; and if it was, we would be incompetent to pass upon it if there was any conflict. In some phases it appears that plaintiff is suing for betterments for breach of a parol contract to convey land; in others it appears that he is suing for boarding and supporting defendant's testatrix; and in others, for work he has done for defendant's testatrix under contract.

If it is for betterments under a parol contract to convey, of course, the plaintiff will have to establish the contract by competent evidence, and show that he has complied with it, before he can recover. If he does this, the general rule of damage is the benefit the improvements have been to the land, and not what they cost plaintiff to put them on the land. But in a case like this case seems to be, where plaintiff moved a house belonging to defendant's testatrix, that matter would have to be taken into consideration and the rents and profits the plaintiff had received from the land would also have to be taken into the account. If

for boarding and taking care of defendant's testatrix, that would depend upon the time and trouble the plaintiff was put to in so doing, and anything he may have paid him therefor would have to be taken into the account.

If these contentions of plaintiff are not established, and he (577) claims for the work he has done for defendant's testatrix, this would depend upon contract to do the same, either express or implied.

From what we have said it will be seen that there was error in not giving defendant's second prayer for instructions and in refusing to give defendant's sixth prayer for instructions, for which there must be a new trial.

No promise the defendant's testatrix may have made to the plaintiff to convey him the land after the improvements were made would support a claim for betterments.

The promise must have been made before the improvements were put upon the land. As a promise to convey, made after the improvements were made, could not have induced him to put them there, and it is the inducement that gives the equitable right to be paid for them. *Luton v. Badham,* 127 N. C., 96, 80 Am. St., 783, 53 L. R. A., 337, and authorities there cited. While it was competent for the plaintiff to prove declarations of defendant's testatrix, it was not competent for defendant to do so unless it was a part of the same conversation or statement.

As the case goes back for a new trial, the court below will, of course, allow the parties to supply or file new pleadings.

New trial.

---

(578)

GREEN v. GREEN.

(Filed 3 June, 1902.)

1. Contempt—Findings of Court—Appeal.

In proceedings in contempt the facts found by the trial judge are not reviewable, except for the purpose of passing upon their sufficiency to warrant the judgment.

2. Contempt—Judgment—Imprisonment—Divorce—Alimony.

Where the trial judge finds that the party in contempt for failure to pay alimony could pay a part of the amount ordered, it was error to imprison him until he should pay the whole amount.

ACTION by Maggie V. Green against John A. Green, heard by *Jones, J.,* at chambers, at Bryson City, N. C., 31 October, 1901. From a judgment for the plaintiff, the defendant appealed.

Robert D. Gilmer and Walter E. Moore for plaintiff.
C. C. Cowan for defendant.

MONTGOMERY, J. In proceedings in contempt the facts found by the judge are not reviewable by this Court, except for the purpose of passing upon their sufficiency to warrant the judgment. *Young v. Rollins,* 90 N. C., 125. The judgment (one of imprisonment) in this matter—a proceeding in contempt against defendant, who had failed to pay an amount of money to the plaintiff as alimony *pendente lite*—can not be sustained on the facts found by his Honor. The judge who heard the proceedings in contempt recited the findings of fact made by the judge who granted the order allowing alimony, and added two others in words as follows: "I further find that said defendant could have paid at least a portion of said money, as provided in said order, and that he has willfully and contemptuously failed to do so. I further find that he is a healthy and able-bodied man for his age, being now about fifty-nine years (579) old." So, notwithstanding the finding of the fact that the defendant was able to pay only a part of the amount ordered to be paid, he was to be committed to the common jail until he should comply with the order making the allowance in the nature of alimony, that is, until he should pay the whole amount. Clearly, the judgment can not be supported on that finding of fact. The finding that the defendant was an able-bodied man is of no consequence in this proceeding. That fact was not found when the order allowing alimony was made, and that condition of body could be of no benefit to a man in jail. In *Muse v. Muse,* 84 N. C., 35, alimony was allowed the wife *pendente lite* at the rate of $3 per month, payable in the future, the husband having denied that he had any property, but conceded himself to be "an able-bodied man." If it had become necessary to enforce the payment of the amount allowed in that case by proceedings in contempt, certainly it would have been a sufficient answer on the part of the husband to have shown that he had afterwards become unable to labor or unable to procure employment after diligent endeavor to do so. In the case before us, if the order allowing alimony, $25 within five days and $12.50 monthly thereafter, had been based on the finding that the defendant was an able-bodied man fifty-nine years old, certainly an order committing him to jail for noncompliance would be dissolved if it appeared that he could not earn so much by manual labor. He made that answer in his affidavit, although, as we have seen, he was not required to do so, because the order for alimony was not based on the finding that he was able-bodied.

There was error.

Cited: Lodge v. Gibbs, 159 N. C., 69.

(580)

HARRIS v. WOODARD.

(Filed 3 June, 1902.)

Mortgages—Description—Sufficiency.

The description in a mortgage of "a certain piece or tract of land, grist-mill and all fixtures thereunto, and one storehouse, 28 x 100 feet long, lying and being in Brassfield Township, Granville County, North Carolina, and adjoining the lands of Anderson Breedlove, J. C. Usry and Dora Harris, said lot to contain 3 acres," there being 40 acres in the tract and nothing to segregate the 3 acres out of the 40 acres, is too indefinite to be a conveyance of any 3 acres, and the mortgage was void as to the land.

ACTION by J. W. Harris and others against the Woodard & Goodridge Company, heard by *Neal, J.*, and a jury, at February Term, 1902, of GRANVILLE. From a judgment for the defendant, the plaintiff appealed.

H. M. Shaw for plaintiff.
W. M. Person for defendant.

CLARK, J. The plaintiffs, holders of a second mortgage, seek to enjoin sale under a prior mortgage executed by the mortgagor to defendants, because the description in the latter is too vague and indefinite to pass title to the defendants. Said description is as follows: "A certain piece or tract of land, grist-mill and all fixtures thereunto, and one storehouse, 28 x 100 feet long, lying and being in Brassfield Township, Granville County, N. C., and adjoining the lands of Anderson Breedlove, J. C. Usry and Dora Harris, *said lot to contain three acres.*" There are forty acres in the tract on which the store and grist-mill are located. There is nothing to segregate this three acres out of the forty, nothing to indicate a beginning, nor where or in what direction the lines are to be
(581) run—nothing whatever beyond the inference—for it is not expressly stated that the gristmill and storehouse are to be located somewhere upon the said three acres when laid off.

As was said by *Gaston, J.*, in *Massey v. Belisle*, 24 N. C., 170, "Every deed of conveyance must set forth a subject-matter, either certain in itself or capable of being reduced to a certainty by recurrence to something extrinsic to which the deed refers." Here there is no subject-matter which is either definite in itself or capable of being reduced to a certainty by recurrence to something to which the deed refers. No beginning point, nor directions, nor distances are given, and there is nothing which authorizes any one to lay off the lines of any particular three acres out of the forty in the tract, which tract is bounded by the parties named. The reference to them renders the forty-acre tract cer-

tain, but is no aid in rendering it possible to select three acres out of said tract. This is not like the "twenty-nine acres to be cut off of the north end" of a tract which was bounded by straight, well-defined lines, and whose selection required merely a knowledge of surveying, as in *Stewart v. Salmonds,* 74 N. C., 518, nor a similar description in *Webb v. Cummings,* 127 N. C., 41.

The statute, Laws 1891, ch. 465, applies only where there is a description which can be aided by parol, but not when, as in this case, there is no description. *Hemphill v. Annis,* 119 N. C., 514; *Lowe v. Harris,* 112 N. C., 472, 22 L. R. A., 379. In *Lowe v. Harris* there were the words "his land," which the minority of the Court insisted could be helped out by parol evidence, but here there is only an uncertain, indefinite, undefined and indefinable three acres out of a tract of forty, and the court properly held that this was too indefinite to be a conveyance of any three acres, and the mortgage was, therefore, void as to the land.

No error.

Cited: Kelly v. Johnson, 135 N. C., 649; *Cathey v. Lumber Co.,* 151 N. C., 595.

(582)

PHILLIPS v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Filed 10 June, 1902.)

1. Instructions—Judge—The Code, Sec. 414.

A request that the trial judge "charge the jury in writing, and as follows" (here follow the prayers), is a request solely to deliver those instructions to the jury, and is not a request to put the entire charge in writing.

2. Instructions—Exceptions and Objections—Assignments of Error—The Code, Sec. 414.

Exception to failure to give instructions in writing must be made before verdict.

3. Instructions—Judge—The Code, Sec. 414—Evidence.

A request to give instructions in writing, under The Code, sec. 414, does not require that the recapitulation of evidence be in writing.

ACTION by J. L. Phillips against the Wilmington and Weldon Railroad Company, heard by *Brown, J.,* and a jury, at October Term, 1901, of BEAUFORT. From a judgment for the plaintiff, the defendant appealed.

Charles F. Warren and Rodman & Rodman for plaintiff.
Small & McLean for defendant.

CLARK, J. At the close of the evidence the defendants handed up to the court the following paper: "Defendant's prayers. The defendant requests the court to charge the jury in writing, and as follows: First." (Here follow ten prayers, duly numbered.) The exception 3 is that the court did not put the whole charge in writing. This is the sole point presented by the appeal, for exception 1 is abandoned; exception 2 is to allowing the witness to explain what he meant by a remark which he testified he had made, and is without merit, and exception 4 is to
(583) refusal of a new trial for above alleged errors.

We think his Honor correctly held that the language of defendant's request, "to charge the jury in writing, *and as follows,*" and entitled "Defendant's prayers," was a request under The Code, sec. 415, solely to deliver those instructions to the jury, and was not a request to put the entire charge in writing, under the provisions of The Code, sec. 414. The addition of the words, "and as follows," restricts the request to the written matter which followed. The defendant did not, at the conclusion of the charge, by exception or otherwise, indicate to the judge that he expected the whole charge to be in writing, and if the defendant's counsel himself put such construction on his prayers, it would have been but just to the judge and to the opposite party to have made that known while the matter could have been corrected, and not have waited till after verdict. By not excepting in apt time, objection was waived.

The charge seems to have been quite full and almost all in writing, a large part being the written requests to charge; but if there had been a request to put the charge in writing, it would have been the duty of the judge to put his whole charge as to the law—but not the recapitulation of the evidence—in writing. *Bank v. Sumner,* 119 N. C., 591, and other cases collected in Clark's Code (3 Ed.), page 538.

No error.

Cited: Sawyer v. Lumber Co., 142 N. C., 163.

---

(584)

PENDER LUMBER COMPANY v. WILMINGTON IRON WORKS.

(Filed 10 June, 1902.)

Damages—Measure of—Contracts—Breach—Negligence.

In an action against a machinery company for failure to deliver machinery according to contract, it is liable only for such damages as are caused by the breach as being incidental to the act of omission as a natural consequence and which may be reasonably presumed to have been in contemplation of the parties at the time the contract was made.

FURCHES, C. J., dissenting.

LUMBER CO. *v.* IRON WORKS.

ACTION by the Pender Lumber Company against the Wilmington Iron Works, heard by *Moore, J.*, and a jury, at December Special Term, 1901, of PENDER. From a judgment for the plaintiffs, the defendant appealed.

Stevens, Beasley & Weeks and J. D. Kerr for plaintiffs.
Meares & Ruark and J. T. Bland for defendant.

COOK, J. Plaintiffs were engaged in the manufacture of lumber, strawberry crates, baskets, and other vegetable packages; had made a few crates two years before, and a few the past year; previous to November, 1899, they had made about 6,000 poor crates, but bought the baskets for them. In 1899 they had contracted with responsible parties to manufacture and deliver to them in the months of February and March, 1900, 25,000 crates at the price of 25 cents per crate. To comply with their contracts it was necessary for them to have repaired the steel rollers belonging to and a part of their veneering machine, without which they could not comply. During the month of November, 1899, plaintiffs and defendant entered into a contract by the terms of which defendant obligated itself to repair the machinery and fit it for the use desired. Plaintiffs contend that defendant agreed to have (585) it ready in three weeks, and that they informed defendant of their contract to manufacture the 25,000 crates, and that defendant failed to do the work within the time agreed upon, and by its repeated and continuing promises to do the work, upon which they relied, they were induced to wait so long that they were prevented from having the work done elsewhere, and the time expired and they were thus prevented from complying with their contracts and had to cancel them, and thereby lost the profit on their contracts; that they were prepared in every other respect to make the crates and were prevented from making them for the want *solely* of the repaired steel rollers. With the rollers so repaired the expense of making the crates would have been 12 cents per crate. The defendant admitted the contract to repair, but denied that it agreed to complete the work in three weeks and denied that it was informed by plaintiffs of their contracts to fill orders for 25,000 crates, but admitted that the work had never been completed. It contended that the contract was made on 21 November, and that the conversation alleged to have been had with plaintiffs (and which it denied having had), on the 19th, formed no part of the contract, and that any information given it at that time did not affect it with notice and was not within their contemplation in making the contract on the 21st, and that plaintiffs could not recover for any *loss* of *profits*, because the evidence showing the cost of making

the crates was speculative, remote and incompetent; and that the loss of such *profits,* if provable, would be a remote and speculative damage, and not such as, being incidental to the breach of contract, would be the natural consequence thereof and reasonably presumed to have been within the contemplation of the parties when the contract was made. The following six issues were submitted to the jury—the first five were answered "Yes," and by the sixth assessed the damages found due to the plaintiff at $750, viz.:

(586) "1. Did the defendant, on 21 November, 1899, enter into a contract with the plaintiffs to alter and repair at the price of $60 the rollers belonging to plaintiffs' veneering machine and to deliver the same, rebuilt and repaired, to the plaintiffs within three weeks from the day of the delivery of said rollers to it by the plaintiffs?

"2. Were such rollers necessary to plaintiffs' veneering machine in preparing the timber of which to manufacture strawberry crates?

"3. Was the defendant at the time of making said contract informed that the plaintiffs had no other machine with which they could prepare veneering for making strawberry crates?

"4. Was the defendant at the time of making said contract informed that the plaintiffs had received orders for 25,000 crates which they had agreed to manufacture and to deliver in the months of February and March, 1900?

"5. Did the defendant wrongfully fail to perform its contract with the plaintiffs?

"6. What damage, if any, are the plaintiffs entitled to recover?"

Judgment was rendered in favor of plaintiffs, and defendant appealed.

The record shows that there was evidence sufficient to sustain the findings. So there are but two substantial questions raised by the assignments of error—one relates to the terms of the contract, the other to the damages. What the terms of the contract were was a question of fact to be found by the jury upon the evidence submitted to them. Whether it was made on the 19th or on the 21st, or partly at one time and concluded at another, is not material. After hearing the evidence, affirmed by the plaintiffs' testimony, and contradicted by that of defendant, the jury found the contract to be as stated in the first, second, third and fourth issues, and there appearing no error in the admission of

(587) evidence to prove the same, it must stand. This brings us to the consideration of the exceptions relating to the damages. While there are numerous exceptions presented by the instructions asked and refused, and to the charge given, they are all raised and covered by the first exception: "Plaintiff offered to prove by witness that plaintiffs were prepared to make crates (with the exception of having the rollers in controversy); the quantity and price at which they had taken orders;

the estimated costs of making them and the estimated profits lost by them," which was objected to and admitted over objection, and defendant excepted.

Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant, and should be precisely commensurate with the injury, neither more nor less. 2 Greenleaf Ev., sec. 253. The amount should be what he would have received if the defendant had complied with his contract. *Alden v. Keighly,* 15 M. & W., 117.

The general rule respecting a breach of contract is that recoverable damages are such as are the result of the breach complained of and must be the natural and proximate consequence of such breach. Greenleaf Ev., secs. 254, 256. But profits which are dependent upon the success of an undeveloped business adventure, fluctuations of values and contingencies, etc., are too remote and uncertain and can not be recovered. But if damages for the loss of profits (which is an extraordinary special damage) are claimed, they must be incidental to the breach in such sense that they were contemplated by the parties at the time the contract was made and the data of estimating such profits must be so definite and certain that they can be ascertained reasonably by calculation and the party at fault must have had notice, either of the nature of the contract itself or by explanation of the circumstances at the time the contract was made that such damages would ensue from the nonperformance; and profits lost by such a breach and under such (588) contract and conditions are recoverable. *R. R. v. Ragsdale,* 46 Miss., 458; *Smead v. Foard,* 1 Ellis & Ellis, 602; *Horne v. R. R.,* 7 C. C. P., 583; *Hadley v. Baxendale,* 9 Exch., 341; *Mace v. Ramsey,* 74 N. C., 11.

The issues as found having established the fact that the defendant was informed by plaintiffs that they had received orders for 25,000 crates, which they had agreed to manufacture and deliver, and that they had no other machine with which they could prepare veneering for making the crates, it naturally follows, according to the due course of business transactions, that it was in the contemplation of the parties that plaintiffs would lose the profits upon their contracts if they could not get their machine repaired and fitted for the work in time to make the crates. Now, then, if the data of estimating the profits be so definite and certain that they can be ascertained reasonably by calculation, then they can be recovered. The market value of the crates is shown by the evidence to have been 28 cents apiece, but plaintiff had agreed with responsible parties to sell them at 25 cents. By deducting the actual cost of making them from the agreed price, we have the exact profit. But defendant insists that the evidence showing the cost of making was speculative,

remote and incompetent. The testimony of plaintiff A. Rowe shows that they had all the material, labor and other utilities necessary for making the crates, and that they cost plaintiffs 12 cents each. The timber in a crate cost 3 cents; the hinges, clasps, corner irons, nails and all hardware cost 3½ cents; the baskets cost 3 cents, setting up the body of the crate cost 1¾ cents, division racks cost ½ cent, making a total of 11¾ cents, leaving a margin of ¼ cent to make the total cost at 12 cents per crate. The accuracy of this testimony and calculation depended upon the credibility to be given it by the jury, to be
(589) ascertained from his capacity, knowledge, experience, etc. There was evidence introduced by defendant tending to show the cost to be 24 cents, the items being hinges and hasps, 1¾ cents; corner irons, 1¼ cents; nails, 3 cents; lumber, 5 cents; uprights, 1 cent; racks, 3 cents; labor, 2 cents; baskets, 5 cents, making 22 cents, and estimating unknown costs, such as wear and tear upon machinery, oil, breaking down and other contingencies, 2 cents, making the total cost 24 cents. With this evidence before the jury, we see no reason why they could not determine with accuracy and certainty the net profits involved in the contracts or orders. After first determining by the weight of evidence and credibility of the testimony the actual cost of the several items, the result would follow from a simple mathematical calculation. And here it seems that the jury relied upon the testimony of defendant's witness (Pierce) and accepted his calculation or estimate as being true, since they assessed the damages at $750 (25c.—22=3c. per crate; 25,000 crates×3c.—$750; having discarded his estimate of 2c. for unknown cost).

In *Jones v. Call,* 96 N. C., 337, 60 Am. Rep., 28, the plaintiff was engaged in manufacturing and selling patent tobacco machines, and had made contracts to sell and deliver a certain number of machines at a certain price. Before complying with his contract his business was broken up by the defendant and thus prevented from doing so. There our Court held that plaintiff could recover the profits on the contracts which he had actually made and been prevented from complying with by the wrongful act of defendant, but not for the possible profits which his business might have yielded if he had not been interfered with. The facts in this case are similar to those in the case at bar, but differed in that this plaintiff's business was discontinued absolutely. But then the plaintiffs, though being thus disappointed, and being prevented from making the crates for which they had orders, and injured by defendant's breach, should not have remained idle; they should have made reasonable exertions to help themselves and thereby reduce the loss and
(590) diminish the responsibility of the defendants. *R. R. v. Ragsdale,* 46 Miss., 458. It may be that plaintiffs were profitably employed

all the while and really performed other work which was more remunerative than would have been the profits on these crates, which they could not have done had the rollers been duly repaired and delivered to them; or, for the want of the repaired rollers, they may have been unemployed wholly or in part, with their laborers on their hands at an expense and with their machinery idle and deteriorating in value. But as to this the pleadings are silent, and we must rule upon the questions as presented to us by the record.

No error.

FURCHES, C. J., dissents.

Cited: Sharpe v. R. R., post, 614; *Owen v. Meroney,* 136 N. C., 478; *Machine Co. v. Tobacco Co.,* 141 N. C., 294; *Tillinghast v. Cotton Mills,* 143 N. C., 272; *Furniture Co. v. Express Co.,* 148 N. C., 90; *Springs Co. v. Buggy Co., ibid.,* 534; *Brown v. R. R.,* 154 N. C., 305; *Lumber Co. v. Mfg. Co.,* 162 N. C., 400.

BANK v. VASS.

(Filed 10 June, 1902.)

Mortgages—Registration—Priority—Notice—Trusts.

Where a trust deed is given to secure purchase money for land, and later a mortgage is given on the same land, which refers to the trust deed as a prior lien for purchase money, and the mortgage is registered before the trust deed, the debt secured by the trust deed must be paid by the mortgagee from the proceeds of the sale of the land, but the mortgagee is entitled to the possession of the land.

ACTION by Commercial and Farmers Bank of Raleigh and J. N. Holding, mortgagee, to the use of said bank, against W. W. Vass, individually, and as trustee for others, heard by *Allen, J.,* at February Term, 1902, of WAKE.

This was a controversy submitted without action under section (591) 657 of The Code, upon the following case agreed:

1. That on 26 December, 1888, A. C. Yates duly executed, acknowledged and delivered to J. N. Holding, trustee, a deed in trust on 239¾ acres of land, in Barton's Creek Township, Wake County, N. C., adjoining the lands of W. O. Allen, J. B. Allen, J. B. Davis, and others, and fully described by metes and bounds in said deed of trust, which was

duly probated, filed and recorded in said county of Wake, in the register's office thereof, in Book No. 105, at page 433; and which said deed in trust was probated and filed for registration in said register's office on 26 December, 1888, at 12:15 o'clock P. M.

That said deed in trust was executed to secure four notes named therein, which were executed by said Yates to J. N. Holding and Mrs. L. M. Brewer, amounting in the aggregate to $1,657.05, said aggregate being the balance of the purchase money due said J. N. Holding and L. M. Brewer for said land, which had been shortly prior thereto conveyed by them to A. C. Yates, and subsequently thereto said J. N. Holding and L. M. Brewer, for value received, assigned to W. W. Vass, Sr., the father of the defendant, two of said notes, aggregating $1,000.

2. That on the said 26 December, 1888, said A. C. Yates, for value received, executed and delivered to J. N. Holding a deed of mortgage on the said 239¾ acres above described, which was duly probated, filed and recorded in the said register's office of Wake County, in Book 105, at page 430, and which said deed of mortgage was probated and filed for registration on 26 December, 1888, at 11:30 o'clock A. M., forty-five minutes prior to the probating and filing for registration the aforesaid deed in trust. Both of said papers were acknowledged before the

(592) clerk of the court by the grantor, Yates.

That said deed of mortgage was executed and delivered to secure the payment of two notes therein named, aggregating $585, and subsequently thereto said J. N. Holding, for value received, assigned to the plaintiff, the Commercial and Farmers Bank, the two said notes secured by said deed of mortgage. The said deed of mortgage contains therein the following clause, following the description of said land, to wit: "Said 239¾ acres is subject to a mortgage or deed in trust for about $1,650, balance of purchase money on same," and also the following clause set out in the warranty clause contained in the said deed of mortgage, to wit: "That the same are free from all encumbrances whatever, except as above stated."

3. That subsequently to ____ day of _____, 189__, at the request of W. W. Vass, the defendant, herein, as executor of his deceased father, W. W. Vass, Sr., who then held the notes that had been previously assigned to W. W. Vass, Sr., and no part of the principal of which had been paid, said J. N. Holding, trustee, advertised and sold at public auction the said 239¾ acres of land, under the powers conveyed in said deed of trust, at which sale the defendant, W. W. Vass, for himself and as trustee, became the purchaser of the same, and said Holding, trustee, executed to him a deed therefor, which said deed has been duly probated and recorded in said register's office, and is now in possession of said land by virtue of the said deed.

4. That no part of the principal of said notes assigned by said Holding to the said bank has been paid, said notes being still held by said bank, upon which several years interest is due, and which said notes have passed maturity, and the said bank and said Holding, mortgagee, have demanded of the said Vass, individually and as trustee, the possession of the said land, which has been refused. That the said mortgage and deed of trust were both in the usual form, and both contained the customary powers of sale, and the usual clauses of *habendum* (593) *tenendum* and warranty.

It is claimed by the plaintiffs that the mortgage under which they claim (which is referred to in paragraph 2 herein), having been first filed for registration, is entitled to priority over the deed in trust referred to in paragraph 1 herein; whereas the defendant claims that the plaintiffs are not so entitled, and that he is the owner of said land free from said mortgage deed. But the parties to this submission of controversy without action, being desirous of having the said question of law involved therein speedily determined, and their respective rights and duties in the premises declared by the court, do submit the foregoing facts agreed upon for the opinion, decision and judgment of the court thereon, it being understood that the right of appeal from the judgment of the court thereon is reserved. From a judgment for the plaintiffs, the defendant appealed.

J. N. Holding for plaintiffs.
S. B. Shepherd for defendant.

MONTGOMERY, J. The defendant by his deed from the trustee did not obtain title to the land conveyed therein, and he is not entitled to the possession of the same. The statute (Code, sec. 1254) declares that "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth," etc. The mortgage having been registered first, by force of the registration laws, the title to the land vested in the mortgagee, the plaintiff. *Hinton v. Leigh,* 102 N. C., 28; *Brassfield v. Powell,* 117 N. C., 140. We are of the opinion, however, that the words of the mortgage, following the description, to wit, "Said 239¾ acres is subject to a mortgage or deed of trust for about $1,650, balance of pur- (594) chase money on same," and the words in the warranty clause, "that the same are free from all encumbrances whatever, except as above stated," constitute more than a bare notice of a former mortgage or deed of trust. We think those words establish a trust in equity in favor

of defendant for the security of the debt mentioned in the deed of trust upon the property, or the proceeds which may arise upon a sale of the same by the mortgage. And this benefit, as we have seen, is in no way derived by title acquired through the deed of trust, but it comes by virtue of the charge and trust set out in the mortgage. The amount of the debt is fixed with as much certainty as in *Hinton v. Leigh, supra.* The creditor referred to in the mortgage, if not actually named, can be certainly identified, because, in the mortgage, the debt is said to be due for the purchase money of the land. The vendor, or his assignee, could certainly be found. And the words, "that the same are free from all encumbrances whatever, except as above stated," clearly demonstrate that the land was conveyed by the mortgage in subordination to a charge in favor of the vendor, to the extent of what was due for the purchase money of the land.

We think, therefore, that there was error in the judgment, and that a judgment should have been rendered that the defendant was not entitled to the possession of the land under the deed of trust, and instructing and requiring J. N. Holding, the plaintiff mortgagee, to sell the land described in the mortgage under the terms and requirements of that instrument, and with the proceeds of the sale to pay, first, the debt due to the defendant, after having paid the expenses of sale, including his commissions, and the balance, if any, should remain to the other plaintiff, the Commercial and Farmers Bank, of Raleigh, North Carolina.

Reversed.

Cited: Piano Co. v. Spruill, 150 N. C., 170; *Wooten v. Taylor,* 159 N. C., 612; *Bank v. Redwine,* 171 N. C., 569.

---

(595)

TAYLOR v. HUFF.

(Filed 10 June, 1902.)

Evidence—Malice—Malicious Prosecution—Attorney and Client.

In an action for malicious prosecution, evidence of language used by an attorney in the original action is not admissible as showing malice on the part of the client.

ACTION by J. W. Taylor against J. G. Huff, heard by *Robinson, J.,* at November Term, 1901, of WAYNE. From a judgment for the plaintiff, the defendant appealed.

M. T. Dickinson for plaintiff.
Allen & Dortch for defendant.

MONTGOMERY, J. Although an attorney is the agent of his client in the execution of matters within the line of his employment, and the client is on that account bound by all the acts of his attorney in the course of legal proceedings (in the absence of fraud), yet it does not follow from this principle of law, that a client is liable to third persons, or to the opposite party, for improper and irrelevant remarks of counsel made in the course of argument. Attorneys are employed to faithfully and intelligently represent their clients' interest, whether in consultation or in the course of the trial of causes; and they are expected on the argument to confine their observations to that which is material and pertinent. They are not employed to indulge in reflections, scandalous and false, nor to speak words calumnious and injurious to individuals and not relevant to the matter in issue. If they do so, however, they themselves are liable to aggrieved parties, but only in such instances. *Gattis v. Kilgo,* 128 N. C., 402; *Shelfer v. Gooding,* 47 N. C., 175. Nothing else appearing, then, the remarks of counsel in the argument of a cause, however calumnious and injurious to individuals, would (596) not subject the client to a suit for slander, for such conduct would be presumed to be unauthorized by the client. If such remarks had been authorized, or if they had been approved by the client, the case would be altered and an action would lie against the client.

In *R. R. v. Smith,* 81 Tex., 479, a railroad company was sued for the loss of plaintiff's baggage; a cross-interrogatory put to her by the company's attorney, she claimed, was libelous, and by an amendment to her complaint she declared on it as a further ground for damages. It was decided that in the absence of evidence that the defendant either directed the attorney or approved of his act, the defendant would not be liable for the conduct of the attorney, even if the interrogatory were libelous. We think the same principle applies to a case like the one before us. This action for malicious prosecution was brought as the result of a prosecution by the defendant in this action of the plaintiff, before a justice of the peace for a forcible trespass. Upon the trial before the justice the attorney of the defendant, here, the prosecutor there, used language alleged to be calumnious and malicious. That language of the attorney was, over the objection of the defendant, admitted by the referee as proof of malice on the part of the defendant. There was no evidence afterwards introduced before the referee tending to show that the defendant directed the attorney to make the objectionable remarks or that he approved of his conduct. There was error in receiving the evidence. We see no other error in the case.

Error.

(597)

RAIFORD v. WILMINGTON AND WELDON RAILROAD COMPANY.

(Filed 10 June, 1902.)

Negligence—Damages—Personal Injuries—Accident—Railroads.

In an action agianst a railroad company for personal injury, it will not be liable for an act or omission, though resulting in damages, unless by the exercise of ordinary care, under all the circumstances, it could have foreseen that the act or omission might result in damage to some one.

ACTION by B. B. Raiford against the Wilmington and Weldon Railroad Company, heard by *Allen, J.*, and a jury, at January Term, 1902, of WAYNE. From a judgment for the plaintiff, the defendant appealed.

Allen & Dortch for plaintiff.

F. A. Daniels and W. C. Munroe for defendant.

MONTGOMERY, J. The plaintiff when he was hurt was in the employment of the defendant in its machine shops at Wilmington. He was at work in the act of dismantling an engine which had been injured in a collision. While he was engaged in removing an iron engine apron that covered the engine bumper a piece of iron, one inch thick by three inches wide and twelve or fourteen inches in length, running crosswise the bumper and underneath it, fell to the track below and in some unaccountable way rebounding struck the plaintiff, who was standing off the track and at the end of the bumper—the bumper extending two feet beyond the rail. The piece of iron was kept in place underneath the bumper by an iron rod extending from the top of the bumper and through the bumper, the rod being fastened underneath the piece of iron by a nut.

(598) Just before the plaintiff commenced his work, another employee of the defendant had removed the nut. Upon the refusal of his Honor, on the defendant's motion, to dismiss the action at the close of the evidence, the question as to whether there was any evidence of negligence on the part of the defendant is raised. When the nut was unscrewed from the bolt and the bolt withdrawn by the first workman, the piece of iron must have been held in place from the time of the withdrawal of the bolt until it fell from some cause produced by the enforced pressure of wood against iron, probably rust of the iron and indentations of the wood.

The negligence alleged by the plaintiff is that the first workman left the piece of iron in the condition it was in after he unscrewed the nut and withdrew the bolt. With that exception, the defendant was not

alleged to be at fault. Work on the engine was not attended with risk or danger, and the place where the engine was standing was free from obstruction of any sort, the floor being laid in concrete and the rails in good condition. The piece of iron falling perpendicularly, struck the ground four inches within the rail, and the plaintiff was standing on the ground two feet from the rail and at the end of the bumper. He said that he had no occasion to work under the bumper, and in fact had not looked under it. Was his hurt an accident or was it produced by the negligence of the defendant?

An accident is "an event from an unknown cause," or "an unusual and unexpected event from a known cause"; "chance, casualty." *Crutchfield v. R. R.*, 76 N. C., 320.

We are of the opinion, under that definition of the word "accident," that the plaintiff's hurt was accidental. The cause of the injury is known, but the event was most unusual and unexpected; it was almost miraculous that that piece of iron should have been held underneath that bumper, after the support had been withdrawn, by any power of adhesion known to us. But the jury so found, and that matter was with them. (599)

It seems to us that no human forethought could have anticipated such a result from such a cause. In describing the manner of the accident, the plaintiff himself testified that the piece of iron "struck me in some sort of fashion, I do not know how. The plate struck something else, and then struck me almost instantly. It was like lightning."

We repeat what we said in *Carter v. Lumber Co.*, 129 N. C., 203:

"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." 16 A. & E. Enc., 439; Pollock on Torts, 36, 37; Shear. & Red. 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.

There is not a scintilla of evidence in this case tending to show that the defendant was negligent or failed to exercise ordinary or reasonable care. We quoted in *Carter v. Lumber Co.*, 129 N. C., 203, from 16 A. & E. Enc., 402, a good definition of the test of ordinary care, which we reproduce: "When 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 (600) 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."

The defendant's motion to dismiss the action should have been allowed. Error.

Cited: *Frazier v. Wilkes,* 132 N. C., 437; *Ramsbottom v. R. R.,* 138 N. C., 41; *Fuller v. R. R.,* 140 N. C., 484; *Fitzgerald v. R. R.,* 141 N. C., 542, 551; *Overcash v. Electric Co.,* 144 N. C., 579; *Bowers v. R. R., ibid.,* 686; *Briley v. R. R.,* 160 N. C., 92; *Bradley v. Coal Co.,* 169 N. C., 256; *Lloyd v. Bowen,* 170 N. C., 220; *Davis v. R. R., ibid.,* 595.

STRAIN v. FITZGERALD.

(Filed 10 June, 1902.)

Evidence—Parol Evidence—Deeds—Seal.

Where a deed is lost and there is no seal on the record, it may be shown by parol evidence that there was a seal on the original deed.

DOUGLAS, J., dissenting.

PETITION to rehear this case as reported in 128 N. C., 396, is allowed.

Winston & Fuller for petitioners.
Manning & Foushee and Graham & Graham in opposition.

CLARK, J. This is a petition to rehear this case, reported in 128 N. C., 396, for that the Court inadvertently failed to pass upon the exception that the court below excluded competent parol evidence which was offered to prove that there was in fact a seal to the sheriff's deed. If that (601) had been shown, the most critical examination could not have distinguished this case from *Heath v. Cotton Mills,* 115 N. C., 202. In that case it was held that where the record represents on its face, as by recitals or otherwise, that the instrument was sealed, and, in fact,

it was duly sealed, the record is valid and sufficient as notice, though it does not show a copy of the seal or any device representing it. *Todd v. Union,* 118 N. Y., 347, is also "on all fours" with this case. There the original tax deed had been lost and the record showed no seal. But the Court held that, as one witness swore that there was a seal on the original and the record of the deed recited, "Witness my hand and seal," there was evidence to go to the jury upon the question. Somewhat to same purport are *Carpenter v. Dexter,* 75 U. S., 513; *Starkweather v. Martin,* 28 Mich., 471; *Geary v. Kansas City,* 61 Mo., 379; *Norfleet v. Russell,* 64 Mo., 177; *Long v. Joplin,* 68 Mo., 422; *Hammond v. Gordon,* 93 Mo., 224; *Flowery v. Bonanza,* 16 Nev., 302; *Jones v. Martin,* 16 Cal., 165; Abb. Tr. Ev., 483.

In *Patterson v. Galliher,* 122 N. C., 511, it appeared that there was in fact no seal. In excluding the evidence here offered to show that in fact there was a seal, there was error.

Petition allowed and

New trial.

DOUGLAS, J., dissents.

Cited: Smith v. Lumber Co., 144 N. C., 50; *Edwards v. Supply Co.,* 150 N. C., 176; *Brown v. Hutchinson,* 155 N. C., 211; *Hopkins v. Lumber Co.,* 162 N. C., 534; *Buchanan v. Hedden,* 169 N. C., 223.

---

(602)

HUNTER v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 10 June, 1902.)

1. Negligence—Telegraphs—Evidence—Sufficiency—Mental Anguish—Verdict—Directing.

In an action for damages for mental anguish for delay in delivering a telegram, the trial judge should not direct a verdict against the defendant if there is more than a scintilla of evidence tending to prove that the defendant exercised due care and diligence.

2. Evidence—Conflicting—Sufficiency—Questions for Jury—Verdict—Directing.

Where there is a conflict of testimony, or it is susceptible of different interpretations, the issue must be left to the jury without any intimation of opinion on the part of the trial judge.

ACTION by T. A. Hunter against the Western Union Telegraph Company, heard by *Shaw, J.,* and a jury, at September Term, 1901, of GUILFORD.

(607) The court charged the jury upon the first issue (as to negligence), that if they believed the evidence to answer said issue "Yes."

Upon the second issue, the court charged the jury, among other things, in substance, that if they believed the evidence they would find that J. S. Hunter was the father of the "Scott" referred to in the telegram, and that the plaintiff and J. S. Hunter were first cousins, and that from such relationship there is no presumption that the plaintiff suffered mental anguish on account of his inability to be present at the funeral of the child Scott, but that the burden was upon plaintiff to show by the greater weight of evidence that there existed between the plaintiff and the said Scott such tender ties of love and affection that his inability to be present at the funeral caused him to suffer mental anguish, and that such inability to be present was caused by the negligence of the defendant company.

From judgment for the plaintiff, the defendant appealed.

Scales & Scales for plaintiff.
King & Kimball and F. H. Busbee for defendant.

DOUGLAS, J. This is an action for damages for mental anguish alleged to have been suffered by the plaintiff in consequence of the failure of the defendant to promptly deliver a telegram announcing the death of a child five years ago, who was the plaintiff's second cousin, and at whose funeral the plaintiff would otherwise have been present.

The comparatively distant relationship between the plaintiff and the deceased gave rise to an interesting discussion as to its bearing upon the right of recovery, which is not necessary for us to consider in the present aspect of the case. It makes no difference what the plaintiff may have suffered if such suffering was not caused by the negligence of the defendant. In the very nature of things, a telegraph company can not (608) insure the delivery of a message, and can be held liable for a nondelivery only upon its failure to exercise such reasonable care and diligence as the circumstances of the case may require. In view of the nature of telegraphic communication, a failure to transmit and deliver a message within such reasonable time as will effect its purpose is in its nature and results equivalent to nondelivery. It is true, the failure to deliver a message shown or admitted to have been received by the company is *prima facie* evidence of negligence; but the presumption arising therefrom is not conclusive. It merely shifts to the defendant the subsequent burden of proof upon that issue. That is, the defendant must then show by the preponderance of the evidence that it has not been guilty of negligence, and of the weight of such evidence the jury alone are

the lawful judges. This brings us to the dominating exception in the case, which was to the direction of his Honor that if the jury believed the evidence they should answer in the affirmative the issue as to the negligence of the defendant. In this we think there was error. It is needless to recapitulate the evidence; but it seems to us that, considering the evidence in the light most favorable to the defendant, and in such light we must consider it under such an instruction, the jury might have found the issue in the negative. In other words, there was more than a scintilla of evidence tending to prove that the defendant exercised due care and diligence in the premises. We do not mean to intimate that such was the preponderance of the evidence, as that is not for us to say.

His Honor properly left to the jury the credibility of the testimony, and if that had been all to one effect there would have been no error. *Nelson v. Insurance Co.,* 120 N. C., 302. But where there is a conflict of testimony, or it is susceptible of different interpretation, the issue must be left to the jury without any intimation of opinion on the part of the court. *Eller v. Church,* 121 N. C., 269; *Moore v. R. R.,* 128 N. C., 455. In *Hardison v. R. R.,* 120 N. C., 492, the Court (609) says: "But as the defendant introduced evidence tending to show there was no negligence on the part of defendant in killing the cow—that is, to rebut the presumption or *prima facie* case of plaintiff—it then became an issue of fact, which could not be found by the court, and should have been left to the jury."

The degree of care and diligence required of a telegraph company in the transmission and delivery of messages, which on their face are of vital interest, has been too fully discussed by this Court to require further comment. *Lyne v. Tel. Co.,* 123 N. C., 129; *Cashion v. Tel. Co.,* 123 N. C., 267; *S. c.,* 124 N. C., 459, 45 L. R. A., 160; *Laudie v. Tel. Co.,* 124 N. C., 528; *Hendricks v. Tel. Co.,* 126 N. C., 304, 78 Am. St., 658; *Bennett v. Tel. Co.,* 128 N. C., 103. For error in the direction of his Honor there must be a

New trial.

Cited: Baker v. R. R., 133 N. C., 34; *Cogdell v. Tel. Co.,* 135 N. C., 434; *Hunter v. Tel. Co., ibid.,* 461; *Harrison v. Tel. Co.,* 136 N. C., 381; *Greene v. Tel. Co., ibid.,* 492; *Helms v. Tel. Co.,* 143 N. C., 395; *Hoaglin v. Tel. Co.,* 161 N. C., 395.

WILLARD MANUFACTURING COMPANY v. MERCHANTS NATIONAL BANK.

(Filed 10 June, 1902.)

Attachment—National Banks—Rev. Stat. U. S., Sec. 5242.

Under Rev. Stat. U. S., sec. 5242, no attachment can be brought against a National bank.

ACTION by the Willard Manufacturing Company against the Merchants National Bank and Geo. H. Tirney & Co., heard by *Neal, J.*, at January Term, 1902, of DURHAM. From judgment for the plaintiff, the defendant bank appealed.

Boone, Bryant & Biggs for plaintiff.
Busbee & Busbee for defendant.

(610) FURCHES, C. J. The plaintiff commenced an action against Geo. H. Tirney & Co., in which plaintiff alleges that said Tirney & Co. is liable to plaintiff in the sum of $285.92 on account of a breach of contract. Upon this allegation, said Tirney & Co. being nonresidents of this State, but owning a lot of cotton in this State (as plaintiff alleged), plaintiff sued out an attachment and caused it to be levied on said fifty bales of cotton. In that action the defendant bank intervened and claimed the cotton. The plaintiff then commenced this action against the defendant bank and attached the same cotton as the property of the defendant bank. In this way both cases stood upon the docket of Durham Superior Court at the same time, and the defendant bank moved to dismiss the action against it and to discharge the attachment as against it; while on the other hand the plaintiff moved to consolidate this action with the action of plaintiff against Tirney & Co. The court refused the motion of defendant to dismiss the action and discharge the attachment against it, but allowed the motion of plaintiff and consolidated the two actions, and defendant appealed.

We do not see at present how it is the plaintiff has a cause of action against the defendant bank for a breach of contract with the defendant Tirney & Co., as alleged by it. But this would be more properly a question to be considered on a trial of the case and not on a motion to dismiss.

But the motion to dismiss the action and discharge the attachment is not made upon that ground, but for the reason that it is commenced by attachment and a levy upon fifty bales of cotton alleged to be the property of the defendant bank. It is alleged by the plaintiff and admitted that the defendant is a "National bank," and, in our opinion, the defendant's motion should have been allowed.

The act of Congress, 1873, incorporated into section 5242, Revised Statutes of the United States, provides that no attachment shall be brought against a National bank in any State court. And this (611) has been held to be the law, not only as to State courts, but also as to United States courts. *Bank v. Mixter,* 124 U. S., 721. And the same is held to be the law in the State of Vermont. *Sanford v. Bank,* 61 Vt., 373.

Therefore, the defendant's motion to dismiss and to discharge the attachment should have been allowed.

Error.

Cited: Mfg. Co. v. Tirney, post, 611.

WILLARD MANUFACTURING COMPANY v. GEO. H. TIRNEY & CO.

(Filed 10 June, 1902.)

Actions—Consolidation.

Where two cases are on trial docket and motion to dismiss one should have been allowed, it was error to consolidate the two actions.

ACTION by the Willard Manufacturing Company against Geo. H. Tirney & Co., heard by *Neal, J.,* at January Term, 1902, of DURHAM. From a judgment for the plaintiff, the defendant appealed.

Boone, Bryant & Biggs for plaintiff.
Busbee & Busbee for defendant.

FURCHES, C. J. The facts in this case are substantially the same as those stated in *Mfg. Co. v. Bank, ante,* 609. The plaintiff alleges that the defendant, Geo. H. Tirney & Co., is liable to it in the sum of $285.92, upon a breach of contract in the purchase of cotton. The defendant being a nonresident of the State of North Carolina, (612) plaintiff commenced an action in the Superior Court of Durham, sued out an attachment and caused it to be levied on fifty bales of cotton alleged by plaintiff to belong to defendant. The National Bank intervened in this action and claimed that the cotton so attached belonged to it. The plaintiff then commenced another action against said National Bank, sued out another attachment and caused it to be levied on the same fifty bales of cotton, upon the allegation that said cotton belonged to the bank. Thus it was that both actions stood upon the docket of the

Superior Court of Durham at the same time. When the bank moved to dismiss the action against it and to discharge the attachment, the plaintiff resisted this motion of the bank and moved to consolidate this action with the action against the bank. The bank's motion was overruled and the plaintiff's motion was allowed and an order made consolidating the two actions. Defendants excepted and appealed.

We have seen in *Mfg. Co. v. Bank, ante,* 609, that the plaintiff could not proceed against the bank by attachment, and as it could not do that and as that action and attachment should have been dismissed (*Mfg. Co. v. Bank, supra*), it was error to consolidate that action with this. But when that action is dismissed it will leave this action as it originally stood, as a suit against Geo. H. Tirney & Co. And while the plaintiff could not attach this cotton as the property of a National bank, we see no reason why it may not intervene and claim that the cotton attached as the property of Geo. H. Tirney & Co. belongs to it. *Cotton Mills v. Weil,* 129 N. C., 452. But its intervening does not make it a party to the action between the plaintiff and Geo. H. Tirney & Co. further than to claim that the cotton attached belongs to it. This is the only issue involved so far as the intervener is concerned, and the affirmative of this issue is upon it. If it is not the owner of the cotton it has no further interest in the action. *Cotton Mills v. Weil, supra; Bank* (613) *v. Furniture Co.,* 120 N. C., 475.

It was error to consolidate the action against the bank with this action; but this action will be allowed to stand upon the docket and the plaintiff will be entitled to the same rights as if no order of consolidation had been made.

Error.

SHARPE v. SOUTHERN RAILWAY COMPANY.

(Filed 10 June, 1902.)

1. Damages—Negligence—Profits—Contracts.

In an action against a railroad company for failure to deliver machinery according to contract, profits become a measure of damages only where they are within the contemplation of the contracting parties and can be reasonably ascertained by calculation.

2. Damages—Measure of—Negligence—Contracts.

In an action against a railroad company for failure to deliver machinery according to contract, the measure of damages is the legal interest on the capital invested, unemployed employees, and other damages the direct and necessary result of the negligence.

SHARPE *v.* R. R.

ACTION by J. M. Sharpe against the Southern Railway Company, heard by *Coble, J.*, and a jury, at November Term, 1901, of IREDELL. From a judgment for the plaintiff, the defendant appealed.

Long & Nicholson for plaintiff.
L. C. Caldwell for defendant.

COOK, J. Profits become a measure of damages only when they were within the contemplation of the contracting parties and the data of estimation so definite and certain that they can be ascertained reasonably by calculation; in which case the party in fault must (614) have had notice, either of the nature of the contract itself or by explanation of the circumstances at the time the contract was made, that such damages would ensue from nonperformance. *R. R. v. Ragsdale,* 46 Miss., 485; *Lumber Co. v. Iron Works, ante,* 584; *Mace v. Ramsey,* 74 N. C., 11. It is not alleged in the complaint, nor shown by the proof, that plaintiff lost any definite and certain profit by the stopping of his mill; nor that the contract was such as to inform defendant that any loss of special profit would ensue to plaintiff by its breach in negligently delaying the shipment and delivery of the machinery, cogwheel and cogs.

The injury sustained is alleged to have resulted from plaintiff's inability to operate his flouring mill for the want of a cogwheel and some cogs which he had ordered to be sent to him from the factory in Pennsylvania, and which were negligently delayed in their delivery by defendant company. His mill had been in successful operation, but the cogwheel and some cogs broke, and he did not have others to supply their place, and could get such as he needed only from the factory.

By reason of the alleged negligence of defendant the mill was stopped from work a month or more, causing a loss to plaintiff on account of expenses incurred in trying to get his machinery, idleness of his mill, expense of keeping his laborers, etc.

To show his loss resulting from the nonuse of the mill, his Honor admitted evidence, over defendant's objection, to show what the profits of the mill would have been during that time if the mill had been at work, as appears from the following questions and answers, viz.:

"Q. What was the damage to you in stopping mill from 3 February to 23 March? What would have been your net profits on your capital during this particular time, counting your capital invested, the (615) custom you had at suspension, wheat on hand, deliveries to be made and condition of things at the mill at this time?

"A. The lightest months are from May up till harvest; this would be two months and a half; witness means by harvest, threshing time. Witness would say his net profits during this particular time would have been about 12½ per cent."

R. R. Hill, plaintiff's witness, testified:

"Q.: Taking into consideration the capital invested, your opportunity to know the custom and business operation of the mill, the character of the mill site, and everything you know in connection with the value of the property and its operations, state your judgment as to the loss likely to be incurred by plaintiff if mill was suspended from 3 February to 23 March.

"A.: Witness should think, from witness's knowledge of the work he was doing, that $250 or $300 per month would be a very low estimate."

For error in admitting this evidence a new trial must be awarded. What the profits would have been during that interim would have depended upon the quantity and quality of grain brought to it; regularity with which it was brought; convenience and caprice of the patrons; price of the flour; opportunity of selling and collecting the price for same, and other contingencies, all of which were uncertain, conditional and indeterminate, and failed to furnish data upon which a reasonably accurate estimate might be made. The facts in this case are very similar to those in *Foard v. R. R.*, 53 N. C., 235, 78 Am. Dec., 277, where a part of the machinery, a steam pipe, was negligently delayed by the railroad company on account of which the mill was left idle for some length of time. There the Court held that the profits which the mill would have made would be too vague, indeterminate and uncertain to be correctly estimated; and held the measure of damages to be the legal interest
(616) on the capital invested, expenses incurred in endeavoring to get the delayed machinery, of unemployed employees and such other damages as were the direct and necessary result of defendant's negligence, to which rule we still adhere.

Therefore, his Honor erred in admitting evidence to show such special or extraordinary profits or income, but should have allowed legal interest on the capital invested, etc., as is held in *Foard v. R. R., supra.*

For the error in admitting such evidence a new trial is awarded.

New trial.

Cited: Furniture Co. v. Express Co., 148 N. C., 90, 92, 100; *Bell v. Machine Co.*, 150 N. C., 112; *Lumber Co. v. R. R.*, 151 N. C., 25; *Brown v. R. R.*, 154 N. C., 305; *Peanut Co. v. R. R.*, 155 N. C., 151.

JERVIS v. LEWELLYN.

(Filed 10 June, 1902.)

Wills—Legacy—Slaves.

Where a man makes a will in 1860 and dies in 1861, leaving certain property to his wife during her life and then to his slaves, naming them, and the widow died in 1899, the slaves can not take under the will.

ACTION by G. W. Jervis, administrator of Lucy Jervis, against J. R. Lewellyn, executor of John Jervis, heard by *Starbuck, J.*, at chambers, in Winston, N. C., 12 December, 1901. From a judgment for the plaintiff, the defendant appealed.

E. L. Gaither for plaintiff.
W. F. Carter for defendant.

MONTGOMERY, J. The testator, John Jervis, made his will in 1860 and died in January, 1861. He devised and bequeathed to his wife, Elizabeth, during her natural life, all his real and personal (617) property, the same "to be kept together on the land herein bequeathed to her during her natural life; and at her death I give, will, bequeath and devise to my negro slaves, Lucy, Robert, David, Rial, Elick, George and Matilda, each, one hundred dollars, to be paid to them by my executors hereinafter named, and to be paid to them before the title to my real estate shall be conveyed." Lucy died in July, 1861, and this action was brought by the administrator, the plaintiff, to recover the legacy, the widow of the testator having died in 1899. The amount charged upon the property in favor of Lucy was a vested legacy—the interest being *in presenti,* the enjoyment *in futuro.* But the legatee under the laws of the State, when the testator died, and up to the time when she died, could not take the legacy. A slave could not be the owner of money or property at that time, except in a very qualified way. *White v. Cline,* 52 N. C., 174; *Whedbee v. Shannonhouse,* 62 N. C., 283. In the last-mentioned case (a case in point with the one on the question involved here) the testator made provision for the emancipation of his slaves and arranged a fund for their transportation to Liberia, the balance of which fund, if any should be left over, to be divided between them. His widow dissented from the will and shortly afterwards married and had her share of her deceased husband's estate allotted to her, including a number of the slaves. Emancipation was brought about by the results of the war, 1861-'65, and suit was brought by the slaves, including those who had been allotted to the widow, for the fund provided for their emancipation under the will. It was there argued by counsel for the defend-

ants that, as to that part of the fund which would have come to such of the slaves as were reduced to slavery again by their having been assigned to the widow as her share of the testator's estate, the legacies failed, for at the time when it was to vest (upon the widow's marriage) they were not capable of taking, and that their incapacity to take was not (618) aided by the fact of the subsequent emancipation; and that that part of the fund passed either to the residuary legatees or to the next of kin. The Court said: "If the legacy had been given to the slaves *nominatim* or as individuals, this conclusion would have been true." That is the case here. Lucy having been incapacitated at the time of the vesting of the legacy (the death of the testator) to take the vested legacy, it became lapsed. She was *in esse,* in being, when the legacy was intended to be vested by the testator, but the laws incapacitated her to take.

Upon the agreed facts, judgment should have been for the defendant. Reversed.

CRATER v. RYAN.

(Filed 10 June, 1902.)

Wills—Legacies—Trusts—Life Estates.

Where a testator provides that property may be sold and the interest therefrom shall be paid to a certain person, the taxes on the money should be paid by his personal representative out of funds in his hands, and not out of the income from the money.

ACTION by R. J. Crater, administrator *d. b. n. c. t. a.* of John Crater, against C. S. Ryan, administrator of A. A. Crater, heard by *Starbuck, J.,* at December Term, 1901, of FORSYTH. From a judgment for the plaintiff, the defendant appealed.

J. S. Grogan for plaintiff.
Mast & Griffith for defendant.

COOK, J. In his will plaintiff's testator devises and bequeaths his property as follows: "I give, devise and bequeath unto my beloved wife, Catherine Crater, all of my real estate, personal prop- (619) erty, except the mill, and the mill may be sold and the interest of the money she may have of the mill, and all of my other property I will to my wife, Catherine Crater, as long as she lives, and after her death that all shall be sold and then go to her heirs." . . . His executor, A. A. Crater, sold the mill for $1,550 and loaned the fund,

listing it for taxation in his name as executor, and paid the interest accruing thereon to the said Catherine, and paid the taxes thereon out of the principal fund. Catherine is now dead, and the administrator *de bonis non cum testamento annexo* of John Crater, the testator, contends in this action that the administrator of A. A. Crater (the executor) is accountable for the full amount of the fund, to wit, $1,550, while defendant contends that his intestate properly paid the interest to the legatee, and the taxes out of the fund, and that he is only accountable for the amount less taxes paid upon it; and this is the question raised by the exception of the defendant to his Honor's ruling and judgment upon the referee's report; or, in other words, should the executor have paid the taxes upon the "mill fund" out of the interest, and paid the residue of interest to Catherine, or should he have paid her *all* of the interest, and paid the taxes out of a part of the principal fund?

From the language used by the testator in his will, we think it clearly appears that he intended that his wife should have the interest—the entire interest—upon the fund to be realized from the sale of the mill. He gave her his real and personal property "as long as she lives," with remainder over, etc., excepting the mill, creating from it a special fund which became a subject of taxation in the hands of his executor, separate and apart from the other part of his estate, upon which he knew taxes would be assessed and would have to be paid. Had he desired her to bear the expenses incidental to the trust, including taxes, he would not have said that she may have the interest; or, if the taxes must be paid out of the interest, then she would get only (620) a part of it, which does not seem to have been intended by him.

We fail to find in our own Reports any decision which will aid us in this case, but the learned counsel for defendant has cited us to *Wilson v. White,* 133 Ind., 614, 19 L. R. A., 581, which is very similar to this case, wherein the Court held that no taxes or expenses of the trust should be charged against the income of a certain fund given to a legatee for life—the language in the will being, "It is my will and I hereby direct my executor, as soon after the payment of debts and funeral expenses as three thousand dollars may be realized from my estate, to loan said sum of three thousand dollars for the benefit of my sister, Josephine, during her natural life . . . said interest to be paid over to my said sister, Josephine, as soon as collected, to be used and enjoyed by her as her absolute property." There, it was held that the taxes should be paid out of other assets in the hands of the administrator. But in the case at bar, no other assets remained in the hands of the executor, nor under his control, from which he could obtain money to pay the taxes. The personal and real estate belonged to the life tenant

and bore its burden of taxation in her hands. The testator did not intend that the "mill fund" should be paid over to her, but he did intend that she should have the interest upon it in the event the fund should be created and any interest accrued. It was not made imperative by the express terms of the will that the mill should be sold, nor was any direction given as to loaning the fund, as was done in *Wilson v. White, supra;* but the fund being created, it necessarily became subject to taxation, for which it would be liable, whether it bore interest or not, and if it bore none, then the principal would be liable for it. But, as it was loaned, then the interest was properly paid, as directed (621) by the testator, to his widow, Catherine.

The amount of taxes paid out of the principal should have been credited to the account of the defendant, and in ruling to the contrary there was

Error.

LYNN v. COTTON MILLS.

(Filed 10 June, 1902.)

1. **Counterclaim—Set-off—Recoupment—The Code, Sec. 244, Sub-sec. 2.**

In an action to recover for services of minor children, a counterclaim of a store account against plaintiff which had been assigned to defendant, is proper under The Code, sec. 244, subsec. 2.

2. **Exemptions—Homestead—Constitution, Art. X, Secs. 1 and 2.**

Under Constitution, Art. X, secs. 1 and 2, a defendant in an action is precluded thereby from availing himself of a counterclaim, though plaintiff does not own $500 worth of personal property, including the debt sued on.

3. **Corporations—Ultra Vires.**

The purchase of a claim against an employee by a corporation, not authorized by its charter, is not *ultra vires*.

ACTION by D. B. Lynn against the Stanly Creek Cotton Mills, heard by *Starbuck, J.,* at May Special Term, 1901, of GASTON. From a judgment for the plaintiff, the defendant appealed.

No counsel for plaintiff.
O. F. Mason for defendant.

CLARK, J. This is an action begun before a justice of the peace for $27.89, for work and labor done by plaintiff's minor children. Before the action was instituted, the defendant bought and took

an assignment of a store account for $36.52 due by plaintiff (622) to a firm, of which one of its officials was a member. The plaintiff is a resident of the State and is not owner of $500 personal property, including the debt for which this action is brought. On appeal the above facts were agreed, the only defense being that the defendant could not avail itself of the counterclaim set up, because:

1. The plaintiff was entitled to take advantage of his personal property exemption by claiming said $27.89 as a part thereof. 2. The purchase of the claim by defendant, a manufacturing corporation, was *ultra vires,* and, therefore, null and void, and nothing passed by virtue of the assignment to it of said claim.

As to the first point, the counterclaim comes within the definition in second subsection of The Code, sec. 244. "In an action on contract, any other cause of action also arising on contract and existing at the commencement of the action." The homestead and personal property exemptions are, under the terms of the Constitution, Art. X, secs. 1 and 2, exemptions "from sale under execution, or other final process," issued upon judgment recovered on any debt. The exemption is not available before judgment, so as to destroy the right of counterclaim or set-off. Otherwise, one could recover judgment when, on a balance struck, nothing is due him. The homestead and personal property exemption can only be claimed by the defendant in an execution. *Curlee v. Thomas,* 74 N. C., 51, and cases there cited; *Commissioners v. Riley,* 75 N. C., 144.

As to the second point, the purchase of the claim against plaintiff was not "carrying on a business" not authorized by its charter, and hence was not *ultra vires.* It was simply an incidental act in the legitimate exercise of its functions. Upon the facts agreed judgment should have been rendered in favor of defendant for the excess of its counterclaim, to wit, $8.63 and costs.

Reversed.

---

(623)

BINGHAM v. CAROLINA CENTRAL RAILROAD COMPANY.

(Filed 10 June, 1902.)

Evidence—Sufficiency—Personal Injuries—Negligence—Damages.

Where there is not a scintilla of evidence tending to show that plaintiff was injured by negligence of defendant, a demurrer to the evidence should be sustained.

BINGHAM *v.* R. R.

ACTION by R. J. Bingham against the Carolina Central Railroad Company, heard by *Starbuck, J.*, and a jury, at January Term, 1902, of MECKLENBURG.

This is an action to recover damages for personal injuries to the plaintiff, alleged to have occurred through the negligence of the defendant.

Among other allegations in the complaint are the following:

"2. That on 14 April, 1900, and prior thereto, the plaintiff was employed by the defendant company as foreman of the mason gang, and had charge of the road in such capacity between Pee Dee, N. C., and Rutherfordton, N. C.; that as such foreman it was his duty to look after culverts and keep them in repair over the line of the defendant between said points, and the defendant supplied him with a lever car, together with hands to operate same, and assist in performing the work in the line of his duty.

"3. That on or about 7 April, 1900, the plaintiff was directed by the defendant to go to Rutherfordton, N. C., and take four hands with him, together with his lever car, and then start back over the road on his said lever car with the hands, towards Pee Dee, N. C., and inspect the culverts, etc., between those points; that in obedience to said order, the plaintiff and his said hands, together with his lever car, were transported on the train of the defendant to Rutherfordton, N. C., and then, on the said lever car, came back from Rutherford-
(624) ton, N. C., towards Pee Dee, N. C., inspecting the road as aforesaid.

"4. That when the plaintiff, on his said lever car, on 14 April, 1900, had gotten down about a mile below Lilesville on his return towards Pee Dee, he saw in front of him on the track a velocipede car, manned by one person; that the plaintiff and the hands on the said lever car kept a careful outlook in front and kept a proper distance behind said velocipede car and were running at a very slow rate of speed; that the hand in charge of the velocipede car negligently and carelessly allowed his coat or some clothing to become entangled in the gearing of the said velocipede car, which was open and exposed, so that anything near it could get into same if the party in charge of the car was not careful; that on account of the said hand allowing the said clothing to become entangled in the gearing of the said car, the same ran off the track; that the plaintiff was keeping a careful watchout, and had his lever car under control; that immediately upon the accident to the velocipede car as aforesaid, both he and his hands used every effort to stop the lever car before it ran into the said velocipede car and avoid injury, but were unable to do so, and as they ran together the plaintiff was stricken by the said velocipede car and his ankle broken in two places."

The plaintiff, being examined in his own behalf, testified substantially in accordance with the essential allegations of his complaint, and particularly as follows: That he was foreman of the mason force of the defendant company; that the defendant required him to look after waterways and culverts, and repair them at the instruction of the road master; that at the time of the injury he had instruction to go over the road and inspect the culverts, and that he had a lever car and four men under his control. In answer to a question as to how the accident occurred, he said: "I got probably a short distance below the section master's house; I suppose he lives about a mile from (625) Lilesville, and I saw a man on the track with a velocipede car, and I expect he was 150 or 200 yards ahead of me. When I got in thirty feet of him I asked him who he was and where he was going. He made some remark, but I did not understand him; and I saw his coat hanging off the car and the sleeve caught in the gear of the wheel; he shook himself in some way and his coat fell and threw the velocipede from the track."

He further testified that he was going about six miles an hour; that he had gotten within about thirty feet of the velocipede car; that he was running slightly faster than the velocipede because he gained some on it; that when he saw the velocipede derailed he got up and started to touch the lever on his car, and caught the lever in a manner he illustrated, and started across the platform; that he stepped on the handle at the center of the car; that at that moment the car struck him, the velocipede car being higher than the lever car, caught his foot between the two cars and mashed it. From a judgment for the plaintiff, the defendant appealed.

Maxwell & Keerans for plaintiff.
Burwell, Walker & Cansler for defendant.

DOUGLAS, J., after stating the facts. We are always loth to set aside the verdict of a jury upon the ground that there is no evidence to sustain it, especially when the case has been so clearly and fairly presented in the charge of his Honor; but under all the circumstances of this case we are forced to such a conclusion. We see no substantial evidence, and by that we mean evidence beyond a mere scintilla, tending to show negligence on the part of the defendant, whose demurrer to the evidence should, therefore, have been sustained. The velocipede car does not appear to have been in a defective condition, or to have been constructed differently from those in common use. (626) The only act of negligence that could possibly be imputed to the defendant was the bare fact that the man on the velocipede was riding

upon his coat. It does not seem to us that an act so simple, and apparently devoid of any possible elements of danger, can be evidence of negligence. The falling of the coat sleeve and its becoming entangled in the gearing seems to have been one of those accidents constantly occurring in human affairs, that seem so simple after they happen, and yet so utterly improbable before they happen, as to be outside the range of human foresight. Pure accidents can not be eliminated by law. All that the law has done is to say that the employer shall exercise reasonable care by himself and servants, to prevent accident, and the courts can hold him responsible only when he fails to exercise such care. The employer is not responsible for an accident simply because it happens, but only when he has caused it directly or indirectly by some negligent act or omission of legal duty.

This Court has said in *Brown v. R. R.*, 126 N. C., 458: "In the light of subsequent events we may say that it was unfortunate that the defendant did not notify the engineer of the presence of No. 64; but we must not forget the old and homely proverb that 'Our hindsights are always better than our foresights.'" In the case at bar we may repeat that in the light of subsequent events it was unfortunate that the man on the velocipede did not take better care of his coat, and equally so that the plaintiff did not remain at a safer distance behind the velocipede. Either precaution would have avoided the accident, and yet neither seemed necessary to the respective parties under the peculiar conditions in which they were placed.

Error.

---

(627)

ORR v. SOUTHERN BELL TELEPHONE COMPANY.

(Filed 10 June, 1902.)

Negligence—Contributory Negligence—Personal Injuries—Telephones.

Where a telephone company fails to furnish an employee with proper tools and appliances with which to do dangerous work, it is liable for injury caused by such negligence.

ACTION by J. S. L. Orr against the Southern Bell Telephone Company and others, heard by *Starbuck, J.*, and a jury, at March Term, 1902, of MECKLENBURG. From a judgment for the defendant, the plaintiff appealed.

Jones & Tillett for plaintiff.
Maxwell & Keerans for defendant.

FURCHES, C. J. This action is brought to recover damages for injuries received in taking down a telephone pole, caused by the negligence of the defendant. The evidence discloses the fact that one Wood was the superintendent of the defendant in charge of this work; that on the morning the plaintiff was injured he came up town to work on another job and Mr. Wood told him, "You can drop off from your work; I want you to go out with Purtle on the long-distance telephone line." The tools and appliances necessary for such work were in the toolhouse of the defendant locked up, and Wood had the key. He unlocked the door and told the hands to put the tools in the wagon, and plaintiff put some of them in the wagon. He then went downstairs after some tie wire, and while down there "they" called, "Come on; we are ready," and he hurried down, got his "dinner bucket," got in the wagon and off they went to where the work was to be done, a distance of about six miles. There were five of them, and they (628) were to work under Mr. Purtle, and when they got to the place where the work was to be done Purtle put them to work—some to digging up the old poles and some to digging holes for the new poles. When they got the old pole ready to come down Purtle said, "Come on, boys, and take it down." This they undertook to do, but found they had neither pikes nor "dead men" to do it with, and they undertook to take them down by hand and by using shovels in place of pikes. "Dead men" and pikes are the usual implements used in doing such work, and plaintiff contends that if they had had pikes and "dead men" the pole would not have fallen and he would not have been hurt. The plaintiff contends that Wood had the right to hire and discharge, and though he thought it was dangerous to take down these poles without pikes and "dead men," he feared that if he did not obey the orders of Purtle he would be discharged by Wood.

The defendant undertakes to defend itself against the charge of negligence in not furnishing the necessary tools and appliances upon the ground that such tools and appliances were in the toolhouse, and that it was the duty of the plaintiff to have gotten them; that he and the other hands were told to go to the toolhouse and get the tools. This does not seem to us to be a satisfactory answer. Purtle was there and he was the "boss," and, it seems to us, it would have been rather officious in the plaintiff, who had just been hired that morning for a day's work, to have undertaken to supersede Purtle and "boss" the job.

We do not lay any stress upon the contention that plaintiff was afraid he would be turned off and lose his job if he did not obey Purtle. This doctrine has been carried to a very great extent, but it has never been carried to the extent of applying it to a hand

(629) employed for *one day,* so far as we are aware, and we do not propose to carry it to that extent in this case.

But we do think it was the duty of the *defendant* to furnish the plaintiff with the proper tools and appliances with which to do this dangerous work, and that it was not the duty of the *plaintiff* to furnish them. There was error in dismissing the action as upon nonsuit.

New trial.

Cited: *S. c.,* 132 N. C., 691; *Bailey v. Meadows Co.,* 154 N. C., 72; *Reid v. Rees,* 155 N. C., 233; *Murdock v. R. R.,* 159 N. C., 132; *Mincey v. R. R.,* 161 N. C., 471.

GWALTNEY v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY.

(Filed 10 June, 1902.)

Life Insurance—Premiums—Fraud—Deceit—Demurrer.

In an action by a policyholder to recover premiums, a demurrer should be overruled where the complaint alleges that the defendant, through its agent, induced him to take the policy through fraud and deceit.

ACTION by W. R. Gwaltney against the Provident Savings Life Assurance Society of New York, heard by *Hoke, J.,* at February Term, 1902, of CATAWBA. From a judgment for the plaintiff, the defendant appealed.

Thomas M. Hufham for plaintiff.
Maxwell & Keerans for defendant.

FURCHES, C. J. It appears from plaintiff's complaint that in December, 1889, he took a policy of insurance for $3,000 in defendant company, for which he paid a quarterly premium of $22.41 for nine years. That the premium was then increased to $28.01 per quarter, which the plaintiff paid for two years, when it was again increased to $41.73 per quarter, and upon plaintiff's failing and refusing to (630) pay this last advanced premium, the defendant canceled the plaintiff's policy. The premiums the plaintiff had paid the defendant on this policy before cancellation amount to $1,030.84. Plaintiff alleged that it was distinctly understood and agreed between him and J. Sterling Jones, who was the general agent of the defendant, that he was never to be required to pay more or a greater rate of prem-

ium than $22.41 per quarter, and that the policy was to be continued at this rate during the life of plaintiff; that he distinctly informed the said Jones that he would not take the policy upon any other terms; that he was not a business man; was at the time of taking said policy a neighbor of said Jones and had confidence in his honesty and integrity, and that Jones knew this. But that Jones took advantage of his confidence and wickedly, designedly, fraudulently, and with the purpose to cheat and defraud the plaintiff, had given him a policy which, the defendant contends, is not what is called a level policy, upon which a premium of $22.41 is to be paid quarterly, but is one on which the premium may be increased, and defendant has wrongfully increased it to $41.73 per quarter, and upon his refusing to pay this wrongfully increased premium, defendant has canceled plaintiff's policy, and this action is brought to recover the $1,030.84 so wrongfully paid the defendant.

To this complaint defendant demurred. The demurrer admits the allegations of the complaint, which contains the most fearful allegation of fraud and deceit practiced upon the plaintiff for the purpose of cheating and defrauding him by wicked design and falsehoods, to get him to take a policy, that Jones knew he would not take if he knew the truth, and knew it was not a level policy.

The complaint alleges that Jones was the general agent of the defendant and had the right to contract with the plaintiff; that he was acting for the defendant, and that the plaintiff is bound by his acts and what he did and said, and the demurrer admits the (631) truth of these allegations.

The case presents very interesting questions for the Court, if, upon the trial, the plaintiff should sustain the allegations of his complaint. But he may not be able to sustain them, and then they would not arise to trouble the Court. Therefore, if we should undertake to pass upon them in this appeal, what we might say would be but *obiter dicta.* Therefore, without passing upon them, or in any way intimating an opinion, we will say that we would not like to sustain a demurrer that admitted the fearful allegations of deceit and fraud that are set forth in plaintiff's complaint. The judgment of the court overruling the demurrer and allowing the defendant to answer is

Affirmed.

Cited: S. c., 132 N. C., 928; *s. c.,* 134 N. C., 552; *Bell v. McJones,* 151 N. C., 89.

(632)

COLLIER v. BURGIN.

(Filed 10 June, 1902.)

1. Peddlers—Licenses—Taxation—Laws 1901, Ch. 9, Sec. 54.

Under Laws 1901, ch. 9, sec. 54, a publishing company selling and delivering books through agents in sets, the title of books remaining in seller until paid for, is liable to license tax on peddlers.

2. Peddlers—Licenses—Taxation—Laws 1901, Ch. 9, Sec. 54—Interstate Commerce—U. S. Constitution, Art. I, Sec. 8—Commerce.

The taxation of persons who sell books through agents and ship them to their agents to be delivered to the buyers is not in violation of Art. I, sec. 8, of the Constitution of the United States as to interstate commerce.

ACTION by P. F. Collier & Son against William McD. Burgin, sheriff, heard by *Councill, J.*, at February Term, 1902, of McDOWELL. From a judgment for the defendant, the plaintiff appealed.

J. C. L. Bird for plaintiffs.
Robert D. Gilmer, Attorney-General, for defendant.

FURCHES, C. J. The plaintiff is a book publishing company, residing and doing business in the State of New York. The plaintiff employed agents in this State to sell and distribute its books, and such agents were engaged in selling and distributing said books in the county of McDowell in this State. The defendant is the Sheriff of McDowell County, and, as such, it was and is his duty to collect the State and county taxes; and the defendant being advised that the plaintiff was liable for a tax for so selling its books, made a demand upon the plaintiff's agent for such tax, which the plaintiff refused to pay, believing it was not liable to any tax on account of said sales. There-
(633) upon the defendant as sheriff levied upon and took possession of a lot of plaintiff's books which he was proceeding to sell for said taxes, when this proceeding was commenced, as a controversy without action, under section 567 of The Code, and the following facts were agreed upon by the parties:

1. The plaintiffs are residents and citizens of the city of New York, in the State of New York, engaged in the publication and sale of books.

2. That the books published by the plaintiffs are, for the most part, published in sets consisting of a number of volumes in each set; for example, the works of Bulwer, Hawthorne, Scott, Shakespeare, Balzac, etc., are published in sets, or in a number of volumes containing the works of each author.

3. That the sets of books so published, when bound, are each packed in a separate box, or package, and are not opened until delivered to the purchaser.

4. That the books published by plaintiffs in the said city of New York are sold by agents, or canvassers, of the plaintiffs by sample or prospectus to purchasers throughout the State of North Carolina and the United States upon the installment plan, viz.: A specified sum in cash, to be paid upon delivery of the books, and a specified sum to be paid each month until the entire purchase price is fully paid, the plaintiffs, P. F. Collier & Son, retaining the title to the books until they are paid for; the agent, or canvasser who makes the sale, takes an order from the purchaser for the books, and the order is forwarded by the agent, or canvasser, to the central office in New York City, or some branch office of the plaintiffs. All orders taken in North Carolina are sent to the branch office of the plaintiffs at Louisville, State of Kentucky, which office is run in the name P. F. Collier & Son.

5. That for the convenience of shipments the books are sent in original package, and in carload lots, from the factory in New York to the branch offices, and are then shipped from the (634) branch office, in original package, to the agent of the plaintiffs, whose business it is to deliver the books and collect the money for them from the several purchasers.

6. That during the month of April, 1901, one King, an agent and canvasser of the plaintiffs, sold books to various parties in Marion, North Carolina, and forwarded the orders for the same to the branch office of the plaintiffs at Louisville, in the State of Kentucky; that the plaintiffs shipped the books in original packages from their warerooms in said city of Louisville, for which orders had been received from their agent, King, to their delivering and collecting agent, Watson, at Marion, North Carolina.

7. That plaintiffs' agent, Watson, delivered the books to the several persons who had given the canvasser, King, orders, and collected the amount which was to be paid on delivery of the said books; that said books were delivered in original packages, as shipped from the factory and not opened until delivered to the purchaser.

8. That plaintiffs' collecting agent, Watson, has continued to collect from the said purchasers the monthly installments as they became due and payable for said books.

9. That the defendant, William McD. Burgin, is sheriff of the county of McDowell, State of North Carolina, and a part of the duties of his office is to collect all license tax imposed by chapter 9 of the Laws of 1901, in the county of McDowell.

10. That on 18 December, 1901, the defendant demanded of plaintiffs'

collecting agent, Watson, a license tax of $20, which defendant alleged was due by plaintiffs under section 54, ch. 9, Laws of 1901, for selling books in McDowell County in the manner hereinbefore set forth.

11. That plaintiffs' agent, Watson, refused to pay the said amount demanded by the defendant to be paid, whereupon defendant levied upon a set of the works of Honore de Balzac, consisting of 25 volumes,
(635) and worth the sum of $28, which belonged to plaintiffs, and which was then in the possession of J. L. C. Bird, for the purpose of selling the same to make the amount demanded by him from plaintiffs' agent for the privilege of doing business in McDowell County as aforesaid.

12. That plaintiffs insist that they are liable for no tax under the Revenue Act of the State of North Carolina, and that the seizure of said books by the defendant was unauthorized and unwarranted. Whereupon the plaintiffs demand judgment for the sum of $28, the cost of said books, with costs of this action.

These facts, we think, make the plaintiff liable for a tax under section 54, ch. 9, Laws 1901. Said section 54 is a reënactment, in substance, of section 25, ch. 2, Laws 1899, except the sale of books is exempted from taxes in Laws 1899, ch. 25, while such sales are not exempted from taxes in Laws 1891, ch. 9, sec. 54. It has been held that under section 25 of the act of 1899, sales made in the manner in which the plaintiff was effecting sales of these books made the parties peddlers and liable to a tax. *S. v. Franks,* 127 N. C., 510. And the same doctrine was held in *Range Co. v. Carver,* 118 N. C., 328.

But the plaintiff contends that if it is liable under the terms of section 54, ch. 9, Laws 1901, said statute is an interference with the doctrine of interstate commerce and void, being in violation of section 8, Art. 1, of the Constitution of the United States. But it has been repeatedly held by this Court that such statutes, applied to facts similar, if not identically the same as these, were not an interference with interstate commerce, and were not unconstitutional. *S. v. Gorham,* 115 N. C., 721, 25 L. R. A., 810, 44 Am. St., 494; *Range Co. v. Carver,* 118 N. C., 328; *S. v. Caldwell,* 127 N. C., 521; *Sims v. R. R., ante,*
(636) 556.

The distinction lies in this: It differs from an ordinary shipment from one State to a purchaser in another State, where the title passes to the purchaser upon consignment and delivery to a common carrier for transportation and delivery. In such case the property passes to the purchaser and consignee upon delivery to the common carrier. In this case the title is reserved and remains in the consignor, or the plaintiff. The books are shipped in New York or Kentucky, as the case may be, by the *plaintiff, to the plaintiff* in North Carolina,

and there is no commerce about it. When the plaintiff gets his goods here, if he wishes to peddle them he must do like other people who have goods and wish to peddle them. He must submit to the laws of this State and obtain a license to do so. He then falls under the doctrine of *Nathan v. Louisiana,* 8 How., 80; *Welton v. Mo.,* 91 U. S., 278; *S. v. French,* 109 N. C., 722, 26 Am. St., 590.

There seems to be some discrepancy in the amount demanded by the defendant in the "facts agreed" and the amount stated in the statute. But as our attention was not called to this on the argument by either side, we suppose that if there was anything in it, it was waived, as both sides seem to be desirous of having the constitutional question passed upon by the Court.

The judgment appealed from is

Affirmed.

McNEELY v. NORTH CAROLINA MICA, MINERAL AND LUMBER COMPANY.

(Filed 10 June, 1902.)

Witnesses—Competency—Evidence—The Code, Sec. 590.

In an action of ejectment the vice president of the defendant company is competent to prove where a person said a certain corner of the land was located, it not being a transaction or communication between him and any one under whom the plaintiff claimed title to the land.

ACTION by Catherine McNeely against the North Carolina Mica, Mineral and Lumber Company, heard by *Justice, J.,* at October Term, 1901, of McDOWELL. From a judgment for the plaintiff, the defendant appealed.

E. J. Justice for plaintiff.
S. J. Ervin for defendant.

FURCHES, C. J. This is an action of ejectment, but the only question presented by the appeal is upon the competency of evidence under section 590 of The Code.

For the purpose of locating the land in dispute, the plaintiff introduced one Watkins, who testified that he surveyed the land, and in answer to a question asked him, "Why he commenced at a point seven poles south of the mouth of Caney Branch?" witness stated that Watkins and his sons pointed that place out as having been shown to them

as the place where the beginning corner of the G. W. Gillespie 50-acre tract stood, by one Henry Gillespie; that Huskins said "he was an old man, and was now dead." Huskins further on testified that there were others present when the place was pointed out to him, among them Terry, Elliott and his two boys. The defendant then introduced Terry to prove what Gillespie said. The plaintiff objected upon the
(638) ground that the witness was the vice president of the defendant company. The court sustained the objection, remarking, "This is the vice president of the defendant company." Defendant excepted.

This ruling of the court was evidently put by his Honor upon section 590 of The Code, and was attempted to be sustained under that section in the argument here. But if it is admitted that the defendant was interested by reason of being vice president of the defendant company, still he was not incompetent to testify as to where old man Gillespie said the corner was. It was not a transaction or communication between him and any one under whom the plaintiff claimed title to the land, and, therefore, did not fall under the inhibitory exception of section 590. It seems that the plaintiff had gotten the benefit of these declarations through the testimony of her witness, Watkins, and fairness would have allowed the defendant to have the benefit of its witnesses as to the same matter. But, however that may be, there was error in excluding the evidence of Terry under section 590 of The Code.

New trial.

IN RE SMITH.

(Filed 10 June, 1902.)

Pensions—Pensioners—Personal Representatives—Laws 1899, Ch. 198.

A warrant for a pension issued after death of pensioner does not become a part of assets of deceased pensioner, but must be returned to the State for cancellation.

ACTION by Samuel Smith and others, pensioners, heard by *Councill, J.*, at chambers, at Hickory, N. C., 29 January, 1902. From a judgment for the pensioners, the State Board of Pensions appealed.

(639) *Avery & Avery for pensioners.*

Robert D. Gilmer, Attorney-General, for State Board of Pensions.

MONTGOMERY, J. The matter in controversy was submitted without action and the agreed facts are few and simple. The several applica-

tions of the deceased pensioners were duly approved by the pension board of Burke County, in July, 1901, and the same were certified as being "correct and just" under the act, and thereupon the State Board of Pensions, on the first day of December following, not knowing that the pensioners had died since their applications had been certified and filed, issued in their names pension warrants under Laws 1899, and the same are now in the hands of the register of deeds of Burke. The question for decision is whether these warrants are assets of the estates of the deceased pensioners, or whether they must be returnd to the Department of the Auditor for cancellation. If pensions are granted in aid of the pensioners for their future support for the year ensuing, then these warrants are to be returned to the Auditor; if they are granted to reimburse and compensate the pensioners for money paid out by them for their past support, then the warrants are assets of their estates. Pensions are personal to the pensioners and they are not granted alone on the consideration of meritorious services rendered the public, but they are granted because of the necessities, condition and circumstances of the pensioners. They are not prizes or rewards, but they are charitable gifts—because of indigent circumstances of the pensioners. If any authority were needed for the correctness of that definition, it will be found on a reference to section 8, ch. 198, Laws 1889, which reads as follows: "That no officer, soldier, sailor or widow holding a National, State or county office which pays annually a salary or fees in the sum of $300, or who owns, in his or her own right, or in the right of his wife, property of the value of $500 as (640) assessed for taxation, or who is receiving aid from the State under any act providing for the relief of soldiers who are blind or maimed, shall be entitled to any of the benefits of this act."

The purpose of a pension, then, is to enable the pensioner to live upon and by means of the gift, and it is not intended as a reimbursement for money already expended by the pensioner in his support. We think, therefore, that the position of the State Board of Pensions that pension warrants under our statute, and generally, are for the ensuing year, is a correct one; and as the pensioners were dead when the warrants were issued, it follows that the warrants should be returned to the Auditor for cancellation. If the pensioners had been living at the time the warrants were issued, but had died before they had received the warrants, then the warrants would, under section 13 of the act, have been assets of the estates of the pensioners. The statute in substance provides for the issuing of only one warrant to each pensioner annually —and that for the whole amount of the pension, and as we have said, for the ensuing year; and we can not see that chapter 228, Laws of 1895, can be of any force or effect.

Upon the agreed facts the judgment should have been for the State Board of Pensions, and that the warrants should be returned to the Auditor.

Reversed.

Cited: Gill v. Dixon, 131 N. C., 89; *Kelly v. Trimont Lodge,* 154 N. C., 101.

(641)

CAWFIELD v. OWENS.

(Filed 10 June, 1902.)

1. **Evidence—Pleadings—General Issue—Ejectment.**

In an action of ejectment it may be shown under the general issue that the deed upon which the plaintiff relies was made by a mortgagee of a mortgage not signed by the wife of the mortgagor.

2. **Homestead—Husband and Wife—Mortgages—Constitution, Art. X, Sec. 8.**

A mortgage made by a man without the joinder of his wife is void, if there is a judgment against the husband upon which execution may be issued, and the expiration of the lien would not validate the mortgage.

ACTION by Sarah Cawfield against Amos Owens, heard by *Justice, J.,* and a jury, at September Term, 1901, of RUTHERFORD.

The plaintiff, Sarah Cawfield, commenced this action on 11 May, 1893, to recover possession of two certain tracts of land described in the complaint, one known as the "Covington tract" and the other known as the "DePriest land." Her claim to the land is founded on a deed executed to her by Matt McBrayer, mortgagee, the mortgage having been executed on 10 November, 1887, by Amos Owens, the owner of the land, his wife, Mary Owens, not having joined him in its execution. At the time of the execution of the mortgage there was a large judgment against the mortgagor docketed in the Superior Court of his county where the land was situated. The Covington tract was conveyed to Amos Owens in September, 1868, and he became the owner of the DePriest land in 1854. The complaint was in the usual form in such actions and the answer of the defendant Mary, the defendant Amos having withdrawn his answer, was a simple denial of its allegations—she having withdrawn that part of her answer which set up a result-

(642) ing trust in the land. On the trial the defendant was allowed, over the plaintiff's objection, to introduce evidence tending to show that the entire real estate of Amos Owens at the time of the execution of the mortgage was worth less than $1,000.

The plaintiff requested the following instructions: 1. That if the jury believe the evidence, the plaintiff was the owner of both tracts of land described in the complaint. 2. That the joinder of the wife in the mortgage to R. and M. McBrayer was not necessary, she only having an inchoate right of dower in said land contingent upon her surviving her husband. 3. That the defendant, husband being estopped by his mortgage deed, the *feme* defendant could not set up a claim to homestead in the Covington tract of land without alleging and proving there were minor children of the defendants. His Honor instructed the jury that if they believed the evidence, the plaintiff was entitled to recover the DePriest tract, but was not entitled to recover the Covington tract. To this instruction, in so far as it related to the Covington tract, the plaintiff excepted. The jury found that the plaintiff was the owner of the DePriest tract, and that the possession of the defendant of that tract was wrongful. From the judgment rendered on the verdict, the plaintiff appealed as to the Covington tract.

McBrayer & Justice for plaintiff.
Justice & Pless for defendant.

MONTGOMERY, J., after a statement of the facts: Was it necessary for the defendant in her answer to have specially pleaded her claim in the land as her homestead interest? If so, the evidence offered and received was irrelevant and incompetent. The rule under The Code pleading (similar to that under the old proceedings in ejectment) permits under the general issue—general denial—proof that a deed introduced as evidence of title was executed by a grantor wanting (643) in capacity, and, therefore, for that reason, void. *Mobley v. Griffin,* 104 N. C., 112. But the plaintiff insists that there is a recognized exception to the general rule, and that the exception is that one who seeks to avoid a deed upon the ground that the land is subject to the homestead right of the pleader must specially set up in the pleadings the facts upon which the homestead depends. The authorities relied on for the position are *Marshburn v. Lashlie,* 122 N. C., 237, and the kindred cases in our Reports there mentioned. But it will be seen on examination of all these cases that the deeds introduced to show title were deeds made under either judicial or execution sales. In such cases the purchasers at such sales, or their grantees, have what is called a *prima facie* title under their deeds—there being a presumption that the sale was properly ordered and made, and that the land was not subject to the homestead right; that it was sold for a debt, which did not exempt it from sale under section 2 of Article X of the Constitution, and the decisions of this Court on that section.

In our case, however, no such presumption existed, the deed under which the plaintiff claims being one from a mortgagee made in default of the payment of the debt secured in the deed, voluntarily made by the defendant's husband, to secure an ordinary debt due in 1888, and it was permissible to offer proof to avoid the plaintiff's deed, under the general rule, under the general denial in the defendant's answer.

The main question for decision—whether the mortgage deed executed by the husband is void or only voidable—is of more importance. The plaintiff's position is, first, that as no homestead had been allotted to the husband of the defendant, before he executed the deed of mortgage, the title passed to the mortgagee under the declaration in *Mayho v. Cotten,* 69 N. C., 289, that section 8, Art. X, of the Constitution, applies only to a conveyance of the homestead "after it has been
(644) laid off"; and, second, that if that is not so, the judgment against the husband owner, and which was a lien on his land at the time of the execution of the deed of mortgage, having expired as to its lien before the sale under the mortgage deed was made, the doctrine announced in *Hughes v. Hodges,* 102 N. C., 236, applies, and the plaintiff's deed is good. In the last-mentioned case, a limitation was made to the broad assertion which we have quoted from *Mayho v. Cotten, supra.* The limitation was called by *Avery, J.,* in his dissenting opinion in *Thomas v. Fulford,* 117 N. C., 667, "a further inhibition upon the right of the owner, without the joinder of the wife, to convey his land. The words of the limitation, or further inhibition upon the power of the owner of lands to convey them, as used in *Hughes v. Hodges, supra,* because of their importance, may properly be repeated here." The only safe rule as to the meaning of section 8, Art. X, of the Constitution, must be deduced chiefly from the two cases last cited (*Mayho v. Cotten,* 69 N. C., 289, and *Hager v. Nixon,* 69 N. C., 108). When there is *no* creditor, there is no reason for restricting the owner in the sale of land, not allotted as a homestead, by any construction placed upon that section, because the whole plan of homestead exemption was framed for the purpose of affording protection against debt. But it does not follow from the mere fact that a man owes debts, that section 8, Art. X, of the Constitution, is to be construed to disable him from conveying his land without the joinder of his wife, unless the deed was executed with intent to defraud his creditors and no homestead had been allotted to him, or unless the land conveyed to him is subject to the lien of a judgment or a mortgage reserving the homestead right, that can not be enforced without allotting a homestead in order to ascertain and subject to sale the excess. The rule stated in *Mayho v. Cotten* is so for modified, therefore, as not to apply when the owner of land is embarrassed with debt and his land is subject to be sold

to satisfy a lien. So, our conclusion is that as there was a (645) judgment in force against the husband of the plaintiff, under which execution might have issued, the deed of mortgage as to the Covington tract was void, and the expiration of the lien of the judgment could not bring into existence that which never had vitality. The Constitution, Art. X, sec. 8, plainly ordains that, "No deed made by the owner of a homestead shall be valid without the voluntary signature and assent of the wife, signified on her private examination according to law." If the deed is made otherwise, it is simply invalid, inoperative.

No error.

Cited: Dalrymple v. Cole, 170 N. C., 105.

STATE v. TELFAIR.

(Filed 25 March, 1902.)

1. **Highways—Summons—Notice—The Code, Secs. 217, 597, 2019, 2044.**
   A summons to a person liable to road duty need not be in writing.

2. **Amendments—Warrant—Special Verdict.**
   The warrant of a justice of the peace may be amended in the Superior Court upon the finding of a special verdict.

INDICTMENT against Asbury Telfair, heard by *Timberlake, J.,* and a jury, at October Term, 1901, of FRANKLIN. From a verdict of guilty on a special verdict, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and W. H. Yarborough, Jr., for the State.

F. S. Spruill for defendant.

MONTGOMERY, J. Does the statute, The Code, sec. 2019, require that the summons to a person liable to road duty shall be in writing or printing? is the question before us for decision. The language of the Code section is that the overseer of the road "shall (646) summons," and that "the notice . . . shall state the hour and the place," etc.; and the contention of the defendant's counsel is that the summons must necessarily be in writing, first, because, as The Code, sec. 217, in which is provided the manner of service of the summons, requires that a copy shall be delivered, a verbal summons, there-

fore, is out of the question—it being impossible that there can be a copy of a verbal summons delivered; that a copy is a writing or printing from an original; and, second, because the language of the statute, "the notice shall . . . state," etc., precludes the idea of a statement by word of mouth of the overseer.

It was also insisted for the defendant that if the summoning by the overseer be treated as a notice, the same must be in writing, under section 597 of The Code. We think, however, that the summons and notice mentioned in chapter 50 of The Code, on Roads, Ferries and Bridges, are very different matters in their nature from the summons in sections 217 and 597 of The Code. The last mentioned both concern judicial proceedings, and are required to be in writing. The summons and notice in chapter 50 are not required to be in writing in so many words or by fair inference; and by a reference to section 2044 of that chapter, it will be seen that the usual manner of service of summons or notice upon a road hand is by making personal or word-of-mouth service upon him. It is only in cases where the overseer is unable to personally notify the hands that he is compelled to serve a *written* summons by leaving the same at the house of the hand. Code, sec. 2044.

His Honor allowed an amendment to the warrant of the justice of the peace upon the finding of a special verdict, and he was authorized to do so. *S. v. Gilliken,* 114 N. C., 832.

Affirmed.

Cited: S. v. Lee, 164 N. C., 535.

---

(647)

STATE v. HOPKINS.

(Filed 25 March, 1902.)

1. **Abandonment—Husband and Wife—Adultery—The Code, Sec. 970.**

Where a wife is guilty of adultery, her husband is not liable to prosecution for abandonment.

2. **Abandonment—Husband and Wife—Intent—Questions for Jury—The Code, Sec. 970.**

In a prosecution of a husband for abandonment the question whether such abandonment was in good faith for the causes assigned is for the jury.

CLARK, J., dissenting.

INDICTMENT against R. B. Hopkins, heard by *Winston, J.,* and a jury, at October Term, 1901, of PAMLICO. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
D. L. Ward for defendant.

FURCHES, C. J. This is an indictment under section 970 of The Code for abandonment and failing to support the defendant's wife and children. The defendant charged his wife with infidelity and adultery with one Tom Daniels, drove her from home and commenced an action for divorce; and the wife has indicted him for abandonment. The wife testified to her fidelity, denied the charge that she had been guilty of illicit intercourse with Tom Daniels or any one else; that the defendant drove her from home, and has neither fed nor clothed her since doing so; but that defendant has supported the children, except the baby, which she has with her, and which he says is not his child. The defendant testified that he had seen Daniels in bed with his wife, and his daughter, 15 years old, testified that she had seen Daniels in bed with her mother, and a witness by the name of Joe Daniels testified that he had seen the prosecutrix in bed with Tom Daniels.

Upon this and other evidence in the case, the court charged the jury: "If the wife is unfaithful to her husband, is not a (648) chaste woman, the obligation to support her is removed. If you find from the evidence that the wife was guilty of adultery with Daniels, and was unfaithful to the defendant, you return for your verdict 'Not Guilty.' If you find from the evidence that she was not unfaithful to him, remained a true wife, then you will return 'Guilty' for your verdict; for he admits that he drove her from home and has not since supported her." Defendant excepted.

The jury returned a verdict of guilty, and the court sentenced the defendant to two years in the county jail. Defendant again excepted.

The statute under which the defendant is indicted (section 970 of The Code) is as follows: "If any husband shall willfully abandon his wife, without providing adequate support for such wife and the children which he may have begotten upon her, he shall be guilty of a misdemeanor."

So it is seen that there must be a *willful* abandonment and a failure to support his wife and the children he may have begotten on her. To constitute the criminal offense, there must be both an abandonment and a failure to support. One without the other does not constitute the criminal offense, and, to constitute the criminal offense, the abandonment must be *willful*. This word "willful" as used in the statute must mean more than an intention not to live with the wife. If it does not, the husband would be compelled to live with and support his wife, although she was living in open and notorious adultery. We can not think this is so, and the court in the trial of this case recognized this

as not being the law, by telling the jury that if the prosecutrix had been guilty of adultery with Tom Daniels and unfaithful to the defendant, he was not bound to support her. There is no objection to this statement as a proposition of law, but the objection is as to the
(649) manner of the trial and the manner in which it was submitted to the jury. The defendant was on trial for a criminal offense, in which he was presumed to be innocent, and this presumption continued until he was found to be guilty by the jury beyond a reasonable doubt.

The manner in which the case was presented seems to us like the argument of counsel for the State. They sometimes indulge in such arguments, which are calculated to divert the minds of the jury from the real issue. But it is the duty of the judge to hold the true issue with a firm and even hand, and to call the attention of jurors back to it, if their minds have been diverted. The issue to be tried by the jury was: Is the defendant guilty or not guilty, as charged in the bill of indictment? This issue was not submitted to the jury, except as a result of their finding upon a collateral and evidentiary question. It was the trial of the wife for adultery. *Anderson v. Steamboat Co.*, 64 N. C., 399.

Under the statute, the abandonment must be willful, and this is a matter for the jury. Wherever an offense depends upon an intent—a purpose of the mind—that is a matter for the jury, as in the case of larceny. *S. v. Coy*, 119 N. C., 901. And *willful*, as we have seen, means without a cause to justify him in doing so. The defendant introduced evidence which he thought justified him in doing what he did; that the last child was born in eight months and fourteen days after he had an opportunity of being its father; that the prosecutrix had been seen in bed with Tom Daniels, and the defendant had commenced an action for divorce; that he could not live with the prosecutrix, after such knowledge, without condoning the offense. And though the jury found that the prosecutrix had not been guilty of adultery with Tom Daniels, still, if the defendant had all this evidence, and believed it to be true, would the law pronounce him a criminal because he did not live with her and support her and a child that he says is not his? These matters, we think, should have been left to the jury to say whether
(650) the defendant's action in the matter was in good faith and for the causes assigned by him—whether abandonment was willful or not, and if not willful, the defendant would not be guilty. And upon the issue of guilty or not guilty, the defendant should have the benefit of any reasonable doubt.

To us this is a remarkable case. We know of none like it; where a man accuses his wife of infidelity, drives her from home and commences

an action of divorce, that she should turn round and indict him for abandonment, succeed in getting a trial before the action of divorce is tried, convict him and put him in the county jail for two years. As the defendant had an action of divorce pending against the prosecutrix, she might have applied in that action, upon motion and affidavit, for alimony pending the action, and if she was entitled to a support from her husband, the court would have given it to her. *Reeves v. Reeves,* 82 N. C., 348. This being so, and from the other facts appearing in the case, it seems to us that if the defendant had been properly convicted, the sentence of two years imprisonment in the county jail was too much. But from the view we take of the case we do not feel called upon to pass upon its constitutionality. And while it seems, from the manner in which the case was submitted to the jury, that they have in effect found for the defendant in the divorce case (prosecutrix in this case), yet that finding should not affect in any way the verdict in the divorce case. And if the jury in the divorce case should find a different verdict on the question of adultery from what the jury did in this case, it would be too late to relieve the defendant from what would then appear to be manifestly an unjust imprisonment. We do not think the defendant has had a fair trial, and he must have a

Venire de novo.

CLARK, J., dissents.

Cited: *S. v. Blackley,* 131 N. C., 733; *S. v. May,* 132 N. C., 1022; *S. v. Smith,* 164 N. C., 479; *S. v. Hannon,* 168 N. C., 217.

STATE v. GOODE.

(Filed 8 April, 1902.)

Assault and Battery—Excessive Force—Questions for Jury—Evidence.

Whether, upon the facts of this case, a person, indicted for an assault and battery, used excessive force was a question for the jury.

INDICTMENT against Lucinda Goode, heard by *Robinson, J.,* at September Term, 1901, of WAKE. From a verdict of guilty and judgment thereon, the defendant appealed.

The prosecuting witness, a white man, went to the house of defendant, an old colored woman, to collect some money on furniture which had been sold to her husband on the installment plan. She invited him into

her house and to take a seat; he told his errand. She said she could not pay, and his testimony is that he went to examine the bedstead, when the defendant batted him on the back of his head with a baseball bat. On cross-examination, he said he had removed a covering or two from the bed when he was hit with the bat, but that he had done this only to see if the bed was in good condition.

The defendant testified in her own behalf that the prosecutor, accompanied by a negro man, drove up to the sidewalk in front of her house, backed the wagon up to the ditch, and both of them got out and came in the porch; both were strangers to her. She invited the prosecutor in and gave him a seat in her rocking-chair, his companion taking a seat on the porch. The prosecutor said he had come for the bedstead or the money for it. She replied that she did not have the money then, and asked him to wait until her husband came. The prosecutor jumped up out of the chair swearing, said he had to have his money then or he would take the bedstead out of there or die and go to hell trying. He then walked around the table where she was ironing and went to the head of the bed and took a tablecloth that
(652) was lying on the bed and threw it on the floor. She told him to go out of her house and to wait till her husband came, and not to take any more things off that bed. He again swore, and said he was going to take that bedstead out or die and go to hell trying, and he then took up an underskirt that was lying on the bed and threw it down on the floor and began to throw back the covering. She again told him to go out of her house and let her things alone, and he kept on throwing back the covering and started to throw back the mattress, and as he started to do this she picked up a small baseball bat that her boy played with, and walked up to the bed and said, "Let my things alone"; and as she did this, he turned sideways at her and drew back his fist and said, "You must be a damned fool," and she hit him with the bat.

Being asked the question why she hit the prosecutor with the bat, she said, "Because he would not let my things alone and go on out of my house." She was corroborated by several other witnesses. His Honor, upon the above evidence, charged the jury that the defendant was, upon her own testimony, guilty of using excessive force upon the prosecuting witness, and instructed the jury to find the defendant guilty. Verdict accordingly. Defendant excepted to the charge. The court sentenced the defendant to thirty days in the workhouse.

Robert D. Gilmer, Attorney-General, and J. C. L. Harris for the State.

W. L. Watson for defendant.

CLARK, J. Whether there was excessive force used or not was a question for the jury, not for the court. The defendant's testimony was fuller than that of the prosecutor, but was not contradicted by him, and taking it to be true, as his Honor assumed, and as must be done on the virtual demurrer to her evidence, these are the (653) facts: Two strangers, one of them a white man, came to the defendant's home; she politely invites the latter in, and gives him her rocking-chair; without showing any credentials, he demands pay for her bedstead; upon her saying she had no money and asking him to wait till her husband came, the prosecutor jumps up violently, and swearing he would take the bedstead or go to hell trying, he throws her tablecloth and underskirt on the floor. She tells him to let her things alone. As she was ironing, presumably those things were freshly washed and nicely starched and ironed, and he must have known that to throw them on the floor would rouse her ire. Then he laid his profane hands on the paraphernalia of her bed and began to throw back the bedclothes and to lift the mattress, all of which would speedily have gone, of course, upon the floor. The defendant would not have been a woman if she had stood that. She seized her little boy's baseball bat and told him to let her things alone and leave the house, when he squared off at her, drawing back his fist, and called her "a damned fool," whereupon very naturally she batted the back of his head. It was probably a "left-fielder," for the prosecutor soon after left that field. The counsel for the prosecutor tells us he left because he did not wish to provoke a difficulty. It is doubtful if he could do more to provoke a woman, which is sometimes worse, and it would seem that he left rather than to collect another installment on the batting.

The woman was in her own house. If her evidence is true, and it must be so taken on this appeal, she treated the prosecutor politely, and he returned her politeness by swearing, throwing her things on the floor, throwing back the bedclothes and mattress, and avowing his intention to carry off her bedstead, at the direst hazard to his soul, and drawing back his fist at her, and cursing her when again told to desist. It can not be said, as a matter of law, with two men against her, and in her own house, she used excessive force in protecting her person, her home and her property. In view of his violent con- (654) duct and language, and refusal to behave or to leave, could she have secured her rights in her own home or his departure by the use of less force? Could she with safety to her person have laid hands on him more gently? If, on another trial, the evidence being the same, it shall be held that this was excessive force, a jury must so declare it. This Court can not.

Sir Edward Coke (3 Inst., 162) says: "A man's house is his castle,

et domus sua cuique tutissimum refugium," which last is a literal quotation by him from the famous *Corpus Juris Civilis* of Justinian, and is to be found in the Pandects, lib. II, tit. IV, *De in Jus Vocando.* And another great lawyer and statesman, whose name is borne with honor by two of our counties, William Pitt, Earl of Chatham, used this ever-memorable expression: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter—but the King of England can not enter. All his forces dare not pass the threshold of the ruined tenement." The old colored woman knew naught of legal lore, but she had an instinctive sense of her rights, and, by means of the wooden wand touched to the back of witness's head, she communicated electrically to his brain the same conception more effectually than if she had read to him the above citations.

This home was an humble one; the bedstead on which defendant slept may not have been fully paid for, but the prosecutor had no right to enter that home and misbehave, or refuse to leave when ordered out, still less to carry off any property therefrom, unless he had been an officer with a legal precept so to do, and the occupant of that home had the right to use sufficient force to make him leave and to abandon his attempt to carry off the bedstead, and to stop his handling of
(655) the other property—in short, to make him "leave her things alone," as the defendant repeatedly told him to do.

Whether, on these facts, the force used by the defendant was excessive is matter for a jury. Indeed, if this evidence is to be believed, the prosecutor was a lawbreaker, and is himself in jeopardy of the judgment for his violence and his defiant disregard of the rights of the defendant. Suppose this defendant had been white, and the prosecutor a negro man. The law is impartial, and extends the same protection to all alike.

Error.

Cited: *S. v. Blackley,* 131 N. C., 733; *S. v. Scott,* 142 N. C., 584; *S. v. Kimbrell,* 151 N. C., 710; *S. v. Cox,* 153 N. C., 642.

STATE v. BATTLE.

(Filed 15 April, 1902.)

1. Punishment—Assaults and Batteries—Affrays.

Where no deadly weapon is used and no serious damage done, the punishment in assaults, batteries and affrays shall not exceed a fine of $50 or imprisonment for thirty days.

2. Indictments—Assaults—Batteries—Affrays.

In indictments for assaults, batteries and affrays, where serious damage has been done, it is necessary to describe the serious damage done, its character and extent.

INDICTMENT against Ed. S. Battle and A. M. Powell, heard by *Robinson, J.*, and a jury, at September Term, 1901, of WAKE. From a verdict of guilty of both defendants and judgment thereon, the defendant Battle appealed.

Robert D. Gilmer, Attorney-General, for the State.

S. F. Mordecai, J. B. Batchelor, D. L. Russell, and W. N. Jones for defendant.

MONTGOMERY, J. There is only one question involved in this appeal, and that presents no difficulty in its decision. If the bill of indictment be stripped of a half dozen superfluous words, it (656) will readily be seen upon the most casual inspection that the offense charged is that of a simple assault—a mutual fighting between the appellant Battle and the other defendant, Powell—occurring during the September Term, 1901, of Wake Superior Court, and within one mile of the courthouse of that county. The jury returned for their verdict that the defendants were guilty in the manner and form as charged in the bill of indictment, and the court suspended judgment as to the defendant Powell, and sentenced the defendant Battle to imprisonment and hard labor upon the public roads for sixty days.

Had the court the authority to impose such a sentence—to impose a sentence for more than thirty days imprisonment or a fine of $50? That is the only question in this appeal, and the answer is, The court did not have that power. In cases where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays shall not exceed a fine of $50 or imprisonment for thirty days. The Code, sec. 987; *S. v. Nash,* 109 N. C., 824; *S. v. Johnson,* 94 N. C., 863; *S. v. Albertson,* 113 N. C., 633. The Superior Court, in a case like this one, could not impose a sentence beyond the limit for a simple assault or affray where no deadly weapon had been used and no serious damage done when tried before a justice of the peace. *S. v. Albertson, supra.* The Superior Courts and courts of justices of the peace have concurrent jurisdiction of such offenses as the one charged in the bill of indictment. Code, sec. 892; *S. v. Bowers,* 94 N. C., 910.

The bill of indictment is as follows: "State of North Carolina, Wake County. In the Superior Court, September Term, 1901. The jurors for the State, upon their oaths, present that Edward S. Battle and A. M.

Powell, in Wake County, on 25 September, 1901, did unlawfully
(657) and willfully mutually assault and beat each other in a public place, and inflict serious injury upon each other, during the September Term, 1901, of Wake Superior Court, and within one mile of the courthouse of said county, and then and there did unlawfully and willfully fight and make an affray, to the terror of the citizens there assembled and against the peace and dignity of the State."

If that bill was intended to be one for an affray in which serious damage was done, and over which the Superior Court had exclusive original jurisdiction, with the power to punish in excess of a fine of $50 or imprisonment for thirty days, the intention is disappointed. It has been over and over decided by this Court that in indictments for assaults, assaults and batteries, and affrays, where serious damage has been done, it is necessary to describe the "serious damages" done, their character and extent, so that the Court can see from the face of the indictment the particular descriptive facts charged; that the offense contemplated by the statute is charged; and that an averment that a party to an affray, or a prosecutor injured in an assault, *was seriously injured or sustained serious damages* is too general and indefinite. *S. v. Earnest,* 98 N. C., 740; *S. v. Moore,* 82 N. C., 659; *S. v. Russell,* 91 N. C., 624; *S. v. Covington,* 94 N. C., 913, 65 Am., 650; *S. v. Shelly,* 98 N. C., 673; *S. v. Porter,* 101 N. C., 713; *S. v. Phillips,* 104 N. C., 786; *S. v. Stafford,* 113 N. C., 635. In the light of these decisions, the words, "inflict serious injury upon each other," used in the bill of indictment, are meaningless, because they are vague and indefinite. The nature and extent of the injury should have been set forth, so that "the court and not the pleader must determine that the facts must constitute the offense, and these must be charged." *S. v. Earnest, supra.*

But even if the bill had sufficiently charged an affray in which serious damage had been done, the evidence embraced in the case on appeal—
the testimony of the witness Bridgers—does not contain one word
(658) concerning the nature and extent of the injuries sustained by Powell, or that he was injured in any way, with the exception that he was knocked down by Battle.

We have decided this case upon the matter brought up to us in the appeal, and upon nothing else. If, in the whole affair, public justice has suffered by reason of a failure of fuller investigation, the responsibility is not upon us.

The case is remanded to the Superior Court to the end that judgment may be pronounced on the verdict according to law.

Remanded.

Cited: S. v. Taylor, 133 N. C., 760; *S. v. Thornton,* 136 N. C., 616.

STATE v. HOLLEMAN.

(Filed 15 April, 1902.)

Highways—Abandonment—Obstruction.

A road worked and used by the public as a highway for forty years is not abandoned by being taken in an incorporated town and kept up by the town as a public highway by taxation, and an indictment will lie for the obstruction thereof.

INDICTMENT against Nathan Holleman, heard by *Robinson, J.*, at July Term, 1901, of WAKE. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and Herbert E. Norris for the State.

Douglass & Simms for defendant.

FURCHES, C. J. This is an indictment for obstructing a public highway. It is admitted that the defendant made the obstructions complained of, but he contends that the road obstructed is not (659) a public highway.

The case shows that the road obstructed by the defendant has been worked and kept up by the public, as a public highway, for the last forty years, and has been so used by the public; that in 1883 the town of Apex was incorporated, and that part of said road obstructed by the defendant is within the boundary of said incorporation; but it has, since the date of said incorporation, been worked and kept up by the corporate authorities of Apex as a public highway, and the public have used it as such. But it appears that the corporate authorities of the town of Apex have laid off and located a number of streets in said town, and have laid off and located one near the road obstructed, and running somewhat parallel with it; but the same has never been worked or opened to the use of the public, and was not in a condition to be used by the public.

It must be admitted that this was a public road, a public highway, in 1883 when the town of Apex was incorporated, and this incorporation did not discontinue it as a public highway. Nor did the fact that the duty of working and keeping it up was transferred to another jurisdiction cause a discontinuance. Suppose it had been near the Wake County line, and in the erection of Durham County it had fallen on the Durham side; this would have worked no discontinuance of the road, while the duty of keeping it up would have devolved on Durham County. Durham County might have discontinued it, but it would have remained a public road until it did so. Nor would the fact that Durham County established

other roads have discontinued it, and certainly not when Durham County continued to work this road and keep it open as a public highway.

The town of Apex had the right to open streets, as public highways, and to discontinue this road as a public highway. But it did not do so, and continued to work it and keep it open to the use of the public.

(660) Nor does the fact that it was worked and kept up by taxation, instead of working it by conscript labor, make any difference. This worked no discontinuance of the road. If this was so, all the public roads in Mecklenburg and other counties that have adopted the new road system of working the public roads by taxation, would be discontinued.

It may be that the town authorities have not been so considerate of the defendant's *interests* as they should have been. But this is not the question involved in this indictment. The question involves the rights of the public, to which *private interests* must yield.

We see no error, and the judgment is

Affirmed.

STATE v. BUCHANAN.

(Filed 22 April, 1902.)

1. **Jurisdiction—Larceny.**

The State courts have no jurisdiction where property is stolen in another State and brought into this State.

2. **Burden of Proof—Larceny.**

The burden is on the defendant to show that the property was not stolen in the State in which it is alleged in the indictment to have been stolen.

3. **Pleading—Not guilty—Pleas.**

Under the plea of not guilty the defendant may show that the crime was not committed in the State.

4. **Evidence—Defense—Proof.**

A defendant is entitled to the benefit of evidence introduced by the State tending to establish his defense.

INDICTMENT against Nelson Buchanan, heard by *Neal, J.*, and a jury, at November Term, 1901, of UNION. From a verdict of guilty and a judgment thereon, the defendant appealed.

(661) *Robert D. Gilmer, Attorney-General, for the State.*
Armfield & Williams for defendant.

S. *v.* BUCHANAN.

FURCHES, C. J. The defendant is indicted for the larceny of one pocketbook and $85 in money. There was no evidence as to the pocketbook, but there was evidence tending to connect him with the larceny of the money said to have been in the pocketbook. The exceptions and assignments of error do not point so directly to the larceny as they do to the question of jurisdiction. The prosecuting witness Morris testified that in August, 1901, he took the train at Atlanta, Ga., for Hamlet, N. C., which left Atlanta about 8 o'clock P. M. He was tired and slept most of the way from Atlanta to Monroe, N. C., waking occasionally. The money and pocketbook were in his pocket when he left Atlanta; he does not know whether it was taken in North Carolina, South Carolina or Georgia, and did not miss it until he reached Monroe, N. C. The defendant was porter on the train that night, called out the stations, and stood near him when calling them out; that he identified two bills of money taken from the defendant next day as his money. The defendant, among other things, testified that the distance from Atlanta, Ga., to Monroe, N. C., was about 213 miles—about 100 miles in Georgia, about 100 miles in South Carolina, and about 13 in North Carolina, and it was about "sunup" when the train reached Monroe. Upon the evidence, the defendant contended that if the jury be of the opinion that the defendant stole the pocketbook and money, the evidence showed that it was stolen in Georgia or South Carolina, and not in North Carolina, and if not stolen in North Carolina the defendant could not be found guilty, though he may have taken the money. This we understand to be the law of this State, and it was so held as early as *S. v. Brown,* (662) 2 N. C., 100, 1 Am. Dec., 548, which has been cited with approval in *S. v. Cutshall,* 110 N. C., 538, 16 L. R. A., 130; *S. v. Hall,* 114 N. C., 909, 28 L. R. A., 59, 41 Am. St., 822; and this is distinctly stated to be the law in Wharton Criminal Law, sec. 930. But it seems that his Honor so understood the law and gave the defendant's fourth prayer for instructions, which is as follows: "If the jury should find from the evidence that the property of the prosecutor was stolen in Georgia or South Carolina, then the courts of this State would have no jurisdiction of the case, and the jury will acquit the defendant." So the defendant has no ground to complain of the charge in this respect.

This is not the law where a larceny has been committed in one county in this State and carried into another. In that case it is held that the courts of either county have jurisdiction, as the same law and the same mode of trial and punishment prevail in one county as in the other; and the plea of acquittal or conviction would be a good defense in a subsequent trial for the same offense. *S. v. Groves,* 44 N. C., 191. But the law of larceny does not obtain where the larceny is committed in another State, as is shown by the authorities cited above. If the crime was

originally committed in Georgia or South Carolina, it was not an offense against the laws of this State, and the courts here have no jurisdiction of offenses against the laws of another State. While the defendant was entitled to have this defense under the plea of not guilty, it was still a matter of defense, and the burden was upon him (*S. v. Mitchell,* 83 N. C., 674), and while this is so, he was entitled to the benefit of any evidence introduced by the State proving or tending to prove that the larceny, if committed at all, was not committed in North Carolina. The defendant contends that his evidence tends to show this, which he contends was corroborated and strengthened by the evidence of the prosecutor
(663) Morris, in which Morris says that he only knows that he had the money when he left Atlanta and did not miss it until he got to Monroe, and that he was asleep most of the way; and the fact that more than 200 miles of this travel was beyond the limits of this State and only about 13 miles in this State was some evidence tending to corroborate him and to show that the money was not taken in North Carolina. While this evidence may not be very strong, still we think it was such as should have gone to the jury in connection with his own evidence. But under his Honor's charge the jury was not allowed to consider it. The jury was charged that "if he (defendant) desires to avail himself of the fact that the offense was committed in another State, *it must be done by proof offered by himself* that it was not committed in this State." *It must be done by proof offered by himself.* In this there was error. There are other exceptions, but they are not considered in this opinion.

New trial.

Cited: *S. v. Blackley,* 138 N. C., 622; *S. v. Barrington,* 141 N. C., 822; *S. v. Long,* 143 N. C., 674.

---

(664)

STATE v. MAULTSBY.

(Filed 22 April, 1902.)

1. Verdict—Setting Aside—Jury—Prosecuting Witness—Relationship.

Refusal to set aside a verdict in a criminal action on account of relationship of prosecuting witness and a juror, discovered after verdict, is not reviewable on appeal.

2. Verdict—Setting Aside—Evidence.

Refusal of trial judge to set aside a verdict against defendant in a criminal action as contrary to the evidence is not reviewable.

3. Witnesses—Corroboration.

Where the credibility of a witness is attacked, he may be corroborated by evidence of similar statements.

INDICTMENT against John W. Maultsby, heard by *Robinson, J.*, and a jury, at January Term, 1902, of CUMBERLAND. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and T. H. Sutton for the State.
Robinson & Shaw for defendant.

CLARK, J. The motion to set aside the verdict on account of relationship between the prosecuting witness and a juror, which was discovered after verdict—even if such relationship is ground of objection, as to which it is not necessary to decide—rested in the discretion of the trial court, and its refusal is not reviewable on appeal. This has been held where the relationship between a party and a juror is not discovered till after verdict. *Spicer v. Fulghum,* 67 N. C., 18; *Baxter v. Wilson,* 95 N. C., 137. The same ruling has been made where, after verdict, the juror was ascertained to be incompetent because a minor (*S. v. Lambert,* 93 N. C., 618), or not a freeholder (*S. v. Crawford,* 3 N. C., 485), or an atheist (*S. v. Davis,* 80 N. C., 412), (665) or a nonresident (*S. v. White,* 68 N. C., 158), or for other causes, see *S. v. DeGraff,* 113 N. C., 690, and *S. v. Council,* 129 N. C., 517, and cases there cited.

The same is true as to the refusal of the motion to set aside the verdict because contrary to the evidence or against the weight of the evidence. *Whitted v. Fuquay,* 127 N. C., 68; *S. v. Davis,* 80 N. C., 384; *S. v. Storkey,* 63 N. C., 7, and *S. v. Kearzey,* 61 N. C., 481.

It was competent to corroborate the witness, whose credibility had been attacked by the course of the cross-examination, to show by his own testimony that soon after the occurrence and before this proceeding began he had made similar statements to his testimony on the stand. *S. v. McKinney,* 111 N. C., 683; *S. v. Freeman,* 100 N. C., 429; *S. v. Parrish,* 79 N. C., 610; and cases cited in Walser's Index-Digest, pages 97, 98.

No error.

Cited: *S. v. Lipscomb,* 134 N. C., 697; *Boggan v. Somers,* 152 N. C., 396; *S. v. Nowell,* 156 N. C., 649; *S. v. Neville,* 157 N. C., 597; *S. v. Broadway, ibid.,* 601; *Mizzell v. Mfg. Co.,* 158 N. C., 269; *S. v. Drakeford,* 162 N. C., 671; *S. v. Rogers,* 168 N. C., 114; *S. v. Upton,* 170 N. C., 771; *Lupton v. Spencer,* 173 N. C., 128.

(666)

STATE v. FOSTER.

(Filed 22 April, 1902.)

1. **Evidence—Threats—Homicide—Malice—Premeditation.**

Where a person is indicted for murder, it is competent to show that the defendant about a month before the murder, having some trouble with the deceased, threatened to "fix" him.

2. **Evidence—Sufficiency—Murder in First Degree.**

The evidence in this case of premeditation and deliberation is sufficient to authorize the jury to find a verdict of murder in the first degree.

3. **Homicide—Instructions—Premeditation—Deliberation.**

On a prosecution for murder, an instruction as to murder in the first degree is incomplete unless it explains the meaning of "premeditation" and "deliberation."

4. **Admissions—Homicide—Attorney and Client.**

Admissions of counsel made on trial as to any fact or law will not be taken as true where it plainly appears that they are not true.

5. **Homicide—Instructions—Admissions—Counsel—Murder in Second Degree.**

Where a person is convicted of murder in the first degree, it is error if the court failed to instruct as to murder in the second degree, even though counsel admitted defendant to be guilty of murder in the second degree.

6. **Homicide—Instructions.**

On a prosecution for murder it is the duty of the trial judge to instruct as to murder in the second degree, even though no request is made therefor.

7. **Evidence—Flight—Homicide—Premeditation.**

On a prosecution for murder the flight of the prisoner does not tend to prove premeditation or deliberation.

8. **Evidence—Character in Evidence.**

Where the defendant in a prosecution for murder testifies for himself, but introduces no evidence as to his character, it is incompetent to show that he had the reputation of being "a little fussy."

(667) INDICTMENT against Benjamin Foster, heard by *Timberlake, J.*, and a jury, at October Term, 1901, of FRANKLIN.

The deceased and the prisoner were employees of one Coppedge, and the homicide occurred at the barn of said Coppedge on Saturday evening just before night. The deceased, Forney Johnson, was unloading guano, his father, a nephew, and some other persons being present, though it does not appear whether they were assisting in unloading the guano or not. The prisoner passed near the barn, when the nephew called to the prisoner to come and help unload the guano, which the prisoner refused

to do, and the evidence shows that he cursed the crowd at the barn and the deceased cursed him, and the prisoner threw a rock which struck the deceased on the head, inflicting a wound from which he died next morning. There was evidence that the prisoner and deceased had some trouble about a bridle about a month before the homicide, when the prisoner said "he would fix" the deceased; that the prisoner and deceased had not been on friendly terms since that time, and the prisoner had complained that evening to Coppedge that the deceased had cursed him; that the prisoner had picked up the rock he threw at deceased between the house and the barn of Coppedge, and that the prisoner's way home, a distance of some two hundred yards, was by the barn where the difficulty took place. It was also in evidence that the prisoner ran after throwing the rock, cursed the deceased, saying, if he had not killed the deceased, who followed him a short distance, that he would kill him if he followed him; that next morning the prisoner went back to Coppedge's, but upon hearing a noise at the deceased's house which led him to think Johnson was dead, he went into the woods, where he remained for about two weeks, and until he received information from Coppedge that if he would come in he would see that he was not mobbed when he came in and surrendered himself to the sheriff of the (668) county. The prisoner went upon the witness stand and gave his version of the difficulty; denied saying "he would fix" the deceased at the time of the trouble about the bridle; denied that he intended to kill the deceased; said he picked up the rock because he was afraid the deceased would attack him, as he had before that time threatened him; said the deceased came at him with a drawn knife, and he threw the rock in self-defense. He also introduced other witnesses for the purpose of corroborating him as to threats of the deceased. Among them was Coppedge, who, among other things, testified that the prisoner "was a little fussy," and that his character for truth was not the best. From a verdict of murder in the first degree and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
F. S. Spruill for defendant.

CLARK, J., after stating the case as above. The appeal shows only four assignments of error: First, that the court refused to charge the jury that, upon the whole evidence, they could not convict the prisoner of murder in the first degree; second, that there was error in admitting the evidence of W. I. Johnson, as to the difficulty about the bridle, which occurred a month before the homicide; third, for that the court charged that "on the other hand, if the evidence satisfies you beyond

a reasonable doubt that the defendant did willfully, deliberately and with premeditation kill the deceased, that is, at the time he threw the rock, however short a time beforehand such purpose was formed, he, the said Benjamin Foster, intentionally, deliberately and with premeditation, made up his mind to take the life of Forney Johnson, however much you may incline through sympathy to find a different verdict, you must return a verdict of murder in the first degree"; fourth, that the judge did (669) not charge the jury as to the law of murder in the second degree, but that the whole of the charge was as to murder in the first degree. The prisoner complains of this, and says that it was prejudicial to him and his defense. The learned judge who tried the case seems to recognize the force of this objection, and, in a footnote to the case on appeal, "in justice to himself," he gives as a reason for this omission that the prisoner's counsel had admitted in his argument to the jury that the prisoner was guilty of murder in the second degree. We can very well see how this admission may have led the court into this omission to charge. The State contends that it was no error, after the admission of prisoner's counsel; and that if it was error not to charge the jury on the law of murder in the second degree, it did not and could not have prejudiced the prisoner's defense, as he was convicted of murder in the first degree.

We see no error in admitting the evidence of W. I. Johnson as to the trouble between the prisoner and the deceased about the bridle. At the time this evidence was introduced there had been no admission by the prisoner's counsel that he was guilty of murder in the second degree, and, as murder in the second degree is the same as murder at common law (*S. v. Rhyne,* 124 N. C., 847), it was competent as tending to show express malice. And it seems that it might have been considered as some evidence, though not sufficient of itself, tending to show premeditation and deliberation. *S. v. Thomas,* 118 N. C., 1113.

We can not sustain the prisoner's first exception, "that the jury could not find the prisoner guilty of murder in the first degree," as we take this prayer in substance to be the same as asking the court to instruct the jury that there was no evidence, or no sufficient evidence, to authorize them to find a verdict of murder in the first degree. This is (670) always a delicate question for a judge, and especially so in the trial of a capital felony, where there is *any* evidence that tends to prove the guilt. But there are cases where the judge should assert his prerogative and so declare or charge. *S. v. Rhyne, supra; S. v. Miller,* 112 N. C., 886; *S. v. Thomas, supra; S. v. Wilcox,* 118 N. C., 1131; *S. v. Gragg,* 122 N. C., 1082.

But in this case we have the evidence of W. I. Johnson as to the difficulty about the bridle, in which the witness testified that the prisoner

said, "I'll fix you." The fact testified to by himself, that he had complained to Coppedge, his employer, that evening, that the deceased had cursed him and he did not like it, and the fact that he picked up a rock with which the fatal blow was given, before he got to the barn where the difficulty occurred, was sufficient, in our opinion, to carry the issue to the jury, while it does not appear to us to have been very strong or conclusive evidence to show that the prisoner had *deliberately and coolly premeditated* the killing of the deceased; but as this evidence was more than a mere scintilla (*Wittkowsky v. Wasson,* 71 N. C., 451) tending to prove that he had, we think it was properly submitted to the jury.

Tested by a number of decisions of this Court, practically all of them made under the statute of 1893, dividing murder into two degrees, we are not able to say that that part of the charge of the court objected to in the prisoner's third exception is legally erroneous. In *S. v. Thomas, supra, S. v. Dowden,* 118 N. C., 1145, and in every case where the matter has been discussed, this Court has held that to constitute murder in the first degree there must have been deliberation and premeditation on the part of the prisoner before the act of slaying. But the statute fixed no time for such deliberation and premeditation, except that it must be before the fatal blow, and this Court has not fixed any, though it is said in *Dowden's case,* which lays down the rule stated by the court in the charge to the jury in this case, that "if there (671) be an intent to kill and a simultaneous killing, then there is no premeditation." This we think is true as a self-evident proposition, if it had not been so stated by the court. It therefore follows that no purpose the prisoner had to kill the deceased, at the time he threw the rock, could make him guilty of murder in the first degree, unless he had deliberately considered the matter before that time, and formed in his heart the murderous purpose. If he had done this, he is guilty of murder in the first degree; if he had not, he is only guilty of murder in the second degree.

It has been uniformly held by this Court that if the purpose to kill was formed before the killing took place, "no matter for how short a time," it would be within the power of the jury to find him guilty of murder in first degree, and not violate the law, nor their oaths as jurors. The judge was not guilty of error when he followed the rule so often prescribed, though he would not have erred if he called the attention of the jury to the brevity of time, if they found that the intent was not formed before the time the difficulty occurred, and that the intent must have been formed before, and not simultaneously with the giving of the fatal blow.

Many of the other States of the Union have statutes dividing murder into two degrees, similar to ours, and they have undertaken to construe

them as we have ours. In *S. v. Thomas, supra, Mr. Justice Avery,* who wrote the opinion of the Court, has cited and quoted from many of these cases. We will avail ourselves of the benefit of some of these quotations, which seem to have been adopted by this Court, as they have been quoted with approval in that opinion. "To say that murder was of the first degree, simply because it was intended at the moment (said Freeman in his note to *Whitford v. Com.,* 6 Randolph (Va.), 721, 18 Am. Dec., 781), would be to construe the words 'deliberate and premeditate' out of the statute." "In the case of *Nye v. People,* (672) 35 Mich. (a court over which *Chief Justice Cooley* was presiding), it is said to be a perversion of terms to apply the term 'deliberate' to any act which is done on a sudden impulse." "This intent is defined by others as a steadfast resolve and deep-rooted purpose, or a design formed after carefully considering the consequences. *Atkinson v. State,* 20 Tex., 522." "The fixed resolve to kill. *People v. Forem,* 25 Cal., 361." "In *S. v. Carter,* 70 Mo., 594, this purpose to kill, it is said, must be made in a cool state of the blood."

We have cited these cases from other States, not for the purpose of showing that the construction put upon this statute by our Court is wrong, but for the purpose of showing what we think to be the meaning of what we have said. It seems to us that in a case like this, where there is so little evidence of deliberate and premeditated killing, that a charge, though not erroneous, is not complete that does not explain to the jury what is meant by deliberation and premeditation; that it should do more than state to the jury that they must exist before the killing, but that it does not matter for how short a time, so they existed before the fatal blow was stricken.

We can very well see why the learned judge did not charge the jury as to murder in the second degree, for the reason, as he says, that the prisoner's counsel had admitted that he was guilty of murder in that degree. The general rule is that admissions of counsel, made on the trial as to any matter of fact, will be taken to be true unless it plainly appears to the court not true. Indeed, it is said in *S. v. Rash,* 34 N. C., 382, 55 Am. Dec., 420, that it can never be error for the court to act upon such admissions. But it seems to us that the rule is too strongly stated in that case, and that it would be the duty of the judge to correct an admission of fact if it plainly appeared to the court to be an erroneous admission. It would certainly be the duty of the judge to correct (673) an erroneous admission as to the law, as the court is "bound to know the law." *S. v. Austin,* 79 N. C., 624; *S. v. Johnson,* 23 N. C., 353, 35 Am. Dec., 742. And we think the same rule would prevail where it plainly appeared to the court that a fact admitted was not true.

But we see no error of fact or law in this admission, and no error in the court's acting upon it as true. If there was error, it was not in the fact that the court accepted this admission as true, but the fact that it resulted in the court's failing to charge the jury as to murder in the second degree. It is contended on behalf of the State that it could not have done this, as the prisoner was convicted of murder in the first degree. This argument does not appeal to our judgment, for if the prisoner had been convicted of murder in the second degree, of which it was admitted he was guilty, of course it could have done him no harm to fail to charge on the second degree. So, we derive no aid from the fact that he was convicted in the first degree. Still, it may have been prejudicial to the prisoner not to charge the jury as to the law of murder in the second degree, as the charge was not as complete as we think it should have been on the first degree. If the court had charged the jury upon murder in the second degree, they would have had both degrees of the crime of murder brought directly to their attention, in contrast the one with the other, and the distinctions pointed out. They would have been told in direct and distinct terms that the prisoner could be convicted of murder only in the second degree for what he did by throwing the rock, even if it was thrown for the purpose of killing the deceased, unless this purpose had been deliberately formed upon due consideration of the consequences of his act. For this reason, the fact that the court did not charge upon the second degree of murder may have been prejudicial to the prisoner; and if it was, it was because such charge might have supplied a lack of fullness in the charge on the first degree. If it had been clearly explained to the jury what constituted murder in the second degree (of which, through (674) his counsel, he had admitted himself to be guilty), it may be that the jury would have coincided in that view. But in the absence of instruction as to that offense, with only the issue of murder in the first degree placed before them, with instructions only as to that offense, with evidence of the homicide, it may well be that the jury held against the prisoner that he was guilty simply because not informed as to the constituent elements of the lesser offense. It is true that where the trial judge fails to charge upon a point in the case, it is not reviewable error, unless he was asked to do so, or the matter was called to his attention in some proper manner. But the rule is different where the judge charges erroneously; he is then reviewable if exception is taken within the prescribed time, as was done here. The reason of the difference is that, in the first case, it was probably an inadvertence, and the presumption is that he would have charged correctly if his attention had been called to the matter; while, on the other hand, it is held that where the judge undertakes to charge the law, he must charge it correctly,

or he is reviewable. *S. v. Austin, supra; Burton v. R. R.,* 84 N. C., 192; *S. v. Johnson,* 23 N. C., 353, 35 Am. Dec., 742.

When the judge charged the jury it had been admitted by counsel that the prisoner was guilty of murder in the second degree, and the court had accepted this admission as true, and proceeded to charge the jury upon the assumption of the correctness of that admission. This being so, the whole case depended upon the first count as to whether it was murder in the first degree; and this depended upon the evidence showing or tending to show that the killing had been done with deliberation and premeditation, as heretofore explained in this opinion. The

(675) evidence shows that on the next morning after the difficulty at the barn, when the prisoner had reason to believe the deceased was dead, he dodged into the woods, where he remained about two weeks; and his Honor in charging the jury said: "The State further contends that the defendant's admission that as soon as he thought the deceased had died he at once threw down his axe and fled, is another circumstance to be considered by you as tending to satisfy you of defendant's guilt. The flight of a person immediately after the commission of a crime with which he was charged is a circumstance in establishing his guilt, not sufficient in itself to establish it, but a circumstance to be considered by the jury in determining the probabilities for or against him. The weight to be attached to this circumstance is a matter for the jury to determine in connection with all the facts in the case." Such evidence is competent, and often considered material, where a crime has been committed and the party who committed it is not certainly known, to prove that a party suspected or charged with its commission has fled the country, and especially where there is a dispute or doubt as to the identity as to the perpetrator of the crime. In this case there were a number of eye-witnesses to the fact, and, besides, the prisoner's counsel had admitted the killing and that the prisoner was guilty of murder in the second degree. This being so, we are entirely unable to see why the attention of the jury should have been specially called to the prisoner's flight in the charge of the court, and told that this was a *circumstance that they must consider* in connection with the other evidence in making up their verdict. We entirely fail to see how it shows or tended to prove *deliberation and premeditation* on the part of the prisoner, and that was the only matter the jury had to consider, as it had been admitted that the prisoner was guilty of murder in the second degree.

As the prisoner had gone upon the witness stand in his own behalf, it was competent to prove his general character for truth. But a

(676) witness testified that he had the reputation of being "a little fussy." This evidence was incompetent, as the prisoner had

not put his character in evidence. *S. v. Traylor,* 121 N. C., 674. It was not objected to, and there was no error in the court's admitting it, but it is here mentioned because the case goes back for a new trial. Under our social structure and the racial conditions which prevail here, it is sometimes difficult to prevent these things from having an influence upon the minds of good men in the trial of a negro for killing a white man; and this being so, we think it was at least unfortunate for the prisoner that the court said near the close of the charge that if the jury found from the evidence that the prisoner killed the deceased willfully, deliberately and with premeditation, they must find a verdict for murder in the first degree, "however much you may incline through sympathy to find a different verdict." We do not say that this charge is incorrect as a proposition of law. The jury should find their verdict according to their convictions, founded upon the evidence, whatever that might be, without sympathy for the prisoner or any one else. We only mention this as a circumstance in the course of the trial that may have prejudiced the prisoner's cause, and not as an error in the court. We know that it was not intended by the court to prejudice his cause before the jury; but for the errors pointed out in this opinion, we think the prisoner should have a new trial.

New trial.

Cited: *S. v. Bishop,* 131 N. C., 736, 760, 769; *S. v. Daniels,* 134 N. C., 680; *S. v. Hunt, ibid.,* 688; *S. v. Exum,* 138 N. C., 615; *S. v. Banks,* 143 N. C., 657; *S. v. Kendall, ibid.,* 665; *S. v. Cloninger,* 149 N. C., 571, 579; *S. v. Lance,* 166 N. C., 419; *S. v. Merrick,* 171 N. C., 791, 796, 797.

---

(677)

STATE v. HOWIE.

(Filed 29 April, 1902.)

1. Pleadings—Warrant—Not Guilty—Pleas.

Where a defendant pleads guilty in a court of a justice of the peace to a warrant charging no offense, and on appeal the warrant is amended in the Superior Court, it is error to refuse to allow him to change his plea to not guilty.

2. Arrest of Judgment—Pleadings—Appeal—Warrant.

A defendant who pleads guilty in the Superior Court may carry up, by a motion in arrest of judgment, the question whether the charge against him constitutes an offense.

S. *v.* HOWIE.

INDICTMENT against Dock Howie, heard by *Neal, J.*, and a jury, at July Term, 1901, of UNION.

Defendant was arrested upon a warrant issued by a justice of the peace. The offense intended to be charged was for a failure to work upon the public roads, of which the justice of the peace had final jurisdiction. The warrant was fatally defective in that it did not charge facts which constitute an offense. At the trial upon the warrant before the justice, defendant pleaded guilty, and from the judgment rendered against him appealed to the Superior Court. In the Superior Court, upon motion of the solicitor, the warrant was amended, and as amended the defendant pleaded "Not guilty." But, as the record states, the "court having inspected the warrant, announced to the defendant's counsel that it appeared from the warrant and the return of the justice of the peace that the defendant pleaded guilty before the justice of the peace; that this was an offense of which courts of justices of the peace have final jurisdiction, and the court would hold that if the defendant pleaded guilty before the justice, he could not now change his plea, and that the judgment of the justice would be affirmed." The defendant,
(678) through his counsel, admitted that a plea of guilty was entered before the justice on the warrant as it stood before any amendment was made. "The court then stated that it would have the jury impaneled and let them pass on the question as to whether that plea was entered before the justice." The jury was impaneled, and under appropriate instructions of the court on that issue, the jury found the defendant guilty. Thereupon, the court rendered judgment as follows: "The judgment of the court is that the judgment of the justice of the peace be affirmed," to which defendant excepted, and (together with other motions which were overruled and excepted to, and assignments of error) moved in arrest of judgment; motion overruled, and the defendant appealed from the judgment pronounced.

Robert D. Gilmer, Attorney-General, for the State.
Redwine & Stack for defendant.

COOK, J., after stating the case. His Honor erred in ignoring the amended warrant, and also in holding that defendant was estopped from changing his plea upon appeal in the Superior Court. The amended warrant and plea of "Not guilty" thereto made by defendant having been ignored by his Honor (to which no exception was taken), we can only pass upon the questions presented to us by the case on appeal, the most important of which is raised by the motion in arrest of judgment.

The warrant to which defendant pleaded "Guilty" in the justice's

court charged no criminal offense whatsoever. Therefore, no judgment could be rendered upon it. His plea of "Guilty" was simply an admission that the facts charged were true, and, if being true and constituting no offense, then he would be guilty of no offense. He does not call in question the facts charged, but relies upon them for his (679) justification. "The appeal could only bring up for review the question whether the facts charged, and of which the defendant admitted himself to be guilty, constitute an offense punishable under the laws and Constitution." *S. v. Warren,* 113 N. C., 684. Chitty on Criminal Law, page 431, states the principle to be that "No confession, however large or explicit, will prevent the defendant from taking exceptions in arrest of judgment to faults apparent in the record"; and Wharton's Criminal Practice and Pleading (9 Ed.), sec. 413, states the principle to be that "By a plea of guilty, defendant first confesses himself guilty in manner and form as charged in the indictment; and if the indictment charges no offense against the law, none is confessed. Hence, in such cases there may be motions for arrest of judgment or writ of error."

In this case no motion in arrest of judgment was made in the justice's court, but upon appeal the trial of the whole matter is had *de novo* in the Superior Court, where he had the right to make the motion.

No criminal offense having been charged in the warrant upon which his Honor ruled, it was error in not allowing the motion in arrest of judgment.

Judgment arrested.

---

(680)

STATE v. THOMPSON.

(Filed 13 May, 1902.)

1. Forcible Trespass—Forcible Entry and Detainer—Action—Dismissal.

Where, in forcible entry and detainer, it appears that the case is one of disputed title, the court should dismiss it.

2. Forcible Trespass—Dower—Widow—Questions for Court.

Where dower in land has not been assigned, the right of widow thereto does not constitute her an owner, entitling her to prosecute an indictment for forcible trespass on land, and the court should so hold.

3. Forcible Trespass—Ownership of Land—Constructive Possession.

Where, in a prosecution for forcible trespass, the land in dispute is covered by the deed of prosecutor and defendant, it is error to charge that the possession by prosecutor of a part of land included in his deed is constructive possession of the disputed part.

S. *v.* THOMPSON.

INDICTMENT against Martin Thompson and others, heard by *Coble, J.*, and a jury, at September Term, 1901, of MONTGOMERY. From a verdict of guilty as to Martin and Will Thompson, and judgment thereon, the defendants appealed.

Robert D. Gilmer, Attorney-General, for the State.
Adams & Jerome for defendants.

FURCHES, C. J. This is an indictment for forcible trespass, or rather for forcible entry and detainer.

The evidence showed that Mrs. Yarborough and the defendant Martin Thompson lived upon adjoining tracts of land, and that there is a strip of woodland that they both claim. The prosecutrix, Mrs. Yar-
(681) borough, claims that it is covered by the deeds to her deceased husband, and the defendant claims that it belonged to his father, who died more than forty years ago, and it was assigned to him in the division of his father's land.

Both offered evidence tending to show title as alleged, and both claimed to be in possession.

It is a clear case of disputed title, and should not have been allowed to be litigated on the State's side of the docket. And after it had gotten there, and it was made to appear to the court that it was a matter about a disputed title, it should have been dismissed. But the State must fail for other reasons. To sustain the indictment, the prosecutrix must have been the owner of the land trespassed upon, or in the actual possession of the same. She was not the owner of the land, from her own evidence, which tends to show, and we will assume did show, that the land she lived on belonged to her husband before his death, and descended to his heirs, as no will is alleged or shown. She was entitled to dower, but this had not been assigned and allotted to her. And the fact that she was the widow and entitled to dower gave her no right to any part of the land. *McCormick v. Monroe,* 48 N. C., 332; *Webb v. Boyle,* 63 N. C., 271; *Williams v. Cox,* 3 N. C., 4; *Harrison v. Wood,* 21 N. C., 437. And if the deed for the tract of land upon which she lived included the land trespassed upon, as she claimed it did, and the defendant's deed also included this land, the possession of the prosecutrix outside of this lappage would not extend across the defendant's line, and she would not have a constructive possession, and the defendants would not be guilty.

Under this state of the evidence the court charged the jury, "That if the jury find beyond a reasonable doubt that the prosecutrix was the owner of a tract of land; that the piece of land in dispute was embraced in a deed under which she held the said tract and was a part of
(682) the said tract, under known and visible lines and boundaries; and

find further, beyond a reasonable doubt, that the said prosecutrix was in the actual possession of any part of said tract, then, under the law, she would be held to be in possession of the land in question." This was excepted to by the defendants. The charge can not be sustained.

It was error to leave it to the jury to find whether the prosecutrix was the owner of the land upon which she lived, when she had shown that she was not the owner, as she had never had dower assigned to her. And instead of leaving this question to the jury, the court should have told the jury that the prosecutrix was not the owner of said tract of land.

It was also erroneous to instruct the jury "That if the prosecutrix was in the actual possession of any part of said tract, then, under the law, she would be held to be in the possession of the land in question." This would have been so if the prosecutrix had been the owner, and there had been no evidence showing or tending to show that the defendant's deed also covered the land trespassed upon. In absence of such evidence it was also error to submit the defendant's claim of title to the jury, with instructions that if they found that the defendant's deed also covered this land, and created what is called "a lappage," then there would be no constructive possession across this line.

This discussion shows that the dispute was one of title, and should not have been tried on the State docket.

Error.

Cited: *Fishel v. Browning,* 145 N. C., 75.

---

(683)

STATE v. CONLY.

(Filed 13 May, 1902.)

1. **Trial—Prosecuting Attorney—Solicitor—Homicide—Due Process of Law.**

An associate counsel, in the absence of the solicitor, with the consent of the court, may prosecute in a criminal action and, upon conviction of defendant, pray the judgment of the court.

2. **Admissions—Evidence—Prisoner—Criminal Law.**

Admissions made by a prisoner under arrest are competent evidence, if no threats or inducements are made.

3. **Homicide—Instruction.**

The instruction in this case presents every phase of murder in the first degree, murder in the second degree, manslaughter and self-defense.

4. Evidence—Sufficiency—Homicide—Murder in the First Degree.

The evidence in this case is sufficient to be submitted to the jury as to murder in the first degree.

5. *Nol. pros.* can be taken only with assent of the court.

INDICTMENT against Archie Conly, heard by *Coble, J.,* and a jury, at November Term, 1901, of ROWAN. From a verdict of guilty of murder in the first degree and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, of the State.
John S. Henderson, T. C. Linn and B. B. Miller for defendant.

CLARK, J. There was no error in refusing a motion in arrest of judgment, because the sentence of death had been prayed by counsel associated with the solicitor, instead of by the solicitor himself, who had been called off. The prayer for judgment is a purely formal matter, and the judge can pass sentence whether it is prayed for or not.
(684) The solicitor acts under the control of the court, and has no power to discharge a defendant or enter a *nol. pros.* before judgment without leave of the court. *S. v. Moody,* 69 N. C., 529. Of course, he could not have that power after verdict, simply refusing to pray judgment. Indeed, in the temporary absence of the solicitor, the court has the inherent power to appoint an assistant or associate counsel to represent the State. 5 A. & E. Enc., 718 (1 Ed.). In the statement of case settled by the judge it is stated that the associate counsel who prayed the judgment "were recognized by the court as appearing for the prosecution or State, . . . and had appeared with the approval of the solicitor and the recognition of the court from the beginning of the trial."

In *S. v. Cameron,* 121 N. C., 572, relied on by the prisoner, it is said: "If that officer (solicitor) should not be present during the trial, then the case on appeal should be submitted to the attorney who represents the solicitor, or who is prosecuting for the State with the sanction and approval of the court."

The exception that the prisoner has been deprived of a trial by due process of law because the solicitor was represented by other counsel with assent of the court, as above stated, is without merit, and requires no discussion.

There was no error in refusing the prayer to instruct the jury that there was no evidence of murder in the first degree.

The evidence is that the prisoner said to one Todd: "Give me a draw off your cigarette, if you want to. If you don't want to, you can go to hell."

Todd said: "I won't give you a draw, and I won't go to hell, either."

Just then the deceased came by and asked one of the bystanders to go to his room, and said to Todd: "Duck, what are you doing standing here? Are you a dead man?" Then the prisoner said to the deceased: "What in the hell have you got to do with it?" The (685) deceased said: "I haven't anything to do with it, my friend; I am not speaking to you." Deceased said, "I am going home," and he and Todd walked off, Todd in front. Prisoner said to deceased, "I don't care nothing for a nigger like you," and deceased said, "I don't care nothing for you, either." Prisoner said: "Do you want to fight?" And deceased said, "No; I don't want to have anything to do with you," and some one hollered, "Get him, Archy," and the prisoner grabbed the deceased with his left hand and made a pass at him with his right hand, and the deceased threw up his hands and hollered, "Boys, don't let him kill me like that." Deceased made a break and ran, and the prisoner right behind, with Todd and two others following and hollering to him, "Don't, Archy." Deceased ran about fifteen yards and fell, and prisoner started to get on him; one of those behind prisoner caught him by the coat. Prisoner was close upon deceased, jumped on him and stabbed him twice after he fell. The prisoner got down on the deceased and made two or three motions with his knife, and deceased said, "Oh! Oh!" Prisoner then got up and started off, saying, "I am gone." Deceased died in five or six minutes. This is the substance of the testimony of the witnesses. The prisoner introduced no evidence.

The murder occurred about midnight. An hour afterwards the prisoner met an acquaintance on the street and said, "I cut a damned nigger over yonder at the dance," and showed blood on his hand and had a Barlow knife open in his hand. The prisoner went to the house of Ella Jones, and was found by the officer of the law at her house between the mattress and the slats. He stated to the witnesses when informed of the death of deceased: "Let him die and go to hell." To another witness the prisoner said, "Is he dead?" and on being answered, "Yes," said, "I aimed to kill him." This last evidence was excepted to on the ground of duress. The prisoner was under arrest, but the testimony was uncontradicted that there were no threats or (686) inducements, and the judge properly admitted the admission.

The charge of *Judge Coble* is very full, and carefully presented every phase of murder in first degree, murder in second degree, and manslaughter and self-defense, and evidently follows with care the precedents settled by this Court. We find no error therein. The court, among other things, charged the jury: "If the prisoner intentionally cut Gus Davis, the deceased, with a knife, and intentionally killed him, and if the State has failed to show beyond a reasonable doubt that the killing was done with deliberation and premeditation, then the prisoner would

be guilty of murder in the second degree, unless the evidence shows that the killing was done in self-defense or under such circumstances as make it manslaughter. . . . The jury are instructed that the prisoner can not be found guilty of murder in the first degree unless the jury are satisfied from the evidence beyond a reasonable doubt, not only that the prisoner is guilty of intentionally and feloniously killing the deceased, but it must appear from the evidence beyond a reasonable doubt that such killing was done willfully, deliberately, and with premeditation, that is, that it was done intentionally and in pursuance of a fixed and premeditated purpose and design on the part of the prisoner to kill Gus Davis, the deceased. To constitute murder in the first degree, there must have been an unlawful killing done purposely and with premeditated malice. By premeditation is meant thought beforehand, for any length of time, however short. If a person has actually formed the purpose maliciously to kill and has deliberated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. An intent to kill may exist in other degrees of unjustifiable homicide, but in no other degree is that intent (687) formed into a fixed purpose by deliberation and premeditation. The intent is defined as a steady resolve and deep-rooted purpose or design formed after carefully considering the consequences. If the prisoner intentionally killed the deceased in pursuance of a fixed design and purpose to kill, formed upon premeditation and reflection, then he is guilty of murder in the first degree."

The prisoner has no cause to complain of the charge in any particular, nor of submission of the issue of murder in the first degree. The murderous assault, entirely without provocation, the subsequent pursuit with three men following him warning him not to harm deceased, one of whom caught hold of his coat and attempted to restrain him, the prisoner jumping on the deceased, lying on the ground, stabbing him fatally, twice, and then getting up and saying instantly, "I am gone," all this assault, pursuant and killing without provocation or anything said or done by deceased calculated to arouse his passion, was certainly evidence tending to show premeditation and deliberate killing with malice, and was sufficient to be submitted to the jury.

Indeed, it is difficult to see how the jury could have found otherwise than murder in the first degree, if they believed the evidence, and of its credibility they were the sole judges.

No error.

Cited: *S. v. Bishop,* 131 N. C., 763; *S. v. Hunt,* 134 N. C., 688; *S. v. Exum,* 138 N. C., 607; *S. v. Daniel,* 139 N. C., 553; *S v. Jones,* 145 N. C., 470, 471; *S. v. Roberson,* 150 N. C., 839; *S. v. Stevens,* 152 N. C., 841.

(688)

STATE v. FLEMMING.

(Filed 20 May, 1902.)

1. **Confessions—Evidence.**

Confessions made by accused in jail are competent, if there are neither threats nor inducements made.

2. **Evidence—Corroboration—Previous Statements.**

Where a witness is impeached he may be corroborated by previous statements.

3. **Evidence—Withdrawal by Trial Judge—Harmless Error.**

The trial judge may correct the admission of improper evidence by withdrawing it from the jury.

4. **Evidence—Circumstantial—Instructions—Reasonable Doubt.**

Where the State relies on circumstantial evidence, it must establish every circumstantial fact upon which it relies beyond a reasonable doubt.

INDICTMENT against Dick Flemming, Ed. Woods and Richard Blaton, heard by *Shaw, J.*, and a jury, at February Term, 1902, of ROWAN. From a verdict of guilty as to Dick Flemming and Richard Blaton, and judgment thereon, they appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for defendants.

CLARK, J. This is an indictment against three negroes for rape upon a white woman, a widow, who, with her little daughter, was living in a house without male protectors. The assailants broke open the door and committed the crime with every conceivable circumstance of violence and brutality. The revolting details are narrated with a simplicity and an evident truthfulness that make the blood run cold. The only question was as to the identity of the prisoners. The jury after hearing the evidence and the defense of able counsel, said for (689) their verdict that they had reasonable doubt as to the identity of one of the prisoners, and acquitted him, but that they had none as to the other two.

There was exception to evidence of previous statements made by the prosecutrix in corroboration of her evidence on the stand, also to evidence which the judge, after admitting over the prisoners' objection, subsequently withdrew and told the jury not to consider. Both these points have been so often passed upon by the Court that no citation of authority is necessary. *S. v. Apple,* 121 N. C., 584; *S. v. Coates, post,* 701; *S. v. Collins,* 93 N. C., 564, and cases there cited.

The confessions in jail were competent, the testimony being that there were neither threats nor inducements. *S. v. Bishop,* 98 N. C., 773.

The special prayers for instructions by the prisoners (which were principally as to the defense of an *alibi*) were given, except the prayer that there was not sufficient evidence to go to the jury, which was properly refused, and the prayer that when circumstantial evidence is relied on "every link in the chain of evidence must be proved beyond a reasonable doubt." In lieu of this last, the court instructed the jury: "In this case the State relies upon both direct and circumstantial evidence, and before the State can rely upon circumstantial evidence it is necessary for the State to establish every circumstantial fact upon which it relies, beyond a reasonable doubt." In this the court followed exactly the rule laid down in *S. v. Crane,* 110 N. C., 536, which has since been more fully stated in *S. v. Shines,* 125 N. C., 730.

Here the prosecutrix testified as to the identity of the two who were convicted. There was circumstantial evidence to corroborate her—such as scratches on the face of one of them the next day after
(690) the crime, which were not there the day before, the identification of his hat and glove, and other corroborating circumstances.

After a full examination of the record, we find no error of law committed by the judge, and the facts were submitted to the jury with proper and just instructions.

No error.

Cited: S. v. Jones, 145 N. C., 471; *S. v. West,* 152 N. C., 834; *S. v. Lane,* 166 N. C., 336; *S. v. Trull,* 169 N. C., 367; *S. v. Frady,* 172 N. C., 980.

STATE v. ELLSWORTH.

(Filed 20 May, 1902.)

1. **Indictment—Sufficiency—Burglary—The Code, Sec. 996.**
   An indictment for burglary, alleging a breaking with intent unlawfully, willfully and feloniously to commit the crime of larceny, sufficiently charges an intent.

2. **Evidence—Withdrawal by Trial Judge—Harmless Error.**
   The trial judge may correct the admission of improper evidence by withdrawing it from the jury.

3. **Evidence—Burglary.**
   Evidence in a burglary case, that witness met defendants the day before the former heard of the safe being broken open, is admissible as fixing the time of the occurrence as to which witness was testifying.

4. Evidence—Opinion Evidence—Burglary.

Evidence in a burglary case, that from the appearance of the door the witness thought it had been broken open by a chisel, is competent.

INDICTMENT against George Ellsworth and J. H. Traynor, heard by *Neal, J.*, and a jury, at September Term, 1901, of ANSON. From a verdict of guilty as to both defendants and judgment thereon, they appealed.

Robert D. Gilmer, Attorney-General, for the State.
H. H. McLendon for defendants.

CLARK, J. The defendants were indicted under section 996 of (691) The Code in the following bill of indictment: " . . . That the defendants did unlawfully, willfully and feloniously break and enter the storehouse of M. H. Lowery and others, doing business as M. H. Lowery & Co., then and there situate, and in which said house there was at the time money, meal, flour, meat, dry goods and other personal property, in the night-time, and with intent unlawfully, willfully and feloniously to commit the crime of larceny," etc. The defendants moved to quash, and also in arrest of judgment, because the intent "to commit the crime of larceny" was not sufficiently charged. The solicitor followed a decision of this Court which is exactly in point, and the judge properly denied the motion. *S. v. Tytus,* 98 N. C., 705. This case has been cited with approval in *S. v. Christmas,* 101 N. C., 755.

A witness testified that the defendants left a horse there tied to a tree and did not come back, and the next day the owner of the horse came for him. The defendants excepted, because this tended to show another substantial crime, but it was not used for that purpose, and was simply a circumstance which incidentally came out in narrating the conduct of the defendants and connecting them with the crime. However, the court, out of abundant caution, subsequently withdrew this evidence from the jury and told them not to consider it. This cured the error, if any. *Wilson v. Mfg. Co.,* 110 N. C., 94, and numerous cases there cited; also, *Crenshaw v. Johnson, ibid.,* 277; *S. v. Apple,* 121 N. C., 584; *Waters v. Waters,* 125 N. C., 591, and other recent cases. Another witness testified that the day he met the defendants was the day before he heard about the safe being broken open. This was not evidence to show that the safe had been blown open, which was amply shown by direct and uncontradicted testimony, but was evidence of the witness to fix the time of the occurrence to which he was testifying. (692)

Nor was there any sound objection to the testimony, "The front door had been broken open with a chisel." This was not a matter of opinion, but the witness was testifying to the impression made on the wood by the chisel, and was subject to cross-examination; nor was it a

very material point whether the door was broken open by a chisel or other instrument. It was as competent for the witness to say that the impression on the door-facing was made by a chisel as to say that a track was made by a man or a horse. There was no conflicting evidence that the room had been broken into and the safe drilled into and broken open by some explosive, and gold coin and other contents abstracted. Those matters were not contested. The point in the case was to show beyond a reasonable doubt that the defendants were the perpetrators of the crime.

The above points are all that are presented in the brief of the learned and able counsel of the defendants.

There are other exceptions in the record, but, on careful examination, they do not require discussion.

No error.

Cited: S. v. Peak, post, 713; *S. v. Ellsworth,* 131 N. C., 773; *Moore v. Palmer,* 132 N. C., 977; *S. v. Mitchell, ibid.,* 1036; *Medlin v. Simpson,* 144 N. C., 400; *Bedsole v. R. R.,* 151 N. C., 153; *S. v. Shuford,* 152 N. C., 810; *S. v. Lane,* 166 N. C., 336.

(693)

STATE v. BRIGGS.

(Filed 20 May, 1902.)

Licenses—Merchants' Licenses—Laws 1901, Ch. 9, Secs. 77, 101, 103.

Laws 1901, ch. 9, secs. 101, 103, create two offenses, one for the failure to take out a merchant's license and one for failure to pay license tax on demand by the sheriff, and such demand is not necessary to a conviction for the first offense.

DOUGLAS, J., dissenting.

INDICTMENT against J. E. Briggs and A. Savery, heard by *Coble, J.,* and a jury, at February Term, 1902, of FORSYTH. From the finding of a special verdict and a judgment of guilty thereon, the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for defendant.

MONTGOMERY, J. The defendant was indicted for unlawfully engaging in the business of merchandise without having procured a license to engage in the business. The jury returned a special verdict to the effect that the defendant, from 1 May, 1901, till the finding of the bill

of indictment at February Term, 1902, and at the time of the trial, was a merchant, and had not taken out the license as required in section 103 of the Revenue Act of 1901, till after the finding of the bill of indictment; that the license was not countersigned by the register of deeds, as is required by section 94 of the same act, till after the February Term, 1902, when the bill was found; that the county commissioners levied no tax under Schedules B and C till the first Monday in September, 1901; that no demand was made on the defendant for the tax, as required in section 100 of the same act, and that the defendant had no knowledge of the law requiring him to pay a special tax. On the special (694) verdict, the court having been of the opinion that the defendant was not guilty, so held him not guilty, and the solicitor for the State made exceptions and appealed to this Court.

An annual license tax of $1 is fixed as the merchant's tax by section 77 of the Revenue Act of 1901, and by section 103 of the same act the failure of every person who shall practice any trade or profession, or use any franchise taxed by the laws of North Carolina without having paid the tax and obtained a license, renders such person guilty of a misdemeanor. By the same section, also, such persons subject themselves to a penalty of $50 for not paying the tax and taking out the license, in addition to the pains and penalties denounced against persons who exercise these trades or professions upon which the law imposes the payment of a tax and the procuring of a license to engage in such business.

There is another offense against the criminal law, connected with the same subject-matter, mentioned in section 101 of the same act, and that offense is the refusal of such person to pay the tax when the same shall be demanded by the sheriff of him. That offense is constituted by a failure on the part of those engaged in trades and professions who have either taken out a license and who did not pay the tax at the time, or who have failed to take out license and who have done business notwithstanding. The language of section 101 on that point is "that it shall be and is hereby made the duty of the sheriff of each county in the State to make diligent inquiry as to whether or not all license taxes provided for under Schedules B and C of this act shall have been paid, and any person, firm or corporation liable for such license tax, who fails or refuses to pay such tax when demanded by the sheriff, shall be guilty of a misdemeanor," etc.

Separate offenses are clearly created by sections 101 and 103. (695) The first, as we have seen, is the doing business without having paid the tax and procured the license, and the last is the refusal to pay the tax when the sheriff demands it. A particular reading of section 101 will make it clear that the sheriff is not authorized to proceed as for a criminal offense against an offending trader for the failure to take out

the license, but only for a failure or refusal on his part to pay the tax after demand made by the sheriff for it.

The reasons for this legislation we need not inquire into. We find the law clearly written, and we only have to interpret it.

His Honor took the view that the two sections, 101 and 103, constituted one offense, and we think it was an erroneous view of the law.

Reversed.

DOUGLAS, J., dissenting: I can not concur in the opinion of the Court, as it seems to be required neither by the wording of the statute nor the policy of the law. I deeply regret the apparent tendency to depart from the strict construction of penal statutes, of immemorial obligation, and to give to them a *liberal* or so-called *beneficial* interpretation. The effect of such "beneficial interpretation" is to *create* criminals by judicial construction. Such a course can never meet my approval.

Let us lay aside for the moment the technicalities of law and take a common-sense view of the facts of the case before us. The defendant is indicted for failing to pay the sum of $1 which he had not the slightest idea he was owing. He is probably but one among a thousand country merchants who are in the same situation. They are perfectly willing to pay their taxes, and probably have done so, as there is no alle-
(696) gation that he owes any tax whatsoever except the $1 license fee.

And yet these men, willing to perform every duty and to pay every debt, are liable to be sentenced to imprisonment in the common jail at the discretion of the court below. They are not given an opportunity to pay the tax. But it seems this is not enough. After serving one term in jail, they are not yet safe. The vengeance of the law is not yet satisfied for their failure to pay that dollar. The sheriff, who in the meantime has collected by execution the penalty of $50 imposed by section 103, may, for the first time, demand that dollar, and a failure to pay on demand may be followed by another long term of imprisonment.

Can we suppose that the law contemplated any such consequences? Surely not. It is a well-settled principle of interpretation that where one matter is specifically provided for in one part of a statute, it is *pro tanto* taken out of the general operation of the statute. It seems clear from the face of the statute that section 101 was intended to cover a failure to pay such unusual and additional taxes as are not supposed to be within the knowledge of the average citizen. I know, of course, that every one is presumed to know the law, but we all know that this is a mere naked presumption of the most violent nature, usually without any foundation in reality. Taking this fact into consideration, section 101 provides that such a taxpayer shall not be liable to prosecution until after demand by the sheriff, and a subsequent failure or refusal to pay. This

section further provides that, even after the delinquent is arrested and carried before a committing magistrate, he may avoid all further penalty by paying the original license fee, with all costs and expenses due to the sheriff.

If section 103 is held to apply to the case at bar, the wise and beneficent provisions of section 101 are practically eliminated from the statute, and the jail doors are open to perhaps a thousand honest men who are entirely innocent of the slightest wrongful intent. (697)

As I have said before, I am in favor of punishing criminals, but not of making criminals.

We should not forget that it has been found as a fact that "the defendant had no knowledge of the law requiring him to pay the special tax." I can not concur in the opinion of the Court, as I think that the wise judgment of the able judge below should be affirmed.

Cited: S. v. Pilkerton, post, 745.

STATE v. MONDS.

(Filed 27 May, 1902.)

1. **Rape—Emission—The Code, Sec. 1101, Laws 1895, Ch. 295.**

   In rape the least penetration of the person is sufficient, and the emission of seed is unnecessary.

2. **Rape—The Code, Secs. 1101-5—Laws 1895, Ch. 295.**

   In an indictment under Laws 1895, ch. 295, for carnally knowing a girl between the ages of 10 and 14, it is error to charge that the crime would be complete "if the jury should find that the defendant injured and abused her genital organs."

INDICTMENT against James Monds, heard by *Jones, J.,* and a jury, at March Term, 1902, of CHOWAN. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
W. J. Leary, Sr., for defendant.

COOK, J. Defendant was tried and convicted upon a bill of indictment drawn under section 1101 of The Code, as amended by Laws 1895, ch. 295, which, as amended, is as follows: "Every person who is convicted of ravishing and carnally knowing any female of the (698)

age of 10 years or more, by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of 10 years, shall suffer death. And every person who is convicted of unlawfully and carnally knowing, abusing any female child 10 years old and under the age of 14 shall be guilty of a crime, and shall be punished by fine or imprisonment in the State Prison at the discretion of the court, provided she has never before had sexual intercourse with any male person."

From the evidence of the prosecuting witness it appears that she was over 10 and under 14 years of age, and that she was willing to the intercourse; and that the exposure was made by two men, who happened to pass along the path and saw her and defendant in a compromising position on the ground in the bushes, having their attention attracted by hearing a "noise between a whine and a cry," and the barking of a dog, which caused them to jump up, and they ran in different directions.

His Honor instructed the jury "that if defendant attempted to have carnal knowledge of the prosecutrix with her consent, and before he accomplished his purpose he was intercepted and proceeded no further, then the defendant would not be guilty unless he injured and abused the genital organs of the prosecutrix; that the jury must find these facts from the evidence introduced, beyond a reasonable doubt, before they can convict." The court further charged "that unless the jury find from the evidence that defendant had actual sexual intercourse with the prosecutrix, that is, that he penetrated and had emission of seed in her person, he would not be guilty of carnally knowing her, and that there was no evidence that he had penetrated, . . . but if the jury find that defendant injured and abused her genital organs, beyond a reasonable doubt, then defendant would be guilty." Defendant excepted and (699) appealed from the judgment pronounced.

His Honor erred in instructing the jury that the offense would be incomplete unless "he penetrated and had emission of seed in her person."

"It shall not be necessary upon the trial of any indictment for the offense of rape, carnally knowing and abusing any female child under 10 years of age, . . . to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only." The Code, sec. 1105; *S. v. Hargrove,* 65 N. C., 466. As this part of the charge was more favorable to defendant than the law permits, he can not complain; but we deem it proper to rule upon it lest our failure to do so would be misunderstood. The error, however, for which a new trial is granted, consists in charging that the crime would be complete, "if the jury find that defendant injured and abused her genital organs." The female's age being over 10 and under 14 years,

the indictment is drawn under the act of 1895, which withdraws its protection from females, within that age, who have previously had sexual intercourse. With this exception, it does not materially differ from the former statute (Code, sec. 1101); in the one it is . . . "carnally knowing and abusing"; . . . in the other, it is "carnally knowing, abusing." . . . In the latter statute a "comma" exists in lieu of the copulative conjunction "and." By no known rule can we construe the comma to mean "or" so as to create a separate offense, and if we construe it as placing "abusing" in apposition with "knowing," then we would have to hold that "knowing" was explained or characterized by "abusing," which was clearly not intended by the Legislature. Therefore, in construing the amendment as a whole, in connection with the amended statute, we must hold that the Legislature did not intend (700) to depart from its former verbiage in extending the "consent" limit. It seems clear to us that they both have the same meaning, and the *gravamen* of the offense is the "knowing"—penetration with his person—without which there is no rape.

The "abusing" is no part of the common (or statute) law definition of rape. We first find it in the statute of 18 Elizabeth, ch. 7, when the "abominable wickedness of carnally knowing and abusing any woman-child under the age of 10 years" was made a felony without benefit of clergy; in which case the consent or nonconsent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.

The "abusing" construed with the "carnally knowing" means the imposing upon, deflowering, degrading, ill-treating, debauching and ruining socially, as well as morally, perhaps, of the virgin of such tender years, who, when yielding willingly, does so in ignorance of the consequences and of her right and power to resist. If the act be committed forcibly and against her will, it would be rape without reference to the statute. "Injury" of her genital organs might have occurred from the effort to penetrate, or in some other way; but the statute does not declare it to be an element of the crime to injure or abuse the organs. To have injured the organs in some way other than by endeavoring to penetrate with his person, if done with her consent, though it would be abusing her, would not be a crime, because there was no act of carnal knowledge. But if the injury occurred against her will and intentionally, then it, the injury, would be embraced in the *assault* charged, for which he could be convicted.

For the error in the charge above pointed out, a new trial is granted.

New trial.

Cited: S. v. Lance, 166 N. C., 413.

(701)

STATE v. COATES.

(Filed 27 May, 1902.)

Indictment—Incompetent Witness Before Grand Jury—Quashal—Arrest of Judgment—Grand Jury.

The finding of an indictment upon the evidence of witnesses, one of whom is incompetent, does not invalidate the indictment.

DOUGLAS, J., dissenting.

INDICTMENT against Garrett Coates, heard by *Justice, J.*, and a jury, at February Term, 1902, of MADISON. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Pritchard, Adams & Rollins for defendant.

CLARK, J. This is an indictment for assault upon Zanie Coates, with intent to commit rape. Said Zanie and Fronie Coates, the wife of defendant, were sworn and examined as witnesses before a grant jury. The defendant moved to quash because his wife was examined before the defendant, were sworn and examined as witnesses before a grand jury. wife was not examined as a witness. Verdict of guilty. Motion in arrest of judgment upon same ground as in motion to quash. Motion denied, and defendant again excepted. This is the only point presented.

The law is uniformly held by many decisions, and not one has been found to the contrary, as follows: When an indictment is found upon testimony, all of which is incompetent, or of witnesses, all of whom were disqualified, the bill will be quashed; but when some of the testimony or some of the witnesses before the grand jury were incompetent, the court will not go into the barren inquiry how far such testimony or such witnesses contributed to finding the bill, which is merely a
(702) charge, but will admit the competent witnesses or testimony on the trial before the petit jury, and, if sufficient to satisfy the jury beyond a reasonable doubt of the prisoner's guilt, the judgment will not be arrested, for such verdict establishes in the most conclusive mode that the incompetent evidence was mere surplusage in making out a *prima facie* case before the grand jury, and works no prejudice to the prisoner.

In *S. v. Tucker*, 20 Iowa, 508, it is held that the admission of incompetent testimony (the wife against the husband) by the grand jury (there being other and competent evidence) does not warrant quashing the indictment. The Court says: "Whether witnesses are competent is often a very difficult question of law, and to hold that if the grand jury,

in the course of their investigation, happen to examine an incompetent witness, that this will have the effect to vitiate their finding, is going a step further than we are prepared to take."

In *S. v. Shreve,* 137 Mo., 1, the Court held that there being competent witnesses against the husband before the grand jury, "it is no ground to quash the indictment that an incompetent witness (the wife) also testified before the grand jury." Exactly the same ruling was made in *Dockery v. State,* 35 Tex. Cr. App., 487, and *Hammond v. State,* 74 Miss., 214, in both of which one of the witnesses was the wife against the husband. In Wharton Cr. Pl. & Pr. (9 Ed.), sec. 363, note 4, it is said: "The mere reception of some evidence that is incompetent does not avoid the finding." Citing *S. v. Fassett,* 16 Conn., 457; *S. v. Wolcott,* 21 Conn., 272; *S. v. Boyd,* 2 Hill (S. C.), 288, 27 Am. Dec., 376; *Turk v. State,* 7 Ohio (Part 2), 242; *S. v. Tucker,* 20 Iowa, 509; *Jones v. State,* 81 Ala., 79, all of which sustain the text. The same section says: "It seems that if a bill is found solely on incompetent evidence, it will be quashed before plea, though the objection will be too late after conviction," citing on this last proposition, among other cases, (703) *S. v. Fellows,* 3 N. C., 340.

Thompson & Merriam on Juries, sec. 642, notes 1, 2 and 3, says: "An indictment should not be held bad because the grand jury heard improper evidence," citing in addition to the cases above cited by Dr. Wharton, *Blumer v. State,* 3 Snead, 66; *People v. Strong,* 1 Abb. Pr. (N. S.), 244; *Hope v. People,* 83 N. Y., 418, 38 Am. Rep., 460; *S. v. Logan,* 1 Nev., 509; *Steele v. State,* 1 Tex., 142.

In 1 Bishop New Cr. Proc., sec. 872 (5), "It will not sustain a plea in abatement that one of several witnesses (before the grand jury) was incompetent." There are other authorities, but all seem to be to the same effect, and this was the common law. *Rex v. Marsh,* 6 Ad. & Ellis, 236. This uniform ruling is recognized by our own courts as settled.

In *S. v. Fellows,* 3 N. C., 340, it is said that "if the bill has been found upon the testimony of a single witness (who is incompetent), it should be quashed," and this is quoted with approval in *S. v. Ivey,* 100 N. C., 542: "Where the indictment is found upon the single testimony of an incompetent witness, it should be quashed."

In *S. v. Krider,* 78 N. C., 481, which is the only citation made by defendant's counsel, there was a *quære* whether the bill was good when all the witnesses before the grand jury might be incompetent. Here, there was competent evidence before the grand jury, and the petit jury by their verdict found that this competent evidence was sufficient to convict.

In *S. v. Knapp,* 9 Pick., 495, 20 Am. Dec., 491 (a somewhat famous case), *Parker, C. J.,* refusing a motion like this, says: "If anything

improper shall be given in evidence before the grand jury, the error may be corrected subsequently in the trial before the petit jury." In *S. v. Fassett,* 20 Conn., at page 472, *Williams, C. J.,* in following that ruling says: "If bills are to be quashed because the grand jury have
(704) admittted or permitted some evidence to be given not strictly legal, and this should be inquired of, few cases of importance would occur in which these questions would not arise preliminary to the trial; for, even in trials before the courts, questions of evidence are continually arising about which counsel differ, and sometimes judges differ. And when we consider that grand jurors are not generally selected on account of their legal acquirements, we may reasonably suppose that they might often admit evidence not strictly legal, which, however, would have very little influence on the cause. If the courts are to inquire into their proceedings and are to quash indictments whenever such testimony is heard, whether called for or not, and whether material or not, few indictments would come to trial without this preliminary process. In such cases, would it be the duty of the court to quash every indictment where illegal evidence is given, or must they inquire whether it was material, and, if material, whether there was not evidence sufficient without it? These and many other questions of this character would be constantly arising."

The uniform practice as established by the authorities is that the court will not inquire into the proceedings had before the grand jury, and will only quash when all the witnesses were incompetent. This is a totally different matter from the incompetency of a grand juror.

No error.

DOUGLAS, J., dissents.

Cited: S. v. Flemming, ante, 689.

---

(705)

STATE v. HICKS.

(Filed 10 June, 1902.)

1. Exceptions and Objections—Assignment of Error—Appeal.

An exception to the charge as given will not be considered by Supreme Court.

2. Evidence—Homicide.

There is sufficient evidence in this case to sustain the charge of murder.

3. Instructions.

The trial judge is not required to give instructions in the very words in which they are asked.

4. Instructions.

It is not error to refuse a charge, however correct in law, which there is no evidence to support.

INDICTMENT against Plummer Hicks for murder, heard by *Timberlake, J.*, and a jury, at Fall Term, 1901, of VANCE.

Grant Hall, a witness for the State, testified: "I am a carpenter and live at Kittrell's, about half a mile from where Robert Crudup was shot; heard gun on night of shooting at quarter to 9 o'clock. It was Sunday night, 30 June, 1901. Soon after hearing gun I went to Moses Link's and found Robert Crudup dead. It was about half an hour after shooting. Crudup was spare-made, about 17 years old and well grown. The body was lying on the porch and seemed to have been shot from his stomach up to his neck; badly about throat. Shot were about No. 6 or 8, I think. They were small shot, not bullets. Report was that of a gun. Gunshots in the porch on the railing about 2½ feet, other shot in posts entering into porch, other shot in railing on inside porch. There was another shot 9 or 10 feet high on porch, evidently from another fire of the gun. Street runs down from Kittrell's past this place (706) and is 30 feet wide. This is the last of six houses in a row. The shot came from beyond the lower corner of the yard, diagonally. Little patch of pines, I think, in front of the house, higher than the house, about 75 yards from the house. Between pines and house there is a cluster of trees, across street from house, as far as length of courthouse, about 60 feet. The house is about 10 or 12 feet from street. House 16 x 16, with ell or small room behind. Porch 8 x 12 feet. It was a bright moonshining night, about the full of the moon."

Cross-examined, he said: "Pines diagonally off from house, more nearly opposite lower corner of yard. Four or five trees in cluster. Examined no tracks. Don't suppose I could have done so. Mr. Williams and myself looked out and saw some tracks on other side the street, the direction from which the shot came, but there were others, and we could not tell about them. Up street Dilly Williams lives in next house, about 65 feet away; Widow Eaton in next, about same distance apart. Well is a little beyond second house, from Link's and towards Kittrell's."

Oscar Link testified: "I am son of Moses Link. Was not at home at time of shooting. Had been to church, and was at well in the street above our house at the time. I saw who shot Robert Crudup. It was Plummer Hicks. I was at the well and saw him slipping along in the little oaks in front of our house. He was going towards street. Had gun; went down

a little above the edge of the street, and I saw him shoot the first time. The last time he shot he was running. He had no coat, but a white shirt; no hat. It was light outdoors. The moon was shining. I hollered, 'It was nobody but Plummer Hicks.' I ran to house and found that Robert Crudup had been shot. He was not dead when I got there, but died in about fifteen minutes. I know Plummer Hicks well. Had known him seven years. He married my sister, who was then upstairs in the
(707) house. There was a window from which he could have seen. Plummer Hicks said he was going to kill mamma; said this soon after Jennie, his wife, left him. It was this year. I had seen him about the branch and pines back of our house after sister left him. I went before coroner and justice of peace and told them what I saw and knew."

Cross-examined: "I was at well when I saw Plummer Hicks. He was 100 yards from me. He was stooping, slipping through the bushes about half bent. Bushes were in old field where there were high weeds. He was in low bushes. He was right in front of house when I first saw him. He was a little other side of street from the house, and a little the other side of the house. He was about as far as door of jury-room (about 30 feet) below corner of yard. He was on opposite side of street and facing house. He was nearer to corner than any other part of yard. Frightened me when he was shot. He was standing straight up. I ran after last shot. I saw the gun he had. It was double-barreled. I got to house first and before Grant Hall got there. Body was on floor of cook-room. Nobody was with me at well. I was hollering to no one when I said, 'It is nobody but Plummer Hicks.' He said he was going to kill mamma and some of the rest of them, and he didn't care what was done with him. It was about 9 o'clock at night. Plummer was standing a little way off out of street when he shot and ran."

Louisa Link testified: "I am mother of Oscar Link and Jennie, wife of defendant. She left him after Easter Monday and came to my house. Plummer said to me, 'You've got Jennie now and you'd better keep her. That if she went back he'd kill her, and me, too, if I darkened his door.' Threatened her life and mine several times. She never lived with
(708) him again. I was at home the night Robert Crudup was shot, and was lying in bed asleep when I heard gun. It was a light night. I saw Robert run by me and fall, when he died. He didn't say anything. My bed was near the front door. He was carried out in the porch that night. Oscar, my son, ran in at once after the shooting, and said, 'You all hush hollering; it was nobody but Plummer Hicks. I saw him and know him.' I saw Plummer Hicks around here often after my daughter left him, in the pines back of our house."

Cross-examined: "Second gun fired as he ran past me. Mary came in soon after Robert was shot. (Not long after Robert passed me before

I heard the next shot fired.) Mary was right behind Robert. It was a bright moonlight night. Oscar said as soon as he came in, 'Hush hollering; it's nobody but Plummer Hicks. Yonder he goes; he went running down the path.' "

Mary Link testified: "Know night Robert was shot. I was at home sitting with him in porch. My back was to street and his face to street. Robert was shot. I saw Plummer Hicks just before Robert was shot, and then again after he was shot. The first time he was up above street, front of door. It was not long after this till Robert was shot. Robert jumped up and ran in house. So did I. Second time he shot he was running. He was bareheaded and did not have on any coat. I told them all in the house that it was Plummer Hicks who shot Robert."

Cross-examined: "I am 15 years old. Crudup was sitting at end of porch with his back sort of turned to the rail and his face in direction where I saw Plummer Hicks. We had been out there a very short time. I had not been anywhere at all. When I first saw Plummer he was in front of house above the street, standing straight. I did— (witness here, by request of counsel, described how she saw him, by a deliberate turn of the head to the rear, and without pause, immediately (709) returning to front view). That was all I saw of him till Robert was shot. He was as far from me to Mr. Hicks from the street (about 15 or 18 feet). Robert was facing the direction from which the shot came. When shot, Robert jumped and ran in room as quick as he could, and I right behind him. I was in room when he fell. My face was turned towards Robert when he was shot. I looked around as we ran and saw it was Plummer Hicks. I was going in door when second shot fired; the shots were close together. Plummer was standing diagonally from house when he shot, opposite or below corner of yard. He was in field. Don't know whether he had a single or double-barreled gun. It was too small to see at night. Had plain cotton shirt, entirely white, no stripes or checks in it. Didn't have on no galluses, that I saw."

This was the whole of the State's testimony. The defendant offered no testimony.

From a verdict of guilty of murder in the first degree, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for defendant.

COOK, J. The prisoner was tried upon a bill of indictment for murder and convicted of murder in the first degree. No evidence was offered on his behalf, nor was there any exception to that introduced by the State. The exception taken, upon which the appeal is based, is to the

refusal of the court to give, first, the special instructions prayed for, and, second, "to the charge as given." The second is a broadside exception and not entitled to be considered under the rules and decisions of this Court. *S. v. McDuffie,* 107 N. C., 885, and numerous other cases. But as a human life is at stake, we have carefully perused the charge of his
(710) Honor as given to the jury, and find it to be without fault. The instructions prayed for were substantially given by the court, except such parts thereof as were not supported by any evidence, and to charge that "upon the whole testimony it is the duty of the jury to render a verdict of not guilty," and in so refusing there was no error. There was abundant evidence to sustain the charge in the bill of indictment. The judge is not required to give instructions in the very words in which they are asked, and when the charge substantially embraces the proper instructions prayed for, it is no ground for a new trial. *S. v. Anderson,* 92 N. C., 732; *S. v. Brewer,* 98 N. C., 607; *S. v. Massage,* 65 N. C., 480; *S. v. Neville,* 51 N. C., 423; *S. v. Brantley,* 63 N. C., 518; *S. v. Booker,* 123 N. C., 725, and other cases there cited.

All of the material and proper parts of the instructions asked to be given by the counsel of prisoner appear to have been fully and explicitly given. In the charge his Honor made no allusion to the "bias of hostile witnesses," nor to the degree of scrutiny to be given to the evidence of such witnesses, as contended for in the prayer for instructions, and he refused to charge that it would be murder in the second degree only if the prisoner "saw deceased in company with a woman whom he supposed to be his wife, who had deserted him and became angered thereby, and in a sudden fury slew deceased." In failing and refusing to so charge, we see no error, for the record contains no evidence to show that the witnesses were biased, or that the prisoner supposed that the deceased, Robert Crudup, was in company with a woman whom he supposed to be his wife. While it is possible, and, from the circumstances of the homicide as testified to, may be probable that prisoner supposed such to be the fact, yet there is no evidence to support such a contention; and it is
(711) held in *S. v. McDuffie, supra,* that it is "not error to refuse a charge, however correct in law, which there was no evidence to support." The burden of the proof was to identify the prisoner as being the man who slew the deceased. No excuse or evidence in mitigation, or evidence of any kind, was offered on behalf of prisoner, nor was such shown from the evidence of the State. There is

No error.

Cited: S. v. Mehaffey, 132 N. C., 1064; *S. v. Davis,* 134 N. C., 634; *S. v. West,* 152 N. C., 834.

STATE v. PEAK.

(Filed 10 June, 1902.)

Rape—Indictment—The Code, Secs. 1101, 1102.

An indictment for an assault with intent to commit rape need not contain the word "forcibly."

DOUGLAS and COOK, JJ., dissenting.

INDICTMENT against Henry Peak, heard by *Councill, J.*, and a jury, at Spring Term, 1902, of POLK. From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Solomon Gallert for defendant.

CLARK, J. The indictment charges that the defendant, "with force and arms, at and in the county aforesaid, unlawfully, willfully and feloniously did commit an assault upon the body of Mary Mooney, with intent her, the said Mary Mooney, unlawfully and willfully and feloniously to rape, against will of said Mary Mooney," etc. There was no motion to quash, nor exception to evidence or charge, but, after a verdict of guilty, the judgment was arrested on motion of (712) defendant because of the omission of the word "forcibly."

In any possible aspect, this is error, and the case must go back for judgment. This is unquestionably a good bill for assault, and the verdict is always imputed to the matter correctly charged. *S. v. Toole,* 106 N. C., 736, and authorities there cited.

If, when the case goes back for judgment, the court shall impose sentence for the aggravated assault, "with intent to rape," then an appeal by defendant would present the question whether the bill authorizes such punishment, and any discussion of that question now is, to some extent, hypothetical and *obiter dictum.*

But, as the matter has been discussed, it is perhaps proper to say that the omission of the word "forcibly," in view of the context, is not fatal, certainly not after verdict; and this is a good bill for assault with intent to commit rape, both at common law and by statute.

"On an indictment for an assault with intent to commit an offense, the same particularly is not necessary as is required in an indictment for the commission of the offense itself," says Dr. Wharton. 1 Wharton Cr. Law (9 Ed.), sec. 644; *Lacafield v. State,* 34 Ark., 275. An indictment for an assault with intent need not specify the facts necessary to constitute that offense which was intended to be, but was not, in fact,

perpetrated. . . . So, in an indictment for breaking into a dwelling-house with intent to commit rape, the crime of rape need not be fully and technically charged.

Wharton Cr. Pl. and Pr. (9 Ed.), sec. 159, and cases cited in notes to above paragraphs: *Commissioners v. Doherty,* 10 Cush., 52; *Singer v. People,* 13 Hun, 418; *ibid.,* 75 N. Y., 608. These cases are from courts of the highest character, are explicit and clear in their reasoning, and cite other authorities.

(713) At common law, as the above citations establish, the bill was good. Our own statutes and decisions are to the same purport. The Code, sec. 1101, defines rape as the "ravishing and carnally knowing any female of the age of 10 years or more by force and against her will." In indictments for that offense, under our decisions, while the word "forcibly" need not be used, its equivalent and that the act was against the will of the female must be charged. *S. v. Johnson,* 67 N. C., 55. Section 1102 prescribes the punishment for "assault with intent to commit rape." A pleader who uses the words of the statute is safe. Here, the charge, following the statute, is a sufficient one for assault "with intent to commit rape." We have had an analogous case at this term. Code, sec. 995, makes the breaking into a dwelling-house of another, "with intent to commit a felony," burglary; and section 996 makes the breaking into a dwelling-house not burglariously, or the breaking into a house not a dwelling, or dwelling if uninhabited, "with intent to commit felony," a crime. Under both these sections it has been held sufficient to allege the breaking properly, and add merely "with intent to commit larceny," without alleging anything more, such as to feloniously take and carry away certain goods, to wit, . . . the property of A—in short, following the common-law rule, as above, that an indictment for assault to commit an offense need not technically charge the offense intended to be committed. This is clearly and distinctly held in *S. v. Tytus,* 98 N. C., 705; *S. v. Christmas,* 101 N. C., 749, and was reaffirmed in *S. v. Ellsworth, ante,* 690. If, therefore, this had been an indictment for breaking into a house (whether dwelling or not) and the breaking were sufficiently charged, it would be sufficient to add merely "with intent to commit rape" or "to commit larceny"; and it follows that if an assault is sufficiently charged, it is sufficient to add merely "with intent to commit murder" (see many precedents cited by Wharton, *supra*), or

(714) simply "with intent to commit rape," as the others cited by him from New York and Massachusetts, *supra,* hold. They are courts of high repute.

Besides, an objection that the offense *intended* to be committed is not sufficiently charged "comes too late after verdict." *S. v. Christmas,* 101 N. C., 749, and cases there cited. As the constituent elements of the

offense intended to be committed were not perpetrated and can not be proved, why, as the decisions say, charge more than an intent to murder, to steal, or to rape?

Then, there is The Code, sec. 1183, enacted to meet just such cases as this, which is an expression of the sovereign power, speaking through the lawmaking body, that there is an evil and it must be remedied, and that is the quashing bills or arresting judgments "by reason of any informality or refinement," which, it is declared, shall not be done "if sufficient matter appears to enable the court to proceed to judgment." Here the defendant is charged with assaulting the girl, with force and arms, with intent feloniously, unlawfully and willfully to rape her against her will, and the jury have said he did it. The statute says (Code, sec. 1102) if any one commits "an assault with intent to commit rape" upon a female, he is punishable. "Sufficient matter appears to enable the court to proceed to judgment," for the charge and conviction are in the very words of the statute. The defendant knew the charge against him; he made no objection by motion to quash or for bill of particulars; he heard the evidence, and only after verdict makes the objection that the charge of "intent to rape" did not set out the constituents of the offense of rape, which offense he is not charged to have committed. If this is not a "refinement," which the statute was passed to prevent, it is hard to conceive to what it would apply. This section 1183 was originally passed in 1811, and has been observed by the Court in a long line of cases, commending its wisdom, many of which are collected in *S. v.* (715) *Barnes,* 122 N. C., 1031, in which case it was held that the omission of the words "with intent" in an indictment "for assault with intent to commit rape," was not ground to arrest the judgment, because, in the language of the act, "sufficient matter appears to enable the court to proceed to judgment."

Besides, even if, contrary to the precedents above cited, and contrary to the reason of the thing, it were necessary in an indictment for an assault with intent to commit an offense, to charge the constituent elements of that offense which was not committed, and which, therefore, can not be proved, this has been done in this case.

In *S. v. Powell,* 106 N. C., 635, which seems to have been inadvertent to the above authorities, there was an omission of the words "against her will," but those words are here used. In *S. v. Johnson,* 67 N. C., 55, which was an indictment for rape (and not, as here, merely for assault with intent), *Reade, J.,* says the word "forcibly" is not indispensable, and "any equivalent word will answer, especially since our statute which forbids the staying of judgment in criminal cases for informality or refinement." Here, the bill charges the defendant *"with force* and arms, unlawfully, willfully and feloniously did commit an assault, etc., with

intent, unlawfully, willfully and feloniously to rape, against the will of her, the said Mary Mooney," etc. While "with force and arms" are held unnecessary and surplusage in indictments for offenses not committed with force, or when the force is otherwise alleged (*S. v. Harris,* 106 N. C., 682), yet if force is not otherwise sufficiently charged, they certainly aver it. Upon the face of the bill it would surely seem that the constituent elements of rape are sufficiently charged; but we need not pass upon that, for this is not a charge for rape, and its constituent elements could not be proved in this action. It is an indictment for assault, sufficiently averred, with the aggravation that there was (716) an intent to commit rape. The defendant and the jury understood the charge fully, and the latter has said it was proved beyond a reasonable doubt.

In arresting the judgment there was error, and the case must be remanded for proper judgment.

Reversed.

COOK, J., dissenting: The bill of indictment upon which defendant was tried and convicted is as follows: "The jurors for the State upon their oath present that Henry Peak, late of the county of Polk, on the first day of June, in the year of our Lord one thousand eight hundred and ninety-nine, with force and arms, at and in the county aforesaid, unlawfully and willfully and feloniously did commit an assault upon the body of Mary Mooney with intent her, the said Mary Mooney, unlawfully and willfully and feloniously to rape, against the will of the said Mary Mooney, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

Defendant moved in arrest of judgment, "because the bill was defective, in that it did not charge the defendant with assaulting the prosecutrix forcibly and against her will." The court allowed the motion and arrested the judgment, from which the State appealed.

An indictment *must* allege the *essential* facts constituting the crime. Rape is the carnal knowledge of a woman by force and against her will. Code, sec. 1101; 1 Bl., 210. Therefore, the three essential elements are (1) the carnal knowledge, (2) forcibly done, and (3) against her will; and, being a felony, they must be charged with having been done "feloniously." This is not an indictment for rape accomplished, but rape attempted. To sustain a bill for the attempt, the crime itself, which is alleged to have been attempted, must be technically set out. (717) As the act was not accomplished, the attempt to accomplish it must, therefore, have been with the intent by *force* and *against her will.* To allege that she was assaulted with intent to ravish against her will is insufficient; it must be alleged that the assault was with intent

to ravish by force and against her will. To rape or ravish implies force; but force charged by implication in the bill of indictment is insufficient, because force is of the essence of the offense, and, therefore, must be *expressly* charged.

In *S. v. Powell,* 106 N. C., 635, the indictment is very similar to the one under consideration; it was there held to be fatally defective for that it failed to charge "any words indicating that the intent was to be executed violently or against the will of the prosecutrix." In the case at bar it alleges it to have been attempted "against her will," but fails to allege that it was done *forcibly* or violently.

In *S. v. Jim,* 12 N. C., 142, the indictment charged the assault to have been made with intent to "feloniously ravish and carnally know," failing to charge that it was done "violently, forcibly and against the will of," etc., and was for that reason held to be fatally defective.

It is not sufficient that the act should be committed against her will; it must also be done by force—not merely force necessary to accomplish the act of connection, but force overcoming resistance upon the part of the female. McCain Criminal Law, sec. 439. In charging force, no stereotyped word or phrase is essential, but; as is said by *Reade, J.,* in *S. v. Johnson,* 67 N. C., 55, "there is no doubt that the indictment must charge the act to be done forcibly, . . . and although 'ravished' would seem to imply force, yet it is necessary to charge force expressly in some appropriate language."

As much as I regret to see a miscarriage of justice, which is caused by the failure to draw a proper bill of indictment, yet it is incumbent upon the courts to follow the well-settled and sound principles of law, from which I can not deviate to give relief to inadvertence or (718) carelessness. The law upon this subject has been well settled and needs no further discussion. This Court, in *S. v. Scott,* 72 N. C., on page 462, cites with approval the form of Mr. Archbold and quotes the same, in charging the crime of assault with intent to commit rape, which could easily have been followed, and prevented this failure of justice. To fail now to charge this offense accurately is inexcusable.

DOUGLAS, J., concurs in dissenting opinion.

Cited: *S. v. Marsh,* 132 N. C., 1002; *S. v. Mitchell, ibid.,* 1036; *S. v. Holder,* 133 N. C., 711.

STATE v. SUMNER.

(Filed 10 June, 1902.)

1. **Homicide—Evidence—Character of Deceased as a violent and Dangerous Man—Particular Character.**

   In an indictment for murder, there being evidence tending to show that the killing may have been done from a principle of self-preservation, it is competent to show the general reputation of the deceased for a *particular* character for violence, if such character was known to the defendant.

2. **Homicide—Evidence—Character.**

   In an indictment for murder it is not competent to show that the deceased had difficulties with other persons than the prisoner.

INDICTMENT against Zeb. Sumner, heard by *Shaw, J.*, and a jury, at April Term, 1901, of MACON. From a verdict of guilty of manslaughter and judgment thereon, the defendant appealed.

(719) *Robert D. Gilmer, Attorney-General, for the State.*
Shepherd & Shepherd for defendant.

COOK, J. Prisoner was indicted for the murder of one Ledbetter and convicted of manslaughter and sentenced to serve a term of five years in the penitentiary. The uncontradicted evidence shows that deceased was a man of dangerous, violent, bad character, especially when drinking, and that he was drinking on the day of the homicide. That upon four occasions previous to the day of the homicide deceased, without apparent provocation, violently abused and cursed prisoner and sought to provoke a difficulty with him. Upon the day of the homicide deceased cursed and abused prisoner in the courthouse and followed him, with a knife up his sleeve, to the clerk's office, and thence to the register's office, and thence out of the courthouse as far as Trotter's store, when prisoner stopped, for fear of being cut in the back, and warned deceased to go away, when deceased remained cursing prisoner, calling him a damn coward, and using other insulting language, when the town marshal came along, and prisoner said to him, "I make charge against him (meaning deceased) for being drunk and disorderly; take him and lock him up. He has followed me all day and I don't want to hurt him." Deceased said to the marshal, "God damn you, I would like to see you arrest me." The marshal said he "did not see that either had done anything to be arrested for," so he did not interfere. But deceased's brother came up and carried him away. One bystander said to prisoner, "I would kill a man that would treat me that way," to which prisoner replied, "By the time you have been locked up for murder, you would

decide that it is best not to kill a man." Shortly thereafter prisoner armed himself and went up the street attending to some business, and while standing upon the street, as prisoner testified, one Palmer said, "George (meaning deceased) has been cursing and abusing you again. . . . There comes George again," and George (de- (720) ceased) came up and said, "You say you have nothing against me?" and prisoner said, "George, I have told you this time and again that I have nothing against you," and deceased said, "Well, give me your hand." Prisoner extended his hand towards him, and deceased dropped his hand and said, "No, by God; we will go to the courthouse and talk this thing over." After some other words deceased stepped one foot back and put his hand back, as it appeared, in his right-hip pocket and pushed his left hand down in his left pocket, and being standing "right up against me," prisoner drew one pistol and opened fire upon him, firing four shots in rapid succession, when deceased walked off in a staggering way, and, looking back at prisoner, with his hands near or about his hip pockets, while about ten or fifteen steps away, prisoner drew another pistol and fired twice, inflicting the mortal wounds with a 44 pistol, at which time, prisoner testified, deceased was trying to draw a pistol, which he saw (and which was afterwards found in his pocket). Prisoner testified that he had been told by everybody about deceased's character as a dangerous and violent man, and had been warned that he would walk up to a man and ask him for his right hand and stick a knife in him with his left hand; and he had been informed that he had cut Lee Allman that way, and had cut Charles McGee's son that way, and that he had mistreated James Potts and tried to take advantage of him and kill him. There were several witnesses who testified that they had heard deceased threaten to kill prisoner, and that some of these threats had been communicated to him before the homicide. Some of defendant's witnesses testified that, during the firing of all the shots, deceased was endeavoring to draw his pistol. Some of the State's witnesses testified that they did not see him attempt to draw his pistol, or have his hand in or at his hip pocket, but that his hand was on the outside of his coat on his hip or side—some saying one way, (721) some another.

Prisoner offered to prove by Potts, Ed. McGee and Charles McGee certain individual difficulties the deceased had with them, which was properly excluded upon objection by the State. Prisoner offered to prove by Potts and Ed. McGee that deceased had "the reputation of being a man who would take the advantage of another, representing himself to be his friend and get the advantage of him and do him some bodily harm, making out at the time that he was his friend," which was, upon objection by the State, excluded, to which prisoner excepted. This raises the

question whether it is competent to show a general reputation for any particular character for violence, and if so, was it material to the issue joined by the plea of not guilty?

The rule is that "evidence of the general character of the deceased, as a *violent* and *dangerous man,* is admissible where there is *evidence tending to show that the killing may have been done from a principle of self-preservation,* and also where the evidence is wholly circumstantial, and the character of the transaction is in doubt." *S. v. Turpin,* 77 N. C., 473, 24 Am. Rep., 455; *S. v. McIver,* 125 N. C., 645. This rule varies from the general rule as to proving general character in that it permits certain particular traits of character to be shown. The reputed character of deceased may be evidential as indicating the prisoner's reasonable apprehension of an attack, for in a quarrel his violent or turbulent character, as known to the accused, may give to his conduct a significance of hostility which would be wanting in the case of a man of ordinary disposition. 1 Greenleaf Ev., sec. 14c. In *S. v. McIver,* 125 N. C., 645, the Court held it to be competent to show that deceased was a man of "vicious temper and violent when he got angry," thus particularizing his peculiar trait and condition under which he
(722) became violent. The principle upon which the admission of this kind of evidence is based is to show to the jury the reasonableness of the apprehension upon which the accused acted. It is admissible to explain and excuse the use of violence ordinarily inexcusable. Under some circumstances, violence used upon a peaceable, quiet man, though of generally bad character, would be inexcusable, while under the same circumstances, if used upon a man of generally good character, though bad for violence under certain conditions (such as when under the influence of liquor, etc.), would be excusable. A man may have a bad character generally, but good in some particulars, such as for truth, or generally bad, but good for peace, sobriety and industry. A man may have a character bad for some kinds of violence, while not bad for other kinds. So the principle upon which the character of the deceased is admissible, in a case of homicide, is to show that the accused had reason to apprehend danger or violence from deceased, which apprehension would be excited by the particular conditions under which deceased was reputed to be dangerous and violent. If bad only when drinking, then no apprehension would exist when he would be sober; if bad for using a knife, then no apprehension would exist when out of reach.

In the case at bar, the prisoner testified that he had "been told by everybody about deceased's character as a dangerous and violent man, and had been warned that he would walk up to a man and ask him for his right hand and stick a knife in him with his left hand." And he also testified that, upon the occasion of the homicide, deceased said to

him, "Well, give me your hand." Now, then, if such were his general character, and knowing of his threats, why should not the prisoner, under such conditions, have then and there apprehended serious danger? and upon an overt act of aggression, such as putting his hand in his pocket or upon his hips, and having such apprehension, should he have waited longer and taken the risk of the danger he might reason- (723) ably have apprehended would follow? But his reputation, if such he had, for this particular kind or practice of violence, or this particular trick in executing violence, was excluded from the jury, and they were not informed of such, if such existed. If such were the reputation of deceased, then the apprehension of prisoner would have been naturally excited, and, upon evidence of aggression by deceased, prisoner would have understood what it meant, and defended himself accordingly. But the evidence having been excluded, the jury could not intelligently judge as to the reasonableness of such apprehension upon which prisoner acted, and upon this his fate depended. The verdict was to be based upon what the jury would think reasonable, and not what the prisoner thought; and not being furnished with this evidence, they could not interpret his conduct in the light of the situation as he actually saw it. Therefore, this evidence was material to explain his sudden and extreme violence when deceased "stepped one foot back" under those circumstances.

Prisoner had testified that deceased did have such general character, and he had been warned of it. Then, it was competent for him to show that such existed, for it may be that his apprehension was founded upon it, and of that the jury should say whether it was or was not reasonably founded. For the error in excluding this testimony, a new trial must be granted. There are several exceptions taken to the charge, but we deem it unnecessary to pass upon them.

New trial.

Cited: *S. v. Worley,* 141 N. C., 766; *S. v. Blackwell,* 162 N. C., 682.

---

(724)

STATE v. FRANK.

(Filed 13 June, 1902.)

Peddlers—Licenses—Taxation—Interstate Commerce—Hawkers—Acts 1901, ch. 9, secs. 54, 103.

A person who travels from house to house on foot selling goods by sample, and afterwards delivers them on foot, is not a peddler, under Laws 1901, ch. 9, secs. 54, 103.

S. *v.* FRANK.

INDICTMENT against W. H. C. Frank, heard by *Jones, J.*, and a jury, at March Term, 1902, of CHOWAN. From a special verdict and judgment of not guilty thereon, the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
Wolcott, Wolcott & Gage for defendant.

CLARK, J. Laws 1901, ch. 9, sec. 54, provides: "Any person who shall carry from place to place any goods, wares or merchandise and offers to sell or barter *the same,* shall be deemed to be a peddler, and shall pay a license tax." Section 103 makes it indictable to peddle without license, and the defendant is indicted therefor. The special verdict finds in substance that the defendant, not having such license, traveled from house to house on foot, exhibiting samples of goods; that he took orders for the goods and sent them to his principal in Norfolk, Va., who shipped the goods to defendant at Edenton, who, traveling around on foot, delivered said goods, not using a wagon, cart or buggy either in exhibiting samples or delivering the goods.

The defendant places stress upon the following provision in said section 54: "Any person carrying a wagon, cart or buggy for the purpose of exhibiting or delivering any wares or merchandise shall be
(725) considered a peddler." A peddler is primarily one who travels on foot, and the above words were used not to restrict the signification, but to extend it to the additional class who sold the goods they carried around in cart, wagon or buggy, and not on foot.

In *S. v. Lee,* 113 N. C., 681, 37 Am. St., 649, it was held, citing the standard dictionaries, that a peddler is one who sells and delivers the identical goods he carries about with him. This was recognized as authority in *S. v. Gibbs,* 115 N. C., 700, and *Range Co. v. Carver,* 118 N. C., 328. In the latter case, at page 334, the Court noted that there had been added to the statute the words, "Any person carrying a wagon, cart or buggy for the purpose of *exhibiting or delivering* any wares or merchandise shall be considered a peddler." In *S. v. Franks,* 127 N. C., 510, the defendant came within the very terms of the decision in *Range Co. v. Carver, supra,* and that decision was reaffirmed. The present case differs from that, in that the exhibit of the samples and the delivery of the goods were made on foot. On the special verdict the court properly adjudged the defendant not guilty. To review the decisions:

A peddler is primarily one who travels around on foot selling or bartering the identical goods he carries. *S. v. Lee* and *S. v. Gibbs, supra.* The act extends the word "peddler" to embrace one selling and bartering the identical goods when he uses a wagon, cart or buggy, and further extended the word to embrace those using such cart, wagon or buggy to

exhibit or deliver the goods. *Range Co. v. Carver* and *S. v. Franks, supra.* But here the defendant did not use a wagon, cart or buggy to exhibit or deliver the goods, nor does the defendant come under the primary meaning of the word by selling or bartering the identical goods. It may be that the defendant has purposely evaded the law. He has evidently carefully studied the statute and has avoided coming within the prohibition against "peddling without license."

It may be a hardship that merchants on this side of the State line, who pay their full share of taxes, shall thus have the compe- (726) tition of a Norfolk house, which sends its agent out on foot to sell by sample, and to whom the goods are shipped, and by said agent delivered on foot. If so, the remedy is in the lawmaking body changing the statute to fit such cases. As it is now worded, the defendant is not within the definition of a peddler, nor subject to the tax for carrying on that business, for reasons given above.

No error.

Cited: *S. v. Ninestein,* 132 N. C., 1042; *Range Co. v. Campen,* 135 N. C., 524.

STATE v. WISEMAN.

(Filed 17 June, 1902.)

Evidence—Fornication and Adultery—Husband and Wife—Witnesses—The Code, Secs. 588, 589, 590, 1353, 1354.

Where a man and a woman are indicted for fornication and adultery, and a *nol. pros.* is entered as to the *feme* defendant, the husband of the woman is a competent witness to show adultery between the defendants committed before the marriage of the woman and the witness.

DOUGLAS, J., dissenting.

INDICTMENT against Elam Wiseman and Hester Blalock, heard by *Councill, J.,* and a jury, at September Term, 1901, of MITCHELL. From a verdict of guilty as to Wiseman and judgment thereon, he appealed.

Robert D. Gilmer, Attorney-General, for the State.
S. J. Erwin for defendant.

CLARK, J. The competency of witnesses is a matter subject to regulation or change by statute. "Public policy" is not a higher law than the express enactment of the law-making power. When the (727)

latter is silent, the courts *ex necessitate* declare what is public policy by analogy to other statutes or reference to the right reason of things. But when the representatives of the people declare what is public policy by the terms of a statute, which the Constitution does not prohibit the Legislature from enacting, there can be no public policy which the courts can hold in derogation of the statutory enactment.

What is the "public policy" as to the competency of witnesses has been explicitly declared, with much care in stating the exceptions to the general rule, by the General Assembly. It will be found in The Code, sec. 589, which removes the common-law disqualification of interest, subject to exceptions stated in section 590. And as to the disqualifications formerly existing by reason of the marriage relation, section 588 makes the husband and wife "in any suit, action or proceeding in any court . . . competent and compellable to give evidence, as any other witness," subject only to these exceptions: neither is competent or compellable "to give evidence *for or against the other* in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No husband or wife shall be compellable to disclose any confidential communication made one to the other during their marriage." Even the above exceptions are reduced by the subsequent section, Code 1353, which provides: "The husband or wife of the defendant in all criminal actions or proceedings shall be a competent witness for the defendant," and section 1354, which provides that neither husband nor wife shall be competent or compellable to give evidence *against the other,* subject to right of cross-examination (728) (section 1353) when a witness for the other, and subject to the further exception that the wife is competent against the husband to prove an assault and battery upon her, or abandonment.

The lawmaking power having declared the public policy that all witnesses are competent, subject only to the above-recited exceptions, the courts can not narrow the general clause by putting in other exceptions. That would be *pro tanto* to repeal the statute and declare a public policy different from and in antagonism to that declared by the lawmaking power. Here, a man is on trial alone for fornication and adultery. Another man is offered as a witness against him. He is competent under the express terms of the statute, and indeed was so independently of and before the statute. That the witness's wife was originally a party defendant has no bearing, for, having been *nol. prossed.*, it is as if she had never been a party. The fact as to which the witness testified occurred before the marriage, and was as to a matter which the witness saw himself. It did not come within the exception, "a confidential com-

munication made by one to the other during their marriage." Nor is the evidence "for or against the other," since the wife is not a party to this action.

In *S. v. McDowell,* 101 N. C., 734, it is said that under section 588, a wife (or husband) is a competent witness to testify in "any suit or proceeding except as stated in that section." To sustain a supposed public policy that would disqualify the witness, it would be necessary not only to disregard the statute, but to overrule our own decisions. Whether the provisions of the statute are wise or harmful, or might not be bettered, are not matters permitted to the courts. The judge below had no discretion but to follow the law as written, and, indeed, if the supposed public policy set up by the defendant can be sustained by any decision rendered before the enactment of our present statutes, it must be remembered that those statutes were enacted to remove all the disabilities previously existing, except as therein stated. (729)

No error.

COOK, J., concurring. The criminal relations upon which the indictment is found existed *before* the witness and *feme* defendant were married. Therefore the crime was committed when the witness was competent to testify against her. After his marriage with her he became an incompetent witness to testify *against* her under the statute. But she was not on trial—a *nol. pros.* had been entered as to her, and she was no longer in jeopardy, was not in court. The witness was called upon to testify against Wiseman, and his testimony could not in any way affect his then wife. The privacy of home life, the relations existing between the husband and wife, were not in any way involved. The witness testified to facts which had occurred and which he knew *before* he was married to the *feme* defendant. To exclude his testimony because he had afterwards married the adulteress would have the effect of depriving the State of its evidence to convict a criminal, by reason of a contract (contract of marriage) entered into by one of the offenders and the witness, to which contract the State was not a party and could not be bound, and which would be against public policy.

Therefore, I think the witness (husband) was a competent witness to testify against the adulterer, Wiseman.

DOUGLAS, J., dissenting. I can not concur in the opinion of the Court, which seems to be based entirely upon the decision in *S. v. McDowell,* 101 N. C., 734. That case does not seem to me to be in conflict with that at bar. In *S. v. McDowell* the wife did not testify to any act on the part of the husband, either before or after marriage, except that he had left her two years before and she had not heard (730)

from him since he left. Neither the purpose nor the effect of her evidence was to cast any discredit upon her husband, but simply to show the impossibility of his being the father of the child. The wife, who was the prosecuting witness in bastardy proceedings against McDowell, testified that after her husband had permanently left her, she had criminal connection with the defendant, resulting in the birth of a bastard child, which she asked that he be made to support. No act of the husband was in question. The wife was simply a voluntary witness to her own disgrace, which had already been shown by her having a child born so long after the desertion of her husband as to preclude any possibility of his being the father.

In the case at bar the husband is made to testify to the infamy of his wedded wife, with whom he is now living, and who, as far as appears from the evidence, has never broken her marriage vow to him.

The cases are, to my mind, so essentially different that I feel that my nonconcurrence in the opinion of the Court is not in derogation of its former decisions. In my opinion, neither husband nor wife can be dragged from the marriage bed to testify to any act of the other, no matter when it happened, that will lead to moral degradation and public infamy.

Cited: *Powell v. Strickland,* 163 N. C., 397.

---

(731)

STATE v. NEW.

(Filed 19 June, 1902.)

Obstructing Justice—Public Officers—Highways—The Code, Secs. 2025, 2027, 2040—Laws 1899, Ch. 581.

Where a person obstructs an overseer in cutting a ditch across his land to drain a public road, he is not guilty of obstructing justice, there being no provision of law for taking private property for this purpose and the payment of just compensation therefor.

FURCHES, C. J., and CLARK, J., dissenting.

INDICTMENT against Wesley New, heard by *Hoke, J.,* and a jury, at April Term, 1901, of SAMPSON.

This is a criminal action for the obstruction of a public officer in the discharge of his duty.

The evidence showed that the defendant was the owner of 2¼ acres of land, all cleared, fenced and under cultivation; that the public road

led from the corporate limits of Clinton, at the Barden House, to Stevens Bridge, and that E. C. Williams was the overseer of said section, duly appointed and acting. That in January, 1901, said overseer, with his hands, were working his section. That in the public road, on the outside of defendant's fence, there was a basin or low place in the road; that in wet times, when there was over the ordinary rainfall, the water from this basin overflowed through defendant's field into a basin similar to this one in the road, and from defendant's field the water flowed only in extra wet times to another basin on Draughan's lands, the adjoining landowner, which was uncleared. The defendant New's field was 70 yards wide at this point; that near the back fence from the road was the lowest place in defendant's field; that the defendant was (732) in his field with the iron scabbard to a sword beating down cotton stalks, when the overseer ordered his hands to enter the field; that the defendant forbade the overseer and hands to enter. They did enter, and passed to the low place near the back fence. At this point, about 70 yards from the road, E. C. Williams, overseer, ordered his hands to begin cutting a ditch, intending to cut it to the basin in the road to dry the water off the road and into defendant's field. Defendant again forbade both overseer and hands.

The overseer then told defendant he intended to cut the ditch anyway. Defendant stuck the scabbard into the ground and said to the overseer: "Not unless you do it over my dead body."

The overseer then ordered his hands to stop, and they did so. The evidence showed the road to have been a public road for sixty years, and at this point there were fences on both sides of the road, 22 feet from each other. That in very cold weather in winter the ice on this water would bear a team and loaded wagon. That the water was from 4 to 6 inches deep in the basin and about 40 yards long. That it was not boggy, and was passable at all times, but when the ice was very thick was dangerous, on account of the teams slipping on the ice. That defendant purchased the 2¼ acres from John Dickson, who bought it from Walter Draughan and cleared it up. That before Dickson bought it, and while it was in the woods, the overseer of the road had cut a trench about four inches deep into the woods to dry this basin, which trench was cut by the overseer along the natural drain for the water, this being the only natural drainage to the basin in the road.

The defendant, through his counsel, requested the court to instruct the jury that the overseer had no legal authority to enter defendant New's field to cut a ditch to dry this basin, and such entry, after being forbidden by New, was a trespass if made by the (733) overseer. That under all the evidence the defendant was not guilty. That no proceedings having been shown to condemn that part

of defendant New's field, defendant was not guilty for resisting the trespass of the overseer. That defendant had a right to resist a trespass such as this, and was not guilty. The court instructed the jury that it was a misdemeanor to obstruct a public officer in the discharge of his duty. This obstruction must be willful. If the evidence was believed, a public officer, an overseer of a public road, was obstructed. That if it was necessary to the safety of persons and teams passing over this road to relieve the roads of this water, and if the natural drain of the water was through defendant's field, then the defendant would be guilty, if the overseer entered the field only for the purpose of cutting the small drain to relieve the road of the water, and if this was necessary for the safety of passengers.

This, however, can only be done by the overseer from necessity to relieve the road, and make it safe for traveling. If the overseer entered for such purpose, and under such necessity, then he would be in the proper discharge of his duty, and defendant would be guilty. If, however, there was no present necessity to relieve the road, and it was not the natural and proper drainage way, and it was not necessary to relieve the road, the defendant would be not guilty. Then the overseer would be a trespasser, and defendant had a right to obstruct him.

The State contends that there was ice in the basin, and this threatened the safety of travelers; that the overseer attempted to drain the water off to relieve the road. That it was necessary to relieve it; that this was the only practicable way to relieve the road; that the road always has been relieved that way. The defendant contends that there was
(734) no ice there then; that there was no natural drainage-way to this basin; that to drain it on defendant's lands would ruin his crops. That defendant would have to cut a ditch 400 yards through Draughan's land to relieve his field; that the overseer could cut a ditch 2 feet deep, 35 yards long, on his own land, and relieve the road of all water; that no former overseer had cut a ditch into this field; that when the lands were woods, then if a trench had been cut, this would not now give the overseer a right to cut this ditch.

The defendant, in apt time, objected to that part of the court's charge which in substance said: If there was a present necessity to relieve the road, and if the overseer entered the field for this purpose, he would be in the proper discharge of his duty, and the defendant would be guilty; objection overruled, and defendant excepts. The defendant excepts because the court refused the instruction prayed for by defendant.

From a verdict of guilty and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
John D. Kerr for defendant.

DOUGLAS, J., after stating the case: It is evident from the above statement of the case on appeal that there was no natural drainway for the basin in the road across the land of the defendant. Natural drainage is where water runs in a state of nature without artificial assistance. The mere fact that it would require the digging of a ditch 70 yards long to carry the water onto the defendant's land would show that it did not go there naturally. Even then it would not reach a natural watercourse, nor even an artificial waterway, but would be turned loose in a low place upon the defendant's land, to his manifest injury. He would be compelled to let it lie there, ruining his crops and destroying the value of his land, or dig another ditch 400 yards long through the land (735) of another man. It seems that the overseer could have relieved the road of all water by cutting a ditch 35 yards long and 2 feet deep through his own land on the opposite side of the road, but he preferred to dig 70 yards of ditch upon another man's land than 30 yards upon his own land. In this he showed fine business sense; but has he the right to thus appropriate the land of another, without compensation, and, as far as we can see, without authority of law? We all know that a ditch is always more or less of a nuisance. It is frequently a necessary nuisance, but a nuisance none the less. It divides a field so that a man can not get from one side to the other without building bridges or ruining the ditch. It takes up not only the land occupied by the ditch itself, but generally much more with its banks and the weeds and briers that always grow on ditch banks. It is true, these banks can be kept clean, but this requires much additional labor and expense. It thus appears that digging a ditch through the land of another is not only an appropriation of a certain part of the land, but is a direct injury to the remainder. Suppose the overseer had dug this ditch, how would the defendant have obtained compensation? No way has been called to our attention, except an action for the trespass, and this it would be difficult to maintain if the overseer had a right to cut the ditch. If he had no right to cut it, the defendant is not liable to indictment for stopping him.

There is no authority either for entry or compensation under chapter 581, Laws 1899, because section 27 thereof expressly provides that this act shall not apply to Sampson County, and there is neither proof nor allegation that Sampson County has adopted said act, or any part thereof, even if it could lawfully do so. The only sections in The Code that we find applicable to the question are 2025, 2027 and 2040. Section 2025 provides that "Where, by the overseers, it may be (736) deemed expedient to make or repair causeways on the same, they shall be at least 14 feet wide; and earth, necessary to raise or cover them, shall be taken from either hand, so as to form a drain on each side of the causeway."

Section 2027 provides that "Overseers may lawfully cut poles and other necessary timber for repairing and making bridges and causeways. And whenever earth shall be needed on a public road, and it can not be conveniently procured on either side of the causeway, the overseer may lawfully take the earth from any adjoining land."

Section 2040 is as follows: "All roads shall be laid out by a jury of five freeholders, to the greatest advantage of the inhabitants, and with as little prejudice as may be to lands and inclosures; which laying out, and such damage as private persons may sustain, shall be done and ascertained by the same jury on oath; and all damages by them assessed shall be deemed a county charge." Nowhere do we find any authority for cutting ditches into private property. On the contrary, it clearly appears that The Code contemplates the filling up of such slight depressions, and their drainage by lateral ditches on the side of the highway.

In the present case the standing water, when it stands at all, is only from 4 to 6 inches deep. This could easily be filled up, either with rock and dirt or by cross-laying with poles and piling dirt on them. This would permanently remedy the evil at little expense, and injure no one.

It would be an intolerable nuisance to permit every road overseer, in his unbridled discretion, to cut ditches through private property, whenever and wherever he saw fit, simply to drain mudholes in a road that he could easily fill up. If the highway were so located as to be absolutely incapable of drainage without draining through private property, it could be relocated, and perhaps an additional easement acquired,
(737) under section 2040 of The Code; but no such question is before us.

The appropriation of private property to public uses has been so recently and so fully considered in *Phillips v. Tel. Co., ante,* 513; *Mullen v. Canal Co., ante,* 496; and *Rice v. R. R., ante,* 375, as to require but little further comment. It is well settled that private property can not be taken, even for a public use, without express legislative authority and the payment of adequate compensation. Any other appropriation would be in violation of the Declaration of Rights in the Constitution of North Carolina, and of the Fourteenth Amendment to the Constitution of the United States. *Cornelius v. Glenn,* 52 N. C., 512; *Johnston v. Rankin,* 70 N. C., 550; *R. R. v. Chicago,* 166 U. S., 226.

That this is the rule in other jurisdictions is shown by an examination of the authorities. In Gould on Waters the author says, in section 271: "An owner of land has no right to rid his land of surface water or superficially percolating water by collecting it in artificial channels and discharging it through or upon the lands of an adjoining proprietor. This is alike the rule of the common and civil law; and a municipal corporation has no greater right in this respect than a private landowner." In support of this proposition the learned author cites a long line of

authorities from Indiana, Minnesota, New York, Maryland, New Jersey, Massachusetts, Colorado, Georgia, Pennsylvania, Illinois, Nebraska, West Virginia, Missouri and Wisconsin. In Lewis on Eminent Domain, the author says, in section 87: " . . . Causing water to flow upon land is a clear violation of the right of exclusive occupation and enjoyment, which can not be taken or interfered with without compensation." And again, in section 103: *"Nevins v. Peoria,* (41 Ill., 502), 89 Am. Dec., 392, is a leading case upon this question. The city of (738) Peoria graded its streets in such a manner as to cause a stream of water and mud to flow onto the plaintiff's property in times of rain, and also to cause a pond to accumulate upon adjacent property, which, by becoming stagnant, diffused unwholesome vapors over the plaintiff's premises. The city was held liable on the ground that the damages complained of were a taking, within the meaning of the Constitution. It was held that the city had no greater power over its streets than a private individual had over his own land, and that the law of adjacent proprietors was applicable. This is the true rule to be applied in all such cases." Preventing the digging of an unauthorized ditch and obstructing an existing ditch whereby the highway is flooded are essentially different.

Another interesting view is presented by this case: Suppose the plaintiff should sue the county for compensation, and the county should repudiate the act of the overseer as unauthorized, what remedy would he have? This Court has said that he can not sue the county for a tort. Shall it now say that he is indictable if he attempts to prevent a tort? Surely, one of two things must be true—either the overseer has no right to cut the ditch or the county must be held responsible for his act.

For misdirection of the jury by his Honor in the court below, a new trial is ordered.

New trial.

FURCHES, C. J., dissenting: The case on appeal states that one Williams was the overseer of a public road in Sampson County, and the defendant is an adjacent landowner to said road; that said road has been located where it now runs for at least sixty years; that by long use the bed of the road had become worn, so that in wet weather the water would stand in the bed of the road from 4 to 6 inches deep, for a distance of 40 yards; and in cold weather this sheet of water (739) would freeze, so as to bear the weight of a horse or wagon, and was dangerous.

The evidence showed (and that question was submitted to the *jury*) that the natural flow of the surface water at this point was on the defendant's land, and when the bed of the road was full of water it flowed off on the defendant's land; that at one time there had been a small ditch

cut on the defendant's land to aid in draining this worn and sunken place in the road, but this was while the land was in the woods and before the defendant bought it.

I thought it settled law of this State that you could accelerate, but not divert surface water. *Mizzell v. McGowan,* 129 N. C., 93.

The country being flat, it would take a ditch some 70 yards long to drain, and keep drained, this depression in the road. And for the purpose of so draining the road, Williams, the overseer, with the hands working the road under him, got over the defendant's fence for the purpose of digging the ditch, when the defendant forbade their doing so; and upon the overseer insisting on cutting the ditch, the defendant said if he did "it would be over his dead body," and, to avoid a personal difficulty with the defendant, the overseer desisted and did not cut the ditch. And the defendant is indicted for obstructing a public officer in the discharge of a public duty.

It was admitted that the overseer was a public officer, and that working the public road was a public duty. But the defendant contends that the overseer had no right to cut a ditch on his land, if it was done in the discharge of a public duty and for the public good; that this would be a taking and appropriating his land without any authority to do so, and without any compensation, which would be in violation of his
(740) constitutional rights. As the natural drainage of the water from this depression in the road was over the defendant's land, it was *servient* to the road, and the defendant could not obstruct and prevent the water from flowing over the same, although there had been no condemnation of his land. *S. v. Wilson,* 107 N. C., 865—very much in point. But the road having been established for sixty years or more, worked and kept up all this time as a public road, it must be presumed to have been established according to law, and the defendant (or those under whom he holds) to have been compensated—paid for the right to locate the road and the damage it might do to the servient tenants. This is so in contemplation of law, if not in fact.

I am not in favor of taking private property for public uses without paying a just compensation, but I do not think that doctrine applies in this case, as the defendant, or those under whom he holds, have been paid.

The overseer, then, having the right, he was the judge as to how it should be done. *Brodnax v. Groom,* 64 N. C., 190, and many other cases. This Court can not become the overseer of a road, nor can it direct or say how the overseer shall do his work. It can not say it would have been better to cut a ditch on the other side of the road. If there was no necessity for draining the road at this point, and the overseer had gone on the defendant's land to cut the ditch out of bad motives or for any other reason than to drain the road, then I think he would have been

a trespasser, and the defendant would not be guilty. But these very questions were submitted *to the jury* by the judge in his charge, and they must have found that he was not influenced by any other motive than to drain and improve the road. I see no error, and think the judgment should be affirmed.

CLARK, J., concurs in the dissenting opinion.

Cited: *Lang v. Development Co.*, 169 N. C., 664.

STATE, APPELLANT, v. J. M. PILKERTON.

Attorney-General for the State. (741)
Glenn, Manly & Hendren for defendant.

PER CURIAM. For the reasons set out in *S. v. Briggs, ante,* 693, there was error in the judgment of the court below, and there must be a new trial.

Reversed.

DOUGLAS, J., dissenting.

N. M. FEREBEE v. LAKE DRUMMOND CANAL AND WATER COMPANY, APPELLANT.

(For headnote, see *Mullen v. Canal Co., ante,* 496.)

Pruden & Pruden and Shepherd & Shepherd for appellant.
P. H. Williams and E. F. Aydlett for appellee.

DOUGLAS, J. This is an action to recover damages for alleged injury to the plaintiff's land by the defendant throwing mud, sand and water thereon, and further flooding it by filling up the sweat and lead ditch which was necessary for its proper drainage. This ditch was on the plaintiff's land.

This is one of a series of cases arising out of injuries inflicted upon abutting landowners by the defendant in deepening and widening its canal in 1898 and 1899. It is identical in principle, and practically so in its essential facts, with *Mullen v. Canal Co., ante,* 496. It is, therefore, unnecessary to repeat the discussion so fully entered into in that

case, as we see no error in the conduct of this case or the charge of the court of which the defendant has cause to complain.

Affirmed.

Cited: Pinnix v. Canal Co., 132 N. C., 125.

---

(742)

G. D. WILLIAMS ET AL. v. DRUMMOND WATER AND CANAL COMPANY, APPELLANT.

(For headnote, see *Mullen v. Canal Co., ante,* 496.)

Pruden & Pruden and Shepherd & Shepherd for appellant.
E. F. Aydlett for appellee.

DOUGLAS, J. This case is practically identical in its essential features with that of *Mullen v. Canal Co., ante,* 496, wherein the legal principles applicable to such cases are fully discussed. In fact, it is against the same defendant, and arises out of the same general work, the deepening and widening of the canal in 1898 and 1899. It is in evidence that the "sweat and lead ditch," the obstruction of which caused much of the injury, had been in continuous use for both purposes for more than fifty years. One of the witnesses, Hughes, testified as follows: "That he has known the land for fifty years, and it has been cultivated for the past fifty years; that the plaintiff's land lies about 1,200 yards along the canal; that the defendant in widening its canal dug out mud, sand and water and threw it over the land of the plaintiffs, filled up the sweat ditch, which is also a lead ditch on the farm, and threw mud, sand and water back on the land 60 feet, and that it ruined the land back to the second ditch, which was 250 to 300 yards back from the canal. That the mud and sand was piled upon the lands and on the bank of the canal from 6 to 8 feet high. That it injured 40 acres of land one-half its value. That the land along the canal was worth $50 per acre. That he had sold part of the same land for $100 per lot—75x150 feet. That because of the bank thrown up and washing the sand and mud on the land, it is now worth but very little or nothing, and can not be sold for lots. That part of the tract of land is in the village of South Mills. The house and lot, which is a portion
(743) of the farm occupied by G. W. Norris, is in South Mills. That the sweat ditch is also one of the lead ditches on the farm, and the top ditches run into this ditch, and have been for over fifty years, ever since he has known the farm. That it is necessary to have this sweat ditch to take off the water percolating the canal bank and the

water falling upon the bank and running from it. That when he first knew the canal and the land, the sweat ditch was there. That it is necessary to have the sweat ditch to prevent the water from the canal, which is held in it by embankments on each side, from flowing over on the land of the plaintiffs, and all the more so because now the water is held 18 or 20 inches higher than before, and unless there is a ditch to catch this water it falls over on the land of the plaintiffs. That he cut a ditch over on the land of the plaintiffs 60 feet from the lead and sweat ditch filled by the defendant, but it will not carry off the water, and will not stand because of the sand piled up by the defendant company, and whenever there is a hard rain it washes the sand in this ditch and fills it up. That the house and lot where Norris lives was damaged from $300 to $400. The shade trees, shrubbery and all vegetation on it were destroyed by the company throwing sand, mud and water on the house and lot. It was piled up in front of the house 6 or 8 feet, and thrown into the porch, and the sand, mud and water ran into the front door. That it was thrown under the house and around it, and over the lot. That the mud and sand was under the house up to the sills, and would run into the house and over the porch to such an extent that the porch was torn down, and they had to dig a trench around the house to keep the water from running into it when it rained. That the damage to the crop was as much as two barrels of corn to the acre, and corn was worth $2 per barrel."

Defendant introduced no testimony, and requested the court (744) to charge the jury as follows:

1. That the defendant had a right to fill up its sweat ditch along the line of the canal, and the filling of this ditch by the defendant did no wrong to the plaintiffs. The jury will assess no damages on that account.

2. That the plaintiffs had no right to cut ditches through their land into the sweat ditch of the defendant, and the defendant, by stopping the drainage of these ditches into its sweat ditch, did no wrong to the plaintiffs, and the jury shall give no damages on that account.

These instructions were properly refused by the court, and there is no error in that part of the charge set out in the record of which the defendant can complain. In the face of such uncontradicted evidence and the resulting verdict of the jury, we can not concur in the contentions of the defendant upon any principle of law known to us. The judgment of the court below is

Affirmed.

Cited: Pinnix v. Canal Co., 132 N. C., 125; *Bullock v. Canal Co., ibid.*, 180; *Dale v. R. R., ibid.*, 708.

(745)

MEMORANDUM OF CASES DISPOSED OF WITHOUT WRITTEN OPINION

S. *v.* DEY, from Currituck. *Attorney General for State; Bond for defendant.* Affirmed.

RESPASS *v.* LUMBER Co., from Beaufort. *Warren for plaintiff; Rodman and Small & McLean for defendant.* Affirmed.

LEWIS *v.* MFG. Co., from Chowan. *Bond and Sawyer for plaintiff.* Defendant's appeal dismissed under Rule 17.

POWELL *v.* PARKER *et al.*, from Hertford. *Winborne & Lawrence for plaintiff; Shepherd and Pruden for defendant.* Affirmed as to Solomon Parker; new trial granted plaintiff as to other defendants.

HARRELL *v.* WOMBLE, from Bertie. *Peebles, Winborne & Scull for plaintiff; L. L. Smith for defendant.* Affirmed.

KING *v.* COOPER, from Pitt. *Fleming & Moore for plaintiff; Shepherd for defendant.* Petition to rehear dismissed.

SMITH *v.* FOY, from Craven. *Guion for plaintiff; Ward for defendant.* Affirmed.

CARSON *v.* JAMES, from Pitt. *Fleming for plaintiff; Skinner for defendant.* Affirmed.

JAMES *v.* CARSON, from Pitt. *Skinner for plaintiff; Fleming for defendant.* Affirmed.

TAYLOR *v.* BREWER, from Franklin. *Massenburg for plaintiff; Gulley for defendant.* Affirmed.

THIGPEN *v.* JONES, from Edgecombe. *Gilliam for plaintiff; Bridgers for defendant.* Affirmed.

S. *v.* HAUSER, from New Hanover. *Attorney-General for State.* Motion of State to docket and dismiss defendant's appeal under Rule 17 disallowed. See *Avery v. Pritchard*, 93 N. C., 266.

(746) BARNES *v.* R. R., from New Hanover. *Grady for plaintiff; Davis for defendant.* Affirmed.

SILLS *v.* HAWLEY, from Sampson. *Cooper for plaintiff; Kerr for defendant.* Affirmed.

MEARES *v.* WHITEHEAD, from New Hanover; two cases. *Bellamy & Bryan for plaintiff; Davis for defendant.* Affirmed.

HUMPHREY *v.* TAYLOR, from Onslow. *Duffy & Koonce for plaintiff.* Affirmed.

CLINTON LOAN ASSN. *v.* JOHNSON, from Sampson. *Allen & Dortch for plaintiff; Davis and Rountree & Carr for defendant.* Affirmed.

CASES DISPOSED OF WITHOUT WRITTEN OPINION.

PROVOW *v.* WILLIAMS, from Onslow. *McIver and Duffy & Koonce for plaintiff; Thompson and Simmons & Ward for defendant.* Affirmed.

GRAHAM *v.* SPRUNT, from New Hanover. *Stevens and Grady for plaintiff; Ruark for defendant.* Affirmed.

SALMON *v.* PAGE, from Harnett. *Murchison for plaintiff; Chapin for defendant.* Affirmed.

SLAUGHTER *v.* GOLDSBORO, from Wayne. *Dickinson for plaintiff; Allen & Dortch for defendant.* Affirmed.

BRIDGERS *v.* R. R., from Wake. *Harris for plaintiff; Day, Womack & Batchelor for defendant.* Affirmed.

IN RE MCBRIDE, from Robeson. *McLean for appellee.* Dismissed under Rule 17.

LUCAS *v.* R. R., from Balden. *Shaw for appellee.* Dismissed under Rule 17.

BLAIR *v.* BELK, from Union. *Adams & Jerome for plaintiff; Redwine & Stack for defendant.* Affirmed.

STEWART *v.* DIXON, from Moore. *Seawell & Spence for plaintiff; Murchison for defendant.* Affirmed.

MANESS *v.* MCNEILL, from Moore. *Black & Adams for plaintiff; Seawell & Burns for defendant.* Affirmed.

BURNS *v.* WOMBLE, from Chatham. *Womack for appellee.* (747) Dismissed under Rule 17.

COUNCILL *v.* R. R., from Granville. *A. W. Graham for plaintiff; F. H. Busbee for defendant.* Affirmed.

BAKER *v.* BOARD OF EDUCATION, from Granville. *Hicks & Devin for plaintiff; Royster & Hobgood for defendant.* Affirmed.

S. *v.* WHITAKER, from Yadkin. *Attorney-General for State.* Affirmed.

S. *v.* HOUSTON, from Iredell. *Attorney-General for State; Lewis for defendant.* Affirmed.

FLEMING *v.* R. R., from Iredell. *Nicholson for plaintiff; Andrews for defendant.* Affirmed.

WORTH WILL CASE, from Randolph. *Bynum for caveators; Long, Morehead and Pou, contra.* Affirmed.

S. *v.* PILKERTON, from Wilkes. *Attorney-General for State; Glenn, Manly & Hendren for defendant.* Reversed.

SCOTT *v.* FURNITURE CO., from Surry. *Alexander for plaintiff; Watson for defendant.* Affirmed.

S. *v.* SMART, from Mecklenburg. *Attorney-General for State; Clarkson & Duls for defendant.* Affirmed.

HOOD *v.* TEL. CO., from Mecklenburg. *Maxwell & Keerans for plaintiff; Jones & Tillett for defendant.* Affirmed. *Cited: Bryan v. Tel. Co.*, 133 N. C., 606.

CASES DISPOSED OF WITHOUT WRITTEN OPINION.

CLONINGER *v.* R. R. *Mangum for plaintiff; Mason and Bason for defendant.* Affirmed.

COTTON MILLS *v.* LAWRENCE, from Gaston. *Mangum for Lawrence; Mason for defendant Whitesides.* Affirmed.

WILLIAMSON *v.* HOLT, from Mecklenburg. *Jones & Tillett for plaintiff; Parker for defendant.* Affirmed.

DOVER *v.* R. R., from Mecklenburg. *Jones & Tillett for plaintiff; Bason for defendant.* Affirmed.

POWELL *v.* R. R., from Caldwell. *Jones for plaintiff; Hufham and Self for defendant.* Affirmed.

(748) HENRIETTA MILLS *v.* CLIFFSIDE MILLS, from Rutherford. *Busbee and Justice for plaintiff; Pou and McBrayer & Justice for defendant.* Affirmed.

EDNEY *v.* BYERS, from Henderson. *Rickman & Holmes for plaintiff; Toms & Rector for defendant.* Affirmed.

S. *v.* GALLOWAY, from Transylvania. *Attorney-General for State; Gash for defendant.* Error. *S. v. Anderson,* 129 N. C., 521.

BANK *v.* BOSTIC, from Buncombe. *Martin for plaintiff; Shuford for defendant.* Affirmed.

COLLINS *v.* COLLINS, from Madison. *Zachary for appellant.* Affirmed.

ALEXANDER *v.* BRIGMAN HEIRS, from Buncombe. *Merrimon, Martin and Moore for plaintiff; Settle for defendants.* Affirmed.

HENSON *v.* FERGUSON, from Haywood. *Crawford for plaintiff; Ferguson for defendant.* Affirmed.

WATKINS *v.* R. R., from Swain. *Crawford and Ferguson for plaintiff; Bason for defendant.* Affirmed.

LOVE *v.* R. R., from Jackson. *Hooker and Shepherd for plaintiff; Bason for defendant.* Affirmed.

ADAMS *v.* SCROGGS, from Cherokee. *Dillard & Bell for plaintiff.* Affirmed.

KINSEY *v.* NOTLA MARBLE CO., from Cherokee. *Dillard & Bell for plaintiff.* Affirmed.

MEADOWS *v.* R. R., from Cherokee. *Dillard & Bell for plaintiff; Gudger for defendant.* Affirmed.

MILLHISER *v.* MARR, from Swain. *Fry for plaintiff.* Affirmed.

GUANO CO. *v.* SWIFT, from Haywood. *Crawford for plaintiff.* Dismissed under Rule 17.

INDEX