NORTH CAROLINA REPORTS.

VOL. 131.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

AUGUST TERM, 1902.

STATE REPORTER:

ZEB. V. WALSER.

ANNOTATED BY

WALTER CLARK.

RALEIGH:
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3 " "	"	48	"
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6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
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OF THE

SUPREME COURT OF NORTH CAROLINA,

AUGUST 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.

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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. COUNCILL	Thirteenth	Lenoir.
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Name.	*District.*	*Residence.*
GEORGE W. WARD	First	Elizabeth City.
WALTER E. DANIEL	Second	Weldon.
L. I. MOORE	Third	Greenville.
CHARLES C. DANIELS	Fourth	Wilson.
RODOLPH DUFFY	Fifth	Catharine 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.
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J. F. SPAINHOUR	Fourteenth	Morganton.
JAMES M. GUDGER, JR.	Fifteenth	Asheville.
JAMES W. FERGUSON	Sixteenth	Waynesville.

LICENSED ATTORNEYS.

AUGUST TERM, 1902.

ALLRED, LENVILLE H. ..... Franklin County.
BRITT, EVERETT J. ..... Robeson County.
BROOKS, BERNARD A. ..... Nash County.
BROWN, JULIUS ..... Pitt County.
BUSBEE, PHILIP H. ..... Wake County.
CARTER, JAMES G. ..... Forsyth County.
COOK, LEON T. ..... Robeson County.
DOUGLAS, STEPHEN A. ..... Guilford County.
DYE, ROBERT H. ..... Cumberland County.
GRIMES, JUNIUS D. ..... Pitt County.
GWYN, JAMES A. ..... Haywood County.
HYAMS, WILLIAM W. ..... Buncombe County.
IVIE, ALLEN D. ..... Rockingham County.
KING, CHARLES B. ..... Moore County.
KITTRELL, JOSIAH C. ..... Vance County.
KLUTZ, WHITEHEAD ..... Rowan County.
KOONCE, CHARLES D. ..... Onslow County.
LEIGH, JOSEPH A. ..... Tyrrell County.
LUTHER, WATSON L. ..... Buncombe County.
MCDUFFIE, DAVID L. ..... Cumberland County.
MUSE, CURTIS M. ..... Moore County.
NEWTON, WAYLAND L. ..... Wake County.
PRESTON, EDMUND R. ..... Mecklenburg County.
REYNOLDS, GEORGE D. B. ..... Moore County.
REYNOLDS, GEORGE S. ..... Buncombe County.
REYNOLDS, HENRY ..... Forsyth County.
ROBERTS, GUY V. ..... Madison County.
SHAFFER, ELMER M. ..... Wake County.
TAYLOR, GASTON W. ..... Wake County.
UPCHURCH, ERNEST F. ..... Nash County.
WILLIAMS, LEONIDAS B. ..... Richmond County.
WRIGHT, THOMAS L. ..... Sampson County.

CALENDAR OF COURTS

TO BE HELD IN

North Carolina During the Spring and Fall of 1903.

SUPREME COURT.

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination for applicants for license to practice law, to be conducted in writing, takes place on the first Monday of each term, and at no other time.

The Judicial Districts will be called in the Supreme Court in the following order:

	February Term, 1903.	August Term, 1903.
First District	February 3	September 1
Second District	February 10	September 8
Third District	February 17	September 15
Fourth District	February 24	September 22
Fifth District	March 3	September 29
Sixth District	March 10	October 6
Seventh District	March 17	October 13
Eighth District	March 24	October 20
Ninth District	March 31	October 27
Tenth District	April 7	November 3
Eleventh District	April 14	November 10
Twelfth District	April 21	November 17
Thirteenth District	April 28	November 24
Fourteenth District	May 5	December 1
Fifteenth District	May 12	December 8
Sixteenth District	May 19	December 15

SUPERIOR COURTS.

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

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

FIRST JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge M. H. Justice.
FALL TERM, 1903—Judge W. B. Council.

Beaufort—Feb. 9 (2); †April 13 (1); *May 11 (1); †Oct. 19 (2); Dec. 7 (3).
Currituck—Feb. 23 (1); Sept. 7 (1).
Camden—Mar. 3 (1); Sept. 14 (1).
Pasquotank—Mar. 9 (2); May 25 (2); Sept. 21 (1); Nov. 23 (1).
Perquimans—Mar. 23 (1); Sept. 28 (1).
Chowan—Mar. 30 (1); Oct. 5 (1).
Gates—April 6 (1); Oct. 12 (1).
Washington—April 20 (1); Nov. 2 (1).
Tyrrell—April 27 (1); Nov. 9 (1).
Hyde—May 4 (1); Nov. 30 (1).
Dare—May 18 (1); Nov. 16 (1).

SECOND JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge Fred Moore.
FALL TERM, 1903—Judge M. H. Justice.

Halifax—Jan. 19 (2); April 6 (2); Aug. 24 (2); Nov. 30 (2).
Northampton—‡Feb. 2 (1); Mar. 23 (2); ‡Sept. 7 (2); Nov. 2 (2).
Warren—Feb. 9 (1); May 11 (1); Sept. 21 (2).
Bertie—‡Feb. 16 (2); April 27 (2); ‡Sept. 14 (1); Nov. 16 (2).
Hertford—*Feb. 23 (1); April 20 (1); *Aug. 17 (1); Oct. 26 (1).

THIRD JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge Garland S. Ferguson.
FALL TERM, 1903—Judge Fred Moore.

Pitt—Jan. 12 (2); †Mar. 16 (2); April 20 (2); Sept. 7 (2); †Oct. 19 (2).
Craven—†Feb. 9 (1); *April 6 (1); †May 4 (2); *Aug. 24 (1); ‡Sept. 21 (2); *Nov. 16 (1); †Nov. 23 (1).
Greene—Feb. 23 (1); Aug. 31 (1); Dec. 7 (2).
Carteret—Mar. 9 (1); Oct. 5 (1).
Jones—Mar. 30 (1); Nov. 9 (1).
Pamlico—April 13 (1); Sept. 14 (1).

FOURTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge Geo. H. Brown
FALL TERM, 1903—Judge Garland S. Ferguson.

Franklin—‡Jan. 19 (2); April 13 (2); Oct. 19 (2).
Wilson Feb. 2 (2); †May 11 (1); *Sept. 7 (1); †Nov. 16 (2); *Dec. 14 (1).
Edgecombe—Mar. 2 (1); †Mar. 30 (2); Sept. 14 (1); †Nov. 2 (2).
Nash—Mar. 9 (1); April 27 (2); Aug. 31 (1); Nov. 30 (2).
Martin—Mar. 16 (2); Sept. 21 (2).
Vance—May 18 (1); Feb. 16 (2); Oct. 5 (2).

FIFTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge R. B. Peebles.
FALL TERM, 1903—Judge Geo. H. Brown.

New Hanover—*Jan. 5 (2); †Jan. 26 (2); *Mar. 23 (1); †April 6 (2); *May 25 (1); * July 13 (1); *Aug. 17 (1) ; †Oct. 12 (2); *Nov. 9 (1); *Nov. 30 (1).
Onslow—Jan. 19 (2); July 20 (2); Oct. 26 (1).
Duplin—Feb. 9 (1); May 4 (1); Aug. 31 (1); Dec. 7 (2).
Sampson—Feb. 16 (2); May 11 (2); Sept. 28 (2).
Pender—Mar. 2 (2); Sept. 7 (2); Dec. 21 (1).
Lenoir—Mar. 9 (2); April 27 (1); Nov. 16 (2).

SIXTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge H. R. Bryan.
FALL TERM, 1903—Judge R. B. Peebles.

Wake—*Jan. 5 (2); †Feb. 23 (2); †Mar. 23 (2); †April 20 (2); *July 13 (2); *Sept. 28 (2); †Oct. 26 (3).
Wayne—Jan. 19 (2); April 13 (1); Sept. 14 (2); Nov. 30 (1).
Harnett—Feb. 9 (2); Aug. 31 (1); ‡Nov. 16 (2).
Johnston—Mar. 9 (2); Sept. 7 (2); Dec. 7 (2).

SEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge C. M. Cooke.
FALL TERM, 1903—Judge H. R. Bryan.

Cumberland—Jan. 12 (1); Feb. 16 (2); ‡Mar. 23 (2); April 27 (1); †May 4 (1); *Aug. 31 (1); †Oct. 26 (1); *Nov. 23 (1).
Robeson—*Feb. 2 (2); †Mar. 30 (2); May 18 (1); *July 27 (1); †Sept. 14 (2); *Nov. 9 (2); †Dec. 7 (1).
Columbus—Feb. 23 (1); April 13 (1); Sept. 7 (1); Nov. 30 (1).
Bladen—Mar. 2 (2); Oct. 12 (2).
Brunswick—Mar. 16 (1); Sept. 28 (1).

EIGHTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge Oliver H. Allen.
FALL TERM, 1903—Judge C. M. Cooke.

Moore—†Jan. 19 (2); *April 20 (1); †May 11 (2); *Aug. 17 (1); †Sept. 21 (1); *Dec. 7 (1).
Chatham—Feb. 2 (1); May 4 (1); †Aug. 10 (1); Nov. 16 (1).
Anson—*Feb. 9 (1); †April 13 (1); *Sept. 14 (1); †Oct. 12 (1).
Union—*Feb. 16 (2); †Mar. 16 (2); *Aug. 3 (1); Aug. 24 (2); Oct. 9 (2); *Nov. 30 (1).
Richmond—†Mar. 2 (1); †Mar. 30 (2); *Sept. 7 (1); Sept. 28 (2).
Scotland—†Mar. 9 (1); *April 27 (1); †Nov. 2 (1); *Nov. 23 (1).

NINTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge W. R. A en.
FALL TERM, 1903—Judge O. H. Allen.

Durham—*Jan. 5 (1); †Jan. 19 (1); †Mar. 16 (1)*May 11 (1); *Aug. 31 (1); †Oct. 5 (2); *Dec. 7 (1).

Guilford—*Jan. 12 (1); Feb. 9 (1); *April 13 (1); *May 4 (1); †June 8 (1); *Aug. 24 (1); †Sept. 21 (1); *Oct. 26 (1); †Nov. 2 (1); †Dec. 14 (1).

Granville—Feb. 2 (1); April 20 (2); Aug. 3 (1); Nov. 23 (2).

Alamance—†Feb. 23 (1); †May 25 (1); †Sept. 7 (2); *Nov. 9 (1).

Orange—March 9 (1); †May 18 (1); Aug. 10 (1); Oct. 19 (1).

Person—April 6 (1); Aug. 17 (1); Nov. 16 (1).

TENTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge Thomas A. McNeil.
FALL TERM, 1903—Judge W. R. Allen.

Montgomery—*Jan. 19 (1); †April 13 (1); Sept. 28 (2).

Iredell—Jan. 26 (2); May 18 (1); Aug. 10 (2); Nov. 9 (2).

Rowan—Feb. 9 (2); May 4 (2); Sept. 7 (2); Nov. 23 (2).

Davidson—Feb. 23 (2); April 20 (1); Aug. 31 (2).

Stanly—*Mar. 9 (1); †July 20 (1); †Sept. 21 (1); †Dec. 21 (1).

Randolph—Mar. 16 (2); July 27 (2); Dec. 17 (1).

Davie—Mar. 30 (2); Oct. 12 (2).

Yadkin—April 27 (2); Oct. 26 (2).

ELEVENTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge Walter H. Neal.
FALL TERM, 1903—Judge Thomas A. McNeil.

Wilkes—Jan. 26 (2); Aug. 10 (2); †Oct. 26 (2).

Forsyth—*Feb. 9 (2); †Mar. 9 (2); May 18 (2); *July 27 (1); †Sept. 14 (2); *Oct. 12 (1); †Dec. 7 (2).

Rockingham—Feb. 23 (2); Aug. 3 (1); Nov. 9 (2).

Alleghany—Mar. 23 (1); Aug. 24 (1).

Caswell—April 13 (1); Oct. 9 (1).

Surry—†April 20 (1); †Aug. 31 (2); Nov. 23 (2).

Stokes—May 4 (2); Sept. 28 (2).

TWELFTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge Thomas J. Shaw.
FALL TERM, 1903—Judge Walter H. Neal.

Mecklenburg—Jan. 12 (2); *Feb. 9 (2); †Mar. 9 (2); April 20 (1); *June 1 (1); †July 20 (2); *Aug. 17 (1); *Sept. 28 (1); †Oct. 12 (2); *Nov. 30 (1).

Cabarrus—Jan. 26 (2); May 4 (2); Aug. 31 (1); Oct. 26 (2).

Gaston—Feb. 23 (2); May 18 (1); Sept. 14 (2); Nov. 23 (1).

Cleveland—Mar. 23 (2); Aug. 3 (2); Nov. 9 (2).

Lincoln—April 6 (2); Sept. 7 (1); Nov. 14 (1).

THIRTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge B. F. Long.
FALL TERM, 1903—Judge Thomas J. Shaw.

Catawba—Feb. 2 (2); †May 4 (2); July 13 (2); Nov. 2 (2).

Alexander—Feb. 16 (1); Oct. 5 (1).

Caldwell—*Feb. 23 (2); *Sept. 21 (2); †Nov. 30 (2).

Mitchell—Mar. 9 (2); May 18 (2); Sept. 7 (2); Nov. 16 (2).

Watauga—Mar. 23 (2); June 1 (2); Aug. 10 (2).

Ashe—April 20 (2); July 27 (2); Oct. 19 (2).

FOURTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge E. B. Jones.
FALL TERM, 1903—Judge B. F. Long.

McDowell—Feb. 16 (2); Aug. 10 (2); Oct. 26 (1).

Henderson—*Mar. 2 (1); May 11 (2); Sept. 21 (2); Nov. 9 (2).

Rutherford—Mar. 9 (2); Sept. 7 (2); Nov. 23 (2).

Polk—Mar. 23 (2); Oct. 5 (1).

Burke—April 6 (2); June 1 (2); Aug. 24 (2); Oct. 12 (2).

Yancey—April 20 (3); Dec. 7 (2).

FIFTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge W. A. Hoke.
FALL TERM, 1903—Judge E. B. Jones.

Buncombe—*Feb. 2 (3); †Mar. 9 (4); April 20 (2); †May 25 (4); Aug. 3 (2); †Sept. 14 (6); †Nov. 16 (1); †Dec 7 (2).

Madison—*Feb. 23 (2); May 4 (3); †Aug. 17 (2); *Oct. 26 (3).

Transylvania—April 6 (2); Aug. 31 (2); Nov. 30 (1).

SIXTEENTH JUDICIAL DISTRICT.

SPRING TERM, 1903—Judge W. B. Council.
FALL TERM, 1903—Judge W. A. Hoke.

Haywood—Feb. 2 (2); May 4 (2); Sept. 28 (2).

Jackson—Feb. 16 (2); May 18 (2); Oct. 12 (2).

Swain—Mar. 2 (2); †July 27 (2); Oct. 26 (2).

Graham—Mar. 16 (2); Sept. 7 (2).

Cherokee—Mar. 30 (2); Aug. 10 (2); Nov. 9 (2).

Clay—April 13 (1); Sept. 21 (1).

Macon—April 20 (2); Aug. 24 (2); †Nov. 23 (2).

*For criminal cases only. †For civil cases only. ‡For civil and jail cases.

COURT CALENDAR.

UNITED STATES COURTS FOR NORTH CAROLINA.

CIRCUIT COURT.

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

DISTRICT COURTS.

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

UNITED STATES CIRCUIT COURT.

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

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT.

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

OFFICERS.

Harry Skinner, United States District Attorney, Raleigh.
Oscar J. Spears, Assistant United States District Attorney, Lillington.
Henry C. Dockery, United States Marshal, Rockingham.
H. L. Grant, Clerk United States District and Circuit Courts for the Eastern District of North Carolina, Goldsboro.

DEPUTY CLERKS.

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

WESTERN DISTRICT.

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

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

CASES REPORTED IN THIS VOLUME.

(Mem.) following a case indicates that it was disposed of without a written opinion.

CASES CITED BY THE COURT.

I. Cases From the North Carolina Reports.

A

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II. Cases Cited Outside of North Carolina.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

AUGUST TERM, 1902.

MEEKINS v. NORFOLK & SOUTHERN RAILROAD COMPANY.

(Filed 9 September, 1902.)

1. NONSUIT—*Limitation of Actions—The Code, Secs.* 166, 1498.

A new action may be commenced in all cases within one year after nonsuit.

2. APPEAL—*Dismissal—Action.*

Refusal to dismiss an action is not appealable.

3. APPEAL—*Dismissal.*

The Supreme Court may consider the points intended to be presented, though the appeal is dismissed.

ACTION by J. C. Meekins, administrator of John Jones, against the Norfolk and Southern Railroad Company, heard by *Judge George A. Jones,* at Spring Term, 1902, of TYRRELL. From a refusal to dismiss the action the defendant appealed.

E. F. Aydlett for the plaintiff.
Pruden & Pruden and *Shepherd & Shepherd* for the defendant.

CLARK, J. This was an action, under the Code, sec. 1498, for damages for the death of plaintiff's intestate, caused by the wrongful act or neglect of the defendant. The origi- (2) nal action was brought within one year from the death of the plaintiff's intestate, and a nonsuit was taken. Within one year after such nonsuit, but more than a year after the death of

intestate, this action was begun. The defendant demurred *ore tenus* and moved to dismiss the action, and appealed from a refusal of its motion.

The Code, sec. 166, provides: "If any action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited, . . . the plaintiff . . . may commence a new action within one year after such nonsuit." The defendant contends that this provision is under the title in the Code applying to *limitations,* and that the time prescribed under section 1498 is not strictly a statute of limitations. *Best v. Kinston,* 106 N. C., 205. But the original action was brought within the time prescribed in section 1498, and therefore it does not here matter what the nature of that prescription is. On the other hand, the time within which a new action may be commenced after a nonsuit, etc., is a statute of limitation, and applies to all cases where a nonsuit, etc., has been sustained. This statute (Code, sec. 166) contains no exception of cases under section 1498, or of any other cases where the time prescribed for bringing the original action might not be strictly a statute of limitation. We know no cause why the privilege to commence a new action within a year after nonsuit should not apply equally to all cases of nonsuit. The statute makes no distinction, and there is certainly none in the reason of the thing, which is the same as to that class of cases as in any others.

No appeal lies from a refusal to dismiss an action. Clark's Code (3 Ed.), p. 738, and numerous cases there quoted; *Clinard v. White,* 129 N. C., 250. But we have, notwithstanding, discussed the merits of the motion, as was done in the last-named case, and in *S. v. Wylde,* 110 N. C., 500.

Appeal dismissed.

Cited: Williams v. B. & L. Assn., post, 270; *Prevatt v. Harrelson,* 132 N. C., 254; *Hood v. Tel. Co.,* 135 N. C., 627; *Hollingsworth v. Skelding,* 142 N. C., 251; *Tussey v. Owen,* 147 N. C., 338; *Lumber Co. v. Harrison,* 148 N. C., 334; *Gulledge v. R. R., ib.,* 568; *Midgett v. Mfg. Co.,* 150 N. C., 348; *Trull v. R. R.,* 151 N. C., 547, 548.

(3)

GOODYEAR v. COOK.

(Filed 9 September, 1902.)

MORTGAGES—*Trusts—Notice.*

A trustee in a deed of trust, applying the proceeds as provided in the registered deed, is not chargeable with notice that the deed was improperly registered, because as attorney he had twelve years before drawn the deed of trust.

ACTION by J. M. Goodyear against Charles A. Cook, heard by *Judge Francis D. Winston,* at September Term, 1901, of WARREN. From a judgment for the plaintiff the defendant appealed.

No counsel for the plaintiff.
B. G. Green and *F. H. Busbee* for the defendant.

CLARK, J. Upon the facts agreed, it appears that the defendant, as attorney at law, on 1 April, 1886, drew a deed in trust (which was not then signed nor delivered), to secure two notes, one for $175, to Benjamin Goodyear, and the other for $370, payable to Rebecca Goodyear. The party for whom the paper was drawn took it away, and on 10 June, 1886, it was recorded without any knowledge or agency on the part of the defendant. The matter passed out of the mind of the defendant, till, about February, 1898, said Rebecca demanded that the defendant, as trustee, should sell the land. The defendant asked for the trust deed and was referred to the registry of the same, and directed to sell by that. As recorded, the trust deed named the defendant as trustee, and required him "to pay in full the note to Rebecca Goodyear, and the surplus, if any," to the grantor. The property was duly advertised, and sold, 21 March, 1898, when it was bought by said Rebecca, at the price of $310, which, being less than her debt, the amount of her bid was credited on her note, and the land was conveyed to her. The (4) plaintiff did not become holder or owner of the $175 note till 1901, and neither Benjamin Goodyear nor anyone else, prior to that time, gave the trustee notice of the $175 claim.

The following averment of the defendant is admitted by the plaintiff, *i. e.:* "The defendant had no knowledge or information whatsoever, nor any reasons to suspect or believe, that there was any defect or error in the registration of said deed, and in executing said powers he was acting as agent for the parties to said deed, and used due care and caution in the discharge of said trust."

Upon the facts admitted, judgment should have been entered

for the defendant. The mere fact that the defendant had once drawn a trust deed for the grantor, requiring payment of the $175 note out of proceeds of sale, as well as payment of the $370 note, which alone is required by the deed, as recorded, was no notice to him that the deed was improperly registered—certainly not, after the admission that he did not have any "information or knowledge whatsoever, nor any reasons to suspect or believe, that there was any defect or error in the registration of said deed of trust." Besides, the laches of the plaintiff, and those under whom he claims, has been so gross as to deprive them of any standing in a court of equity, if there had been at any time any merit in his contention.

Reversed.

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(5)

WOLFE v. HAMPTON.

(Filed 9 September, 1902.)

EVIDENCE—*Witnesses.*

Where a plaintiff first testifies as to what passed between defendant and the deceased, the defendant is entitled to give his version of the same transaction.

ACTION by T. B. Wolfe and others against W. H. Hampton, heard by *Judge H. R. Starbuck* and a jury, at December (Special) Term, 1901, of WASHINGTON. From a judgment for the defendant the plaintiff appealed.

W. M. Bond for the plaintiffs.
A. O. Gaylord for the defendant.

CLARK, J. The plaintiffs, children of H. E. Wolfe, bring this action as the beneficiaries named in a life insurance policy. They allege that the defendant, in 1885, contracted with their father, for a consideration, to keep up the policy by paying the premiums thereon, but that, in December, 1888, the defendant defaulted in such payment, whereby the policy became forfeited. H. E. Wolfe died in 1897. This action was instituted in November, 1900.

T. B. Wolfe, one of the plaintiffs, testified that the defendant agreed with his father and himself, for the consideration named, to keep the premiums on said policy paid up, and that after his father's death he saw the defendant, who admitted said agree-

ment, and that he had allowed the policy to lapse in 1888. The defendant testified that his agreement with H. E. Wolfe was that he (witness) would pay the premiums only so long as they did not exceed the then rate of $3.40 per month, and that any excess above $3.40 should be paid by Wolfe; that no one was present besides H. E. Wolfe and himself, and that when the excess became heavy Wolfe stopped paying, and (6) that this was the sole cause of the forfeiture. The exception to this evidence of the conversation and contract between the witness and the deceased is the only point presented, as the other exception is as to evidence admitted upon another issue, which became immaterial, in view of the finding upon this issue, and which, consequently, the jury did not pass upon.

As the plaintiff T. B. Wolfe first gave his version as to what passed between his father and the defendant, it could not be error to permit the defendant to give his account of the same transaction.

No error.

ALLEGHANY COMPANY v. EAST COAST LUMBER COMPANY.

(Filed 9 September, 1902.)

1. INJUNCTION—*Restraining Order—Timber.*

Where, in an action to try title to timber land, the trial judge finds as a fact that there is a *bona fide* contention on both sides, based upon evidence, and that the plaintiff has made out a *prima facie* case, such issue should be submitted to a jury, and could not be determined on a motion to continue an order restraining the cutting of timber.

2. INJUNCTIONS—*Laws* 1901, *Ch.* 666.

An order restraining trespass on timber lands was properly continued until the hearing, under Laws 1901, ch. 666.

ACTION by the Alleghany Company against the East Coast Lumber Company and others, heard by *Judge George H. Brown,* at chambers, at Washington, N. C., 28 January, 1902. From an order continuing a preliminary injunction restraining the cutting of timber the defendants appealed.

Rodman & Rodman and *Small & McLean* for the (7) plaintiff.

E. F. Aydlett and *F. H. Busbee* for the defendant.

CLARK, J. It is admitted that the defendants are cutting timber around the southern side of Endless Bay; and if the head

of the northeast prong of Long Shoal River is located as contended by plaintiff, then (for the purposes of this motion only) it is further admitted that said cutting is being done upon the lands described in the complaint and covered by the John Hall grant.

There is a *bona fide* and serious contention as to the true location of the head of the northeast prong of Long Shoal River, upon the determination of which rests the location of the John Hall grant, under which plaintiff claims, and defendants do not, and which grant, if located by plaintiff's contention, covers the *locus in quo*. This contention, which is supported by affidavits of each party in favor of its own view, cannot be decided upon this motion, but must be submitted to a jury.

His Honor, having correctly found as a fact that "there is a *bona fide* contention on both sides, based upon evidence," and that the plaintiff has made out a *prima facie* case, could not, under chapter 666, Laws 1901, do otherwise than continue the restraining order to the hearing.

No error.

(8)

TAYLOR v. BRINKLEY.

(Filed 16 September, 1902.)

IMPROVEMENTS—*Fraud—Wills—Evidence.*

Where the plaintiff is induced to make improvements on land by promise of testator that he should have the use of it while testator lived, and at death of testator the land should belong to wife of plaintiff, and the testator devises it to wife of plaintiff for life, with remainder to her children, it is not such fraud as authorizes plaintiff to recover for such improvements.

ACTION by F. H. Taylor against A. Brinkley and others, heard by *Judge George H. Brown*, at April Term, 1902, of HALIFAX. From a judgment for the defendants the plaintiff appealed.

Day & Bell for the plaintiff.
Thomas N. Hill and *E. L. Travis* for the defendants.

FURCHES, C. J. On 18 November, 1885, the plaintiff married Hattie E. Perkins, the only daughter of the intestate. The plaintiff was at that time a resident of the State of Virginia, and the testator a resident of Halifax County, North Carolina. At the urgent solicitation of the testator, the plaintiff disposed of his property in Virginia and moved to North Carolina in the

fall of 1888, where he and his family have lived ever since. In order to induce the plaintiff to move to North Carolina, the testator stated to him that if he would do so he should have the immediate control and use of the home place, on which the testator then lived, during the testator's lifetime, and "it would belong to the plaintiff's wife at his death." That the plaintiff should have board for himself and family free of charge, and that he should have the benefit of such improvements as he might put on the land. And, under this promise of the testator, he moved to North Carolina and took charge of said (9) "home place," containing about two thousand acres, and put valuable improvements thereon, consisting of barns and tenant houses, to the value of $5,000; for which he says he is entitled to be paid that amount, for the reason that said lands did not become the property of his wife at the death of the testator, as testator said they would, and that he is thereby damaged to that amount.

That part of the testator's will disposing of this "home place" is as follows: "Item 2. I loan to my daughter, Hattie E. Taylor, during her life, all that part of my home tract of land, beginning (giving boundaries). I loan to Hattie E. Taylor, during her life, then to go to her children. In speaking of my home tract of land, I mean all the land I own that joins my home tract."

This contract, agreement or promise which defendant's testator made, the plaintiff alleges, induced him to move from Virginia to North Carolina, and to place said improvements upon the land, is denied in the defendant's answer. It cannot, therefore, be proved as a legal contract or liability, not being in writing, and void under the statute of frauds. The only relief the plaintiff has, if he has any, is in equity, to prevent a fraud, by which the plaintiff would be damaged and the testator's estate benefited, to prevent one party from reaping the benefit of another's money or labor, obtained by the breach of his own contract or promise that induced the placing of the buildings on the land. It is therefore held that, where one person is induced to put valuable improvements on the land of another under a promise or contract of the owner to convey, and he afterwards refuses to do so, the party so induced to make the improvements may recover compensation therefor to the value of said improvements. This is not a *legal right,* but an *equitable relief to prevent fraud.* It is not an action upon the contract, or for a breach of the contract, though the contract or promise (10) may be shown to establish the fraud. But the relief is collateral to the contract, and is not for the cost of the improve-

ments or the labor done in putting them there, but for the amount they have benefited the land. The plaintiff's right to relief in such cases does not proceed so much upon the idea of compensating the plaintiff for his work, but upon the idea that the defendant shall not be benefited by the plaintiff's work so induced, without paying what it is worth to the defendant. *Luton v. Badham,* 129 N. C., 7, and authorities there cited.

It was stated in the argument that *Luton v. Badham* had gone as far as any case in our reports, but it had advanced nothing new, unless it might be that it was a more pronounced declaration of this doctrine as a cause of action as well as a ground of defense. But it seems to us that this doctrine is well sustained by the authorities cited in that case, and such a distinction as claimed by defendants, that it is only a matter of defense, rests upon no well-grounded reason or principle, and is not sustained by authority. And we are unwilling to say that the plaintiff is not entitled to relief, for the reason that he is plaintiff and is asking affirmative relief.

And we do not say that no judgment can be had *in personam* under this doctrine, without declaring a lien on the property improved, as there seems to be no reason why such judgments might not be granted.

The general rule has been to make judgments in such cases a lien upon the land so improved, until paid. This is done for the protection and benefit of the party who has put the improvements on the land. But for this, the defendant might defeat the recovery by claiming the homestead, or otherwise. And if any such judgment as this is asked, the owner of the land should be a party. But we do not see why he should be, if no such lien is asked.

If the plaintiff was induced to put valuable improve-
(11) ments on this land during the testator's lifetime, it was a benefit to the testator, as the land was his at that time; and we do not see why he should not be liable for them, if he afterwards so acted, by selling or conveying the land to some one else, as to deprive the plaintiff of its use and benefit. And if he would have been liable, we do not see why his estate would not be.

Then, is the plaintiff entitled to recover damages against the defendants? He is induced to leave Virginia and come to North Carolina, and to put the improvements on the land, by the promise of the testator that if he would do so he should have the use of the land while the testator lived, and the improvements he might put on it, and at his (testator's) death "it would belong to plaintiff's wife." There is no complaint until the testator's death, when he willed the land to the plaintiff's wife for

life, and then to her children in fee. It is true that in another paragraph of the will he leaves it in trust for them, but the trustees named have renounced their trusteeship, and the plaintiff has been appointed trustee in their stead. He and his family are in possession of said land and improvements, and have been ever since the testator's death.

We have seen that the plaintiff has no *right of action at law.* He therefore appeals to equity, and it is seen that, in proper cases, *equity, to prevent fraud,* will give relief. But this doctrine rests entirely upon the ground of *fraud.* The only ground or allegation of fraud is that the testator said, "At my death it will be your wife's." By testator will, it is his wife's, though not free from encumbrances, nor for so long a time as plaintiff desires. But it is hers, and substantially covers the plaintiff's ground of complaint. It seems to us that most men would have been satisfied with its being left to *his wife and children.* But however this may be, we see no such fraud as will induce the Court, in the exercise of its equitable jurisdiction, to (12) interfere with the *legal* rights of the parties.

Affirmed.

CLARK and DOUGLAS, JJ., concur in the result.

PHELPS v. WINDSOR STEAMBOAT COMPANY.

(Filed 16 September, 1902.)

CARRIERS—*Steamboats—Lessor—Lessee—Negligence.*

The lessor of a steamboat, not being a *quasi* public corporation, is not liable for injury to a passenger from negligence of the lessee.

ACTION by J. T. Phelps and wife against the Windsor Steamboat Company, heard by *Judge George H. Brown,* at Spring Term, 1902, of BERTIE. From a judgment dismissing the action as to defendant Elizabeth Branning, administratrix, the plaintiff appealed.

St. Leon Scull for the plaintiffs.

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

CLARK, J. This is an action against the defendant steamboat company, alleging that while a passenger on one of its boats, by negligence in the loading and operation thereof, the boat was capsized and the plaintiff was thrown into the water and injured, and her baggage was also damaged. The plaintiff joins in the action the administratrix of one John W. Branning, upon the ground that said Branning was the owner of said vessel, and had leased it to the said steamboat company. It does not appear, nor is it alleged, that he had any connection with the
(13) operation of said vessel by the other defendant.

His Honor properly dismissed the action as to Branning, upon the ground that no cause of action is stated against him. *Gulzoni v. Tyler,* 64 Cal., 334; S. and R. Neg., sec. 501. In *Harden v. R. R.,* 129 N. C., 354; 55 L. R. A., 784; 85 Am. St., 747, and the cases there cited; from *Aycock v. R. R.,* 89 N. C., 321, down to and inclusive of *Perry v. R. R.,* 129 N. C., 333, and *Raleigh v. R. R., ib.,* 255 (affirmed since in *Smith v. R. R.,* 130 N. C., 344), the lessor is held liable, notwithstanding the lease, because a railroad company (the lessor in those cases) was a *quasi* public corporation, enjoying the use of the right of eminent domain to take private property by condemnation for its right of way, "because it is for a public use," and with many other special privileges and rights conferred for the public benefit, and it could not be allowed by merely making a lease to put off all liability for the manner in which its duties are discharged, while receiving the full benefit for valuable privileges conferred upon it in the shape of rental. This can only be done, as the authorities cited in those cases show, when the legislative power, having had opportunity to look into the solvency of the lessee, has not only authorized the lease, but has expressly released the lessor company from further responsibility. *Logan v. R. R.,* 116 N. C., 940; 20 Am. and Eng. R. Cases Ann., at pp. 847, 848, and numerous other cases cited in *Harden v. R. R., supra.* Were it otherwise, an insolvent lessee could operate the railroad without responsibility to the public or to employees, leaving the lessor, the original corporation, to enjoy the profits of its privileges without any corresponding responsibility in return.

But nothing in those cases, nor in the reason of the thing, applies to the lessor of a steamboat which has received no
(14) special privileges or benefits of great value from the State, and who, indeed, in this instance, was a private individual. No liability attaches to said Branning because he was president of said company, unless it were alleged and shown that the lease was collusive and colorable only, and a sham, to

avoid personal liability, and that he had in fact leased his own property to himself. But there is no such averment, and in dismissing the action, as against his estate, there was

No error.

COOK, J., concurs in the conclusion.

Cited: Britt v. R. R., 144 N. C., 252.

CARTER v. WHITE.

(Filed 16 September, 1902.)

EJECTMENT—*Partition—Judgment.*

Where, in an action of ejectment and judgment that defendant owned a certain undivided interest, less than claimed by him, and the plaintiffs the balance, a judgment in subsequent partition proceedings allotting such defendant his share in severalty, does not prevent his claiming an undivided interest with the plaintiffs under an after-acquired title from one not a party to the action in ejectment or partition proceedings.

ACTION by J. C. Carter and others against L. R. White and others, heard by *Judge George A. Jones,* at March Term, 1902, of CURRITUCK. From judgment for the plaintiffs the defendants appealed.

Pruden & Pruden and *Shepherd & Shepherd* for the plaintiffs.
E. F. Aydlett for the defendants.

COOK, J. In 1895 the plaintiffs brought an action of ejectment against defendant in the Superior Court of Currituck, and alleged in their complaint that they were the (15) owners in fee simple of the land in controversy. Defendant, in his answer, denied that his entry and possession were unlawful and wrongful, but averred that he was the owner in fee of seven seventy-seconds (7-72) parts of the land. Upon the trial the jury found for their verdict that the "defendant was entitled to one fifty-fourth part of the whole, and the plaintiffs to the balance thereof." And thereupon the court rendered judgment "that the defendant owns in fee simple one undivided one-fifty-fourth part of the land, and the plaintiffs, trustees, the balance of the same."

Thereafter, in 1898, the plaintiffs instituted a special pro-

ceeding for partition against defendant, and caused the share of defendant to be assigned and allotted to him in severalty under decree of the court.

In February, 1899, defendant purchased the interest of one Thomas S. Land in said tract of land. Said Thomas S. Land was not a party to the action, nor to the special proceeding, and it appears from the pleadings and affidavits in this action that he was the owner of an undivided interest in the land as one of the heirs of Jeremiah Land, one of the original grantees, at the time of and before the institution of said action and special proceeding, which he sold and conveyed to defendant on 1 February, 1899.

By virtue of his title, thus acquired, defendant claims a tenancy in common with the plaintiffs in the entire tract of land, and has entered upon said land, and insists that he has a right to enter thereon equally with plaintiffs, and that such entry is not a trespass, as alleged.

Plaintiffs contend that, notwithstanding said Land was not a party to the said action and special proceeding, and while he (Land) would not be debarred from entering upon and claiming his right and interest in the tract of land, if he had any, on account of said judgment and decree, yet the defendant,
(16) who has purchased Land's interest, is estopped from claiming any interest thereunder by reason of the judgment rendered in said action in 1896, and the decree of partition in 1898, to which defendant was a party.

So the plaintiff's contention is, that by reason of said judgment and decree, defendant is estopped from setting up his interest, acquired under the purchase from Land, notwithstanding Land was not a party to the action or special proceeding; wherefore they instituted this action to enjoin and restrain defendant from entering upon the land, etc.

His Honor held with the plaintiffs, and made an order continuing the restraining order, and defendant appealed.

In so holding, his Honor was in error. In the action of ejectment, the *only* title in issue was that of defendant. Plaintiff's title was not in controversy. It was there found and adjudged that defendant was a tenant in common with the plaintiffs. Whether they owned all of the *remaining* interests or only a part of them, or any interest at all, was not in issue. It was they alone who denied the title of defendant, and the only title established was that of defendant, who did not deny that plaintiffs were entitled as tenants in common. Nor did the partition proceeding in anywise affect the title, either of plaintiffs or defendant. In partition proceedings between tenants in common

no title passes; only the unity of possession is dissolved, and title vests in severalty, the common source of title resting undisturbed. *Lindsay v. Beaman,* 128 N. C., 189. Land's interest never passed to plaintiffs, and was not represented, nor was he a party; therefore he was not bound by the action or special proceeding. As to him, they were void, and he had a right of entry and possession equally with the other tenants in common, whomsoever they might be. By his deed passed all the right of Land to the defendants, who then stood in Land's shoes, and had all the rights and remedies of Land, independent of and notwithstanding the judgment in said action and decree (17) of partition. Had Land been a party, then he and those holding under him would have been estopped by the judgment and decree. *Dixon v. Waters,* 53 N. C., 449; *Bickett v. Nash,* 101 N. C., 579.

But Land was not a party; his title was derived from a common source with that of plaintiffs, and was not an outstanding title, as was the case in *Mills v. Witherington,* 19 N. C., 433.

So the question of an outstanding title or encumbrance upon the joint estate is not involved in this action.

Defendant, owning Land's interest, has the same rights and remedies under it which Land himself could exercise, had he not sold it. There is

Error.

Cited: S. c., 134 N. C., 469, 479.

WALKER v. BRINKLEY.

(Filed 16 September, 1902.)

BONDS—*Laches.*

A bond required by an employer before appointing an employee, and conditioned to be void if the employee performed his services faithfully and competently, is a primary liability, and the doctrine of laches does not apply.

ACTION by Walker & Myers against D. O. Brinkley and others, heard by *Judge H. R. Starbuck* and a jury, at December (Special) Term, 1901, of WASHINGTON. From a judgment for the plaintiffs the defendants appealed.

A. O. Gaylord for the plaintiffs.

W. M. Bond for the defendants.

FURCHES, C. J. The plaintiffs, being residents of the city of Baltimore, Md., and the owners of a sawmill in Ply-
(18) mouth, N. C., in December, 1898, employed one C. L. Morton as their general manager and agent of said mill and milling business, taking the bond sued on for their protection and indemnity against the default and misconduct of the said C. L. Morton, which is in the following words and figures:

"NORTH CAROLINA—Washington County.

"We, D. O. Brinkley, L. S. Landing, Louis P. Hornthall and Warren Ambrose, of the county and State above named, acknowledge ourselves bound unto A. M. Walker and James R. Myers, trading as merchants in Baltimore, Md., under the firm name of Walker & Myers, in the sum of fifteen hundred dollars. The conditions of the foregoing obligation are such that, whereas one C. L. Morton, of said county and State, has contracted with the said Walker & Myers, as employee of said Walker & Myers, to operate and superintend the sawmill owned by Walker & Myers, at Plymouth, North Carolina, and to act as general business manager thereof, in the manufacture of pine, ash, cypress and juniper timber, subject to the orders and control of said Walker & Myers: Now, therefore, if the said C. L. Morton shall faithfully act as such manager, as aforesaid, and perform the services required in that capacity in a reasonably safe, competent and honest manner during the time in which he shall hold the same, this obligation to be void. Witness our hands and seals.

"D. O. BRINKLEY. (Seal.)
"L. S. LANDING. (Seal.)
"LOUIS P. HORNTHALL. (Seal.)
"WARREN AMBROSE. (Seal.)

"Signed 5 December, 1898, and forwarded to W. & M. by H. S. Ward."

While this bond was required by the plaintiffs before they appointed C. L. Morton their agent and superintendent of their mill, and was intended to protect them against the mis-
(19) conduct and defalcations of said Morton, it was an original primary liability, and not secondary. It is a penal bond, in which the defendants acknowledge themselves bound to the plaintiffs in the sum of fifteen hundred dollars, to be void upon the said C. L. Morton performing the conditions therein contained. Of course, if he has performed the conditions, the plaintiffs have no right of action. But the action is brought upon this bond, and breaches of its condition are specifically set out and assigned.

The answer of the defendants is what is known as a statutory denial of the complaint—that they "had no knowledge of the facts alleged, nor sufficient information to form a belief as to their truth, and they are therefore denied."

There was but one witness introduced—the plaintiff, James R. Myers—who testified that he met the defendants in Mr. Ward's office; they talked the matter over, and he employed the said C. L. Morton, upon the terms stated in the bond; that soon after that he received the bond, enclosed in a letter from Mr. Ward, stating that it was good for $4,000; that he at once wrote Mr. Ward and C. L. Morton that the bond had been received and accepted, and C. L. Morton took possession of the mill and assumed its control and management; that the defendants all had admitted to him that they signed the bond, and that the defendants and their attorney, Ward, all lived in the town of Plymouth, Washington County.

Upon this uncontradicted evidence the following issues were submitted to the jury (and found as stated), with an agreement of counsel that the case should be referred, to ascertain the damages, if the jury should find for the plaintiffs:

"1. Did defendants Brinkley, Hornthall, Landing and Ambrose execute the bond set out in the complaint? Yes.

"2. Were said defendants discharged from said bond by the negligence of the plaintiffs, as alleged? No."

There are but two exceptions set out in the record; one is to dismiss the action, for the reason that the evidence (20) showed that the defendants had no notice of the acceptance of the bond. This was overruled, and the court charged the jury, "if they believed the evidence, they should find the first issue 'Yes' and the second issue 'No,'" and the defendants again excepted.

Neither of these exceptions can be sustained. Instead of the evidence showing that the defendants did not have notice of the acceptance of the bond, it strongly tended to prove that they did have such notice, *if it was necessary to give them any such notice. Straus v. Beardsley,* 79 N. C., 59. And it being a primary and not a secondary liability, the doctrine of laches does not apply, *if there had been such.*

The court gave judgment for the plaintiffs and made the order referring the case to ascertain the damages, as it had been agreed by counsel he should do, and the defendants appealed. As we see no error the judgment is

Affirmed.

Cited: Cowan v. Roberts, 134 N. C., 420.

MONDS v. ELIZABETH CITY LUMBER COMPANY.

(Filed 16 September, 1902.)

1. ESTOPPEL—*Trespass—Timber.*

A defendant in trespass, claiming the right to cut timber under a void contract from one who afterwards deeded the land to the plaintiff, is estopped to deny the title of the plaintiff.

2. TRESPASS—*Timber.*

A defendant, in trespass for cutting timber, has not any equity against plaintiff for the money because he paid the grantor of the plaintiff money under a void contract for the timber.

ACTION by Charles Monds against the Elizabeth City Lumber Company, heard by *Judge George A. Jones* and a jury, at Spring Term, 1902, of CHOWAN.

(21) *Timber Contract—Exhibit "A."*

This agreement, made this 20 March, 1888, between R. E. Parrish and Mary J. Parrish, his wife, of the county of Chowan, in the State of North Carolina, of the first part, and the Gay Manufacturing Company, of the State of Virginia, of the second or other part, witnesseth:

That in consideration of the sum of one hundred and thirty dollars, agreed to be paid by the party of the second part unto the parties of the first part, viz., for timber on 72 acres, more or less, to be hereafter laid off and designated out of the tract hereinafter described by said party of the second part, which purchase money or consideration is to be paid as follows, viz., sixty-five dollars prior to the execution of this deed, the receipt of which is hereby acknowledged, and the balance in twelve months from date of this contract, the said parties of the first part do hereby grant, bargain, sell and convey, with general warranty unto the said party of the second part and its assigns, all the timber to fourteen inches across the stump on the track of land lying in Chowan County, North Carolina, bounded and described as follows, viz.: By the lands of William Byrum, Rose Bunch, Jordan White, Benjamin Bateman, Doct. Richard Dillard Warren's land and others, Job Riddick, and the timber embraced in this contract is in three separate tracts. The one tract is my home farm of fifty acres; second is a ten-acre tract called the Williams tract; third tract, of twelve acres, is known by the name of the James Parrish tract. The entire land is completely joined together.

And said parties of the first part hereby grant unto said party

of the second part, its successors or assigns, agents and servants, a right of way through and across the said tract of land above described, and any other lands owned by said parties of the first part, for the purpose of cutting and removing the timber cut from said land by said party of the second part or its agents, or for the purpose of cutting or removing timber (22) from any other tract of land purchased or controlled by the said party of the second part.

And said parties of the first part also grant to said party of the second part the right to erect all tracts, machinery, buildings, improvements and fixtures to be used for the objects and purposes set out in the clause next hereinbefore, and also to remove the same at the pleasure of said party of the second part. And said parties of the first part hereby grant to said party of the second part and any persons or body corporate, its lawful successors or assigns, the right of way through said tract of land and all lands owned by said parties of the first part for a permanent railway, to be owned and operated by any persons or body corporate to whom said party of the second part shall assign the right hereby specially granted.

And said parties of the first part hereby covenant with said party of the second part and its assigns to pay all levies, taxes, assessments and dues upon the land and timber herein described during the continuance of this contract.

And the said parties of the first part hereby grant, accord and assure unto said party of the second part and its assigns the full term of five years within which to cut and remove the timber hereby conveyed, said term to commence from the time said party of the second part begins to manufacture said timber into wood or lumber.

Witness the following signatures and seals.

R. E. PARRISH. (Seal.)
MARY J. PARRISH. (Seal.)

Witness: Chas. W. Dennis.

From a judgment for the plaintiff the defendant appealed.

W. M. Bond for the plaintiff.

Pruden & Pruden and *Shepherd & Shepherd* for the (23) defendant.

FURCHES, C. J. This is stated to be an action to remove a cloud upon the title of plaintiff's land, but the pleadings and trial of the case resolve it substantially into an action of trespass upon the plaintiff's land, and cutting and removing timber therefrom. It appears that on 20 March, 1888, R. E. Parrish and

wife sold and undertook to convey the timber on this land to the Gay Manufacturing Company, for which it paid Parrish $130. On 5 March, 1892, said Parrish and wife sold and conveyed said land to the plaintiff by deed in fee simple. The plaintiff at once entered and took possession, and has held the actual possession of said land under said deed ever since. On 28 June, 1900, the Gay Manufacturing Company sold and assigned all its interest in said timber to the defendant company, and this is the only claim the defendant has to said timber. In October, 1900, the defendant entered upon said land and cut and carried away the timber therefrom, and this action is for trespass and the value of the timber so cut and carried away.

The contract of Parrish and wife with the Gay Manufacturing Company and the deed from Parrish and wife to the plaintiff were offered in evidence, and the trespass in cutting and taking away the timber was admitted, its value was found by the jury and, judgment being rendered for the plaintiff, the defendant appealed.

It was admitted by counsel for the defendant that the contract between Parrish and the Gay Manufacturing Company was the same in terms as the one declared on in *Rumbough v. Mfg. Co.*, 129 N. C., 9, and was absolutely void. This, it seems to us, puts an end to the case, but the defendant did not
(24) think so, and filed the following exceptions:

At the close of the testimony the defendant asked the court to charge as follows:

1. There is no evidence for the consideration of the jury that the plaintiff owned the land described in the complaint at the time the trespass was committed. Refused, and defendant excepted.

2. There is no evidence for the consideration of the jury that the plaintiff owned the timber described in the complaint at the time the trespass was committed. Refused, and defendant excepted.

The court charged the jury that inasmuch as the plaintiff claimed the title under R. E. Parrish and wife, under whom the defendant also claimed the right to cut the timber by virtue of the said timber contract, the defendant was estopped to deny the plaintiff's title to said land, and if they believe the evidence in the case they should answer the first issue "Yes." To this charge the defendant excepted.

None of these exceptions can be sustained, and in our opinion do not call for a discussion at our hands.

In the argument before us the learned counsel contended that the defendant had an equity upon the plaintiff for the $130 the

Gay Manufacturing Company paid Parrish, which the plaintiff should pay; and that he must do that or offer to do so before he had any right of action; that it was an equitable action and he must do equity. No such ground as this was taken in the pleadings nor on the trial below so far as we are informed, nor do we see any ground to rest such a defense upon. This question was expressly decided in *Rumbough v. Mfg. Co., supra,* argued by the same attorneys, and which would have to be overruled if we were to sustain this contention.

But the defendant has never paid the plaintiff anything, nor has the plaintiff ever recovered anything from the defendant, and we see no privity between them or equity (25) in the case. As the plaintiff never received anything from the defendant we fail to see any right of action against the plaintiff if it had been set up in the answer. *Davison v. Land Co.,* 126 N. C., 704.

Affirmed.

Cited: Burch v. Lumber Co., post, 830; *Bunch v. Lumber Co.,* 134 N. C., 116; *Smith v. Lumber Co.,* 150 N. C., 41.

PARKER v. COBB.

(Filed 23 September, 1902.)

1. LEGACIES—*Devises—Wills.*

Where a person devises land to his son for life, in trust for the support of wife and younger son of testator, and charges the land with a legacy, provided the elder son has but one child, and the elder son dies first, leaving but one child, the legacy is not payable until after the death of the younger son.

2. PARTIES—*Legacies—Wills.*

In an action to enforce the payment of one of two legacies, the other legatee should be made a party.

ACTION by R. L. Parker against J. E. Cobb, administrator, and others, heard by *Judge Henry R. Bryan* and a jury, at Spring Term, 1902, of EDGECOMBE. From a judgment dismissing the action the plaintiff appealed.

John L. Bridgers for the plaintiff.
No counsel for the defendants.

CLARK, J. By the will of Bennett P. Pitt, probated and recorded 7 October, 1880, it is provided as follows: "(6) Item. I give and devise to my son B. C. Pitt, and his heirs forever, all my plantation in the county of Edgecombe and State of
(26) North Carolina whereon I now reside, known as the home tract, and containing 604 acres, in trust for the following uses: That my wife, Keturah Pitt, may have the absolute use and control of the dwelling house, garden, kitchen and all necessary outhouses, and that she shall be provided by my son B. C. Pitt with everything necessary for her comfortable support and maintenance as she has lived in my lifetime, the control of these buildings and the farming of such necessaries to continue till the death or marriage of my said wife; that my son Hassell Pitt shall have the privilege of living on the premises, and out of the rents and profits of the plantation he also shall be comfortably supported during his life, and that my son B. C. Pitt shall, as far as possible, stand in my place to the said Hassell, and be to him both guardian and trustee; that the management of the said plantation shall be under the control of my son B. C. Pitt unless he fails to perform the duties that have been hereinbefore imposed upon him in reference to my said wife and my son Hassell, and in the event of such failure his control over the plantation shall cease and determine during their lives and during the life of the survivor, and my wife shall have power to manage the farm and receive the rents and profits. But if my son B. C. Pitt faithfully discharges the duties imposed upon him as aforesaid then he may appropriate to his own use the rents and profits of the farm over and above what is necessary for the support and maintenance of my wife and my son Hassell. From and after the death of my wife and my son Hassell the said B. C. Pitt shall hold said plantation for his own use and benefit for and during the term of his natural life. From and after his death I give and devise said plantation to the children of him, the said B. C. Pitt, and their heirs forever, without any charge or encumbrance, provided the said B. C. Pitt leaves him surviving more than one child or lineal descendant, but if he leaves him surviving only one child
(27) or lineal descendant, then I give and devise said plantation to such child or lineal descendant, to him and his heirs forever, but charged with five hundred dollars, to be paid by the said child or descendant to Robert Lee Parker, son of Weeks B. Parker and my daughter Leah F. Parker; and also with the same sum, payable by the said child or descendant, to George T. Singletary, son of R. W. Singletary and my daughter Mary Jane Singletary, his wife; and if the said B. C. Pitt shall

leave him surviving no child or lineal descendant, then and in that event I give and devise said plantation to my own right heirs."

Said B. C. Pitt undertook the trust reposed in him by the terms of said paragraph, and faithfully performed the same until his death, which occurred in March, 1897. Keturah Pitt, wife of Bennett P. Pitt and mother of B. C. Pitt, died before the death of said B. C. Pitt. The defendant John E. Cobb is administrator of B. C. Pitt.

Said B. C. Pitt left him surviving but one child, being his only lineal descendant, which said child is the defendant W. B. Pitt, who is a minor under the age of 21 years and has no general guardian, and appears by his *guardian ad litem.*

The plaintiff contends that on the death of B. C. Pitt the lands described in clause (6) descended to W. B. Pitt, charged with the sum of $1,000, of which $500 belongs to the plaintiff, and bears interest from the death of B. C. Pitt in March, 1897, and asks that the charge be declared for said sum and interest from March, 1897, and that unless payment thereof is made the land be sold and said charge be paid out of the proceeds. This last the plaintiff afterwards modified by asking judgment that the land be sold subject to the right of said Hassell to retain possession of said farm and have his support out of the proceeds of same, or if that cannot be done that a receiver be appointed to take possession of the farm, permitting said Hassell to occupy the dwelling, and out of the rents (28) and profits furnish him a comfortable support, and apply the balance to the payment of the aforesaid legacy and interest and the costs and expenses of this action.

There is no question that the legacies have now become a charge upon the land (*Hunt v. Wheeler,* 116 N. C., 422), but the plaintiff is premature in asking to enforce it. The testator placed the support of his wife and Hassell in the first class, his son Bennett in the second class, and when the charge in favor of his wife and Hassell shall cease by the death of both, then the land is devised to his son B. C. Pitt for life (and now, since his death, to B. C. Pitt's son, W. B. Pitt, absolutely), charged with payment of the $1,000. Pitt is only made a trustee and guardian during the life of the testator's wife and Hassell, who are given the occupancy of the premises, and out of the rents and profits was to support them, taking the surplus, if any, for the faithful discharge of his duties. "From and after the death of my wife and my son Hassell" B. C. Pitt was to have the land "for his own use" for life, and after his death it was to go to his children, and if only one child, then subject to the above recited

charge in favor of plaintiff and another for $500 each. That B. C. Pitt pre-deceased Hassell does not alter the fact that said B. C. Pitt was to hold as trustee and guardian (with right to pernancy of surplus), and was not to hold for his own use till "from and after the death" of both his wife and Hassell.

Upon the death of Hassell, and not till then, would the land descend freed from the above trust to B. C. Pitt, and now to his son, and then the charge in favor of the legatees will become payable, and until that event happens said legacies will not bear interest. On the death of B. C. Pitt the pernancy of the profits over and above the support of Hassell go to the son, W.
(29) B. Pitt, as the testator's will makes B. C. Pitt and his children the sole beneficiaries as to this tract subject to the occupancy of the premises by and the support of his wife and Hassell, and after the death of both of these and of B. C. Pitt himself then, in the event the latter should leave only one child, a charge of $1,000 in favor of plaintiff and another grandchild. But both the death of the *cestui que trust* Hassell and of B. C. Pitt, leaving only one child, must occur before the legacies are demandable.

It was not intended that the lands should be charged at one and the same time with the support of the testator's wife and Hassell (or the survivor of them) and the payment of the $1,000 also. The land, if sold as requested by plaintiff, subject to the occupancy of the dwelling by Hassell and a charge for his support, would bring a very inadequate price, and the $1,000 legacy and interest as asked from March, 1897, would seriously impair the interest of B. C. Pitt (and now of his son W. B.), who are evidently intended to be preferred to the plaintiff and the other legatee.

We have not adverted to the defect of parties in that the other legatee of $500 is not made a party, which should have been done. In dismissing the action there was

No error.

BULLOCK v. BULLOCK.

(Filed 23 September, 1902.)

EVIDENCE—*Adverse Possession—Partition—The Code, Sec.* 147.

Where a defendant in partition proceedings claims title by adverse possession, evidence that defendant entered as tenant is competent.

ACTION by F. B. Bullock and others against W. O. Bullock and others, heard by *Judge Henry R. Bryan* and a jury, at March Term, 1902, of EDGECOMBE. From a judgment for the defendants the plaintiffs appealed. (30)

G. M. T. Fountain for the plaintiffs.
No counsel for the defendants.

CLARK, J. This action began as a petition for partition. The defendants pleaded sole seizin and the statute of limitations under adverse possession up to known and visible boundaries for more than twenty years. Thereupon the action was transferred to court at term for the trial of the issue of title, as in an action of ejectment. The plaintiff asked a witness, "Did the defendant W. O. Bullock enter possession of the Minnis place in 1874 as the tenant of Jesse Bullock, your father?" This question, counsel stated, was asked for the purpose of showing that the defendant entered into possession as the tenant of Jesse Bullock, and has so remained, paying rent for more than thirty years. The evidence was excluded, as were three other questions somewhat different in form, but all asked for the same purpose, and the plaintiff excepted.

There was error. The Code, sec. 147; *Mobley v. Griffin,* 104 N. C., at page 115. In *Alexander v. Gibbon,* 118 N. C., 796, 54 Am. St., 757, the point is so clearly treated and disposed of by the present learned Chief Justice that further discussion is unnecessary. That case is cited. *Shannon v. Lamb,* 126 N. C., 38; *Hatcher v. Hatcher,* 127 N. C., 200.

Error.

Cited: Parker v. Taylor, 133 N. C., 104; *Woody v. Fountain,* 143 N. C., 69.

(31)

DUFFY v. MEADOWS.

(Filed 23 September, 1902.)

1. NUISANCES—*Guano Manufactory.*

A guano manufactory will not be declared a nuisance *per se* unless it is so situated as to affect the health, comfort or property of those who live in the community.

2. NUISANCES—*Guano Manufactory—Injunction.*

The fact that odors are smelled at a great distance and are unpleasant and objectionable, is not sufficient ground for an in-

junction to interfere with the business from which the odors arise.

3. APPEAL—*Dismissal—Exceptions and Objections—Trial.*

The refusal of judgment upon a complaint and answer is not appealable. An exception to the refusal should be noted, to be considered on appeal from the final judgment.

ACTION by Francis Duffy against E. H. and J. A. Meadows Company, heard by *Judge Francis D. Winston,* at May Term, 1902, of CRAVEN. From a refusal of judgment on complaint and answer and an injunction the plaintiff appealed.

W. D. McIver and *A. D. Ward* for the plaintiff.
M. DeW. Stevenson and *W. W. Clark* for the defendant.

MONTGOMERY, J. The plaintiff commenced this action to have abated an alleged nuisance, to-wit, a manufactory of guano, on the premises of the defendant. The plaintiff, in his complaint, alleged that the manufactory was both a public and a private nuisance. The complaint is that the odors arising from certain of the materials used in the manufacture of the guano gives out an unpleasant and objectionable odor, amounting to an offensive stench; that the odors are so noisome and offensive that they "pollute and permeate the atmosphere to such an extent as to render the buildings of the plaintiff almost unfit for habitation, and render the life of plaintiff and his
(32) tenants uncomfortable," and that they are deleterious to health as well; that, as plaintiff is informed and believes, by reason of the foul and offensive odors and stenches arising from the operation of said factory in the city of New Bern the same is a public nuisance, noisome, offensive and hurtful to the inhabitants of the city generally, and especially to those in the vicinity of said factory. The allegation as to the establishment being a public nuisance is as follows:

The defendant, in his answer, denies all such allegations except the thirteenth and fifteenth. The thirteenth is in these words: "That the said material gives off odors which may be smelt at great distances in the direction of the wind."

The fifteenth allegation is as follows: "That the said odor arising from the said material is an unpleasant and objectionable one."

The plaintiff moved for judgment upon the complaint and answer, the damage to be determined by inquiry thereafter to be submitted to the jury. He made a further motion, "That upon the complaint and answer the defendant be enjoined from using, bringing upon or storing on the premises of defendant,

described in the pleadings, any of the said materials as described in the complaint and referred to in allegation thirteen of the complaint, which gives off odors that may be smelt at great distances in the direction of the wind, . . . and which said odor arising from the said material is an unpleasant and objectionable one, as described in allegation fifteen of the complaint." Both motions were denied, and the plaintiff appealed.

The first motion could have been sustained only upon the ground that the material used in manufacturing the guano constituted either a nuisance *per se,* or that the answer admitted the allegations of the complaint to such an extent as to show that the manner in which the business was conducted and the material used caused a nuisance. This Court would (33) be slow to declare any lawful business a nuisance *per se.* A slaughter house located in a thickly populated town or city, or a manufactory of guano similarly situated, in which the chief material used was decayed fish, not having gone through a process of deodorization, would be a nuisance *per se,* and there may be others. But if a slaughter house was situated in a place remote from residences and public highways it would not be a nuisance unless it was shown that the business was conducted in an improper manner, as by allowing or permitting the escape of gases, stenches or vapors, thereby producing serious and substantial discomfort and annoyance to those residing in the neighborhood, from a want of proper care in the removal or burning of the offal from the premises. Such a guano manufactory as we have mentioned, so remotely situated from residences and highways as not to affect the health or comfort of the community by means of odors, would not be a nuisance.

The denial of the first motion, however, was not an appealable matter. The correct practice would have been to note an exception to the refusal, so as to have it considered on appeal from the final judgment. *Walker v. Scott,* 106 N. C., 56; *Cooper v. Wyman,* 122 N. C., 784, 65 Am. St., 731; *Cameron v. Bennett,* 110 N. C., 277. A refusal to grant the injunction is the question then for consideration in the case.

Each and every allegation of the complaint in which there is a charge of facts concerning the alleged nuisance is denied in the defendant's answer, the answer being a verified one, except the thirteenth and fifteenth, which we have set out already in this opinion. The admission of these allegations are harmless to the defendant. The fact that odors are "unpleasant and objectionable" is no ground for invoking the aid of the Court in interfering with a business or other establishment from which such odors arise. That they are unpleasant will not be suffi-

(34) cient; they must work some substantial annoyance, some material physical discomfort to those who live in the neighborhood, or injury to their health or property. 21 Am. and Eng. Enc., 692, and the numerous cases there cited.

No error.

SMITH v. GARRIS.

(Filed 23 September, 1902.)

1. EVIDENCE—*Parol.*

The fact that a person searched the office of the clerk of the Superior Court for a docket of a justice of the peace, without showing that the papers had ever been there, is insufficient to render parol evidence of their contents admissible.

2. ESTOPPEL—*Justices of the Peace—Jurisdiction—Mortgagor and Mortgagee.*

A judgment of a justice of the peace in an action in ejectment by a mortgagee against a mortgagor, even though it is alleged that the mortgagor is a tenant of the mortgagee, is not an estoppel to an action in ejectment between the same parties in the Superior Court.

ACTION by B. F. Smith against R. H. Garris, heard by *Judge Francis D. Winston* and a jury, at April Term, 1902, of PITT. From a judgment for the plaintiff the defendant appealed.

Skinner & Whedbee for the plaintiff.

F. G. James and *Jas. H. Pou* for the defendant.

FURCHES, C. J. The plaintiff was the fee simple owner of the land in controversy, which he mortgaged to Hardy, and failing to pay the mortgage debt the land was sold under the powers contained in the mortgage, and the defendant became the purchaser. The plaintiff alleges that the defendant (35) bought the land for him, and was to convey the same to the plaintiff upon the plaintiff's repaying the defendant the purchase money, which he alleges he has paid, and more than paid, in money and in rents and profits, and in money received by the defendant for lumber while he has wrongfully been in possession of said land. The defendant denies that he bought the land for the plaintiff; denies that he agreed to buy it for the plaintiff and was to reconvey it to the plaintiff upon his repayment of the purchase money, and denies that the plain-

tiff has ever paid him back the purchase money he paid out for said land. The defendant also pleads an estoppel of record, and says that he brought an action of ejectment before one Asbury, a justice of the peace, recovered judgment therein and obtained a writ of ouster.

Upon the trial the defendant showed that the justice of the peace, Asbury, was dead; the defendant did not have the papers in the case of himself against the plaintiff before Asbury nor the docket of the justice of the peace, and to enable him to introduce parol evidence of the same he showed by the clerk of Pitt Superior Court that he had searched his office and no such docket or papers were to be found therein. But he failed to show that said docket and papers had ever been in the clerk's office, and he also failed to show that he had searched for them or inquired of the justice's family for them.

Upon this evidence his Honor refused to allow this parol evidence upon the ground that the loss of the papers had not been sufficiently accounted for, and also upon the ground that such a judgment, if shown, would not be an estoppel, as it appeared that the title to the land was involved and there were equities involved between the parties as to the land over which a justice of the peace had no jurisdiction. The defendant excepted to the rejection of this parol evidence, and this is the (36) only exception in the case on appeal.

There was but one issue submitted to the jury: "Did the defendant Garris, at the sale under the Hardy mortgage, purchase the land in question in trust for the plaintiff Smith? Answer: 'Yes.'"

Upon this finding the court entered judgment that the defendant was the legal owner of the land, but held it in trust for the plaintiff, and ordered a reference to L. I. Moore to take an account.

We see no error. A court of a justice of the peace has no jurisdiction under the landlord and tenant act to try title to land. And where it appears that title is involved or that there are equities involved as to the land a justice of the peace has no jurisdiction. *Parker v. Allen,* 84 N. C., 466. The landlord and tenant act does not apply in cases where the mortgagor is in possession, and no allegation of renting by the mortgagor will be allowed to give the justice of the peace jurisdiction under the landlord and tenant act. *Greer v. Wilbar,* 72 N. C., 592.

We think his Honor committed no error in rejecting this

evidence for both of the reasons he assigns, and the judgment is Affirmed.

Cited: Brick v. R. R., 145 N. C., 205.

LA VALLETTE v. BOOTH.

(Filed 23 September, 1902.)

CONTRACTS—*Breach—Sales—Damages.*

Where a person fails to deliver oysters according to contract, he is not entitled to damages for a subsequent failure of other party to comply with contract.

ACTION by A. T. LaVallette and others against A. Booth & Company, heard by *Judge Francis D. Winston* and a jury, at Spring Term, 1902, of CARTERET. From judgment for (37) the plaintiffs the defendant appealed.

A. D. Ward for the plaintiffs.
D. L. Ward for the defendants.

CLARK, J. The plaintiffs allege that the defendants contracted to take the output of their oyster factory at a specified price up to March, 1900, but that on 25 January the defendants refused to take more oysters, and plaintiffs sue for the damages sustained by such breach of contract.

The written contract was, however, put in evidence, and showed that the agreement, dated 16 November, 1899, was that the plaintiffs were to furnish 1,000 gallons per day of standards and selects. There was no evidence of any subsequent change in the terms of this contract. It was in evidence by plaintiffs that the amount sent on ranged from 10 gallons per day to about 300, on five days only as much as 500 gallons, the highest being 648 gallons on 26 January, after the order to stop shipping. The letters of plaintiffs were in evidence, to-wit: Letter 7 January, 1900, in which they acknowledged they had not been able to ship the defendants 1,000 gallons per day, because the oysters had not come and they could ship only a very few; another letter, dated 25 January, the very day of the alleged breach, in which they say, "We cannot expect you to take 1,000 gallons weather like this, as we could not give them to you when it was cold"; and still another letter, 3 February, 1900, in which

they say, "I know we did not do as we intended, as it was *impossible to come up to our agreement,* as we could not get the oysters"; and a letter of 19 February, 1900, in which plaintiffs say, "As we failed on our part to give you the quantity, as stated in the conditions of the order, we could make no complaint more than to ask you to renew your order." (38)

His Honor erred in refusing defendants' prayer to instruct the jury that, upon the above admissions, they should answer the second issue "No." The uncontradicted evidence shows that the contract was broken by the plaintiffs the very first day, and was not lived up to by them a single day thereafter. Not having furnished the oysters during cold weather, they could not call upon the defendants to take the oysters when the weather had become warmer and oysters less salable. The plaintiffs, not having kept the contract themselves in any respect, either as to quantity or quality (for in the letter of 3 February they admit they had shipped defendants some as good and some as bad oysters "as ever did come out of North Carolina"), cannot call upon defendants to observe a contract which they themselves had never kept. The contract of 16 November, 1899, was drawn up and sent plaintiffs by defendants, and, though the former merely signed, but did not return it, if this was not an acceptance, there was no contract at all.

The third exception is also well taken. There was no evidence to sustain the assessment of damages for breach of contract by defendants, when the contract had been totally disregarded and broken by the plaintiffs themselves. The plaintiffs were only entitled to pay for the oysters actually shipped to and accepted by defendants, and that has been paid.

Error.

(39)

HARRINGTON v. RAWLS.

(Filed 23 September, 1902.)

1. INJUNCTION—*Restraining Order—Mortgages—Foreclosure—Sale.*

Where, in an action to restrain a sale under a mortgage, it is alleged that the mortgagor had mortgaged her land as surety for her husband and an extension of time had been granted him, a temporary restraining order should be continued to the final hearing.

2. PARTITION—*Deeds.*

A deed of partition conveys no title, but is simply a severance of the unity of possession.

HARRINGTON *v.* RAWLS.

ACTION by W. H. Harrington and others against M. O. Rawls and others, heard by *Judge Francis D. Winston,* at October Term, 1901, of PITT. From a judgment dissolving the restraining order the plaintiffs appealed.

No counsel for the plaintiffs.
Skinner & Whedbee for the defendants.

CLARK, J. Jesse Harris died, seized in fee of a tract of 188 acres, which descended to his two daughters, Elsie and Susan, who respectively married J. A. Briley and B. F. Jolly. They made partition, by mutual deeds, of land, allotting 84 acres to Mrs. Jolly and 104 acres to Mrs. Briley. In 1874 the parties exchanged lands, B. F. Jolly and wife executing a quitclaim deed to J. A. Briley and wife for the 84 acres, and they in turn executing a quitclaim to Jolly and wife for the 104-acre tract.

In 1889 Briley and wife executed a mortgage to the defendant Rawls upon the 84-acre tract, who subsequently assigned the bond to the defendant Flanagan, and Briley has sold the land to defendant Tyson, who is in possession. The land has
(40) been advertised for sale under the mortgage; Elsie is dead, and the plaintiffs are her heirs at law. The complaint alleges that the mortgage was executed to secure a debt from J. A. Briley, that the joinder in the mortgage by his wife made her merely surety to that extent, and that she has been released by extension of time, granted for a consideration to said Briley, without the assent of the wife (*Smith v. B. & L. A.,* 119 N. C., 257); and, further, that the debt is barred by the lapse of more than three years since the maturity of the bond (but see *Hedrick v. Byerly,* 119 N. C., 420), and asked for a restraining order (which was granted) and an injunction till the hearing. The defendant answered, alleging that the debt was the joint debt of Mrs. Briley and her husband, and denying that any extension had been granted without her consent, and denying also that the debt is barred by the statute of limitations. His Honor dissolved the restraining order upon the coming in of the answer.

These pleadings raised a serious contention, and, if nothing more appeared, the injunction should have been continued to the hearing. *R. R. v. R. R.,* 125 N. C., 96; *Whitaker v. Hill,* 96 N. C., 2. But the defendants further aver that the mutual deeds of partition being made to Briley and wife, and especially the subsequent deed of exchange being so worded, this put the title in him and his wife by entireties, and, she being now dead, J. A. Briley holds by survivorship, and these plaintiffs, claiming

as heirs of his wife, have no cause of action. But a deed of partition conveys no title. It is simply a severance of the unity of possession. Elsie Briley took no new title by purchase, but held by descent from her father, and the insertion of her husband's name in the mutual deeds of quitclaim and release conveyed nothing to him. *Harrison v. Ray,* 108 N. C., 215; 11 L. R. A., 722; 23 Am. St., 57; *Carson v. Carson,* 122 N. C., 645. In partition no title passes; only unity of possession is (41) dissolved. *Lindsay v. Beaman,* 128 N. C., at p. 192.

The subsequent deeds of exchange were merely a new reallotment of readjustment, and had no more effect than the first partition. Besides, the deed on its face is a quitclaim merely to J. A. Briley and his wife, and could not have the effect to convey to him any property which till then belonged to his wife. The claim that J. A. Briley is sole seized by right of survivorship cannot be sustained, and the injunction to the hearing should have been granted, that the other issues raised by the pleadings may be determined. As an appeal from a dissolution of an injunction does not keep it in force (*Reyburn v. Sawyer,* 128 N. C., 8), it may be that the sale has taken place, but that is not made to appear to us.

In dissolving the restraining order there was

Error.

Cited: Smith v. Parker, post, 471; *Carter v. White,* 134 N. C., 480; *Harrington v. Rawls,* 136 N. C., 67; *Tise v. Whitaker Co.,* 144 N. C., 511.

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(42)

SWIFT v. DIXON.

(Filed 23 September, 1902.)

1. LANDLORD AND TENANT — *Evidence — Mortgagor and Mortgagee.*

The evidence in this case is sufficient to authorize the finding of the court that a lease did not cover the entire tract of land in litigation; therefore, the lessee could deny the title of lessor to that part of land not covered by the lease.

2. PARTIES—*Judgment—Estoppel.*

Where, in an action to foreclose a mortgage on land of wife, a summons is served on husband and one on wife, returnable at different terms, the two actions not being consolidated, the wife

is not bound by a judgment in the action in which summons was served on husband.

3. LIMITATIONS OF ACTIONS—*Adverse Possession—Color of Title —The Code, Sec.* 148.

Adverse possession under color of title for seven years before the death and three years after the death of a married woman is a bar to an action by her heirs.

ACTION by C. W. Swift and others against R. D. S. Dixon and others, heard by *Judge Frederick Moore,* at November (Special) Term, 1900, of GREENE. From a judgment for the defendants the plaintiffs appealed.

George M. Lindsay and *Jarvis & Blow* for the plaintiffs.
L. V. Morrill and *Connor & Son* for the defendants.

FURCHES, C. J. In 1877 Anna S. Rawls was the owner of the land in controversy, and her husband, Isaiah Rawls, was indebted to William Devries & Co. and to Devries, Young & Co., and to secure this indebtedness the said Anna S. Rawls and her husband, Isaiah Rawls, made and executed a deed in trust to W. T. Dortch on said land. This indebtedness not being fully paid, said Dortch, trustee, on 1 September, 1878, commenced
(43) an action by the issuance of a summons against the said Rawls and wife, Anna S. Rawls, for the purpose of foreclosing said trust, returnable to Fall Term of Greene Superior Court. Service of this summons was acknowledged by Anna S. Rawls, but no service was made upon her husband, Isaiah Rawls. But this summons was not returned to said Fall Term, or, if it was, it was not put upon the docket of said court. And on 2 March, 1879, the plaintiff Dortch commenced another action by issuing another summons against said Rawls and wife, which was served on the husband alone; and at said Spring Term of said court the plaintiff filed his complaint and took judgment, for want of an answer, no appearance ever having been made by either of the defendants named in the summons.

Under this judgment, Isaac F. Dortch, the commissioner named in the judgment, sold said land on Saturday, 17 January, 1880, when William R. Devries became the purchaser, at the price of $1,500, which sale was reported to Spring Term of said court and confirmed.

It appears that said deed from Isaac F. Dortch to Devries, the purchaser, was executed before the sale was reported and confirmed. It also appears from the decree of the court confirming said sale that the purchaser was one of the plaintiffs in the action under which the land was sold.

It also appears from the mortgage itself that while it conveyed a large boundary of land, being the entire tract on which the mortgagors resided, it contained the following: "The said Anna S. Rawls reserving, however, her homestead right under the Constitution and laws of the State in the said land." This homestead had been laid off and located by metes and bounds before the sale by the said commissioner. And he sold and conveyed to Devries under the same terms of reservation as those contained in the mortgage; and all the mesne conveyances from Devries contain the same reservations as to (44) the homestead of Mrs. Rawls down to the last, which is a deed from Jones to the defendant Dixon, which deed only conveyed that part of the tract outside of the homestead boundary. But after the death of Mrs. Rawls the defendant bought and took a deed from Jones for that part of the land covered by the homestead. After the death of Isaiah Rawls, and on 22 November, 1890, the defendant Dixon leased from Mrs. Rawls "all her land and interest in the land that she formerly resided on in Greene County, and known as the 'Dr. Swift farm,' for the year 1891, and as long thereafter as the party of the second part wishes this lease to be in force," for the price of $150, or 1,700 pounds of lint cotton, per year. Isaiah Rawls died on 18 May, 1893, and Anna S. Rawls died in February, 1900, and the plaintiffs are the children and heirs at law of the said Anna S. Rawls, and this action is brought to recover said land.

A jury trial was waived and the whole case was submitted to his Honor to find the facts and declare the law, which he proceeded to do, and the same are set out and sent up as a part of the case on appeal, with the plaintiffs' exceptions thereto.

These findings are very lengthy, covering thirteen pages of printed matter, and we will not therefore set them out in full, but will state such as we think have any bearing in the case, and we have already stated the most of those we think of any importance to its consideration.

It was contended by the plaintiffs that the lease from Mrs. Rawls to the defendant, made in October, 1890, covers the whole tract of land mortgaged to Dortch, and was an estoppel on the defendant to deny the title of Mrs. Rawls to the whole tract; while the defendant contended that it only extended to that part of the tract covered by the homestead allotment. And his Honor sustained the defendant's contention, and (45) found as a fact that it only covered the homestead. This is final and not reviewable by this Court, if there is any evidence to sustain such finding. This is admitted by the plaintiffs, but they say there is no such evidence; but it seems to us there was

such evidence as authorized the finding. There was the fact that the plaintiffs had bought the land outside of the homestead boundary from Jones, were in possession of it before the date of this lease, and had been for a number of years treating it as his own, taking the rents and profits and paying none to anyone. He paid no rent to Mrs. Rawls until after this lease was made, when he went into possession of the homestead boundary and paid her rent for the same. This evidence, we think, authorized the court to make this finding, as it is unreasonable to suppose he would have leased his own land from Mrs. Rawls.

The court finds that the summons issued to Fall Term, 1878, was never placed on the docket until he ordered it to be done at this trial, and finds there was no order for an *alias*, nor to consolidate the two actions.

Upon the facts found, the court held as a matter of law that Anna S. Rawls was a party to and bound by the judgment taken at Spring Term, 1879. In this there is error.

It is manifest that the complaint was filed at Spring Term, 1879, upon the summons, returnable to that term of the court. It is true that there is not a mark on the complaint to show when it was filed—not even on the verification. But how could it have been filed before then, when there was no such case on the docket? Where the plaintiff in an action is the purchaser of land, the burden is upon him and those claiming under him to show that everything necessary to sustain the judgment has been done. *Lyerly v. Wheeler,* 33 N. C., 288; 53 Am. Dec., 414, approved in *Lee v. Eure,* 82 N. C., 428, and many other cases.

(46) We see no connection between the summons returnable to Fall Term, 1878, and the action in which the judgment was taken. There is nothing on the docket to show any connection between the summonses; and if there was, it devolved upon the plaintiff in the action under which the land was sold, and those claiming under him, to show it (if it could be shown outside the records themselves). This being so, the said Anna S. was never a party to the action in which the judgment of foreclosure and sale was had. The defendant cites *Harrison v. Hargrove,* 120 N. C., 96; 58 Am. St. Rep., 781, as sustaining his contention, upon the ground that, although Anna S. was not in fact served, the clerk inadvertently entered upon the docket that she had been served. Whether this (if the plaintiff had not been the purchaser) would have availed the defendant, or not, as the record proper showed that she had not been served, it is not necessary for us to say. But as one of the plaintiffs was the purchaser at the commissioner's sale, it was his duty to know whether she had been served, and if she had not been, he got no title.

Lyerly v. Wheeler, supra. The case of *Harrison v. Hargrove* is distinctly put upon the ground that he was *not a party* and was an innocent purchaser *without notice,* and is therefore distinguished from *Chambers v. Brigman,* 75 N. C., 487, where it was held the purchaser got no title. If Hargrove had been a party to the action under which he bought, he would have gotten no title, and the plaintiffs in that case would have recovered. Then William R. Devries got no title by this sale and the purchaser from him got nothing but a color of title. But the deed from Devries to Jones and Beaman is dated 6 October, 1880, and they immediately entered into possession of all the land outside the homestead boundary, and they and those claiming under them, down to and including the defendant, have been in the actual adverse possession of said land ever since, except the land covered by the homestead, and that remained in posses- (47) sion of Mrs. Rawls, by herself and her tenants, down to and at the time of her death—that is, from 1880 to 1900.

As defendant, and those under whom he claimed, have held possession under color of title seven years, this would have been sufficient to ripen the title, if there had been no exception to the general rule. But as Mrs. Rawls was a married woman, time was not counted against her until her husband died on 18 May, 1893, provided she availed herself of the statutory time to bring her action after his death, which was three years. Section 148, Code. That time expired on 18 May, 1896, and this action was not commenced until 28 April, 1900. The plaintiffs, therefore, are barred by the lapse of time, actual adverse possession and the statute of limitations from recovering that part of the land sued for outside of the homestead boundary. But they are not barred by the statute, are the owners of and entitled to recover that part of the land sued for, embraced within the homestead boundary.

There is error, and the judgment of the court below will be modified in accordance with this opinion.

Error.

Cited: Eason v. Dortch, 136 N. C., 296; *Dixon v. Jones,* 139 N. C., 77, 78.

(48)

WOOD v. ATLANTIC & NORTH CAROLINA RAILROAD COMPANY.

(Filed 23 September, 1902.)

1. APPEAL—*Verdict—Setting Aside.*

Where a verdict is set aside as a matter of law, as here, because the judge held that he had erroneously refused a prayer asked by the losing party, an appeal lies.

2. MECHANIC'S LIEN—*The Code, sec.* 1801—*Sub-Contractor—Contractor.*

The owner of property is not responsible to a sub-contractor for a debt of the contractor, if he owes the contractor nothing at the time he receives notice of claim of sub-contractor.

ACTION by J. W. Wood against the Atlantic and North Carolina Railroad Company, heard by *Judge Thomas A. McNeill* and a jury, at May Term, 1901, of CRAVEN. From a judgment setting aside the verdict and granting a new trial the plaintiff appealed.

W. D. McIver for the plaintiff.
Simmons & Ward for the defendant.

CLARK, J. When the trial judge sets aside or refuses to set aside a verdict on the ground that it is against the weight of the evidence, or excessive, or for other matters resting in his irreviewable discretion, no appeal lies. Clark's Code (3 Ed.), pp. 736, 746. But when the verdict is set aside as a matter of law, as here, because the judge held that he had erroneously refused a prayer asked by the losing party, an appeal lies. *Bryan v. Heck,* 67 N. C., 322; *Gay v. Nash,* 84 N. C., 333; *Thomas v. Myers,* 87 N. C., 31. An appeal lay at once, because a verdict is a substantial right, and the appellant should not be put to the trouble and expense of another trial if this verdict was erroneously set aside.

The plaintiff testified that, having done some work for R. S. Neal upon a warehouse which Neal had built for the
(49) defendant company, he called upon the president of the company, James A. Bryan, notified him of the amount, and asked him to retain said sum for him in the settlement with Neal, and that this was about three weeks before Neal failed, which occurred in September, 1900. The president refused to do so, saying that when Neal called for his money he would have to pay it to him. President Bryan and the treasurer,

Matt. Manly, both testified that on making up a statement of Neal's account, it appeared that by 9 July, 1900, the defendant company had overpaid Neal for the warehouse. This evidence was uncontradicted, and the defendant requested the court to instruct the jury that, if they believed the evidence, to find on the issue submitted that the defendant was not indebted to the plaintiff. This instruction the court refused, but on the motion for a new trial, made on the ground that he had committed an error in refusing the instruction, he properly so held, and set aside the verdict. The defendant could not be liable to the plaintiff unless at the time of his notification to President Bryan of his claim the defendant was then or thereafter indebted to Neal on account of said work (Code, sec. 1801); and the uncontradicted evidence is that before that time Neal had been more than settled with in full for said warehouse. The reply of President Bryan was not an assumption of Neal's debt to plaintiff, and if it had been it was without consideration and not in writing. It did not mislead the plaintiff, even, because the president expressly refused to assume any responsibility.

In setting aside the verdict there was

No error.

Cited: Bird v. Bradburn, post, 490; *Johnson v. Reformers,* 135 N. C., 387; *Oil Co. v. Grocery Co.,* 136 N. C., 356; *Abernethy v. Yount,* 138 N. C., 344; *Shives v. Cotton Mills,* 151 N. C., 294.

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(50)

TAYLOR v. NORFOLK & CAROLINA RAILROAD COMPANY.

(Filed 23 September, 1902.)

NEGLIGENCE—*Logs and Logging—Railroads.*

There is not sufficient evidence in this case to be submitted to the jury on the question of the negligence of the railroad in breaking a raft of logs which had lodged against its bridge.

ACTION by W. P. Taylor against the Norfolk and Carolina Railroad, heard by *Judge George H. Brown* and a jury, at Spring Term, 1902, of HERTFORD. From a judgment for the plaintiff the defendant appealed.

L. L. Smith for the plaintiff.

George Cowper for the defendant.

MONTGOMERY, J. A large raft of logs was broken loose from its moorings by a high freshet in Chowan River and was driven down against the defendant's railroad bridge across the river, lying broadside against the piling which supported the bridge. The defendant, through its agents and employees, broke up the raft, by means of which the logs passed under the bridge and many of them were lost. It was admitted, and proved also, that the safety of the bridge was imperiled and endangered by the lodgment of the raft.

This action was brought to recover of the defendant damages for the loss of the logs and the gear which held together the raft. The allegation of the complaint on that point was "that the defendant company, by its agents and employees, willfully, negligently, wantonly and wrongfully broke the said raft in pieces and threw the rafting gear into the river and turned the said logs adrift in the current, and the said gear sunk to the bottom of the river and the said logs floated down the river and were lost." The plaintiff also alleged that "if it was safe and prudent on the part of the defendant's employees to remove the
(51) raft, it was not necessary, in order to save the bridge, to throw the gear to the bottom of the river or to turn the logs adrift in the current"; and the fourth allegation is in these words: "That by the said willful, wanton and wrongful negligence on the part of the defendant's agents and employees, the said gear and logs, to the value of $250, were lost, to the plaintiff's damage."

In passing, it is curious to observe that the plaintiff got a verdict for 13 cents less than the amount demanded in the complaint, and we have searched in vain for any evidence upon which the deduction was made.

The plain meaning and intent of the complaint are that the plaintiff's damages arose from the destruction of the raft, and that that act itself, although done to save the defendant's bridge, as it was shown to have been, was wanton and willful and negligent. There is no charge in the complaint that the defendant was negligent in not saving the logs after they were broken loose from the raft and turned adrift. The plaintiff's loss was declared to have been brought about by the *said willful, wanton negligence* on the part of the defendant's agents; and the *said* willful, wanton and wrongful negligence mentioned in the complaint was the breaking the raft into pieces.

The case seems to have been tried altogether upon the theory of the plaintiff, as set out in his complaint. It seems to us that the only issue that ought to have been submitted on the complaint and answer was, "Did the defendant's agents negligently

and wantonly and wrongfully destroy the plaintiff's property, as alleged in the complaint?" And in looking into the case we find that his Honor took that view of the matter and submitted one issue only, and that in the very language of the above.

In the course of the trial, however, it having been admitted and proved that it was necessary for the safety of the bridge to break up the raft, and that that act was not (52) wanton or willful or negligent, the question arose as to the duty of the defendant in connection with the logs after they floated under the bridge and into the stream below. If that had been an issue, the greater part of his Honor's charge on that subject was correct; but we think he was wrong when he said to the jury, "If the defendant could save any of the logs by exercising due care with the means which it then actually had at its command, it was its duty to do so," without further instructing them that that would not have been the defendant's duty if the means at hand were not sufficient to save both the bridge and the logs. Certainly the first duty of the defendant was to use all available means to secure the bridge for the benefit of the traveling public and the protection of its own property. But, in any view of the case, we think there was no sufficient evidence to be submitted to the jury on the question of the defendant's conduct in reference to the logs after the raft was broken up. The only scintilla, if that, came from the son of the plaintiff, who said: "Defendant made no effort to save any of the logs or gear; plenty of men to do it there; there were between thirty and forty men." That was only an opinion, for he mentioned no appliances nor other means which could be put to use by the men in an attempt to save the logs. This witness says that the boss, while engaged in breaking up the raft (on a Sunday), in a high freshet of rolling waters, and getting higher, in peril of his life, and fighting to save a valuable railroad bridge, when told by the witness not to break up his raft, that his father would be there soon with a tug, exclaimed "Damn the logs!" and that was argued to be evidence of willful and wanton destruction of the property. We hardly think so. The wonder is he had not said more.

W. H. Pyland, Jr., a witness for the plaintiff, said: "The defendant's agent made no effort to save the logs; they could have done so if they had had boats below to catch (53) the logs as they cut them loose."

Pyland, another witness for the plaintiff, said: "The raft was lengthwise against the bridge, and greatly endangered it. If the railroad people had had boats enough, ready prepared, they

might have saved some of the logs. They had two skiffs, but I did not see any other boats there."

And another witness (Stain) for the plaintiff said that "More logs could have been saved by taking two boats on the lower side of the bridge, taking the logs up separately as fast as they came through."

His Honor properly told the jury that the defendant was not required by law to anticipate that a raft would break loose and come against its bridge, and it was not required to have on hand boats sufficient to save the logs. Now, in connection with that part of the charge where the plaintiff's evidence is carefully examined, it will be seen to afford no grounds upon which to impute negligence to the defendant in respect to its duty to save the logs or any part of them. Plaintiff's evidence does not tend to show that there was a boat or any other appliance available with which to make an attempt to save the logs. There was, however, on the part of the defendant, ample evidence going to prove that there were no facilities or appliances at hand and which could be used to save the logs. N. Y. Robinson said: "The logs doubled and piled on each other, and, reaching down near the bottom row, were pressing against the bridge with such strength and dangerous force as to require immediate relief. We had only two boats, and it was impossible for our men to save the logs and at the same time bestow reasonable attention upon the safety of the bridge." And Culpepper testified that the only means of saving the logs after they had passed through the bridge was by boats, and these the railroad company did not have.

(54) What we have said does not apply to the gear, for it seems there was some evidence tending to show that it was wantonly and negligently destroyed in breaking up the raft.

New trial.

JESTER v. STEAM PACKET COMPANY.

(Filed 23 September, 1902.)

1. SUMMONS — *Service — Foreign Corporation — The Code, sec.* 217, *subsec.* 1.

Service of summons on the president of a foreign corporation is valid, if made within the State, whether the president is in the State on private or official business.

2. APPEAL—*Premature—Summons.*

An appeal from an order refusing to dismiss an action for lack of valid service of summons is premature.

COOK, J., dissenting.

ACTION by Ella L. Jester against the Baltimore Steam Packet Company, heard by *Judge George H. Brown,* at April Term, 1901, of HERTFORD. From a refusal to dismiss the action the defendant appealed.

Winborne & Lawrence for the plaintiff.
George Cowper for the defendant.

MONTGOMERY, J. Under a special appearance, the defendant made a motion to dismiss the action for want of valid service of the summons. His Honor found from the evidence that the plaintiff's cause of action arose in another State; that the defendant had no agent in the State of North Carolina; that it was doing no business in the State, and that service of summons was made on the president of the defendant (55) company in Raleigh by the reading of the summons and delivery of a copy thereof to him.

Was the service of the process valid? The courts of this State are open to all suitors, resident and nonresident, whether individuals or corporations. "Civil actions shall be commenced by issuing a summons," and there are no limitations or restrictions as to the residence of a would-be plaintiff. The manner prescribed by the Code for the service of the summons upon corporations (section 217, subsection 1) is by the delivery of a copy to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof; but such service can be made in respect to a foreign corporation only when it has property within this State, or the cause of action arise therein, or when the plaintiff resides within the State, *or when such service can be made within the State* personally *upon the president, treasurer or secretary thereof.*" (Italics are ours.) The president of the defendant company was found in this State, and the summons was personally served upon him. Our law was complied with. Why is not the service good? The purpose and aim of the service of the summons are to give notice to the party against whom the proceeding or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice. The legislative power of the State in which the action is commenced is charged with the duty and responsibility of prescribing the rules governing in such matters, and its action is not reviewable, unless it should plainly appear that the notice did not amount to "due

process of law." Such manner of service of summons as our legislative body has provided may not be the best that might have been desired, but it is clear as to its meaning, not unreasonable, and there is nothing for the courts to do but uphold
(56) it. It is a most reasonable presumption that the officer served with the process in this case would communicate the notice to the corporation at once. It was his duty to take notice of the commencement of the action and to give the information to the defendant. We do not see how the fact that the officer who was served with process was in the State, on his private business, at the time of the service, can render the service invalid. Neither can the fact that he was not actually engaged in the service of the corporation at the time have such effect. In the case of service on an officer of a domestic corporation it could not be supposed that it was necessary to serve it on him while he was actually engaged in the corporation's business or acting officially for it. The just and legal foundation for such service rests in the duty of the officer to report such service, and that the corporation would by that means receive notice. A judgment obtained in an action thus commenced against a foreign corporation would be valid in this State and enforcible against any property at any time found in this State. What effect it would have in another State we need not discuss. The law of New York upon the question of service of process on foreign corporations is like ours, except that a nonresident, either individual or corporation, cannot bring suit against a foreign corporation. In that State, the question now before us, on a similar state of facts, has been before their Court of Appeals,and the service was held to be valid. *Pope v. Mfg. Co.,* 87 N. Y., 137. The court there said: "In order to make such service effective, it is not needful that the officer served should be here in his official capacity, or engaged in the business of the corporation, or that the corporation should have any property in the State, or that the cause of action should have arisen in the State." The Court of Errors and Appeals of New Jersey, in *Moulin v. Ins. Co.,* 24 N. J., 222, a case in which a judgment creditor commenced an action in that State upon a judgment obtained in the
(57) State of New York, the defendant having been a foreign corporation, without property in the State, the cause of action not having arisen in the State, the corporation having no business in the State, and the president being accidentally in the State on a visit when the summons was served on him, refused to recognize the validity of the judgment. There was no such statutory law, however, in New Jersey as existed in New York in reference to the service of process on foreign corporations.

But this appeal was premature and must be dismissed. *Cooper v. Wyman,* 122 N. C., 784; 65 Am. St., 731.

Appeal dismissed.

COOK, J., dissents.

Cited: Lamb v. Elizabeth City, 132 N. C., 198; *Greenleaf v. Bank,* 133 N. C., 302; *Johnson v. Reformers,* 135 N. C., 387; *Higgs v. Sperry,* 139 N. C., 303.

GARRETT-WILLIAMS COMPANY v. HAMILL.

(Filed 23 September, 1902.)

FRAUDS, STATUTE OF—*Contracts—Parol—Promise to Answer for Debt of Another.*

A verbal agreement to be liable for the debt of another is void under the statute of frauds.

ACTION by Garrett-Williams Company against F. A. Hamill and others, heard by *Judge Francis D. Winston* and a jury, at November Term, 1901, of HALIFAX. From a judgment for the plaintiff the defendant Ada Hamill, as administratrix of the estate of T. L. Hamill, deceased, appealed.

E. L. Travis for the plaintiff.
Day & Bell for the defendant.

MONTGOMERY, J. The plaintiff brought this action to recover of the defendant an amount alleged to be due for liquors sold and delivered to the defendants F. A. Hamill and (58) T. L. Hamill, the intestate of the defendant Ada Hamill. The defendant administratrix, in her answer, admits that her intestate did, by parol, agree to pay to the plaintiff a bill of $233.83 for liquors to be delivered to the other defendant, F. A. Hamill, but that the same has been paid, and that if any promise was ever made by her intestate to pay any part of the amount now claimed to be due, it was by parol and for the sole benefit of F. A. Hamill, and pleads the statute of frauds. The liquors were shipped to F. A. Hamill, at Whitakers, and the liquor license was in his name. The plaintiff introduced as its witness A. D. Pender, who said: "I sold goods. I am plaintiff's agent. I sold goods on T. L. Hamill's credit. He said he would see it

paid." The witness further testified: "T. L. Hamill was in business in Enfield, and was solvent. F. A. Hamill was not solvent. T. L. Hamill told me F. A. Hamill was carrying on business in Whitakers. We went to Whitakers, and T. L. Hamill bought goods and said, ship goods in future to F. A. Hamill whenever he needed them until he notified us not to ship, and he would see us paid, and to collect from F. A. Hamill when I came around, and if F. A. Hamill failed to pay he would. I had no written contract with T. L. Hamill. He asked as to the payments, and never notified us to stop shipping goods to F. A. Hamill. He never countermanded orders or notified us to stop shipping. T. L. Hamill was to pay for the goods, and we sold them on his order, on his credit. F. A. Hamill paid me certain amounts, and I gave him credit for them, all under the verbal order of T. L. Hamill. I saw some of the goods in Hamill's store. T. L. Hamill never instructed me to ship or sell any specific goods to F. A. Hamill after the first order. I don't know when T. L. Hamill died. I was in Enfield a day or two before he died. I did not instruct the house to make out account against T. L. Hamill and F. A. Hamill; the goods were
(59) all shipped to F. A. Hamill, but T. L. Hamill was responsible for them. The account was entered on the books 'F. A. Hamill, T. L. Hamill responsible.' I don't know how they were entered, and never saw the book." The other evidence in the case threw no light on the contract and was of no benefit to the plaintiff.

The defendant asked the court to instruct the jury that there was no evidence to go to the jury as to the liability of the defendant A. R. Hamill, administratrix of T. L. Hamill, and the request was refused. We think it ought to have been given. If there was any conflict in the testimony of Pender it was only an apparent conflict, not a real one. It is true the witness said, "T. L. Hamill was to pay for the goods, and we sold them on his orders, on his credit." But that was explained by his saying, "I sold the goods to T. L. Hamill's credit; *he said he would see it paid.* We went to Whitaker's, and T. L. Hamill bought goods and said, 'Ship goods in the future to F. A. Hamill whenever he needed them until he notified us to stop, *and he would see us paid,'* and to collect from F. A. Hamill when I came around, and if F. A. Hamill failed to pay he would." "I had no written contract with T. L. Hamill."

New trial.

(60)

AYERS v. MAKELY.

(Filed 23 September, 1902.)

1. APPEAL—*Pleadings—Amendment—Presumptions.*

The presumption that a refusal to allow an amendment to pleadings was made in the discretion of the court, is rebutted by the statement of the trial judge to the contrary in the case on appeal.

2. CONTRACTS—*Vendor and Vendee—Mortgages.*

An agreement, in an executory contract for the purchase of land, that payments should be applied on a mortgage held by a third party, until it was reduced to a specified sum, was not an assumption by the vendee of the mortgage debt.

3. APPEAL—*Premature—Amendment—Pleadings.*

An appeal from an order refusing an amendment to pleadings is premature. An exception should be noted and the case proceeded with.

ACTION by S. B. Ayers and others against M. Makely, heard by *Judge George A. Jones*, at Fall Term, 1901, of BEAUFORT.

In July, 1893, W. H. Wahab and George Credle, being then the owners of a certain tract of land in Hyde County, known as the "Donnell farm," entered into a written contract and agreement to sell and convey the same to Stephen B. Ayers for the price of $40,000; $5,000 of the purchase money was to be paid in November, 1894, and $5,000 on 1 November in each subsequent year, with interest on all unpaid sums, payable annually, until the whole purchase money should be paid. Makely, the defendant in this action, was a party to the contract. At the time of its execution he held a mortgage on the tract of land, and agreed to purchase another encumbrance on the same held by James A. Bryan, trustee of Miss Donnell, both encumbrances aggregating about $25,000. It was further agreed in the contract that the payments to be made by Ayers were to be applied to the payment of the encumbrances until the principal of the encumbrances and interest thereon should be re- (61) duced to $10,000. When that should be done then Wahab and Credle and their respective wives were to execute and deliver to Ayers a good deed in fee to the land, and Ayers at the same time was to execute and deliver his notes to Makely, secured by a mortgage upon the premises for the $10,000, in two payments of $5,000 each, to be a first lien on the land. Ayers was also to execute his notes to Wahab and Credle for the balance of the purchase money, to be secured by a mortgage on

the premises. It was also agreed that in case of default in any of the payments then, at the option of Ayers and Credle and Makely, the contract should be null and void, and the total amounts unpaid should be considered due and payable at once. Also Ayers was to furnish to Makely, at the time of the execution and delivery of the contract, a bond satisfactory to Makely in the sum of $10,000, guaranteeing the first two payments provided for by this contract. Under the said contract Ayers went into possession and control of the land on 1 November, 1893, the rents and profits for that year, however, to belong to Wahab and Credle. Differences and controversies having arisen between Ayers and Wahab and Credle the last two, with Makely, instituted an action of ejectment in the Superior Court of Hyde County against Ayers, and demanded possession of the land. Ayers filed his answer in that suit, and gave the bond as required by law in the sum of $200, with sureties. Under an order of the Superior Court made in the cause Ayers was required to give an additional bond in the sum of $5,000 to secure the rents, costs and damages that might be sustained by the plaintiff. The bond was given with sureties.

While the action of ejectment was pending against Ayers the plaintiffs in the action, Makely, Wahab and Credle, entered into an agreement among themselves whereby Makely in-
(62) stituted an independent action against Wahab and Credle in the Superior Court of Hyde County for the foreclosure of the mortgage held by Makely upon the land, and the part of the notes or bonds owned by Makely and secured by the deed of trust to James A. Bryan. Ayers was not a party to the agreement, and was not a party to the action of foreclosure. By the terms of the agreement between Makely on the one part and Wahab and Credle on the other it was stipulated and provided that at any sale under the foreclosure decree in the cause Makely would bid for the land, or cause to be bid therefor, such sum as would discharge the indebtedness due him as aforesaid by Wahab and Credle, or if he failed to do so and bought the land himself at any less price, that he would cancel and satisfy the balance of his judgment upon his debts aforesaid. Under his contract and agreement with Wahab and Credle as aforesaid the land was sold by Makely through a commissioner appointed by the court on 11 May, 1896, and was purchased by him for $15,500, and the residue of said judgment due Makely, after crediting the amount bought by the sale of the land, was canceled by him under his agreement aforesaid. Ayers, notwithstanding the foreclosure and sale, continued to remain in possession of the premises. Pending the said action of ejectment

Henry W. Wahab died intestate, and his personal representative and heirs at law were made parties plaintiff with Makely and Credle therein. A judgment was recovered in said action of ejectment against Ayers and his sureties and in favor of George Credle, as surviving partner of Wahab and Credle, for the penal sums of the aforesaid bonds, to be discharged upon the payment of $3,200 with interest thereon from 1 January, 1896, being for the rents and profits of said land for the year 1895, and for the further sum of $464.65 costs. A large amount has been paid by some of the sureties of Ayers on the judgment recovered against them in the suit of ejectment. The defendant appealed from the judgment rendered.

Chas. F. Warren for the plaintiff. (63)

Rodman & Rodman and *Geo. W. Ward* for the defendant.

MONTGOMERY, J., after stating the facts. The plaintiffs in this action are Ayers and the sureties on his bond in the ejectment suit. In the complaint they allege that during the pendency of the action of ejectment Ayers was not ejected by process of law but that he voluntarily surrendered possession of the premises to Makely on Makely's express promise to Ayers and his sureties that they should not be held responsible for the rents and profits growing out of the land while Ayers was in the possession thereof, and that he would hold Ayers and his sureties harmless against any demand that might be made on them for the rents and profits by Wahab and Credle. And this action is brought to recover from Makely the amount which the sureties have had to pay and will have to pay because of the recovery against them on the bonds in the ejectment suit.

The defendant in his answer denied the cause of action alleged in the complaint. At the Fall Term, 1901, of Hyde Superior Court, he moved to amend his answer and to plead counterclaims and set-off. The counterclaim which the defendant desired to plead was in substance that Ayers was the principal in the bonds filed in the ejectment suit, and that the other plaintiffs were sureties, and that Ayers owed him $5,359.44, that amount being the difference between the amount of Makely's encumbrance on the land and the amount at which he bought the land at the commissioner's sale, and that Ayers had assumed the payment of the encumbrances.

The motion to amend the answer and set up the counterclaim was denied, the order being silent as to the ground of refusal. The plaintiff contends that there can be no appeal at any time from the refusal to allow the answer to be filed, for the rea-

(64) son that such matter was entirely discretionary with the court, and the order being silent as to the ground of refusal, the conclusion is that it was denied as a matter of discretion. But in making up the case on appeal his Honor stated that he did not refuse to allow the amendment as a matter of discretion, but on the ground that the offered counterclaim did not amount to a counterclaim in law. The presumption in law that the order was made in the discretion of the court was rebutted by the statement of his Honor to the contrary in the case made up for this Court.

The appeal was premature, but as the whole matter in dispute came out on the argument here it may be best for all (the Court included) to pass upon the ruling made by his Honor that the claim of the defendant did not amount to a counterclaim in law. We see no error in the ruling. It was argued here by the counsel of the defendant that the legal effect of the contract of sale was to make Ayers the principal debtor, as between himself and Wahab and Credle, as to the debts due by Wahab and Credle to Makely, and that that position was brought about by the assumption by Ayers to pay those debts for Wahab and Credle. On that proposition it was insisted that the release of Wahab and Credle from their indebtedness to Makely was only a release of the sureties, and not a release of Ayers, the principal. But from our reading of the contract we do not find that there was any assumption on the part of Ayers of the debts of Wahab and Credle to Makely. The relations of the parties to that contract were not changed by its execution. The most that could be said is that Ayers bound himself to see that particular payments on the purchase money should be applied to the claims of Makely. The language of that part of the contract is as follows: "It is understood by and between the parties hereto that the payments above mentioned to be made by said third party (Ayers) shall be applied to the payment of those encumbrances held by said second party (Makely) until the
(65) principal of said encumbrances and interest thereon has been reduced to the sum of ten thousand dollars."

We are of the opinion, therefore, that when, at the time of his purchase of the land at the commissioner's sale, Makely released and discharged Wahab and Credle, the principal debtors, from the payment of the encumbrances, Ayers was also released. The appeal, however, was erroneously granted, because it was premature. Exception should have been noted and the case proceeded with. *Milling Co. v. Finlay,* 110 N. C., 411; *Walker v. Scott,* 106 N. C., 56.

Appeal dismissed.

DAWSON v. BAXTER.

(Filed 23 September, 1902.)

LIBEL AND SLANDER—*Libel Per Se.*

A publication that the chief of police and mayor declined to aid a committee of citizens to ascertain the perpetrator of a felony is not libelous *per se*, there being no charge of a breach of official duty to the public.

ACTION by W. C. Dawson against W. M. Baxter and others, heard by *Judge George A. Jones,* at May Term, 1902, of PASQUOTANK. From a judgment sustaining a demurrer to the complaint the plaintiff appealed.

Geo. W. Ward and *P. W. McMullan* for the plaintiff.
E. F. Aydlett for the defendant.

COOK, J. The demurrer to the complaint was properly sustained by his Honor. No special damage is alleged to have resulted from the publication, but it is contended to be libelous *per se*. The publication of which plaintiff com- (66) plains is as follows, to-wit:

"Recognizing the fact that in this matter all agencies should work together for the accomplishment of the end in view, we immediately proposed that we should communicate with Mr. Dawson, the chief of police, and secure the benefit of his services and ability. Mr. Dawson was waited on by several members of the committee at different times and invited and urged to cooperate with us; he positively refused to do so, and from the date of our appointment until this hour he has not, neither has the mayor of this city, done one single thing to assist us, but have at all times seriously handicapped our efforts by their actions and manner of treatment. For this reason we were badly thwarted in our efforts at the very outset."

And again: "We could have accomplished better results and saved much time and labor had the chief of police and the mayor recognized that they were public officers, paid as public servants, and discharged their duty in accordance with those facts."

It was made by the defendants and one H. T. Greenleaf, who "were appointed a committee of five for certain ends and purposes foreign to this complaint, and that said committee was styled and known as 'The Citizens' Committee.'"

The publication shows that plaintiff is charged with a breach of his official duty with respect to the defendants in the execution of the ends and purposes for which they were appointed,

and not with respect to the public. Then what official duty did plaintiff owe to them? None is alleged in the complaint, nor does any appear upon the face of the publication. The "committee" appears to have been a volunteer organization and self-appointed. It nowhere appears that it had any legal existence, or that it owed any duty or service to the public, or
(67) that the public through its officers owed it any duty or service; and the Court cannot assume such to be the fact, *quod non apparet non est.* We must construe the language of the publication as a whole in its ordinary and popular sense with reference to what the persons to whom it was published would reasonably suppose to have been intended (Jaggard on Torts), and not what defendants intended to charge or what plaintiff understood.

Plaintiff insists that he is charged with misfeasance and nonfeasance in office. Defendants contend that the breach of duty charged has reference solely to his hindrance and refusal to assist them in their undertaking as a "committee," and not to his official duties with reference to the public.

To arrive at a proper construction of the publication we must construe the doubtful part by comparing it with those parts which are clear and certain, and so find out its sense from the words and obvious intent of the others, as in the case where the meaning of a word is doubtful, its meaning must be ascertained from its associates, *nocitur a sociis.* So, coupling the words of the last sentence of the publication with those of the preceding, we can ascertain the sense in which they should be understood, *couplatio verborum indicat acceptationem in eodem sensu.* Thus construing them we find the charge of misfeasance to be that he, as an officer, hindered, handicapped and badly thwarted their efforts in carrying out their undisclosed purpose; and that of nonfeasance to be that he did not recognize that he was a public officer, and did not discharge his duty in accordance with the fact, in that he would not render any official services in aid of their purposes. With this understanding of the meaning of the publication taken from its face and context, and they must have been so understood by the readers, we are unable to discern any meaning or intendment which would bring the plaintiff into disrepute or which imputed to him an unfitness, either in
(68) respect or morals, inability or want of integrity for the discharge of the duties of his office; and we cannot go beyond and enter into the region of conjecture, but must confine ourselves to the allegations contained in the complaint.

From this publication it nowhere appears that plaintiff was charged with having violated or failed to perform any duty

imposed upon him by his office. As a public officer and public servant he was obliged to obey and execute the prescribed and established laws of the land, and not to serve and co-operate with any body or bodies of men having neither legal existence nor legal authority to make, execute or enforce law, or to preserve the peace. As their ends and purposes were foreign to the matters of the complaint, and no legal authority is shown for their appointment, it must be assumed, even if not engaged in an unlawful purpose, that their undertaking was not within the pale and protection of the law, or that they were undertaking to usurp the functions of officers of the law, and by reason of their incompetency or inexperience the plaintiff officer did not deign to dignify them with his official recognition. And as the plaintiff and mayor, of whom they also complaint, did not take steps to suppress their efforts, we must assume that the purpose they had in view was not of a criminal character.

Defendants, in their publication, do not state such facts as to show that they were engaged in an undertaking which would entitle them to invoke the aid of legal authority. They do not claim that plaintiff officer failed to discharge any duty further than to fail to assist them in their own peculiar undertaking. To refuse them his services and ability in that behalf he had a right to do, and "he positively refused to do so"; and he at all times seriously handicapped their efforts by his actions and manner of treatment. Should he have done otherwise? So far as the record shows the duties of his office did not require it. In thwarting their efforts and preventing them from (69) accomplishing better results and saving them much time and labor, by not recognizing the fact that he was a public officer and not discharging his duty in accordance with those facts, it seems that he regarded the matter they had in view as being of such a character as would appeal to his discretion rather than a demand as of legal right. The inference is strong that they were endeavoring to manage matters which pertained to the duties of the chief of police and mayor, who deemed their uninvited efforts officious and unnecessary, and kept aloof from them. If that be so, then the officers would owe them no duty; and to charge them with a failure of duty with respect of them would not injure the plaintiff's reputation or expose him in his private or official character to public scandal, hatred, ridicule or contempt.

As there is no special damage alleged to have resulted from the publication it must appear that the words of the publication were such as to impute to the plaintiff an unfitness to perform

the duties of his office, or a want of integrity in the discharge of such. And this the words do not show. There is

No error.

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(70)

BEST v. BRITISH AND AMERICAN MORTGAGE COMPANY.

(Filed 23 September, 1902.)

1. PLEADINGS—*Answer—Courts—Discretion—The Code, Sec.* 274.

The extension of time to answer after the time limited is discretionary with the trial judge and is not reviewable.

2. VERIFICATION—*Pleadings—Corporations—The Code, Sec.* 258.

The managing director of a foreign corporation may verify its pleadings.

3. REHEARINGS—*Appeal.*

The Supreme Court will not *ex mero* review a former decision upon a second appeal in the same case.

ACTION by W. E. Best against the British and American Mortgage Company, heard by *Judge O. H. Allen,* at September (Special) Term, 1901, of GREENE. From an order refusing judgment on complaint the plaintiff appealed.

Geo. M. Lindsay for the plaintiff.
L. V. Morrill and *Battle & Mordecai* for the defendant.

MONTGOMERY, J. The defendant in this action, a nonresident corporation, was brought into court by publication. A special appearance was entered on its behalf, and a motion to dismiss the action and vacate the attachment was granted. Upon the appeal of the plaintiff that ruling was declared to be erroneous by a decision of this Court—128 N. C., 351. The plaintiff, in due time, moved in the court below for judgment on his verified complaint, no answer having been filed. The court refused the motion, and the defendant was allowed to file an answer, and the plaintiff appealed.

It does not appear from the record that the defendant got leave to file an answer under section 220 of the Code, and we must presume, therefore, that the order was made under
(71) section 274 of the Code. The matter was entirely in the discretion of the court, and cannot be reviewed on appeal. *Gilchrist v. Kitchin,* 86 N. C., 20; *Woodcock v. Merrimon,* 122 N. C., 731.

In *Millard v. Patterson,* 108 N. C., 255, the defendant filed an unverified answer, the complaint in the action having been verified, and the defendant, after a lapse of five years, asked to be allowed to file a new answer, properly verified, and the court allowed him the leave, though he was not entitled to it as a matter of right. This Court approved of the order, and declared that the exercise of the discretion by his Honor was not reviewable.

After the answer was filed in the case now before us the plaintiff moved for judgment on the ground that the answer was not properly verified, the alleged insufficiency being that the verification had been made by L. H. Graham, a managing director of the defendant corporation. The motion was disallowed, and properly so. When a corporation is a party the verification may be made by any officer thereof. The Code, sec. 258. Certainly the managing director of a foreign corporation is such an officer as would meet the requirements of the Code in the matter of the verification of pleadings.

The counsel of the plaintiff, in his brief, discusses at some length the decision of this Court in the former appeal of this case on the question of the discontinuance of the action on the part of the plaintiff, and suggests that the Court will *ex mero motu* review that question. But rehearings are not allowed in such a manner.

No error.

Cited: Britt v. R. R., 148 N. C., 42.

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(72)

WHITE v. LOKEY.

(Filed 23 September, 1902.)

PLEADINGS—*Answer—Bond—The Code, Secs.* 274 *and* 237.

The extension of time to answer and file a defense bond is discretionary with the court, and not reviewable.

ACTION by Laura A. White against John Lokey and others, heard by *Judge Francis D. Winston,* at February Term, 1902, of CRAVEN. From a refusal of motion of plaintiff for a default judgment and an order allowing defendants thirty days in which to file answer and defense bond the plaintiff appealed.

W. D. McIver for the plaintiff.
W. W. Clark for the defendant.

CLARK, J. This is an action of ejectment. At the first term there was a general order continuing cases on the summons docket, with time to file pleadings. Counsel on both sides were absent, and there was no objection. On the last day of the second term the plaintiff moved for judgment because no answer had been filed and no defense bond as required by section 237 of the Code. The court, in its discretion, granted thirty days in which to file answer and bond, and the plaintiff excepted. In fact the answer and bond were filed during that same day and before court adjourned. The extension of time to file answer is within the express terms of the Code, sec. 274, which makes it a matter of discretion with the judge. Such discretion is not reviewable. Clark's Code (3 Ed.), page 309, and numerous cases there collected. The same section also confers on the judge the discretion to extend the time for filing the defense bond. *Taylor v. Pope,* 106 N. C., 271.

Indeed, as the bond and answer were in fact filed at
(73) the second term, to which time had been extended without exception, the effect was the same as if they had been filed at the proper term, and a judgment by default must have been struck out upon the filing thereof within the term.

This case differs from *Cook v. Bank,* 129 N. C., 149. In that case there was no answer filed, and the plaintiff moved for judgment by default and inquiry upon his verified complaint. The defendant, instead of filing answer then or getting time to answer (as in this case), opposed judgment. On appeal it was held that judgment on that state of facts was a legal right, and the Court held that it was error to refuse it.

No error.

MEADOWS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 30 September, 1902.)

OPINION ON EVIDENCE—*Negligence—Instructions—Telegraphs—The Code, Sec,* 413—*Mental Anguish.*

In an action against a telegraph company for negligence in delivering a message, it is error for the court to refer in its charge to the *"proverbial slowness of the messenger boy."*

CLARK, J., dissenting.

MEADOWS *v.* TELEGRAPH CO.

ACTION by W. D. Meadows against the Western Union Telegraph Company, heard by *Judge Francis D. Winston,* at February Term, 1902, of CRAVEN. From a judgment for the plaintiff the defendant appealed.

D. L. Ward for the plaintiff.
W. W. Clark and *F. H. Busbee* for the defendant.

MONTGOMERY, J. This action was brought to recover (74) of the Western Union Telegraph Company, the defendant, damages on account of alleged mental anguish suffered by plaintiff on account of an alleged negligent failure to deliver to him a telegraphic message. The telegram was in these words: "New Bern, N. C., 3 October, 1901. To Bill Meadows, Pollocksville, N. C. Will Phillips' wife at point of death. Will Phillips." The language of the telegram differs from that of any in our reported cases, but as a new trial is to be had for matters hereinafter mentioned it might not be of any benefit to discuss now the legal effect of the language of the dispatch.

In his instructions to the jury his Honor, among other things, said "that it was the duty of the telegraph company to use reasonable diligence in the transmission of all messages committed to it, and that by the term reasonable or due diligence was not meant the speed of the lightning, except in the transmission of the message over the wire, on the one hand; not the proverbial slowness of the messenger boy on the other." There was an exception to the latter part of that instruction, and the same was assigned by the defendant as error, and we are of the opinion that the position of the defendant is a correct one. Whether the defendant had exercised due diligence in the delivery of the message was the question of fact before the jury. Telegraphic messages are usually delivered by boys called "messenger boys"; and the plaintiff had testified that "R. R. White's boy worked in the telegraph office. He knows me, knew where I lived; could stand in the office and see my house. The boy signed the receipt for the message himself. After my name was signed I said, 'This thing has been delayed, what is the matter?'" It seems to us that his Honor, in the language used, took as a criterion of negligent delay the agency employed by the defendant to deliver its message. "No judge in giving a charge to the petit jury, either in a civil or criminal (75) action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law

thereon." Code, sec. 413. It is true that his Honor did not, in precise and exact words, tell the jury that in his opinion the fact of a negligent delay had been fully proved, but it seems to us "that his language, when fairly interpreted in connection with so much of the context as is set out in the record, was likely to convey to the jury his opinion of the weight of the evidence." That is the construction of the statute adopted in *S. v. Jones,* 67 N. C., 285, and approved in *S. v. Laxton,* 78 N. C., 564.

New trial.

DOUGLAS, J., concurring in result. I concur in the result of the opinion of the Court because it appears to me, not that harm has been done, but that harm may have been done.

Had I been a juror the objectionable words would probably have made no such impression on my mind, but that fact alone does not authorize me to say that they could not have such effect upon the minds of other reasonable men, in view of the evident effect that they have had upon the minds of a majority of this Court.

The words themselves do not contain the slightest intimation that any fact in controversy has been proved or disproved. The most that can be said is that they may have been understood by the jury as meaning that the *defendant's* messenger boys were proverbially slow, and that such intimation may have operated to the prejudice of the defendant. If this is so the defendant should have a new trial. My views as to the absolute right of the citizen to a fair and impartial verdict upon the facts, free from the slightest influence of the court, have
(76) been too fully and too recently expressed in *S. v. Howard,* 129 N. C., 584, 663, to require any further expression in the present case.

CLARK, J., dissenting. The uncontradicted evidence is that the sister of plaintiff, being at the point of death in New Bern, her husband, at her request and in consequence of her prior promise to plaintiff in such contingency, on 3 October, 1901, at 4:15 p. m., sent a message, which the company's agent wrote for him, to the plaintiff at Pollocksville: "Will Phillips' wife at point of death." The husband prepaid the message, which was written by defendant's agent, who testified that he knew it was an important message. The train passed Pollocksville coming to New Bern at 5:04 p. m. The plaintiff was at work a little more than half a mile from the station in Pollocksville, but in plain view of the office, as was also his house near by, and the message could have been delivered in less than fifteen

minutes. The defendant made no effort to deliver the message, but kept it till 6:55 p. m., and then wired back to New Bern for fifty cents more to deliver the message, the residence of plaintiff being just outside of the free delivery limits. The fifty cents was promptly sent, but the message was not delivered to plaintiff till 8:30 p. m., four hours and fifteen minutes after its receipt by the defendant. The plaintiff contends that it was negligence not to have at once wired back for money to pay for extra service, and that if this had been done plaintiff could have come to New Bern on 5:04 train, before his sister became unconscious.

The court in its charge to the jury incidentally said: "The company is required to use due diligence in the delivery of a message; by this is not meant the speed of the lightning, except in the transmission of the message over its wires, nor the proverbial slowness of a messenger boy, but it is required to use reasonable diligence and nothing more." The defendant excepts because of the use of the words "proverbial slowness of a messenger boy." This could not possibly have harmed (77) the defendant nor have been any expression of opinion whatever upon the controversy in this case. There was no contention by plaintiff that the messenger boy was slow. The jury did not have to consider that matter in any possible view of the case. It was not controverted that defendant received the message at 4:15 p. m.; that the only train on which plaintiff could have gone to New Bern passed Pollocksville at 5:04, and that defendant took no steps to deliver the message at that time, and did not telegraph to New Bern for money to send the message out till 6:55. This was the ground relied upon to show defendant's negligence. *Hendricks v. Tel. Co.*, 126 N. C., 304, 78 Am. St., 658. When at last at 6:55 defendant wired for money to send the message the damage had been done, the train had passed, and there is no allegation that when the message was finally delivered to the messenger boy, after 8 p. m., that he lingered or delayed. The fault was wholly and entirely with the operator at Pollocksville, and the incidental remark by the court in regard to the slowness of messenger boys could not possibly be an expression of opinion "upon those facts respecting which the parties take issue or dispute, and upon whose existence depends the liability of the defendant." *S. v. Angel*, 29 N. C., 27; *S. v. Jones*, 67 N. C., 285; *S. v. Debnam*, 98 N. C., 712; *S. v. Jacobs*, 106 N. C., 696, and cases there cited.

In *Stilley v. McCox*, 88 N. C., 18, the judge laid down some moral observations and the Court said: "We know of no law which prohibits a judge in his charge to the jury from pro-

nouncing a dissertation upon such moral questions as may be suggested by the incidents of the trial, provided it be innocent and work no prejudice to either of the parties"; and in *S. v. Gay,* 94 N. C., 814, the Court says: "It cannot be error to state a proposition to the jury which is universally admitted."

(78) What can be more undoubtedly admitted from common observation than the "proverbial slowness of a messenger boy," and how could the expression of that truism be harmful to defendant when the conduct of no messenger boy was called in question. From plaintiff's contention the liability of defendant accrued solely from the neglect of the operator at Pollocksville, long prior to the delivery by him of the message to the messenger boy.

In the trial of Warren Hastings, to a criticism of a rhetorical flourish in his opening speech, Sheridan replied that it was a novelty in legal proceedings "to take a bill of exceptions to a metaphor or enter a special pleading against a trope," but the appellant seems to have repeated that novelty. It is the function of this Court to pass upon alleged errors of law of the trial judges, but it has not been deemed part of our duties to pass upon matters which should be left to their individual tastes. Some judges are terse, others are florid, some may refer incidentally to matters of common knowledge, and others restrict themselves to narrower limits, but unless what is said is an expression of opinion "upon the facts in controversy," the Appellate Court has not heretofore felt that it was called upon to criticise the style or tenor of the charge as reversible error.

Cited: Helms v. Tel. Co., 143 N. C., 395.

WEEKS v. WILMINGTON & WELDON RAILROAD COMPANY.

(Filed 30 September, 1902.)

1. NEGLIGENCE—*Railroads—Trestle.*

A person who goes upon a railroad trestle is guilty of negligence.

2. NEGLIGENCE—*Railroads—Trestle.*

Where a person goes upon a railroad trestle, and seeing an approaching train, jumps and is injured, and the train stops before reaching the trestle, the railroad is not guilty of negligence.

WEEKS *v.* R. R.

ACTION by Mamie Weeks against the Wilmington and (79) Weldon Railroad Company, heard by *Judge Francis D. Winston* and a jury, at April Term, 1902, of JONES. , From a judgment for the plaintiff the defendant appealed.

Simmons & Ward and *P. M. Pearsall* for the plaintiff.
Junius Davis for the defendant.

COOK, J. On 3 October, 1899, plaintiff and two other ladies, Misses Simmons and Emmett, were out walking, and as they passed by defendant's depot heard the agent say that the mail train, due from the north, was expected in seventeen minutes. They then walked along the railroad track towards the Trent River, some four hundred feet distant, which is spanned by a railroad bridge. Before reaching the river the track is upon an embankment about twelve feet high, then follows a trestle 120 feet to the river and twelve or fourteen feet above the ground, then the bridge, 117 feet across, and then the trestle on the north side, thirty-one feet long. The bridge and trestle are not provided with any conveniences as a passway for people, nor is there any place of safety provided for people to protect themselves from a passing train. When they came to the trestle they did not intend to go across for, testifies the plaintiff, "we knew we could not get across before the train came," but continued their walk upon the trestle (120 feet, nearly halfway across) until they reached the bridge just over the water, when one of them suggested, "Suppose the train would come, what should we do?" Just then they looked back and saw a train coming (this was a log train coming up from Maysville to Pollocksville to take siding and let the passenger train pass), and turned back, meeting it, which was then a "little way from the depot." Miss Emmett ran and got off the trestle and ran down the embankment some twenty-five or fifty yards ahead of the engine, and the other two might have done likewise; (80) but Miss Simmons would not run and leave Miss Weeks, the plaintiff, who was weak and feeble, caused by an accident which had happened to her two months previous, rendering her unable to run fast. But such weakness and feebleness were not known to defendant's employees on the train. The train was not going to cross the bridge, but this was not known to plaintiff and her companions. Miss Simmons had plaintiff by the hand and they were trying to get off, but plaintiff being weak, and thinking that she could not get off, pushed Miss Simmons aside, and seeing the engine coming near the trestle Miss Simmons swung down by the capsill her length and jumped, landing upon

the ground unhurt; and plaintiff jumped from the top of the trestle to the ground, fourteen feet beneath, and was injured in the ankle and back. Plaintiff and Miss Emmett and one of defendant's witnesses testified that when she jumped the engine was close upon and moving towards her, and did not stop until it had passed beyond the place from which she jumped; and while upon the ground plaintiff and Miss Simmons looked up and saw log cars above them, and the cinders from the engine fell down upon them. Eight witnesses (three of whom were employees upon the train and five not connected with defendant) testified on behalf of defendant that the train stopped at the clear-post, twelve or sixteen feet from the trestle, and did not go upon the trestle until after the ladies had jumped off. There was also evidence that one of the employees of defendant company (Brandt) hallooed to the ladies not to jump, and that it was heard by the witness Lee 125 yards away. Witness Harriott testified that plaintiff was about two *bents* (about 24 feet) from the south end of the trestle when she jumped.

Of the eight assignments of error we deem it necessary to consider only the third. Defendant requested the court to charge the jury that "If the jury shall believe from the evidence that the engine of the defendant stopped upon the embank-
(81) ment on the south end of the trestle and did not go upon the trestle until after the plaintiff had jumped from the trestle, then the jury should answer the first issue 'No.'" The first issue was, "Was plaintiff injured by the negligence of the defendant?" His Honor refused to give this instruction, and in this there is error.

This railroad bridge and trestle were constructed solely for the use of the defendant company, and no invitation was extended to the public to go upon them; so no place of safety was provided against the passing of trains. Plaintiff knew of its danger, for that was apparent; she also knew that a train was expected to cross it within seventeen minutes after she left the depot, 400 feet away, and knew that she could not get *across* before the train came, and in the face of such knowledge went nearly halfway (120 feet) across it without stopping to consider the danger. Being uninvited and without even showing a license to enter upon it, she voluntarily put herself in a dangerous and perilous condition and became a trespasser. There is no conflict in the evidence concerning the trestle and the bridge, and of the plaintiff's being on it, and of her conduct while there, and that the trestle was from twelve to fourteen feet high, and a place of danger; so negligence becomes a question of law, and this Court has decided that such entry upon a trestle under

similar circumstances is contributory negligence. Therefore, upon the uncontradicted evidence of plaintiff and defendant, plaintiff was guilty of negligence in going upon the trestle.

In *Little v. R. R.*, 119 N. C., on page 776, the Court says: "It was decided in *Clark v. R. R.*, 109 N. C., 430, 14 L. R. A., 749, that a person who places himself on a railroad trestle so high as to make it perilous for him to jump to the ground is negligent, and that he is guilty of contributory negligence if he is injured by a passing train."

In this case plaintiff was not injured by a passing train, but was injured by her own act, which is alleged (82) and insisted upon as having been forced upon her by the negligence of defendant in not stopping its train, and by failing to do so forced her as a dernier resort to accept the lesser of two apparent dangers. If the train was stopped at or near the clear-post, as testified to by defendant's witnesses, then defendant discharged its duty and would not be liable; but if it was not stopped, but continued its course, as testified to by plaintiff and her witnesses, it would be. When did it become the duty of defendant to stop the train? When the engineer first saw the ladies on the trestle? Certainly not, for he saw one run forward to get off twenty-five or fifty yards ahead of the engine. The other two remained upon the trestle and were in no danger of the engine if it was stopped at the clear-post, as testified to by the employees on the train. They had the same opportunity and apparently a like physical power to come forward and get off that Miss Emmett had, had they so desired. Why they remained was not known to the engineer. He did not know of the feeble condition of plaintiff, but had a right to presume that she was able to take care of herself, and that she and her companion would do so. If, being conscious of her feeble condition, she became frightened and in her excitement imprudently and unnecessarily jumped over and was injured that was her misfortune and not defendant's fault. She was not placed or induced to go upon the trestle by any negligence of defendant company, but being there she could have remained or gone in the direction of the bridge with perfect safety if unable to head off the train, as Miss Emmett did. Therefore, if she adopted a perilous mode in endeavoring to escape an apprehended danger under excitement, defendant would not be responsible for the result. Beach on Contributory Negligence (*3* Ed.), sec. 40; *Jones v. Boyce,* 1 Starkie, 493. Had plaintiff gone upon the trestle through the negligence of defendant and acted negligently or wildly under the excitement in adopting a means of escape and been injured, then it would not be con- (83)

sidered negligence or contributory negligence, although there may have been at her command a safer and more certain means of escape, "for the reason that persons in great peril are not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances." Beach, *supra.* But "no such allowance is made in favor of one whose own fault has brought him into the peril which disturbs his judgment." 1 Shearman and Red. on Neg., sec. 89. So plaintiff having voluntarily gone upon this dangerous place, which is deemed negligence by our Court (*Little v. R. R., supra*), she would be required to guarantee her own judgment when confronted with peril and the emergency arose.

But plaintiff alleges and so testifies (together with two other witnesses) that the train did not stop, and had she remained on the trestle she would have been killed; wherefore she acted prudently and escaped with an injured ankle and back rather than losing her life. Whether this was so or not was most material to the issue. If it be true, as she testifies, then defendant company, having had the last *clear chance,* and having failed to exercise it, would be guilty of negligence, and plaintiff would be entitled to recover notwithstanding her negligence. But if it be not true, and be as testified to by eight witnesses on behalf of defendant, and the engine was stopped some thirty-five or forty feet from her, then she was not in peril from the approaching train, and no allowance would be made by the unwise, negligent and imprudent method of escape adopted by her under excitement and apprehension, and defendant company would not be guilty of negligence, and his Honor should have instructed the jury as prayed for in the third prayer.

New trial.

DOUGLAS, J., concurs only in result.

Cited: Strickland v. R. R., 150 N. C., 10.

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(84)

KNIGHT v. TAYLOR.

(Filed 30 September, 1902.)

1. JUSTICES OF THE PEACE — *Jurisdiction — Sum Demanded — Constitution, Art. IV, Sec. 27—The Code, Sec.* 835.

In a civil action founded on contract, the jurisdiction of a justice of the peace is determined by the sum demanded.

2. ACCOUNTS—*Verified Accounts—Laws* 1897, *Ch.* 480.

An itemized account to be *prima facie* evidence of its correctness must be properly verified and stated so as to show an indebtedness.

ACTION by M. E. Knight against J. C. Taylor and others, heard by *Judge Francis D. Winston* and a jury, at April Term, 1902, of PITT. From a judgment for the plaintiff the defendants appealed.

F. G. James and *Jas. H. Pou* for the plaintiff.
Skinner & Whedbee for the defendants.

DOUGLAS, J. This was a civil action, begun before a justice of the peace, from whose return on appeal we take the following statement.

"The plaintiff complained for balance due on an account for $1,000 for one-third interest in the stock of goods owned by J. C. Taylor & Co., which account was, on 29 March, 1899, transferred to and assigned to this plaintiff for full value, subject to a credit of $800 paid on said account 16 December, 1899, amount now claimed in this action being $200, interest and cost.

"The defendant denied the justness of the claim and plead to the jurisdiction of the court the general issue payment and satisfaction, offsets and counterclaim."

The plea to the jurisdiction of the court was apparently based upon the fact that owing to the accumulation of interest before the payment of the $800 credit the principal of the account still remained over $200, exclusive of the interest (85) thereon.

The Constitution of this State (Art. IV, sec. 27) says: "The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions founded on contract wherein the *sum demanded* shall not exceed two hundred dollars." Also, the Code, sec. 834; *Martin v. Goode,* 111 N. C., 288, 32 Am. St., 799.

It is the sum demanded in good faith that determines the jurisdiction, and if that sum, exclusive of interest thereon, does not exceed $200 in an action on contract, the jurisdiction of the justice attaches, because the plaintiff cannot recover more than he has demanded. If, however, the principal sum exceeds $200 the action can be brought within the jurisdiction of the justice under the provisions of section 835 of the Code, by the plaintiff formally remitting all in excess thereof. This is in effect simply a reduction by the plaintiff of the sum demanded down to the jurisdictional limitation.

However, the defendants contend that the justice had no jurisdiction because the evidence disclosed that the account sued on was more than $200, and that the plaintiff did not formally remit the excess. This contention cannot be sustained. It is not what the plaintiff might be entitled to recover if he were suing in another court, but the amount he is demanding that determines the jurisdiction by the express words of the statute as well as of the Constitution.

By his own action he has limited his possible recovery to the sum demanded, and has in legal effect, certainly as far as this action is concerned, remitted the excess by necessary implication. *Brantley v. Finch,* 97 N. C., 91, and *Cromer v. Marsha,* 122 N. C., 563, are directly in point.

(86) Upon the trial the first evidence introduced by the plaintiff was a verified account, which is as follows: "J. C. Taylor, W. A. Taylor and F. B. Knight, 28 March, 1899; to one-third interest in stock of goods known as J. C. Taylor & Co., $1,000. Interest at 6 per cent from date. 16 December, 1899, by cash, $800."

"M. E. Knight, being duly sworn, says that the above account is correct and just, and that no part has been paid except $800, paid 16 December, 1899, and that there is still due and unpaid $200 and interest; that the said account is her property, and was transferred to her and delivered to her on 29 March, 1899. (Signed) M. E. Knight. Sworn to before me, S. T. Carson, J. P." "On the back of this account was written the following words in the handwriting of F. B. Knight: '29 March, 1899, I transfer all my right and title to this claim to M. E. Knight, without recourse on me.'" To the introduction of this evidence the defendant objected. We think the objection should have been sustained. The Act of 1897, chapter 480 of the Public Laws, makes an itemized statement of an account, properly verified, *prima facie* evidence of its correctness. This clearly can apply only where accounts are not only properly verified but are properly stated so as to show an indebtedness. The act simply makes such an account *prima facie* evidence of what it professes to show; but if it shows nothing, then it is irrelevant. That before us does not profess to show the relation of debtor and creditor between any one. J. C. Taylor, W. A. Taylor and F. B. Knight are all placed in one class as debtors, but to whom does not appear. M. E. Knight now claims to own the account, not as original creditor, but by assignment from F. B. Knight, one of the apparent debtors. We may infer from the evidence, which is by no means clear, that the Taylors bought Knight's

interest in the common stock of goods at the price named in the account, but it does not say so.

We think that for an account to be introduced as substantive evidence it must upon its face tend to prove some (87) material fact at issue. We doubt whether this account can be brought under the act of 1897, because it is neither "itemized" nor is it "for goods sold and delivered"; but in any event we think that it was irrelevant, and therefore should have been excluded.

New trial.

Cited: Riddle v. Mining Co., 150 N. C., 690.

GILL v. DIXON.

(Filed 30 September, 1902.)

PENSIONS—*Assignment—Acts* 1889, *Ch.* 198—*The Code, Sec.* 177.

Instalments of a pension payable in the future are not assignable.

ACTION by D. H. Gill against Wm. Dixon and others, heard by *Judge H. R. Bryan,* at February Term, 1902, of VANCE. From a judgment sustaining a demurrer to the complaint the plaintiff appealed.

T. T. Hicks for the plaintiff.
W. B. Shaw for the defendants.

MONTGOMERY, J. The defendants in this action executed and delivered to the plaintiff a paper-writing, a copy of which is as follows: "I, William Dixon, am now indebted to D. H. Gill in the sum of one hundred and twenty-five dollars, after a full and complete statement of all matters between us; for this he holds a mortgage on my horse and other personal property, which I am desirous that he shall indulge. I am in receipt of a pension annually from the State of North Carolina on account of services in the late war of the Confederacy. This pension and all sums to be due me thereon from year to (88) year hereafter I assign to said D. H. Gill, and hereby give him full power and authority to collect the same and receipt for it in my name until the proceeds therefrom shall pay this debt and interest. This assignment of my said pension is made upon

the further consideration that he now permits me to have and remove from his land my crop of corn, about twenty-five barrels, made this year, which is liable to him for the rent and supplies which compose the debt due by me to him and mentioned above. In the event of my death or the cessation of said pension in any way, for any cause, he shall not be obliged to indulge his said mortgage any longer and may foreclose the mortgage at once. Bettie Dixon, wife of said William Dixon, hereby assents to the assignment of this pension, and agrees that in the event of the death of her said husband prior to her death this shall operate to pass and assign to said D. H. Gill any pension that may accrue to her as his widow until this debt is paid and satisfied. This 31 December, 1896."

Pursuant to the above agreement the pensioner, William Dixon, delivered to the plaintiff, or permitted him to receive, pension warrants for 1897, 1898 and 1899, but since that time has refused to have applied to the debt the warrants for pensions. They are held by some one to await the result of this action. The object of this suit is to have the pension warrants which have been issued to defendant Dixon since 1899 subjected to the payment of the balance due on his debt to the plaintiff. The defendants filed a demurrer to the complaint, in which they assign various grounds upon which it is contended that the assignment was invalid. The demurrer was sustained. The question is, were the future pensions undertaken to be conveyed in the agreement assignable at law? It is not denied that a warrant for a pension is assignable. It is the State's obligation and promise to pay. But legislative provision for a pen-
(89) sion until the warrant has been issued is not a contract between the State and the pensioner. Pension legislation is largely founded on charitable considerations—the idea of a gift to the pensioner for his future support. *In re Smith,* 130 N. C., 638. It would seem, therefore, that under section 177 of the Code a pension, to become payable in the future, would not be assignable. The language of the Code is: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." The plaintiff, however, contends that section 11 of the Pension Act, chapter 198 of the Laws of 1889, recognizes the right and promise of the pensioner to assign or sell a future pension. That section is in the following words: "Any person who shall speculate or purchase for a less sum than that to which each may be entitled, the claim of any soldier or sailor, or widow of a deceased soldier or sailor, allowed under

the provisions of this act, shall be guilty of a misdemeanor," etc. The word "claim," it is insisted, embraces more than the *warrant* for the pension. We do not concur in that interpretation. The legal meaning of the word "claim," without other qualifying language, is a demand for something as a right, something that could be in law the subject of a demand. There are no words in the section quoted that extend or enlarge the legal meaning of "claim," and we must hold that it refers to a warrant issued for the pension. It therefore follows that the paper-writing executed by the defendants to the plaintiff is inoperative, and the demurrer was properly sustained.

No error.

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(90)

KERR v. HICKS.

(Filed 30 September, 1902.)

1. AMENDMENTS—*Nunc Pro Tunc—Record.*

An amendment by the court of the record *nunc pro tunc*, to speak the truth, there being no conflicting evidence, is conclusive.

2. REFERENCES—*Pleadings.*

Where a party excepts to an order of reference made before the filing of pleadings, he is entitled to a jury trial.

3. REFERENCES—*Pleadings.*

An order of reference cannot be made until pleadings are filed.

4. REFERENCES—*Exception and Objections.*

The trial judge may permit exceptions to report of referee at any time before judgment.

5. REFERENCES—*Jury—Evidence—Trial.*

Where there is a reference of a case, evidence before the jury is not restricted to the evidence heard by the referee.

6. DEPOSITIONS—*References.*

An objection that commissioner to take depositions was related to one of the parties must be taken at time of opening such depositions before the clerk.

FURCHES, C. J., dissenting.

PETITION to rehear this case as reported in 129 N. C., 141, is allowed.

Shepherd & Shepherd and *J. C. Stewart* for the petitioner.
Stevens, Beasley & Weeks in opposition.

CLARK, J. This was an action begun in 1891 by husband and wife, mortgagors, against the mortgagee, alleging overcharges, usury and overpayment, asking for a statement of the account, judgment for balance due plaintiffs and a cancellation of the mortgage, and for a restraining order against the sale of
(91) the mortgaged property pending the action. The defendant averred in his answer, among other things, that the plaintiffs were estopped by accounts rendered, which they had accepted without objection. At the return term time was given to file complaint and answer, and at the same term a reference was ordered, no pleadings having been filed. At February Term, 1894, the plaintiffs having demanded a trial by jury of the issues of fact raised by the pleadings on the ground that the reference had been compulsory, Judge Brown, after hearing affidavits on both sides, found as a fact that the reference was compulsory and not by consent, and that "the *plaintiffs excepted to* any order purporting to be a consent reference," and directed that the record and order of reference be amended *nunc pro tunc* to show these facts, and the parties were ordered to prepare such issues of fact as each claimed arose from the pleadings before next term of the court. The defendant excepted to this order, but the authority and duty of the court to amend the record to speak the truth are beyond question, and there being conflicting evidence, his finding of fact is conclusive. See cases cited in Clark's Code (3 Ed.), pages 305, 306.

At October Term, 1897, the issues were submitted to the jury and found in favor of the plaintiffs, and thereupon the cause was recommitted to the referee with directions to reform and revise his account to conform to the verdict of the jury. An appeal was taken by the defendant from the order recommitting the report, but the appeal was dismissed because premature. *Kerr v. Hicks,* 122 N. C., 409.

At February Term, 1901, upon exceptions filed to the amended report, Judge Hoke rendered the judgment set out in the record. The defendant filed fourteen exceptions thereto, which repeated and included all the exceptions taken by him during the progress of the cause, including, of course, those set out in the appeal, which was dismissed as premature.

When this last appeal was heard at August Term, 1901
(92) (*Kerr v. Hicks,* 129 N. C., 141), the Court held that the reference in 1891 having been compulsory, the plaintiffs were entitled to appeal, because there was a plea in bar,

and not having appealed they had no right thereafter to insist on their right to a jury trial. We are now called on by this rehearing to reconsider that ruling. This point was raised by the Court *ex mero motu* upon examination of the record, and we did not have the benefit of argument by counsel. Indeed one of the defendant's exceptions (2) on appeal is that this order of reference was invalid because made before any pleadings were in. We were inadvertent to this fact that when the reference was ordered and exception noted (as the judge finds was done), there were no pleadings, and consequently no plea in bar. The order of reference on its face recites that the plaintiffs should have fifteen days after adjournment of the court to file complaint, and the defendant fifteen days thereafter to file answer. The exception, therefore, to the order of reference then entered was all that was required, and an appeal, if prosecuted, would have been dismissed as premature. The plea of an estoppel *in pais* is rather a defense than a plea in bar, which must be disposed of before a trial on the issue. But if it were a plea in bar it was not on file when the order of reference was made, and the plaintiffs could not appeal for failure to dispose of it. An appeal from an interlocutory order is usually ground for an exception and not an appeal. When an appeal is permissible from such order it is never compulsory, and the party entitled thereto can, if he prefers, note his exception and have the point reviewed on appeal from the final hearing, because (as in this case) he may be satisfied with the future action of the court and not wish to appeal. Why should the plaintiffs have appealed here when their exception to the reference was in and they knew this preserved their right to a jury trial, and they would only wish to appeal when that was denied (93) them. Besides, the alleged estoppel could not be a plea in bar in this action to surcharge an account for usury. If a plea in bar the defendant waived it by not excepting to the order of reference. *Grant v. Hughes,* 96 N. C., 177; *Wilson v. Pearson,* 102 N. C., 290. The plaintiffs had nothing to object to except that the reference was compulsory, and that was matter for exception and not for appeal.

When the report came in the plaintiffs did insist that the reference, having been compulsory and an exception duly noted, they were entitled to a trial by jury, and the judge so held, and the defendant did not appeal. Had he done so his appeal must have been dismissed as premature. On reconsideration, therefore, we think that there was inadvertence in our opinion at Fall Term, 1901, and we reinstate the case as it stood at that hearing.

This brings us to the fourteen exceptions brought up by the defendant in that appeal, which are:

1. That *Judge Brown* erred in amending the record to show that the reference was compulsory, and that exception was taken thereto at the time. This point we have already passed on above.

2. That it was error in *Judge Boykin,* at December Term, 1891, to make the order of reference before any pleadings were filed that could raise issues. This is true (*Jones v. Beaman,* 117 N. C., 259), but as it was the plaintiffs who excepted (and defendant did not) at the time, and the plaintiffs afterwards secured a jury trial because of the invalidity of the reference, it cannot be seen how the defendant can either present or be benefited by this exception. The plaintiffs had nothing to except to, except that the reference was compulsory and made before pleadings filed, and these were matters of exception and not of appeal.

(94) 3. That *Judge Brown* erred in permitting plaintiffs to file exceptions to the referee's report at February Term, 1894. We presume that this is on the ground that the exceptions should have been filed at October Term, 1893, when the report was filed, but the judge had the discretion to permit them to be filed at any time before judgment. See cases cited in Clark's Code (3 Ed.), p. 569.

4. That *Judge Allen* erred at October Term, 1897, in refusing to submit the third and fourth issues tendered by the defendant. These matters could be and were presented to the jury upon the issues settled by the court, and the refusal to submit the issues was not error. *Paper Co. v. Chronicle Co.,* 115 N. C., 147; *Allen v. Allen,* 114 N. C., 121.

5. That *Judge Allen* erred in overruling defendant's objections to the deposition of R. P. Paddison. These objections were: (1) That the deposition was not before the referee nor embraced in his report; but this was a trial before the jury, and evidence on the issues was not restricted to that heard by the referee. (2) That the commissioner taking the deposition was father-in-law of John D. Kerr. This objection was not taken before the clerk by whom the deposition had been regularly opened, examined and allowed as evidence to be read in this trial without objection, and, besides, said commissioner was father of John D. Kerr's first wife, and not of his present wife, who is plaintiff in this action.

6. That it was error to go to trial before the jury when there was an issue in bar (the estoppel by furnishing accounts stated), but the reference was invalid, according to the defendant's second exception, and the ground of the alleged plea in bar was

one of the matters submitted to the jury, and was embraced in the issues passed on by them.

7. That for the above reason it was error to recommit the report to the referee to make it conform to the verdict. The defendant had not excepted to the reference, and had therefore waived any exception to it. Besides, the recommittal was simply in effect a reference to state the account in accord- (95) ance with the facts settled by the verdict.

8. That *Judge Hoke,* at February Term, 1901, overruled an exception to the same purport as the second exception, above stated, which we have also overruled, *supra.*

9. That *Judge Hoke* erred in not allowing an exception to the manner of computing interest. The judge finds that that method of computing the interest was tendered the referee by the defendant in a calculation of interest made by him, and was adopted at his suggestion by the referee, as fully appears by the referee's report, and, besides, is a method which usually makes in favor of the debtor.

10. That *Judge Hoke* erred in overruling the defendant's exception that the referee failed to charge in his account certain items of leakage. His Honor finds that said items were fully considered and passed upon by the referee, and are embraced in his account.

11. That *Judge Hoke* erred in finding any facts regarding the order of reference. His Honor simply recited the matters of record, and as we have found them to be, on inspection of the record.

12. That *Judge Hoke* erred in not striking out all previous proceedings and ordering a new trial upon the issues raised by the pleadings, and especially by the plea in bar. A trial upon those issues had been had before *Judge Allen* at October Term, 1897, and *Judge Hoke* had no power to set aside the action of his predecessor, which we have just reviewed above, and in which we find no error.

13. That *Judge Hoke* erred in not rendering judgment for plaintiffs upon the account filed by the referee, as reported by him. But the second re-reference was made at the instance of the defendant, who submitted his statement of the accounts, which was adopted by the referee. (See referee's report, October Term, 1900.)

14. That *Judge Hoke* erred in not rendering judgment (96) for the defendant upon the first report filed. This has already been disposed of by what we have said.

We have carefully gone through the entire record and each and every of above fourteen exceptions brought up by the appeal,

and find no error. The petition is allowed, and the judgment below is affirmed.

Petition allowed.

FURCHES, C. J., dissents, and refers to his opinion, 129 N. C., 141.

Cited: Shankle v. Whitley, post, 169; *Kerr v. Hicks,* 133 N. C., 175, 177; *Jones v. Wooten,* 137 N. C., 425.

COOK v. AMERICAN EXCHANGE BANK.

(Filed 7 October, 1902.)

PLEADINGS—*Answer—Discretion—Appeal—The Code, Sec.* 274.

The trial court may permit an answer to be filed after the Supreme Court has decided that judgment by default should have been entered for the plaintiff.

PETITION to rehear this case, reported in 130 N. C., 183, allowed, and case remanded.

Busbee & Busbee, G. W. Ward and *Norris Morey* for the petitioners.

E. F. Aydlett and *F. H. Busbee* in opposition.

MONTGOMERY, J. This case is before us again upon the defendants' petition to rehear. We have had it under consideration twice before, and it will be found reported in 129 N. C., 149, and 130 N. C., 183. On the first appeal, the plaintiff's alleged grievances were, first, the refusal of the court below to grant him a judgment upon a verified complaint, no answer having been made; and, second, that his Honor vacated the
(97) attachment which had been sued and levied upon the defendants' property by the plaintiff. The vacation of the attachment seemed to have been acquiesced in by the plaintiff when it came to be argued here; and we held that the agreement entered into between the counsel on both sides, and set out in the first reported case, amounted to a general appearance in the action by the defendants; and that, as the complaint was filed and duly verified, and no answer having been made for two terms, the plaintiff was entitled to his judgment at that time, and that the judge was in error in refusing it. We are of that

opinion still on these questions. The opinion of this Court in the first appeal reached the Superior Court of Dare in time for its November Term, 1901, when the plaintiff moved for judgment according to that opinion. At the same time the defendants, still claiming a special appearance, entered a motion to dismiss the action "for want of legal service." Later, the defendants withdrew their motion and asked leave of the court to answer the complaint. The court refused the plaintiff's motion and granted to the defendants leave to file an answer, which was done. The plaintiff appealed from both rulings. Upon that appeal this Court held that his Honor below erred in not rendering judgment for the plaintiffs, and that it was not within his discretion to reopen the case for further pleadings or for any other purpose. The reason assigned by this Court for its holding was that the matter in controversy had been concluded by the decision of this Court in the first appeal; in other words, that the opinion of this Court in the first appeal was a final determination of the matter in controversy between the parties. After a full consideration of the petition to rehear, we think there was error in our conclusion upon the last appeal. We overlooked the full significance of *Griffin v. Light Co.*, 111 N. C., 434. There the plaintiff had put in a verified complaint, and the defendant had failed to verify its answer, and the (98) judge below had refused to grant judgment for the plaintiff on the motion of his counsel. This Court said that that was appealable error; and the Court added: "Since, however, the case goes back, it will be in the discretion of the judge below to permit a verified answer to be filed. Code, sec. 274. Whether he will permit this, should largely depend whether the defendants can satisfy him that they had a meritorious defense, for it is unquestionably true that 'a delay of justice is often a denial of justice.' "

It was in the power of this Court to have entered a judgment here upon the first appeal, but it was not done. So the case was sent back to the Superior Court, with a decision upon the question then involved, *i. e.*, the right of the plaintiff to his judgment under the then existing circumstances, where there was a verified complaint and no answer. There was no judgment in the court below at the time of the decision of this Court, nor has one ever been rendered in that court up to this time.

When, therefore, the plaintiff made his motion for judgment, and the defendant asked leave to file an answer, his Honor, looking at the case in all its aspects, considered it proper to let the defendant be heard by an answer; and, upon a reconsideration of the whole matter, we are decidedly of the opinion that the

ruling was a correct one. And this view of the case in nowise conflicts with *Calvert v. Peebles,* 82 N. C., 334, and *Dobson v. Simonton,* 100 N. C., 56. In those cases it was held that where this Court affirmed the judgment of the court below, that court had no right or power to disturb or modify the judgment in any respect, and that such judgment could only be corrected or modified by a direct proceeding, as pointed out in those last-mentioned cases. Neither is *Banking Co. v. Morehead* 126 N. C.,
(99) 279, in conflict with this decision, for the reason that the judgment of the Superior Court was not altered or modified by the proceedings which took place after the decision of this Court. The judgment was not interfered with by those proceedings, but only the respective liabilities of the defendants to each other, and not to the plaintiff, were investigated.

In retracing our steps in this case to the path of former adjudications, we are glad that we have corrected a mistake of practice, and not one involving the rights of property.

Petition allowed and case remanded for further proceedings.

Petition allowed.

NORFLEET v. BAKER.

(Filed 7 October, 1902.)

CHATTEL MORTGAGES—*Mortgages—Liens—Landlord and Tenant.*

A mortgage given by a tenant to a third person on his crop, produced on a certain farm, does not give a lien on rents paid by a sub-tenant of a portion of the farm where such rents are assigned before the execution of the mortgage.

ACTION by G. S. Norfleet and another against G. W. Baker and others, heard by *Judge George H. Brown,* at April Term, 1902, of BERTIE. From a judgment for the defendants the plaintiffs appealed.

St. Leon Scull for the plaintiffs.

Shepherd & Shepherd and *Peebles & Martin* for the defendants.

(100) COOK, J. This action was heard upon the facts agreed, upon which his Honor rendered judgment in favor of defendants, and plaintiffs appealed. The facts agreed are as follows, to-wit:

"For the year 1901 Claudius Hyman rented of Freeman Hardy a part of the tract of land in Bertie County known as the 'Snow Field' tract, it also being known as 'Robert Thompson old place.' On or about 1 January, 1901, said Hyman rented to Miles Pugh for said year twenty acres of said land, and was to receive as rent therefor 875 pounds of lint cotton. On 19 January, 1901, said Claudius Hyman, for full value received, sold, transferred and assigned to defendants the said 875 pounds of lint cotton and gave to defendant a written order for same on Miles Pugh, a copy of which is attached, marked 'Exhibit B.' In pursuance of said order, Miles Pugh delivered to defendants the said 875 pounds of lint cotton in the fall of 1901, which was worth $61.25. Said cotton was raised on the 20 acres of land, as aforesaid, by Miles Pugh, and was cultivated by said Pugh and not by said Claudius Hyman. On 25 January, 1901, said Hyman executed to plaintiffs a crop lien, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this statement of agreed facts. That after 25 January, 1901, plaintiffs, in pursuance of said crop lien, advanced to said Claudius Hyman over $300, and there is now due them over $200. That prior to and on 25 January, 1901, Miles Pugh was living on and in possession of the 20 acres of land rented as aforesaid. Plaintiffs had no actual knowledge of said fact that any part of said land was rented to Pugh when they took the lien."

Exhibit A.—"Whereas, G. S. Norfleet & Co. have this day agreed to make advances of supplies and money to Claudius Hyman, from time to time, as required, during 1901, to an amount not to exceed $265, to be by him expended in the cultivation of a crop, during said year, upon the follow- (101) ing-described lands: a tract of land known as 'Snow Field,' owned by Godwin Cotten, and any other land that he may cultivate during said year: Now, therefore, in consideration of the premises, I do promise to pay the full amount advanced to me on or before 1 November, 1901, and do hereby give to the said G. S. Norfleet & Co. a lien upon all the crops which may be made by me upon said land during said year, to the extent of such advances, in accordance with the statute in such case made and provided; and if I fail to pay the amount so advanced by the time specified, said G. S. Norfleet & Co. shall have power to take possession of said crop and sell the same, the proceeds to be applied to the payment of said advances, and the surplus, if any, to me. Now, also, to further secure the payment of the advances to be made, as before mentioned, the said Claudius Hyman does hereby sell and convey to the said G. S. Norfleet & Co. all the crops which may be made by him during the said year 1901 upon

the above-described lands, and also the following-described articles of personal property, to-wit: one dark-bay horse, named Jim; one gray mare, named Hector; one farm cart and wheels, with iron axle; two sows. All of the above property is now in my possession." . . .

The question presented is, does the lien cover the crops made upon the *entire tract* of lands, being those made by Hyman himself and also those made by his tenants, or does it cover *only* those made by Hyman?

From the context of the deed it seems clear to us that his Honor was right in holding that it only covered the crops made by Hyman himself. The advances were made to him, "to be by *him* expended in the cultivation of a crop upon the following-described land, . . . and any other land that *he* may cultivate." . . . He placed the lien upon all the crops which may be made by *"me"* (him). And to "further secure (102) the payment of the advances . . . the said Hyman does hereby sell and convey . . . all the crops which may be made by *him* . . . upon the above-described land, and also . . . on dark bay horse," etc. (The italics are ours.) Was it intended by the parties that any crop, other than that which *Hyman* would cultivate, should be encumbered for the advances? The *particular* crop encumbered is specially mentioned, and therefore any other is excluded. *Expressio unius est exclusio alterius.* The presumption is that, having expressed *some,* they have expressed *all* the conditions by which they intend to be bound under the instrument. The language used is simple, definite and unequivocal, about the meaning of which there can be no doubt. Had the parties intended that the *rents* from such land as might be rented by him to others should be also conveyed, they could and should have so stated in the deed, but they did not. But it is argued that the crops made upon that entire tract of land are necessarily included in the deed. How can this be so? When Pugh rented the land from Hyman, there was no encumbrance upon the land or the crops to be grown thereon, except the lien of the landlord from whom Hyman rented, and that is not involved in this question. The tenancy of Pugh gave him an estate in the land he rented, and Hyman had no interest in the crops to be grown thereon, except his landlord's lien, securing his rent. Hyman could not mortgage Pugh's crop. It is true the statute vests the constructive possession of the crop in Hyman, Pugh's landlord, but it is limited to the payment of the rent; the rent being paid, the lien and constructive possession vanish. The rent is a species of incorporeal hereditament, and became the property of Hyman

as soon as the land was rented by Pugh, which he had a right to sell, transfer and assign, free from all liens, except that of his landlord, which he did sell, assign and transfer to defendants six days before he executed the deed relied upon.

But it is further argued that if plaintiff's deed did not (103) cover all the crops made upon that *entire tract* of land, then Hyman could have rented out all of the land (cultivated none himself) and transferred the rents and defrauded plaintiffs of the entire amount. That might be so, but the deed provides that the advances were agreed to be made "from time to time, as required during the year," and it seems that this provision was made to prevent such an imposition. However, that condition does not exist in this case, for it appears that Hyman did make a crop himself, and utilized all of the land, except the 20 acres rented to Pugh. Nevertheless, it is the province of the courts to construe deeds and contracts so as to give effect to the intention of the parties at the time the contract is made. The terms are made by the parties, by which they are bound, and we cannot construe them with reference to a possible breach.

Affirmed.

HOUSE v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 7 October, 1902.)

1. NONSUIT—*Dismissal—Evidence.*

   On a motion for a nonsuit, the evidence of the plaintiff must be accepted as true. and all the evidence must be construed in the most favorable light to him.

2. CONTRIBUTORY NEGLIGENCE—*Questions for Jury—Personal Injury—Railroads.*

   In an action against a railroad company for personal injuries the question of contributory negligence is for the jury if there is a conflict in the evidence.

3. CONTRIBUTORY NEGLIGENCE—*Directing Verdict—Burden of Proof—Laws* 1887, *Ch.* 33.

   In an action against a railroad company for personal injuries the burden of proving contributory negligence being on the defendant, the trial court cannot direct a verdict for the defendant.

ACTION by J. W. House against the Seaboard Air Line (104) Railroad Company, heard by *Judge M. H. Justice,* at

January Term, 1902, of FRANKLIN. From judgment of nonsuit the plaintiff appealed.

F. S. Spruill for the plaintiff.
Day & Bell for the defendant.

COOK, J. Upon the conclusion of the evidence, defendant moved the judge to instruct the jury that, considering all the evidence, it would be their duty to answer the second issue, to-wit, "Did plaintiff, by his own negligence, contribute to his own injury?" "Yes." The judge thereupon intimated that he would so hold and so instruct them. Plaintiff submitted to a nonsuit and appealed.

After carefully reading the evidence of plaintiff and that of defendant (sixty-nine pages of the printed record), we find it to be very conflicting. If the evidence of plaintiff be believed (and it must be accepted as true and all the evidence construed in the most favorable light to him, upon a motion to nonsuit), then the jury would be warranted in finding that he was not negligent. While if that of plaintiff be not believed, and that of defendant should be believed, then the jury would be warranted in finding that he was negligent, and but for such negligence the injury would not have occurred. What is negligence or contributory negligence is a question of law upon a given or ascertained state of facts, to be decided by the court. But when the facts are not ascertained and are in dispute, then negligence becomes a mixed question of law and fact, and it is the duty of the judge to leave the question of fact to be found by the jury, under proper instructions concerning the rule of ordinary care, and to apply the law to the facts as they may find them. *Miller v. R. R.*, 128 N. C., 26, and cases there cited; *Moore v. R. R.*, 128 N. C., 455.

(105) Here the facts were not found and the evidence concerning them conflicting, with the burden of proving contributory negligence resting upon defendant. Laws 1887, ch. 33. So his Honor erred in ruling that he would direct the jury to answer the second issue "Yes." The principle that the court cannot direct a verdict in favor of a party upon whom rests the burden of proof is now too well settled to admit of discussion. *Cox v. R. R.*, 123 N. C., 604, and cases there cited.

Under rule 31 of the Rules of Practice of this Court, plaintiff's motion is allowed, and the entire cost of printing the transcript on appeal will be taxed against defendant.

New trial.

Cited: Lindsay v. R. R., 132 N. C., 60; *Bessent v. R. R., ib.*, 946; *Graves v. R. R.*, 136 N. C., 10; *Kyles v. R. R.*, 147 N. C., 396.

LOFTIN v. HILL.

(Filed 7 October, 1902.)

1. NEGOTIABLE INSTRUMENTS—*Bills and Notes—Evidence.*

In this action on a promissory note, assigned before maturity, the evidence is sufficient to be submitted to the jury on the question whether the assignee was a *bona fide* purchaser without notice of fraud in the execution of the note.

2. NEGOTIABLE INSTRUMENTS — *Bills and Notes — Evidence — Contracts.*

In an action on a note by the assignee, there being some evidence that the assignee was not a *bona fide* purchaser without notice, a contemporaneous contract with the execution of the note is competent evidence on the question of consideration.

ACTION by S. H. Loftin and others against R. F. Hill, heard by *Judge E. W. Timberlake* and a jury, at March Term, 1902, of LENOIR. From a judgment for the plaintiffs the defendant appealed.

No counsel for the plaintiffs. (106)
N. J. Rouse for the defendant.

MONTGOMERY, J. The plaintiff is the assignee, before maturity, of a plain promissory note for the amount of $100, payable to W. T. Magee & Co. The defendant, the maker, in his defense, pleaded fraud in the treaty leading up to the execution of the note, failure of consideration, equities arising out of a contemporaneous agreement between the maker and the payee, and that the plaintiff had, or ought to have had, notice of all these matters; and he further pleaded notice on the assignee's part that the payees were doing a fraudulent business, and that he had knowledge of such facts; that his action in taking the note amounted to bad faith, and that he did not take the note in good faith and for value.

On the trial (an appeal from a justice's court), the plaintiff, as a witness in his own behalf, testified that he bought the note of W. T. Magee before maturity, and for value, and without any

knowledge of any fraud; that he paid $30 for it; that Magee was a stranger in the community, and asked the witness, before taking the note from Hill, the defendant, as to Hill's financial standing, and that he told him that the defendant was solvent and that his note would be good. The counsel for the defendant asked the witness, "If, on Saturday next preceding the purchase by witness of defendant's note in controversy, one J. K. Aldridge did not ask the witness (plaintiff) whether he had purchased from said Magee a note of $100, executed by said Aldridge to said Magee & Co., and upon receiving from the witness an affirmative reply, if said Aldridge did not tell witness that said Magee & Co. were doing a fraudulent business, and that he held a contract against said note, and if the said Aldridge did not then show the witness (plaintiff) the said written contract?"

Upon the objection of the plaintiff, his Honor excluded (107) the evidence. The defendant, on being examined as a witness for himself, said:

"I am the defendant in this action, and signed the note in controversy. W. T. Magee came to my home, about five miles from Kinston, on Monday morning, about 10 o'clock. After some negotiation, I signed the note, and at the same time we both signed a contract, upon which the note was based. Soon after Magee left I began to think about the matter, and became convinced that I had been 'picked up,' and immediately hitched my horse and drove to Kinston, arriving there about 1 o'clock P. M. of the same day of the execution of the note. After a few moments' consultation with my attorney, I went to the Bank of Kinston and learned that the note had not been offered there. I then went to the plaintiff's bank and found that he was not in. I then went out, and soon found the plaintiff Loftin on the street, and asked him if he had bought my note. He said he had. I said, 'Mr. Loftin, I have been "picked up," and want to get my note.' I asked him what he paid for it, but he would not tell me. I then told him I had been defrauded and wanted to get my note in, and would pay him whatever he paid for it and something more. He said he would not take it; that he bought it to make money and would have to have what it called for. I then left him. I have never received any fertilizer distributors or other benefits under said contract, and have never heard from Magee since, and have investigated and found that there is no such concern as the Charlotte Plow Company."

The defendant then offered to introduce the contract executed by himself and Magee contemporaneously with the note, but upon the objection of the plaintiff his Honor refused to admit it. The contract, in substance, provided for the lease, for a term of

years, of the exclusive right to sell a patent fertilizer distributor—the Fuller fertilizer distributor. It was stipulated that the distributors would be furnished during the lease (108) through the Charlotte Plow Company or some other manufactory of Magee's selection. The lessee, the defendant, was to sell the distributors within the territory allotted to him, and to pay Magee a part of the profits, and to execute his note for $100 as a security for the payment of the profits. It was further agreed in the contract that "if the parties of the second part shall fail to pay said note at maturity, then the said party of the first part shall, at his option, have the right to cancel this contract and take back the sample distributor; but if at the time the party of the first part shall decide to cancel the said contract one-half of the profits on the distributors sold do not equal the amount of the said note, then the party of the first part shall surrender to the parties of the second part the note above referred to, upon the payment to the party of the first part by the parties of the second part of one-half of the profits on the distributors sold up to the said time."

The defendant then offered to prove by the witness J. K. Aldridge "that on Saturday before the plaintiff purchased defendant Hill's note the said Aldridge saw the plaintiff and told him he had heard that he had bought a note which he (Aldridge) had executed to Magee & Co.; that the plaintiff told him he had. Thereupon Aldridge told the plaintiff that Magee & Co. were doing a fraudulent business and defrauding the people of Lenoir County; that he (Aldridge) had a written contract against the note, which contract he showed to plaintiff, and he read it," but, on the objection of the plaintiff, the court refused to allow the evidence.

The defendant then tendered the following issue: "Did the plaintiff take the note sued on in good faith and for value?" and the court declined it, and submitted the usual issue in debt, and instructed the jury that if they believed the evidence to answer the issue for the plaintiff. The defendant excepted to each ruling of his Honor, all and each of them bearing (109) upon the same question. And we think the exceptions were well taken.

It is too well settled in our State to need the citation of precedents that the holder of a negotiable note is presumed to be the proper owner thereof, and that he had received it before it became due, for a valuable consideration, in usual course of business; and that if there be fraud or illegality in the inception of it, the burden is upon the maker to show it. But that presump-

tion is only *prima facie* evidence of such ownership, and may be rebutted or explained.

The defendant insists that he introduced evidence, and also offered evidence which was rejected erroneously by the court, tending to rebut that presumption by showing that the plaintiff was not a *bona fide* purchaser for value and without notice, and that the court erred in rejecting the proffered evidence, and also in refusing to submit an issue upon his contentions, and in instructing the jury that if they believe the evidence they should answer the issues in favor of the plaintiff. We are strongly inclined to the view that, outside the rejected evidence, the instruction to the jury was erroneous.

Magee, the payee of the note, was a stranger in the community and was known to the plaintiff to be doing some kind of a business with the people in Lenoir. Before he took the note from the defendant, the plaintiff talked the matter over with Magee and told him that the defendant was solvent and his note *would* be good. The defendant lived five miles in the country from Kinston, and at 10 o'clock in the morning executed the note. Within four hours after that time Magee returned to Kinston, sold the note to the plaintiff for $30, left the town and has never been heard of since. Also, the plaintiff, when asked by the defendant what he paid for the note, refused to tell him. The whole conduct of the plaintiff was so utterly repugnant to
(110) every idea of fair and open dealing as to shock the sensibilities of the ordinary man, and are so suspicious as to place the onus on him of extending his inquiries in reference to the circumstance in which this note was given. He had knowledge of such facts and circumstances—those which we have recited—which made it incumbent on him to inquire as to the character of the note which he purchased, and, that being so, he would be affected with knowledge of all that the inquiry would disclose. *Bunting v. Ricks,* 22 N. C., 130; 32 Am. Dec., 699; *Hulbert v. Douglas,* 94 N. C., 122.

It follows from what we have said that the judge ought to have permitted the contract between defendant and Magee to have been read in evidence. We further think that the evidence of Aldridge was competent. As we have said, this man Magee was a stranger; he was known to the defendant as engaged in some kind of business with the people of Lenoir, and Aldridge offered to prove that, before the plaintiff bought the note, he had been told by Aldridge that Magee was engaged in a fraudulent business and had defrauded him, and showed him the evidence of it in writing. The plaintiff's counsel, in his contention that the evidence of Aldridge was not competent, cited, among other

cases, three from our own reports—*Holmesley v. Hogue,* 47 N. C., 393; *Withrow v. Biggerstaff,* 87 N. C., 176, and *Winborne v. Lassiter,* 89 N. C., 1. We think the law of those cases does not apply to the facts of this case. In the first of them, *Holmesly v. Hogue,* it being an action by a creditor to establish the fraudulency of a certain conveyance made by the debtor defendant, it was held that a fraudulent transfer of other property which had been made by the defendant to another person could not be offered as evidence to prove the fraud under investigation; and the two other cases involve the same rule of evidence. In our case the question is whether, in a suit by the assignee of a note against the maker, evidence tending to (111) show that the payee, a stranger in the community and known to the assignee to be engaged in some kind of business, was engaged in a fraudulent business and had defrauded another person whose note he had taken in the course of that business, and that those facts had been made known to the assignee before he purchased the note in suit, is admissible to show circumstances calculated to attract the assignee's notice, put him on his guard and stimulate inquiry as to the character of the note.

There are facts in this case not found in *Farthing v. Dark,* 111 N. C., 243, and the decision there, in upholding in its integrity the law in reference to the rights of the holders of negotiable notes, is the extreme limit of that doctrine. We can go no further with it.

New trial.

Cited: Setzer v. Deal, 135 N. C., 430.

THOMPSON v. EXUM.

(Filed 7 October, 1902.)

CONTRACTS — *Evidence — Landlord and Tenant — Customs and Usages—Corroborative Evidence.*

In an action between a landlord and tenant as to the terms of a contract, testimony of another tenant as to the terms of a contract made with him is not admissible to corroborate the landlord.

ACTION by Levi Thompson against W. P. Exum, heard by *Judge O. H. Allen* and a jury, at April Term, 1902, of WAYNE. From a judgment for the plaintiff the defendant appealed.

Allen & Dortch for the plaintiff.
Isaac F. Dortch for the defendant.

(112) MONTGOMERY, J. The plaintiff was a cropper on the lands of the defendant, under a special contract, during 1900. When the season was over, the plaintiff claimed a part of the cotton seed, under the contract, which claim the defendant disputed. The defendant was introduced as a witness in his own behalf, and testified as to the contract between him and the plaintiff, and further said: "It is my invariable rule, in renting land, to stipulate that no cotton seed are to be carried away by the tenants, and I so said to the plaintiff. I never made a contract in renting land different as to cotton seed in all my life."

For the purpose of corroborating the defendant as to his alleged invariable rule concerning the renting of land, as to cotton seed, the defendant proposed to ask a witness for the plaintiff, on his cross-examination, "What was your contract of renting in 1900?" The question was not allowed, and the defendant excepted and appealed, and that is the only exception in the case. We think the court properly sustained the objection to the question. The avowed purpose of the question was to show the custom of the defendant in reference to the renting of his land, as to the cotton seed grown by his croppers. But the answer could have had no tendency toward establishing an invariable rule. If it had been answered in a manner most favorable to the plaintiff, only the terms of the contract with the witness would have been shown, and that would not have been competent.

Besides, the defendant, by his own statement, had a contract with the plaintiff, in which it was stipulated that no cotton seed was to be carried off the lands cultivated by the plaintiff. A contract between the defendant and every man in his county, containing a like provision as that which he contended was embraced in his contract with the plaintiff, could not be admitted to affect the terms of the particular contract between him and the plaintiff. It is permissible to introduce evidence to (113) show a custom or usage of a *place,* the home of a contract, for the purpose of explaining the meaning of terms used in it, or for the purpose of annexing incidents to it which do not contradict the terms of the contract. *Moore v. Eason,* 33 N. C., 568; *Brown v. Atkinson,* 91 N. C., 389. But this rule has never been extended, so far as we know, to apply to the business rules or customs of individuals.

No error.

ARNOLD v. HARDY.

(Filed 7 October, 1902.)

APPEAL—*Case on Appeal—Statement of Facts—New Trial.*

Where a case on appeal does not contain a sufficient statement of facts to enable the Supreme Court to make a decision, it will be remanded for a new trial.

ACTION by William Arnold and others against C. Hardy and wife, heard by *Judge W. S. O'B. Robinson* and a jury, at November Term, 1901, of HARNETT. From a judgment for the defendants the plaintiffs appealed.

Murchison & Johnson for the plaintiffs.
O. J. Spears and *T. M. Argo* for the defendants.

PER CURIAM. For the reasons given in *Arnold v. Dennis,* at this term of the Court, and also for the additional reason that it does not appear that F. H. Thomas, the devisee, in item 8 of the will (a construction of which seems to be the purpose of the appeal), died *without issue,* the most material part of the case, this case must go back for a new trial. It is said in the statement of the case that "plaintiffs *claim* that he died (114) without issue," but surely that must be found as a fact before it can be expected that we should make a decision in the matter. The case was made up by counsel.

New trial.

ARNOLD v. DENNIS.

(Filed 7 October, 1902.)

APPEAL—*Case on Appeal—Statement of Facts—New Trial.*

Where a case on appeal does not contain a sufficient statement of facts to enable the Supreme Court to make a decision, it will be remanded for a new trial.

ACTION by William Arnold and others against W. D. Dennis and others, heard by *Judge W. S. O'B. Robinson* and a jury, at November Term, 1901, of HARNETT. From a judgment for the defendants the plaintiffs appealed.

Murchison & Johnson for the plaintiffs.
Stewart & Godwin for the defendants.

PER CURIAM. In this case, made up by the counsel, we are unable to make a decision, for want of a sufficient statement of the facts. The plaintiffs allege a tenancy in common with the defendants, and pray for a sale for partition. The defendants plead sole seizin. There is no evidence sent up, and the statement of the case fails to state in what relation the parties stand to each other, or to the testator, or to the devisee, Nancy E. Thomas, named in the seventh item of the will, the construction of which seems to have been the object of the appeal. The case must be remanded for a fuller statement of the facts to be brought out on a new trial.

New trial.

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(115)

PAGE v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 7 October, 1902.)

1. INSURANCE—*Premium—Payment—Evidence—Trial.*

   The possession of a life insurance policy reciting that it should not be delivered till the payment of the first premium is *prima facie* evidence of the payment thereof.

2. INSURANCE—*Premium—Payment—Burden of Proof.*

   Where a defendant insurance company admits the execution of a life policy and the death of the assured, the burden of proving that the policy was not in force is on the defendant.

3. INSURANCE—*Executors and Administrators.*

   The possession of a policy of life insurance authorizes the possessor to administer on the estate of the assured, a non-resident.

4. ADMISSIONS—*Pleadings—Evidence—Answer—Insurance—The Code, Sec.* 268—*Issues.*

   Where an answer admits facts alleged in the complaint, such admissions may be considered by the trial court to determine whether the pleadings raise an issue, though the answer is not put in evidence.

ACTION by George Page, administrator of John Page, against the Life Insurance Company of Virginia, heard by *Judge W. S. O'B. Robinson* and a jury, at November Term, 1901, of HARNETT. From a judgment for the plaintiff the defendant appealed.

McLean & Clifford for the plaintiff.
Stewart & Godwin for the defendant.

CLARK, J. This is an action upon a policy of life insurance. The answer admitted the execution of the policy and death of the assured prior to the falling due of the first renewal premium, but averred that the policy was not in force at his death, that no premium had been paid, and that the policy was procured by fraud and misrepresentation; that the assured was a non-resident of the State and owned no property here, and (116) hence that administration had not been legally taken out here. But all these were matters of defense, the burden of which was upon the defense.

The plaintiff introduced the policy, which recited on its face that it was not to be delivered till the first premium was paid. Its possession by the plaintiff was *prima facie* evidence of payment, like a receipt (*Whitley v. Ins. Co.,* 71 N. C., 480), subject to proof, if offered, to the contrary. *Ormond v. Ins. Co.,* 96 N. C., 158.

The defendant demurred to the evidence, which being overruled, it offered no evidence, and his Honor properly instructed the jury that if they believed the evidence to respond "Yes" to the issue, "Was the policy sued on in force at the death of the testator?"

As to the last defense set up by the answer, the policy described the assured as a resident of the District of Columbia, but there was no evidence that the assured did not die in this State and leave property here; but if there had been, the possession of the policy authorized the plaintiff to take out administration here. *Shields v. Ins. Co.,* 119 N. C., 380; *Morefield v. Harris,* 126 N. C., at p. 628.

The defendant insists that, the answer not having been put in evidence, the admissions therein could not be considered, and relies upon *Smith v. Nimocks,* 94 N. C., 243; *Greenville v. Steamship Co.,* 104 N. C., 91, and cases there cited, and *Smith v. Smith,* 106 N. C., 498. Those cases hold that when issues are raised by allegation and denial in the pleadings, any other statements in the pleadings which might shake or controvert the allegations or denials of the party making such statements are matters for the jury, like other declarations against interest, when put in evidence by the opposite party. But whether the pleadings raise an issue or not (Code, sec. 268), is a matter of law for the court, and the court rightly held that the answer admitted the execution of the policy. The jury (117) did not have to pass upon that. The recitals in the policy put in evidence being *prima facie* evidence of the payment of the premium, and there being no evidence in support of the

defenses set up in the answer, there was no error in the instructions given.

No error.

PERRY v. BANK OF SMITHFIELD.

(Filed 7 October, 1902.)

1. BANKS AND BANKING—*Checks—Deposits.*

An action cannot be sustained against a bank by the payee of a negotiable check, though the drawer has funds on deposit sufficient for its payment against which the bank has no claim.

2. BANKS AND BANKING—*Checks—Deposits.*

The giving of a check upon a bank is not, unless it is accepted, an assignment of the claim of the depositor, and passes no title, legal or equitable, to his moneys on deposit in such bank.

DOUGLAS, J., dissenting.

ACTION by J. W. Perry against the Bank of Smithfield, heard by *Judge W. S. O'B. Robinson* and a jury, at December Term, 1901, of JOHNSTON. From a judgment for the plaintiff the defendant appealed.

James H. Pou and *Allen & Dortch* for the plaintiff.
F. H. Busbee and *T. M. Argo* for the defendant.

CLARK, J. On 4 October, 1900, the plaintiff sold to one Hudson forty-three bales of cotton for cash, $2,064, and took his check therefor on defendant bank. On presentation of check, 6 October, payment was refused, the amount to the credit of the drawer being then only $630. Hudson, after the purchase of the forty-three bales from the plaintiff, sold twenty-three
(118) bales thereof, and twenty-seven bales bought from another party, to the Roxboro Mills, for $2,436, and drew his draft on them for said amount, which he deposited in said bank to his credit, with bill of lading for said fifty bales attached. The other twenty bales bought of plaintiff were returned to him by Hudson, after payment of his check had been refused by the bank, and the plaintiff seeks in this action to recover of the bank only $1,127, balance due him by Hudson.

His Honor correctly instructed the jury that, applying the rule, "the first money in, the first money out" (*Boyden v. Bank*, 65 N. C., 13), the credit on the bank's book, 6 October, 1900, was part of the proceeds of the cotton bought by Hudson and resold

by him to the Roxboro Cotton Mills. But the bank did not induce the plaintiff to part with his cotton, as in *Smith v. Young,* 109 N. C., 224. It took the drafts on Roxboro Cotton Mills without knowledge, as appears by plaintiff's evidence, that the cotton had been bought upon an agreement to pay cash. If there was fraud, the bank was not a party to it. When the draft on the Roxboro Mills was delivered to the bank, the value thereof was placed to Hudson's credit in the ordinary course of business, and all of said credit was paid out on Hudson's check, save $630, before the bank had notice that Hudson had not paid Perry for the cotton.

The plaintiff had no claim upon the bank by reason of the check drawn on it by Hudson, which it has never accepted or agreed to pay (*Bank v. Bank,* 118 N. C., 783; 54 Am. St., 753; 32 L. R. A., 712), even though there should be standing to the credit of the drawer on the books of the bank a sum more than sufficient to meet the check. *R. R. v. Bank,* 54 Ohio St., 60; 31 L. R. A., 653; 56 Am. St., 700, in which the conflicting authorities are cited. The following, quoted therefrom, we think, states the law correctly, and certainly accords with our own decision, *supra* (118 N. C., 783; 32 L. R. A., 712; 54 Am. St., 753): "Deposits become the absolute prop- (119) erty of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous, which right constitutes the consideration for the bank's promise to the depositor. The bank's agreement with the depositor involves or implies no agreement with the holder of a check. The giving of a check is not an assignment of so much of the creditor's claim. It passes no title, legal or equitable, to the holder in the moneys previously deposited, nor does it create a lien on the fund, for there is no special fund out of which the check can be paid, nor does it transfer any money to the credit of the holder. It is simply an order, which may be countermanded and payment forbidden any time before it is actually cashed or accepted. If accepted, then the agreement is to pay according to the terms of the check or acceptance, but until then the payee looks exclusively to the drawer. He can maintain no action against the bank, for the bank owes to the payee no legal duty, and an action at law cannot be maintained unless there is shown to have been a failure of legal duty. Being liable to the drawer to account with him for failure to honor his check, the bank cannot, on either legal or equitable considerations, be held at the same time liable to the holder of the check. Tested by these rules, the plaintiff can have no cause of action against the bank." To same effect, *Bank v. Millard,* 77 U. S., 152.

It was the plaintiff's own fault that he took an order on another party—a check on the bank—instead of requiring the cash. The credit was extended to Hudson, not to the bank. The $630 to the credit of Hudson when the check was presented was not a special fund, nor, in fact, any fund which could be followed. It was simply an indebtedness from Hudson to the bank, which the latter could discharge by paying subsequently other checks or by charging up to Hudson any indebtedness it held against
(120) him. If it did neither, it would remain an indebtedness, for which Hudson could bring action, but not the plaintiff. It would seriously impair the usefulness of banks, which are accustomed to credit to a depositor any proceeds of drafts with bill of lading attached, if, whenever it turns out that the depositor has not paid in full for the property bought by him, the seller can hold the bank responsible for the balance of the purchase money, which is a matter between seller and buyer, and which cannot concern the bank when the seller has turned over the property to the depositor. If the title is defective, that concerns the party in receipt of the cotton, and not the bank. *Finch v. Gregg,* 126 N. C., 176; 49 L. R. A., 679, and *Bank v. Davis,* 114 N. C., 343; 41 Am. St., 795, relied on by the plaintiff, have no application to the facts of this case.

In the instructions given, that the plaintiff could reclaim the property or the proceeds thereof in the hands of the defendant bank, there was

Error.

DOUGLAS, J., dissents.

Cited: Mason v. Cotton Co., 148 N. C., 497.

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(121)

MARTIN v. BANK OF FAYETTEVILLE.

(Filed 14 October, 1902.)

1. AMENDMENTS—*Pleadings—Appeal.*

The trial court has the right to allow an amendment where it makes no change in the cause of action.

2. AMENDMENTS—*Pleadings—Continuances.*

Where an amendment to pleadings is such as to cause surprise, it is cause for continuance only.

3. AMENDMENTS—*Pleadings—Appeal.*

Where refusal of trial court to allow an amendment to pleadings is put upon the ground of a want of power, it is reviewable.

4. TENDER—*Payments—Trusts and Trustees—Parol Agreement to Convey.*

In an action to declare a person a trustee under a parol agreement to convey land upon the payment of a stipulated amount and for an accounting, no tender is necessary before bringing action.

5. TENDER—*Payments—Waiver—General Denial.*

A general denial by the defendant of the right of plaintiff to recover, cures the failure of the plaintiff to allege a tender before action brought.

ACTION by J. F. and C. A. Martin against the Bank of Fayetteville, heard by *Judge W. S. O'B. Robinson* and a jury, at March Term, 1902, of CUMBERLAND. From a judgment for the defendant the plaintiffs appealed.

D. T. Oates and *Busbee & Busbee* for the plaintiffs.
R. T. & R. L. Gray for the defendant.

FURCHES, C. J. The plaintiffs executed a note to I. Luther for $1,700, which he endorsed for plaintiffs (as we suppose, though the case does not say so), and they had it negotiated at the Bank of Fayetteville. This, we think, is (122) shown from the fact that the note was made to Luther, endorsed by him, was negotiated at the bank, and plaintiffs made a mortgage to Luther to secure him as such endorser.

The plaintiffs paid the interest on the note until about 1889 or 1890, when Luther, as mortgagee, sold the land, and the defendant bank became the purchaser, at the price of $1,500, and Luther made the bank a deed for the land so sold; and since said sale the plaintiffs have paid the bank, at different times, something over $2,100, according to their allegations, which, they say, was paid on said note, under an arrangement with the bank, or Mr. Williams, its president, that he would buy the land and hold it for plaintiffs until they could pay and satisfy the note. While the defendant does not deny the payments, it alleges that they were made as rents for use and occupation of the land, which belonged to the defendant, and not as payments on the note.

The purpose of this action is to have the defendant declared a trustee, and for an account, alleging that they are able, ready and willing to pay the defendant any balance that may be found to be due on said note.

But after the defendant had answered the complaint and denied that plaintiffs had any interest in said land, claiming that it belonged to the defendant, and that the plaintiffs were its tenants, and that the payments they had made were rents—after answering and setting up this defense—when the case was called for trial it interposed a demurrer, *ore tenus,* that the plaintiffs had not made the defendant a tender of what was due on the note before bringing suit; whereupon the plaintiffs asked permission of the court to amend the complaint by alleging that plaintiffs' attorney, before the action was commenced, went to see the defendant for the purpose of ascertaining the balance due on the note, with the view of arranging to pay the same,

(123) when the defendant said the plaintiffs had no right in the matter, as the defendant had bought the land and was the rightful owner thereof. The court declined to allow this amendment, upon the ground that it had no right to allow it, sustained the demurrer and dismissed the action. In this there was error. The court had the right to allow the amendment, as it made no change in the cause of action. *Woodbury v. Evans,* 122 N. C., 779; *Knott v. Taylor,* 96 N. C., 553; *Robeson v. Hodges,* 105 N. C., 49. And if the amendment is such as to cause surprise, it is cause for a continuance only. *Sams v. Price,* 119 N. C., 572. Where the court can see that the opposing party would not be misled, the amendment should be allowed. *Garrett v. Trotter,* 65 N. C., 430.

As a general rule, it is discretionary with the court whether it will allow an amendment or not, and when allowed or refused as a matter of discretion, such action of the court is not reviewable in this Court; but when the refusal is put upon the ground of a *want of power,* it is reviewable. *S. v. Fuller,* 114 N. C., 885; *Balk v. Harris,* 130 N. C., 381. But is easy to see that the amendment in this case would not have taken the defendant by surprise, as it had *answered* the complaint and denied the truth of the facts alleged therein. The defendant must therefore have come to court prepared to try the case upon the issue raised by the pleadings. And the court erred in holding it had *no power* to allow the amendment.

But it does not seem to us that this is such an action as requires a tender. The object of the action is to have the defendant declared a trustee for plaintiffs of the mortgaged land, under a parol agreement with the defendant that it would buy and hold the land for plaintiffs until they could pay the note, and for an account. But if there was anything in the point raised for the first time at the trial, by the interposition of a demurrer, *ore tenus,* it had been waived by the defendant by its answer

denying the rights of plaintiffs as claimed in their com- (124)
plaint. *Cotton Mills v. Abernathy,* 115 N. C., 402. This answer had been filed before the demurrer *ore tenus,* and plainly showed that if plaintiffs had known the amount they owed the defendant on the note, and had tendered it, the defendant would have refused to accept it, as the defendant contends that it is the absolute owner of the land, free from any claim of plaintiffs whatsoever.

So the case should have proceeded to trial upon the issues made by the pleadings.

If the defendant had answered, admitting plaintiffs' right to the land upon full payment of the note and interest, there should have been a decree for the plaintiffs that defendant convey upon payment of the note and interest, and that plaintiffs pay the cost of action. *Cotton Mills v. Abernathy, supra.* But the defendant cannot be allowed to contest the plaintiffs' right to recover, and then be allowed his cost, upon a mere technicality. The object of the Code practice is to avoid technicalities as much as possible, and to try cases upon their merits. *Allen v. R. R.,* 120 N. C., 548.

There is error, and a new trial is awarded.

New trial.

Cited: Sykes v. Boone, 132 N. C., 208; *Lassiter v. R. R.,* 136 N. C., 90.

(125)

COLEMAN v. HOWELL.

(Filed 14 October, 1902.)

1. INJUNCTION—*Restraining Order—Executors and Administrators.*

A temporary injunction restraining the disposition of assets in this State of an estate administered on in another State, in which the administrator is alleged to have committed a *devastavit,* was properly continued in this action to the hearing of the cause.

2. JUDGMENTS — *Impeachment — Executors and Administrators — Probate Courts.*

A judgment of the Georgia Probate Court, discharging an administrator, may be impeached in this State for fraud of the administrator practiced on the court and the heirs at law.

ACTION by Vina Ann Coleman and others against W. G. Howell, administrator of the estate of M. Q. Coleman, and

others, heard by *Judge W. S. O'B. Robinson,* at April Term, 1902, of COLUMBUS. From an order continuing the restraining order to the hearing, the defendant appealed.

D. J. Lewis and *McLean & McLean* for the plaintiffs.
J. D. Shaw, Shepherd & Shepherd and *Stephen McIntyre* for the defendants.

CLARK, J. This is an appeal from an injunction to the hearing, restraining the widow and children of M. Q. Coleman from converting to their own use or removing from the State the assets of the estate of D. K. Coleman, which, it is alleged, are in their possession, and the appointment of a receiver thereof. It appears that D. K. Coleman died, domiciled in Ware County, Georgia, in January, 1895, leaving as his only distributees and heirs at law the plaintiffs and defendants, or those under (126) whom they claim. M. Q. Coleman was, in March, 1895, appointed administrator in Georgia, took into his custody the estate, which the plaintiffs herein allege was worth more than $100,000, and in October, 1895, he obtained from the ordinary an order discharging him in full settlement. M. K. Coleman died in May, 1897, and his wife administered on the estate and received a similar order of discharge in June, 1900. The plaintiffs allege in full detail, and duly itemized and specified many and sundry fraudulent acts of said M. Q. Coleman, by which he converted to his own use the great bulk of the assets of D. K. Coleman; and, further, "that on 7 October, 1895, upon the fraudulent concealment from the Court of Ordinary, in the county of Ware, of the acts hereinbefore set out, without any personal service upon these plaintiffs, and in their absence, and without any of them being represented by any attorney, and without their knowledge of the fraudulent representations made by the said M. Q. Coleman upon his application for discharge, or of the fraudulent practices of which the said M. Q. Coleman had been guilty, as hereinbefore set out, he was granted letters of dismissal as administrator upon said estate by the Court of Ordinary of the county of Ware." The plaintiffs further allege that the false and fraudulent representations by which said M. Q. Coleman procured from them receipts for their respective shares of this estate, and their ignorance of all above-recited representations and acts till a short time before instituting this action, that the defendant Penelope Coleman has removed with her children to this State, and they have brought with them money, goods and effects of M. Q. Coleman, duly itemized, making a total of $65,689, and they allege that "all or a greater part

of this amount came from the estate of D. K. Coleman, the same being the proceeds of the property, goods and effects belonging to the estate of D. K. Coleman, fraudulently converted by his administrator aforesaid"; and it is further alleged (127) that the defendants are converting said property to their own use, and threatening to remove the same from the State, and "unless restrained from doing so, will conceal and dispose of all the residue in their hands, so as to prevent any recovery of any part thereof by the plaintiffs in this action." The allegations are full and specific, and are sustained by affidavits and denied by counter-affidavits.

It is clearly a case where the restraining order should be continued till the hearing, when the truth of the disputed matters of fact may be legally and properly determined, unless the defendants are protected from investigation by the order of the ordinary in Georgia discharging M. Q. Coleman from responsibility, and that is the only point before us. The order discharging the administratrix of M. Q. Coleman cuts no figure, for there is no allegation that she did not administer honestly; and if the assets which came to her hands were really the property of D. K. Coleman, fraudulently and wrongfully converted by M. Q. Coleman, the plaintiffs will not be estopped by any administration thereupon by his widow.

As to the discharge of the ordinary in Georgia of M. Q. Coleman the defendants rely upon the provision in the Constitution of the United States, Art. IV, sec. 1, "That full faith and credit shall be given in each State to the . . . judicial proceedings of every other State." It is well settled that subject only to the inquiry as to the jurisdiction of the court rendering the judgment and impeachment for fraud (*Simmons v. Saul,* 138 U. S., 439; *Cole v. Cunningham,* 133 U. S., 107) full faith and credit should be given in every other State to a judgment rendered in another State. 2 Black Judgments, sec. 859. As to impeachment for fraud, *Fuller, C. J.,* in *Cole v. Cunningham,* 133 U. S., at p. 113, quotes with approval from *Dobson v. Pearce,* 12 N. Y., 156, 62 Am. Dec., 152, as follows: "The Court of Appeals held that while a judgment ren- (128) dered by a court of competent jurisdiction could not be impeached collaterally for error or irregularity, yet it could be attacked for want of jurisdiction or for fraud or imposition." This ruling was made in New York sustaining a judgment rendered in Connecticut, which had set aside a judgment in New York because procured by fraud. But apart from that we must consider the nature of an order by the ordinary in Georgia discharging an administrator, for we are not called upon to give it

greater authority here than it has at home. *Pearce v. Olney,* 20 Conn., 544; *Engel v. Scheurmann,* 40 Ga., 206; 2 Am. Rep., 573; *Cage v. Cassidy,* 23 How., 109, cited by *Fuller, C. J.,* in 113 U. S., at page 113. It is not held there to be a judgment in the full and complete sense of that term, and its nature is clearly stated by the following opinion of *Simmons, C. J.,* in *Pass v. Pass,* 98 Ga., at page 794: "Whether a judgment can be attacked collaterally by a party thereto as void because of fraud in its procurement is a question upon which courts have differed (citing authorities). As to a judgment discharging an administrator, however, the question is settled in this State by our Code, which declares, 'A discharge obtained by the administrator by means of any fraud practiced on the heirs or ordinary is *void,* and may be set aside on motion and proof of the fraud' (sec. 2608); and 'a judgment that is void may be attacked in *any* court and by *anybody*' (sec. 3828). 'The judgment of a court having no jurisdiction of the person and subject-matter, or *void for any other cause,* is a *mere nullity,* and may be so held in *any court* when it becomes material to the interest of the parties to consider it' (sec. 3594)." Such being the provisions of the statute in the State where the order was made, such must be its effect—no greater, no less—here.

If the allegation of fraud practiced is proved, such order is

"void, and can be attacked in any court and by anybody;
(129) it is a mere nullity, and may be so held in any court."

It may be noted here that the above sections are quoted by *Chief Justice Simmons* as numbered in the Georgia Code of 1882, sections 2608, 3828 and 3594. These sections are retained, without alteration, in the Georgia Code of 1895, except that these sections are numbered respectively 3511, 5373 and 5369.

The defendants contend, however, that the validity of this very order was questioned and sustained in *Coleman v. Coleman,* 113 Ga., 150, but an examination shows that the case did not go off on the merits, but the injunction was denied for insufficiency of the complaint in respects which are fully cured in this proceeding.

The parties and the property having been removed from Georgia, there is no opportunity to get jurisdiction to move to set aside the judgment in that State. Jurisdiction can be had of both the property and person here, and under the Georgia statute, if the allegations of the complaint are established, the so-called judgment in that State is a mere nullity and can be so treated in any court. It cannot have greater sanctity and force here than in the State where rendered.

If the allegations are not established judgment will go against the plaintiffs, and the restraining order and receiver will be discharged. If the allegations are established on the trial the fund may be paid over to an administrator of D. K. Coleman, who can be appointed in this State when assets of his are found here (*Morefield v. Harris,* 126 N. C., 626), or it may be that to save multiplicity of actions the court may go on and distribute, through the receiver, the fund to the parties according to their several interests, but as to this matter we need express no opinion now.

In continuing the restraining order and receiver to the hearing there was

No error.

Cited: Levin v. Gladstein, 142 N. C., 486.

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(130)

BRINKLEY v. SMITH.

(Filed 14 October, 1902.)

1. DEEDS—*Probate.*

The probate of the deed offered in evidence in this cause is defective.

2. DEEDS—*Probate—Certificate of Probate—Clerks.*

The certificate of a clerk of the Superior Court does not validate a probate essentially defective.

3. ADVERSE POSSESSION—*Title.*

An instruction that the adverse possession of land for more than thirty years, gives title, notwithstanding the possession has been at intervals interrupted, and that the occupancy of the claimants was not connected, is erroneous.

ACTION by B. W. Brinkley against Henry Smith, heard by *Judge Thos. A. McNeill* and a jury, at May (Special) Term, 1901, of COLUMBUS. From a judgment for the plaintiff the defendant appealed.

C. C. and H. L. Lyon for the plaintiff.
J. B. Schulken for the defendant.

DOUGLAS, J. This was a special proceeding commenced before the clerk for the partition of the land described in the complaint.

The defendant pleaded sole seizin, and the case was transferred to the Superior Court in term for trial of the issues raised in the pleadings. It was heard on appeal at the last term of this Court, but the record was in such condition that we thought it necessary to refer it to the clerk for correction. 130 N. C., 224.

There are only two exceptions which we deem it necessary to discuss, as they result in a new trial, where the other exceptions may not arise.

The plaintiff introduced a deed from John Daniel to
(131) A. T. Clark, to which the defendant excepted on the grounds that it had not been executed by said Daniel and had not been properly probated. Upon said deed appear the following statements:

"Signed, sealed and delivered in the presence of J. M. Miller and J. D. Robinson, J. P."

"State of Georgia—Wayne County.

"Personally appeared before me, Hansell Rappell, clerk Superior Court in and for said county, J. D. Robinson, who on oath says that he saw John Daniel sign a land deed on 21 October, 1897, and that he also signed the deed officially as a justice of the peace in and for 1519 District G. M. of said county, and also saw J. M. Miller sign the same as a witness.

"Sworn to before me, this 22 November, 1897.

"J. D. ROBINSON, J. P.
"HANSELL RAPPELL,
"Clerk S. C. W. C."

"North Carolina—Columbus County.

"The foregoing certificate and seal of office of Hansell Rappell, clerk Superior Court of Wayne County, State of Georgia, is adjudged to be sufficient.

"Let the deed and certificate be registered. This 19 January, 1898.

"A. M. MCNEILL,
"Deputy Clerk Superior Court."

This probate is singularly defective. Robinson, who seems to be swearing in his official capacity, does not prove the signature of the grantor to the deed in question, nor even his own attesting signature. He simply says that "he saw John Daniel sign *a* land deed," and that he and Miller signed the same deed. The only construction we can put upon this language is that
he and Miller signed the same deed that he saw Daniel
(132) sign, but he does not pretend to identify that deed or the signatures thereon as the deed then offered for probate.

In other words, he does not prove the execution of this particular deed, which was the essential fact to be proved. Therefore we think that this deed, in its present condition, was not competent evidence, and should have been excluded upon objection by the defendant. The certificate of the clerk of the Superior Court of Columbus County merely permitted its registration, and could not have the effect of validating a probate essentially defective upon its face.

There is an exception to the charge that we think must be sustained. His Honor charged that if the jury found from the evidence that certain persons with whom the plaintiff's title was supposed to have some connection had been in adverse possession of the premises for more than thirty years it was their "duty to answer the issue 'Yes,' notwithstanding the possession has been at intervals interrupted and that the occupancy of the claimants was not connected." This state of facts would have been sufficient to take the title out of the State, but not of itself to put it into the plaintiff. *Walden v. Ray,* 121 N. C., 237; *Everett v. Newton,* 118 N. C., 919. Twenty years' adverse possession of land by himself or those under whom he claims will give title in fee to the possessor as against all persons not under disability; but such possession must not only be adverse but must also be open, notorious and continuous, under known and visible boundaries. The reason of this is clear. Such statutes of limitation, originally statutes of presumption, are founded upon the legal presumption of a grant or release. The law presumes that the party holding the legal title, knowing his land is in the actual possession of one who claims it as his own and having a right of action for its recovery, admits the lawful claim of the possessor if he permits him to remain in open and undisturbed possession for so long a time.

If the possession is not so open and adverse as to reasonably put the legal owner upon notice, either actual (133) or constructive, he cannot be expected to sue on a cause of action of which he is ignorant. On the other hand, if the possessor abandons the property, its constructive possession at once reverts to the holder of the legal title. A conveyance of the property being an assertion of ownership is not considered as an abandonment.

As is said in Angell on Limitations, sec. 390, quoted with approval in *Malloy v. Bruden,* 86 N. C., 251, "The principle upon which the statute of limitations is predicated is not that the party in whose favor it is invoked has set up an adverse claim for the period specified in the statute, but that such adverse claim is accompanied by such invasion of the rights of

another as to give him a cause of action which, having failed to prosecute within the limited time, he is presumed to have surrendered."

The other exceptions are not necessary for the determination of this appeal and may not arise again.

New trial.

JONES v. WILMINGTON & WELDON RAILROAD COMPANY.

(Filed 14 October, 1902.)

1. FORMER ADJUDICATION—*Appeal—Rehearing.*

Where a matter of law has been decided by the Supreme Court it can be reviewed only on a rehearing, and cannot be again questioned in the same case on a subsequent appeal.

2. PROBABLE CAUSE—*Malicious Prosecution—Preliminary Examination—Waiver.*

The voluntary waiving of a preliminary examination before a committing magistrate is *prima facie* evidence of probable cause, which may, however, be rebutted.

(134) ACTION by W. W. Jones against the Wilmington and Weldon Railroad Company, heard by *Judge Frederick Moore* and a jury, at March Term, 1901, of CUMBERLAND. From a judgment for the defendant the plaintiff appealed.

N. A. Sinclair for the plaintiff.
Geo. M. Rose for the defendant.

DOUGLAS, J. The essential facts are thus stated in the report of this case in 125 N. C., 227, when it was before us for the first time: "The plaintiff, William Wright Jones, was arrested upon a State warrant sworn out by a detective of the defendant upon a charge of breaking the insulators and rocking the railroad train of the defendant. The plaintiff was arrested by a constable at his home near Dunn, was handcuffed in presence of his mother and family, bail offered and refused, and was taken to Fayetteville and lodged in jail. The next day he was admitted to bail by the justice and waived a preliminary examination, the *State* not being ready, and was bound over to court. The grand jury failed to find a true bill, the plaintiff was discharged and prosecution ended. The plaintiff testified that he was not guilty of the charge imputed to him. Henry Smith,

upon whose information the detective testified he had acted in swearing out the warrant, was sworn, and testified that he gave the detective no such information, and had never seen the plaintiff break the insulators or rock the train."

When this case was first heard, the point being directly before us, this Court held, in 125 N. C., 227, third syllabus, that "The voluntary waiving of the preliminary examination before the justice of the peace is *prima facie* evidence of probable cause." Again, on page 232, the Court assigns as error that "His Honor refused to instruct unqualifiedly the jury, at the defendant's request, that the waiving of the preliminary ex- (135) amination before the justice of the peace was *prima facie* evidence of probable cause." From this there was no dissent, and by the unanimous opinion of this Court it became *res judicata* the law of the case. It is well settled that when a matter of law has been once decided by this Court it can be reviewed only on a rehearing, and cannot be again questioned in the same case upon any subsequent appeal. *Pretzfelder v. Ins. Co.,* 123 N. C., 164, 44 L. R. A., 424; *Hendon v. R. R.,* 127 N. C., 110; *Shoaf v. Frost,* 127 N. C., 306; *Wright v. R. R.,* 128 N. C., 77; *Kramer v. R. R.,* 128 N. C., 269; *Setzer v. Setzer,* 129 N. C., 296.

In *Pretzfelder v. Ins. Co., supra,* this Court uses the following words on page 167: "The proposition to rehear a case by raising the same points upon a second appeal cannot be entertained."

In *Illinois v. R. R.,* 184 U. S., 77, 93, the Supreme Court of the United States, in apparently its latest utterance upon the subject, says: "Every matter embraced by the original decree of the circuit court, and not left open by the decree of this Court, was conclusively determined as between the parties by our former decree, and is not subject to re-examination upon this appeal." It then proceeds to quote with approval as follows: "In *Roberts v. Cooper,* 20 How., 467, 481, the Court said: 'On the last trial the circuit court was requested to give instructions to the jury contrary to the principles established by this Court on the first trial, and nearly all the exceptions now urged are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decision of this Court that after a case has been brought here and decided and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the Court on the first writ of error can be (136)

reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the Court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members. . . . We can now notice, therefore, only errors as are alleged to have occurred in the decisions of questions which were peculiar to the second trial.' To the same effect are numerous cases, some of which are cited in the margin." We have quoted at length from that opinion because it seems to be the latest decision of that Court upon the subject.

When this case was again before us (127 N. C., 188) the appeal was dismissed as being premature. Therefore there was nothing before us to decide. It is true the Court, inadvertent to the scope of its former decision, proceeded to state what it had then intended to "intimate," but such intimation was neither intended to have nor could have the effect of reversing a material point decided upon the former appeal.

While this point is settled as to this case it seems proper that we should more fully express our views on account of the importance of the question and the long and careful consideration we have given it on this appeal. We do not find any case in our Reports directly in point, but from analogy to our own decisions and direct authorities from other States we are clearly of the opinion that the voluntary waiving of a preliminary examination before a committing magistrate is *prima facie* evidence of probable cause which may, however, be rebutted by any other competent evidence. In other words we do not
(137) see why the mere waiver of examination should have any greater effect than a finding by the magistrate that there was probable cause upon an examination of the testimony.

From the earliest times this Court has held that (quoting from the syllabus in *Johnston v. Martin,* 7 N. C., 248): "In an action for a malicious prosecution the dismissal of a State's warrant by the magistrate who tried it is *prima facie* evidence of the want of probable cause, and throws upon the prosecution the burden of proving that there was probable cause." *Bostick v. Rutherford,* 11 N. C., 83; *Johnson v. Chambers,* 32 N. C., 287; *Smith v. B. and L. Asso.,* 116 N. C., 73.

In *Griffis v. Sellars,* 19 N. C., 492, 31 Am. Dec., 422, this Court, speaking through *Chief Justice Ruffin,* says: "It is settled in this State that a discharge by the examining magistrate

imports that the accusation was groundless. If the magistrate commit or if the grand jury find a bill it has never been doubted that in law that is evidence of probable cause, and calls for an answer from the plaintiff as to the particular circumstances; which imposes it on the plaintiff to go into the circumstances in the first instance. It is true that in these cases the evidence is deemed *prima facie* only. . . . After conviction, however, the evidence rises in degree and is conclusive." That was an action on the case for malicious prosecution where the plaintiff had been convicted in the Superior Court but obtained a new trial on appeal. It was held that his conviction was conclusive evidence of probable cause, but nowhere do we find in this State that anything less than *conviction* is conclusive.

In other jurisdictions we can find but one case tending to sustain the contention of the defendant that the waiver of examination is conclusive. That single case is *Van Sickel v. Brown,* 68 Mo., 627, an ill-considered opinion that will not bear analysis. The following extract from page 636 will show how utterly unreliable it is: "In the case of *Brandt v.* (138) *Higgins, Judge Napton,* speaking for the Court, said: 'The magistrate and the grand jury have the very question of probable cause to try; the evidence on the side of the prosecution alone is examined, and the proceeding is entirely *ex parte.* Under such circumstances the refusal of the examining tribunal to hold the accused over to trial must necessarily be very persuasive evidence that the prosecution is groundless.' On the other hand it has been held that a commitment of the plaintiff is *prima facie* evidence of probable cause (citing cases). If the finding of the magistrate on the facts proved before him makes a *prima facie* case surely waiving an examination and voluntarily entering into recognizance amount to a confession by the accused that there is probable cause. *Vide State v. Railey,* 35 Mo., 168." This is a clear *non sequitur,* but let us examine the only case cited as authority for such a conclusion. What the Court really does say in Railey's case is as follows, on page 172: "The justice's docket, though not showing an adjudication by the justice, shows an actual admission of the defendant that the crime had been committed, and not merely that there was probable cause to believe him guilty of it, but a *direct and unequivocal admission of his guilt.*" We have underscored the words to show the force and extent of the miscitation. Of course if the plaintiff Jones had "unequivocally admitted his *guilt*" such an admission of guilt would have included an admission of probable cause.

Against this single opinion, evidently written *currente calamo,*

we have several well-considered cases. The rule is thus laid down in 19 Am. and Eng. Enc. (2 Ed.), 664: "The waiver of preliminary examination by a party charged with crime has been held to raise a *prima facie* presumption of probable cause for the prosecution." In *Schoonover v. Myers,* 28 Ill.,
(139) 308, the Court says, on page 312: "The first question of law which is presented arises upon the fact that when the plaintiff was brought before the magistrate upon the prosecution, for the institution of which this action was brought, he waived an examination and voluntarily gave bail for his appearance at the circuit court. This, it is insisted, was an admission at least of such a probability of guilt as to preclude him from ever after saying that the prosecution was maliciously instituted. We do not think so. Such a course may often be judiciously advised when the party is not only innocent in fact but known to be so by the prosecutor. At least this course should have no more influence than would the finding of the magistrate upon a hearing of the evidence that there was probable cause, and binding the party over for his appearance or committing him."

In *Hess v. Banking Co.,* 31 Oregon, 503, the Court says, on page 505: "In other words the waiver of an examination is tantamount in law to a finding by the magistrate that there is sufficient cause to believe the defendant guilty, and the authorities are substantially agreed that such a finding is not conclusive but only *prima facie* evidence of probable cause, which may be overcome by competent evidence on the trial, and that an allegation in the complaint of a want of probable cause is a sufficient averment for the admission of such proof. *R. R. v. Hendricks,* 13 Ind. App., 10, and authorities there cited."

In *Brady v. Stiltner,* 40 West Va., 289, it is said that "the waiver of a preliminary examination by a person charged with crime is *prima facie* evidence of probable cause." In that case *Holt,* president, dissents in a forceful and elaborate opinion, maintaining that the waiver of a preliminary examination, being merely the exercise of a lawful right, is not even *prima facie* evidence of probable cause.

The following citations will show that our decision in this case is not an extreme view of the law, as other juris-
(140) dictions have gone beyond it. In *Barber v. Scott,* 92 Iowa, 52, it is held that "a *conviction* of plaintiff, though obtained without fraud and without false testimony on the part of prosecutor, is *not conclusive* of probable cause for the prosecution complained of, but such conviction establishes probable cause unless overcome." In *Miller v. Railway Co.,* 41 Fed.

Rep., 898, it was held that where on examination the justice commits and the grand jury fails to find an indictment the action of one merely offsets, neutralizes or destroys the other, so as to render both or either of them valueless to establish a *prima facie* case either for or against the plaintiff, thus leaving the want of probable cause to be established by other testimony.

For the reasons above stated we adhere to our decision that the waiver by the plaintiff of a preliminary examination is only *prima facie* evidence of probable cause, which may be rebutted by other competent testimony.

Error.

Cited: Holland v. R. R., 143 N. C., 437; *Britt v. R. R.*, 148 N. C., 42.

HOUSE v. HOUSE.

(Filed 14 October, 1902.)

DIVORCE—*Adultery—The Code, Sec.* 1285—*Recrimination.*

Adultery by the husband on but two occasions is not ground for divorce by wife, and hence does not constitute the defense of recrimination, preventing his obtaining a divorce from the wife on proof of adultery.

ACTION by W. M. House against Minnie House, heard by *Judge Francis D. Winston* and a jury, at July (Special) Term, 1902, of WAKE. From a judgment for the defendant the plaintiff appealed.

Busbee & Busbee for the plaintiff. (141)
J. W. Hinsdale, Jr., and *W. B. Jones* for the defendant.

CLARK, J. This is an action by the husband against the wife for divorce. The jury found on the issues duly submitted that the parties were married; that the plaintiff had been a continuous resident of the State for two years next preceding the filing the complaint; that the defendant had committed the adulteries alleged in the complaint, and that the plaintiff had not with knowledge thereof condoned such adulteries. And to a further issue: "5. Has William House committed adultery, as alleged in the amendment to the answer?" the jury responded, "Yes; only two acts and no more." Thereupon his Honor refused to sign judgment in favor of plaintiff, and dismissed the action. Plaintiff excepted and appealed.

The complaint averred that the defendant had separated from the plaintiff in July, 1901, four years after marriage, and had not lived with him since, and had committed adulteries with divers parties, naming two, and averring that the others were unknown to the plaintiff. The answer denied each allegation of the complaint except those of marriage and residence for the statutory period. The amended answer alleged adultery by plaintiff with sundry parties, naming two of them, and sexual intercourse by her with plaintiff since July, 1901.

By our statute, the Code, sec. 1285 (2), it is ground for divorce "If the wife shall commit adultery." But such conduct is not ground for divorce against the husband, who comes under section 1285 (1), "If either party shall separate from the other and live in adultery." The Legislature has made the distinction for reasons satisfactory to them, and the courts must administer the law as it is written.

So the single question presented is whether the husband, who has established his legal grounds for divorce by the ver-
(142) dict of a jury, can be defeated thereof by matter in recrimination, which would not have entitled the wife to have brought an action for divorce against him. "The general principle which governs in a case where one party recriminates is that the recrimination must allege a cause which the law declares sufficient for divorce." Tiffany Dom. Rel., sec. 108, pages 203, 204; *Morrison v. Morrison,* 142 Mass., 361; 56 Am. Rep., 688, and cases there cited. The contrary doctrine is held in *Astley v. Astley,* 3 Eng. Ecc. Rep., 303, but the English ecclesiastical law of divorce has not been followed in this country. In *Horne v. Horne,* 72 N. C., 530, habitual adultery, night after night, by the husband, was shown by the evidence and established by the verdict, and the same was true in *Haines v. Haines,* 62 Tex., 216. Here the two acts of adultery found by the verdict were committed by the husband after his wife abandoned him, and are not ground of defense or recrimination for her. *Setzer v. Setzer,* 128 N. C., at page 172; 83 Am. St., 66; *Foy v. Foy,* 35 N. C., 90; *Whittington v. Whittington,* 19 N. C., 64.

In *Tew v. Tew,* 80 N. C., 316; 30 Am. Rep., 84, it is held: "No husband can have the bonds of matrimony dissolved by reason of the adultery of the wife committed through his allowance, his exposure of her to lewd company or brought about by the husband's default in any of the essential duties of the married life or supervenient on his separation without just cause," which holding plainly rests upon such conduct being fraud on the part of the husband, who will not be allowed to take ad-

vantage of his own wrong and procure a release by reason of conduct of his wife instigated by himself. For, as is said in *Steel v. Steel,* 104 N. C., at page 636, citing *Tew v. Tew, supra,* the divorce can, in the words of the Code, sec. 1285, be granted only "on application of the *party injured,*" which the husband would not be if he were the cause of the misconduct of the wife.

But such conduct is not here pleaded in the answer, nor found by the jury, nor any issue offered, nor any prayers (143) for instruction on that aspect, nor is it clear that the evidence would have justified the submission of such issue if such matter had been pleaded.

The issues found make out a good cause for divorce against the wife and not against the husband, as our statute is framed, and it was error to refuse to render the judgment upon the verdict tendered by the plaintiff. The cause must be remanded to the end that judgment be signed for the plaintiff in accordance with the verdict.

Reversed.

Cited: Mott v. R. R., post, 238; *S. v. Jones,* 132 N. C., 1051; *Kinney v. Kinney,* 149 N. C., 325.

ARRINGTON v. ARRINGTON.

(Filed 14 October, 1902.)

BANKRUPTCY—*Discharge—Judgment—Alimony.*

A judgment for alimony is provable against the estate of a bankrupt, and hence the discharge of the bankrupt constitutes a discharge of the judgment.

ACTION by P. D. B. Arrington against W. H. Arrington, heard by *Judge O. H. Allen,* at February Term, 1902, of WAKE. From a judgment for the plaintiff the defendant appealed.

Marion Butler and *J. W. Hinsdale, Jr.,* for the plaintiff.
F. S. Spruill and *Shepherd & Shepherd* for the defendant.

FURCHES, C. J. This is an action brought in the Superior Court of Wake County to enforce the collection of alimony due the plaintiff under a decree of a court of competent jurisdiction in the State of Illinois. The plaintiff's right to recover in this action is contested by the defendant upon the (144)

grounds that it appeared that the plaintiff obtained a decree for a divorce *a vinculo matrimonii,* and alimony is not allowed by the laws of North Carolina where this is the case; also upon the grounds that the decree for alimony in the State of Illinois was not a *final* judgment, and for that reason could not be the basis of an action in this State. Defendant also pleaded the statute of limitations, and the judge of the Superior Court, being of the opinion that plaintiff's right of action was barred by the statute of limitations, the plaintiff submitted to a judgment of nonsuit and appealed to this Court. Upon the hearing in this Court it was held that plaintiff's right of action was not barred by the statute of limitations, and that the judgment sued on was a *final* judgment, and although alimony is not allowed in this State upon a decree of absolute divorce, that as it was admitted that it was so allowed by the laws of Illinois, and as the Constitution of the United States, Art. IV, sec. 1, required the courts of this State to give to the judgments of Illinois the same validity, force and effect they had in that State, this Court held that plaintiff was entitled to recover upon a proper authentication of said judgment. 127 N. C., 190; 80 Am. St., 791.

We then held that the Illinois judgment sued on was a *final* judgment, and we so hold now. And as the Bankrupt Act provides for the proof of judgments against the bankrupt's estate, we hold that this *Illinois judgment* was a provable claim, and a discharge in bankruptcy is a discharge against the same.

Error.

CLARK, J., concurring. When this cause was here before (127 N. C., 190; 80 Am. St., 791) two members of the Court dissented, giving as one ground of dissent that the *causa litis* being a judgment for future alimony was interlocutory and an
(145) action could not be maintained thereon, citing *Lynde v. Lynde,* 162 N. Y., 418; 48 L. R. A., 679; 76 Am. St., 322, which has been since sustained on writ of error, 181 U. S., 183. But the majority of this Court sustained plaintiff's contention that it was a final judgment, and therefore an action could be maintained upon it. Now that the defendant has obtained his discharge in bankruptcy the plaintiff is again before the Court contending that the Illinois judgment for alimony was not a final judgment, and hence the discharge in bankruptcy does not release defendant's liability. In view of the subsequent decision of the Federal Supreme Court above cited it may be said here that if this matter were before us on a rehearing we would reverse our former decision, but that decision is the law

of this case, for a rehearing is not admissible under the form of another appeal. *Perry v. R. R.,* 129 N. C., 333, and cases there cited.

But the plaintiff is in nowise hurt. Could we, on this second appeal, reverse our former decision and hold the Illinois judgment interlocutory, this action must be dismissed. Adhering, as we must, to that decision as the law of this case, the Illinois judgment is a final judgment, and the defendant is protected by the discharge in bankruptcy. So *quacunque via* this long litigation is at an end.

COOK, J., concurs in the concurring opinion of CLARK, J.

DOUGLAS, J., concurring. I am constrained to concur in the opinion of the Court, as a matter of law as well as justice, under the peculiar circumstances of this case. And yet I am not inadvertent to the cases of *Lynde v. Lynde,* 181 U. S., 183, and *Audubon v. Shufeldt, ibid.,* 575. In the former it was held (after the rendition of our former opinion in this case), on appeal from the Court of Appeals of New York, that the courts of that State were bound by a decree for alimony rendered in the State of New Jersey only to the extent of the ali- (146) mony therein declared to be due and payable at the rendition of the decree. The Court says, on page 187: "The decree (in New Jersey) for the payment of $8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond sequestration, receiver and injunction being in the nature of execution, and not of judgment, could have no extra territorial operation; but the action of the courts of New York in these respects depended upon the local statutes and practice of the State, and involved no Federal question." I have quoted this paragraph because it clearly and forcibly expresses my reasons for dissenting from the former opinion of this Court in the case at bar. However, this Court decided that the Illinois judgment for future alimony was a final judgment, which could neither be reviewed nor modified in the courts of this State. That decision became the law of this case, and is now binding to that extent upon this Court. *Setzer v. Setzer,* 129 N. C., 296; *Illinois v. R. R.,* 184 U. S., 77.

In *Audubon v. Shufeldt,* 181 U. S., 375, the Court held that "alimony, whether in arrear at the time of an adjudication in

bankruptcy or accruing afterwards, is not provable in bankruptcy or barred by the discharge."

As this is a Federal question, I would feel bound by this decision if it directly applied to the peculiar facts of the case at bar. The decision is evidently based upon the dominating idea that a decree for alimony is not a *final* judgment or decree. The Court says, on page 577: "Generally speaking alimony may be altered by the Court at any time, as the circumstances of the parties may require. The decree of a court of one State,
(147) indeed, for the present payment of a definite sum of money as alimony is a record which is entitled to full faith and credit in another State, and may, therefore, be there enforced by suit. But its obligation in that respect does not affect its nature. In other respects alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. . . . And as the Court of Appeals of the District of Columbia has more than once said, 'the allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction.'" Herein lies the difference. If our former decision was correct, and it cannot now be questioned by either party to the action, the plaintiff sued upon a final judgment upon a fixed sum then due in the enforcement of which this State had no discretion whatever. Such a judgment comes clearly within the terms of the Bankrupt Act of 1898, which includes in section 63, among the debts which may be proved in bankruptcy, *"a fixed liability,* as evidenced by a judgment or an instrument in writing, absolutely owing." If the plaintiff's Illinois judgment had not been held to be a "fixed liability" it would have been subject to review in this State, where on grounds of public policy no alimony is allowed upon a divorce *a vinculo.* In concurring in the opinion of the Court I feel that the spirit and intent of the law have been followed, albeit by a somewhat circuitous route not entirely of my own choosing.

(148)

WHITFIELD v. GARRIS.

(Filed 14 October, 1902.)

WILLS — *Construction — Descent and Distribution — Legacies and Devises—Conditional Fee—The Code, Sec.* 2180.

Where a testator devises realty to a grandson, and in the event of death of latter without children, then the land to descend to other grandchildren, such devise vests a fee simple estate in the first devisee, defeasible only on condition that he dies without leaving heirs of his body.

ACTION by F. G. Whitfield and others against Ransom Garris and others, heard by *Judge W. S. O'B. Robinson,* at November Term, 1901, of WAYNE. From a judgment for the defendants the plaintiffs appealed.

W. C. Munroe for the plaintiffs.
Allen & Dortch and *F. A. Daniels* for the defendants.

FURCHES, C. J. This is an action of ejectment and involves the construction of the will of Lewis Whitfield. The will was written in 1848, and the testator died in 1850, at the advanced age of 90 years. He was a man of large real and personal estate, without living children, but having a number of grandchildren.

In item 15 of the will he disposes of the land in controversy as follows: "I give, devise and bequeath to my grandson Franklin Whitfield (son of L. S. Whitfield, deceased) that part of my land lying on the north of Neuse River, between Walnut Creek and Bear Creek, in the counties of Wayne and Lenoir (here follows a description of the land conveyed in item 15, said to be about seven square miles of the most valuable land in Wayne County), and in the event of the death of the said Franklin Whitfield (son of Lewis S. Whitfield, deceased), leaving no heirs of his own body, then and in that event (149) the above described land and other property shall descend to the three sons of Lewis S. Whitfield, deceased, Hazzard Whitfield, Cicero Whitfield and Lewis Whitfield, or the survivor of them; and in case the last survivor of the sons of L. S. Whitfield, deceased, shall die, leaving no heir or heirs of his own body, the said land or real estate shall be equally divided between all my grandchildren."

Franklin Whitfield died in 1900, leaving the plaintiffs, his children and heirs of his body. It seems to us if it was not for the large amount involved in this action it would not be a very difficult one to dispose of, and this fact should not make it any more difficult than if the amount involved was much smaller.

The plaintiffs contend that in construing the will the Court should find out if it can the testator's purpose in making the will, and that should be carried out by the Court. And to do this the Court should examine the whole will, all that is written within "its four corners," as it is sometimes expressed, to find out the testator's intention. And these are some of the rules adopted by courts for construing wills. But the learned counsel who represents the plaintiffs has pointed out no other part of the will that affords us any aid in putting the construction on item 15 they contend it should have.

But there is another rule more important in the construction of wills than those suggested by the plaintiffs, and that is, there must be something to construe. The Court can no more make the language of a will than it can make the will. Where there is language of doubtful meaning used in the will for the purpose of interpreting the meaning of such doubtful language the Court may try to ascertain the intention of the testator. But some language is too plain, the meaning too obvious, to admit of interpretation. In such cases the language of the testator must be taken to mean what it says. *Coble v. Shaffner,* 75 N. C., 42.

(150) The plaintiffs contend that the testator only intended to give Franklin a life estate, to be enlarged into a fee simple upon his having heirs of his body, and having but a life estate he could not convey the fee simple estate; that the effect of the condition was to enlarge the estate of Franklin from a life estate to a fee simple. We do not think this the proper construction of item 15. But if it was, when the condition was fulfilled by Franklin's having heirs of his body we do not see what benefit the plaintiffs, who are his children and heirs at law, would have on that account, when their father had conveyed it to the defendants for a full consideration and with general warranty.

But we think the devise to Franklin without any limitation, under the act of 1784, then chapter 122, section 10, of the Revised Statutes, and now section 2180 of the Code, was a devise in fee simple, with a condition of defeasance that if he died without leaving heirs of his body his fee simple estate should be defeated and the land should go to the three children of L. S. Whitfield, named in the will. The public law enters into and becomes a part of every transaction and conveyance. *McCless v. Meekins,* 117 N. C., 34, and chapter 122, section 10, of the Revised Statutes, was then in force. Therefore item 15 must read as if it had been written to Franklin Whitfield, his heirs and assigns forever, but upon condition that if the said Franklin Whitfield shall die without leaving heirs of his body, then and

in that event to the heirs of L. S. Whitfield. This is written in the will by the statute of 1784. So if the contingency had happened upon which the condition was to take effect (dying without heirs of his body) the lands would have gone to "Hazzard Whitfield, Cicero Whitfield and Lewis Whitfield," sons of L. S. Whitfield, deceased. So it would seem that the plaintiffs in no event could take the land under the will of the testator, Lewis Whitfield. If Franklin died leaving heirs of his body the contingency never happened by which his fee simple estate was to be reduced to a life estate, and *he* was the (151) fee simple owner. And if it had happened then the land was to go to the heirs of L. S. Whitfield. Franklin died leaving heirs of his body (the plaintiffs in this action), and the land did not go over to the heirs of L. S. Whitfield. The plaintiffs would have inherited it from their father, Franklin, but he sold and conveyed it to the defendants with full covenants of warranty, and the plaintiffs have no interest whatever in it.

The authorities cited by the plaintiffs are not in point. They are as to the time when the contingency must happen; and there is no such question in this case as that is fixed by the will to be at the death of Franklin.

The judgment must be affirmed for the reason assigned by his Honor who tried the case below.

Affirmed.

Cited: S. c., 134 N. C., 24; *Wilkinson v. Bond,* 136 N. C., 47; *Sessoms v. Sessoms,* 144 N. C., 125.

FLANNER v. BUTLER.

(Filed 14 October, 1902.)

TRUSTS—*Resulting Trusts—Husband and Wife—Gifts.*

Where a husband deposits money in a bank in the name of his wife, and real estate is purchased with such funds and a deed is made to the wife, the property becomes her separate estate, and no trust results from such transaction in favor of the husband.

ACTION, by A. J. Flanner against Carrie L. and Henry W. Butler, heard by *Judge E. W. Timberlake* and a jury, at April Term, 1902, of NEW HANOVER. From a judgment for the defendants the plaintiff appealed.

(152) *Bellamy & Peschau, Rountree & Carr,* and *Stevens, Beasley & Weeks* for the plaintiff.

E. S. Martin for the defendants.

FURCHES, C. J. This is an action to have defendant Carrie Butler declared trustee of two pieces of property in the city of Wilmington, known as the "Front street property" and the "Dock street property," for the benefit of the plaintiff. The trial resulted in a verdict and judgment in favor of the plaintiff for the "Front street property" and a judgment for the defendant as to the "Dock street property," and both plaintiff and defendant appealed.

At the conclusion of the evidence the defendants moved to nonsuit plaintiff upon the ground that he had not made a *prima facie case,* taking all the evidence to be true and viewing it in the most favorable light for the plaintiff. The court refused this motion as to the "Front street property" but allowed it as to the "Dock street property." To this ruling of the court dismissing his action as to the "Dock street property" the plaintiff excepted, and this exception presents the only question made by the plaintiff's appeal.

The plaintiff and the defendant Carrie were married in 1885, and were husband and wife when the property in controversy was purchased. But since then the plaintiff and defendant Carrie have been divorced, and the defendant Carrie has intermarried with Henry W. Butler, her co-defendant Carrie. The defendant Carrie testified that when she was married she had no estate and that the money used in buying the property came from the plaintiff Flanner. But it appears from the testimony of the defendant Carrie and from that of the plaintiff (and not contradicted by any evidence) that the plaintiff, some time after his marriage, became a member of a partnership composed of his father-in-law Larkin, his brother-in-law Alderman
(153) and himself; that a large amount of money belonging to the plaintiff was used in this partnership, which soon became insolvent, and was compelled to make a general assignment.

The plaintiff testified that when he discovered the partnership was insolvent "in order to save something from the wreck" he procured the execution of notes, payable to his wife, to the amount of $6,000, which notes were given a preference in the assignment and were paid in full by the assignee Davis; that these notes were deposited in bank to the credit of the defendant Carrie, and when paid the money was deposited to her credit; that the plaintiff received about $3,000 from other sources,

which was also deposited in bank to her credit. This money was used in buying and improving the "Dock street property," and a deed therefor made to the defendant Carrie with the plaintiff's knowledge and consent.

There has been some discussion as to the possession, whether it was in the plaintiff or the defendant, but we do not think that question is raised by the evidence in this appeal as neither was ever in the actual possession of the property, it being rented by common consent of the parties, and sometimes one collecting the rent and sometimes the other. But the general rule is that possession is presumed to be in the owner where there is nothing to show to the contrary (*Gaylord v. Respass,* 92 N. C., 553), but this is not always the case as between husband and wife. *Faggart v. Bost,* 122 N. C., 517.

If this property had been bought with the plaintiff's money, and the deed made to his wife with his knowledge and consent, it would not have created a resulting trust in the plaintiff. *Thurber v. LaRoque,* 105 N. C., 301. But in this case the land was bought with the money of the defendant Carrie, as the plaintiff had procured the notes for $6,000 to be made payable to her and deposited them in bank to her credit; and when they were paid the money was deposited in bank to her credit. This constituted a gift by the plaintiff to the defendant (154) Carrie, and the money became hers. *Hairston v. Glenn,* 120 N. C., 341. The other $3,000 the plaintiff deposited in bank to the credit of defendant Carrie was a gift, and became her money for the same reason and upon the same authority as the other $6,000.

It seems from the evidence that the plaintiff usually collected the rents until the defendant Henry informed the defendant Carrie that she could control the property, and she at once wrote to the tenants to pay no more rents to the plaintiff, and as soon thereafter as she could procure the money to do so she went to South Dakota, where she procured a divorce from the plaintiff, and not long after procuring the divorce she married her co-defendant Henry.

It seems by these manipulations the plaintiff lost his money and his wife, and we are unable to see any legal remedy he has to regain them. The fact that he gave his money to his wife to defraud his creditors will hardly afford him any comfort; but the fact that he also lost his wife may be some consolation to him.

Affirmed.

Cited: Currie v. Gilchrist, 147 N. C., 652.

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FLANNER v. BUTLER.

(Filed 14 October, 1902.)

1. TRUSTS AND TRUSTEES—*Resulting Trusts—Husband and Wife —Presumptions.*

Where property is bought with money belonging to the husband, and the deed is made to the wife without the consent or knowledge of the husband, the presumption is that it was a gift to the wife, but this is a presumption of fact which may be rebutted.

2. LIMITATIONS OF ACTIONS—*Adverse Possession—Husband and Wife.*

Where land is purchased with money of husband, and title taken in name of his wife, and neither party is in actual physical possession, the statute of limitations does not run against the husband where an action is brought to have the wife declared a trustee for the husband.

ACTION by A. J. Flanner against Carrie L. and Henry W. Butler, heard by *Judge E. W. Timberlake* and a jury, at April Term, 1902, of NEW HANOVER. From a judgment for the plaintiff the defendants appealed.

Bellamy & Peschau, Rountree & Carr, and *Stevens, Beasley & Weeks* for the plaintiff.

E. S. Martin for the defendants.

FURCHES, C. J. The plaintiff and defendant Carrie were married in 1885, when the plaintiff was only twenty-one years old and just out of school. Soon after this marriage the plaintiff inherited about $60,000 upon the death of his uncle, Joseph Flanner. This estate was received in money and bonds and deposited by the plaintiff in the Wilmington Bank, of which his father-in-law, William Larkins, was president. Soon after receiving the estate said Larkins told the plaintiff that
(156) certain property on "Front street" in the city of Wilmington was to be sold very soon, that it would be a good investment, and advised the plaintiff to buy it. The plaintiff then instructed said Larkins, who had control of his money, *to buy it for him,* the plaintiff. At the sale Larkins bought the property and paid for it out of the plaintiff's money, but had the deed therefor made to his daughter Carrie, then the wife of the plaintiff. The plaintiff knew that Larkins bought the property and paid for it out of his money on deposit in the bank, and thought it was bought for him, and did not know the deed was made to defendant Carrie until it was registered. When the plaintiff discovered the deed was made to defendant Carrie

he complained of it and told Larkins that he told him to buy the property for *him,* and he (Larkins) had the deed made to his daughter Carrie, when Larkins said it was all the same, what a man's wife had was her husband's, and he would have the use and control of it the same as if the deed had been made to him. The plaintiff was young and without business experience; had just married the daughter of Larkins; was living in his family and, having confidence in Larkins, he made no further complaint as to the manner in which the deed was made. But he never did consent to its being made to his wife. He and the defendant Carrie continued to live together as man and wife until 1899, and the property being rented he collected and used the rents arising therefrom. In 1899 the defendant Carrie notified the tenants not to pay any more rents to him, but to pay them to her, and he has received no rents therefrom since that time. The defendant Carrie very soon after giving this notice to the tenants went to South Dakota where she procured a divorce from him, and soon after procuring said divorce married Henry W. Butler, her co-defendant.

This statement of facts is made principally from the plaintiff Flanner's own testimony, corroborated by that of E. H. Freeman, G. L. Morton and others. And it is not (157) denied but what the defendants offered evidence tending to rebut or contradict a part of this evidence. But if the plaintiff's evidence is believed it makes a *prima facie* case for the plaintiff, and as the jury may believe it (and in this case did believe it) there was no error in his Honor's ruling refusing the defendants' motion to nonsuit the plaintiff as to the "Front street property," this being the property involved in this appeal.

The court submitted three issues, as follows:

1. Was the land described in article three of the complaint purchased with the money of the plaintiff?

2. If so, was the deed to the defendant made to it without his knowledge or consent?

3. Is the plaintiff's cause of action barred by the statute of limitations?

The jury answered the first and second issues in the affirmative and the third in the negative. This, it seems to us, settles the case, unless there were such errors committed on the trial as to vitiate the findings of the jury.

It is admitted by the defendants that the general rule is that where property is bought with the money of another and the deed made to another person, without the knowledge or consent of the party furnishing the money, the holder of the deed will be declared trustee for the party who furnished the money.

Lassiter v. Stanback, 119 N. C., 103; *Norton v. McDevit,* 122 N. C., 755. But it is contended by the defendants that this rule does not obtain in cases of husband and wife. And this is so, nothing else appearing, as the law, owing to the relation of the parties, will presume that the husband intended it as a gift or present to his wife. *Thurber v. LaRoque,* 105 N. C., 301. But this is only the presumption of a fact the law makes, which may be rebutted by evidence, and when this is done the
(158) parties then stand as if they were not man and wife, that is, they stand as other parties, and the general rule prevails. *Faggart v. Bost,* 122 N. C., 517. This being so, and the jury having found that this "Front street property" was bought with the plaintiff's money, that the plaintiff directed Larkins to buy it for him, and that the deed was made to the defendant Carrie *without his knowledge or consent,* the plaintiff has a clear case for the enforcement of the general rule and to have the defendant Carrie declared a trustee for his benefit.

But it is further contended by the defendants that if the plaintiff ever had this right it is barred by the lapse of time and the statute of limitations. But in this case neither was the plaintiff nor the defendant Carrie in the actual *possessio pedis* of the property, it being actually occupied by tenants. And according to the plaintiff's testimony, corroborated by the tenants, the plaintiff made contracts for renting and received and receipted for the rents, and used them for his own purposes; and we must presume the jury believed this evidence. The plaintiff, therefore, was as much and even more in possession than was the defendant Carrie. And where they were both in possession the statute of limitations does not run. *Faggart v. Bost* and *Norton v. McDevit, supra.* So the defendants must fail on the plea of the statute of limitations.

There are some of the exceptions as to evidence relating to the defendant Carrie's going to South Dakota and obtaining a divorce and marrying the defendant Henry that were irrelevant and should not have been allowed. But we fail to see what bearing it had on either of the issues or how it did or could have affected their findings on the issues submitted. We are therefore unwilling to grant the defendants a new trial for these errors, which we think in no way affected the verdict on the issues submitted. While we have not discussed each one
(159) of the many exceptions of the defendants, we have carefully examined them all and find no error for which we can give the defendants a new trial.

Affirmed.

Cited: Norcum v. Savage, 140 N. C., 473.

SAVAGE v. DAVIS.

(Filed 14 October, 1902.)

1. PLEADINGS—*Answer—Set-off—Counterclaim.*

In an action for malicious prosecution an allegation in the answer that the plaintiff admitted on trial before justice that he owed defendant a certain amount, is a sufficient pleading of a set-off.

2. MALICIOUS PROSECUTION—*Malice—Torts.*

In an action for malicious prosecution, it is necessary that the ill-will or malice should have existed against plaintiff personally.

ACTION by T. F. Savage against J. A. Davis, heard by *Judge E. W. Timberlake* and a jury, at October Term, 1901, of EDGECOMBE. From a judgment for the plaintiff both plaintiff and defendant appealed.

No counsel for the plaintiff.
Jno. L. Bridgers and *G. M. T. Fountain* for the defendant.

PLAINTIFF'S APPEAL.

MONTGOMERY, J. The complaint embraces two causes of action, the first count charging the defendant with a malicious prosecution without probable cause, and the second the slander of the plaintiff by the defendant growing out of the same transaction. The defendant in his answer denies having prosecuted the plaintiff maliciously and without probable (160) cause, and also denies that he used the slanderous words imputed to him by the plaintiff. The jury answered all the issues in favor of the plaintiff, and assessed his damages on the issue as to the malicious prosecution in the sum of $500, and his damages for injury on account of the slander at nothing. The defendant in his answer made the following averment: "That T. F. Savage claimed that he alone purchased the guano on the trial of the said warrant, and was chargeable therewith; that the value thereof is $120 with interest from 1 November, 1898, and said plaintiff is therefore indebted to the defendant in said amount." The defendant had arrested and brought before a justice of the peace the plaintiff on a charge of having gotten five tons of guano from him, the defendant, under false pretense. On the trial of the action in the Superior Court, the plaintiff denying that he procured the guano under a false pretense, admitted that he had received four tons at the price claimed by the defendant, and his Honor, treating the averment as a set-off, though inadvertently calling it a counterclaim, gave

judgment for the plaintiff for the $500 against the defendant less the amount of the four tons of guano, which the plaintiff admitted that he received from the defendant. The plaintiff thereupon demurred *ore tenus* to that section of the answer which his Honor treated as a set-off on the ground that it did not take the cause of action in respect to said *counterclaim,* and the court had no jurisdiction of the same. The court overruled the demurrer and rendered a judgment as above set out, and the plaintiff excepted and appealed.

The exception of the plaintiff was not to the pleading of a set-off in an action in tort, but the exception was first to the jurisdiction of the court, the amount of the set-off being less than $200; and, second, to the failure of the defendant to state a cause of action in counterclaim. But it will be seen by (161) reference to that part of the defendant's answer that a counterclaim was not intended to be nor was in fact pleaded. It was only a set-off, sufficiently pleaded, and the court committed no error in deducting it from the amount of the plaintiff's recovery. There was, as we have said, no demurrer to the pleading of the set-off in the action.

No error.

DEFENDANT'S APPEAL.

MONTGOMERY, J. His Honor properly charged that the plaintiff's right to recover, on the issue concerning malicious prosecution, was dependent upon both malice and want of probable cause on the part of the defendant. In explaining the term "malice," his Honor said to the jury: "Whenever want of probable cause is found by the jury, the jury may infer malice therefrom, or not, but there is no presumption of malice—simply an inference which the jury may or may not draw. The plaintiff contends that, in addition to the inference which you may draw from the want of probable cause, he has offered you evidence upon which you should find malice. There is evidence tending to show that on several occasions the defendant said, if he was not paid, he would put the plaintiff in the penitentiary, and tending to show that he started the prosecution to collect his money. These are circumstances to be considered by you on the question of malice. On the other hand, the defendant denies this evidence and says he had no malice against the plaintiff; that he honestly believed that he had gotten his guano under false pretenses, and to guard against error he employed and consulted counsel. All of these circumstances are to be considered by you as tending to negative malice, and it is your duty to consider them carefully and impartially. Unless you find malice,

although you may find want of probable cause, you will answer the issue 'No.' But if you should find both, under the rules of proof laid down as to evidence and law, you will (162) answer the issue 'Yes.' By malice is not necessarily meant that state of mind which must proceed from a spiteful, malignant and revengeful disposition, but it includes as well that which proceeds from an ill-regulated mind, not sufficiently cautious, and recklessly bent on the attainment of some desired end, although it may inflict wanton injury on another."

If no other instruction had been requested by the defendant that charge might be sufficient on the question of malice. But the defendant requested the court to instruct the jury more particularly as follows: "By malice is meant special or particular malice, not general malice, but particular malice against the plaintiff. So before the plaintiff can ask a verdict at your hands on the first issue he must show you that the defendant was prompted by particular malice toward him in procuring the warrant complained of in this action, and at the same time did not have reasonable grounds or probable cause to commence the prosecution."

In *Brooks v. Jones,* 33 N. C., 260, which was an action for malicious prosecution, the Court said: "The case then, as we infer, was intended to present this question: In an action for malicious prosecution is it sufficient for the plaintiff to show that the defendant in instituting the prosecution was influenced by general malice, or must he show that the plaintiff had particular malice against him? His Honor thought the plaintiff must show particular malice on the part of the defendant towards him." We concur in this opinion. In actions for libel it is not necessary that the ill will or malice should exist against the plaintiff personally. *Gattis v. Kilgo,* 128 N. C., 402. The rule, however, is different in actions for malicious prosecution, as we have seen.

Error.

Cited: Lewis v. R. R., 132 N. C., 386; *Baker v. R. R.,* 144 N. C., 43.

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WILSON v. BEAUFORT COUNTY LUMBER COMPANY.

(Filed 14 October, 1902.)

1. APPEAL—*Exceptions and Objections—The Code, Sec.* 550.

An appeal is in itself an exception to a judgment.

2. APPEAL—*Exceptions and Objections—Trial—The Code, Sec.* 513.

Where there is objection to evidence, or any other matter occurring at the trial, except as to the charge, a specific exception must always be taken at the time.

3. EXCEPTIONS AND OBJECTIONS—*Appeal Trial—Instructions.*

A "broadside exception" to the charge as given will be disregarded.

4. APPEAL—*Exceptions and Objections—The Code, Sec.* 957.

The Supreme Court will take notice of errors on the face of the record proper without any assignment of error.

5. JUDGMENTS — *Judgment Docket — Minute Docket — Lien — The Code, Sec.* 435.

Where a judgment for damages and costs is recorded on the minute docket, but the judgment docket omits the judgment for damages, no lien is thereby created by the judgment for damages, though the judgment docket refers to the minute docket.

6. JUDGMENTS—*Homestead—Lien—Limitations of Actions.*

Under a statute limiting the life of a docketed judgment to ten years, a lien of such judgment is not prolonged by the allotment and recording of the homestead to the debtor after the expiration of ten years, though the judgment was kept revived.

7. JUDGMENTS—*Lien—Costs.*

Each of two separate parcels of land owned by a judgment debtor at the time of the docketing of the judgment is liable for its own proportion of the docketed judgment in whosesoever hands it may come.

ACTION by Louis Wilson and others against the Beaufort Lumber Company and others, heard by *Judge Francis D. Win-*
(164) *ston,* at March Term, 1902, of PITT. From a judgment ment for the plaintiffs they appealed.

Skinner & Whedbee for the plaintiffs.
Flemming & Moore for the defendants.

CLARK, J. A jury trial having been waived the facts were found by the court. From the judgment rendered thereon the

plaintiffs appealed. There is no exception and none is necessary, the appeal being of itself an exception to a judgment. *Murray v. Southerland,* 125 N. C., 175; *Delozier v. Bird,* 123 N. C., 689; *Reade v. Street,* 122 N. C., 301; *Appomattox Co. v. Buffaloe,* 121 N. C., 37; *Thornton v. Brady,* 100 N. C., 38; Clark's Code (3 Ed.), page 772; Code, sec. 550.

Where there is objection to the evidence, to the charge or any other matter occurring on the trial, an exception must always be specifically taken; Code, sec. 550, and cases cited in Clark's Code, (3d Ed.), pages 772-774; and except as to the charge such specific exception must be taken at the time. *S. v. Downs,* 118 N. C., 1242, and cases cited; Clark's Code (3 Ed.), page 509. A "broadside exception" to such matters cannot be noticed. Clark's Code (3d Ed.), 513.

By virtue of the Code, sec. 412 (3), an exception to the charge can be taken for the first time in the appellant's statement of the case on appeal, though it must be specific and not "broadside." *Lowe v. Elliott,* 107 N. C., 718; *Taylor v. Plummer,* 105 N. C., 56, and numerous cases collected in Clark's Code (3d Ed.), pages 513 and 773.

But as to errors upon the face of the record proper, such as defects in the summons, pleadings and judgment, the appellate court is required to take notice of these without assignment of error, by the Code, sec. 957. The distinction is clearly pointed out in *Thornton v. Brady,* 100 N. C., 38, and in numerous cases since, collected in Clark's Code (3 Ed.), at pages (165) 772, 800, 924. Errors in the face of the record proper are necessarily either (1) that the court has not jurisdiction, or (2) that the complaint (or indictment) does not state a cause of action, as to both of which Rule 27 of this Court states that the Court will take notice *ex mero motu* without assignment of error; or (3) that the facts found, whether by general verdict or special verdict, or by the judge, or by consent, do not justify the judgment imposed. Clark's Code (3d Ed.), pages 920-924.

The court (a jury having been waived) found as facts that at June Term, 1889, of Pitt Superior Court, judgment was rendered in favor of the plaintiffs against Lizzina Wilson for $225 for mesne profits and for partition, and $50.19 costs, and said judgment was recorded in full on the minute docket, but in the judgment as docketed and duly indexed at that term the $225 was omitted from said docketing; and that about 1 December, 1898, this omitted part of the judgment was placed on the docket at the request of the plaintiffs, but without notice to the defendants, by the clerk after the expiration of his term of office. The docketed judgment, however, contained the following: "For

decree see Minutes No. 5, pages 619-623"; and the decree there copied in full embraced the $225 recovery. It is further found as a fact that in June, 1889, at the time the above judgment was docketed, Lizzina Wilson owned in fee two tracts, one containing sixty acres, which was worth, 1 March, 1902, $300, and the other, containing sixty-six and two-thirds acres, worth, 1 March, 1902, $800; that on 12 April, 1894, said Lizzina Wilson conveyed, for $135, the timber on the sixty-acre tract to the Beaufort Lumber Company, and thereafter conveyed the fee of said tract (subject to above conveyance of the timber) to the defendants, her son, Geo. W. Wilson, and grandson, John W. Wilson, without consideration; that on 18 December, 1890, she
(166) conveyed the sixty-six two-thirds-acre tract, without consideration, to her son McD. Wilson, who on 25 December, 1896, conveyed the same for value to the *feme* plaintiffs, who are her daughters, and who are now the owners thereof; that on 25 May, 1899, notice was issued to Lizzina Wilson for revival of said judgment, and execution was issued thereon 26 May, 1899, and the homestead was allotted out of these lands, but the allotment was not recorded till after the expiration of ten years from the date of docketing said judgment. On 7 June, 1901, after the answer in this case had been filed, the plaintiffs entered a release of the lien of said docketed judgment as to the 66 2-3-acre tract.

His Honor correctly held that the judgment was not a lien for the $225, that part of the judgment not having been docketed. Code, 435. The reference to the minute docket was sufficient notice to put a purchaser on guard as to the nature thereof, as to matters which did not "affect the title or direct the payment of money." But a money judgment cannot be made a lien unless set out in the docketing thereof, which is required for this very purpose of guarding against liens, unless entered on the docket. In *Holman v. Miller,* 103 N. C., at page 120, it is said: "It is very clear that unless the judgment is docketed *upon this particular docket* there can be no lien by virtue of the judgment alone," and in *Dewey v. Sugg,* 109 N. C., at page 335, 14 L. R. A., 393, *Merrimon, C. J.,* says: "A docketed judgment *creates and secures* a lien upon the judgment debtor's land. But a judgment, in order to create such lien, must be docketed in the way and manner above pointed out, otherwise the judgment is not docketed and no such or any lien arises," citing authorities.

The judgment was docketed in 1889, and no allotment of homestead having been made till after the ten years had expired, there was no suspension of the statute of limitations, and

the lien of the judgment having expired, could not be revived by its allotment after that time. The execution (167) issued on the revived judgment has lien only from its levy and by virtue of the levy, and not by virtue of his docketing the judgment in 1889. *Spicer v. Gambill,* 93 N. C., 378; *Pipkin v. Adams,* 114 N. C., 201; *McCaskill v. Graham,* 121 N. C., 190. The defendants, the lumber company, having acquired title for value prior to the levy of such execution the lands in their hands would not ordinarily be subjected. Whether this, being a judgment for costs in partition, is a judgment *in rem* as to which no statute runs (*Dobbin v. Rex,* 106 N. C., 444; *In re Walker,* 107 N. C., 340), we are not called upon to decide as the defendants did not appeal, but if it is, his Honor correctly adjudged that defendants pay only three-elevenths of the costs, for each tract should bear its own proportion. *Hinnant v. Wilder,* 122 N. C., 149. That case holds also that no homestead could be allotted against the judgment for costs in partition. The plaintiffs could not transfer the lien on their own tract to the defendants by an entry in their own favor on the judgment docket. The $225 part of the judgment was not for equality for partition but a mere personal judgment incidentally annexed for *mesne* profits, and no lien ever attached as above stated by reason of its having been omitted from the docketing of the judgment.

No error.

Cited: Baker v. Dawson, 131 N. C., 227; *Smith, ex parte,* 134 N. C., 497; *Mershon v. Morris,* 148 N. C., 51.

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SHANKLE v. WHITLEY.

(Filed 21 October, 1902.)

1. APPEALS—*Premature—References—Account.*

Where, upon issues found by a jury, it is necessary to have an account taken, and an order of reference is made, an appeal therefrom is premature if taken before final judgment.

2. COUNTERCLAIM—*Judgment—Estoppel.*

The failure to set up a counterclaim existing at the time of a former suit does not estop the defendant to set it up in a subsequent suit between the same parties.

DOUGLAS, J., dissenting.

SHANKLE *v.* WHITLEY.

ACTION by S. L. Shankle, administratrix of W. L. Shankle, against G. A. Whitley, heard by *Judge Thomas A. McNeill* and a jury, at April Term, 1902, of RICHMOND. From a judgment for the defendant the plaintiff appealed.

Jas. A. Lockhart for the plaintiff.
Morrison & Whitlock for the defendant.

CLARK, J. Upon the issues found by the jury it was necessary to have an account taken, and the cause was referred to a referee to state the account. It was premature to appeal before the final judgment upon the coming in of the report. *Blackwell v. McCain,* 105 N. C., 460, and numerous cases there cited. The plaintiff should have merely entered his exception at this stage. *Williams v. Walker,* 107 N. C., 334.

A distinction must be noted between those cases in which the plea in bar is sustained or overruled as a matter of law by the judge, whereupon the party may appeal at once if he so elect (*Royster v. Wright,* 118 N. C., at page 155, and cases there cited; *Smith v. Goldsboro,* 121 N. C., 350), and cases like this, where the issues arising upon the pleadings have been
(169) found by the jury and the reference is afterwards made to state an account or ascertain some incidental matter, which becomes necessary before final judgment upon the hearing. Even in the first class of cases it is optional to note an exception or appeal at once. *Kerr v. Hicks, ante,* 90.

It may not be improper to say, as the case was fully discussed on the merits, that the defendant was not estopped to set up his counterclaim in this action because he might, if he had chosen, have pleaded it in a former action against him by the plaintiff, brought for a different cause of action. The pleading of a counterclaim is optional. *Woody v. Jordan,* 69 N. C., 189; *Tobacco Co. v. McElwee,* 94 N. C., 425.

Appeal dismissed.

DOUGLAS, J., dissenting. I do not think the appeal is premature.

Cited: Mauney v. Hamilton, 132 N. C., 300; *Jones v. Wooten,* 137 N. C., 425.

FOWLER v. FOWLER.

(Filed 21 October, 1902.)

BASTARDY—*Legitimation—The Code, Secs.* 39, 136, 255—*Laws* 1887, *Chap.* 766.

Where, by the laws of the domicile of the parents at the time of the birth of their bastard child and of their marriage, their marriage legitimates him, the legitimacy attaches at the time of the marriage, he being a minor, and follows him wherever he goes.

ACTION by S. G. Fowler against Kitty Seaman and Kit Stanley Fowler, heard by *Judge Walter H. Neal* at chambers, MOORE County. From a judgment for the plaintiff the defendant Kitty Seaman Fowler appealed.

U. L. Spence for the plaintiff. (170)
Douglass & Simms and *Shepherd & Shepherd* for the defendant.

CLARK, J. This is a proceeding begun before the clerk by the plaintiff for the legitimation of his son under the Code, sec. 39. The petition alleges that the plaintiff is a citizen and resident of the county; that about 1 July, 1893, the plaintiff and defendant were married at Milwaukee, Wisconsin; that for four or five years previous thereto and up to the marriage they had lived and habitually cohabited together at 6337 Carpenter street, Chicago, Illinois, and during that time there was born to them on 15 November, 1892, a son, of whom the plaintiff was, and has always been reputed to be, the father, and that the plaintiff and the defendant have continued to live together since the marriage. The wife answers, admitting all of above allegations except that she denies that plaintiff is a resident and citizen of the county; and for a further defense alleges cruel treatment by plaintiff, for which she has an action for divorce *a mensa et thoro* pending, and that the clerk of the Superior Court has no jurisdiction. The child was made a party defendant, and through his *guardian ad litem* answered, admitting all the above recited allegations of the complaint. The clerk granted the petition, and his judgment on appeal was affirmed by the judge at chambers, from which judgment the wife appealed.

The plaintiff contends that by virtue of the Code, sec. 136, the words "Superior Court," in section 39, means the clerk, and that if this is not so, the case having gotten before the judge of the Superior Court, his action is valid by virtue of chapter 276, Laws 1887, amending the Code, sec. 255, and relies on

Roseman v. Roseman, 127 N. C., 494, and *Ury v. Brown,* 129 N. C., 270, and cases there cited. The defendant contends that considering the caption of section 39, as may be done,
(171) *S. v. Woolard,* 119 N. C., 779, and other language in section 39, that section 126 does not apply, but the Superior Court at term alone has jurisdiction, and that this defect is not cured by the appeal to the judge at chambers.

We are not called upon to decide this very interesting question because, upon the face of the petition, there is a fatal defect in that no cause of action is stated; a defect which the Court must notice *ex mero motu. Nash v. Farrabow,* 115 N. C., 303; *Ladd v. Ladd,* 121 N. C., 118; *Cary v. Allegood, ibid.,* 54. This proceeding is provided to legitimate illegitimates, but it appears from the averments in the complaint that the child is already legitimated.

By the laws of this State the subsequent marriage of the parent does not legitimate their children born prior to the marriage. But legitimacy is a *status,* and by the laws of Illinois the subsequent marriage of the parents legitimates their prior offspring. "If the mother of any bastard child and the reputed father shall, at any time after its birth intermarry, the said child shall in all respects be deemed and held legitimate." Rev. Stat. (1895), page 203, sec. 15. The parties were domiciled, according to the complaint, at the time of the child's birth and up to the time of the marriage in Illinois, and it is well settled that the child, being still a minor, its legitimacy then accrued and accompanies it wherever it goes. Even if the domicile had been in Wisconsin at the time of the marriage, the law there is the same, if the father recognized the child as his, as it appears he did. Rev. Stat. Wisconsin (1778), sec. 2274. The Illinois statute was enacted as far back as 1845.

By both the civil and canon law the subsequent marriage of the parents legitimated their offspring born before marriage. 1 Bl. Com., 454. It was when the Bishops at the Parliament held at the Priory of Merton in Surrey (in 1236) attempted to procure a change in the common law to that effect that the Barons answered, *"Nolumus leges angliae mutari,"* "we
(172) are unwilling to change the laws of England" (1 Bl. Com., 456; 2 Kent Com., 209), and made an entry on the Journal, 20 Hen. III, ch. 9, which is known as the Statute of Merton. This remains the law of England to-day as it does in North Carolina, though Virginia and many other States, as well as Illinois and Wisconsin, have adopted the civil law in this particular. It seems well settled in England, as well as elsewhere, that when by the law of the domicile of the parents, both

at the time of the birth and the law of the domicile at the time of the subsequent marriage of the parents, the effect of the marriage is to legitimate the children, the legitimacy attaches (if the children are not adults) and goes with them wherever they go. "If by that law he is thereby rendered legitimate he will be regarded as legitimated everywhere, even in States whose laws do not recognize subsequent legitimation." Minor Confl. Laws, sec. 99, citing very numerous authorities. The English courts only differ from others in holding that it is the law of the father's domicile at the *time of the birth* which governs, and not the law of the domicile at the time of marriage. Minor, *ut supra,* where the whole subject is clearly and interestingly discussed. To same purport Dicey Confl. Laws, Rule 134; Wharton Law of Nations, 172; Wharton Confl. Laws, secs. 240-248; Story Confl. Laws, sec. 93-93v (8 Ed.), where the subject is exhaustively considered; *Miller v. Miller,* 91 N. Y., 315, 43 Am. Rep., 669; *Ross v. Ross,* 129 Mass., 252, 37 Am. Rep., 321. The American authorities, all to same purport, will be found collected in 3 Am. and Eng. Enc., 895 and 6; 6 Century Digest, C. C. 1827-1830. In *Ross v. Ross, supra, Gray, C. J.,* reviews all the authorities up to that decision (1880); see also *Adams v. Adams,* 154 Mass., 290, 13 L. R. A., 275, and notes.

As the child was legitimate upon the allegations in the complaint when the child came to this State, the removal of his parents hither could not have the effect to make (173) him a bastard, and the complaint states no cause of action.

A similar instance is that of a marriage solemnized in a State whose laws permit such marriage between a negro and a white person domiciled in such State. This is valid on their removal to this State, though such marriage would have been invalid if such parties had been domiciled here. *S. v. Ross,* 76 N. C., 242, 22 Am. Rep., 678; *Woodard v. Blue,* 103 N. C., at page 114. The *status* accompanies the person and is not changed by the removal.

Action dismissed.

Cited: S. v. Bossee, 145 N. C., 581.

BURNS v. WOMBLE.

(Filed 21 October, 1902.)

1. TRESPASS — *Estoppel — Writ of Possession — Mortgages—Ejectment—Sheriff.*

Where a wife joins a husband in a mortgage for the purpose of relinquishing her right of dower and homestead, and the mortgage is foreclosed and ejectment brought by the purchaser, she not being made a party thereto, the wife has no ground for trespass against a sheriff who executes a writ of possession in the ejectment suit, although after the giving of the mortgage she received a deed for an interest in the property from a third person.

2. TRESPASS—*Release—Writ of Possession—Sheriff.*

A release of a sheriff from liability for trespass in executing a writ of possession releases the plaintiff in the writ.

DOUGLAS, J., dissenting in part.

ACTION by G. B. and Martha Burns against J. W. Womble, heard by *Judge Walter H. Neal* and a jury, at November Term, 1901, of CHATHAM. From a judgment for the plaintiffs (174) the defendant appealed.

No counsel for the plaintiffs.
Womack & Hayes and *H. A. London* for the defendant.

FURCHES, C. J. On 14 February, 1888, the plaintiff G. B. Burns made and executed a mortgage to S. T. Womble for the tract of land on which he resided, with full covenants of warranty and seizin, in which the plaintiff Martha, who is the wife of the plaintiff G. B. Burns, united. It is stated in the mortgage that the plaintiff Martha joined in the deed for the purpose of relinquishing her right of dower and claim to homestead. The mortgage contained the usual power of sale upon default of payment, and upon such default the mortgagee sold said land, and the defendant became the purchaser and took a deed therefor from the mortgagee. Upon the plaintiffs refusing to surrender possession to the defendant he commenced an action of ejectment against the plaintiff G. B. Burns in the Superior Court of Chatham County. In this action for possession the plaintiff therein (the defendant in this action) set forth in his complaint the making of the mortgage to S. T. Womble, the sale and purchase by him, that he is thereby the owner of the land and demands possession. The defendant (G. B. Burns) answered, admitting the execution of the mortgage as alleged in the complaint, but saying that he had not sufficient knowledge

of the facts stated in the second paragraph of the complaint to admit it, and therefore denies the same. And he denied that the plaintiff was the owner of the land mentioned in the mortgage and in the complaint.

At May Term of said court the case came on for trial upon the issues raised by the complaint and answer, and the court submitted this issue: "Is the plaintiff the owner and entitled to the immediate possession of the land described in the complaint?" and the jury answered "Yes." And upon (175) this issue being found for the plaintiff, his Honor, *Judge Allen,* on motion of plaintiff's counsel, rendered judgment as follows: "It is ordered and adjudged that the plaintiff is the owner and entitled to the immediate possession of the land described in the complaint, and that he recover his costs of the defendant, to be taxed by the clerk." And upon this judgment the clerk of said court issued an execution and writ of possession to the sheriff, in which the following language is used: "You are therefore commanded to satisfy said judgment by dispossessing the said G. B. Burns and those holding under him, and by placing the said J. W. Womble in possession," etc. This writ was placed in the hands of the sheriff, and he was attempting to execute it when the trespass complained of was committed.

It is clear that the sheriff had a duty to perform in discharge of the requirements of his office, for which he would have been liable to penalties and damages if he failed in its performance. All he could do was to see that the judgment was regular and authorized the issuance of the writ, and then to execute the same.

Whether the plaintiff G. B. Burns was the owner of the land or not he had made his deed (the mortgage), in which he alleged and covenanted that he was the owner in fee simple. And he was certainly estopped to deny that he was the owner, and has no right to complain that he has been dispossessed by a judgment of the court and a writ of possession.

The wife, the *feme* plaintiff, was a party to the mortgage, signed and duly executed the same, in which she covenanted that her husband, G. B. Burns, was the fee simple owner "and had the right to make" said mortgage. But she now claims that on 11 January, 1895, M. T. Burns made her a deed to one undivided fourth of said land, and that she is now the owner thereof. This may be so, but if it is the sheriff (176) could not take her word for that and not discharge the duties of his office in executing the process of the court. If she was the owner of one-fourth part of this land, or any other part, she had the right to intervene, make herself a party to

the action of Womble against her husband, and set up her claims, whatever they are, and have them passed on by the court. *Cecil v. Smith,* 81 N. C., 285; *Taylor v. Apple,* 90 N. C., 343; *Young v. Greenlee,* 82 N. C., 346.

Suppose the plaintiff Martha had not gotten a deed from M. T. Burns (dated 11 January, 1895), will it be contended that the sheriff would have committed a trespass on the plaintiffs in this action by removing them and their effects from this land in obedience to the execution then in his hands? And the fact that she had a deed (which she did not even show to the sheriff) can make no difference. Suppose that Burns had been the tenant of A and Womble had brought his action of ejectment against him, A would have had the right to intervene and set up his title to the land, and if he sustained his title Womble would not have been entitled to a writ of possession. But suppose he sat by and did not intervene, and Womble recovered judgment declaring that he was the owner and entitled to the immediate possession, would it be contended that A would be allowed to meet the sheriff on the premises and defy his authority to dispossess Burns? As A was not a party he would not be estopped to bring an action and assert his title against Womble, if he had any. But he would not be allowed to enforce his claim by preventing the sheriff from executing the process of the court. The plaintiff Martha stands in the same condition as A would have stood, as it will appear from the cases already cited.

The sheriff being authorized to dispossess the plaintiffs, he committed no trespass for which he is liable for damages unless it be on account of the manner in which he executed the
(177) process. And although the plaintiffs allege that it was done with great violence the evidence does not seem to sustain that allegation, and if it did that matter is not before us, as the plaintiff did not appeal.

The right of the plaintiffs to recover against the defendant depends upon the unlawful acts of the sheriff, and as we are of the opinion that he was authorized to do what he did the plaintiffs' action must fail.

But it further appears that the plaintiffs had compromised with the sheriffs, Jenkins and Johnson, for the alleged trespass for which this action is brought, for which they received $135 from each one of them. This was a discharge of the defendant Womble. A party may have an action against each of several trespassers, but the satisfaction of one judgment is a satisfaction and discharge of all. And a compromise and discharge of one is a discharge of all. *Kirkwood v. Miller,* 5 Sneed (Tenn.),

455; 73 Am. Dec., 144, and notes, and authorities there cited; *Patterson v. Mfg. Co.*, 41 Minn., 84; 4 L. R. A., 744, and notes on pages 44, 45. And this is held to be so although the plaintiff stipulates that it is not to be a discharge of the others. *Ellis v. Bitzer*, 2 Ohio (Hammond), 89; 15 Am. Dec., 534. There is Error.

DOUGLAS, J., concurring in result only. I concur in the opinion of the Court only in so far as it holds that the release of the sheriffs by the plaintiff operated as a release of the defendant. I cannot concur in the remainder of the opinion, either upon reason or authority, nor is it at all necessary to do so for a determination of this case.

It may at times create unmerited hardship, but I feel compelled to adhere to the principles laid down by this Court in *Smith v. Ingram*, 130 N. C., 100. It should be remembered that in the case at bar the plaintiff is and was at (178) the time of the eviction a married woman; that she was not a party to the action of ejectment, and that she held possession of the land from which she was evicted as a tenant in common under a title admittedly good and entirely disconnected from her husband. As is said in the opinion of the Court it is stated in the mortgage that the plaintiff Martha joined in the deed for the purpose of relinquishing her right of dower and claim to homestead. She acquired one undivided fourth of the land after the execution of the mortgage, which therefore could not possibly have been conveyed in the mortgage. To say that a married woman is estopped by any covenants of warranty contained in a deed professedly made for the sole purpose of conveying only her dower and homestead is an extension of the doctrine of "feeding an estoppel" which I am not prepared to accept. Neither can I admit that a married woman can lose her rights of property by failing to intervene in a suit to which the then plaintiff did not see fit to make her a party.

QUEEN CITY PRINTING & PAPER COMPANY v. MCADEN.

(Filed 21 October, 1902.)

1. CONTRACTS—*Fraud—Subscriptions—Corporations.*

The evidence in this case is sufficient to be submitted to the jury on the question whether the subscription for stock was induced by fraud.

2. PLEADINGS—*Answer—Waiver—Demurrer—The Code, Sec.* 248.

The defect of the answer, setting up the defense of fraud, from failure to allege the knowledge of the plaintiff of the fraud, is waived by failure of plaintiff to demur.

(179) ACTION by the Queen City Printing and Paper Company against Henry M. McAden, heard by *Judge H. R. Starbuck* and a jury, at January Term, 1902, of MECKLENBURG.

This action is brought to recover the amount ($500) subscribed by defendant for ten shares of stock in plaintiff company. Defendant resisted a recovery upon the grounds (among others not necessary now to be stated or discussed) that plaintiff, through its agent and president, H. A. Murrill, induced the subscription by false representations. Upon the trial the defendant, in his own behalf, testified that:

"Between 16 and 20 April, 1900, Mr. Murrill came to me with the subscription list introduced in evidence. He had other papers with him, or at least told me he had, but I did not see them. He told me that he and J. P. Wilson and George B. Hiss and others had been talking about reorganizing the Queen City Printing and Paper Company and wanted me to help him; that he, J. P. Wilson, E. A. Smith and George B. Hiss had agreed to take most of the stock, and would take it all but wanted a few outsiders for their influence, and that George B. Hiss had recommended and sent him to me. He said George B. Hiss would be treasurer of the company and that George B. Hiss, J. P. Wilson and E. A. Smith would be large stockholders, and that George B. Hiss would be actively in charge of the financial part of the business. I said to him, 'I don't know anything about your business but if George B. Hiss is going to be a stockholder and manage the thing and I can be of any assistance to you I will be glad to take some stock. I suppose you want only a small subscription. I will subscribe for three shares, or $150.' He said, 'You might as well make it $500.' I replied, 'Well, if George B. Hiss is going to be interested and manage this concern and asks for my help we will make it $500.' I then signed my name for $500. At that time George B. Hiss

(180) and I were associated in a number of business enterprises and we had been accustomed to help each other out. If Mr. Hiss wanted help I would help him, and *vice versa*. Mr. Murrill told me that Mr. Hiss had sent him to me. I said to him, 'Why is it that Mr. Wilson and Mr. Hiss have not subscribed?' He said, 'They haven't subscribed their names because they expect to take whatever stock is left and don't know now what to put down,' and he further said that Wadsworth and Franklin had authorized him to put their initials on the list,

but had not signed themselves because they were constantly being solicited to take stock in companies and didn't want everybody to be bothering them, but that they were going to be stockholders in the company.

"Mr. Hiss is a splendid business man and I had absolute confidence in him. When Mr. Murrill came to see me he stated that he knew I had great confidence in Mr. Hiss.

"I told Mr. Percy Thompson what I have told here.

"Some time before the meeting, which was held on 26 April, 1900, Mr. Murrill came back to see me and said: 'It may be Mr. Hiss is so busy in other matters that he can't become treasurer. Would some other good man do for treasurer?' I said, 'Any reliable man that the stockholders may agree on for treasurer will be satisfactory to me.' He then said, 'Would Mr. D. W. Oates do?' and I replied, 'If Mr. Oates is satisfactory to a majority of the stockholders as treasurer he will be satisfactory to me.' He showed me a paper from Mr. Oates stating that he would accept the position. I then said to him, 'Well, what about Mr. Hiss?' He said, 'He is a stockholder and will give it as much of his time as his business will permit, and will be interested in the management of the company.' I then said to him, 'I take the stock on account of my friendship for Mr. Hiss and because it has been represented to me that he wanted me to take it.' This representation was what had caused me to sign the subscription list. I told Mr. Murrill of my friendship for Mr. Hiss and of the different things we were (181) interested in together. Mr. Murrill told me that the corporate stock of the reorganized company was to be $15,000; that he did not want a large subscription from outsiders because Mr. Smith, Mr. Wilson and Mr. Hiss expected to be large stockholders. Mr. Wilson and Mr. Smith are highly successful business men.

"The main reason why I signed the subscription list was because Mr. Murrill stated to me that Mr. Hiss was going to be a large stockholder and take an active interest in the company, and I was willing to intrust my money in the enterprise on account of my confidence in Mr. Hiss.

"Afterwards I had a conversation with Mr. George B. Hiss and Mr. J. P. Wilson. In consequence of what they said to me I went and saw Mr. Murrill before the meeting, which was held on 26 April, and stated to him that things had been misrepresented to me and that Mr. Hiss had told me that he was not a stockholder and had never intended to be, and had not suggested Murrill's going to see me, and would have nothing to do with the management of the concern. I told Mr. Murrill that I with-

drew my subscription. I got the notice of the meeting of 26 April, 1900, after this conversation with Mr. Murrill. After the notice and on the day set for the meeting I went to see Mr. Murrill again, and repeated to him what I have just stated, adding that I was not liable on the subscription and would not come to the meeting. It was stated in the notice that the meeting would be held for the reorganization of the company on 26 April, 1900. Mr. P. M. Thompson was with me when I had the last conversation with Mr. Murrill. Mr. Murrill didn't deny what I said but said to me, 'I am not in a position to release you, and it will break up the whole thing if you drop out.' He said, 'You come to this meeting and I will find a way afterwards to take the stock off your hands.' I said to him, 'If I
(182) come to your meeting I will make it so hot for you that I had better stay away.'

. . . "My refusal to go into the company was because of the representation that Mr. Hiss was going to be a stockholder and actively interested in the business. The fact that this representation was not true was the reason that I refused to go into the company." . . .

The case on appeal states that "Upon the conclusion of the evidence the court ruled that the representations which defendant McAden testified had been made to him by Murrill were insufficient to invalidate McAden's subscription to the stock upon the grounds, as contended by defendant, that said subscription was induced by said representations, were false and constituted a condition to the subscription which had not been complied with, and that the jury would not be permitted to consider said representations for the purpose of finding the subscription invalid upon the grounds aforesaid," to which defendant excepted. There was a verdict for plaintiff; motion for new trial refused, and defendant appealed.

Defendant contends that the evidence of defendant must be taken as true, as the court ruled it out upon the ground that it was insufficient in law to establish any defense to the plaintiff's claim. And assuming that the subscription of McAden was induced by the false representations that Hiss had agreed to become a stockholder and to take an active part in the management of the business of the company, and that plaintiff's agent had been sent by it to defendant to request him to take stock, then such representations were material and that the court erred in its ruling.

Plaintiff contends that this evidence was immaterial and insufficient to invalidate the contract of subscription, and that its consideration was properly excluded by the court upon the

grounds that the allegations in the answer do not state facts constituting fraud, in that they do not allege that the falsity of the representations was known to plaintiff, and insist (183) that it was necessary for defendant to have *alleged* and *proved* the same.

From a judgment for the plaintiff the defendant appealed.

C. W. Tillett and *T. C. Guthrie* for the plaintiff.
Burwell, Walker & Cansler for the defendant.

COOK, J., after stating the case. From the ruling of his Honor we understand he held that, taking McAden's evidence to be true, it was immaterial and insufficient to make out such a case of fraud as would rescind the contract of subscription, and in this we think there was error.

To constitute the fraud there must have been a representation, express or implied, false within the knowledge of Murrill, reasonably relied on by defendant, and constituting a material inducement to the contract. Adams Eq., 177.

From the evidence of McAden it clearly appears that the representations made to him by Murrill, and upon which he relied, were false; that they were material to the inducement, for otherwise he would not have signed the subscription list. The nature of the transaction shows that Murrill was speaking as of his own knowledge ("Murrill told me that Mr. Hiss had sent him to me"; "he (Hiss) is a large stockholder"; "I went to see Murrill again and repeated to me what I have just stated. . . . Murrill did not deny what I said"), and therefore the falsity of the representations must have been known to him. If this be so then the subscription was induced by fraud and voidable at the option of defendant, which he promptly repudiated without laches. Clark on Corporations, 283 *et seq.;* 1 Cook on Stock and Stockholders and Corp., sec. 151 and 161; *Henderson v. Lacon,* Law Reps., 5 Eq. Cases (1867-'8), 248; *Ross v. Estates Investment Co.,* 3 Law Rep., 682. The contention of plaintiff as to the failure to allege knowledge by Murrill of the falsity cannot be sustained. It is true that such (184) knowledge should have been expressly pleaded, for otherwise the answer would be demurrable, and the answer does not allege that Murrill knew that the representations he made were false; but plaintiff did not demur to it as he should have done (Code, sec. 248) had he desired to take advantage of such defects in the answer. So we have a defective statement of defendant's grounds of defense which must be deemed to have been waived under the principle well settled and fully discussed in

Halstead v. Mullen, 93 N. C., 252; *Knowles v. R. R.,* 102 N. C., 59; *Ladd v. Ladd,* 121 N. C., 118; *Martin v. Martin,* 130 N. C., 27. In those cases the exceptions were taken to defects appearing in the plaintiff's complaint, while in the case at bar they are taken to the allegations made in the answer, which sets up an affirmative defense with the burden of proof on defendant, and is subject to those rules which apply to a complaint. The facts relied upon as the basis of a defense must be set out in the answer with the same precision as is required in a complaint. *Anderson v. Logan,* 105 N. C., 266; *Rountree v. Brinson,* 98 N. C., 107. The answer expressly alleges all the facts material and necessary to constitute the fraud, except that plaintiff *knew* that his representations were untrue at the time he made them to defendant, of which no advantage was taken by demurrer. Had plaintiff demurred to the answer, stating such defect as his grounds, it could have been easily remedied by amendment (*Ladd v. Ladd* and *Martin v. Martin, supra*), had defendant been so advised.

As there will have to be a new trial, we deem it unnecessary to discuss the other questions raised in this appeal.

New trial.

(185)

HALL v. HALL.

(Filed 21 October, 1902.)

1. DIVORCE—*Verdict—Jury—Laws* 1899, *Chap.* 211—*The Code, Sec.* 1288.

   In an action for divorce, a verdict by eleven jurors, consented to by both parties, is valid if for the defendant, but invalid if for plaintiff.

2. DIVORCE—*New Trial—Issues—Judgment.*

   A new trial may be granted in an action for divorce on the issues of adultery by plaintiff without granting it on the issues of desertion by the defendant, and judgment should be rendered upon the verdict as to desertion.

ACTION by Fannie M. Hall against Allan Hall, heard by *Judge Thomas A. McNeill* and a jury, at May Term, 1902, of MOORE. From a refusal to render judgment for the defendant he appealed.

No counsel for the plaintiff.

U. L. Spence for the defendant.

CLARK, J. This is an action by the wife for a divorce, under chapter 211, Laws 1899, alleging that her husband abandoned her, 21 November, 1898, and since said date has lived separate and apart from her and has contributed nothing to her support. The answer denies this allegation and sets up as recrimination adultery by plaintiff with three parties named, and asks for a divorce from her.

The jury returned as their verdict, as to the first and second issues, that the parties were married and had been residents of this State for two years next before the beginning of this action. As to the third issue, "Did the defendant abandon the plaintiff and live separate and apart from her, as alleged in the complaint?" the jury came into open court and stated that they stood eleven to one upon that issue, whereupon the counsel for plaintiff proposed that the finding of the eleven upon this (186) issue should be returned, by consent, as the verdict of the whole jury, which was agreed to by the defendant's counsel, and the jury then responded "No" to that issue. At the same time the jury announced their hopeless inability to agree upon the fourth, fifth and sixth issues, which were as to the charges of adultery by the wife with the three persons named in the defendant's answer. A juror was withdrawn and a mistrial ordered as to those three issues. The defendant then tendered a judgment "that as to plaintiff's cause of action the defendant go without day and recover his costs, and that the plaintiff be not allowed a divorce." This judgment the court declined to sign, upon the ground that the verdict on the third issue was by a majority of the jury, to which the defendant excepted and appealed.

It is in the power of the Superior Court to grant a new trial on one or more of several issues and to let the verdict on the others stand (*Benton v. Collins,* 125 N. C., 90; 47 L. R. A., 33, and list of cases there cited), but this is in the discretion of the court and not a right of the party (*Nathan v. R. R.,* 118 N. C., 1070), and it must "clearly appear that the matter involved is entirely distinct and separate from the matters involved in the other issues, and that the new trial can be had without danger of complications with other matters." *Benton v. Collins, supra; Beam v. Jennings,* 96 N. C., 82. Such seems to be the case here; and, besides, the plaintiff is not appealing.

An appeal lies from the refusal of a judgment to which the party is entitled. *Griffin v. Light Co.,* 111 N. C., 434; *Kruger v. Bank,* 123 N. C., 16.

There was consent that the verdict on the third issue should be returned by eleven jurors. The authorities seem to be uniform

that in civil cases this may be done, but as to criminal (187) cases there is a division in the authorities, this State being among those which hold that it cannot be done. *S. v. Scruggs,* 115 N. C., 805; see authorities collected in 17 Am. and Eng. Enc. (2 Ed.), 1098. Divorce being a civil action, the only question as to the validity of the consent to a verdict by a jury of eleven arises upon the following provision in the Code, sec. 1288: "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given *in favor of the plaintiff* in any such complaint until the facts have been found by a jury." The object of this provision is to prevent the obtaining of divorces by collusion, but here the consent to a verdict by eleven jurors results in a verdict against the plaintiff and against the divorce, and is not prohibited. If the verdict had turned out the other way, it would have been invalid. It was the folly of the plaintiff to have made so unequal an agreement, unless her object was at all events to abandon her action. When the remaining issues are tried, on the defendant's cross-action, he will become, *pro hac vice,* plaintiff in the purview of section 1288. It was in the discretion of the judge to have refused a partial new trial, but, having granted that, without setting aside the verdict on the first three issues, it was error to refuse judgment in favor of the defendant as to the plaintiff's cause of action upon those issues, as found. The case must be remanded for judgment in accordance herewith. The judgment tendered was erroneous, however, in asking judgment for costs against the wife.

Error.

Cited: Timber Co. v. Butler, 134 N. C., 52; *Carraway v. Stancill,* 137 N. C., 475; *Hawk v. Lumber Co.,* 149 N. C., 16; *Rushing v. R. R., ib.,* 163.

(188)

WILLIAMS v. AVERY.

(Filed 28 October, 1902.)

1. CONTRACTS—*Abandonment—Instructions.*

An instruction relative to the abandonment of a contract, there being no evidence of abandonment, is erroneous.

2. CONTRACTS—*Trusts and Trustees—Foreclosure of Mortgages—Sales.*

A contract by a purchaser at a foreclosure of a mortgage to hold the land for the benefit of the mortgagor until he could redeem it, is binding on a resale necessitated by failure of the purchaser to pay the purchase price, though he claimed to purchase at the second sale for a third party.

ACTION by J. W. Williams and others against Calvin Avery and others, heard by *Judge M. H. Justice* and a jury, at October Term, 1901, of BURKE. From a judgment for the plaintiffs the defendants appealed.

Avery & Erwin for the plaintiffs.
S. J. Erwin and *J. M. Mull* for the defendants.

COOK, J. Defendant relies upon the second and third exceptions taken to the charge of the court to the jury. That part of the charge to which the second exception is taken is, "If they found this agreement, made prior to the first sale, was abandoned prior to the second sale, then such agreement would not extend to the second sale, and they should answer the issue—'Was said land purchased by the plaintiff Julia T. Hayes, or her agent, at said sale, under a contract with defendant Calvin Avery that he, said Avery, should be allowed to redeem the same upon payment of the amount bid at said sale?'—'No.'"

Defendant contends that this part of the charge was erroneous, upon the ground that there was *no evidence* (189) tending to show any *abandonment* of the contract by him. This contention must be sustained, because it nowhere appears in the evidence certified to us that defendant, by act or word, did or said anything inconsistent with the purpose to raise the money and redeem his land under his alleged agreement with Dr. Tull, made on the day of and shortly before the first sale. Whether the agreement was made was the question in dispute between the parties, to be settled by the finding of the jury. Dr. Tull denied that he made such agreement, and testified: "No contract with Avery to bid in land for him. I probably told him before the first sale to tell Mr. Wall to bid in land and I would give him chance to pay for it. He never said anything more about it till after the second sale, but it was re-advertised and resold. Never had any agreement with him to buy it at the second sale. I bid it off at second sale for Mrs. Hayes, and deed was made to her. When Laxton came I told him I would have to write to Mrs. Hayes and see whether she wanted to sell the land." . . . Defendant testified: "Dr. Tull told me before the first sale that

he would save the land for me and buy it in for me and take care of it for me. . . . After sale (first sale) I told Dr. Tull I was going off to make the money, and I went to Marion to work, and stayed fifteen days, and my family got down with fever. . . . Went to Marion two weeks after first sale. Second sale while I was in Marion. I knew nothing of second sale. . . . Dr. Tull told me after second sale that he wanted me to pay, and I told him I didn't have the money. I got Mr. Laxton to go with me to Dr. Tull and offer him the money, and he declined it." . . .

No evidence of the abandonment of the alleged contract appearing, it was error to have given such charge.

The third exception is to a part of the charge given in response to an inquiry by the jury after they had retired and re-
(190) turned into court the next day and asked "if an agreement made prior to the first sale would extend to the second sale." In response to this inquiry the court replied, "That would depend on circumstances. If at the first sale Tull bid in the land in his own name for defendant, under an agreement with defendant that he would hold it for him until defendant could repay him his money, and the first bid was not paid nor title made, and mortgagee sold the land, and at second sale he again bid in the land in the name of his daughter, and caused the deed to be made to her, and this was done as a mere pretense or subterfuge, and for the purpose of defrauding the defendant out of his rights under his contract with him, then the contract made prior to the first sale would extend to the second sale; but if Tull, at the second sale, was authorized by his daughter, Mrs. Hayes, to purchase the land for her, and he did so at her request, with her money, and in good faith, and not for the purpose of defrauding the defendant under his contract, or if the contract had been abandoned by the parties, then the agreement would not extend to the second sale."

In this charge we think his Honor also erred. While there is no evidence tending to show that Tull was authorized by his daughter to purchase the land for her, or that he did so at her request, with her money, nevertheless, whether he bid in the land for his daughter in good faith or for the purpose of defrauding the defendant, the contract made before the first sale would continue and remain as *then* made. How that contract could be changed, modified or abrogated, so as not to extend to the second sale, by any act or conduct of Tull, without the consent of Avery, we cannot see. If he assumed the trust, he could not release himself from it by making a contract with a third party, whether in good faith or fraudulently; nor could he do so

by causing the land to be sold a second time and then purchasing at said second sale. Having defaulted in the payment of his bid at the first sale, had he promptly notified Avery of (191) such default and of his failure to acquire title, and of his abandonment of the contract, so that Avery could have protected his interest at or before the second sale, then no trust would have attached to the land, should he have purchased at a second sale. But he could not in good conscience obtain an advantage in buying at the second sale by his bad faith in defaulting at the first.

For the errors above declared, there must be a

New trial.

Cited: Avery v. Stewart, 136 N. C., 441.

SPRINGS v. PHARR.

(Filed 28 October, 1902.)

JUDGMENTS — *Merger — Liens — Homestead—The Code, Sec.* 567—*Laws* 1885, *Ch.* 359.

Where a judgment creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second.

ACTION by E. B. Springs, surviving partner of Springs & Burwell, against H. N. Pharr, administrator of W. L. Owens, and W. R. and J. A. Berryhill, trading as Berryhill & Son, heard by *Judge W. A. Hoke,* at October Term, 1901, of MECKLENBURG. From a judgment for Berryhill & Son the plaintiff appealed.

Clarkson & Duls for the plaintiff.

Burwell, Walker & Cansler for the defendants Berryhill & Son.

CLARK, J. The plaintiff's judgment was docketed 22 December, 1888. The defendants Berryhill & Son obtained their judgment before a justice of the peace, and docketed same 19 December, 1888. They obtained a judgment upon (192) said judgment, and docketed same 2 December, 1895. The homestead of the defendant in the above judgment had been laid off 3 December, 1888. Said homesteader having died since said second judgment, the defendant Pharr, his administrator, sold the homestead under a decree to make assets, and, the proceeds being insufficient to pay both above-named judgments, this

action is submitted without controversy, under the Code, sec. 567. The plaintiff contends that, by obtaining the second judgment, Berryhill & Son lost the priority to which their first judgment was entitled; that there was a merger, and that the Berryhill judgment has rank only from the date of the second judgment, in 1895.

In *Andrews v. Smith,* 9 Wend., 53, *Savage, C. J.,* says: "The only question in this case is whether a judgment before a justice, rendered upon a judgment before another justice, *extinguishes* the judgment first obtained. As to judgments in courts of record, this question has been settled in the negative. 1 Johns., 517, and cases there cited; 5 Wend., 129, 222. The general principle of law governing in cases of this kind, and which applies to all securities, is, that a security of a *higher* nature extinguishes *inferior* securities, but not securities of an *equal* degree." (The italics are in the original.) To same purport, *Mumford v. Stocker,* 1 Cow., 178; *Preston v. Parton,* Cro. Eliz., 817, cited in *Weeks v. Pearson,* 5 N. H., 324; *Griswold v. Hill,* 2 Paine, 492, which seem to us sustained by the reason of the thing, as tersely stated by *Savage, C. J.,* above. The contrary view is taken in *Purdy v. Doyle,* 1 Paige, 558, and *Gould v. Hayden, 63* Ind., 443. These last have been followed by 17 Am. and Eng. Enc. (2 Ed.), 808, and 20 *ib.,* 600, but the weight of the authorities (which are very few, the above embracing all directly in point, except the one below quoted) and the reason of the thing, as we have said, is the other way.

(193) *Lawton v. Perry,* 40 S. C., 255 (1893), is a case "on all-fours." There a judgment was obtained in 1867; in 1871 the debtor made a payment thereon; after his death the creditor, not proceeding to revive the judgment (as he could have done), brought instead an action on the former judgment and obtained judgment thereon in 1889. Held, that the old judgment of 1867, acknowledged by the payment in 1871 (and therefore not presumed to be paid until 1891), was not so merged in the judgment of 1889 as to deprive the latter judgment of its original lien of 1867 on all the property of the then living judgment debtor. In the present case the Berryhill judgment, docketed 19 December, 1888, had not lost its lien on the homestead, notwithstanding the lapse of seven years. Laws 1885, ch. 359; see Clark's Code (3 Ed.), p. 677, note. In the above case of *Lawton v. Perry,* 40 S. C., at pp. 274, 275, it is said: "Usually it happens that the *cause of action* is so completely absorbed in the judgment that it is not competent longer to consider such cause of action apart from the judgment. This is not universally the case, however. . . . So far as dignity or rank as

between the judgments (that of 1867 and 1889), they were the equal, one of the other, for each was a judgment. There was, therefore, no new dignity created. Would it not be a hardship to declare this judgment obtained in 1889 to have destroyed that of 1867? It seems to us that it should fall among the exceptions to the general rule, and not affecting the general rule."

We must concur in this conclusion, that a judgment upon a judgment, being of the same dignity, does not fall within the general rule that a *cause of action* is merged in the judgment. Here, by virtue of the act of 1885, the justice's judgment, when docketed, remained a lien on the homestead after the lapse of ten years, but would lose its validity as to any other property after ten years (*McDonald v. Dickson,* 85 N. C., 248), and could not be sued on after seven years. *Daniel v. Laugh-* (194) *lin,* 87 N. C., 433. Is there any reason why the judgment creditor can only keep it alive and enforcible as to subsequently acquired property outside of the homestead by paying as a penalty the surrender of the priority of lien which he holds (*Jones v. Britton,* 102 N. C., 166; 4 L. R. A., 178) on the homestead under the first judgment? We know of none, and there is no precedent in this State to that effect. Indeed, our only precedent is in complete accord with what we have said above, and is decisive of this case.

In *McLean v. McLean,* 90 N. C., at pp. 531 and 433, *Smith, C. J.,* says: "Assuming that the recovered judgment is but a renewal of the first, the one being the sole cause of action, we see no reason why both may not subsist and remain in force as separate securities for the same debt, with the advantages incident to each retained. It is not correct to say that one extinguishes the obligation contained in the other, and that the plaintiff's remedy must be sought only in the last. As soon as one judgment is entered, the plaintiff may take out execution, and at the same time bring another action upon the judgment, as itself a cause of action. This is clearly involved in the decision, if not directly decided in *Carter v. Colman,* 34 N. C., 274. It may be that liens on land have been acquired since the rendition of the first and prior to the last recovery; and, if so, the plaintiff ought to be at liberty to revive and sue out remedial writs on the oldest."

Affirmed.

(195)

PICKETT v. GARRARD.

(Filed 28 October, 1902.)

1. DEEDS—*Construction—Estates—Life Estates—Remainders—Tenancy in Common.*

A deed conveying land to J. and W. and their heirs, W. not to come into possession of said land until after the death of J., conveys the land to J. and W. as tenants in common, with possession in J. of the entire tract during her life.

2. DEEDS—*Consideration—Meritorious—Bastardy—In Loco Parentis—Partition.*

In a partition proceeding, wherein the defendant asks for the reformation of a deed, made by his father to himself, an illegitimate son, in order to establish a meritorious consideration he may show that the relation of *in loco parentis* existed between them.

ACTION by L. G. Pickett and Mary Pickett, his wife, against W. W. Garrard, heard by *Judge Walter H. Neal* and a jury, at March Term, 1902, of DURHAM. From a judgment for the plaintiffs the defendants appealed.

Winston & Fuller for the plaintiffs.
Boone, Bryant & Biggs for the defendants.

FURCHES, C. J. The *feme* plaintiff, Mary Pickett, is the legitimate daughter of Waine Garrard, and the defendant W. W. Garrard is the illegitimate son of Waine Garrard. This is alleged by the defendant and admitted by the plaintiffs; and Martha Garrard was the wife of Waine Garrard and mother of Mary Pickett, but not the mother of the defendant.

On 15 April, 1887, Duane (D. W.) Garrard made and executed the following deed, to-wit: . . . "Witnesseth, that said

(196) Duane Garrard, in consideration of one dollar and fifty cents to him paid by Martha J. Garrard and W. W. Garrard, the receipt of which is hereby acknowledged, has bargained and sold, and by these presents does bargain and sell and convey to said Martha J. and W. W. Garrard, their heirs, a certain tract or parcel of land in Durham County, State of North Carolina, adjoining the lands of Gaston Pickett, W. O. Cole, C. G. Marcom and others, bounded as follows, viz., containing 148 acres of land, more or less. The condition of the deed is that the said W. W. Garrard does not come into the possession of said land until after the death of Martha J. Garrard. To have and to hold the aforesaid tract of land, and all privi-

leges and appurtenances thereto belonging, to the said Martha J. and W. W. Garrard, their heirs and assigns, to their only use and behoof, forever. And the said Duane Garrard covenants that he is seized of said premises in fee, and has the right to convey the same in fee simple. That the same are free and clear from all encumbrances, and that he will warrant and defend the said title to the same against the claims of all persons whatsoever. In testimony whereof, the said Gerrard has hereunto set his hand and seal, the day and year above written." (Signed) D. W. Garrard (Seal). Attest: L. G. Pickett, J. B. Gates.

And Waine Garrard and Martha Garrard both being dead, the plaintiff Mary claims that said deed conveyed one undivided half of said land to the defendant and the other half to her mother, which descended to her upon the death of her mother as her only child and heir at law. And, so claiming, this action was commenced as a special proceeding for partition, but upon the defendant's pleading sole seizin it was transferred to the Superior Court in term for trial.

The defendant contends that a proper construction of this deed gave the wife, Martha, a life estate and the remainder to him in fee simple. But if it does not do this, as it was written, it should have done so; that it was the intention of the (197) said Duane Garrard to convey the land to Martha for life and the remainder to him in fee, and if it did not it was because of the mutual mistake of the parties and the ignorance of the draftsman; that it was delivered and accepted by the grantee with the understanding and belief that it did so convey said land; and if it does not, the defendant asks that it may be reformed, so as to carry out the intention of the parties and so as to convey the fee simple to him.

As the deed is written, we cannot sustain the contention of the defendant that it gives him the fee simple estate in the whole of the land after the death of Martha. It seems to us that it conveyed the land to Martha and the defendant as tenants in common, but defendant was not to have the possession and enjoyment of his part until after the death of Martha; or, in other words, we sustain the contention of the plaintiffs as to the construction of the deed as it now stands.

This leaves but one matter for our consideration (as the error committed in refusing to allow the defendant to show that he paid seventy-five cents as a consideration is harmless), and that is, whether the fact that the defendant is a bastard will deprive him of the benefits arising from a "meritorious consideration." The plaintiffs contend that it does. And it seems that the fact that the defendant is the natural son of Waine Garrard, of itself,

would not be a meritorious consideration. *Ivey v. Granberry,* 66 N. C., 223. But the facts in that case did not present the question of *loco parentis,* and that question is not discussed nor decided in that opinion. But many authorities hold that the relation of *loco parentis* does create a meritorious consideration, upon which courts of equity will give relief. *Powell v. Morrison,* 98 N. C., 426; 2 Am. St., 343; *Hunt v. Frazier,* 59 N. C., 90; 2 Pomeroy Eq. Jur., sec. 588; Adams Eq., star page 98; 18 Vesey Ch.; *Pay ex parte* and *DuBost ex parte, id.,* star page 140, on 144-5.

(198) The defendant claims that Waine Garrard took him to his house when he was only four or five years old, and he lived with him until his death, as a member of his family, calling Waine father and his wife mother; and these and many other facts will show that the relation of *in loco parentis* existed between him and Waine Garrard, and that Waine stood in the place of a father to him. He also offered to show that the plaintiff Mary had been provided for by her father, Waine Garrard, in conveying to her other lands of equal value to this. But the court, being of opinion that the fact that the defendant was the natural son of the grantor debarred him from all benefits of an equitable nature, rejected this evidence.

We have found no authority debarring the defendant from the benefits growing out of the relation of *in loco parentis,* because he was the natural son of Waine Garrard; and we see no reason for doing so, except it would be as a punishment for a misfortune for which he was in nowise responsible.

We are therefore of the opinion that the relation of *in loco parentis* furnishes a meritorious consideration upon which courts of equity will act, and the defendant had the right to show that this relation existed between him and the maker of the deed, if he could; and if he succeeded in doing this, then to show ground for reforming the deed, if he could. This, we think, disposes of all the matters presented by the appeal, and we prefer not to go further, but to leave the court, on a new trial, free to act upon such issues of fact and questions of law as may then arise.

New trial.

(199)

GATTIS v. KILGO.

(Filed 28 October, 1902.)

EVIDENCE—*Incompetent—Withdrawal—Instructions—New Trial.*

The permitting of the introduction of a mass of incompetent evidence (as in this case), and it not being withdrawn by the trial judge until after the argument of counsel on both sides is closed, is error for which a new trial will be granted.

ACTION by T. J. Gattis against John C. Kilgo and others, heard by *Judge Thomas J. Shaw* and a jury, at November Term, 1901, of GRANVILLE. From a judgment for the plaintiff the defendant appealed.

Boone, Bryant & Biggs, Gathrie & Gathrie, A. W. Graham and *A. A. Hicks* for the plaintiff.

Winston & Fuller, T. T. Hicks and *Royster & Hobgood* for the defendants.

MONTGOMERY, J. In the opinion of the Court delivered at the February Term, 1901, and published in 128 N. C., 402, it was said: "Whether or not the speech of the defendant Kilgo, published by the defendants in pamphlet form and embodied with the whole proceedings in the matter of the investigation, was a privileged communication (and it would have been more accurate to have said a privileged occasion), was a question of law, there having been no dispute or uncertainty as to the circumstances attending the publication, and his Honor properly tried the case as one of qualified privilege." In the new trial ordered in that opinion it was anticipated that in that trial the question of malice in the defamatory publication would be the only matter before the trial court. It was perfectly apparent to this Court, and it seemed to be equally so to his Honor who presided at the first trial of this case, that from the plaintiff's evi-
dence the investigation by the trustees of Trinity College (200)
of certain charges of incompetency and moral unfitness,
made against its president, Dr. Kilgo, was a matter of justice to Dr. Kilgo and to the college, and that the college was in a sense a public institution, and therefore that the publication of the proceedings in the investigation by the college was a privileged occasion. From a careful reading of the statement of the case on the present appeal, it seems clear that the plaintiff's counsel acquiesced in that view of the opinion of this Court. The plaintiff himself, when upon the stand as a witness, was asked by his

counsel "whether you were a witness before the board of trustees of Trinity College upon the investigation of the matter of the charges said to have been brought by Judge Clark against Dr. Kilgo," and we find nothing in the whole evidence tending to show that the meeting of the board of trustees was not properly called or was not properly constituted. The plaintiff also introduced in evidence a paper called a challenge of Judge Clark to the board, in which challenge exception was made to certain individual members of the board. But the regularity and authority of the board were recognized in the last lines of the challenge, in these words: "As an act of justice to yourselves, to the college and to myself—an act of justice that no North Carolinian should ever seek in vain—I ask that the triers be polled, and that no one shall sit on this investigation who is not absolutely and altogether impartial and uncommitted by former deliberate expressions of his views." The manner, too, in which the plaintiff's counsel conducted the plaintiff's case shows that the counsel regarded the publication of the defamatory matter as an occasion of privilege. The plaintiff, in his complaint, did not allege any matters or make any admission to the effect that the publication of the matter was a privileged occasion. The simple allegation of the complaint was that the publica-
(201) tion had been made. It was therefore incumbent on the defendant to show the privileged occasion. The plaintiff, however, was not satisfied to introduce evidence of the publication of the defamatory matter, and stop, which was all he was required to do, upon the allegations of the complaint, and wait for his adversary to take up the burden of showing a qualified privilege. He went into matters showing the privileged occasion himself. And that can only be accounted for upon the supposition that he would have to meet that contention on the part of the defendants, when the defendants should have put in their evidence on that point, and that he, the plaintiff, had as well meet the matter *in limine*. But the counsel of the plaintiff, instead of being consistent in the matter of the introduction of evidence and confining it to matters going to show malice in the publication, brought into the trial a vast pile of evidence inconsistent with their theory of the case and entirely incompetent, if the occasion of the publication was privileged.

His Honor, however, in what he calls "Note Y," in the record, as distinguished from what he designates his charge, states that he, "in the admission of evidence of what transpired before the board of trustees upon the trial of Kilgo, the court opened the door and permitted plaintiff to offer evidence of everything that happened there, to determine as to whether there was a trial

there." As we have said, the plaintiff, having alleged the publication by the defendant of matter which was and is libelous, *per se*, and having introduced evidence of its publication, was entitled to judgment, if he had not shown by his own testimony an occasion of privilege in the publication of the defamatory matter, or unless the defendants had assumed the burden, and in their evidence had shown a privileged occasion in the publication of the matter.

But if his Honor, notwithstanding the manner in which the plaintiff's counsel conducted the case, felt it his duty to investigate the proceedings before the board of trustees (202) of the college, to see whether there had been any trial, he should have admitted only such evidence under that head as pertained to the regularity and the integrity of the proceeding. That he did not do. He allowed evidence to the effect that the meeting of the trustees was held with closed doors; that the stenographer was not sworn; that Judge Clark was refused a stenographer; that Judge Clark's challenge to the board was rejected; that Mr. Jurney said, "I am a Kilgo man; I told the district conference at Rockingham yesterday I was coming here to fight for Kilgo, that I should fight for him with my fingers and with my teeth, and when my teeth gave out I would gum it for him"; that *Judge Montgomery* nodded and consulted with Dr. Kilgo, and referred him to Greenleaf on Evidence, and that Dr. Kilgo's conduct and behavior when cross-examining the witnesses, including the plaintiff, were overbearing and offensive and brutal to the plaintiff.

Especially should his Honor not have allowed as evidence that part of the challenge to the board which is in these words: "I have been pronounced in my views against the illegality of trusts, and I have concurred with the resolution of the Western North Carolina Conference against the sale and manufacture of cigarettes, and I stand here by the terms of your invitation in "benefactor's parlor," Duke's building, a room thus doubly labeled with the remainder of the cigarette business, the influence of whose vast accumulations is like the darkness of Egypt, in that it can not only be seen, but can be felt. This institution itself becomes a partner in that very business by being the holder of a large block of its stock, from which it derives no small part of its income."

His Honor also allowed a witness for the plaintiff to state that Dr. Kilgo, during the investigation, locked the door of the room against a correspondent of one of the daily papers of the State; and another witness to state that just before the (203) trial commenced, and as he got up to the building, in the

shade, on the grass, Mr. Oglesby and Dr. Kilgo were lying on their stomachs, with their heads close together, and seemed to be in an interesting conversation.

How that evidence could be considered as going to show malice in the publication of the defamatory matter on the part of the defendant Kilgo, we cannot see; but it was allowed also to be given in against defendants Odell and Duke.

His Honor erroneously admitted evidence as to special damages suffered by the plaintiff, and the loss of gross profits, and individual customers (sixth, seventh, eleventh, twelfth and thirteenth exceptions); also evidence of the church membership of Duke (fourteenth exception); also evidence that Oglesby, the prosecutor, lived in the parsonage of the Main Street Methodist Church, Durham (nineteenth exception), the plaintiff having been allowed to show that the defendant Duke belonged to that church; that the stenographer Newsome was the private secretary of Dr. Kilgo (twenty-seventh exception); that Oglesby was pastor of Main Street Church, Durham (thirty-fourth exception), the defendant Duke having been shown to be a member of that church; upon the character of the plaintiff as a minister of the Gospel (sixty-sixth exception); evidence that there was published in the *Morning Post* large number of supplements to that edition containing nothing but the speech of Dr. Kilgo, no evidence having been given as to the knowledge or consent of defendant to such publication (exceptions 76, 77, 78, 79, 80, 127, 128).

It must be remembered that the great question in the case was whether or not there was malice on the part of the defendants in the publication of the defamatory matter, for his Honor held as a matter of law that everything that occurred before the board of trustees was absolutely privileged, and he also told the jury that "If you believe the evidence in the case, the publica-
(204) tion complained of by the plaintiff was one of qualified privilege." His ruling of law is in these words: "At the close of the evidence, the court, in the presence of the jury, ruled that it would hold as matters of law that everything that occurred before the board of trustees in connection with the investigation of the charges, including the trial, was absolutely privileged, and could not be considered by the jury as any evidence of malice or the falsity of the publication, nor on the question of damages, and that the evidence as to the folders or supplements was ruled out." He had discovered then, *before* argument was commenced, that all that mass of damaging evidence that we have mentioned as having been admitted concerning matters which had occurred before the board of trustees; but he allowed the argument to proceed and to be concluded upon the very

matters which he had said to the counsel, in presence of the jury, should not be considered by the jury. After the argument on both sides was closed, his Honor undertook to withdraw from the consideration of the jury, not only the incompetent evidence concerning the investigation before the board of trustees which he allowed, but also the other objectionable evidence which we have above referred to. It may be best to quote the language of the court in reference to the attempted withdrawal of the evidence:

It is as follows: "Note Y.—At the close of the argument and before charging the jury, his Honor stated to the jury as follows: The court charges you that the pamphlet introduced by the plaintiff is not evidence to be considered by the jury in showing the falsity of the publication complained of for malice. The court withdraws from your consideration, and instructs you that you must not consider in making up your verdict, or in any way in this case, any of the following evidence: The testimony of the plaintiff covered by the sixth exception, and that part of the seventh exception in brackets; the evidence covered by the eleventh, twelfth, thirteenth and fourteenth exceptions, (205) the nineteenth exception, the twenty-eighth exception and the thirty-fourth exception; also the evidence covered by the sixty-sixth exception, seventy-seventh exception, seventy-eighth and seventy-ninth exceptions, and the questions and answers between the seventy-seventh and seventy-ninth exceptions, and one question and answer before the seventy-seventh, and the three succeeding the seventy-ninth exception; also the evidence covered by the 127th and 128th exceptions, and the question and answer between those two.

"The questions and answers referred to in the foregoing exceptions, and the intervening questions and answers above referred to, were read to the jury.

"And the court further stated to the jury as follows: In the admission of evidence of what transpired before the board of trustees upon the trial of Kilgo, the court opened the door and permitted plaintiff to offer evidence of everything that happened there, to enable the court to determine as to whether there was a trial there.

"And the court charges you that nothing that occurred upon said trial is to be considered by the jury as evidence of malice against either one of the defendants in this case, and as to the evidence tending to show that the meeting was held with closed doors; the evidence as to the stenographer not being sworn, and the refusal to allow Judge Clark to have one, his challenge to the jury and the rejection of the same; what Jurney said, if any-

thing, about 'gumming' it for Kilgo, and *Judge Montgomery's* 'nods' and consultations with Kilgo, and his reference to Greenleaf's Evidence, and Dr. Kilgo's conduct and behavior in cross-examining witnesses, including the plaintiff, that he was imperious, overbearing, offensive and brutal to plaintiff in cross-examining him (except you may consider this, if true, in connection with the testimony of the plaintiff as to why he didn't answer questions asked), and that certain evidence was excluded upon said trial.

(206) "As to all these matters, if they occurred, they were simply incidents of a trial, and all were under the control of the board of trustees, and are not to be considered by the jury in any respects, except as tending to show there was a trial being conducted before the board of trustees. They are not to be considered as evidence of the falsity or maliciousness of the publication, or on the question of damages.

"The evidence as to Kilgo and Oglesby lying on their abdomens under the shade of the trees, and of excluding newspaper correspondents, including Merritt, from the meeting, and closing the doors on him, does not have anything to do with the case, and is withdrawn from and must not be considered by the jury at all in passing upon any of the issues of this case, or in considering the case. (54.)

"The defendants except to the manner and time of withdrawing evidence between 53 and 54 from the jury, and insist that when evidence is admitted and remains with the jury several days, it can not be withdrawn from the jury, as was done in this case, and assign such ruling and order of his Honor as error. (Exception.)

"One hundred and thirty-second exception:

"The evidence in the case was taken down by a stenographer, and at the beginning of the argument very little of it had been transcribed by him, and the same was not completed until a short time before the court began its charge. The evidence covered about eighty typewritten, single-spaced pages. The defendants requested the court to put its charge and every part of it in writing, and the court had not completed the writing of its charge and reading and consideration of the evidence and exceptions thereto when the argument was concluded, and the court announced its rulings as to the exclusion of evidence, as hereinbefore set out, as soon as it could be done under the circumstances."

This case was being tried for several days. Some of the (207) ablest lawyers in the State had appearances on either side, and the plaintiff's counsel were allowed in the argu-

ment to use a mass of evidence against the defendants totally incompetent, and calculated to arouse passion and prejudice against the defendants, and to obscure the real question at issue.

But the plaintiff's counsel, here, contended that, under our decisions, his Honor did what was allowable. They insisted that he simply corrected a slip in the admission of evidence. We have searched our reports for cases bearing on the question of the right and power of the trial judge to correct a slip in admitting incompetent evidence. The first one is that of *S. v. Nay,* 15 N. C., 328. There, the Court held that if improper evidence be received, it may afterwards be pronounced incompetent, and the jury instructed not to consider it. The Court said, *Chief Justice Ruffin* speaking for the Court: "In such a case, I conceive that it is not the object of the law, nor the province of an appellate tribunal, to watch for and catch at an *inadvertence* into which the judge was *betrayed for an instant;* but to see that no error was finally committed and that ultimately that law and justice of country were truly administered." In *McAllister v. McAllister,* 34 N. C., 184, there was one piece of incompetent evidence received—the register's book. The Court said: "If there had been an error in admitting the register's book, the defendant would have no cause of complaint, for the evidence was clearly and promptly withdrawn from the jury as irrelevant, and the defendant suffered no prejudice from it. It is undoubtedly proper and in the power of the court to correct a slip by withdrawing improper evidence from the consideration of the jury, or by giving such explanations of an error as will prevent it from misleading a jury. Here, that was so effectually done that neither the court nor the counsel on either side took any notice of the mortgage in submitting their observations to the jury."

In *S. v. Collins,* 93 N. C., 564, after the evidence had closed, and one of the counsel for James Collins had fin- (208) ished addressing the jury, and when the solicitor was partly through his remarks to the jury, but before the last speech of the defendant's counsel (who had the closing speech) was made, his Honor told the jury that the declaration of the defendant, Julius Jones, made to the witness Southall, which had been received in evidence, was inadmissible and was ruled out.

In *Bridgers v. Dill,* 97 N. C., 222, the court told the jury that the evidence of one of the witnesses on one point—how much crop might have been made on a piece of land but for the trespass—was to be excluded from their consideration. So, in the case of *S. v. Ellen,* 104 N. C., 853; *S. v. Crane,* 110 N. C., 530; *Wilson v. Mfg. Co.,* 120 N. C., 94, and *Crenshaw v. Johnson,* 120 N. C., 270, only one point of evidence was corrected and

withdrawn from the consideration of the jury. But the permitting of the introduction of the incompetent evidence pointed out in this case was not a simple slip on the part of the judge, which our trial judges can correct at almost any time before judgment; but it was a misconception of the theory on which the case should have been tried. It was a case of privileged occasion. His Honor tried it as a case of ordinary libel, the publication being *per se* libelous.

The incompetent evidence embraced nearly the whole of the evidence offered to show malice. Indeed, we are not absolutely sure that there was any evidence of malice offered in the case. But we do not undertake to decide that now. There was error, for which there must be a

New Trial.

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

Cited: Parrott v. R. R., 140 N. C., 548.

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(209)

FOWLER v. McLAUGHLIN.

(Filed 28 October, 1902.)

GUARDIAN AND WARD—*Limitations of Actions—Husband and Wife—Acts* 1899, *Chap.* 78.

Where on marriage of a ward in 1865 the possession of her personal property by the guardian was in law transferred to the husband, the statute of limitations began to run against the right of action against the surety on the bond of guardian at the time of the marriage.

ACTION by the State on the relation of Eunice Fowler and another against C. R. McLaughlin, administrator of Joseph McLaughlin, heard by *Judge Thomas A. McNeill,* at March Term, 1902, of UNION. From judgment for the plaintiffs, the defendant appealed.

Redwine & Stack for the plaintiffs.
Jones & Tillett and *Shepherd & Shepherd* for the defendant.

CLARK, J. Charity Hasty qualified as guardian of the *feme* plaintiff, April, 1864, the defendant's testator being surety on

her guardian bond in the sum of $300. The complaint alleges that she "took into possession various sums of money and other property of her said ward," and died 21 November, 1867, without having made any return or final settlement as guardian. Her administrator made due advertisement for creditors and settled her estate. The defendant's testator, surety on said guardian bond, died August, 1893, the defendant qualified as his executor, and on 24 August, 1893, advertised according to law for creditors to present their claims, and plaintiff's claim was not presented within twelve months, nor within seven years thereof. The *feme* plaintiff was married July, 1865, before she was sixteen years of age, and has been continuously ever since a *feme covert*. The defendant pleads the various statutes (210) of limitations. The plaintiffs, to repel the bar of the statute, rely upon the disability of coverture.

As the law stood at the time of the marriage (1865), the guardianship of the female ward ceased upon her marriage, because "the husband became the owner of all her personal property in the hands of the guardian, and seized in her right of all her real estate," says *Gaston, J.*, in *Shutt v. Carloss*, 36 N. C., at p. 238. Tiffany Dom. Rel., sec. 186 (d), and cases cited, note 10. The personalty became *eo instanti* his property, for the possession of the guardian was the possession of the ward, and the law transferred the possesion to the husband. It was in law "reduced to possession." *Pettijohn v. Beasley*, 15 N. C., 512; *Miller v. Bingham*, 36 N. C., 423, 36 Am. Dec., 58; *Stephens v. Doak*, 37 N. C., 348; *Caffey v. Kelly*, 45 N. C., 48; *Ferrell v. Thompson*, 107 N. C., 420, 10 L. R. A., 361; *McDaniel v. Whitman*, 16 Ala., 343, which was as to money of the ward received by the guardian; *McGhee v. Toland*, 8 Porter (Ala.), 30. The husband could, therefore, at once have brought his action in 1865 to recover the possession of the property of every description in the hands of the guardian, or the value thereof if converted, for it became absolutely his upon the marriage, and this action has long since been barred. In 15 Am. and Eng. Enc. (2 Ed.), 822, where the cases are collected, it is shown that as to the possession of the wife's agent, trustee, bailee, guardian, or any other person not holding adversely, such possession became the possession of the husband, and this rule applies to money possessed by third persons, as well as to other chattels; and such personalty goes, under the above decisions, if the husband die before recovery of possession, to his personal representative, and not to his wife. But the possession of an executor or administrator was not the possession of the husband as to any interest in the estate belonging to the wife. That is a chose in action which (211)

belonged to the husband only when he reduced it to possession.

It has been suggested that a part of these assets in the hands of the guardian may have been choses in action, and, if so, the husband, not having reduced them to possession, should he die before doing so (and within three years from the enactment of chapter 78, Laws 1899), the wife could bring this action. *O'Connor v. Harris,* 81 N. C., 279. To this, it may be observed (1) that this action is necessarily by the husband in his own right; *Morris v. Morris,* 94 N. C., 613; *Benbow v. Moore,* 114 N. C., 263, and is barred, whatever might be the case as to an action by the wife if the husband has died and the wife has brought her action before the expiration of three years since the enactment of chapter 78, Laws 1899. (2) The complaint avers only the receipt by the guardian "of various sums of money and other property belonging to her said ward, the exact amount of which plaintiffs can not state." Nothing indicates that any part thereof consisted of choses in action, but, if it did, the guardian's possession of them was the ward's possession, which the law transferred to the husband, and, *as against the guardian,* the husband and the husband alone was and is entitled to recover them, or the value thereof if converted, and such action is barred, for thirty-seven years have elapsed. If the husband had received possession of any choses in action from the guardian, then, as *against the debtor* therein, he would be entitled only if he reduced the same to possession by collection thereof, and if he failed to do so and had died, the wife could maintain an action thereon, if brought before she has become barred under the Act of 1899, above referred to.

It was error not to hold upon the facts agreed that this action is barred by the statute of limitations.

Reversed.

DOUGLAS J. I concur in the result only, but can not
(212) concur in the second part of the opinion, which seems to me unnecessary to a determination of the case.

MORRIS v. LIVERPOOL, LONDON AND GLOBE INSURANCE CO.

(Filed 28 October, 1902.)

1. FINDINGS OF COURT—*Judgment—Excusable Neglect—The Code, Sec.* 274.

Upon a motion to set aside a judgment for excusable neglect the findings of fact by the trial judge are conclusive where there is any evidence to support them.

2. JUDGMENTS—*Excusable Neglect—Appeal—The Code, Sec.* 274.

On a motion to set aside a judgment, whether the facts found constitute excusable neglect, is a conclusion of law reviewable on appeal.

3. JUDGMENTS—*Excusable Neglect—Appeal—The Code, Sec.* 274.

Whether to allow a motion to set aside a judgment, excusable neglect being shown and so found by the judge, is discretionary, and not appealable unless there has been a clear abuse of discretion.

4. JUDGMENTS—*Setting Aside—Excusable Neglect—The Code, Sec.* 274.

On a motion to set aside a judgment for excusable neglect, the facts in this case constitute neglect on the part of the agent of the defendant, and the neglect of the agent being the neglect of the defendant, his principal, it was inexcusable and the motion properly refused.

ACTION by B. Morris against Liverpool, London and Globe Insurance Company, heard by *Judge Walter H. Neal,* at chambers, in Laurinburg, N. C., on 24 June, 1902. From the refusal of the court to set aside the judgement, the defendant appealed.

Jones Fuller for the plaintiff. (213)
Hinsdale, Lawrence & Hinsdale for the defendant.

CLARK, J. This is a motion to set aside a judgment for excusable neglect under the Code, sec. 274. The findings of fact by the judge are conclusive, except where there is no evidence to support them. *Koch v. Porter,* 129 N. C., 132; Clark's Code (3 Ed.), p. 311. Whether the facts found constitute excusable neglect is a conclusion of law reviewable on appeal. But if there is excusable neglect, whether the judge shall then set aside the judgment or not rests "in his discretion," by the terms of section 274, from which an appeal lies only when there has been a clear abuse of such discretion. *Wyche v. Ross,* 119 N. C., 174; *Cowles v. Cowles,* 121 N. C., 272. The discretionary power only

exists when excusable neglect has been shown. *Stith v. Jones,* 119 N. C., at page 341; *Brown v. Hale,* 93 N. C., 188; *Simonton v. Lanier,* 71 N. C., 498.

The facts found in this case are that the summons was served on the local agent of the defendant at Durham, 4 January, 1902, returnable to the Superior Court of that County, which began 20 January. Said agent was a proper party upon whom service could be made (Code, sec. 217), but he informed the sheriff that he was not, and that the service should be made on the general agent of defendant company at Raleigh, and, soon after meeting counsel for plaintiff, said local agent imparted the same legal information to him. The said counsel told the agent "he thanked him for the information"—merely this and nothing more.

At said January Term a verified complaint was filed, and, no defense being interposed by the defendant, judgment by default and inquiry was entered up. At the March Term, the inquiry was instituted before a jury, and a final judgment rendered in accordance with the verdict. The defendant had no
(214) actual knowledge of said judgment till May Term, when this motion was made.

On appeal, every intendment is in favor of the judgment below. If the refusal to set aside the judgment upon the ground that, though there was excusable neglect, the judge, "in his discretion," refused to set it aside, his action is not reviewable, as section 274 vests him with that discretion.

But if it were conceded that the judge held that the facts did not constitute excusable neglect, it can require no discussion to hold that he was right. There was gross and inexcusable neglect. The agent should have notified the company that service had been made on him, and his neglect to do so was the neglect of the principal. With the slightest attention to the case, it should have been known that a complaint was filed, and that inquiry before a jury was to be instituted at the next term. As calendars of causes for trial are usually printed in the newspapers in a town like Durham (though there is no finding by the judge on this point), it is strange that the agent or some one in the employ of the company, as attorney or otherwise, did not take notice of the matter. *Henry v. Clayton,* 85 N. C., 371.

The nearest case upon the facts is *Churchill v. Ins. Co.,* 88 N. C., 205, where the defendant supposed that in law it was not required to answer till a copy of the complaint was served upon it. The Court held that this was inexcusable neglect, as was here the somewhat similar error in law of the agent in supposing that the summons could not be served upon him. Action founded upon a mistake in law is not excusable neglect. *White v. Snow,*

71 N. C., 232, and *Williamson v. Cocke,* 124 N. C., 585, in which cases the defendant misconceived the legal import of a summons served on him. In this last case it was said by *Faircloth, C. J.,* at page 590, such "negligence can not be held a sufficient ground for setting aside a regular judgment, entered up in consequence of inattention on the part of the defendant to an important duty. The courts must proceed with business in a (215) reasonable way or forfeit their usefulness to the public."

In *DePriest v. Patterson,* 85 N. C., 376, the defendant, who was sick and unable to leave home, told the officer he thought he was serving the summons on the wrong man, and understood the officer to promise to ascertain whether he was or not, and let him know before returning the summons, but did not, and judgment was taken against him; it was held that it was inexcusable neglect for the defendant not to look after the case, and the judgment was not set aside.

It was argued here that the agent was misled by the plaintiff's counsel thanking him for his legal advice. The judge does not find that in fact he was misled, and we can not assume that he was. He could not have been reasonably misled thereby. The duty of the agent was to have informed his company of the fact, which he knew, that the summons had been served on him, instead of advising the counsel of the other side as to a matter of law, which he did not know. It was inexcusable neglect to suppose that the attorney of the opposite party would be governed by his (the agent's) opinion on the law. The agent "carried his coals to Newcastle," and his employer should not be surprised that it has now to pay the freight.

No Error.

Cited: Pepper v. Clegg, 132 N. C., 313; *Stockton v. Mining Co.,* 144 N. C., 596.

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TARLTON v. GRIGGS.

(Filed 5 November, 1902.)

1. DEEDS—*Execution—Delivery.*

A deed is not executed and will not be enforced where the maker has not gone so far with its execution that he cannot recall or control it.

2. DEEDS—*Delivery.*

A deed is only operative from the time of actual delivery.

TARLTON *v.* GRIGGS.

3. DEEDS—*Execution—Delivery—Acknowledgments— Presumptions.*

The delivery of a deed will not be presumed from the acknowledgment of the husband and the acknowledgment and privy examination of the wife.

ACTION by Sarah J. Tarlton against Mary A. Griggs and others, heard by *Judge T. A. McNeill* and a jury, at December (Special) Term, 1901, of ANSON.

Plaintiff is the widow of Willis R. Tarlton, from whose will she dissented and filed her petition in this special proceeding, praying to be endowed of the land whereof he was seized and possessed during their coverture, and alleges that her husband died, seized and possessed of the land in controvery, described in the petition. Defendants, who are his devisees, in their answer, aver that said Willis R. Tarlton duly conveyed by deed, in which plaintiff joined in reliquishment of her dower, the land of which she asks to be endowed, to the defendants, J. B. Tarlton and others, and plead the said deed as an estoppel in bar of her recovery.

Plaintiff, replying, says that the deed so signed and acknowledged before a justice of the peace by her said husband and herself, whose privy examination was taken, was never *delivered* by her said husband, or any other persons under his direc-
(217) tion, to the grantees named in said deed, nor to any one for them, and that the same passed no title to the grantees, is of no effect and void; that her said husband was, at the time of signing the same, and continued so to be up to and at the time of his death, in possession of the land described therein, cultivating and paying the taxes on the same.

The issue joined is: "Is plaintiff entitled to dower in the land described in the complaint?" The exceptions relied upon by plaintiff are to the refusal of the court to give, among others, the following instructions: 5. That a deed is not considered executed, and the courts will not enforce the same, when the maker has not gone so far with its execution that he cannot recall or control it, and if the jury shall find from the evidence that the maker, W. R. Tarlton, could control and recall said deed, they will answer the issue 'No.'" "6. That a deed is only operative from the time of actual delivery, and if the jury shall find from the evidence that there was no actual delivery of said deed until after the death of the maker, W. R. Tarlton, said delivery can not defeat the right of the widow to dower in said land, and they will answer the issue 'No.'"

The evidence relating to the *delivery* is as follows: "The deed in due form signed 'W. R. Tarlton (Seal); S. J. Tarlton (Seal),'

then follows the acknowledgment and privy examination of plaintiff in the statutory form taken before J. T. Redfearne, justice of the peace, under his seal.

Z. T. Redfearne, introduced by plaintiff, testified: "Several years prior to 26 November, 1895, Shepherd, a son-in-law of W. R. Tarlton, came to me and said that Tarlton wanted me to go over to his house and fix up some papers. I went and drew several deeds for him, and a will. The deeds were executed by him and his wife, and the will by him. Tarlton told me to keep the deeds and the will, and, if not called for during his life, to deliver them after his death. Two or three years afterwards, Shepherd came for me again; he wanted me to go (218) again to Tarlton's to fix up some papers. I went, and Tarlton said that he had deeded some of the land, and wanted to make some changes in the papers that I had previously prepared for him. He then destroyed the first deed prepared by me under his direction. I drew a consolidated deed to all his children, except Eliza Tarlton; I then drew a deed for Eliza conveying fifty acres of land to her; then a deed conveying ten acres to Tarlton's wife, Sarah Jane Tarlton; Tarlton signed all the deeds; Mrs. Tarlton signed the first, the consolidated deed, dated November 26, 1895, to J. B. Tarlton and others, and when asked to sign the deed to Eliza, she declined to do so. Then W. R. Tarlton said, 'If I cannot make deeds to all my children, I will not make deeds to any of them.' Mrs. Tarlton retired, and Mr. Tarlton told me that his wife was out of humor that day, and for me to carry them home with me, and that he thought she would consent to sign them in a few days, and if she did consent he would carry her over to my house to sign them. I kept the papers for several years just as they were. I thought of leaving the State, and sent word to him to know what disposition he desired me to make of his papers, and Shepherd, his son-in-law, came for them and I let him have them. I knew nothing more of them until after Tarlton's death. At the time of drawing them, I was an acting justice of the peace."

Allen Watson, introduced by the plaintiff, testified: "A bundle of papers was placed in my hands by Shepherd some time before Tarlton's death. I was requested to keep them. I did not know what the bundle contained until after Tarlton's death. I was told to keep the papers without further directions. After Tarlton died, Mr. C. C. Griggs came to me and inquired if I had any of Tarlton's papers. I told him that I did, and gave the bundle of papers to him. Tarlton never spoke to me about the papers, and I have never received any (219) instructions from him one way or the other."

Frank Shepherd, introduced by defendant, testified: "I was present at the time the deed dated 26 November, 1895, was made. This was the deed from Willis Tarlton to J. D. Tarlton and others. Z. T. Redfearne, Mr. and Mrs. Tarlton were the only ones present. Mr. Tarlton told Redfearne to take the papers and keep them till his death, and then to deliver them to his executor. I married the daughter of Tarlton, and she and I are parties to this action. I afterwards got the papers from Redfearne and carried them to Watson, and he kept them until after Tarlton's death. I went after Redfearne at each of the times that he prepared papers for Tarlton. Redfearne drew no deed when he made the will. The will was drawn in 1890. He sold me a part of the land that was divided in the will. Tarlton had this joint deed drawn, dated 26 November, 1895, and a deed to his daughters, and one to his wife. His wife signed the joint deed and the one to herself, but refused to sign the deed to his daughter. He never said that he did not want to make deeds to a part of his children unless he could make deeds to them all. He did not say that his wife was out of humor that day and that she would get all right, and that he would carry her over to Redfearne's to sign the other deeds. Tarlton did not destroy any papers."

C. C. Griggs, introduced by defendant, testified: "I am son-in-law of Willis R. Tarlton, deceased, and one of the defendants in this action. The deed from Willis R. Tarlton to J. B. Tarlton, dated 26 November, 1895, conveys all the land that Willis R. Tarlton was possessed of at the time of his death, except about 50 acres. I got the deed from Allen Watson on Saturday after Tarlton's death, which was on Thursday before. The grantees have been in possession of the land since Tarlton's death. I went to Watson and asked him if he had Tarl-
(220) ton's papers, and he gave me a bundle of papers; this deed was found in the bundle. I didn't know that Tarlton had this deed, and didn't know at that time that it was in this bundle of papers. I do not know that Watson was the agent of Tarlton or that he held the papers in the capacity of his agent. I brought the deeds to the courthouse and had them recorded, and have had them in my possession since." Verdict and judgment for defendants, and plaintiff appealed.

Robinson & Caudle for the plaintiff.
James A. Lockhart for the defendants.

COOK, J., after stating the case: Plaintiff was clearly entitled to have the instructions prayed for given to the jury. We learn

from the sages of the law, Sir Edward Coke and Sir William Blackstone, that no title passes by deed unless it is *delivered.* What acts constitute delivery, and when the delivery becomes complete, have been the subjects of much discussion in many of the decisions of our own court as well as in those of other jurisdictions. "No particular form or ceremony is necessary; it will be sufficient if a party testifies his intention in any manner, whether by action or by word, to deliver or put it into possession of the other party; as, if a party throw a deed upon a table, with the intent that it may be taken by the other, who accordingly takes it; or, if a stranger deliver it with the assent of the party to the deed. 1 Phillips Ev. (2 Ed.), 467; 1 Coke Lit., 36a. Where the deed was executed by the donor in the presence of the donee, and then attested by the witness, who immediately retired leaving the deed so executed lying on the table in the presence of both the donor and the donee (which it seems was, after his death, found among the donee's aunt's papers) a presumption is raised that the deed was delivered to the donee. *Levister v. Hilliard,* 57 N. C., 12. There must be an intention of (221) the grantor to pass the deed *from his* possession and beyond his control, and he must *actually do so* with the intent that it shall be taken by the grantee or by some one for him. Both the intent and act are necessary to a valid delivery. Whether such existed is a question of fact to be found by the jury. *Floyd v. Taylor,* 34 N. C., 47. But if the grantor did not intend to pass the deed beyond his possession and control, so that he would have no right to recall it, and did not do so, then there would be no delivery in law; the facts of which must likewise be found by the jury. No presumption of delivery arises so long as the deed remains in the possession of the maker; but, *per contra,* the presumption is that it had not been made, and the contrary has to be proved. *Kirk v. Turner,* 16 N. C., 14; *Baldwin v. Maultsby,* 27 N. C., 505; *Newlin v. Osborne,* 49 N. C., 157; 67 Am. Dec., 269. No title can pass by the signing, sealing and attestation of a deed; there must also be a *delivery* which is a necessary agency by which the title moves from one person to another. But when the deed, properly executed, is found out of the possession of the maker and in the possession of some other person, then the law presumes the *fact* to be that it was *intentionally* delivered to or for the grantee. *Snyder v. Lackenour,* 37 N. C., 360; 38 Am. Dec., 685; *Ellington v. Currie,* 40 N. C., 21; *Airey v. Holmes,* 50 N. C., 142; *Phillips v. Houston,* 50 N. C., 302; *Robbins v. Rascoe,* 120 N. C., 79; 38 L. R. A., 238; 58 Am. St., 774.

But if the deed passed out of the maker's possession by acci-

dent, fraud or mistake, or was not intended to be delivered to the grantee or any one for him, then such presumption of the fact of delivery may be rebutted. *Love v. Harbin,* 87 N. C., 249; *Whitman v. Shingleton,* 108 N. C., 193; *Helms v. Austin,* 116 N. C., 751.

In *Snyder v. Lackenour, supra, Judge Gaston,* speaking
(222) for the Court, says: "The deed of gift from George Lackenour to the plaintiff, was executed in the absence of the plaintiff, was attested in the presence of the donor by two witnesses, and at the request of the donor was proved and registered. We hold, therefore, unhesitatingly, that the defense set up that it was not delivered, is in law unfounded." In *Phillips v. Houston, supra,* where the donor handed the deed to a third person, signed and sealed, to have it proved and registered (*without retaining any* authority or power to control it), which was returned to him, and he then delivered it to another person in like manner and for the like purpose, but who neglected to have it registered until after the donor's death, it was held that the delivery to the *first* person to whom it was handed, was a complete delivery, the point being that the donor absolutely parted with the deed with no intention of exercising any further control over it.

But when the grantor parts with the possession of the deed, *showing* an intention that it should not *then* become a deed, but delivered merely as a depository and subject to the future control and disposition of the maker, then the delivery would be incomplete and no title could pass. *Rae v. Lovick,* 43 N.C., 89. This case is specially applicable to the case at bar.

In the case above cited, where delivery was made to the clerk of the Superior Court for probate, or probated and registered, *no condition or purpose* was expressed inconsistent with an intent to make a complete and absolute delivery.

Our conclusion is, that there is no delivery of a deed where the maker has not gone so far with its execution that he can not recall or control it; and if from the evidence the jury should have found that Tarlton intended that Redfearne should hold the deed subject to his further direction and control, then there would have been no delivery. And if there was no delivery made when he handed it to Redfearne, then no delivery could have been made after Tarlton's death (*Baldwin v. Maltsby, supra*),
(223) and his Honor erred in not giving the instructions prayed for.

Defendants, however, contend that delivery is presumed from the acknowledgment of the husband and acknowledgment and privy examination of the wife (plaintiff) before the justice of

the peace. They "acknowledged the due execution of the foregoing deed," and that by "due execution" the law presumes the fact to be that it *had been delivered.* This contention is without merit and can not be sustained. To convey title free from incumbrance, the acknowledgment and privy examination of the wife is a pre-requisite imposed by law. Having complied with the statute, the deed would then be ready for delivery—not delivered. Her acknowledgment and privy examination can not be taken as an admission that the deed had been made, for, had the delivery been made *before* it was taken, the deed would have been invalid as to her rights; if so, why presume that an invalid delivery had been made, when the object of taking it was to make a valid one which would bar her dower right? Should the law impose such a presumption as is contended for, great hardship and gross injustice would follow. A deed thus prepared or "executed" for delivery, and in fact not delivered on account of mischance, awaiting the compliance of bargainee, or an opportunity to meet and perfect the agreement, or upon his default, etc., and then found in the possession of the maker (among his papers, perhaps) after his death, would impose upon the widow and devisees or heirs at law the burden of proving that it had *not* been delivered. How could this be done? From what source could they get the evidence to prove the non-occurrence of such a presumed fact? No evidence showing that the deed was ever out of his possession, yet should they be required to *prove* that it never was? Then, if such proof is not made, she would be debarred of her dower and the heirs at law or devisees deprived of their land, for which not a dollar had been paid. Surely this cannot be law. (224)

We can find no decision to support such a proposition. We are cited to *Redman v. Graham,* 80 N. C., 231, where the headnote says: "The execution of a deed *includes delivery,* and therefore the adjudication of a probate judge that the execution has been duly proved is a judicial determination of the fact of delivery, which cannot be *collaterally* impeached." (The italics are ours.) Upon an examination of the case, we find that it shows a state of facts similar to many of the others above cited: "The deed for the land was prepared and executed by the said defendants and their wives, the latter being privily examined, and duly proved before the judge of probate, and *left in his custody*" (italics ours), without expressing any intention whatsoever of exercising any further control over it. Had defendants instructed the judge of probate to hold the deed subject to their order, could it be held by a court that the delivery would be complete, and that title passed to the grantees? We think not.

In the case of *Baldwin v. Maltsby, supra,* the deed was signed and sealed and attested by two witnesses, and the maker declared to the witnesses that it was "his act and deed," and afterwards told a friend, "I am satisfied with the way I have disposed of my negroes; the deed of gift is in my trunk; I wish you would deliver it to Charles Baldwin immediately after my death." No presumption of delivery arose there. So, in the case at bar, no presumption of delivery arose from the acknowledgment of the husband, or from the acknowledgment or privy examination of the wife. When he handed the deed to Redfearne, it had been duly prepared and properly "executed," according to the forms and requirements of law, and ready for delivery; nothing else appearing, this would have been a delivery in law. But
(225) there is evidence tending to show that such delivery was for a temporary purpose, and that he intended to exercise further control and authority over it, and, if he did, it did not then become his deed.

New Trial.

Cited: Gaylord v. Gaylord, 150 N. C., 233.

PHILLIPS v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 5 November, 1902.)

EVIDENCE—*Incompetent—Telegraphs—Harmful Error.*

In an action to recover damages for the maintenance of telegraph poles on land the evidence of a witness, an adjacent landowner, that he would not have the poles across his land for several hundred dollars, was incompetent.

PETITION to rehear this case, reported in 130 N. C., 513, allowed.

J. R. McIntosh, F. H. Busbee and *Walser & Walser* for the petitioner.

E. E. Raper in opposition.

FURCHES, C. J. This is a petition to rehear this case, decided at the last term of the Court and opinion published in 130 N. C., 513. There are many errors assigned in the petition, and while they have all been considered, we find but one error, and for that we grant the petition and a new trial.

This error was not overlooked on the former hearing, but it

was then thought by a majority of the Court to be harmless. The witness Sink, introduced by the plaintiff for the purpose of proving the amount of damage done the plaintiff's land by reason of the poles being on the land, testified that he did not know, but he was an adjacent landowner to the plaintiff, and was then allowed to testify, over the objection of the defend- (226) ant: "I would not have those poles across me for several hundred dollars." The poles were erected on the land before the plaintiff became the owner of it. This removed any idea of damages for the trespass of going upon the lands to erect the poles, and the only question to be considered by the jury was that of damages for the right of the defendant to have and keep them there. For this, they awarded the plaintiff $180, which, in the opinion of the Court, was excessive. The Court is asked to grant the petition and a new trial for this reason, and cases are cited to sustain this contention.

But whatever may have been done by the courts of other jurisdictions, we can not grant the defendant's petition upon that ground without reversing a long line of decisions of this Court, made with such unanimity that we are unable to find one to the contrary.

But as the verdict, in our opinion, is excessive, and as there is no evidence to support it, except that of plaintiff, which puts his damages at $800, and this estimate seems to have been so extravagant that the jury disregarded it, and, if they did, it only left the erroneously admitted evidence of Sink for them to base their finding upon. The Court did not hold, in considerng this case at the last term, that this evidence was properly admitted, but thought it harmless. But upon a review of the case, we think it might, and probably did, influence the jury in finding the amount of damages they did. And for this reason, and this alone, we allow the petition and award the defendant a new trial.

Petition allowed and a new trial awarded the defendant.

Cited: *Bullock v. Canal Co.*, 132 N. C., 181.

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BAKER v. DAWSON.

(Filed 5 November, 1902.)

1. EXCEPTIONS AND OBJECTIONS—*Appeal—Judgments—Record.*

An appeal is itself an exception to the judgment or any other matter appearing on the record proper.

2. EXECUTORS AND ADMINISTRATORS—*Settlement of Estates of Decedents—Preferred Debts—The Code, Sec.* 1416.

Under the Code, sec. 1416, medical services rendered the wife, child or tenant of the deceased, is not a preferred debt.

3. EXECUTORS AND ADMINISTRATORS—*Settlement of Estates of Decedents.*

It is error to allow a claim against the estate of a decedent for medical services rendered his tenant if there is no allegation and proof that the services were rendered at the request of the deceased.

ACTION by Julian M. Baker against N. B. Dawson, administrator of S. P. Jenkins, heard by *Judge Henry R. Bryan,* at Spring Term, 1902, of EDGECOMBE. From a judgment for the plaintiff, the defendant appealed.

John L. Bridgers for the plaintiff.
No counsel for the defendant.

CLARK, J. There is no exception in the record, but an appeal is itself an exception to the judgment or any other matter appearing on the face of the record proper. *Wilson v. Lumber Co., ante.*

The following facts are admitted: The plaintiff, a physician, rendered medical services within twelve months just prior to the intestate's death, as follows: (1) to intestate personally, $347; (2) services to intestate's wife and child, $84; to tenants of intestate, $36. The plaintiff seeks to have all of above
(228) adjudged to be preferred debts under the Code, sec. 1416, which places among the sixth class of preferred debts "medical services within the twelve months preceding the decease." This language, however, contemplates only services rendered to the deceased, personally, for the indebtedness is given priority if rendered twelve months prior to his decease, and not within twelve months prior to decease of his wife, his child, or his tenant. As to them, the physician renders the services like any other creditor, relying upon the credit of the person requesting the services, that he will pay or can be made to pay.

It must be noted that there is no priority even for medical services rendered the deceased personally, unless he dies. In all other cases, the physician's bill is like any other debt. If the physician wishes to secure such debts, he must exact security or proceed to collect by law. When the patient is in his last illness, this might be inconvenient or indecent, and as such illness might extend to twelve months, the law endeavors to secure for the patient medical attention by giving a legal priority for such services, if rendered to the patient within twelve months preceding his decease. But such reason does not apply to services rendered his wife and children, as to which the physician has extended credit, relying upon the father or husband or landlord himself paying the debt incurred. There are no words extending the meaning to such debts other than personal services to the debtor, and the language of the statute is restrictive—"for medical services within twelve months prior to the decease"—meaning the decease of the debtor, not of his wife, child or tenant.

The statute being in derogation of the equity of a *pro rata* distribution, should be strictly construed so as not to confer a priority over other creditors unless clearly called for. A somewhat similar provision is in class two of this same section (1416), which clearly means the funeral expenses of the debtor, and not of his wife, child or tenants.

The defendant did not contest that first debt above (229) stated, for medical services rendered deceased himself was a preferred debt, and the judge rightly disallowed any priority as to medical services rendered the tenants of the deceased, but erred in rendering judgment therefor to be paid *pro rata* with other debts of the intestate, since it is not alleged nor proved nor admitted that the services were rendered to the tenants at the request of the intestate, and without this, the landlord is not liable for such services.

The judge also erred in adjudging that the bill for medical services rendered the wife and child of the deceased was a preferred debt. He should have rendered judgment for the amount thereof to be paid *pro rata* with the other unpreferred indebtedness of the defendant's intestate.

Error.

ROBINSON v. LAMB.

(Filed 5 November, 1902.)

1. FERRIES—*County Commissioners—Jurisdiction—The Code, Sec.* 2014.

Where a river lies wholly within a county the county commissioners of an adjoining county have no jurisdiction to establish a ferry across such river.

2. COUNTIES—*Boundaries—Questions for Court—Judicial Notice.*

Where a certain river is made by the Legislature a boundary of a county the court will take judicial notice that a "cut-off" of the river is not a part of the boundary.

3. COUNTIES—*Boundaries—Waters and Water Courses—2 Revised Statutes,* 111.

Where an act creating Camden County describes it as all that part of Pasquotank County lying on the northeast side of Pasquotank River, the whole of said river is in Pasquotank County.

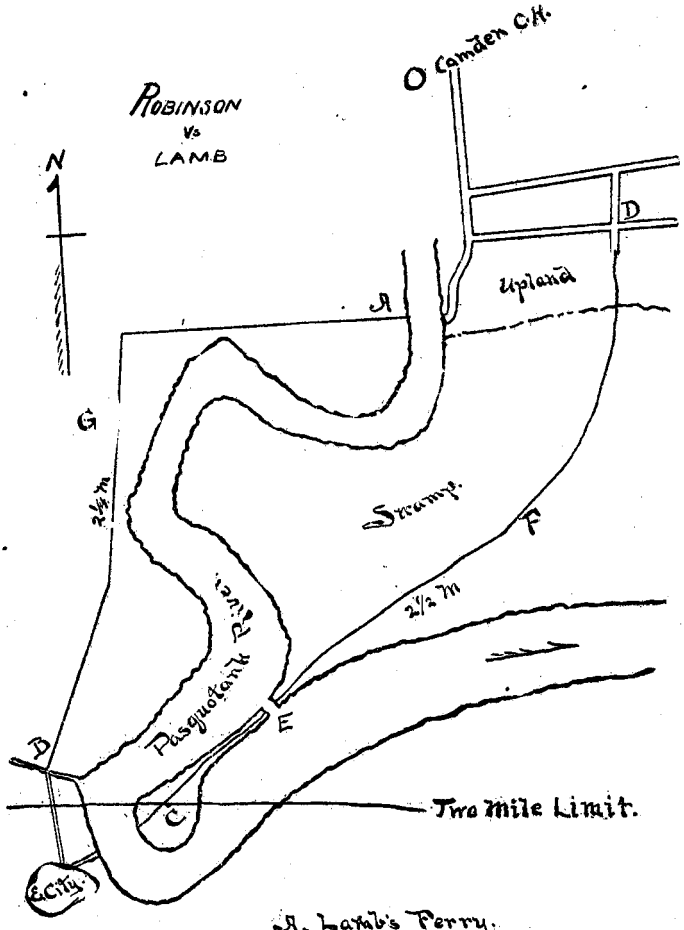
(230) ACTION by C. H. Robinson and others against E. F. Lamb, heard by *Judge George A. Jones,* and a jury, at Spring Term, 1902, of CAMDEN. From a judgment for the plaintiffs the defendant appealed.

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

Busbee & Busbee for the defendants.

CLARK, J. This is a proceeding begun before the commissioners of Camden County to establish a ferry across Pasquotank River. The same proceeding to establish the same ferry at the same spot, with the same parties plaintiff (except one person), and the same defendant, was heretofore begun before the commissioners of Pasquotank County, and the same propositions of law presented by the exceptions in this case were decided in that, on appeal. *Robinson v. Lamb,* 126 N. C., 492. The judgment in the former action is pleaded by the plaintiffs as an estoppel in this, since no other relief is asked than the establishment of the ferry, at the expense of the plaintiffs, as prayed in the former action. But if the commissioners of Camden could give any relief not already given by the commissioners of Pasquotank, the judgment would not be an estoppel, though the principles of law there laid down would apply and be conclusive here.

An appeal in the present action was before the Court (*Robinson v. Lamb,* 129 N. C., 16), in which it is held that the court



A. Lamb's Ferry.
B. Knobb's Creek Bridge.
C. Goat Island
D. Morrisetts.
F. Proposed Road.
G. Lamb's Road.
E. Stinking Gut

below erred in granting a motion to dismiss because of Private Laws 1901, ch. 72. When the case went back, the issues were found in favor of the plaintiffs, and, the law applicable having already been adjudged in favor of the plaintiffs in the two appeals above cited, judgment was rendered accordingly, and defendant appealed.

The defendant contends that Stinking Gut is Pasquo-
(232) tank River, or a part of it, and that a ferry over it would be illegal, because over Pasquotank River within two miles of Lamb's Ferry, but we cannot assent to the proposition. This gut, with its malodorous name, is stated to be 80 to 100 feet wide and 150 yards in length. It is a "cut-off," seven or eight feet deep, through which boats sometimes pass, while what is and always has been known as Pasquotank River is very much larger, being 150 yards wide, and with great curve sweeps by Elizabeth City where the new ferry is, and then bends back, the peninsula thus formed, and whose neck is crossed by Stinking Gut, being known as Goat Island. It is, by the evidence, some 500 yards across Goat Island from the new ferry to where the road will cross Stinking Gut. Even geographically speaking, it is clear that the broad stream which flows by the town is Pasquotank River, and the "gut," which is one-fifth of the width of the river, or less, is merely a "cut-off," like the Dutch Gap Canal, dug by General Butler in James River during the war, or like similar "cut-offs" excavated not infrequently by floods in the Mississippi.

But even if it could be shown that Stinking Gut was physically the true river, and the broader stream (five times as broad) that flows by Elizabeth City was the subsidiary stream, still the latter has always been known as Pasquotank River, and this is the stream over which the ferry was ordered, and which, for the century and a quarter since the act establishing Camden County, has been the county boundary. In all that time Goat Island, as is conceded and cannot be denied, has been in Camden County. If Stinking Gut were Pasquotank River, or, legally speaking, a part of it, then Goat Island would be in Pasquotank County. It is physically and legally impossible that Pasquotank River, as it flows around Goat Island, and Stinking Gut, which cuts across its narrow neck, should both be the boundary between the counties, as defendant contends. The Pasquotank River is the
(233) boundary between the counties, and has been since 1777. When the legislation under which the defendant claims was enacted, this river was the stream that flows by Elizabeth City. It could not be at two places. There has been no legislation as to Stinking Gut.

The establishment of a road from the eastern end of the ferry, and a bridge or ferry across Stinking Gut, are matters for the cognizance of the commissioners of Camden, since, as we have said, Stinking Gut is Stinking Gut and is in Camden County, and is not Pasquotank River, which lies wholly in the county of that name. A ferry or bridge over Stinking Gut is not a ferry or bridge over Pasquotank River. If it could be shown and demonstrated that Stinking Gut is the scientific boundary, being the true Pasquotank River, it has not been so known, styled and treated, and hence is not in law any part of that stream, though it flows into and flows out of the Pasquotank. An act of the Legislature would be necessary to make the change in the boundary and in the name of the stream.

Doubtless the citizens of the prosperous and progressive city by the Pasquotank will some day procure an act of the Legislature to bestow some name more euphonious and sweet-smelling* upon a stream which lies so close to their doors as malodorous Stinking Gut. But no change of name, not even were that of Pasquotank River bestowed upon it, would transfer the county boundary to the "cut-off," unless the act clearly so indicated. Certainly, neither the court nor the jury could change a county boundary, recognized as such for a century and a quarter, upon the ground that another stream, bearing another name, is the scientific frontier, upon the ground that it is physically the true Pasquotank, or a part of it, and that what has been known as Pasquotank River all these years is physically not entitled to be solely so designated. An issue to that effect was properly refused; for upon the facts admitted, or of which the court takes judicial notice (like a county boundary), the propo- (234) sition is one of law, not of fact. The defendant moved in this Court for the first time to dismiss for want of jurisdiction, in that Pasquotank River lies wholly in Pasquotank County, and the commissioners of that county alone have jurisdiction. Code, sec. 2014. The act of 1777 (2 Rev. Stat., 111), creating Camden County, describes it as "all that part of Pasquotank County lying on the northeast side of said river (Pasquotank)." This, of course, leaves the river entirely in Pasquotank County, and the commissioners of that county have sole jurisdiction to establish a ferry over it, and the defendant's motion to dismiss this proceeding for want of jurisdiction in the commissioners of Camden County is well taken and must be allowed.

But as the ferry has already been established by the commissioners of Pasquotank, and their action affirmed (126 N. C., 492), and it has been held that the act (private) of 1901 does not

* Such as "Camden Cut-off," for instance.

affect a ferry already ordered to be established (129 N. C., 16), though the motion of the defendant must be granted, we do not see that it can in anywise avail him beyond a recovery of the costs in this case.

Action dismissed.

Cited: S. v. Barco, 150 N. C., 797.

MOTT v. SOUTHERN RAILWAY COMPANY.

(Filed 11 November, 1902.)

RAILROADS—*Negligence—Assumption of Risk—Issues—Acts (Private)* 1897, *Chap.* 56.

It is error to submit an issue as to assumption of risk where the cause of action is for injury sustained in the course of employment by a railroad employee.

(235) ACTION by Charles D. Mott against the Southern Railway Company, heard by *Judge Thomas J. Shaw* and a jury, at May Term, 1902, of IREDELL. From a judgment for the defendant the plaintiff appealed.

Long & Nicholson, Armfield & Turner and *W. G. Lewis* for the plaintiff.

F. H. Busbee for the defendant.

CLARK, J. The plaintiff was injured while in the employment of defendant company. He was ordered by one who had a right to command him to aid a foreman to take a tire off an engine, which tire weighed 800 or 1,000 pounds, and had to be heated red-hot to obtain the expansion necessary to secure its removal. The plaintiff alleged that while he was engaged in helping to remove this tire, it slipped, by the negligence of defendant and its servants, as specified in the complaint, and fell upon the iron bar the plaintiff was using, crushing him and injuring him seriously.

The jury found, upon issues submitted to them, that the plaintiff was injured by the negligence of the defendant, as alleged in the complaint; that the plaintiff did not by his own negligence contribute to his injury, and assessed the plaintiff's damages at $500. The court submitted, over plaintiff's objection, another issue, "Did the plaintiff assume the risk of injury when he accepted service of the defendant?" To the submission of this

issue the plaintiff excepted. The jury responded "Yes" thereto, and by reason of such response the judge rendered a judgment in favor of defendant, and plaintiff appealed.

The submission of the issue as to assumption of risk was error, the finding of the jury thereon is immaterial, and the plaintiff is entitled to judgment upon the finding upon the other issues. The cases of *Coley v. R. R.*, 128 N. C., 534, and same case on rehearing (129 N. C., 407), are conclusive of this. Those (236) cases have been cited as authority in *Thomas v. R. R.*, 129 N. C., 392; *Cogdell v. R. R., ib.*, 398; *Ausley v. Tobacco Co.*, 130 N. C., 34; *Springs v. R. R., ib.*, 186; besides other cases at this term. In *Cogdell's case, supra,* the point was made, and so ruled, that the judge, under the authority of *Coley's case,* properly refused to submit an issue as to assumption of risk when the cause of action was for injury sustained in the course of his employment by a railroad employee.

The act, ratified 23 February, 1897 (printed, for some reason not yet made public, as chapter 56 in the Private Laws of that year), is as follows:

"Section 1. That any servant or employee of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such employee who shall have suffered death in the course of his services or employment with said company, by the negligence, carelessness or incompetency of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.

"Sec. 2. That any contract or agreement, expressed or implied, made by an employee of said company, to waive the benefit of the aforesaid section, shall be null and void."

In *Coley v. R. R.*, 128 N. C., 534, *Furches, C. J.,* after an able and full discussion of the above statute and its bearing upon the doctrine of assumption of risk, says (at page 541): "The greater part of the record, consisting of prayers for instruction and the judge's charge, is predicated upon the first issue, *the assumption of risk,* which are *eliminated* by the view we have taken of the case. . . . The prayers of the defendant, mainly, if not all of them, are addressed to the assumption of risk, and it is not necessary for us to discuss them, after taking this (237) view of the act of 1897."

After full argument and most careful consideration on rehearing, the Court reaffirmed (*Coley v. R. R.*, 129 N. C., 407) the view expressed by the Chief Justice; *Douglas, J.,* saying (page 409) that our statute is "an *unconditional abrogation* of the

kindred doctrine of fellow-servant and assumption of risk, as applied to railroad companies"; and on page 410, "We have, therefore, no hesitation in holding the act of February, 1897, valid in its entirety, and that it deprives all railroad companies operating in this State of the defense of assumption of risk, whether resting in contract, express or implied, and whether pleaded directly or under the doctrine of fellow-servant."

No case has ever been more thoroughly argued and more carefully and deliberately considered than *Coley v. R. R.* It was argued before us by able counsel three times; first at September Term, 1900, and was carried over, under an *advisari,* to Spring Term, 1901, when it was re-argued by leave of the Court, the opinion affirming *Judge Hoke,* who tried the cause below, being written by *Chief Justice Furches.* It was again argued on rehearing at Fall Term, 1901, the Court reaffirming its former decision in a well-considered opinion by *Mr. Justice Douglas.* And these opinions have since been approved in several cases, as already cited.

It was suggested here that the act applied only to employees running the trains, but the language of the statute is both comprehensive and explicit. It embraces injuries sustained by *"any* servant or employee of any railway company, . . . *in the course of his services or employment with said company."* The plaintiff was an employee and was injured in the course of his service or employment.

The issue and finding thereon as to assumption of risk being irrelevant and immaterial, the cause must be sent back,
(238) with directions to enter judgment in favor of the plaintiff, in accordance with the findings upon the other issues. *House v. House, ante,* 140.

Reversed.

Cited: Elmore v. R. R., post, 583; *Sigman v. R. R.,* 135 N. C., 184; *Lassiter v. R. R.,* 137 N. C., 152; *Nicholson v. R. R.,* 138 N. C., 517.

RALEIGH HOSIERY COMPANY v. RALEIGH AND GASTON RAILROAD COMPANY.

(Filed 11 November, 1902.)

1. NEGLIGENCE—*Railroads—Presumptions—Burden of Proof—Fires.*

Where property is destroyed by sparks from a railroad engine the burden of proof is shifted to the railroad company to rebut the presumption of negligence.

2. NEGLIGENCE—*Railroads—Fires—Fuel.*

In an action for damages caused by fire set by an engine it is not error to refuse to instruct that if the use of anthracite coal would lessen the danger of fire failure to use it is negligence.

ACTION by the Raleigh Hosiery Company against the Raleigh and Gaston and Seaboard Air Line railroad companies, heard by *Judge O. H. Allen* and a jury, at April Term, 1902, of WAKE. From a judgment for the defendants the plaintiff appealed.

Battle & Mordecai, Womack & Hayes, Busbee & Busbee and *Shepherd & Shepherd* for the plaintiff.

Day & Bell and F. H. Busbee for the defendant.

DOUGLAS, J. This was an action originally brought by the hosiery company to recover damages for losses by fire, alleged to have occurred through the negligence of the defendants. Upon their own motion, the insurance companies were (239) made parties plaintiff for the purpose of participating in the recovery to the extent to which they may have paid the losses. The determination of this appeal practically depends upon a single point—whether the presumption of negligence arises from the fact, found or admitted, that the defendant's engine set fire to the property. This point is directly decided in *Mfg. Co. v. R. R.*, 122 N. C., 881, frequently called the *Ice Company case,* where *Furches, J.,* speaking for a unanimous Court, says (on page 888): "When the origin of the fire is fixed on the defendant, the presumption then arises that it was guilty of negligence, and the burden rests upon it to show that it used approved appliances in the operation of its road to prevent the emission of sparks and cinders, or that the damage was caused by some extraordinary cause, over which the defendant had no control," citing 2 Shearman and Red. Neg., sec. 676; *Lawton v. Giles,* 90 N. C., 374; *Ellis v. R. R.,* 24 N. C., 138; *Aycock v. R. R.,* 89 N. C., 321. To these authorities may be added *Moore v. Parker,* 91 N. C., 275; *Haynes v. Gas Co.,* 114

N. C., 203; 26 L. R. A., 810; 41 Am. St., 786; Wood Ry. Law, 1580; 2 Thomp. Neg., secs. 2284, 2285; 13 A. and E. Enc. (2 Ed.), 498.

Ellis' case, cited by the Court in *Mfg. Co. v. R. R., supra,* is the leading case, in which *Gaston, J.,* for the Court, lays down the rule of presumed negligence as follows: "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 cannot be repelled but by proof of care, or of some extraordinary accident which renders care useless."

In Lawson's Law of Pres. Ev. the rule is thus stated: (240) "Rule 19b. But when the thing is under the management of the defendant, and the accident is such as ordinarily does not happen if those who have its management use proper care, a presumption of negligence arises from the happening of the accident." In subsection 2 the author says: "A's property is destroyed by sparks from the locomotive of a railroad company. The presumption is that the sparks were negligently emitted." Numerous cases are cited.

The rule 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 cases therein cited. The condition of the engine was peculiarly and in fact exclusively within the knowledge of the defendant.

The court below charged the jury as follows: "If the jury should find from the evidence that the fire originated from the defendant's engine, this would not of itself cast the burden on the defendants to prove that the engine was properly equipped with spark arresters, and skillfully operated." In this there was substantial error, for which a new trial must be ordered.

There is one other exception which we will briefly notice. The plaintiffs requested the court to charge as follows: "That if the jury shall find that the use of hard or anthracite coal in an engine lessens the danger of throwing sparks or fire from the smokestack, it is negligence not to use such coal." This instruction his Honor properly refused. The courts have no powers of legislation. They cannot say that railroads shall use certain fuel or appliances. The most that courts can say is, that if a railroad or anyone else fails to use such reasonable care in the

selection and use of its fuel and machinery as a man of ordinary prudence, dealing with his own affairs and hav- (241) ing due regard for the rights and safety of his fellow-men, would use, then such failure becomes actionable negligence. This is but an exemplification of the ancient maxim, *"Sic utere tuo ut alienum non laedas."* We are not prepared to say, as a matter of law, that a man of ordinary prudence would, under present conditions, adopt the use of anthracite coal if he could conveniently burn any other kind of fuel.

New trial.

Cited: Winslow v. R. R., 151 N. C., 254.

LAMB v. ELIZABETH CITY.

(Filed 11 November, 1902.)

1. EMINENT DOMAIN—*Damages—Towns and Cities—Evidence—Improvements.*

Where plaintiff sued for wrongful taking of land and for damages to buildings, and abandoned the claim for the wrongful taking, evidence of special benefit to property of plaintiff by the improvements becomes immaterial.

2. EMINENT DOMAIN—*Pleadings—Allegata et Probata—Damages.*

In an action for damages to buildings removed from land condemned for public use, there being no allegation as to damages for cost of raising buildings after being removed, nothing can be recovered therefor.

3. EMINENT DOMAIN—*Damages—Improvements—Set-off.*

In an action for damages to buildings removed from land condemned for public use special benefits from the improvements cannot be used as a set-off to such damages, if such benefits were used as a set-off in the condemnation proceedings.

ACTION by E. F. Lamb against Elizabeth City, heard by *Judge O. H. Allen* and a jury, at March Term, 1901, of PASQUOTANK. From a judgment for the defendant the (242) plaintiff appealed.

Busbee & Busbee and *J. H. Sawyer* for the plaintiff.
E. F. Aydlett and *G. W. Ward* for the defendant.

CLARK, J. In this action the plaintiff asks damages (1) because the defendant had wrongfully entered and appropriated a

strip of land, 8 feet at one end and 4 feet at the other, and 293 feet long, taken off the front of plaintiff's lot, in widening the street, which was paved and otherwise improved; (2) because the defendant moved back "the buildings and improvements from said land in a negligent and careless manner, to the plaintiff's damage $300."

It appeared in evidence that the strip had been regularly and legally condemned, the damages assessed and tendered. The plaintiff thereupon obtained leave, and amended his complaint by striking out the allegation of wrongful taking. There was a great amount of evidence tending to show that the special benefit to plaintiff's property, separate from the general benefit common to others, was very much greater than the value of the strip taken. In view of the amendment abandoning the cause of action for wrongful taking the strip, and the adjudication in the condemnation proceedings (from which no appeal was taken), and tender of the damages assessed, all this evidence becomes immaterial and irrelevant.

As to the other ground of damages, for removal of the buildings in a careless and negligent manner, the plaintiff testified that the injury "to the land and buildings was about three hundred dollars," by reason of such negligence. It was in evidence that the defendant paid for their removal, and paid plaintiff rent for the same during the time they were necessarily unoccupied. The court rightly refused to instruct the jury, as prayed by plaintiff, to consider as an element of damages
(243) the cost of raising the houses after they were removed, for there was no allegation of such damages in the complaint.

But the court erred in instructing the jury to deduct the value of the special benefit to the plaintiff's land by reason of the improvement. This was a proper matter for consideration in the proceedings for condemnation and in assessing the amount of plaintiff's damages therein. They were probably so considered, as the damages assessed in that proceeding were only $30. Such damages were not a proper subject for consideration in this action, which is, after amendment of complaint, solely for injury sustained in the negligent and careless manner of removal of the buildings, unless it had been affirmatively shown that the benefit to the plaintiff's land by reason of the public improvement had not been considered in assessing the damages for taking the land.

Error.

Cited: S. c., 132 N. C., 194.

SINCLAIR v. HUNTLEY.

(Filed 11 November, 1902.)

1. EJECTMENT—*Estoppel—Deeds—Writs.*

Where parties claim title from a common source a subsequent grantee is estopped to claim as against a prior deed from the same grantor, unless such deed is invalidated for fraud or other cause.

2. EJECTMENT—*Title—Burden of Proof—Writs.*

Where in ejectment the plaintiff fails to prove a valid title as against the defendant it is not necessary for the defendant to show title in himself.

ACTION by Mary E. Sinclair and another against N. G. Huntley and others, heard by *Judge Thomas A. McNeill* and a jury, at April Term, 1902, of ANSON. From a judgment for the defendants the plaintiffs appealed. (244)

H. H. McLendon for the plaintiffs.
James A. Lockhart for the defendants.

FURCHES, C. J. This is an action of ejectment, and we are not certain upon what right the plaintiffs claim the land in controversy. It is admitted that both plaintiffs and defendants claim under Nancy Rickets, who seems to have been the mother of the *feme* plaintiff, who, she alleges, died intestate, and that she (the *feme* plaintiff) "is one of her heirs at law." But, in addition to this allegation, she offers in evidence a deed from her mother, Nancy Rickets, to herself for the land in controversy, dated 9 March, 1875. This makes a *prima facie* case for the plaintiffs, as both plaintiffs and defendants claim under Nancy.

But the defendants offer in evidence a deed from the said Nancy Rickets to Daniel Gatewood, dated 22 December, 1873; a deed from Gatewood to E. A. Edwards, dated 19 February, 1876, and a deed from E. A. Edwards to the defendant N. J. Huntley (the *feme* defendant), dated 1 October, 1886; and the evidence tends to show that Gatewood, Edwards and the defendant Huntley have had continuous possession under these deeds. And while there was much evidence as to the possession of the defendants and those under whom they claim, and while the court below seems to have considered that a material question, we do not.

The only title the plaintiffs have is derived from Mrs. Rickets, as an heir at law, or under the deed dated 9 March, 1875; and,

Mrs. Rickets having conveyed the land to Daniel Gatewood 22 December, 1873, she had nothing to convey to the plaintiffs in 1875, nor did she have any estate in this land to descend to the *feme* plaintiff as one of her heirs at law. As the plain-
(245) tiffs claim to derive their title from Mrs. Rickets, the deed to Gatewood was an estoppel upon them, and they could not proceed without first removing it, upon the ground of fraud or some other cause. This they attempted to do, but were not successful.

As the plaintiffs' title failed, their action failed, and it was not necessary for the defendants to establish their title, and for that reason it is not necessary to discuss the question of possession of defendants and those under whom they claim.

The plaintiffs' exceptions have been considered, and if any of them could be sustained they could not affect the result, under the view of the case the Court has taken.

Affirmed.

BELL v. WYCOFF.

(Filed 11 November, 1902.)

SHERIFFS—*Service of Process—Summons—Return—Fines—Penalties—The Code, Sec.* 2079.

The facts in this case are not sufficient to excuse a sheriff from the penalty imposed upon him for failure to make return of process delivered to him twenty days before the sitting of the court to which the same is returnable.

ACTION by Ida L. Bell against J. H. Wycoff, heard by *Judge A. L. Coble,* at February Term, 1902, of ROCKINGHAM.

After the failure of the defendant sheriff to make due return of the summons issued to him in the action of Ida L. Bell *v.* William T. Bell, upon motion of the plaintiff, judgment *nisi* was entered against him, under section 2079 of the Code, by the court, and *sci. fa.* issued. Upon a return of the *sci. fa.,* his Honor found the facts, upon the evidence submitted by
(246) plaintiff and respondent, and thereupon entered judgment in favor of the plaintiff, and defendant appealed.

The court found the following facts: "That the summons was issued 27 June, 1901, returnable to July Term, 1901, which began 29 July, 1901; that the summons was received by Wycoff, sheriff, 1 July, 1901; that said term of court to which the summons was returnable adjourned *sine die* 1 August, 1901; that

said summons was returned by said Sheriff Wycoff 6 August, 1901; that the clerk of the court received the said summons from said sheriff 7 August, 1901; that *sci. fa.* was served on Wycoff, sheriff, on 29 November, 1901; that immediately on receipt of said summons by said sheriff he placed the same in the hands of one of his deputies, W. C. Wooten, who lives in the section of the county where the said sheriff had been informed that the defendant in the said action of Ida L. Bell *v.* William T. Bell had resided; that the said defendant sheriff gave his said deputy instructions to make diligent search for the said defendant Bell, and, if found, to serve the paper on him at the earliest possible moment; that some time during July the said sheriff met said deputy sheriff and asked him about said summons; that the said deputy informed him that the said defendant Bell was not and had not been a resident of the State for nearly a year, as he had learned upon inquiry, but that one Thomas Bell, the father of said defendant Bell, and who resided in Iredell County, had informed him (the said deputy) that said defendant Bell would pay a visit to his father's home the latter part of July or first of August of said year 1901, and that if he should be allowed to hold the said summons a while longer, then he could secure service upon the said defendant Bell; that, afterwards, when the said sheriff received a letter from A. J. Benton, attorney for the plaintiff in said action, he (the said sheriff) caused the said deputy to bring said summons in, when he was informed that the deputy had learned from the father (247) of the said defendant Bell that he was unable to come on the expected visit, on account of sickness in his employer's family; that thereupon the said sheriff caused the said deputy to make the return which appears on the back of said summons, and to return the same unexecuted, at the same time returning the sixty cents fees which had been advanced to the said sheriff by the plaintiff; that when the said Deputy Sheriff Wooten received the said summons he was under the impression that the said summons was returnable at a later day, to-wit, the latter part of August of said year; that the said summons, on its face, stated that it was returnable at the courthouse in Wentworth on the fifth Monday before the first Monday in September, 1901; that as soon as the said Wooten received said summons he made diligent inquiry for the said defendant William T. Bell; that he inquired of five or six persons who, in the opinion of the said Deputy Sheriff Wooten, were likely to know the said defendant's whereabouts, and that all of the said people told the said Wooten that they did not believe that the said defendant Bell was in the State of North Carolina, but that the said deputy

sheriff, being anxious to further discharge his duty in the premises, went to the father of the said William T. Bell, who lived at the distance of some three miles, and inquired of him of the whereabouts of his said son, at the same time informing him that he had a summons for him in a suit commenced by his wife, Ida L. Bell, in the Superior Court of Rockingham County; that the father of the said defendant Bell informed the said Wooten, deputy sheriff, that his said son was not a citizen or resident of the State of North Carolina and had not been for nearly a year, but that he was then a citizen and resident of the State of West Virginia, and that he had received a letter from his said son, in which he stated that he intended to make a visit to his said father and mother, in Iredell County, in the latter part (248) of July or the first of August, 1901, and that if the said Wooten, deputy sheriff, would hold said summons until said time, that he could recover service of the same; that the said deputy, desiring to accommodate the plaintiff and secure service for her, held said summons until the first of August, when he learned that said defendant Bell was not in the county of Iredell, and that he would not probably be in said county; that the said deputy sheriff held said summons solely for the purpose, as he conceived, of performing his duty and accommodating the plaintiff."

It is prescribed by section 2079 of the Code that "Every sheriff, by himself or his lawful deputy, shall execute all writs and other process to him legally issued and directed within his county, . . . and make due return thereof, under penalty of forfeiting one hundred dollars for each neglect, where such process shall be delivered to him twenty days before the sitting of the court to which the same is returnable, to be paid to the party aggrieved, by order of the court, upon motion and proof of such delay, unless such sheriff shall show sufficient cause to the court," etc.

From judgment for the plaintiff the defendant appealed.

A. J. Burton for the plaintiff.
Armfield & Turner for the defendant.

COOK, J., after stating the case. We sustain his Honor in holding that the cause of his delinquency, as stated in the facts found, was insufficient to excuse defendant from the penalty imposed by law. The impression that the summons was returnable at a later date, to-wit, the latter part of August, was not made by his reading the summons, as he should have done, for the word "August" does not appear therein. The "fifth" Mon-

day before the first Monday in September" cannot come the latter part of August, so his impression was not obtained from the summons which he received and was "com- (249) manded" to serve.

Before undertaking to obey the precept he should have read and learned its contents and known what he was "commanded" to do. This he neglected and failed to do, for which he was inexcusable, and will have to bear the burden of his own (or his deputy's) carelessness.

His diligence in undertaking to locate the defendant and to serve the summons upon him when he should reach the county was incumbent upon him, and in doing so he only discharged his duty to that extent. But in holding the summons *after* the return day for the purpose, as he conceived, of performing his duty and accommodating the plaintiff, was a misconception of duty and does not protect him against the penalty. To accommodate the plaintiff was no part of his duty. An officer should discharge his duties faithfully and impartially, and accommodate his acts and doings to the requirements of law and his oath of office, and not to aid friends and favorites, or to incur the favor of any particular person or persons. Why a case so utterly devoid of merit should be taken by appeal to this Court we are unable to conceive.

Affirmed.

(250)

PALMER v. WINSTON-SALEM RAILWAY AND ELECTRIC CO.

(Filed 11 November, 1902.)

1. ASSAULT AND BATTERY—*Damages—The Code, Sec.* 525, *Subsec.* 4.

   In an action for damages for an assault provocation is not a defense, but may be shown in mitigation of damages.

2. ASSAULT AND BATTERY—*Damages—Carriers—Street Railways—Master and Servant.*

   In an action against a street railway company for an assault by its motorman, to render the company liable the person injured must be a passenger on the car of the company at the time of the assault, or still within the sphere of its protection, or the employee must be acting at the time within the scope of his employment on the car of the company.

ACTION by Alfred Palmer against the Winston-Salem Railway and Electric Company, heard by *Judge A. L. Coble* and

a jury, at March Term, 1902, of FORSYTH. From a judgment for the plaintiff the defendant appealed.

Jones & Patterson for the plaintiff.
Glenn, Manly & Hendren and *Watson, Buxton & Watson* for the defendant.

CLARK, J. The plaintiff, while a passenger on the street car of the defendant and somewhat intoxicated, used grossly insulting words to the motorman. Arrived at his destination the plaintiff got out, deposited his bundles on the sidewalk, returned to the car, again got into an altercation with the motorman, turned and left the car, whereupon the motorman followed him up and, two or three steps from the car, struck the plaintiff on the back of the head with the lever which controlled the car, knocking him down.

(251) The fact that the plaintiff invited the assault by insulting language or provoking conduct would not bar recovery in a civil action, not even when the parties fight by consent. *Bell v. Hansley,* 48 N. C., 131; *Williams v. Gill,* 122 N. C., 967; Cooley on Torts (2 Ed.), pages 183, 187 and 190. The rule in criminal actions is that no words, however violent and insulting, justify a blow, but if a blow follows both are guilty, though the party giving the insult strikes no blow. The insult is not a defense but matter in mitigation of punishment. In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages, and if the amount is less than fifty dollars the plaintiff recovers no more costs than damages. Code, sec. 525 (4). In the civil as in the criminal action the provocation is a mitigation, not a defense.

The only question which remains is as to the liability of the defendant for the assault upon the plaintiff. If the plaintiff had been a passenger, or his passage had not been fully terminated or if, when he left the car at his destination, the employee had immediately followed the passenger up and assaulted him, the defendant concedes that there would be no question as to the liability of the company. *Daniel v. R. R.,* 117 N. C., 592; *Williams v. Gill,* 122 N. C., 967; *Strother v. R. R.,* 123 N. C., 197.

Here the passage had terminated, for the passenger had deposited his bundle and then returned to the car. *R. R. v. Peacock,* 69 Md., 257; 9 Am. St., 425; *R. R. v. Boddy,* 51 L. R. A., 885; *Creamer v. R. Co.,* 156 Mass., 320; 16 L. R. A., 490; *R. R. v. Bates,* 103 Ga., 333. But the plaintiff insists, however, that

the defendant is liable, notwithstanding, if the motorman assaulted the plaintiff while acting in the scope of his employment. The court so charged, and the exception is that the evidence, as above stated, did not justify submitting that matter to the jury.

In *Pierce v. R. R.*, 124 N. C., 83; 44 L. R. A., 316, the fireman threw a lump of coal at a boy stealing a ride (252) on the tender of a switching engine, in violation of a town ordinance, knocking him from the engine or frightening him so that he fell and was run over and killed by the engine, which was running backwards.

In *Cook v. R. R.*, 128 N. C., 333, a tramp was stealing a ride under a car. A flagman and a brakeman threw rocks at him, striking the rod under him, frightening him and causing him to get off while the car was in motion, whereby his foot and he was caught and badly hurt.

In *Brendle v. R. R.*, 125 N. C., 474, the plaintiff was watering his team at a stream; the engineer on a train passing on a bridge above wantonly blew his whistle for the purpose of frightening the plaintiff's horses, which ran away, throwing the plaintiff out of his wagon and injuring him.

In none of these cases was the plaintiff a passenger, and in the first two he was a trespasser, and in all three the company was held responsible. But this was because the servant of the company was "acting in the scope of his employment," *i. e.*, on duty as servant, when the tort was committed.

But here the plaintiff was neither a passenger nor was the employee acting within the scope of his employment. The court should have told the jury that, taking the evidence most strongly for the plaintiff, they should answer the first issue "No." The employee in this case had left the car and was not engaged in any work or employment for the company at the time of the assault. He had, for the time being, abandoned his post, and was not doing service for the company, as in each of the three cases last cited. The assault was not made while the motorman was in the line or in the discharge of his duty. 20 Am. and Eng. Enc., 168n, 169; 1 Thompson Neg., secs. 525, 526. If the plaintiff's contract of passage had not terminated, and the plaintiff had been assaulted while on the car or upon leaving it by an employee, then the company would (253) be liable, whether the employee was acting within the scope of his employment at the time or not, for, as was said in *Cook v. R. R.*, 128 N. C., at page 336, it can never be in the scope of an employee's service to assault any one wrongfully. "Acting within the general scope of his employment means

while on duty." *Ibid.* This is the limitation upon the liability of the company for torts of its employees towards those not passengers or under the protection of the contract of safe carriage at the time of the tort.

The law can hardly be better summed up than in the following extract from the brief of the learned counsel for the defendant:

"To render the defendant liable (1) the plaintiff must have been a passenger on defendant's car at the time he was stricken, or still within the sphere of its protection; or (2) the employee must have been acting at the time within the scope of his employment on defendant's car."

New trial.

Cited: Seawell v. R. R., 132 N. C., 859; *Roberts v. R. R.*, 143 N. C., 179; *Stewart v. Lumber Co.*, 146 N. C., 102; *Jones v. R. R.*, 150 N. C., 478.

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(254)

DORSETT v. CLEMENT-ROSS MANUFACTURING CO.

(Filed 11 November, 1902.)

1. RELEASES—*Fraud—Questions for Jury—Evidence—Sufficiency—Contracts.*

   In this action for personal injuries, a release being set up and there being more than a scintilla of evidence tending to show fraud, the question of fraud in procuring the release was properly left to the jury.

2. RELEASES—*Consideration—Inadequacy—Evidence—Fraud—Contracts.*

   Inadequacy of consideration alone is not sufficient to set aside a release, unless such consideration is so inadequate as to shock the moral senses, but it may be considered along with other evidence as tending to show fraud.

3. EVIDENCE—*Impeachment of Witnesses—Releases—Contracts.*

   Where a person seeks to avoid a release on account of fraud it is competent, to impeach a witness, to ask him on cross-examination whether he had not witnessed several other releases of the same character for the same party.

4. MASTER AND SERVANT—*Negligence—Pleadings—Assumption of Risk—Personal Injuries.*

   In an action for personal injuries, the defense of assumption of risk must be pleaded.

5. MASTER AND SERVANT—*Questions for Jury—Negligence.*

Where there is evidence tending to show that an injured employee did not have a reasonably safe place to work, the question whether the place was reasonably safe was properly left to the jury.

6. EVIDENCE—*Sufficiency—Master and Servant—Negligence.*

In an action by an employee for personal injuries, evidence that five other persons, working at the same place and at the same work, had been caught by the same cog wheels, was competent.

ACTION by Arthur Dorsett against the Clement-Ross Manufacturing Company, heard by *Judge Thos. J. Shaw* and a jury, at April Term, 1902, of DAVIDSON. From a judgment for the plaintiff the defendant appealed. (255)

Emery E. Raper for the plaintiff.

P. H. C. Cabell and *Glenn, Manly & Hendren* for the defendant.

FURCHES, C. J. The defendant is a corporation engaged in manufacturing veneering, and the plaintiff was an employee of defendant at the time he received the injury complained of, and this action is brought for damages.

The plaintiff alleges that his business at the time of the injury (as it had been for the past four or five days) was to hoist logs or blocks by means of a sweep, to which was attached a block and tackle; that the blocks were raised in this way from the floor of the building, a distance of some four feet, swung around to the machine and then fastened; that it was also a part of his duty to sweep them off with a broom, which was kept hanging on the post of the sweep or crane for that purpose; that he had just hoisted a block, placed it upon the machine, swept it off, and was in the act of hanging up the broom when he was injured. This machine consisted of a large knife or blade that cut or pared the veneering from the blocks as they were made to revolve by means of powerful cogwheels. These cogwheels were on a piece of shafting, four feet and one inch from each other, and about seventeen inches in diameter, and worked by other smaller cogwheels. The evidence further tends to show that the space in which the plaintiff had to stand to do his work was about four feet long and about eighteen or twenty inches wide, and in this space stood the post of the crane, on which the broom hung. These cogwheels were not boxed or covered, and as the plaintiff turned and was in the act of hanging up the broom his coat sleeve was caught in the exposed cogwheels, which had been put in motion, his arm (256)

drawn in and so badly mangled that it was necessary to amputate it near the shoulder joint. It was no part of the plaintiff's duty to start or run the machine. The plaintiff alleges that his injury was caused by the negligence of the defendant, and without fault or negligence on his part.

The principal ground complained of as negligence on the part of the defendant was the limited space the plaintiff had to work in and the uncovered condition of the cogwheels, which he says could have been easily covered without affecting the running or the efficiency of the machine.

The defendant answered the complaint, and admits the injury and that the cogwheels mentioned in the complaint were uncovered, but denies that it was due to the carelessness or the negligence of the defendant that they were not covered; that it was neither careless nor negligent not to have them covered, and alleges that the plaintiff was injured by reason of his own carelessness and negligence.

The defendant also pleads, in discharge of any right of action the plaintiff may have had against it on account of said injury, a release and discharge given the defendant by the plaintiff since he received the injury. To this release the plaintiff replied, and alleged that it was procured by fraud, deception and undue influence.

This presents the first question for our consideration, as it is a bar to the plaintiff's right to recover, whatever the merits of his case may be, unless it is set aside. And it is not for us to say whether it was properly procured or not. This was a matter for the jury, if there was such evidence as to authorize the court in submitting the question to them, and as to whether evidence was allowed to go to the jury over the objection of the defendant that ought not to have been allowed, or that the judge erroneously instructed the jury as to the law involved in
(257) the trial of the issue, or refused properly to instruct the jury when requested to do so. And it is not our duty to undertake to reconcile conflicting testimony nor to say what weight or credit should be given to such testimony. Indeed, in considering this question as to whether there was evidence reasonably tending to establish fraud in procuring the release, we can only consider that which tends to show fraud, as the jury might have believed it and not have believed that tending to disprove fraud. But this evidence must be more than a scintilla, more than to raise a suspicion or belief, but it must be such if believed as ought to satisfy a reasonably fair mind that the release was not obtained fairly, and it was not without consideration. *Harding v. Long,* 103 N. C., 1; 14 Am. St., 775.

It therefore becomes our duty to examine this question upon the evidence in the case, which tends to show fraud in its procurement. The plaintiff says it does not have the appearance of a business transaction, in which parties are expected to deal on equal terms; that the plaintiff was not consulted as to the terms of this contract (release); that it was prepared in Thomasville by the agent of the defendant without his knowledge, and that the terms were fixed by the defendant or its agent without the knowledge or consent of the plaintiff; that the release being prepared on 18 March (the plaintiff having been injured on 5 February), the superintendent, Finney, of defendant's factory, and Dr. Julian, the physician of the defendant, who amputated the plaintiff's arm and attended him while sick from the injury, go to the plaintiff's house, two and a half miles in the country, *to get him to sign it;* when they got to plaintiff's he was at the barn, and the following is the plaintiff's statement of what occurred: "Finney did not ask me what doctor I wanted. I told him I wanted Dr. Mock. I live two and a half miles from Thomasville; was in the barn pushing back hay. Julian and Finney came in Julian's buggy. Julian spoke and said, 'What are you doing up here?' and I spoke and (258) said a few words, and one of them said, 'Come down, I want to talk with you,' and I went down, and we went up to the bars, and Finney said, 'You were up the other day to get money to get clothes?' and I said 'Yes, sir'; and he said, 'We have a paper here for you to sign so the doctors can get up their money.' And Dr. Julian said, 'Yes, Dr. Hill is pushing on me, so is Dr. Bird; you will sign the paper so we can get our money and they will pay you $15 for your time.' I said I would rather not do that now—would rather see Mr. Clement, the man that owned the factory, and Dr. Julian said, 'There is Mr. Finney, he will do as well,' and he did not think Mr. Clement would do any better than that, and pay me my time like he had done all the rest of the boys; and we talked on a while, and I said, 'I would rather go and see my wife.' Dr. Julian said, 'Aren't you twenty-one years old? She has nothing to do with it.'" He says nothing was said to him about its being a release, and he thought it was a paper to enable Dr. Julian to get his money and to pay him $15 for lost time when he was not able to work. He says the paper was partly read over to him, and he will not say it was not all read; but if it was he did not understand it to be a release of defendant's liability to him for damages; that he is an ignorant man and cannot read or write, except his name. This paper was not required to be probated and registered, but after the plaintiff had signed it and Finney and

Julian had witnessed it they would not pay him the $15 until he went before a notary public and acknowledged the same. The release is stated to be in consideration of $95 paid the plaintiff, when it is admitted that he was only paid $15. This they undertake to explain by saying that the other $80 was paid Dr. Julian for medical services in amputating the plaintiff's arm and attending him while sick from the injury. But Dr. Julian says that his bill was against the defendant, that *plain-*
(259) *tiff owed him nothing,* and he thought Finney would have paid him any bill he would have presented to him.

Taking this evidence to be true, taking it as uncontradicted, as we must do in passing upon this question, we cannot say it should not have been left to the jury to say what it proved. *Cox v. R. R.,* 123 N. C., 604; *Harding v. Long,* 103 N. C., 1; 14 Am. St., 775. We say this, recognizing the law to be as contended by defendant, that an instrument of writing should not be set aside for fraud unless the fraud is fully established. And that where a party to the writing can read and has the opportunity and does not do so, no other circumstances occurring or connected therewith, the party signing cannot have the instrument set aside upon the ground that he was deceived as to its contents; and the party that cannot read and does not ask that the paper be read is in the same fix as if he could read and did not do so. But where a party cannot read, and the paper is read to him incorrectly, falsely, the signer may have it set aside for fraud. *Cutler v. Lumber Co.,* 128 N. C., 477.

In this case the plaintiff cannot read, and taking his evidence to be true the paper was not all read to him, or it was not correctly read, as he says he heard nothing said about a release, and thought from what he heard that he was signing a certificate to enable the doctor to get his pay and to get $15 pay for the time he had lost on account of the injury.

The fact that the release was prepared upon the terms fixed by the defendant, without the knowledge or concurrence of the plaintiff, and sent out there by the defendant's agent, Finney, and Dr. Julian, who had so recently successfully treated the plaintiff, an ignorant man likely to be influenced by the doctor; and the fact that the doctor participated in urging him to sign the paper in order that *he might get his pay,* when he admitted his bill was against the defendant, and he thought the
(260) defendant would pay any bill that he would present to it, and the fact that he objected to the plaintiff seeing his wife before he signed the paper, and that they had him to go and acknowledge it before a notary public before they would pay him the $15, are such things as do not ordinarily take place

in open, fair and even-handed transactions. And while we are of the opinion that written contracts entered into with deliberation, where the parties are at "arm's-length" and on even terms with each other, should not be disturbed upon slight evidence, we must hold (looking at the plaintiff's evidence as we should) that the court committed no error in submitting this issue to the jury.

Nor do we see that the court erred in its instructions to the jury, nor in refusing to give instructions not substantially given in the charge. The court charged the jury that the plaintiff admitted he signed the release, and "unless the *plaintiff* has shown by the greater weight of the evidence that its execution was fraudulently procured by the defendant's agents you will find this issue 'No.'" This we think, taken in connection with the rest of the charge, was a correct instruction, and substantially covered that part of the defendant's prayers upon this issue that were proper and were not given.

It is true that inadequacy of consideration alone is not sufficient to set aside a written instrument "unless the consideration is so inadequate as to shock the moral senses and cause reasonable persons to say he got it for nothing." But it is proper evidence to be considered upon an issue of fraud and may, in connection with other evidence and circumstances tending to show fraud, be sufficient to establish the fraud and to set aside the instrument. *McLeod v. Bullard,* 84 N. C., 515. And the rule to be observed in cases where the validity of the instrument is attacked upon the ground of fraud is the preponderance or the greater weight of the evidence. *Harding v. Long,* 103 N. C., 1; 14 Am. St., 775; where the distinction (261) is drawn between cases for the reformation of the instrument and those sought to be set aside for fraud.

But taking the plaintiff's evidence to be true it would seem that there was *no real consideration* to support this release. He says that $80 was to be paid to Dr. Julian for his medical services, and Dr. Julian testified that the plaintiff owed him no medical bill, that he was employed by the defendant, and his bill was against the defendant; and the plaintiff says that the $15 he got was for the time he lost on account of the injury.

Dr. Julian, a witness for the defendant, who participated in procuring the release, was asked, on cross-examination, if he had not witnessed several other releases of this character for the defendant. This question was allowed, and the defendant excepted. It was evidently intended as an impeaching question, and for that purpose it was not improperly allowed.

This leaves the question of negligence to be determined. The

court refused to submit an issue or to give the defendant's prayer for instruction as to the voluntary assumption of risk by the plaintiff, upon the ground that it was not pleaded. It has been held by this Court that the voluntary assumption of risk is like contributory negligence in this respect, that it is a plea in the nature of confession and avoidance. *Bolden v. R. R.*, 123 N. C., 614. And this being so, like contributory negligence, it must be pleaded, and the burden of proof to sustain it is on the defendant. We do not think this conflicts with *Rittenhouse v. R. R.*, 120 N. C., 544. It is not held in that case that it was not necessary to plead voluntary assumption of risk, but this defense might be submitted in the same issue with that of contributory negligence. But this practice has since been condemned by the Court with a suggestion that it is better (262) to submit a separate issue as to assumption of risk, when it is pleaded. The decision in *Rittenhouse's case* upon this point was only a ruling as to a matter of practice, and not as to the substance of the matter at issue. Only such issues should be submitted as are raised by the pleadings. And this defense was not pleaded, and there was nothing in the pleadings upon which to base such an issue. If it had been pleaded it would have been the duty of the court to submit the issue; but it cannot be error not to do so when it was not pleaded. What effect it would have had upon the trial if it had been pleaded and an issue submitted we cannot say, as the court charged the jury "that when one person enters into the employment of another he assumes such risks as are ordinarily incident to his employment." All such machinery as this was is to some extent dangerous, but this alone does not make the owner and employer liable for damages. But it is the negligence of the defendant in not providing safe machinery and a reasonably safe place for the employee to work. And the general rule is that if the employer furnishes such machinery as is in general use this is sufficient. He is not bound to provide the latest and most improved machinery. It was not shown that this was such machinery as was in general use, but it was shown that it was a "standard machine," which may mean that it was such as was in general use. But the question does not entirely depend upon this. Standard machinery may be more than ordinarily dangerous if not properly or suitably located so as to enable the employees to do their work with reasonable safety; and it is the duty of the employer to do this. *Myers v. Lumber Co.*, 129 N. C., 252.

It is difficult for us to understand this so well as the jury who heard the evidence and tried the case. The evidence dis-

closes the fact, as we understand it, that there was an open space some four feet long and eighteen or twenty inches wide for the plaintiff to stand in to work a sweep or crane, to which was attached a block and tackle, by which he was to (263) raise heavy logs or blocks and to swing them over and upon the veneering machine, run by these powerful cogwheels. It was in evidence that a person could work there without getting hurt, but it was also in evidence that five other persons, working in this place and doing the same work the plaintiff was doing, had been caught in these cogwheels. A man engaged in such work cannot always be on special guard against such danger. It seems to us that the five similar cases which had occurred before would have been sufficient notice to an ordinarily prudent man that there was something wrong, and would have caused him to provide against it by enlarging the space or covering the cogwheel. The evidence, we think, tends to show that it was not a reasonably safe place to work with those powerful cogwheels uncovered. And this is all we have to decide, that there was evidence tending to show this, and then it was a question for the jury. *Cox v. R. R.*, 123 N. C., 604.

This case is easily distinguished from *Ausley v. Tobacco Co.*, 130 N. C., 34. There voluntary assumption of risk was pleaded, and the case is put upon that ground; but the facts in that case are entirely different from this. The cogwheel in that case was seven feet above the floor, put there by the plaintiff, who was employed to superintend and run the machine. The plaintiff stumped his toe and fell on the wheel, and it was but an accident, if he had not voluntarily assumed the risk.

The defendant objected to the question asked by the plaintiff to show that other persons had theretofore been caught by these cogwheels, working at the same place and at the same work the plaintiff was. But we think this evidence was competent for the purpose of showing the dangerous location and situation of the place furnished the plaintiff to work in, and to fix the defendant with notice of such danger. The plaintiff (264) says that he had not been there long and had not heard of the others being caught by these wheels when he was hurt.

It seems to us that the question of contributory negligence was fairly submitted to the jury, and upon a review of the whole case we see no error. The judgment is

Affirmed.

Cited: Kiser v. Barytes Co., post, 615; *Lewis v. Steamboat Co.*, 132 N. C., 920; *Bessent v. R. R., ib.*, 946; *Gwaltney v. Ins. Co.*, 134 N. C., 562; *Marks v. Cotton Mills,* 135 N. C., 291;

Bottoms v. R. R., 136 N. C., 473; *Perry v. Ins. Co.*, 137 N. C., 407; *Stewart v. Carpet Co.*, 138 N. C., 63; *Hayes v. R. R.*, 143 N. C., 129; *Leathers v. Tobacco Co.*, 144 N. C., 339; *Dermid v. R. R.*, 148 N. C., 197.

PARKER v. BROWN.

(Filed 11 November, 1902.)

AGENCY—*Principal and Agent — Contracts — Contractor — Declarations—Evidence—Insufficiency.*

In this action to recover from the owner of a house for lumber used therein, the evidence is insufficient to show that the contractor was the agent of the owner of the house in purchasing the lumber.

ACTION by S. W. Parker and L. R. Hunt against J. S. Brown, heard by *Judge T. A. McNeill*, at April Term, 1902, of GRANVILLE. From a judgment of nonsuit the plaintiffs appealed.

H. M. Shaw and *J. W. Graham* for the plaintiffs.
T. T. Hicks and *A. A. Hicks* for the defendant.

COOK, J. The bare representations or declarations made by Spencer, the contractor, to plaintiffs that he was buying the lumber for defendant were not competent to prove agency for that purpose (*Jennings v. Hinton*, 128 N. C., 214; *Summerrow v. Baruch, ibid.*, 202; *People v. Dye*, 75 Cal., 108; *Hubback v. Ross*, 96 Cal., 426; *Bergtholdt v. Porter*, 114 Cal., at page 689), and were therefore properly excluded. So the
(265) second, third, fourth and fifth exceptions cannot be sustained. Spencer was a contractor, and had contracted to repair and remodel defendant's dwelling house for a lump sum, $1,383.50, and to furnish all the material, so that the single fact that the *lumber* was used in repairing the house for defendant would not be any evidence of a ratification of such representations as Spencer may have made to plaintiffs.

Whether the relation of principal and agent had been created depended upon the authority or power delegated. *What* that authority was is a question of fact, its effect a question of law; therefore the court properly excluded the plaintiffs' question (to which the first exception is taken), "If he (Spencer) was the agent of Brown for the purchase of the lumber?" The

agency being in dispute, the express or implied authority to act must be shown. The facts being shown, then, whether the relation of principal and agent is created becomes a question of law for the court to declare, and not for the witness.

We think his Honor properly sustained defendant's motion to nonsuit under the statute (to which exceptions six and seven were taken). It was a "turnkey" job. Spencer was his own principal in the purchase of lumber. He quit the job before completing it, leaving nothing due to him by defendant. No authority appears from the evidence to have been given Spencer to purchase lumber for Brown. "Brown asked me (Spencer) if I (Spencer) expected him to pay the bills for material which I was buying. I replied that I had no money to pay for the same, and would expect him to do it"; to which Brown made no reply. This is relied upon by plaintiffs as some evidence to show agency, but we do not think it does. Brown did not consent to do so. His silence was not an assent. Neither party acted upon it, for he completed the job (except about $40 worth of work to be done), and Brown did not buy or pay for a single item; nor was he requested to do so.

Parker, one of the plaintiffs, testified that Spencer desired to use a cheaper grade of lumber. Plaintiffs, from (266) whom he was buying, had none of that kind on hand, but informed the defendant and Spencer that they had a better grade of the same kind of lumber, which they would furnish at an advanced price. Spencer objected to paying for the better grade at the advanced price, and Brown thereupon put his hand in his pocket, took out some money and tendered and paid to plaintiffs the difference between the price which Spencer wanted to pay for the lumber and the price plaintiffs charged for lumber furnished; and this high-priced lumber was charged against Spencer at the price asked for the cheap lumber. This is no evidence that Brown had agreed to pay the bills of lumber, but tends to show the contrary.

The conversation between plaintiffs and Brown about the bill in suit negatives the alleged agency. Brown told plaintiffs to get an order from Spencer and he would pay it. Plaintiffs (Parker) told Brown that Spencer was fractious and he did not want to offend him; that one Turner, a lumber man, had followed Spencer up too closely with a bill and that Spencer had quit trading with him, and that he (Parker) did not desire to lose him as a customer.

Nor does it establish any liability against Brown on account of such promise. The promise was to pay Spencer's order if plaintiffs would get one. This they did not then do, while

Brown was in debt to him, which was in November. But on 28 March following, *after* Spencer had quit the job and when defendant did not owe him anything, they got an order, and this defendant refused to pay. His liability on this account, however, is not seriously pressed, and as such contention could not be sustained we will not discuss it.

There being no error in the ruling of the court in excluding the evidence excepted to, and no evidence tending to show that defendant was liable for the bill sued upon, his Honor properly sustained the motion to nonsuit under the statute.

No error.

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(267)

WILLIAMS v. IRON BELT BUILDING AND LOAN ASSOCIATION.

(Filed 11 November, 1902.)

1. SERVICE OF PROCESS—*Foreign Corporations—The Code, Sec.* 874—*Laws* 1901, *Ch.* 5.

   A summons issued by a justice of the peace against a non-resident corporation need not be served ten days before the trial, where served on the secretary of the State Corporation Commission, the non-resident corporation not having appointed an agent in this State upon whom service could be made.

2. LIMITATIONS OF ACTIONS—*Usury—Foreign Corporation—The Code, Secs.* 162, 166, 1498, 3836—*Laws* 1901, *Ch.* 5.

   An action against a foreign corporation to recover usury may be begun within two years from the time there is someone in the State upon whom service can be made.

ACTION by A. B. Williams against the Iron Belt Building and Loan Association and J. S. Manning, trustee, heard by *Judge Walter H. Neal,* at January Term, 1902, of DURHAM. From a judgment for the defendants the plaintiff appealed.

Winston & Fuller for the plaintiff.
Manning & Foushee for the defendants.

CLARK, J. If it be conceded, as defendant claims, that all previous proceedings were discontinued by the failure to issue *aliases,* this action to recover the penalty for usury "double the amount of interest paid" (Code, sec. 3836) began by the issue of a summons by a justice of the peace, 25 May, 1901. This was served in Durham County upon the secretary of the Corporation Commission, as provided by chapter 5, Laws 1901, the

defendant being a nonresident corporation, doing business here, and not having appointed an agent in this State upon whom service could be made. This summons was returnable 30 May, 1901, when the plaintiff obtained judgment for (268) $200. Upon appeal to the Superior Court, *Shaw, J.*, at September Term, 1901, set aside the judgment as irregular, because summons had not been served ten days before trial (Code, sec. 874), and remanded the case to the justice, and the plaintiff's exceptions were entered on the record. On 4 January, 1902, the justice dismissed the action "in deference to the ruling of *Judge Shaw*," and plaintiff appealed.

On 30 May, 1901, the plaintiff began his action in the Superior Court, alleging the judgment for $200 he had that day obtained before the justice of the peace (as above stated); that the defendant held a mortgage against the plaintiff, claiming a balance due thereon of $150, under which the property had been advertised for sale, asking for a cancellation of the mortgage and an injunction. A restraining order was granted.

These two actions were consolidated, and at January Term, 1902, a jury trial being waived by consent of parties, the facts were found by *Neal, J.*, who found, in addition to the above recitals (and sundry matters that are immaterial in the view we have taken), that the defendant had collected usury. It was admitted that the last payment of interest was made 4 January, 1898, and that the defendant was then, and has been ever since, a nonresident corporation, upon whom service could not then, nor at any time since, have been made (it having no agent in this State) until the enactment of chapter 5, Laws 1901, ratified 15 March of that year. His Honor, being of opinion that the action was barred, not having been begun within two years from the last payment of interest, decided against the plaintiff, and authorized a sale of plaintiff's property for the balance due under the mortgage.

The Code, sec. 874, on its face, applies only to cases in which a justice's summons has been issued against a defendant residing in another county, and has no application to a (269) case like the present. There was error in the judgment at September Term, 1901, setting aside the judgment for irregularity and remanding the case to the justice. The plaintiff preserved his right to have such judgment reviewed by causing his exception to be noted on the record.

Under chapter 69, Laws 1895, action to recover the penalty for usury may be brought within two years after payment in full of the indebtedness, but this debt, having been contracted prior to that act, under its terms, falls under the Code, sec. 3836, by

which action must be brought within two years after the payment of the usury complained of. *Smith v. B. & L. Assn.*, 119 N. C., 257. But this two-year prescription is subject to the provisions of section 162 of the Code, that if, when a cause of action accrues against a person he shall be out of the State or shall thereafter depart therefrom and reside out of the State, "the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of such action." "The time *herein* limited" means, and must mean, the time prescribed elsewhere in the Code, or in statutes amending or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents, and not to protect them from an action unless they have been for two years exposed to service of summons. *Armfield v. Moore*, 97 N. C., 34.

It was contended that this was an enabling statute, and not a statute of limitations. We see no reason why section 162 does not apply to this section as to any other. It is true that the statute (Code, sec. 3836) created the liability, but that is true of a great many causes of action, as to which, as here, the statute prescribes a term of years within which the action must be brought. The Code, sec. 1498, gives the personal representative a right of action for wrongful death of his testator (or intestate), provided the action is brought within a year. In (270) *Meekins v. R. R., ante*, we held that this section was subject to the provisions of the Code, sec. 166, authorizing a new action within one year after a nonsuit. By the same reasoning, the two years within which an action may be brought, under the Code, sec. 3836, is to be construed in connection with the provisions of section 162, which provides that if the defendant departs from or resides out of the State, such action may be brought within two years after process can be served upon him; otherwise the statute would be illusory and partial, in favor of nonresidents. *Armfield v. Moore*, 97 N. C., at p. 38.

Since the enactment of chapter 5, Laws 1901, will now expose such corporations to service of summons, cases like the present will very rarely, if ever, arise hereafter.

Error.

Cited: Green v. Ins. Co., 139 N. C., 310.

(271)

FINCH v. FINCH.

(Filed 18 November, 1902.)

1. EVIDENCE—*Judgment Roll—Record—Title—Ejectment.*

A judgment roll in an action in which a deed to a son of one defendant was set aside as a fraud on creditors is competent evidence in a subsequent action of ejectment by the same plaintiff to complete his chain of title, though one defendant in the ejectment suit was not a party to the former action.

2. EJECTMENT—*Burden of Proof—Deeds.*

In ejectment, the plaintiff claiming that the deed was from the common source to a son, and the defendant claiming that it was from the common source to the wife, the burden of proof is on plaintiff to show that it was made to the son, and if the jury so find, they should find that it was not made to the wife.

3. EJECTMENT—*Evidence—Deeds—Sheriff's Deed.*

In ejectment, a deed of a sheriff executed in pursuance of a sale under an execution against a person not claimed by either party to have had title, is not admissible in evidence.

4. ESTOPPEL—*Evidence—Judgments—Instructions.*

Where the wife of a defendant was not a party to a suit to have a deed to a son of defendant set aside as a fraud on creditors, in a subsequent action of ejectment, in which she is a defendant, it is proper to instruct that she was not "bound" by the judgment in the first suit.

ACTION by S. J. Finch against J. W. Finch and others, heard by *Judge Thomas J. Shaw* and a jury, at April Term, 1902, of DAVIDSON. From a judgment for the plaintiff the defendants appealed.

Emery E. Raper for the plaintiff.
Long & Nicholson and *Walser & Walser* for the defendants.

FURCHES, C. J. This is an action of ejectment, in which S. J. Finch is plaintiff and J. W. Finch, E. Lee (272) Finch, B. H. Finch, Joshua Copple and Samuel Copple are defendants. The plaintiff claims his title under a deed from a commissioner appointed by order of court to sell the land, in an action in which S. J. Finch and E. J. Finch were plaintiffs and J. W. Finch, B. H. Finch and H. F. Warren were defendants.

The defendant E. Lee Finch is the wife of J. W. Finch, and answers and denies the plaintiff's title, and claims that she is the owner of the land.

The plaintiff claims that the land was once owned by Alvira

Copple, wife of Joshua Copple, and that J. W. Finch bought it from the Copples and had the deed made to his minor son, B. H. Copple, for the purpose of defrauding his creditors, and for that purpose did not probate and register the deed from the Copples; that S. J. Finch and E. J. Finch, being creditors of J. W. Finch, brought suit in the Superior Court of Davidson against said J. W. Finch, B. H. Finch and H. F. Warren, alleging said fraud and asking that said land be sold to pay their debt; and in that action it was found that the land was bought by J. W. Finch, the deed made to B. H. Finch in fraud of the creditors of the said J. W. Finch, and a sale was ordered, at which the plaintiff bought.

The defendant E. Lee Finch denied that the deed from the Copples was made to B. H. Finch, and alleged that it was made to her and that she was the owner of the land, but that said deed had never been registered and was lost. She also alleged that at an execution sale the said land was sold as her husband's land, and that she bought the same at said sale, and claimed also to hold under that deed; and on the trial she offered in evidence the judgment and execution against J. W. Finch and a sheriff's deed in pursuance of a sale under said judgment and execution.

(273) It was admitted that both sides claimed under the Copples as a common source, and the question was, who had the Copple title? On the trial the plaintiff offered in evidence his deed from the commissioner who sold under order of court. He then offered in evidence the judgment roll, containing the order of sale, in the action of S. J. Finch and E. J. Finch against the defendants J. W. Finch, B. H. Finch and H. F. Warren, and the defendants objected; the objection was overruled, and the defendants excepted. This exception cannot be sustained, as this record and judgment were competent evidence and an estoppel as to the defendants J. W. Finch and B. H. Finch, and a link in the chain of the plaintiff's title from him to the common source—the Copples. It was the same, in effect, as if he had offered a deed from the Copples to the defendant J. W. Finch for the purpose of connecting his title with the Copples; it was one of the links in his chain of title.

The court submitted the following issues:

"1. Was the deed from Joshua Copple and Alvira for the land in controversy executed to B. H. Finch?

"2. Was the deed from said Copple and wife for said land executed to Mrs. E. Lee Finch?

"3. Is the plaintiff the owner and entitled to the possession of the land described in the complaint?"

The judge, among other things not excepted to, charged the

jury that the burden of showing that the deed from the Copples to B. H. Finch was on the plaintiff; and if they so found, they should answer the first issue "Yes" and the third issue "Yes." To this the defendant excepted. But we see no error.

The court further charged the jury that the burden was on the defendants to show by a preponderance of evidence that the deed from the Copples was made to the *feme* defendant E. Lee Finch; and if the jury answered the first issue "Yes," they should answer the second issue "No"; but if they answered the (274) first issue "No" and the second issue "Yes," they should answer the third issue "No," and the defendants again excepted. But we see no error in this instruction, except a repetition of what he had just charged.

The court further charged that the jury should not consider the sheriff's deed offered in evidence by the defendants, and the defendants again excepted. And we see no error in this instruction, for the reason that she acquired no title under that deed, unless the defendant J. W. Finch had title. And if the contentions of the plaintiff were true, he had none; and this is equally so if the contentions of the defendant E. L. Finch were true and there had been no evidence offered tending to show that J. W. Finch ever had any title to the land.

The court also charged the jury that the defendant E. L. Finch not having been a party to the action of S. J. Finch and E. J. Finch against J. W. Finch, B. H. Finch and H. F. Warren, she was not "bound" by that judgment. We think the word "estopped" would have been better, but we do not think the jury were misled or that this affected the verdict. The jury answered the first issue "Yes," the second issue "No," and the third issue "Yes," and, judgment being signed for the plaintiff, the defendants appealed.

We have examined the record with care, and, finding no substantial error, the judgment is

Affirmed.

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(275)

McLEAN v. BULLARD.

(Filed 18 November, 1902.)

BOUNDARIES—*Question for Jury—Wills—Ejectment.*

In ejectment, where land is situated with respect to a dividing line between parties as mentioned in a will, is a question for the jury.

McLEAN *v.* BULLARD.

ACTION by Mary B. McLean and others against W. W. Bullard, heard by *Judge Thomas A. McNeill,* at March Term, 1902, of SCOTLAND. From a judgment of nonsuit the plaintiffs appealed.

John D. Shaw, Jr., for the plaintiffs.
James A. Lockhart for the defendant.

MONTGOMERY, J. The testator, in his last will and testament, devised the whole of his real estate to his two sons, and undertook to make a particular division of it between them. The language of that part of the will is in these words:

"Unto my sons, Malcomb and Daniel, I also give and bequeath all the lands which I now possess, to be divided between them in the following manner, to-wit, Malcomb shall have the hundred acres granted to Daniel McCay, lying between the Big Bay and the Little Shoe Heel; also the fifty acres called the Watson tract, together with all the land I own on the east side of the branch rising in the Hoop Pole Branch, except eight acres of the last-mentioned land, which I hereby give and bequeath to my said daughter, Flora, to be located by the side of said branch.

"My son Daniel shall have my home plantation, together with all the land I own on the west side of the branch, except eight acres, to be located on the said branch, which I give and bequeath to my daughter, Isabella."

(276) If the dividing line, between the brothers, of a certain portion of the testator's land, to-wit, "the branch rising in the Hoop Pole Branch," is to stand, then there will remain a considerable portion of the land devised to Daniel and Malcomb not embraced in the attempted partition in the will; for, according to the evidence of the witnesses, and from the map introduced, there is no *branch rising in the Hoop Pole Branch.* There is a body of water, a little north of the center of the Watson tract, called the "Hoop Pole *Pond,*" and there is a branch issuing out of the pond and running southwardly through another tract, called the Williams tract, upon which was the home settlement of the testator. If it could be held that the testator inadvertently wrote Hoop Pole *Branch* for Hoop Pole *Pond,* we are met with the difficulty that with such a construction the *pond* would be the source of Hoop Pole Branch, and in that case the land in dispute would lie to the north of the branch and not to the west of it or touching it; and therefore it would not have been allotted in the partition attempted under the will to Daniel, but would have remained under the general devise, to be partitioned between the brothers.

The plaintiff represents Malcomb's interest, and she could bring the action to recover the whole of the tract of land for the benefit of the tenants in common. There was error in the judgment of nonsuit.

It does not appear that there is much, if any, dispute as to what are the boundaries of the land, the recovery of which is sought in the action; nor was there any trouble in fixing the description to the land itself. The only question is, where is it situated, with respect to the dividing line between the two brothers, as is mentioned in the will? And that matter is for the consideration of the jury, under instructions from the court.

Error.

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(277)

KECK v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY.

(Filed 18 November, 1902.)

NEGLIGENCE — *Evidence — Sufficiency — Personal Injuries — Telephones and Telegraphs.*

Where a person is injured while unloading telephone poles from a car, and there is evidence that the method of unloading was the usual one, and it does not appear that there is any lack of hands or that the poles are loaded in an unusual way, a nonsuit is properly granted.

ACTION by J. G. Keck against the American Telephone and Telegraph Company and the Atlantic and Yadkin Railway Company, heard by *Judge Walter H. Neal* and a jury, at February Term, 1902, of GUILFORD. From a judgment for the plaintiff against the American Telephone and Telegraph Company it appealed.

James A. Barringer for the plaintiff.
A. B. Andrews, Jr., for the defendant.

MONTGOMERY, J. A judgment upon the verdict was entered in favor of the defendant, the Atlantic and Yadkin Railway Company, and, the jury having found the issues in favor of the plaintiff against the other defendant, the American Telephone and Telegraph Company, judgment was rendered against that company for the amount of the recovery.

The circumstances connected with the incident or transaction connected with which the negligence of the defendant, the telephone company, was imputed, were substantially these: The

defendant railroad company brought on their cars a lot of telephone poles from Wilmington to a point a little north of Greensboro, shipped to the defendant telephone company. N. O. Wood, alleged by the plaintiff to have been the superintendent of the defendant telephone company (which was denied by the
(278) defendant), employed the plaintiff to assist in the unloading of the cars. The plan adopted for unloading was to cut the standards on one side of the cars about half way through, and then to send hands on top of the poles and cut the wires which ran across the top of the poles and fastened together the standards on both sides of the cars. Usually in unloading in that way, when the wires were cut, the poles would give way and easily roll off on that side where the standards were cut. When the plaintiff, however, had cut the last wire and had gotten back on the other side of the car, the standards on the opposite sides of those that had not been cut, as well as those that had been cut, gave way, and the plaintiff, together with the poles, rolled off and was hurt. A witness (Goodman) testified that he had had experience in unloading poles; that he was employed at the same time, and that Keck stood where it was usual to stand. He said, further, that the poles were loaded in the usual way. "No usual way to unload them. You can unload them any way. You can either derrick them or unload them with skids. . . . Both Mr. Wood and myself instructed Keck how to cut the wires." John Rives testified that "he and Keck cut wires on the top of the standards; . . . that was the usual way of unloading poles; there might have been a little curve. The side we fixed for them was a little higher than the other." There was no evidence that there was any lack of hands to properly unload the cars, nor was there any evidence tending to show that the standards were inferior or unsound or were too small in size. Everything, apparently, was in proper condition and no mishap or danger anticipated. It seems to have been an accident—"an event from an unknown cause"; and the defendant's motion for judgment of nonsuit against the plaintiff ought to have been granted.

Ordinarily we would consider the matters concerning the other defense set up by the defendant, viz., that the telephone
(279) line of the defendant was being constructed by an independent contractor at the time of the accident; but as it appeared in evidence that there was a contract, in writing, between the defendant telephone company and the Southern Bell Telephone Company concerning the construction of the line in the possession of the defendant, though not before the court, it

will be better to await the production of that paper, in case there is another trial and that defense is relied on.

The contents of that contract were not allowed by his Honor to be given in evidence, but there was evidence to the effect that Wood was in the employment of the Southern Bell Telephone Company at the time of the accident, and that that company was doing the work. In what capacity it was doing the work, whether as agent or as an independent contractor, must be determined by the written contract.

New trial in behalf of the defendant, the American Telephone and Telegraph Company, for the error pointed out

New trial.

Cited: Lassiter v. R. R., 150 N. C., 486.

WILKES v. ALLEN.

(Filed 18 November, 1902.)

LIMITATIONS OF ACTIONS — *Married Women — Free Traders — Judgment—The Code, Sec.* 1827.

The statute of limitations does not run against a married woman who is a registered free trader.

ACTION by Jane R. Wilkes against T. W. Allen and others, heard by *Judge A. L. Coble,* at October Term, 1902, of MECKLENBURG. From a judgment for the plaintiff the defendants appealed.

Burwell, Walker & Cansler for the plaintiff.
Clarkson & Duls for the defendants.

FURCHES, C. J. This is an action of debt upon a judg- (280) ment of the Superior Court of Mecklenburg, recovered by the plaintiff against the defendants at February Term, 1886, and this action was commenced on 9 March, 1899, and the defendants plead the statute of limitations in bar of the plaintiff's right to recover.

This plea imposes the burden upon the plaintiff to show that the action is not barred, as more than ten years had elapsed between the taking the judgment sued on and the commencement of the action. This the plaintiff undertakes to do by showing that she was a married woman at the time the judgment was

taken, and has continued to be such ever since. To this the defendants reply by showing that the plaintiff has been a registered free trader, under section 1827 of the Code, continuously since 25 March, 1875.

It is plain the action is barred if the statute runs against the plaintiff. But married women are excepted from its operation, and the fact that the plaintiff had the right to sue and maintain actions in her own name does not put the statute in motion against her. *Lippard v. Troutman,* 72 N. C., 551; *Campbell v. Crater,* 95 N. C., 156; *Smith v. Briggs,* 83 N. C., 306.

The case, then, depends upon the fact that the plaintiff was a registered free trader, and we do not see that this has any effect upon the case. It is her *status* that exempts her from the operation of the statute, and the fact that she registered as a free trader does not change her status. This view of the case is supported by *Stubblefield v. Minzies* (C. C.), 11 Fed., 268, 274, 275; *Asheley v. Rockwell,* 43 Ohio St., 336, and many other authorities. But the fact that the plaintiff became a registered free trader did not affect the relations of the parties to this action. She had the right to sue the defendants before she became a free trader, and that is all she had after she became a free trader. Neither did it affect the rights or duties of
(281) the defendants. They were under the same obligation to pay they would have been if she had not been a free trader.

It is presumed that section 1827 of the Code was passed for the benefit of married women who wish to engage in business, in order to give them credit, as was the right to sue alone given as a benefit to them (*Shuler v. Milsaps,* 71 N. C., 297), but it did not change their *status* nor remove the exemption which excluded them from the operation of the statute of limitation. *Lippard v. Troutman, supra.* Neither was the right of married women to sue alone, nor to become free traders, intended for the benefit of their debtors.

We see no error, and the judgment of the court below is

Affirmed.

Cited: Featherston v. Merrimon, 148 N. C., 207.

SHUTE v. HEATH.

(Filed 18 November, 1902.)

CONTRACTS—*Restraint of Trade—Indefiniteness as to Territory.*

A provision in a contract of sale of a business of manufacturing lumber and ginning cotton that the seller would not engage in the same business in any territory in which the seller had secured patronage, is void for indefiniteness as to territory.

ACTION by H. A. Shute and others against W. C. Heath and W. S. Lee, heard by *Judge T. A. McNeill* and a jury, at March Term, 1902, of UNION. From a judgment for the defendants the plaintiffs appealed.

Maxwell & Keerans for the plaintiffs.
Armfield & Williams and *Adams & Jerome* for the defendants.

MONTGOMERY, J. Contracts in partial restraint of (282) trade can be made and enforced of common right. This Court said, in *Kramer v. Old,* 119 N. C., 1; 56 Am. St., 650; 34 L. R. A., 389: "The modern doctrine is founded upon the basic principle that one who by his skill and industry builds up a business, acquires a property at least in the good will of his patrons, which is the product of his own efforts, and has the fundamental right to dispose of the fruit of his own labor, subject only to such restrictions as are imposed for the protection of society, either by expressed enactments of law or by public policy."

An indefinite restriction as to duration will not make such contracts void. *Kramer v. Old, supra.* But there must be a definite limitation as to space; and the reasonableness of such limitation will depend upon the nature of the business and good will sold. A contract, for instance, for a valid consideration not to engage in the manufacture and sale of firearms in general use would be allowed to cover a larger extent of territory than would a contract not to engage in the manufacture of timber or the ginning of cotton. And the reasonableness of the limitation as to space is a matter of law for the court to decide. Chitty on Contracts, 738. And the test of that reasonableness is whether the space or territory is greater than is necessary to enable the assignee to protect himself from competition on the part of his assignor, and thereby to get the benefit of what he has bought. The assignee would have the right to freedom from the competition of the assignor in the whole territory from which the as-

signor derived the profits of his business. The contract before us is silent as to restriction as to time, but, under the decision made in *Kramer v. Old, supra,* that would be construed to be for the lives of the assignors. The trouble in the present case grows out of that part of the contract in respect to the limitation as to space. The defendants, after selling to the plaintiffs a
(283) tract of land and ginning and sawmill machinery, agreed with them that they "would not erect, conduct or carry on the business of ginning and baling cotton or making brick in any territory now occupied by them or from which they secure their patronage, so as to compete with them or injure their business in any of the lines of ginning and baling cotton or making brick, either for ourselves or as agents for another or others."

The defendants in this Court filed a motion to dismiss the action, on the ground that the complaint did not state a cause of action, in that the contract set out in the complaint is void for indefiniteness as to territory within which defendants were not to gin cotton. We think the motion must be allowed. The infirmity of the contract does not consist in the reasonableness as to the extent of territory in which the plaintiffs were to conduct their business, free from competition on the part of the defendants, but it is in the indefiniteness of that territory. No rule can be laid down by which the area can be made certain. No instructions could be given even to an expert—surveyor—by which he could define the bounds of the space. It is without shape, without course or distance from any object or pointer. The fixing of the bounds would depend upon the testimony of witnesses, each testifying as to what he knew as to who were the patrons of the plaintiffs and where they resided. The attempted enforcement of such contracts would, in the nature of things, be likely to produce litigation between the assignor and the assignee as to the extent of the territory, with the probability that large numbers of witnesses would be called and great expense incurred, both by the litigants and the public. A retrospect of the course of the law in respect to contracts in restraint of trade confirms us in the view we have taken of the contract in the present case as to the limitation as to space therein set out—that is, that the agreement that the limitation as to space shall be so defi-
(284) nitely set out in the contract as that the bounds must be determined by the same rules as apply to the description of real estate in deeds. Contracts in general restraint of trade with English-speaking people have always been void; and while the doctrine has been in modern days modified to the extent of permitting such contracts, to operate in limited territory, to be made and enforced, yet in all the cases we have found (except

one hereinafter referred to) the space has been definitely fixed in the contract with as much certainty as is required in the description in deeds. The evil consequences likely to flow from such contracts to the parties, as well as to the public, induce us to construe the requirement of definiteness as to space, strictly, and that the contracts themselves shall set out such a description as shall be definite without the aid of testimony *dehors,* except such as is allowed in establishing the boundaries to real estate conveyances. An opinion in the case of *Alger v. Thacher,* 19 Pick., 51, is of so much interest on this subject that we feel justified in making the following quotation from it:

"Among the most ancient rules of the common law, we find it laid down that bonds in restraint of trade are void. As early as the second year of Henry V. (A. D. 1415), we find by the Year Books that this was considered to be old and settled law. Through a succession of decisions it has been handed down to us unquestioned till the present time. It is true, the general rule has from time to time been modified and qualified, but the principle has always been regarded as important and salutary. For two hundred years the rule continued unchanged and without exceptions. Then an attempt was made to qualify it by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started from a general and unlimited (limited) restraint of trade, which has been adhered to down to the present day. This qualifica- (285) tion of the general rule may be found as early as the eighteenth year of James I. (A. D. 1621) (*Broad v. Jolyffe,* Cro. Jac., 596), where it was holden that a contract not to use a certain trade in a particular place was an exception to the general rule, and not void. And in the great and leading case on this subject, *Mitchell v. Reynolds,* reported in Lucas 27, 81, 131, the distinction between contracts under seal and not under seal was finally exploded, and the distinction between limited and general restraints fully established. Ever since that decision, contracts in restraint of trade generally have been held to be void, while those limited as to time or place or persons have been regarded as valid and duly enforced. . . . It is reasonable, salutary and suited to the genius of our government and the nature of our institutions. It is founded on just principles of public policy,and carries out our constitutional prohibitions of monopolies and exclusive privileges. The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: 1. Such contracts injure the parties making them, because they diminish their means of

procuring livelihoods and a competency for their families; they tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves. 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill. 4. They prevent competition and enhance prices. 5. They expose the public to all the evils of monopoly. And this especially is applicable to wealthy companies and large corporations which have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market. (286) Against evils like these, wise laws protect individuals and the public by declaring all such laws void."

The plaintiffs' counsel referred to the cases of *Kramer v. Old,* 119 N. C., 1; 56 Am. St., 650; 34 L. R. A., 389, and *Hardware Co. v. Hardware Co.,* 87 Ala., 206, as supporting the plaintiffs' contention that the limitation as to space was sufficiently definite to be enforced. In the first-mentioned case the defendants agreed not to continue the milling business "in or in the vicinity of Elizabeth City." There the defendants did not make, in this Court, the contention that the area was too great, and therefore unreasonable, or that it was too indefinite. The contention was over the limitation as to time. The other case, however—the hardware case—is toward the sustaining of the plaintiffs' position. The contract there provided that the defendants, upon a sale of their business to the plaintiffs, would sell no more "plow blades and plow stocks," without stating any particular or definite territory. The Court there said: "The territory in which the vendees obtained their trade was well known to the vendors, and therefore the contract is not in general restraint of trade and invalid. A contract by which a partnership engaged in the business of selling hardware sold out their stock of plow blades and plow stocks to a rival and agreed not to handle any more plow blades or plow stocks, was construed in connection with the attending circumstances, showing the extent of country over which the rivalry in the business extended, is not an unreasonable restriction of trade." But this Court decided exactly the reverse in *Hauser v. Harding,* 126 N. C., 295; and, for the reasons given there, and here, we will abide by that decision. Motion allowed, and

Action dismissed.

BELDING v. ARCHER.

(Filed 18 November, 1902.)

1. VENUE—*Change—Trial—The Code, Sec.* 195, *Subsec.* 2.

The removal of a case from one county to another for the convenience of witnesses is discretionary with the trial judge.

2. PARTIES—*Judge—Discretion.*

The making of certain persons parties defendant on motion of the plaintiff is discretionary with the trial judge.

3. TRUSTS—*Trustees—Contracts—Evidence—Merger.*

In this action to remove trustees for a breach of trust, all prior contracts are merged in the deed of trust and memorandum thereto attached, and evidence relative to matters embraced in such prior contracts is incompetent.

4. TRUSTS—*Trustees—Sales.*

The trust deed herein set out authorizes the trustees jointly to sell a part of the lands at private sale.

5. EVIDENCE—*Trusts—Trustees.*

In an action to remove trustees for a breach of trust, a report by one of the trustees is not competent against the other trustee.

6. TRUSTS—*Trustees—Evidence.*

In a proceeding against trustees for a breach of trust, the reason of plaintiff for entering into the deed of trust is immaterial.

7. EVIDENCE—*Trusts—Trustees—Breach of Trust.*

In an action for removal of trustees for breach of trust, evidence of the impracticability of getting out timber, alleged as one of the breaches, is admissible to show good faith in the trustees.

8. EVIDENCE—*Torts—Trustees—Breach of Trust.*

In an action to remove trustees for breach of trust for failure to sell the land for a fair price, it is competent to show by a surveyor a decrease of acreage on account of lappages.

9. EVIDENCE—*Trusts—Trustees—Breach of Trust.*

In an action to remove trustees, letters written by one trustee as to the trust property are incompetent as against the other trustee.

10. EVIDENCE—*Judgment—Trusts—Trustees—Breach of Trust.*

In an action to remove trustees for a breach of trust, the records in prior suits are admissible to show that matters alleged by the plaintiff to be unsettled by the prior contracts had been

determined and settled and were the matters referred to in the memorandum attached to the trust deed, although the plaintiff was not a party to those suits.

11. TRUSTS—*Trustees—Deeds.*

Conveyances by a trustee and his wife to himself and a co-trustee operates as a valid conveyance to the co-trustee.

12. EVIDENCE—*Trusts—Trustees—Breach of Trust.*

In an action to remove trustees for failure to sell land at a fair price, evidence of the value of similar land is competent.

13. EVIDENCE—*Opinion Evidence—Trusts—Trustees.*

In an action to remove trustees for failure to make the trust property bring its full value by selling land instead of cutting the timber, it is admissible to show by an experienced lumberman the impracticability of removing the timber.

14. EVIDENCE—*Parol—Paper Writing.*

The contents of a paper writing collateral to the issues is provable without producing the paper.

15. EVIDENCE—*Trusts—Trustees—Breach of Trust.*

In an action to remove trustees for a breach of trust, conversations between a trustee and third persons are competent to show an effort to sell the land and to show good faith.

16. ISSUES—*Judge.*

Where the issues submitted by the court are clear and cover the case, it is not error for the court to refuse other issues tendered by one of the parties.

17. TRUSTS — *Trustees — Breach of Trust—Removal—Questions for Jury.*

In an action to remove trustees for breach of the trust, it is a question for the jury whether the trustees acted in good faith and exercised a sound discretion in the performance of the duties imposed upon them by the deed of trust.

(289) ACTION by D. W. Belding against R. N. Archer and others, heard by *Judge George A. Jones* and a jury, at Fall Term, 1901, of CLAY.

From a judgment for the defendants the plaintiffs appealed.

Merrimon & Merrimon for the plaintiffs.

T. F. Davidson, T. A. Jones, C. B. Mathews, Dillard & Bell and *R. L. Cooper* for the defendants.

MONTGOMERY, J. The cause of action, as stated in the original complaint and in the three amendments, is based upon

alleged injury to the plaintiff's interests, growing out of the alleged failure of the defendants to discharge their duties, as trustees, under the trusts imposed upon them in the several instruments of writing set out in the complaint.

It is alleged that the contracts of 7 November, 1893; 8 January, 1895; 9 December, 1899, and the other contracts and conveyances supplemental to the one of 9 December, are all to be construed together, and that they disclose a trust on the part of the defendants Archer and McGarry which required them to take immediate possession of the land and cut and market the timber, and with the proceeds pay, first, the expenses and costs of such cutting and marketing the timber, and then apply the balance to the creditors named in the deeds of 1899, and that that not having been done, a breach of their trust (306) has occurred.

Further specific breaches of trust are alleged in the amendments to the complaint, as follows: First, that the defendants Archer and McGarry neglected and failed to prosecute or defend certain civil actions pending in the counties of Graham and Cherokee, involving the title to portions of the land in question, and in neglecting and failing to keep off trespassers and squatters from the land, and preventing them from cutting and removing timber from the same. Second, that they failed and neglected to pay the taxes upon said land to the county of Graham, and suffered the same to be sold for taxes. Third, that, as plaintiff is informed and believes, they have suffered a large number of logs, which had been cut previous to 9 December, 1899, and left upon said land, to remain there, unprotected from the weather, and that the same have decayed and are greatly damaged, if not entirely worthless, to the great damage of the plaintiff. Fourth, that prior to the commencement of this action, as the plaintiff is informed and believes, they, professing to act as trustees, and in violation of the trust imposed upon them, entered into a contract with certain parties in said contract named, whereby they undertook to bind themselves to sell and convey the lands in Graham County, and that, upon information and belief, the amount to be realized from said sale is not one-half the value of said land, and said contract shows that said trustees have in their said negotiations calculated nicely the amount that would be required to pay the claims of the said Archer, and provide for the purchase of the Cooper and Bragg interest, and pay $6,000 to one Creitch, and the balance to be distributed to said trustees and in payment of counsel fees, leaving nothing whatever to the real owners of said land."

The judgment prayed for by the plaintiff is that the defend-

ants reconvey to the plaintiff his interest in the property mentioned in the complaint; that they be removed from their
(307) trusteeship and be restrained and enjoined from any further control of the property, and for such other and further relief as the plaintiff may be entitled to.

The defendants answered and the plaintiff made replication, and his Honor submitted the following issues:

1. Did the defendant Robert N. Archer negligently fail to discharge the duties imposed upon him in respect to the trust property by the memorandum of agreement and deed of trust, dated as of 9 December, 1899, and the deed and agreements supplementary thereto?

2. Did defendant Thomas F. McGarry negligently fail to discharge the duties imposed upon him in respect to the trust property by the memorandum of agreement and deed of trust, dated as of 9 December, 1899, and the deed and agreements supplementary thereto?

3. Was the price at which the said defendants undertook to sell said land in Graham County a fair price for the same?

The record in this case contains nearly six hundred pages. A considerable portion of it has been of no service to the Court, but has served rather to embarrass and perplex us. There are ninety-six exceptions brought up for review, one concerning venue, one concerning a motion to make new parties, fifty-six on matters of evidence, one concerning the issues tendered by the plaintiff, and the remainder in respect to his Honor's charge and his failure to give instructions asked by the plaintiff.

A motion was made by the defendants to remove the case from Cherokee County to Graham County for the convenience of the witnesses, and it was announced by the court that the removal would be made to Graham County. Upon objection being made by the plaintiff his Honor said that in order that a speedy trial might take place he would remove it to either Graham, Macon or Clay, and stated to the plaintiff that he might select either of those counties. Whereupon the
(308) plaintiff's counsel said he would "take" Clay County, if he was compelled to choose, and the case was removed to that county. Whatever irregularity there may have been in the proceeding was cured by the action of the plaintiff himself. His Honor had the power under the statute (Code, sec. 195, subsec. 2) to remove the case to Graham for the convenience of the witnesses. The plaintiff, instead of submitting, chose Clay County instead of Graham, and he cannot complain.

The plaintiff, a few days before the trial, served a notice on the defendants that he would move to make Leighton and others,

the would-be purchasers of the land, parties defendant to the action, and before entering upon the trial the plaintiff moved for the order and the same was refused. The matter was discretionary with the court. The plaintiff, when he issued the summons and drew his complaint, knew the relation of those persons whom he sought to make parties to the subject-matter of the suit and their interest in the controversy as well as he did when he made the motion. If the motion had been made by the defendants themselves to become parties the case would have been different.

Exceptions three and four were made to the refusal of his Honor to admit evidence concerning matters which were embraced under the contract of 1893 and 1895. Together with these exceptions we may consider the refusal of his Honor to submit the third issue tendered by the plaintiff, which was in these words: "Did the defendant Robert N. Archer negligently fail and refuse to perform his covenants, obligations, stipulations and duties under the contracts of 1893 and 1895, as the same were consolidated by the contract of 8 January, 1895, in breach of trust contained in last named said contract?" And also that part of his Honor's charge excepted to by plaintiff which in substance was that by the terms of the judgment of Loudon County, Tennessee, the judgment of the (309) Superior Court of Graham County, North Carolina, and the memorandum and agreement and deed of trust of date 9 December, 1899, the contract of November, 1893, and the one of 8 January, 1895, were annulled and merged into the said memorandum and agreement and deed of trust dated 9 December, 1899, and that they should not consider the contracts of 1893 and 1895 in making up their verdict; and that the duties and powers and responsibilities of the defendants, Archer and McGarry, are set forth in the memorandum of agreement and deed of trust of 19 December, 1899, and the supplemental agreements thereto, and these different instruments should be construed together as one instrument in determining the rights of the parties in this action. We think his Honor committed no error either in refusing the evidence, in refusing to give the instruction asked, or in giving the instruction which he did give. The record in the Tennessee and North Carolina suits, and the agreement and trust deed of 9 December, 1899, show upon their face that the ends and objects for which the contracts of 1893 and 1895 were executed were concluded; that they had ended disastrously to all the parties concerned and with a very large debt due to the defendant Archer under the terms of those contracts; that the agreement between the defendants of December,

1899, referred to the litigation concerning the contracts of 1893 and 1895, and the parties, to put an end to all those matters and litigations, stated and fixed the debt due to the defendant Archer at $85,000, and as far as could be done agreed upon the manner and method of payment of that debt by a sale of the property mentioned in the agreement; and the parties in interest, the plaintiff and the others, in December, 1899, undertook to carry out the agreement and memorandum. That part of the property embraced in the contracts of 1893 and 1895, which was conveyed by the agreements and deeds of December, 1899, is dedi-
(310) cated to different purposes entirely from those for which it was used under the contracts of 1893 and 1895. There is not a stipulation in the contracts of 1893 and 1895 like any one in the agreement and deed of 1899; in fact there is nothing left in law or in fact of the contracts of 1893 and 1895.

It was contended, however, for the plaintiff that the contract of 1895 was still in force and to be construed with the other written contracts bearing on the case, because of the last clause of article seven of the memorandum and agreement of December, 1899, reference is made to the contract of 1895. That reference is in these words: "And in case of the nonpayment of the moneys above mentioned to Robert N. Archer, in manner and form as above expressed, the said Robert N. Archer shall, for the space of ninety days after any default, have the option to enforce this instrument or be remitted to his original rights under the contract of 8 January, 1895, and the suits mentioned in the third paragraph hereof, as if this contract had never been made, and said deed just mentioned shall be null and void and all parties shall be returned to their original rights." Now, if that section seven of the memorandum and agreement of December, 1899, had been the only power given in that instrument by which Archer and his co-defendant McGarry could have sold the property mentioned in the agreement for the payment of Archer's debt, then the contract of 1895, together with the suits referred to, would have been in force, and the agreement and deed of trust of December, 1899, would have been void and of no effect. But there is another clause or section in the agreement and memorandum of 1895 which confers upon Archer and McGarry, trustees, the power to sell the property for the payment of Archer's debts and also for the payment of other debts mentioned in the agreement; and the power is in these words: "And the said trustees, Robert N. Archer and
(311) Thomas F. McGarry, are also authorized and empowered, at any time, to sell said property or any part thereof, at private sale, at such price and in such manner and

upon such terms and conditions as they deem proper; provided, however, that no such sales shall be made of the whole of said property unless sufficient be realized to satisfy the claims of the several parties herein mentioned, principal and interest, hereinbefore scheduled and set forth."

The reasonable construction of the two distinct powers given to the trustees to make payment of the debts mentioned in the agreement is this: Under section five of the agreement the power was conferred upon *both* Archer and McGarry to make sale of the property *privately,* according to their best judgment, at any time they may see fit during the five years of the life of the agreement; in section seven of the agreement an additional power was given to Archer himself and alone, without the cooperation or even assent of McGarry, the other trustee, to sell *publicly* at auction, and after advertisement of the sale, the entire property, provided he would do so within ninety days after any default in the several amounts due to him; and further, it was intended by the agreement and memorandum of 1899 that if Archer preferred not to proceed under section seven and sell the property at public auction he should have the option, the privilege, of proceeding under his contract of 1895 and the suits in Loudon County, Tennessee, and Graham County, North Carolina.

Under section seven of the agreement of 1899 Archer had no right to make sale *himself* for the purpose of paying his debt with the proceeds after ninety days from the time the first default occurred; and he alone made no effort to sell at public sale. He therefore had the option to proceed under his judgments based on the contract of 1895, but he did not do that. He, together with the other trustee, McGarry, proceeded to make the sale *privately* under article five of the agreement and memorandum. The power, the authority, for (312) Archer and McGarry, when acting together, to make sale of the property privately, under section five of the agreement and memorandum of December, 1899, is not denied in the plaintiff's complaint nor in his replication, but is admitted. The insufficiency of the price agreed to be paid for the property, going to show a breach of trust, is the gravamen of the plaintiff's complaint, and that is clearly to be seen from a reading of the ninth of the plaintiff's tendered issues, viz.: "Was the price at which the said defendants undertook to sell said land in Graham County a full price for the same, as alleged in the defendants' answer?"

The defendants, trustees, Archer and McGarry, having the power to sell the property privately, have entered into an agree-

ment with certain persons called the Cleveland parties for that purpose. Exception is made by the plaintiff to the terms of that agreement, the contention being that upon its face it is beyond the power of the defendants to make. We have examined it carefully and are of the opinion that the defendants have not exceeded their power in the execution of it.

The fourth exception was to the refusal of the judge to allow a report concerning the property, made by McGarry alone in April, 1900, to be used as evidence against Archer. Clearly the paper was inadmissible against Archer. Archer could not be deposed from his trust because of any conduct on the part of McGarry not known or approved by Archer. His Honor was correct in overruling exceptions five and six, in which his Honor refused to allow the plaintiff to give his reason why he entered into the deed of trust of December, 1899. However, the evidence substantially got in, because, on the question of the value of the timber, his Honor allowed the plaintiff to testify as follows: "It was reported by McGarry that he would get some $250,000 for the standing timber on the 49,000 acres of land, or (313) thereabout, that was originally transferred to Archer, leaving the land and whatever minerals there were in the original owners' hands." A witness, Coburn, was introduced by the plaintiff, who gave testimony tending to show that logs could be cut and floated down the streams in Tennessee to certain mills in that State, operated by the Crosby Lumber Company, the same mills that the defendant Archer had been operating under the contract of 1895. That witness was asked by the defendant on cross-examination if the Crosby Lumber Company did not fail in their operations and that they quit insolvent. The question was a proper one. The plaintiffs were seeking to hold the defendants responsible for not getting out their logs to market under the agreement of 1899, and the defendants had a right to show that those persons who had embarked in that enterprise had failed, as evidence of their good faith; that was the seventh exception. The answer which was in response constituted the eighth exception. The ninth exception was directed to the permitting of a question to be put to an expert witness, Harrell, as to how he spent his time while he was prospecting the property. We see no objection to the question, but the witness made no answer.

Exceptions 10, 22, 23, 24, 25, 26, 27 and 28 refer to lappages of other surveys of land upon those mentioned in the complaint and answer. The contention of the defendants on this question was that the acreage of the land mentioned in the pleadings had been, to a considerable extent, reduced by a discovery of various

lappages of other surveys and tracts of land over those mentioned in the pleadings, and that that fact ought to be considered by the court on the question of the value of the land contracted to be sold by Archer and McGarry to the Cleveland people. A surveyor, acquainted with the land and who had done surveying in reference to these lands and the lappages, was introduced for the purpose of showing these lappages and the extent of them. So far as we can see, the witness (314) testified to nothing except what he had practical knowledge of and definite information about in reference to the lappages. He did not have particular surveys of these lappages, but he had other surveys connected with the adjoining tracts that gave him such information as that he would reasonably make estimates of the lands embraced in the lappages, and that he did. The exceptions are therefore without merit.

Exceptions from eleven to fifteen, inclusive, relate to letters and communications made by McGarry individually to the owners of the property, without the knowledge of Archer. They were not admitted as evidence against Archer, and there was no error in his Honor's ruling.

Exceptions 16, 17, 18, 19, 20, 20a and 20b relate to the records of the suits in Graham County, North Carolina, and in Loudon County, Tennessee. The evidence was properly received. It does not make any difference whether the plaintiff was a party to those suits or not so far as the introduction of the records was concerned in this case, for the memorandum and agreement entered into between the defendants in December, 1899, referred to these suits; and while it was said that the judgments were disputed as to their validity, yet the recital in that memorandum and agreement of December, 1899, after referring to the suits and judgments, further recited: "Now, therefore, in order to settle said matters and all litigation it is hereby mutually agreed as follows: 1. That the amount due to said Robert N. Archer is hereby settled and agreed upon as follows, at the sum of $85,000." The plaintiff in his deed of trust made in December, 1899, pursuant to the memoranda and agreement of the same date, recognized the terms of the memorandum and agreement and the settlement made therein. The records of the court then were admissible to show that the matters which the plaintiff alleged were still open and unsettled by the contract of 1895 had been determined and settled, and were the mat- (315) ters referred to in the memorandum and agreement of 1899.

The defendants offered in evidence the deed from Archer and wife to Thomas F. McGarry and Robert N. Archer, as trustees,

and also a bill of sale from the same to the same. It is not stated in the record what property was conveyed in these instruments nor for what purpose they were made, and the instruments themselves are not in the record. But if they were before us we cannot see why the property conveyed therein did not vest in the other trustee, McGarry, even if the objection on the grounds stated, to-wit, that Archer as an individual could not convey to himself as trustee, could be maintained. We think exception 29 cannot be sustained for the same reason given in the discussion of exceptions 10, 22, etc.

Exception 30 is about a harmless matter. A question was put to a witness as to whether he had heard of any large sales of land in Graham County. He answered that he had only known of them through hearsay. Nothing further was said and no harm was done.

Exceptions 31, 32, 33, 34, 37, 38, 39 and 40 relate to the value of lands in Graham County as evidence of the value of the lands described in the pleadings in this case. The defendants were undertaking to prove the value of the land in Graham County, which they had contracted to sell to the Cleveland people, by showing the value of other mountain lands in Graham County similarly situated and of similar character. We think the evidence was competent. In *Warren v. Makely,* 85 N. C., 12, it was undertaken to show the value of a certain tract of land by proof of the value of a certain tract of land by proof of the value of an adjoining tract. There, there was no evidence of similarity in the character of the soil, quality of the land or of anything going to show that the two tracts were alike, and the evidence was not allowed. But in discussing that case
(316) *Smith,* C. J., said: "The question is simple and absolute, unaccompanied with any suggestion that the two tracts possessed the same or similar qualities in soil, culture, location or improvement, or possessed in common the elements that enter into the estimate of their respective values. . . . As presented to us in the record, and without any explanatory circumstances, the question was properly excluded as irrelevant and misleading." Those very matters are presented here in our record, and we are of the opinion that they make the evidence competent.

Exceptions 41, 54 and 55 relate to the practicability of removing, manufacturing and selling the timber from the lands of the defendants. A witness, who testified that he was 52 years old, that he had been in the lumber and timber business for 35 years, that he had worked in lumber in all capacities, in the woods, part of it from a chore boy up to scaler, foreman

and superintendent, and that he had tried to keep posted in every location where there was timber manufactured and for sale, and that he took the best lumber journals, etc., and who further testified that he took charge of the property with a view to make a sale of it for the defendants, and that he became acquainted with the timber and location, the rivers and the roads and the general character of the country; was asked whether or not, from his knowledge of that country, the location of the timber, his experience as a lumber man and timber man, if it would have been practicable for these trustees to have undertaken to have that timber manufactured and sell it profitably he answered, "No, I do not." The plaintiff's exception, upon objection to the question and answer, was that it was not competent for the witness to give his opinion upon the question presented, and that it was undertaking to give the witness the opportunity to decide what is the province and duty of the court and jury to pass upon, and therefore incompetent. It is common learning that opinion evidence, as a rule, ought not to be received. But there are exceptions to the rule, (317) and it seems to us that this is a proper instance in which an exception ought to be allowed. And the witness may not be treated as an expert, but as an ordinary witness who is entitled to an opinion based upon facts within his own knowledge, the circumstances from which that opinion is deduced being such as cannot be made palpable to others. There are so many contingencies and difficulties, inherent and extraneous, about the timber business, especially in mountainous sections lacking facilities for transportation, nearness of markets, etc., that it would be almost impossible for the ordinary jury to arrive at a just estimate of the expense attending such a business, without the aid of the judgment and opinion of those persons who have experience in the same.

Exceptions 42 and 43 cannot be sustained. The paper-writing introduced as evidence was collateral to the issues, and its contents provable without producing the paper. *Carden v. McConnell,* 116 N. C., 875.

Exceptions 44, 45 and 46 relate to interviews between Archer and C. R. Palmer and Ridder, in reference to a sale of the land and an option to purchase. It was competent to show efforts to sell the property, good faith, etc.

Exception 47 was to the permitting of Archer to give evidence of a conversation between himself and a chemist on an analysis of some samples of mineral earth submitted to him for examination. The court admitted it only for the purpose of

showing good faith, and not on the question of the value of the land.

The forty-eighth exception relates to the exception of Archer to the effect that the plaintiff, through McGarry, who represented him, wished to pay the first installment of the debt due to Archer, and had offered to raise his part of it. We see no error in its admission.

The forty-ninth exception was entered to the permis-
(318) sion of his Honor for Archer to state how the debts due to the Cooper and Bragg estates, mentioned in the agreement of 9 December, 1899, were arrived at. If it was not material it was harmless.

Exceptions 50 and 60 refer to the ruling of the court on the matter of the issues. The plaintiff tendered, in the first place, nine issues, which were all refused, and later on during the course of the trial tendered another one as to the damages the plaintiff might be entitled to on account of any breach of the trust. It is not stated what became of the last issue tendered, but as it was not submitted to the jury his Honor must have declined it, for the reason that no evidence had been offered to show damages. We have seen that his Honor committed no error in refusing the third issue tendered, and he committed none in refusing the other eight, for they simply particularized the alleged breaches of trust, and the ones submitted covered the case and were clear.

Having treated the exceptions to the evidence and those concerning the issues we come to a consideration of the law of the case.

The defendants, Archer and McGarry, were charged with the execution of the most responsible trusts concerning very valuable property. That property was to be utilized by them for the payment of a very large indebtedness in the way of encumbrances upon the same. As we have already said in the discussion of one of the matters of evidence the defendants had the power, under the agreement and deed of December, 1899, to make a private sale of the property, in whole or in part, and at any time they saw fit. In the memorandum and agreement of December, 1899, there was no provision made for nor any suggestion of the manufacture and sale of the timber separate from the land itself. But the deed made by the plaintiff and others to the defendants, Archer and McGarry, in 1899
(319) contains this provision (quoted *literatim et punctuatim* from the pleadings and from the instructions given by the court to the jury): "Nevertheless to take immediate possession of the same, manage, control, safeguard, sell, dispose of,

cause to be manufactured and sold the timber off said lands in whole or in part, in such manner as the said parties of the second part shall deem best to convert said timber or lumber into money, speedily and in the most advantageous way, but without authority to incur any indebtedness or liability upon grantors." In addition to what we have already said on the power of Archer and McGarry to sell the property it may not be amiss to add that if the language just quoted was all that was used in the agreement and memorandum and deed of 1899 on the subject of the sale of the land itself, we would have grave doubts about the power of the defendants to sell the land, which they have contracted to sell to the Cleveland people. But the deed of 1899, as we have seen, refers to the memorandum and agreement of the same month and year, and the makers declare it their purpose to carry out the memorandum and agreement, that latter agreement giving, as we have seen, full power to sell the land itself. And, besides, the deed itself in the last clause reads, "And in case of default in making any of the payments, as mentioned in the said contracts, the said land and the timber thereon shall be sold by the grantees herein, and the proceeds of said sale shall be paid on account of the sums so due said Archer."

In the discharge of their duties as trustees it was in their sound and honest discretion, in making provision for the payment of the indebtedness, to take choice between a sale of the land itself for that purpose and the undertaking of the cutting and manufacturing of the timber or lumber separate from the land. They were not required to test the experiment of the latter plan if they honestly and reasonably believed that it ought not to have been tried. If they thought the (320) best plan to relieve the indebtedness was by a sale of the land itself they had the power to sell it, and it was their duty to do so. They were given that discretion in the memorandum of agreement and in the deed, and all they were required to do was to exercise it conscientiously and with reasonable care.

But the plaintiff in this connection insists that it is not in the power of the defendants to make the sale they proposed to make to the Cleveland people, for the reason that there is a proviso in the sale to the effect that no such sale shall be made of the whole of the said property unless sufficient money be realized to satisfy the claims of the several parties therein mentioned, principal and interest; that is, that the trustees shall not have the power to sell all of said property, whether they sell the same as a whole or the whole by parcels, unless sufficient money could be realized to pay all the claims secured by the

contract; and that there was evidence offered tending to show that the balance of the value of the land, lying in Cherokee, Clay and Swain counties, added to the amount of the contract price of the Graham County land, would not equal the whole of the indebtedness provided for in the deed of 1899. That contention cannot be sound. Of course if all the land had been contracted to be sold for less than the entire debt the plain words of the deed would prevent such a sale. But the object in view was the payment of the indebtedness by a sale of the property, and under the contracts the defendants, Archer and McGarry, had the right to sell any part of the property at such price, in such manner and upon such terms and conditions as they deemed proper. If, therefore, they sold any part of the property less than the whole, in good faith and for fair value, the true intention of the deed would be carried out. The proviso in the deed doubtless was put there to prevent an improvi-

(321) dent sale of the whole, and to subject the conduct of the defendants to scrutiny, and to compel them if they sold the property in parts or lots to procure a fair price for such lots. If it could be shown, however, that the contemplated sale of the Graham County land affected injuriously the value of the land lying in the other counties because of the separate sale, then the trustees would not be allowed to consummate the sale, even though the price for the Graham County land was its full value. It was the duty of the defendants to use their best business judgment and reasonable skill to raise the money to pay the indebtedness out of the property, and if they failed to do so they were guilty of a breach of trust; and they were to guard and preserve the interest of each beneficiary under the trust in choosing between a sale of the property and the manufacture of lumber, and also in making any sale of the property if they chose that way. And also, if it was for the best interest of all parties under the trust, for the defendants to have manufactured and sold the lumber, or that they could have found out that that was the best way of raising the funds to pay the indebtedness, and failed to do so, they would have been guilty of a breach of trust. The defendants themselves were not required to go upon the property if they used a sound discretion in the selection of Creith, their agent, who did take possession for them.

The memorandum and agreements, as we have seen, bear date 9 December, 1899, but there was evidence that they were not executed or delivered until February, and Creith, as agent, took possession in the early days of March following.

The reasonableness of time elapsing between the execution

of the papers and the taking possession of the property by the defendants' agent was submitted to the jury, and under proper instructions.

As we have already said, in discussing the evidence, all the agreements and contracts concerning the plaintiff and defendants made prior to December, 1899, were merged (322) into the latter, and they were not for the consideration of the jury. His Honor charged fully along all these lines, and as we have decided the law to be in the matter, and our discussions have been based on the judge's charge and the instructions asked by the plaintiff and refused by his Honor. The plaintiff's fifth, sixth, seventh, eighth and twelfth prayers for instructions have not been considered in what we have said, and we will now take them up.

The fifth concerned the evidence in relation to some nonsuits suffered by the defendants in actions brought by others concerning the trust property. On that instruction the court told the jury that the trustees were bound to prosecute the actions if in their reasonable judgment the prosecution of such actions was to the interest of the trust estate, and if they should find from the evidence that the nonsuits were negligently had after 8 December, 1899, the date of the trust deed, and by reason of the nonsuits injury came to the estate, the defendants would be guilty of a breach of trust—negligence being the want of that degree of care that an ordinarily prudent man would use in the same or similar circumstances.

The sixth prayer for instructions was in relation to depredations by squatters and trespassers on the property. His Honor told the jury in reference to that matter that the defendants should have used due diligence and care in keeping trespassers off, and if they should find from the evidence that the defendants, through their agent, did not, after 8 December, 1899, use such care and diligence as an ordinarily careful business man would have used in his own business under the same circumstances, then that would have been a breach of trust, and that they should so answer; and if such precaution was taken and such diligence exerted then they did not commit a breach of trust in failing to keep off the trespassers.

The seventh prayer was concerning the failure of the defendants to pay taxes on the land. His Honor told (323) the jury that if they should find from the evidence that the defendants failed to use their best judgment and reasonable skill, as it was their duty to do, to raise money out of the trust funds, and by reason of such failure the trust property or any part thereof was sold for taxes, then they should find that the

defendants had committed a breach of trust, and they should so answer.

The eighth prayer for instructions was directed toward the alleged loss of a quantity of felled timber and logs belonging to the trust property, and which were alleged to have been injured and lost by the negligence of the defendants. In reference to that matter his Honor said that if the jury should find from the evidence that if the defendants, after 9 December, 1899, the date of the trust deed, suffered the same to remain there unprotected, and allowed them to decay and become worthless, they had made a breach of trust in that respect, and the jury should so answer. But that it was not incumbent on the defendants to take charge of the logs, if the jury should find that they were worthless, or if the defendants, in their honest and best judgment, were of the opinion that the logs were so damaged that it was not for the best interest of the trust for them to take charge of them. We see no error in the instructions given, and such parts of the ones asked by the plaintiff that were proper were given, and those parts not proper were rejected.

The instructions of his Honor given on the fifth, sixth and eighth prayers were excepted to by the plaintiff on the ground that there was no evidence to support these instructions. We take a different view of the evidence.

The twelfth special prayer for instructions has been considered in our treatment of the sixth prayer. The jury answered the first and second issues "No" and the third "Yes." We see no error in the trial, and the judgment is

Affirmed.

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(324)

JOYNER v. SUGG.

(Filed 25 November, 1902.)

1. HUSBAND AND WIFE—*Deeds—Trusts.*

Where the husband buys land and has the deed made to his wife, the land becomes the property of the wife, as against the heirs of the husband.

2. HOMESTEAD—*Exemption—Deeds—Husband and Wife.*

A deed of land in trust, by the husband, in which the wife does not join, reserving the homestead therein to the grantor, passes the entire land except $1,000 worth thereof. (By DOUGLAS and COOK, JJ.)

3. HOMESTEAD—*Exemptions—Deeds—Husband and Wife.*

A deed of land in trust, by a husband, in which the wife does not join, reserving the homestead of the grantor therein, conveys no interest in the land therein named. (By FURCHES, C. J.)

4. HOMESTEAD—*Exemptions—Deeds—Trusts—Husband and Wife.*

A deed in trust, by the husband, in which the wife does not join, reserving the homestead of the grantor therein, passes the entire land therein conveyed, subject only to the determinable exemption $1,000 worth thereof from the payments of the debts of the grantor during his life. (By CLARK and MONTGOMERY, JJ.)

ACTION by J. H. Joyner and others against Mary A. Sugg and another, heard by *Judge F. D. Winston* and a jury, at April Term, 1902, of PITT. From a judgment for the defendants the plaintiffs appealed.

Skinner & Whedbee for the plaintiffs.
Jarvis & Blow and *Connor & Son* for the defendants.

DOUGLAS, J. Blaney Joyner, in 1893, executed a deed of trust to Allen Warren to secure creditors, in which was included the land in controversy, which was conveyed "subject to and reserving, however, his (Blaney Joyner's) homestead (325) rights therein, as secured by the laws of North Carolina." After due advertisement, according to the terms of the trust, the land was sold "subject to the reserved homestead right of Blaney Joyner," and was bought by R. L. Davis, with whom Blaney Joyner had arranged that it should be bought for his benefit, and the deed thereof was made by Allen Warren, trustee, to said Davis, "subject to the homestead right of Blaney Joyner," and coupled with a parol trust to convey the same to whomsoever Blaney Joyner might direct, and by direction of Blaney Joyner said Davis did convey the land, "subject to said Blaney Joyner's homestead right," to his wife, J. A. E. Joyner. Blaney Joyner and his wife united in a mortgage to secure said Davis the purchase money, which was subsequently paid off entirely by Blaney Joyner, his wife paying no part thereof. Blaney Joyner died without issue, and the plaintiffs are his heirs at law. J. A. E. Joyner died subsequently in 1901, having devised the land to her two nieces, the defendants, who are in possession of the premises.

The plaintiffs seek by this action:

1. To establish that J. A. E. Joyner took the land upon the parol agreement that she would hold the naked legal title for the use of Blaney Joyner in fee, and that he having paid off

the mortgage for the purchase money the plaintiffs, as his heirs at law, are entitled to recover the premises.

But the evidence set out in the record shows no agreement nor any acknowledgment of a parol trust by J. A. E. Joyner. The parol trust by R. L. Davis in favor of Blaney Joyner was performed by his execution of the conveyance to J. A. E. Joyner, as directed by Blaney Joyner. The mere payment of the purchase money by the latter gave the plaintiffs no rights as his heirs at law as against his wife, to whom he had a right to give the property, except as to creditors, and the creditors are all paid off.

2. The plaintiffs contend that if they cannot establish (326) the parol trust the original deed in trust to Allen Warren, "subject to the homestead right of Blaney Joyner," is void for uncertainty in both the quantity and quality of the estate, or at least the reservation included the reversion of the homestead, the wife not having joined in the deed; and that Blaney Joyner being dead the plaintiffs, as his heirs, can recover the land once covered by his homestead or which would have been so covered if it had ever been actually allotted.

We may as well frankly say that we find it impossible to fully reconcile all the decisions of this Court upon the subject. We will not try to do so, but will attempt simply to present those principles necessary for the determination of this case in the view we take of it.

This is the first time that this question has come directly before this Court as now constituted. We do not regard the case of *Williams v. Scott,* 122 N. C., 545, as directly affecting the case at bar. In that case the homesteader neither sold nor attempted to sell the so-called reversion of the homestead. It was sold in bankruptcy proceedings, and referring thereto this Court says, on page 549: "The decree of the district court ordering a sale of the reversionary interest in the land, not having been appealed from by the bankrupt, concluded him and binds the defendants who claim under him and are privies in blood and estate." Again, the Court says, in the sentence immediately preceding: "It (the decree) was not open to collateral attack, and the decision of the district court in the matter, where it had sole jurisdiction, was and is binding on our courts." This was the law of that case.

Our earlier decisions seem based upon the idea that the homestead is an estate. This is apparent from the very sentence quoted from *Jenkins v. Bobbitt,* 77 N. C., 385, upon which the defendants rely, and in which *Judge Pearson* repeatedly

uses the terms "homestead estate" and "estate in re- (327) version."

Another *quotation* is as follows: "But a sale by the owner of a homestead of his estate in reversion stands as at common law, and the owner has full power to sell it." With the highest respect for the great Chief Justice, who evidently regarded the homestead as a particular estate carved out of the fee, we are unable to find that the "homestead estate" had any standing at common law. If an estate at all it would seem to be a life estate in the homesteader, with a contingent remainder for an uncertain term of years to his children and an ultimate remainder or reversion back to himself if the land remains unsold, or to his grantee if sold.

One thing at least seems clear: A homestead is either an estate or it is not an estate. If it is not an estate in itself, but is merely "a *quality* annexed to the land whereby an estate is exempt from sale under execution for debt," as was said in *Littlejohn's case,* then there must be some estate to support the exemption. A naked right of exemption is worthless unless the debtor has some property that he can retain under the exemption, and he cannot retain that which he does not possess. This exemption gives him nothing, but simply keeps that which he already has from being taken away from him.

The idea that the homestead exemption was an estate has been long since abandoned. The theory now of universal acceptance was first clearly enunciated by *Bynum, J.,* speaking for the Court in *Bank v. Green,* 78 N. C., 247, where he says, beginning on page 252: "There is some misconception as to the nature of the homestead law. The homestead is not the creation of any new estate, vesting in the owner new rights of property. His dominion and power of disposition over it are precisely the same after as before the assignment of homestead. The law is aimed at the creditor only, and it is upon him that all the restrictions are imposed; and the extent of these re- (328) strictions is the measure of the privileges secured to the debtor; and these restrictions imposed on the creditor are that in seeking satisfaction of his debt he shall leave to the debtor untouched $500 of his personal and $1,000 of his real estate. . . . The homestead has been called a determinable fee, but as we have seen that no new estate has been conferred upon the owner and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him."

It is needless to cite the numerous cases in approval. A brief quotation from one or two will be sufficient:

In *Simpson v. Wallace,* 83 N. C., 477, the Court says: "The assignment of a homestead creates no new estate in the exempted land; it simply ascertains and sets apart a portion of what the debtor owns, of limited value, and relieves it of liability for his debts during a specified period, leaving in him the estate already possessed unimpaired."

In *Markham v. Hicks,* 90 N. C., 204, this Court says: "The argument in support of this contention (that the sheriff could sell the land subject to the homestead exemption) proceeds upon the misconception that there is a divided estate in the debtor, produced by the separation and setting apart of the exempt from the remaining land, one enduring for his own life and prolonged for the benefit of his wife and minor children, the other, the residue of his previous estate."

The Court then held, citing with approval *Bank v. Green, supra,* that the estate cannot be so divided, and that the sheriff cannot sell the reversion even in the absence of statutory prohibition. Therefore it is not an estate. We cannot have a shadow without something to cast the shadow; neither can we have a quality of exemption without something to be exempted.

(329) Some confusion may have arisen from the indiscriminate use of the word "homestead," as applying either to the right of exemption or the land exempted. As used in the Constitution it is evident that the homestead is the land itself. The homestead right is the right to hold and use the land free from execution for debt. In other words, the homestead is the land itself; the homestead right is the right of the owner to hold the land exempt from execution; while the homestead exemption is a quality attached to the land by virtue of said right. The homestead right may exist as a pure abstraction, but there can be neither homestead nor exemption without the land. While the exemption follows from the homestead right, it seems that when once attached it follows the land into the hands of the purchaser, while the homestead right remains in the vendor. This is no longer an open question. So whatever doubts some of us might have as to its logical correctness must yield to what has become a rule of property. *Stare decisis.* In any event it is not involved in this case.

For the homestead right to be of any benefit to a man it is evident he must own some estate in land to which it can apply. This is clearly the meaning of the Constitution. In Article X, section 2, it says: "Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand

dollars, to be selected by the *owner* thereof, or in lieu thereof, . . . any lot in a city, . . . *owned* and occupied by any resident of this State, . . . shall be exempt from sale under execution." . . . And again, in section 3, it says: "The homestead, after the death of the *owner* thereof, shall be exempt," etc. And in section 5 it says: "If the *owner* of a homestead die," etc. (the italics are ours). Section 8 provides how the *owner* of a homestead may sell it. Throughout this entire article appears an inseparable connection between ownership and exemption.

The assignment of the homestead adds nothing to the owner's title. It merely locates that part of the land which is exempt and which he continues to hold under his former (330) title. We do not see how he can sell his land and retain a mere quality annexed to the land. We do not say that he cannot, by a proper deed, convey his land with a reservation to himself of a life estate. This would be in effect the conveyance of the remainder after the life estate. Perhaps he could further extend his reservation for the life of his wife and the minority of his children, but none of these questions are involved in this case.

The deed of trust to secure creditors under a consideration expressly states that the land in controversy is conveyed "subject to and reserving, however, his (Blaney Joyner's) homestead rights therein, as secured by the laws of North Carolina." He does not pretend to convey the so-called reversion of his homestead. On the contrary he expressly reserves all that the law would allot to him as a homestead if he had made no deed. The object of an assignment for the benefit of creditors is not to give the creditors the right to resort to the land for the payment of their debts, as that right they already have or can obtain by means of a judgment. Its object is to prevent the lien of subsequent judgments and to regulate the distribution of his assets, either by preferring such creditors as he wishes or preventing any preference. Assignments are usually made in an emergency, when there is no time to lay off the homestead. All that the debtor can do is to reserve the homestead right allowed by law. What is that right? This Court has said, in *Bank v. Green, supra,* that it is a "restriction imposed on the creditor; . . . that in seeking satisfaction for his debt he shall leave to the debtor *untouched* five hundred dollars of his personal and one thousand dollars of his real estate." This Court has said in *Simpson v. Wallace, supra,* that it "leaves in him the estate already possessed *unimpaired.*" It is held that the reversion of the homestead cannot be sold under execution, because

(331) there is no reversion. *Marcom v. Hicks, supra.* In fact no part of the land can be sold under execution until the homestead is laid off. Upon such allotment the homestead, the land itself, is still held by the owner under his former title and cannot be touched, that is, interfered with, in any manner. The sale of the fee in reversion would of course interfere with it, and would seriously impair the homesteader's former estate. If he owns the land in fee he is entitled to any rise in value subject to the liens. A thousand dollars worth of land near one of our growing towns may in a few years become so valuable as to pay off all encumbrances and leave a handsome surplus. But if the reversion has been sold he has no incentive to improve the property or render it more salable, as the result of his labor and thrift would go to the speculator who, perhaps, has bought the fee for a nominal price. Therefore not only the letter of the Constitution and the decisions of this Court, but public policy, favor the retention of the title in the man who alone can develop the property.

When Blaney Joyner, in executing his deed in trust, reserved his homestead rights, he reserved one thousand dollars worth of the land. Assuming the land to be worth $4,000 in legal effect he conveyed to the trustee only three-fourths of the land, reserving to himself a fourth undivided interest, to which he retained the legal title. To that extent he was a tenant in common with the trustee. This unity of possession could have been severed by the assignment of the homestead, which would have been equivalent to partition. This the trustee does not seem to have done, as he sold the land in its entirety; but he could not convey any greater title than he held. Therefore the undivided fourth interest remained in Blaney Joyner, as it would have done in the case of any other tenant in common.

(332) Under the facts as developed in this case we are of opinion that the plaintiffs, as heirs at law of Blaney Joyner, are the owners of an interest in the land in controversy of the value of one thousand dollars, to be estimated as of the time of the execution of the deed of trust by Blaney Joyner to Allen Warren.

We are further of opinion that the remainder of said land passed by said deed from said Joyner to said Warren, and from him to Mrs. Joyner, by whom it was devised to the defendants.

Error.

FURCHES, C. J., concurring. On 5 September, 1893, Blaney Joyner made and executed a deed of trust to one Allen War-

ren upon the land in controversy, containing about 450 acres, and worth, according to the evidence, somewhere about $4,000. Blaney, at the time of making the trust, was a married man, Jackey Ann Eliza Joyner being his wife, who did not join in the making of said deed of trust, and never signed nor acknowledged the execution thereof. This land was afterwards sold under the deed of trust by the trustee therein named, and was bought by one Davis in trust for Blaney, who at the instance of Blaney conveyed the same to J. A. E. Joyner, and she and her husband Blaney joined in a mortgage to said Davis to secure the purchase money. Blaney did not live long after this transaction, and since then the said J. A. E. Joyner has died, leaving a last will and testament devising said land to the defendants, who are her nieces, neither she nor said Blaney leaving children or lineal descendants surviving them.

The debt secured by the mortgage of Blaney and wife to Davis has been paid, mostly before the death of Blaney, and the residue before the death of Jackey Ann Eliza.

The deed in trust to Warren was in form a deed in fee simple with this provision, "Subject to the homestead exemption of Blaney Joyner." (333)

The plaintiffs are the heirs at law of Blaney Joyner, and claim that as said land belonged before the deed to Warren belongs to Blaney, and as said deed conveyed nothing the land belonged to Blaney at the time of his death, at which time it descended to them, and this action is brought to recover possession thereof.

The plaintiffs claim, first, that Davis bought the land for Blaney at the trust sale of Warren, and therefore held the same in trust for him. I do not think this is denied by the defendants, but they say that said trust was discharged when Davis made the deed to J. A. E. Joyner at the request and direction of Blaney; and no new trust was declared when this deed was made nor when the mortgage was made back to Davis to secure the purchase money he had paid for the land at the trust sale made by Warren. I agree with the contention of the defendants and with the opinion of the Court as to this transaction between Davis and Mrs. Joyner.

But as to the other point presented by the case on appeal, as to whether the deed of trust from Blaney to Allen Warren conveyed the land therein named and now in controversy, I differ from the opinion of the Court. In my opinion Blaney could not convey this land without the joinder of his wife, and the fact that he inserted the following clause in said deed of trust, "Reserving, however, his homestead right therein, as secured

by the laws of North Carolina," makes no difference in the right of said Blaney to make said conveyance. This consideration of the case involves the much discussed question of the homestead, so much discussed in *Thomas v. Fulford,* 117 N. C., 667. The Court differed so much in its views at that time—every member of the Court filing a separate opinion, which my friend Col. Edwards styled "five dissenting opinions in one case"—that I was in hopes it would not return to trouble
(334) the Court again, at least while I was a member thereof. But it is here, and I must meet it with the best thought I am able to give it.

Where a question has been "settled," if a question can become settled, that is, where a question has received for a considerable length of time a uniform construction, it is often better not to disturb it, even if erroneous. *"Stare decisis."* But this question was not considered settled in *Hughes v. Hodges,* 102 N. C., 236, which was by a divided Court, and which overruled and construed away many of the former opinions of this Court. It was not considered settled in *Vanstory v. Thornton,* 112 N. C., 196, which was by a divided Court, and overruled a good portion of *Hughes v. Hodges* and many other decisions. It was certainly not settled in *Thomas v. Fulford,* 117 N. C., 667, which settled nothing except the rights of the parties to that action, and there has been nothing since *Thomas v. Fulford* to settle it. I know it is claimed in the opinion of the Court that it is settled by *Jenkins v. Bobbitt,* 77 N. C., 385, and *Williams v. Scott,* 122 N. C., 545. But upon an examination of those cases I am satisfied it will be found they do not do so. It is known to every lawyer who has any practice in bankruptcy that when the bankrupt claimed his homestead the Federal Court held that the homestead did not pass to the register by the adjudication, nor to the assignee by his general assignment, and he could not sell it under said assignment. But upon a petition filed in the cause by creditors where the bankrupt was a party the Court, unless cause was shown to the contrary, would decree a sale of the reversion and appoint a commissioner (who was usually the assignee) to make sale of the reversion, subject to the homestead right under the State law, and to report said sale to court. This was the kind of sale at which the plaintiff bought, in *Williams v. Scott.* A sale made under a decree of the Federal Court, to which the homesteader was a party, is claimed as a pre-
(335) cedent and as settling the case now under consideration. But it does not do so and has no application to this case, and our Court has decided the same thing in principle. Minor children are entitled to a homestead, but this Court has held

that in an application to sell real estate for assets by the personal representative, where the minors are properly made parties to such application and make no defense, and a decree of sale is entered against them and the land sold, they are estopped from afterwards claiming a homestead.

This brings me to a consideration of the main question, Did the trust deed of Blaney Joyner to Allen Warren convey the estate in the land in controversy, no homestead having ever been laid off or allotted to him or his wife, and his wife not having joined him in the deed?

It seems to me that if it were not for the many conflicting opinions as to whether it does or not, there would be but little trouble about it. If Article X, section 8, of the Constitution, which says, "Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed, but no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law"—I say, if this section of the Constitution was now to be construed for the first time, in my opinion it would be held that, in such cases as this, the wife should join in the deed, or it would be *invalid.* The Constitution says it shall "be void" if she does not sign the deed and is not privately examined. And the trouble arises now from the fact that the court has undertaken to construe the plain words of the Constitution, which were so plain that they were not susceptible of construction. Until the homestead *is laid off and allotted,* all the lands the debtor owns are, in law, his homestead, and are protected from sale by this provision of the Constitution, which is self- (336) executing. The allotment is not to *create* the homestead; this is done by the Constitution; but to restrict and define its location and boundary, if the homesteader owns more than $1,000 worth of land. But no sale of any part of it can be made by creditors until this allotment is made. These propositions are so well established that I do not encumber the opinion with a citation of authorities.

No homestead had been laid off here, and until that was done *every part of Blaney Joyner's land was his homestead,* and any deed of his, attempting to convey it without his wife's joining him, was, in the language of the Constitution, *void.* This argument has not and cannot, it seems to me, be answered.

But it is attempted to be answered by saying that, in the deed of trust to Warren, Blaney reserved his homestead right under the Constitution and laws of North Carolina. What were these rights, and where was the homestead? It has never been laid

off and located; and if his deed was valid to convey the fee simple estate in the whole tract, as is claimed in the opinion of the Court, such reservation was void, as it was reserving the right to have a homestead located on Warren's land. This he could not do.

Section 2, Article X of the Constitution, provides that the "owner" of the land shall select the homestead, when his land is worth more than $1,000; that he shall be a resident of the State and the *"owner* and occupier" of the land so allotted to him as a homestead. So it is seen, if Blaney's deed to Warren was valid and carried the title to Warren, Blaney had no land out of which he could have a homestead. If the homestead had been laid off and located by metes and bounds, his deed to Warren would have probably conveyed the estate outside the homestead boundary, for the reason that the homestead had been located, and Mrs. Joyner had no homestead interest in the land outside the

(337) homestead boundary. See my opinion in *Thomas v. Fulford,* 117 N. C., 667. If Blaney's homestead had been laid off and assigned to him before the deed to Warren, and it had contained no reservation, would it be contended that his deed, in which his wife did not join, would have conveyed this allotted homestead? And if not, how can it be contended that it conveyed the whole tract before the homestead was laid off, when the whole tract was his homestead until it was reduced by assigning him a part of it, less than the whole?

But it is contended in the opinion that it is settled by the decisions of this Court that the deed from Blaney to Warren was a valid deed and conveyed the title to Warren. To this proposition I dissent. The earlier decisions of this Court upon the subject of homestead, made soon after the Constitution of 1868, are full of inaccuracies, as the more recent decisions will show. In the early decisions it will be seen that the homestead was treated as an "estate," and that part that remained after the determination of the homestead was treated as a remainder. But this doctrine has long since been abandoned. In *Bank v. Green, Bynum, J.,* exploded this doctrine, and showed that was no *estate* of any kind, but only a determinable *exemption* from sale under execution. This was approved in *Markham v. Hicks,* 90 N. C., 204, and numerous other cases since, until it has become the settled doctrine in this Court.

This is a very important modification of the law of homestead. Under the doctrine, treating it as an *estate* with a *remainder* over, it was logical to hold that the "reversion," as it was generally called, could be sold under execution or by the homesteader without selling his particular *estate,* called the

homestead, or to sell the fee, subject to his *homestead estate,* without his wife's joining with him in the conveyance, as the *homestead estate* was not affected by such sale. It was then treated as an *estate* that the homesteader had ac- (338) quired, distinct from the original estate, and was treated as a new estate, as an estate in dower or curtesy is treated. Under that ruling of the Court it became necessary to pass the act of 1870 to prevent the sale of the remainder, or "reversion," as it was generally called. This act, to prevent sales of the "reversion," was not brought forward in the Code of 1883, and all acts not brought forward in that compilation were repealed; and creditors commenced to enforce their executions against the "reversions." But in *Markham v. Hicks,* 90 N. C., 204, which was after the repeal of the act of 1870, the Court held that, under the new doctrine, the homestead was not an *estate,* but only an exemption, and the estate and the homestead were but one entirety, and the "reversion," as it was called, could not be sold. And, while the Court recognizes that the homestead is not an *estate,* it seems to me that it fails to recognize the results that follow from this change in its opinion.

It would make but little difference whether it was called an estate or an exemption if they were both the same in all except the name. So it will not be safe to put a decision upon these early decisions without considering the fact that when they were made, the homestead was considered an *estate,* but is now considered only an *exemption* and a part of the entire estate, and cannot be sold, although the act of 1870 has been repealed. *Markham v. Hicks, supra.*

We are so often influenced by a comparison of cases which are not analogous to the one under consideration; and when we are, it is likely to lead us into error. So it will not do to compare the homestead with dower, and reason from the analogy. Dower is an *estate* given to the wife, and, under the act of 1867, establishing the common-law right of dower in this State, gives to the wife one-third of all the lands of which the husband was seized during *coverture,* while the homestead is not an *estate,* and can only be claimed by the *owner of the land.* But (339) the opinion of the Court says "the question is settled that the deed to Warren passed the title," and cites *Jenkins v. Bobbitt,* 77 N. C., 385; *Hinsdale v. Williams,* 75 N. C., 430; *Murphy v. McNeill,* 82 N. C., 221; *Castlebury v. Maynard,* 95 N. C., 281; *Jones v. Britton,* 102 N. C., 184; 4 L. R. A., 178; *Hughes v. Hodges,* 102 N. C., 236; *Vanstory v. Thornton,* 112 N. C., 196; 34 Am. St., 483; *Thomas v. Fulford,* 117 N. C., 667, and *Wil-*

liams v. Scott, 122 N. C., 545. I have already commented on *Thomas v. Fulford* and *Williams v. Scott.*

Jenkins v. Bobbitt and *Bruce v. Strickland* are cases where the marriage took place and the land was bought before the Constitution of 1868, and fell under *Sutton v. Askew,* 66 N. C., 172. *Murphy v. McNeill* is put on *Jenkins v. Bobbitt.*

Jenkins v. Bobbitt is one of the cases most strongly relied on by the Court as settling the opinion of the Court in this case. But it does not, as I think. It falls under the doctrine of *Sutton v. Askew,* and anything said in discussing the case outside of that is but *obiter.* But if it were not it is clearly distinguishable from this case, as the homestead in that case was laid off *before the sale.*

In *Castlebury v. Maynard* the homestead had been allotted to the plaintiff before the sale upon his own petition, and the Court held that he could not make a good title to the land without his wife's joining him in the deed. It is true that the Court held that he could make a good title to that part not included in the homestead. See my opinion in *Thomas v. Fulford, supra.*

Hughes v. Hodges was by a divided Court, and I do not think it sustains the opinion in this case. And while I cannot cite the dissenting opinion of *Judge Merrimon* in that case, which in my opinion was unanswered and is unanswerable, yet I wish specially to call the attention of the profession to it.

What *Jones v. Britton* and *Vanstory v. Thornton* have
(340) to do with the validity of the deed from Blaney to Warren I am unable to see. And if these cases do not outweigh reason and authority I do not think "it is settled" that the deed to Warren conveyed the title to this land to him. *Vanstory v. Thornton* and *Jones v. Britton* show that the homestead is a condition and runs with the land, as a sale did not relieve it from judgment liens that had attached while the homesteader was the owner; whereas, if it had been personal to the homesteader when he sold the land, it would have discharged the lien.

The case of *Hinsdale v. Williams* shows that the Court in that case was treating the homestead as an *estate,* and that part after the homestead fell in as another *estate,* and the Court then treats it "as at common law," when there is no such thing as *estate or common law* in it.

The defendants' title depends on the title of J. A. E. Joyner, and her title depends on the title of Allen Warren. If Warren's title was not good the defendants' title is not good; and if the deed of Blaney to Warren did not convey the land it remained in Blaney, and the plaintiffs are entitled to recover. As I do

not think the deed from Blaney to Warren conveyed the title I think there was error.

The foregoing opinion was written as a dissenting opinion to the opinion of the Court as originally written, which held that the deed of Blaney Joyner to Warren conveyed the entire tract and plaintiffs were not entitled to recover anything. Since then there has been a modification of the opinion of the Court and another opinion written. And while it does not seem to me that the conclusion arrived at is the logical result of the reasoning employed in the opinion, it is at least conservative, and may tend to quiet titles that otherwise might be disturbed by what I consider the logical deduction therefrom. Therefore, without abandoning the arguments contained in my opinion, I now file it as concurring in the opinion of *Justice Douglas,* which becomes the opinion of the Court.

(341)

COOK, J., concurring. As the "homestead interest" is involved in this case, and the numerous decisions of our Court concerning it having failed to reach any settled construction, it seems to me that it will be best to disregard what has been so successfully unsettled and blaze out a new line, run by a construction of the Constitution as it is *written,* without reference to the rules governing estates at common law.

The following part of Article X of the Constitution defines what the homestead, as ordained by it, shall be: "Every homestead and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwellings and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt." . . . Sec. 2.

"The homestead, after the death of the owner, shall be exempt from the payment of any debt during the minority of his children, or any one of them." Sec. 3.

"If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall enure to her benefit during her widowhood, unless she be the owner of a homestead in her own right." Sec. 5.

"Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but 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." Sec. 8.

Prior to the adoption of our present Constitution
(342) (1868) a judgment creditor had the right to have sold under execution *all* of the debtor's land, leaving him without home or shelter for himself and family. To prevent such homelessness the sections above quoted were ordained and incorporated into our organic law, and we now have to construe their meaning in deciding the questions presented in this appeal.

We do not understand that the purpose of creating the homestead was to prevent the creditor from collecting his judgment out of the homestead, but simply to postpone the time of doing so, thus giving the homesteader a chance to provide a living for himself and family, if he should have one, and an opportunity to make the money to pay the debt. The docketed judgment by statute creates a lien upon it, which remains until the time limit of the exemption expires.

The word "homestead" in its general significance, as defined by Webster, means "the home place"; "a home and the enclosure or ground immediately connected with it"; "the home or seat of a family." Its existence so defined is general, and is not confined or limited to any class or condition of people. But as defined by our Constitution it is limited to that class of owners who are involved in debt; so badly involved that it would require a sale of substantially all their property to pay their debts. For this class the "homestead" of one thousand dollars worth of real estate is created by our Constitution. If provided for any other class, why exempt it "from sale under execution or other final process obtained on any debt?" Art. X, sec. 2. "Shall be exempt from the payment of any debt during the minority of his children, or any one of them" (sec. 3); "the same shall be exempt from the debts of her husband" (sec. 5). Its association and use are inseparably connected with *exemption from sale for the payment of debt.* Therefore it must necessarily follow that if there be no debt for which the owner of a homestead is liable there can be no "homestead" as *defined* and
(343) *created* by our *Constitution.* But as soon as the debt or liability to pay is created this exemption from the payment of the same out of the land designated and of the prescribed value, called the "homestead," springs into existence and action and stays the hands of the selling power.

By "owner," as used therein, is meant he who holds the freehold estate in the land, whether of inheritance or not of inheritance, whether the legal or the equitable estate.

As to such homestead, as is so defined, no sale can be ordered

or made by statute to enforce the collection of any debt due by the owner during the time limited in the Constitution. If the owner be tenant for life his estate in the land dies with him. If he be tenant in fee it descends to his heirs at law or devisees, but the hand to sell is stayed until the contingencies provided in sections three and five happen, and then the right of sale begins, and not before. During the stay of sale the judgment lien remains upon the title which is vested in the judgment debtor, but the judgment debtor's title remains in him just as it did before the judgment lien attached. If he owned a fee simple estate it continued to be a fee simple, simply encumbered with the lien and nothing more. Under our statute a docketed judgment becomes a lien upon all of the "owner's" (debtor's) land; the excess of a thousand dollars worth may be sold under execution issued upon it, whereby the title of the "owner" as to that is divested from him and transferred to another, and he loses all estate and interest in it. But as to that part *exempt from* sale, the "homestead," the title remains vested in the "owner," encumbered, it is true, with the judgment lien, nothing more. The "homestead" or "right of homestead" creates no estate in the owner; the estate is created by the title under which he acquired and holds the land, and in no other way. No remainder is created by the stay of sale because no *estate*, "particular or otherwise, passes out of the owner or is carved out of the fee." No *title* passes from the owner by or on account (344) of the homestead, but it *remains* in him; therefore there can be no reversion—there was no title out of him to revert. The entire fee remains in him. Should the owner pay off the judgment the lien would vanish and there would be no particular estate to fall in or outstanding title which could come back; so the estate and title would remain just as before in the tenant in fee, the owner or homesteader. Upon the death of the owner or tenant in fee the title to the land descends to his heirs, carrying with it the right of entry and possession without a change of title—only encumbered with the lien, which the heir could extinguish by paying the judgment, or he could refuse to pay and allow the fee to be sold and the excess of the proceeds of sale, after discharging the lien, to be paid over to the personal representative or heir, according to law in such cases.

Without debt there can be no "homestead," as defined by the Constitution. When the owner creates his debt the Constitution creates his homestead; when the owner extinguishes his debt the Constitution extinguishes his homestead. They are constitutional inseparable companions. If there be no debt there is no homestead or homestead right. Therefore a deed executed by

the husband who owes no debt (the wife not joining in the deed) conveys the land free from homestead but subject to the dower right; but if he be in debt the deed is *invalid* (sec. 8) as to so much of the real estate designated as is worth one thousand dollars, but is valid (subject to dower right) as to the excess, whether the homestead has been laid off or not, for *it* (the $1,000 worth) becomes definite and certain when the homestead becomes definite and certain, that is, when the homestead is or may be laid off and allotted or assigned. The laying off and assignment of the homestead is not essential to create it. It is created and defined by the Constitution (sec. 2), and
(345) any resident of this State is entitled to have at all times as much as one thousand dollars worth of his real estate (as therein designated) exempt from sale, and no more, at any time. Should the land assigned increase in value beyond the value limited the excess could be sold and the proceeds applied to the judgment debt. Should it decrease in value the deficiency could be claimed in any land or town or city property afterwards acquired by him. The identity of the thousand dollars worth can be certain by laying it off; so whether laid off or not is immaterial. *Id certum est quod certum reddi potest.*

At the time Blaney conveyed the land to Warren he was in debt and made the deed of trust to secure his debts, but he did not intend to convey his homestead (one thousand dollars worth of it); but conveyed the land "subject to and reserving his homestead rights therein as secured by the laws of North Carolina," in which deed his wife did not join. His "homestead rights" being the right to own one thousand dollars worth of the land in fee or for life, subject to any lien for debt, by *reserving* the "homestead rights," he reserved his title in fee to that much of the land. By his deed title passed to all of the land *in excess* of one thousand dollars worth, but did not pass to one thousand dollars worth thereof, which could at any time have been made certain and definite by laying off the same in conformity with section 2, Article X. So, not having conveyed his "homestead," the sale was not invalidated under section 8, Article X, and the title to that much of the land remained in him, and upon his death descended to his heirs at law. The sale by Warren, trustee, conveyed to Davis, the purchaser, the *excess* of one thousand dollars worth thereof, the title to which passed to J. A. E. Joyner by the conveyance of Davis to her under the parol trust under which Davis bought. So it is clear to me that plaintiffs, heirs at law of Blaney Joyner, are entitled to recover so much of that tract of land, including the
(346) dwellings and buildings used therewith, as will not exceed

in value one thousand dollars, to be selected by them, the present owners thereof.

CLARK, J., dissenting. I concur with the concurring opinion of the Chief Justice that "it does not seem to me that the conclusion arrived at (in the opinion of the Court) is the logical result of the reasoning employed in the opinion." Indeed it seems to my mind to lead irresistibly to the opposite result. If, as *Bynum,* J., says in *Bank v. Green,* 78 N. C., 247 (which is twice cited with approval by the Court in this case), the homestead is "a determinable exemption from the payment of the homesteader's debts in respect to the particular property allotted to him," it necessarily follows that when Blaney Joyner conveyed all his realty, "subject to and reserving his homestead rights therein," the grantee took all, subject to that "determinable exemption," and upon the determination of his exemption by his death (leaving no minor children) there was nothing left to pass to his heirs at law.

The "reversion," or more accurately speaking, "the land covered by the homestead subject to the determinable exemption," was liable to sale subject to such determinable exemption till an act was passed to prevent it, and that such land is liable to be subjected, the sale being merely postponed till the determination of the homestead, is evidenced by the fact that a docketed judgment becomes a lien thereon, and the statute of limitations is suspended as to such lien. The law forbids the sale under execution of such "reversion," *i. e.,* the land subject to the determinable exemption, not because it is not property of the debtor but because, at a forced sale thereof, subject to an exemption of uncertain duration, the property would bring a song, and would either be bought in for the homesteader, or more probably, as was the practical experience, by speculators. Hence the statute was passed suspending sale under execution till (347) the falling in of the "determinable exemption," but preserving in force the lien of judgments thereon unimpaired by any statute of limitation. There is no such evil to be guarded against by legislation when the owner makes a voluntary sale, and there is no reason to restrict his *jus disponendi.* The reversion (so called) being the debtor's property and something apart from his "determinable exemption," on which last there could be no judgment lien, any owner thereof, when, as in this case, no judgment had been docketed, could sell it, and there is no statute to prevent a sale or conveyance thereof by him.

That the land allotted is something separate and apart from the "determinable exemption" is evidenced by the further fact

that if it increases in value the excess may be valued and sold under an execution. Clark's Code (3 Ed.), sec. 504a. If it is separate and apart a conveyance of all the realty, "reserving only the homestead rights," which is held to be "a determinable exemption," conveys the land subject to such determinable exemption.

When, therefore Blaney Joyner conveyed his realty, "subject to his homestead rights," the grantee took it all, subject only to the "determinable exemption" upon that part thereof which should be allotted as his homestead. At the determination of that exemption, which is all that Blaney Joyner reserved, there was nothing to go to his heirs at law. *The very fact that the homestead is "not an estate but a determinable exemption" settles that. Only an estate could devolve upon his heirs at law. His "determinable exemption," which is all he reserved, determined at his death.*

Indeed this point has been often before the Court and has been settled against the plaintiffs by our repeated decisions that a conveyance of land "subject to the homestead right" of the grantor is valid, and conveys not only the excess but also the reversion of the homestead. The facts in *Jenkins v.*
(348) *Bobbitt*, 77 N. C., 385, presented a stronger case for the plaintiff's contention, in that there the homestead had been actually set apart by metes and bounds before the conveyance, yet *Pearson, C. J.*, says: "Was a conveyance of the land *subject to the homestead* valid to pass the reversion? His Honor ruled that it was invalid for want of assent of the wife of the defendant. The wife has no estate, interest or concern in the reversion. It does not take effect in possession until after the termination of the homestead estate. So we are at a loss to see on what ground the assent of the wife should be necessary in order to give validity to the deed of the husband, by which he conveys his estate in reversion." By "estate in reversion" he indicates merely the "allotted land," subject to the determinable exemption. The word "reversion" is used merely for lack of a better, and because the land, when freed from the determinable exemption, resembles an "estate by reversion," and not because it is such. The idea being clear, the use of a technically inaccurate expression (for lack of a better) should not cause confusion. Then, after adverting to the statute which prevents a sale of such "reversion of the homestead" under execution and the lack of necessity for such statute, if the wife could prevent such sale by her veto, and that the Court in *Hinsdale v. Williams*, 75 N. C., 430, had extended the operation of the act to forbid sales of the reversion by administrators to pay debts,

Pearson, C. J., further says: "But a sale by the owner of a homestead of his estate in reversion stands as at common law, and the owner has full power to sell it." This case has never been overruled or questioned, and we find in the annotated reprint of that volume (77 N. C.) that it has been cited with approval in *Murphy v. McNeill*, 82 N. C., 221; *Castlebury v. Maynard*, 95 N. C., 281; *Jones v. Britton*, 102 N. C., 166; 4 L. R. A., 178; *Hughes v. Hodges*, 102 N. C., 236-262; *Vanstory v. Thornton*, 112 N. C., 196; 34 Am. St., 483; *Thomas v. Fulford*, (349) 117 N. C., 667, and *Williams v. Scott*, 122 N. C., 545.

In *Thomas v. Fulford*, 117 N. C., at pages 678, 684, 688, the majority of the Court held, in seriatim opinions, that a conveyance "subject to homestead right" was valid and carried the entire estate of the grantor, including the reversion of the homestead and subject only to the homestead right (which right only exempts the homestead from sale during the life of the grantor and till his youngest child became of age) laid off or to be laid off.

In *Williams v. Scott*, 122 N. C., 545 (the last case), this was reaffirmed by a unanimous Court, *Montgomery, J.*, saying: "The laws of North Carolina prohibit a sheriff from selling the reversionary interest in homestead lands under execution, but they do not prevent the homesteader himself from conveying it. *Jenkins v. Bobbitt*, 77 N. C., 385."

As to dower rights, the conveyance of the husband of his realty without the joinder of his wife is valid, subject to her contingent right of dower. *Scott v. Lane*, 109 N. C., 154; *Gatewood v. Tomlinson*, 113 N. C., 312.

In my judgment the judge below ruled correctly. I can find no error in any respect.

MONTGOMERY, J., concurs in the above dissenting opinion.

Cited: S. c., 132 N. C., 584; *Robinson v. McDowell*, 133 N. C., 186.

NOTE.—Revisal, 686 (Laws 1905, ch. 111), provides that when a homesteader conveys his allotted homestead, the exemption ceases as to it, but the homesteader can select another homestead.

(350)

FAY v. CAUSEY.

(Filed 25 November, 1902.)

1. AGENCY—*Principal and Agent—Payments—Contracts.*

A contract by an agent selling machinery to take lumber in payment for the same is not binding on the principal unless authorized by him.

2. PAYMENTS—*Evidence—Sufficiency.*

There is not sufficient evidence in this case to be submitted to the jury on the question whether the notes sued on had been paid.

ACTION by the J. A. Fay & Eagan Company against H. C. Causey and others, heard by *Judge Thomas J. Shaw* and a jury, at December Term, 1901, of GUILFORD. From a judgment for the defendants the plaintiff appealed.

L. M. Scott for the plaintiff.
J. A. Barringer for the defendants.

MONTGOMERY, J. The execution of the two notes sued on was admitted and payment was set up as a defense in the answer. On the trial the defendants undertook to prove that payment was made in lumber. The sale of the machinery for which the notes were given in part was made by J. H. Burgess, an agent. The defendant Causey was examined as a witness in his own behalf, and testified that he and the agent agreed that a part of the purchase money (without stating how much) might be paid in lumber, and that about that time a lot of lumber was shipped to Burgess. That was an agreement not binding on the principal unless it was authorized by the principal, and there was no evidence tending to show that such authority had been given or that it had been ratified. The witness said that at
(351) the time Burgess received the lumber he said nothing about being agent. Neither was there any evidence that any lumber was ever paid as a credit on the notes, which are the subject of this action. Burgess did testify that he was authorized to receive payment of the notes in lumber (but not to sell in the first place for lumber), but nowhere does he say that he received anything, lumber or money, on these particular notes. He said that after he had received the lumber he "accounted to Mr. Causey for it and paid off one or two of his notes and *gave* them. I accounted to the company so as to get these papers turned over. I received the lumber on this account for Eagan & Company. I got the lumber as far back as 1892." So it is clear from this witness's testimony that such of the notes given for the machinery (there were three) and which had been paid for in lumber were turned over to Causey by Burgess; and as the notes (two) sued on were never in the hands of the defendant, but in the plaintiff's possession, the payment of them was not the matter about which the witness was testifying. The letters of the defendants, too, support the witness Burgess on that point.

On 14 December, 1892, several weeks after the lumber had been delivered to Burgess, the defendant Wall wrote to the company asking how much was due on the notes, and was informed that there were three notes unpaid, two of $100 each and one of $75. In reply to the letter containing that information Wall wrote that there had been some trouble about some knives belonging to the machinery not having been delivered, but that if the company would deduct $25 for the knives there would be no more trouble about the accounts.

But a series of letters from the company to the defendants, of dates 26 May, 1893, 30 June, 1893, 5 July, 8 July and 21 July, 1893, are sent to the defendants making demands for the payment of the three notes. These letters also show that the defendants were claiming payment in lumber to (352) Burgess. On 3 August following the defendants sent to the plaintiffs a check for $105.83, and asked that the same be placed to their credit on the machine bought from Burgess, and on 15 September following they sent $11.60 with the request to place the same on the machine bought from Burgess.

The testimony of the defendants, the correspondence between them and the plaintiffs, and the testimony of Burgess, all taken together, explain the whole transaction, and show that there is no evidence that any payment was ever made on the two notes sued on except the credit of $11.60 on the $100 note, either in lumber or in money. The first instruction asked by the plaintiffs ought therefore to have been given.

Error.

DAVIS v. SUMMERFIELD.

(Filed 25 November, 1902.)

ADJOINING LAND OWNERS — *Excavations — Lateral Support — Notice—Negligence—Damages.*

It is negligence to excavate by the side of the wall of an adjoining land owner without giving notice of the extent and plan of the proposed excavation.

ACTION by B. Davis against M. and C. Summerfield, heard by *Judge Walter H. Neal* and a jury, at March Term, 1902, of DURHAM. From a judgment for the plaintiff the defendant appealed.

Boone, Bryant & Biggs for the plaintiff.
Winston & Fuller for the defendants.

(353) CLARK, J. This is an action for damages caused by depriving the soil under plaintiff's wall of its lateral support, by negligence of the defendant while excavating for a new building on an adjoining lot. The right to lateral support has been before this Court in *Hammond v. Schiff*, 100 N. C., 161, and the whole subject is discussed in the very full and elaborate notes to *Larson v. R. R.*, 110 Mo., 234; 33 Am. St., 446, 447; 16 L. R. A., 330. Another full consideration may be found in Jones on Easements, secs. 585-631. There was evidence that the defendant made his excavation two feet deeper than the bottom of the foundation of the plaintiff's wall, causing it to crack and otherwise injuring the plaintiff's building. There was counter evidence, and the jury, as triers of the fact, found a verdict for the plaintiff and assessed his damages at $225.

The exceptions presented on the appeal are very numerous and were very fully and ably argued here, as doubtless they also were below. After careful consideration we find no material error. The only new point or proposition not heretofore decided, and the point perhaps most pressed on the argument, is the following instruction, to which the defendant excepted: "While there is evidence that the plaintiff knew that the defendant was going to excavate and build, for she testified to that herself, still the defendant owed to her the duty, which is not an unreasonable one, to tell her of the extent of his proposed plan so she might adopt measures for self-protection, if she chose to do so, and the court charges you there is no evidence that he gave proper notice to the plaintiff on the line above indicated. To give this notice involves no expense to the proprietor and affords opportunity to the adjoining owner to protect his rights, for improvements made by one proprietor may be attended with disastrous results, even when prosecuted by competent workmen." We see nothing unreasonable or erroneous in this instruction. So far from giving such notice,
(354) when the plaintiff sent over an employee, who said to the male defendant, "Mrs. Davis says please protect her wall, to dig it out in sections," he replied, "I know my business, let her attend to her business." And when in her anxiety about the safety of her building the plaintiff sent over another person to ask of the defendant "not to hurt her wall," asking that the work might be prosecuted in such a manner as not to endanger her building, the defendant very ungallantly sent the lady back word "to go to the devil."

The action is not for the defendant's rude speeches, it is true, but certainly after these messages from the plaintiff, showing her anxiety to protect her wall, he at least owed it to her, as his Honor charged, to give her notice of the manner and depth of his proposed excavations. If informed in that respect she might have placed supports under her wall or removed weights from the floors, or otherwise protected her property; or if plaintiff's plans seemed an illegal invasion of her rights she might, if so advised by counsel learned in law, have sought protection by an application for an injunction. The defendant's failure to give such notice and information was, under the circumstances, as injurious to the plaintiff as the manner of his refusal was wanting in credit to himself. Jones on Easements, sec. 610; *Spohn v. Dives,* 174 Pa. St., 474; 16 L. R. A., 330; 33 Am. St., at page 470.

The true rule deducible from the authorities seems to be that while the adjacent proprietor cannot impair the lateral support of the soil in its natural condition, but is not required to give support to the artificial burden of a wall or building superimposed upon the soil, yet he must not dig in a negligent manner to the injury of that wall or building, and it is negligence to excavate by the side of the neighbor's wall, and especially to excavate deeper than the foundation of that wall, without giving the owner of the wall notice of that intention that he may underpin or shore up his wall, or relieve it of any (355) extra weight on the floors, and the excavating party should dig out the soil in sections at a time so as to give the owner of the building opportunity to protect it and not expose the whole wall to pressure at once. The defendants did not give any notice of the nature of their proposed excavation, and the evidence justified the jury in finding them guilty of negligence.

Upon the whole case substantial justice appears to have been done, and we find no error requiring a new trial.

Affirmed.

Cited: S. c., 133 N. C., 325.

LEFLER v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 25 November, 1902.)

1. TELEGRAPHS—*Telegrams—Delivery—Agency—Negligence.*

Where a telegram to a person is addressed in care of a corporation, a delivery to an agent of the corporation is sufficient.

2. TELEGRAPHS—*Telegrams—Delivery—Agency—Negligence.*

Where a telegram to a person is addressed in care of a corporation, it is not the duty of the telegraph company to inform the agent of the corporation to whom it is delivered of its contents.

ACTION by Price Lefler and another against the Western Union Telegraph Company, heard by *Judge Thomas J. Shaw* and a jury, at May Term, 1902, of ROWAN. From a judgment for the plaintiffs the defendant appealed.

Overman & Gregory and *Long & Nicholson* for the plaintiffs.
Armfield & Turner, F. H. Busbee and *Geo. H. Fearons* for the defendant.

(356) FURCHES, C. J. Action for damages for negligence in delivering a message received at Mooresville, Iredell County, to be delivered at Salisbury, Rowan County.

The message was as follows:

"To Price Lefler, care So. Railway Co., Salisbury, N. C.
"Mother dying. Come at once.
"D. M. HOWARD."

This message was received by defendant company at 8:20 at Mooresville, and received at Charlotte at 10:55, and at Salisbury at 11:15. The evidence tended to show that the agent at Mooresville endeavored to send the message to Charlotte at once, but the agent at Charlotte did not answer his calls, and he could not do so sooner than he did. Upon the message reaching Salisbury it was at once delivered to Leroy Shuping, a messenger boy 16 years old, and who had lived at Salisbury all his life. He did not know Price Lefler, nor did he know where he lived, nor whether in Salisbury or not, and it would seem from the evidence that he made extensive search and inquiry for Lefler, the sendee, but was unable to find him. And this being so at 11:15 o'clock he delivered the message to Johnson, the ticket agent of the Southern Railway at Salisbury. This delivery to Johnson was in time for the plaintiffs to have gone to Mrs. Howard's before her funeral, if the delivery had been made to Price Lefler in person.

The discussion of this case has assumed a wide range, as the discussion of such cases usually does. But not to consider what is not necessary for a decision of the case the discussion is very much limited.

The message was delivered to Johnson in proper time, and eliminates the discussion of any negligence there may have been in sending the message, as no negligence can avail the plaintiffs that did not cause the injury. It also eliminates a discussion as to whether the messenger boy, Shuping, used due diligence in trying to find Price Lefler or not, who was not (357) in town at that time.

The court properly instructed the jury that Johnson was a proper agent of the Southern Railway Company, to whom a delivery of the message might be made, and a delivery to him was a delivery to the Southern Railway Company. And as the message was directed to Price Lefler in care of the Southern Railway Company, the said company was made his agent, and a delivery to the agent discharged the defendant from further liability on account of the message. *Tel. Co. v. Haughton,* 82 Texas, 561; 15 L. R. A., 129; 27 Am. St., 918; *Tel. Co. v. Young,* 77 Texas, 245; 19 Am. St., 751. These cases were cited by the plaintiffs for the purpose of showing that although the telegram was sent in care of the Southern Railway Company, it was still the duty of defendant to make diligent inquiry for Price Lefler, which the plaintiffs allege was not done. But upon examination of the cases it will be seen that this is only necessary when the party in whose care the message is sent cannot be found. When he is found and delivery made to him the defendant has nothing further to do with the telegram. In this case the messenger boy, Shuping, made extensive inquiry for Price Lefler before he delivered the message to the Southern Railway Company. This he need not have done, but might have delivered it to the Southern Railway Company at once. As the said company became the agent of the plaintiffs a delivery to it was a delivery to the plaintiffs. *Haughton's case, supra.* And we cannot see (outside of the statute) how the defendant incurred any liability for not informing the plaintiff's agent what was in the telegram. The plaintiff was then in possession of the message, and it could speak for itself.

If the defendant's messenger could have found Price Lefler and delivered the message to him that would have been a compliance with its contract and a discharge from any further liability. But it seems that a delivery to the (358) wife of Price Lefler might not have been a sufficient delivery. It would not have been a literal compliance with the

contract, but it would at least be a presumptive delivery and a question for the jury, and unless some reason was shown why it was not or should not be it would be held sufficient. Gray on Communications by Telegraph, sec. 23.

While the court charged the jury correctly that a delivery to the Southern Railway Company was a compliance with the contract, and a delivery to Johnson was a delivery to said company, it erroneously charged the jury that if they found from the evidence that a prudent man would have informed Johnson, when the message was delivered to him, that "it was a very important message," then it was the duty of the defendant to have done so, "and if it did not it was guilty of negligence." This was excepted to and was error. It was no part of the defendant's duty to inform the plaintiffs nor their agent what the telegram contained, and it had no right to inform any one else. For this error there must be a

New trial.

DOUGLAS, J., concurs in the result.

Cited: Hinson v. Tel. Co., 132 N. C., 466; *Gerock v. Tel. Co.*, 147 N. C., 10.

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(359)

TOWN OF GASTONIA v. McENTEE-PETERSON ENGINEERING COMPANY.

(Filed 25 November, 1902.)

1. GARNISHMENT—*Attachments—Contracts—Liens.*

The creditors of a contractor acquire no lien on funds in the hands of a town applicable to the contract between the contractor and the town, by garnishments served before the completion of the contract.

2. PRINCIPAL AND SURETY—*Contracts.*

A surety of a contractor is entitled to have funds in the hands of a town applicable to the contract between the contractor and the town applied in satisfaction of claims secured by the bond as against other general creditors of the contractor.

ACTION by the town of Gastonia and others against the McEntee-Peterson Engineering Company and the American Surety Company, heard by *Judge H. R. Starbuck* and a jury, at February Term, 1902, of GASTON.

A jury trial having been waived, the court having found the

facts as set out in the record, to which findings there was no exception except to finding No. 12. The action was originally brought by the town of Gastonia to recover upon a bond in the penal sum of $3,000, executed by the McEntee-Peterson Engineering Company as principal, and the American Surety Company as surety, to the town of Gastonia and its mayor and board of aldermen, *to indemnify and save harmless the obligees against loss or damage* on account of the construction of an electric lighting plant and waterworks pumping station by the engineering company, and *to secure the payment of all materials furnished and used and labor performed in the construction of said public works.* The engineering company, be- (360) fore entering upon said work, executed a written contract with the town, by which it stipulated to construct said works for $7,270, in accordance with the terms of said contract, and contemporaneous with and as a part thereof executed said bond as principal, with the surety company as surety, for the purposes above stated.

The work was completed according to contract and accepted by the town on 20 October, 1900, at which time there remained in the hands of the officers of the town a balance of $1,560.86 of the price agreed to be paid for said work, and the engineering company owed to the plaintiffs (other than the town and its officers) $3,907.64 for materials furnished to and used by the engineering company in constructing said work, no part of which has ever been paid.

On 18 October, 1900, the Post-Glover Electric Company instituted a civil action in the Superior Court of said county against the engineering company to recover the sum of $302.88 (an indebtedness *not* contracted for materials or labor used in or about said works), and caused a warrant of attachment to be issued therein, by virtue of which the sheriff of said county, on 19 October, levied upon said waterworks pumping station and electric lighting plant, as the property of said engineering company, and also served notice of garnishment upon the town and its officers of any funds in the hands of either belonging to or due the engineering company; and on the 20th of said month the Illinois Insulated Wire Company also instituted a civil action against the engineering company to recover the sum of $999.16 (for materials furnished to and used by the engineering company in constructing said works), and *likewise attached* and *garnisheed* the *same property* and *funds* levied upon in the Post-Glover case.

The town and its officers *filed answers* to the notices of garnishment in both cases, in *which they denied* that they owed

any debt or held any funds belonging to the engineering
(361) company *subject to garnishment,* having been *compelled* for that purpose to *employ counsel* to advise and represent them in said matters at the cost of $300.

Subsequently, on 8 February, 1901, the town of Gastonia, *alone,* instituted this action against the defendants for the purpose of adjudicating the rights and interest of the several parties claiming the balance of the funds in its hands as a part of the contract price for said work, and also to recover the penalty of said bond, to be discharged by the payment of $300 paid out by it in defending said garnishment proceedings, and the further sum of $3,907.64, the balance due for materials furnished as aforesaid, less the sum of $1,560.86, the balance of the original contract price for said work remaining in the hands of its officers. At June Term, 1901, of said court, upon affidavit and petition, the court permitted all the plaintiffs (other than the town of Gastonia) to become parties plaintiff in this action.

At the February Term, 1902, this action and the cases of the Post-Glover Electric Company and the Illinois Insulated Wire Company against McEntee-Peterson Engineering Company were, by consent and without prejudice, consolidated.

Upon the facts found the court gave judgment for the plaintiffs for the full penalty of the bond, to be discharged upon the payment of the "balance found to be due upon the said sum of $3,907.64 for materials furnished by the several plaintiffs above named, with six per cent interest from 23 October, 1900, until paid, after applying thereto the sum of $1,410.86, the balance remaining in the hands of the officers of said town of the contract price of said work, after deducting the sum of $150 paid out by it for legal services rendered as aforesaid."

The court also adjudged that neither the Post-Glover Electric Company nor the Illinois Insulated Wire Company acquired any lien "upon the tangible property levied upon by
(362) virtue of the warrants of attachment issued in said action or upon the alleged indebtedness of $1,650.86 of the plaintiff municipal corporation to the McEntee-Peterson Engineering Company, by virtue of the notice of garnishment served upon the officers of said town by the sheriff in said action." From this judgment the Post-Glover Electric Company and the Illinois Insulated Wire Company appealed.

R. L. Durham for the plaintiffs.
Burwell, Walker & Cansler for the defendants.

CLARK, J., after stating the case as above. The exceptions to the judgment of the court, holding that the attachment levied

upon the waterworks pumping station and electric lighting plant created no lien on the property, cannot be sustained. *Snow v. Commissioners,* 112 N. C., 335; *Vaughn v. Commissioners,* 118 N. C., 636.

It is true that in the case of an ordinary debt owing by a town to a third person the debt may be garnisheed, 1 Dillon Mun. Corp. (4 Ed.), sec. 101; but here the engineering company itself could not have recovered the fund until it had complied with its contract with the town by furnishing it with releases of all claims for material used in constructing the work, and the garnishers can have no greater claim against the town than the garnishees through whom it is sought to make the collection. And further, as this money was not due the engineering company at the date of the garnishment (the work not having been completed and accepted), and as the engineering company never did become entitled to demand the payment of said money, for the reasons above stated, the several creditors who gave the town notice of their claims for material furnished the engineering company thereby acquired a claim upon said funds, at least superior to any rights the garnishers acquired. Besides, the American Surety Company, hav- (363) ing become surety to the engineering company for the faithful performance of said contract, upon any default of its principal by which it became liable on said bond, if it did not become subrogated to the rights of its principal in this fund, it is at least entitled to have it applied to the payment of these claims for materials, in exoneration of its liability therefor. *Patton v. Carr,* 117 N. C., 176.

No error.

Cited: Hall v. Jones, 151 N. C., 425.

TOWN OF GASTONIA v. McENTEE-PETERSON ENGINEERING COMPANY.

(Filed 25 November, 1902.)

1. CONTRACTS—*Parties—Bonds—Beneficiaries—Laborers—Material Men.*

The beneficiaries of a contract, though not a party or privy thereto, may maintain an action thereon.

2. CONTRACTS—*Attorney and Client—Fees—Bonds—Municipal Corporations.*

Where a contractor executes an indemnity bond, guaranteeing a town against loss on account of the performance of the contract, the contractor and its surety are not liable on their bond for counsel fees paid by the town in defense of suits brought against the town by creditors of the contractor.

ACTION by the town of Gastonia and others against the McEntee-Peterson Engineering Company and the American Surety Company, heard by *Judge H. R. Starbuck* and a jury, at February Term, 1902, of GASTON. From a judgment for the plaintiffs the American Surety Company appealed.

The statement of case in the appeal of the Post-Glover Electric Company and Illinois Insulated Wire Company in (364) this case, *ante,* is a sufficient statement in this appeal.

Burwell, Walker & Cansler for the plaintiffs.
Julius C. Martin for the defendant.

CLARK, J. The defendant engineering company entered into a contract with the town of Gastonia to construct a waterworks and sewerage system and an electric lighting system in and for said town of Gastonia, and with its co-defendant, the American Surety Company of New York, entered into a bond to pay claims for materials used and work and labor done in the construction of said systems, and there is a balance due on said contract by the town of Gastonia, which is claimed by the said engineering company and also by persons who furnished material and performed work and labor in the construction of the said systems, under the contract between the town and the engineering company, the said balance being $1,560.86; and the other plaintiffs seek by this action to charge the other defendant, the American Surety Company, upon its indemnity bond for $3,000, given as aforesaid, for the amounts alleged to be due them for work and labor performed and materials furnished in the construction of said systems; and to the end that the amounts due for materials and labor may be determined all persons holding such claims were properly made co-plaintiffs.

The contract between the town of Gastonia and the engineering company contains the following:

"Section 1 of the contract provides that the contractor is required to furnish all materials and labor required in the construction of the public works embraced in said contract."

Section 5 provides that "the contractor further agrees that he will and, concurrent with this contract, does execute a bond in the penal sum of $3,000, in such form and with such sure-

ties as may be approved by the mayor and aldermen of (365) the town of Gastonia, conditioned to indemnify and save harmless said town and board from all suits . . . brought against said town or said board, or both, . . . for or on account of any injuries or damages sustained or received by any person, structure or property by or from said contractor, . . . or by or in consequence of any act or omission of said contractor, his servants or agents, and the faithful performance of this contract, and *for the payment of all material used and wages of all laborers employed by said contractor.*"

Section 10 provides that the said contractor hereby further agrees that it "shall not be entitled to demand or receive payment except in the manner set forth in this agreement, and further agrees that it will *produce full releases of all claims from all persons who have furnished machinery or labor for the work,* whenever the board may require it."

The bond executed by the surety company provides that "if the above bounden, the McEntee-Peterson Engineering Company, its heirs, executors, administrators, successors or assigns, shall *in all things* stand to and abide by and well and truly keep and perform the terms, covenants, conditions and agreements in such contract contained, on its part to be kept and performed, and each of them, at any time, and in the manner and form therein specified, then said obligation shall be null and void."

Though no mechanic's lien could be filed against the property in the hands of the town, it was competent for the parties to contract, and they did contract, that the engineering company should pay for "all materials used and wages of all laborers employed by said contractor," and the surety company became responsible for the execution of that stipulation. The engineering company has defaulted in this respect to an amount greater than the penalty of the bond executed against the American Surety Company, to-wit, in the sum of $3,907.64, for (366) material furnished by several parties who have been made co-plaintiffs in this action for the purpose of ascertaining and determining the amount of the indebtedness severally due them.

The town desired to know whether it should pay said balance to the engineering company, or (in view of the fact that it had stipulated with said company, and required surety, that the company should pay off all claims for labor and materials before calling on the town for settlement) whether it was not its duty to require compliance with this requirement in favor of the claimants for labor and material. Those claimants, being the beneficiaries of the contract, could have brought their separate actions on said contract against the engineering company and

its surety, and it was eminently proper and saves multiplicity of suits, the time of the court and unnecessary court costs, that they should be co-plaintiffs in this action, to the end that the entire matter should be settled and determined in one action.

In *Gorrell v. Water Co.,* 124 N. C., 328; 46 L. R. A., 513; 70 Am. St., 598, it was held, after careful consideration and full discussion, that the beneficiaries of a contract, though not a party or privy thereto, can maintain an action thereon. In that case the beneficiaries, the citizens of the town, were ascertained by reference to the nature of the contract, but in this case the contract is more specific and points out those who shall furnish labor or material as specially designated to be protected. The contract requires surety for such stipulation, and provides that the town cannot be called upon for settlement by the engineering company until receipts for such claims are furnished by the company. It was a wise, thoughtful and considerate provision, inserted by the town, requiring the engineering company, a nonresident
(367) corporation, to pay the labor and material men, who are usually residents of the town or vicinity, before it could claim any balance due on the work. This is just to such parties, whose amounts claimed for labor and material are usually small, and who should not be forced to attachment or other legal proceedings, when the town, whose funds are raised by taxation, can protect its own people by such a stipulation as this, requiring payment of these just claims before receiving the town funds, to be carried off where they cannot be reached. It would be well if every municipality which has public works executed should insert a similar provision in its contract, for the protection of labor and material men, who are usually its own citizens. Indeed, in this contract it is further provided that all labor employed shall be "home labor," except as to such skilled labor as could not be found there, thus showing throughout that the labor and material men are beneficiaries in contemplation of the contracting parties.

The proposition laid down, with citation of authority in *Gorrell v. Water Co., supra,* had been intimated, without actual decision in *Haun v. Burrell,* 119 N. C., at p. 548, and *Sams v. Price, ib.,* 572. It has since been expressly held in *Shoaf v. Insurance Co.,* 127 N. C., 308; 80 Am. St., 804, which holds that a policy holder in an insurance company can maintain an action for a loss on property covered by his policy against another company in which the first company reinsured its risks. In that case it was expressly stipulated that the contract was only effective between the two companies, and that no holder of a policy in the first company should be entitled to enforce the reinsur-

ance against the reinsuring company. But this Court held that, notwithstanding that stipulation, the policy holder was entitled to recover against the second company. In the present case the contract expressly stipulates who the beneficiaries are—the labor and material men. It is provided as one of the (368) considerations of the contract that they shall be paid and their receipts delivered to the town, the other contracting party, and the surety company stipulates for the performance of that condition. The contract requires this and some other matters absolutely, and the provision to save harmless the town is merely thrown in at the end as a careful saving clause to cover anything that may have been omitted—not to restrict or repeal any stipulations expressly made.

Gorrell v. Water Co., supra, has been cited as authority in *Lacy v. Webb,* 130 N. C., 545. It is amply sustained elsewhere. *Gorrell v. Water Co.,* 124 N. C., 328; 70 Am. St., at p. 605; 7 Am. and Eng. Enc. (2 Ed.), 104-110. Though there is some conflict of authority elsewhere, there is none in our decisions. This is necessarily the true doctrine wherever the statute, as in this State, requires the real party in interest to bring suit, and is the rule in equity also. 7 Am. and Eng. Enc. (2 Ed.), 110, notes 1 and 3. In *Lyman v. Lincoln,* 38 Neb., 794, the Court expressly held (citing authorities in a case "on all-fours" with the case at bar) that "the promise they (the contractor and surety) made to the city of Lincoln was for the benefit of all persons who furnished labor and materials used under said contract, and such persons could sue on said bond, and that an *express* statute was not necessary to give the city authority to require such a bond of the contractor, and that awarding the contract was sufficient consideration to support such promise, both by the contractor and his surety." This case has been repeatedly affirmed by the same court, notably in *Doll v. Crume,* 41 Neb., 655; *Morton v. Harvey,* 57 Neb., 304. The same principle has been enforced by the Supreme Court of Missouri in *Deavers v. Howard,* 144 Mo., 671; *School District v. Livers,* 147 Mo., 580; *St. Louis v. Von Phul,* 133 Mo., 561; 54 Am. St., 695, which says the town owes this duty to laborers to protect (369) them. To like effect have been the decisions in the Appellate Court of Indiana—*Williams v. Markland,* 15 Ind. App., 669; *Young v. Young,* 21 Ind. App., 509; *King v. Downey,* 24 Ind. App., 262. In Iowa, *Baker v. Bryan,* 64 Iowa, 561. And in California, *Union Works v. Dodge,* 129 Cal., 390. A leading case upon this subject is *Philadelphia v. Stewart,* 195 Pa. St., 309, which is reaffirmed in cases between the same parties, 198 Pa. St., 422, and 201 Pa. St., 526. The additional reason is

given in these last cases that the subcontractors for labor and material, not being able to file any lien against a city, and having no security beyond the doubtful solvency of the contractor, it is public policy that the city should, as in our case, stipulate for payment of the labor and material men to prevent the work being "scamped," or done by unworthy or unfit men. All of the above hold that such beneficiaries can maintain an action on the contract.

The former decisions of this Court (*Morehead v. Wriston,* 73 N. C., 398; *Peacock v. Williams,* 98 N. C., 324, and *Woodcock v. Bostic,* 118 N. C., 822) have not been overruled, and are readily distinguishable, in that there was no indication in the facts of those cases that the third party had a right to any benefit under the contract. As to them, the contract was *res inter alia acta.* In *Gorrell v. Water Co., supra,* from the nature of the contract, public waterworks, paid for by public money, it was apparent that the property of the citizens was to be protected. From the nature of the transaction in *Lacy v. Webb* and *Shoaf v. Ins. Co., supra,* it was apparent that those not parties to the contract were beneficiaries, though in the latter case there was a stipulation which attempted to bar the policy holder from bringing an action. In the present case, as we have said, the third party, the material and labor men, are especially referred to in the contract as beneficiaries thereof, and for
(370) their protection surety is required, and their payment by the engineering company is made a condition precedent before said company can call upon the town for payment.

His Honor properly gave judgment in favor of the material and labor men, plaintiffs herein, against the defendants, the engineering company and its surety, for the undisputed amount of their claims, after first applying thereto the balance due said engineering company by the town.

The judgment should be reformed, however, by striking out the credit of $150 allowed the town for counsel fees, expended in defending actions brought by the Post-Glover Electric Company and the Illinois Insulated Wire Company, to subject by garnishment the aforesaid balance of $1,560.86 to payment of indebtedness due them by the engineering company. It was simply the misfortune of the town that said actions were brought, and there is no stipulation in the contract of the engineering company or of the American Surety Company covering responsibility for counsel fees in defending an action of that nature.

As thus modified, the judgment of the court below is

Affirmed.

Cited: Voorhees v. Porter, 134 N. C., 603; *Jones v. Water Co.,* 135 N. C., 554; *Wood v. Kincaid,* 144 N. C., 395; *Hardware Co. v. Graded Schools,* 150 N. C., 681; *Hall v. Jones,* 151 N. C., 425; *Hardware Co. v. Graded Schools, ib.,* 509.

(371)

MOORE v. MOORE.

(Filed 25 November, 1902.)

1. DIVORCE—*Alimony Pendente Lite—Reduction—Motions—Venue.*

   A motion to reduce alimony *pendente lite* may be made anywhere in the district in which the action is pending.

2. DIVORCE—*Alimony Pendente Lite—Reduction—Motion—Jurisdiction—Laws* 1901, *Ch.* 28, *Sec.* 4—*The Code, Secs.* 335-337, 379.

   A resident judge holding court in another district cannot hear a motion to reduce alimony *pendente lite* in a suit pending in the district in which he resides.

3. DIVORCE — *Alimony Pendente Lite — Reduction — Motions—The Code, Secs.* 274, 1291.

   Where a motion to reduce alimony *pendente lite* has been disallowed, another motion for the same purpose should not be heard unless a different state of facts is shown and a receipt exhibited for a reasonable proportion of the allowance made at the former hearing.

ACTION by Jeannette G. Moore against J. H. Moore, heard by *Judge W. B. Councill,* at chambers, at Hickory, N. C., 26 July, 1902. From an order reducing alimony *pendente lite* in a divorce suit pending in ALEXANDER County the plaintiff appealed.

Long & Nicholson for the plaintiff.
A. C. McIntosh for the defendant.

CLARK, J. This is a motion for alimony *pendente lite,* which was before this Court, 130 N. C., 333. When the decision was certified down, the defendant moved, on 10 July, 1902, before *Judge Starbuck,* then holding by regular rotation of the courts of the Thirteenth Judicial District, in which this action is pending, to reduce the former allowance. This his Honor refused, rendering the judgment set out in the record. (372) Thereupon, on 26 July, 1902, the defendant renewed the

motion before *Judge Councill,* the resident judge of the Thirteenth Judicial District, but at that time in regular rotation, assigned to duty in the Fifteenth Judicial District, who reduced the allowance to $3,000, and the plaintiff appealed. Her first exception is that *Judge Councill* had no jurisdiction.

A motion for judgment on the merits or a motion in the cause, strictly speaking, can be heard only in the county where the action is pending, but a motion in an ancillary proceeding can be heard anywhere in the district, and this being a motion of that nature could be so heard. *Moore v. Moore,* 130 N. C., 334, and cases there cited. There is no defect of jurisdiction on that score, as the hearing was within the district. But under our rotating system the judge holding by rotation the courts of a district has, during the six months he is assigned thereto (Laws 1901, ch. 28, sec. 4), the sole jurisdiction therein (*S. v. Ray,* 97 N. C., 510, and numerous cases there cited) just as the resident judge had when there was no rotation (*Birdsey v. Harris,* 68 N. C., 92), except in the cases otherwise specially provided by statute, and those exceptions in civil cases are restricted to restraining orders and injunctions to the hearing (Code, secs. 335-337) and the appointment of receivers. Code, sec. 379. *Habeas corpus* proceedings are an exception also, but that is a prerogative writ. As to contempt proceedings they are criminal in their nature, for the governor can relieve from the judgment by virtue of the pardoning power. *Herring v. Pugh,* 126 N. C., at p. 862.

Judge Councill was, by virtue of the statute, judge at the time this motion was heard of the Fifteenth Judicial District, and having no jurisdiction in the Thirteenth Judicial District, in which he was resident, of any motion in a civil action (373) (*S. v. Ray, supra*) other than motions for restraining orders, injunctions to the hearing and for appointment of receivers, his judgment herein is therefore void.

The plaintiff further contends that *Judge Starbuck's* order of 12 July made this matter of reduction of the alimony *res judicata.* It is true that when a judge of the Superior Court has rendered an erroneous judgment the remedy is solely by appeal, and that another judge cannot modify or hold it erroneous. *Henry v. Hilliard,* 120 N. C., at p. 487. Such other judge can set aside a judgment at any time, if void or irregular, and may relieve a party from a judgment, within one year after notice of the judgment, for mistake, inadvertence, surprise or excusable neglect. Code, sec. 274. Code, sec. 1291, also provides that as to alimony *pendente lite* "such order may be modified or vacated at any time." In *Moore v. Moore,* 130 N. C.,

at p. 337, this Court expressed the opinion that the allowance was a large one, but held that it was "not so gross as to be an abuse of discretion," and hence if the motion for a modification should be refused no appeal would lie, certainly it would not unless an entirely new state of facts were developed on the new motion, and found by the judge, which would render such refusal an abuse of discretion. *Judge Starbuck* heard and refused the motion to modify 11 July, 1902, and no appeal was taken, and the order of *Judge Councill,* making a reduction 26 July, 1902, was void for want of jurisdiction. We will not say that if a new state of facts is presented on a new motion to reduce the allowance that the judge holding the courts of the district would not be authorized to consider and pass upon it. As no appeal lies, for reasons stated *supra,* such motion will not cause appreciable delay and can hardly be deemed vexatious, as each judge holds jurisdiction in a district for six months, and in that time the allowance can be collected by enforcement of the judgment. Indeed, the motion does not suspend execution of the judgment. That is suspended only by an appeal, (374) when an appeal lies and a proper bond is given.

The granting of alimony *pendente lite* is given by statute for the very purpose that the wife may have immediate support and be able to maintain her action. It is a matter of urgency. Therefore, to avoid delay by appeal, the amount is left to the discretion of the judge, and his action cannot be reviewed unless in a clear case of abuse of discretion. This imposes on the judges of the Superior Courts the duty of being moderate in their allowances of alimony, because the fact whether the wife has a good cause of action has yet to be passed upon by a jury. On the other hand an appeal (except in a clear case of abuse of discretion) is not allowable, and the plaintiff should not be vexed nor delayed of the support the statute and the judgment give her by successive motions for reduction. Unless there is a material change in condition or evidence showing a different state of facts no motion for a reduction should be made, and even then it should be peremptorily dismissed unless accompanied by a receipt for so much of the sum allowed as is reasonably a fair proportion of the allowance in accordance with the pecuniary condition of the defendant, as alleged in the motion to reduce, compared with his pecuniary worth, as found by the judge who granted the first order.

As there was no appeal from *Judge Starbuck's* order 12 July, 1902, refusing a reduction, and we cannot consider the findings of fact on *Judge Councill's* order granting a reduction on 26 July, 1902, since he was without jurisdiction, we cannot say

that there are not facts which may not now authorize a renewed motion before a proper judge; but such reiterated motions are not seemly and may be easily vexatious and oppressive. The judge should not entertain or consider another motion unless accompanied by a receipt for the payment of whatever
(375) part of the allowance already made as justice to the plaintiff and her necessities require, as above stated.

Motion dismissed.

LANE v. RANEY.

(Filed 25 November, 1902.)

1. INSURANCE—*Agency—Notice—Commissions.*

Where one of two local agents claims half the commission on an insurance policy, the general agent is not liable for such claim if he had paid the commission to the one forwarding the application without knowledge of the claim.

2. INSURANCE—*Agency—Notice—Commissions.*

A local insurance agent is not bound by a rule of the general agent as to payment of joint commissions, of which rule he had no knowledge.

3. INSURANCE—*Commissions—Evidence.*

The evidence in this case shows that the trial judge erred in calculating the commissions due a local agent on an insurance policy.

ACTION by S. H. Lane against R. B. Raney, heard by *Judge F. D. Winston* and a jury, at February Term, 1902, of CRAVEN. From a judgment for the plaintiff the defendant appealed.

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

DOUGLAS, J. This is an action brought to recover commissions alleged to be due for obtaining a certain policy of insurance. There appears but little contradiction in the testimony.

The defendant, as State agent of the insurance company,
(376) employed the plaintiff as a local agent to solicit applications in the county of Craven, "subject to existing agencies and such others as may be established therein." This contract does not pretend to give the plaintiff the exclusive right to solicit business in Craven County, and therefore we see

no reason why the defendant could not send Martin or any other agent to solicit applications in the same territory, either in conjunction with or independently of the plaintiff. If the application for insurance had been sent on by the plaintiff or he had had exclusive control of said territory, it would have been the duty of the defendant to have settled with him for the commissions. But there was no such exclusive control, and the application was witnessed and forwarded by Martin without any notice to Raney, direct or indirect, that Lane had any connection with the application, nor was there anything to put Raney upon notice. To all appearances the application was Martin's alone, and if Raney in good faith paid the full commissions to Martin, without any notice of Lane's claim, he fulfilled his obligations. We do not mean to say that such notice must have accompanied the application, but it must have been given actually or constructively before the commissions were paid to Martin. The trouble is, we can find no evidence in the record that Raney has ever paid the commissions to any one. The case seems to have been tried upon the theory that he had paid them to Martin, or allowed them on settlement, before he had any notice of Lane's claim; but no one has so testified as far as appears from the record.

The defendant asked the following instruction exclusive of the words in parenthesis, which were added by the court, to-wit: "If the jury should believe that Raney made full settlement of the commissions on the Guion policy with Martin before Lane notified Raney that he was claiming any part of the commissions of same, or made any demand therefor (and the rule was in existence, and Lane knew of the rule, or ought (377) to have known of it from his business dealings), that the plaintiff would not be entitled to recover." This prayer might have been refused on the ground that there was no evidence to sustain it, but as given there was error. Under the circumstances of this case Raney was entitled to notice irrespective of any private rule he may have made, and therefore his liability should not have been made to depend upon Lane's knowledge of a rule that was immaterial. If there had been any evidence of payment to Martin then the instruction should have been substantially given as requested by the defendant.

There are other exceptions by the defendant as to the effect of the defendant's private rules, which have no merit whatever, as the following, for instance: "The judge erred, first, in charging that Lane must have knowledge of the rule to be bound by it. He should have charged if Raney had such rule then Lane

cannot recover." In this respect his Honor's charge was entirely proper.

The last exception, we think, must be sustained upon the testimony in this case. It is thus stated in the record: "The judge erred also in the charge when he states if Guion took out the policy and paid the company $175 then Lane can recover $43.75 unless, etc. The error is in charging the amount that Lane is entitled to recover, if anything. According to the contract Lane could not be entitled to more than fifty per cent of the first premium. From the evidence Guion had made application for a twenty-payment life, whose annual premium was $175. The company issued a twenty-year endowment, whose annual premium was $253.80. The agent must settle with the company by paying fifty per cent of the first annual premium to the company for the policy. This policy, from the evidence, could not be delivered to Guion except upon the reduction of the first annual premium from $253.80 to $175. The
(378) agent's settlement with the company must have been by paying over to the company $126.90 upon the endowment policy, which being deducted from the $175, money actually received, would leave commissions of $48.10, of which, according to plaintiff's contention, he would not have been entitled to but one-half of this, to-wit, $24.05."

If the evidence of Raney and Martin is to be believed the commissions on Guion's policy were only $48.10, only half of which would belong to the plaintiff, if he were entitled to recover at all.

New trial.

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(379)

WESTFELT v. ADAMS.

(Filed 25 November, 1902.)

1. EJECTMENT—*Pleadings—Equity.*

Ejectment may be brought to recover land on an equitable title, though no facts constituting the equity are alleged in the complaint, where a court of competent jurisdiction would order a correction of the defect in an *ex parte* proceeding.

2. DEEDS—*Seal—Evidence—Title—Bankruptcy.*

A deed of an assignee of a bankrupt is competent evidence as a link in a chain of title to land, though not sealed, where the bankruptcy proceedings shows the authority of the assignee to execute the deed.

3. DEEDS—*Acknowledgment—Probate—Seal—Registration.*

The certificate of probate to a deed need not have a seal if not required by statute at the date of the execution or registration of the deed.

4. EVIDENCE—*Hearsay—Declarations—Ejectment—Boundaries.*

The declarations of a deceased person are admissible to establish a corner of a tract of land, which is not in view at the time of the declarations, but the position of which was afterwards identified by other witnesses.

5. EVIDENCE—*Reputation—Boundaries.*

In an action involving a disputed boundary, general reputation as to the boundary is not competent evidence where such reputation did not arise before the beginning of the suit.

ACTION by G. R. Westfelt and others against W. S. Adams, heard by *Judge George A. Jones* and a jury, at July Term, 1901, of SWAIN. From a judgment for the plaintiff the defendant appealed.

F. A. Sondley and *Julius C. Martin* for the plaintiffs.
Merrimon & Merrimon, Shepherd & Shepherd and *J. J. Hooker* for the defendant.

MONTGOMERY, J. Four questions of importance are (380) involved in the case on appeal: First, the propriety of an action to recover possession of land where the title is an equitable one, the equity not being stated in the complaint; second, the legal effect of a conveyance for land, not being under seal when introduced as a link in the chain of title; third, the rule concerning hearsay evidence as applicable to boundary; and fourth, the rule in reference to general reputation as to boundary.

It seems to be settled by the decisions of our Court that a plaintiff may recover in ejectment upon an equitable title. *Taylor v. Eatman,* 92 N. C., 601; *Condry v. Cheshire,* 88 N. C., 375; *Geer v. Geer,* 109 N. C., 679. In cases, however, where it is necessary to establish equitable ownership by extrinsic testimony, then the facts and circumstances should be particularly set out in the complaint. Under the former system, in cases where it became necessary to resort to the court of equity to recover possession of land, all the facts necessary to establish the equity and to warrant equitable interference were required to be set out in the bill. And under the present practice, in conformity to the old practice, they must be particularly set forth in the complaint. But where the naked legal title is outstand-

ing in another, or where, upon the face of the record evidence introduced on the trial, a court of competent jurisdiction would, in an *ex parte* proceeding, and, as a matter of course, order the correction of a mere formal defect in a deed; for instance, it is not necessary to set forth the particular facts constituting the equity in the pleadings. *Geer v. Geer, supra.* And that view is not inconsistent with *Patterson v. Galliher,* 122 N. C., 511, and the cases there cited. Of course, the same rule would apply in cases where the defendant was defending his possession.

In respect to the second question—the legal effect of deeds not under seal—of course, the general rule is that they con-
(381) vey nothing and are void. Land can only be conveyed by deed, and a deed is an instrument of writing, signed, sealed and delivered. But there is an exception to the rule, or, at least, one instance in which the lack of a seal may be dispensed with, under a decision of this Court—a decision which meets our hearty approval—*Geer v. Geer, supra.* There the deed was without seal. On the trial the plaintiff introduced evidence in the nature of a record of the Superior Court concerning a sale of land for partition. The clerk of the court, who was appointed to sell the land and convey the same to the purchaser, omitted to put a seal at the end of his name, and the Court held that, "Where, upon the face of the record, evidence like that before us, the court would in a direct proceeding, as a matter of course, order the correction of a mere formal defect in the execution of its decree, it is unnecessary (though perhaps better practice) to set forth the facts in the proceeding."

In the case before us there appeared no seal to the deed, which formed a main link in the chain of the plaintiff's title, and in his complaint there were no equities set out. The plaintiff, however, introduced in evidence the full record of the bankruptcy proceedings on the petition of E. H. Cunningham, filed on 26 May, 1868. That record showed the appointment, by the proper authority, of F. S. H. Reynolds, of Buncombe County, as assignee of the bankrupt; and the deed in question, in which was conveyed the land in dispute, was executed by Reynolds, the assignee, to George Westfelt, the plaintiff. We are of the opinion that the same rule ought to be applied here that was applied in *Geer v. Geer, supra.* Certainly the United States District Court, through which the administration of the Bankrupt Law of 1867 was conducted, would, upon the inspection of the records introduced in this case as evidence, upon motion, order a commissioner appointed by the court to execute a
(382) deed with a seal, the defect in the original being merely technical and formal.

Under the circumstances of the case, we think there was no error in the ruling of his Honor that the deed was sufficient to pass title. Probate of the deed was had in Buncombe County, and the land was situated at that time in the county of Macon, and afterwards embraced in the territory of the new county of Swain, formed in 1871 (Laws 1870-'71, ch. 94). The officer who took the probate in Buncombe County did not attach his seal to the certificate; and when the registry of Swain County was introduced by the plaintiff, the defendant objected, because the certificate of the probate officer of Buncombe County was not made under that officer's seal. The probate was dated 1 May, 1869, and was registered in Swain County on 16 September, 1881. At neither date did the laws require the certificate to be accompanied by the seal of the probate officer. Laws 1868-'69, ch. 64; Batt. Rev., ch. 35, sec. 5; *Holmes v. Marshall,* 72 N. C., 37.

The third and fourth questions for consideration can be discussed together.

The beginning corner of the tract of land claimed by the plaintiff was the chief matter in dispute. In *Dobson v. Finley,* 53 N. C., 495, in the discussion of the admissibility of evidence by general reputation and of hearsay, *Chief Justice Pearson,* for the Court, said: "It is settled law that both kinds of evidence are competent evidence of private boundary in this State. In the latter, to-wit, hearsay evidence, it is necessary, as a preliminary to its admissibility, to prove that the person whose statement it is proposed to offer in evidence is dead; not on the ground that the fact of his being dead gives any additional force to the credibility of his statement, but on the ground that if he be alive he should be produced as a witness; whereas it is manifest that, in respect to evidence by reputation, this (383) preliminary evidence cannot arise. *Shaffer v. Gaynor,* 117 N. C., 15.

In the case before us, his Honor admitted the testimony of two witnesses (Cable and Francks) as to the beginning corner of the plaintiff's land, who got their information from persons deceased, the witness not having been at the time of receiving his information at or near the boundary beginning, but twenty-five or thirty miles away; that is, that the corner or the beginning was not pointed out to the witness by the deceased person. Those particular witnesses had never afterwards actually identified the boundary as fitting the description given by the deceased declarant. *Other* witnesses, however, testified that they found a tree at the alleged beginning corner answering the description given by the deceased to the first witnesses. If the beginning cor-

ner had not been afterwards identified, then the testimony of Cable and Francks would have been inadmissible. Because it was afterwards found, we think it was competent.

In *Scoggin v. Dalrymple,* 52 N. C., 46, the Court said: "The precise point, and the only one presented in the bill of exceptions, is whether the declaration of a deceased person is admissible to establish a corner tree which is not in view at the time of the declaration, but the position of which is *described* by the declarant *so* that it is found by *a* witness." (Italics the writer's.) The testimony was held to be admissible. The hearsay becomes definite by the aid of the witness who, following the direction given, finds the tree; and while it might be considered as of doubtful admissibility, disconnected from the evidence of the living witness, yet, aided by that, it seems to us clearly competent. We do not wish to be understood as laying down a rule that declarations of deceased persons as to corner or line trees not in view would be incompetent; that might depend upon whether their positions were so defined by the declarant
(384) as to make it practicable to identify them or prove their location to the satisfaction of the court and jury. The point before us is whether the hearsay evidence offered, connected with the other testimony giving it definiteness, was properly left to the jury, and that only we undertake to decide. The force of the proof would, of course, depend upon the identification of the tree found with the tree meant by the deceased, which was properly submitted, as a matter of fact, we suppose, to the jury."

We think that the testimony was competent, although *the* witness to whom the declarant made his statement was not the witness who afterwards identified the boundary. It is not so much *which* witness afterwards found the corner as it is the description which the declarant gave of the corner which enabled it to be found.

His Honor allowed two witnesses to testify that, by general reputation, the chestnut tree claimed by the plaintiff was the beginning corner. They said they had never heard anything about that tree being the beginning corner until after the year 1886. The land was entered and surveyed in 1860, and this action was commenced in 1891.

We are of opinion that the evidence of the witnesses on general reputation ought not to have been received, for two reasons: first, it was too recent, and, second, it had not attached *ante litem motam.*

There were only about five years elapsing between the time when Westfelt went to the corner, which he claimed as the be-

ginning corner of his land, with the entry taker of the county and a surveyor, to identify and ascertain the beginning corner, and the commencement of this action. Surely that was too short a time in which traditionary or general reputation evidence could be said to attach. *Deaver v. Jones,* 119 N. C., 598. Tradition and general reputation, in common sense and in law, must mean that which is derived from the declarations of those who lived or were living at a time, if not ancient, at least comparatively remote.

It is clear, from reading the whole evidence, that the (385) plaintiff did not know, in 1886, where his lines were. As we have said, the land was entered and surveyed in 1860. It was then surveyed again in 1877 by the deceased surveyor, McDowell. It was surveyed again in 1886, at which time Westfelt, a surveyor, and the entry taker, were unable to make a starting point in the survey until they had sent back and got McDowell, who had made the survey in 1877, to join them. It was again surveyed in 1891. Surely, then, a survey made by the plaintiff in 1886, in which he settled his own beginning point, under all the circumstances shown in the evidence, ought not to be allowed to fix by reputation the boundaries of his land. The ground on which such evidence is admitted at all is that "the declarations are the natural effusions of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." There cannot be entire indifference in a community about matters over which there is a controversy; for, as a rule, in disputes, men take one side or the other; and if they desire to be entirely impartial, they may not see facts through a true medium. In the first volume of Greenleaf on Evidence, at section 132, the author writes on this subject: "To avoid, therefore, mischiefs which would otherwise result, or *ex parte,* declarations, even though made upon oath, referring to a date subsequent to the beginning of the controversy, are rejected. This rule of evidence was familiar in the Roman law, but the term *"lis mota"* was there applied strictly to the commencement of the action, and was not referred to an earlier period of a controversy. But in our law the term *"lis mota"* is taken in the classical and larger sense of *controversy,* and by *lis mota* is understood the commencement of the controversy, and not the commencement of the suit."

For the error in the admission of the evidence on gen- (386) eral reputation there must be a new trial.

In the discussion of the case we have felt called upon to consider the other questions involved in the case on appeal, feeling

certain that they would be raised again in the course of the next trial, and that counsel may know our views on them.

New trial.

Cited: Cowles v. Lovin, 135 N. C., 491; *Yow v. Hamilton,* 136 N. C., 359; *Hemphill v. Hemphill,* 138 N. C., 506; *Bland v. Beasley,* 140 N. C., 631; *Lumber Co. v. Triplett,* 151 N. C., 412.

BRISCOE v. YOUNG.

(Filed 2 December, 1902.)

1. WATER AND WATER COURSES—*Diversion—Damages.*

Where a person diverts water from a stream by cutting a channel from it, and at a point lower down the stream turns it back into the old channel, and by its own momentum it is carried on to the lands of an adjoining owner, he is liable for damages.

2. EVIDENCE—*Water and Water Courses—Diversion—Damages.*

In an action for damages to land from diversion of water, it is competent to show the difference in value of land before and after the injury.

ACTION by Alice Briscoe and others against N. Young, heard by *Judge F. D. Winston* and a jury, at June (Special) Term, 1902, of RUTHERFORD. From a judgment for the plaintiffs the defendant appealed.

No counsel for the plaintiffs.

S. Gallert and *Busbee & Busbee* for the defendant.

DOUGLAS, J. We are compelled to say that we find great difficulty in understanding this case from the pleadings and the evidence. The map that was used on the trial below has not been sent up. Whether it would have enlightened us, or not, we do not know.

(387) Here, and below, the defendant demurred *ore tenus* to the complaint as not setting forth a cause of action. Although some parts of the complaint are somewhat unintelligible, we think that, as a whole, it does state facts constituting a cause of action, and perhaps more than one. Section 4 of the complaint is as follows:

"That the defendant, in the early part of the year 1901, negligently and wrongfully proceeded to cut a canal, from one-fourth

to one-half mile in length, commencing at a point about ------ yards above where plaintiffs' and defendant's lands join, and emptying into the old channel of the creek at a point about ------ yards below the upper line of plaintiffs' land, and, by reason of said canal, did wrongfully divert the water from plaintiffs' land, and did cause the old channel or creek run to fill up with mud, sand, brush and other obstructions, and did thereby greatly damage the plaintiffs' land by sobbing and rendering totally unfit for cultivation some twenty or twenty-five acres of the most productive part of the plaintiffs' bottom land."

We do not see how diverting water *from* a man's land would tend to flood it, nor how such diversion would fill up the old channel with mud, sand and brush. How did the sand and brush get there if there was no water to carry them? Such a condition would more likely be the result of a freshet, for which the defendant might not be responsible. We must bear in mind that the defendant is responsible only for the damages resulting from his unlawful diversion of water, and not for such as are caused by a freshet or other circumstances beyond his control, except to the extent to which his unlawful act may have contributed thereto. The clearing-up of our lands is constantly increasing the number and violence of freshets in two ways—by permitting the water to run off the land more rapidly, and by filling up the stream with sand. Occasionally freshets are so great as to cover the entire bottom lands; and, under such circumstances, ditches, whether lawful or unlawful, add (388) nothing to the result. In fact, they are usually filled up, unless their direction and fall are such as to enable them to clean themselves with the receding waters.

Water may be diverted in two ways, which are somewhat different in their results and in the legal principles by which they are governed. The first, which has been more frequently before this Court, is where a ridge or natural watershed has been cut through, so as to change the entire direction of the waters beyond and bring them where nature never intended them to go. *Mullen v. Canal Co.,* 130 N. C., 496, and cases therein cited. The other form of diversion is where the current of the stream is changed without turning into it any waters that would not naturally have gone there. Where both the natural and the artificial channels are on the defendant's own land, we do not see how he would be liable. *Mizell v. McGowan,* 129 N. C., 93; 85 Am. St., 705.

But where the natural channel is the boundary line between adjacent proprietors, different questions arise, some of which are not necessarily involved in this case.

If, under the circumstances, the defendant cut the new channel into the old, at a right angle, so that the water would be carried by its own momentum across the channel and onto the plaintiffs' land, he would be liable for the resulting damage. If the cutting of the new channel did in fact cause the obstruction of the old, and the defendant turned the water back into the old channel without removing such obstructions, we see no reason why he should not be liable for the damage resulting from his own neglect. We think such facts are sufficiently alleged in the complaint, and that there was evidence tending to sustain them. The demurrer to the complaint and the motions to nonsuit were properly refused.

The exceptions to the evidence cannot be sustained. There is no reason why the witnesses should not testify to the dif-
(389) ference in value of the land before and after the injury. The difference in productiveness is merely one of the elements affecting its value.

There is an exception to the introduction of a letter from G. C. Briscoe to Young, but, as neither the letter nor its essential purport appears in the record, we are unable to say there was error.

Nearly all the defendant's special prayers were given, and there is nothing in his Honor's charge to which he can rightfully except. As we see no error in the trial of the action, the judgment is

Affirmed.

Cited: Craft v. R. R., 136 N. C., 51.

TATE v. MUTUAL BENEFIT LIFE INSURANCE COMPANY.

(Filed 2 December, 1902.)

INSURANCE—*Policy—Premium—Dividends—Extended Insurance.*

The amount of a certificate of indebtedness given in part payment of an insurance premium is properly deducted from the accumulated profits before their application to an extension of the policy where the policy provides that the net reserve, less any indebtedness to the company on the policy, shall be applied to the extension of the policy.

DOUGLAS, J., dissenting.

TATE *v.* INSURANCE CO.

ACTION by Sarah A. Tate against the Mutual Benefit Life Insurance Company, heard by *Judge F. D. Winston* and a jury, at June (Special) Term, 1902, of RUTHERFORD. From a judgment for the defendant the plaintiff appealed.

McBrayer & Justice and *E. J. Justice* for the plaintiff.
Burwell, Walker & Cansler for the defendant.

FURCHES, C. J. This action is prosecuted to enforce (390) the collection of an insurance policy, issued to C. L. Tate on 16 December, 1890, for the benefit of the plaintiff. The annual premium on this policy was $24.42, to be paid on 16 December of each succeeding year, which payment continued the policy for one year from the date of said payment, at which time the policy became void if the premium was not paid. But it was a mutual beneficiary association, in which the assured participated in the profits, and when a policy became forfeited for the nonpayment of premiums, if there were accumulated profits belonging to the assured, they were applied to the payment of such premiums, and gave the assured the benefit of an extension of the policy for such time as the accumulated profits paid for. But it gave him no right to participate in the accumulations after the forfeiture for nonpayment.

The last payment of premiums was on 16 December, 1893, which continued the policy, with all its benefits, until 16 December, 1894, when the next premium became due. At that time there was due the assured from the accumulated profits (called the reserve) the sum of $41.36. This amount, if applied to the payment of premiums, would have extended the policy until after the death of the assured.

But the policy contained other terms and conditions which have to be considered. It allowed a party to insure by payment in cash of seventy per cent of the premium and the other thirty per cent in a certificate of indebtedness to the company, and this policy was taken out on that plan. It is claimed by the defendant that these certificates of indebtedness should be deducted from the $41.36 of accumulations, and only the balance, after deducting this indebtedness (and some other expenses which we do not discuss lest it might produce confusion), should be applied to extending the policy. And it is admitted that if this is done the time of extension had expired (391) before the death of the assured. So this is the question and forms the contention between the parties, and makes it a question of law depending upon the construction of the policy.

It has been held in *Insurance Co. v. Dutcher,* 95 U. S., 269,

in an action on a policy very much like the one under consideration in that respect, that the notes or certificates of indebtedness to the company for the thirty per cent of the premium were payments to the company, and so we hold in this case. And if the policy in other respects was like the one involved in *Insurance Co. v. Dutcher* we would hold that the plaintiff should recover, and reverse the judgment appealed from. In that case, as the defendant does in this case, the insurance company sought to have the surplus applied first to the payment of the premium notes due it, and only the balance applied to the extension of the policy. But the Court in that case refused to allow that to be done for the reason that it was not provided for in the policy.

But the insurance company, since that decision and before the policy sued on was taken out, had changed the wording of its policies, and as it seems to us the provisions of its policies (this policy), so as to meet the difficulty pointed out in the case of *Insurance Co. v. Dutcher, supra.*

It is provided in this policy that these notes or certificates of indebtedness, given in part payment of premiums, shall be a lien on the policy, and only "the net reserve less any indebtedness to the company on the policy" shall be applied to the purchase of a nonparticipating policy, that is, to the extension of the policy. This, it seems to us, distinguishes it from *Insurance Co. v. Dutcher,* and this view is fully sustained in *Bank v. Ins. Co.*, 84 Fed., 122.

The defendant in this case being the same defendant as in that case, and the policy there sued on being the same as
(392) the one sued on in this case, the court below so held, and, as we fail to see the error complained of, the judgment is

Affirmed.

DOUGLAS, J., dissenting. I cannot concur in the opinion of the Court because I am not certain that the facts have been understood. It is true the policy provides that any indebtedness of the assured to the company shall be a lien on the policy and may be deducted from the reserve. But are the deferred premium notes an actual indebtedness? I doubt it. All old line companies stipulate for premiums largely in excess of what is reasonable or necessary, with a view to their reduction by so-called dividends. These dividends are no part of the surplus or reserve, but are payable annually to the assured, either in cash or by allowance in reduction of premiums. For instance, the stipulated annual premium on one of my life policies is $198.90, while this year's dividend amounted to $54.40, reducing

the net amount of premium I was compelled to pay to $144.50. The reserve is entirely distinct and is kept intact until the payment or expiration of the policy. In the latter event it may be used under certain conditions for paid-up or extended insurance.

I am under the impression that in the case at bar the assured was permitted to give his note for thirty per cent of his premium in lieu of dividends, with the expectation on both sides that the accruing dividends would pay the notes without recourse upon the assured. If this is true and the notes have been or should have been paid by the accruing dividends, they are no longer an indebtedness, and cannot be deducted from the reserve. This would leave the entire reserve belonging to the policy in a condition to be used for its extension. The defendant is said to be a mutual company, but the policy in dispute is apparently based on "old line" methods. It is certainly not upon the assessment plan.

If these facts are true, and I am free to say they are by no means clear, it would be a gross imposition upon (393) the assured to permit the defendant to charge up against the surplus notes wholly or partially paid from the dividends, and thus defeat the entire policy of insurance.

JUSTICE v. GALLERT.

(Filed 2 December, 1902.)

1. INSTRUCTIONS—*Oral—Judge—The Code, Sec.* 415.

The trial judge may disregard an oral request for instructions.

2. INSTRUCTIONS—*Appeal—Case on Appeal—The Code, Sec.* 414.

A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal.

3. INSTRUCTIONS, PRAYER FOR.

An omission to charge on a given point is not error, unless there is a prayer to instruct thereon.

4. EXECUTORS AND ADMINISTRATORS — *Claim — Filing — The Code, Sec.* 164.

The admission of the validity of a claim by an administrator, where presented within proper time, dispenses with any formal proof thereof.

JUSTICE *v.* GALLERT.

ACTION by M. H. Justice, executor of Emily Forney, against Solomon Gallert, administrator of J. A. Forney, heard by *Judge F. D. Winston* and a jury, at June (Special) Term, 1902, of RUTHERFORD. From a judgment for the plaintiff the defendant appealed.

Eaves & Rucker for the plaintiff.
McBrayer & Justice for the defendant.

(394) CLARK, J. The appellant properly concedes that "the requests for instruction having been oral his exception for failure to charge as asked cannot be sustained. The statute is explicit that "the judge may disregard them." Code, sec. 415.

There was no request for the judge to put his instructions in writing (Code, sec. 414), and the case on appeal states that he did not do so, but that he jotted down some disconnected notes of his charge, in which notes, as written, it appears that he instructed the jury on a certain state of facts to answer "Yes," which was erroneous; but the judge states in the case on appeal that in fact he told the jury upon that state of facts, if found, to answer "No." The charge was not handed to the jury, and the material matter is what was said to them, and we are bound by the judge's statement of fact. The counsel for the appellant, in a letter to the judge, incorporated in the case, says he has no personal recollection how the judge stated it to the jury, and that if he said "Yes" he is satisfied it was a clear inadvertence. As the judge said to the jury "No," the inadvertent entry on his notes "Yes" could do no harm. If the charge containing the word "Yes" had been handed to the jury (Laws 1885, ch. 137; Clark's Code, 3 Ed., sec. 414) this would have been reversible error, though the judge had orally said "No," and this though the "Yes" in the written charge was a mere inadvertence. Again, if the charge had been written out at request under Code, sec. 414, it should have been signed and filed with the clerk. This would have made it "part of the record," and this would control any statement in the case on appeal. *S. v. Truesdale,* 125 N. C., 696.

It was not error to omit to charge the jury as to the length of time that would be a statutory bar. An omission to charge on a given point is not error unless there is a prayer to instruct the jury thereon. Clark's Code (3d Ed.), p. 514, and numerous cases there collected. Besides, the case on appeal states:

(395) "The case was presented to the jury by both parties on the question of the statute of limitations, on the ground that if the defendant administrator had recognized the claim

it was not barred, and if he had not that it was barred, and this the court explained to the jury." So there was no dispute as to the length of time.

The court instructed the jury: "If Mrs. Forney presented this claim to the administrator and demanded payment, and he admitted that the amount was due and promised to pay it, you will answer the issue 'No.'" And further: "The recognition of the amount by the administrator must be positive and unconditional." The defendant excepted on the ground that there was no evidence to support these hypotheses. Upon that exception we need consider of course only the evidence for the plaintiff. R. F. Tate, son-in-law of the plaintiff's testatrix, testified that within a year after the qualification of the defendant as administrator he heard the defendant tell Mrs. Forney (plaintiff's testatrix) that when he could get the money he would pay her; that this promise was made in reference to this money; also, that the defendant had made him the same promise six or eight months after the death of the defendant's intestate, and that the defendant then stated that he knew that his intestate had the money (alleged to have been deposited with him by plaintiff's testatrix), and that it was a mystery to him what became of it. There was no dispute as to the amount. The controversy was as to whether the administrator had so acted as to bar the running of the statute.

This was sufficient evidence to go to the jury. In *Stonestreet v. Frost,* 123 N. C., at pages 646 and 647, it is said that it is a sufficient "filing," under the Code, sec. 164, when the claim is presented within the proper time to the personal representative and he acknowledges the validity of the debt. "The creditor can never compel the administrator to 'string' the claim. He has done his part when he has presented it to the ad- (396) ministrator with sufficient certainty as to the nature and amount of the debt, and the admission of its validity by the administrator dispenses with any formal proof thereof. When he admitted the validity of the judgment he admitted the correctness of the amount. There was nothing else to prove." To similar purport *Woodlief v. Bragg,* 108 N. C., 571; *Turner v. Shuffler, ibid.,* 642.

In this case there was no dispute as to the amount which, if due at all, was a sum collected on a judgment in favor of Mrs. Forney, plaintiff's testatrix, by defendant's intestate, a lawyer, and left with him for investment, to-wit, $705, less $150, which was thus invested by him for her. It is not sought in this action to fasten any liability upon the defendant individually.

No error.

Cited: S. v. Worley, 141 N. C., 768; *Nelson v. Tobacco Co.,* 144 N. C., 420.

SMITH v. PATTON.

(Filed 2 December, 1902.)

1. CLERKS OF COURTS—*Bonds—Commissioners—Laws* 1889, *Ch.* 470—*Private Laws* 1891, *Ch.* 41, *Sec.* 2—*The Code, Sec.* 72.

A clerk of the Superior Court is liable on his bond as insurer for funds paid him by a commissioner in partition proceedings.

2. PARTIES—*Clerks of Courts—The Code, Sec.* 1883.

Under the Code, sec. 1883, claimants of a fund arising from a partition sale are the proper parties to sue on bond of the clerk for failure of clerk to pay funds by the commissioners in partition.

ACTION by C. B. Smith, as executor, and others against P. W. Patton and others, heard by *Judge W. B. Councill* at Spring Term, 1902, of BURKE. From a judgment for the plain-(397) tiffs the defendants appealed.

J. T. Perkins for the plaintiffs.
A. C. Avery for the defendants.

CLARK, J. Under proceedings to sell land for partition the commissioner paid the proceeds of the sale into the clerk's office, taking his receipt therefor as clerk. The clerk deposited the same in the Piedmont Bank, which later failed, and the fund being impaired or lost, this action is to recover the amount so lost from the clerk on his bond.

It is settled in this State that the bond of a public officer is liable for money that comes into his hands as an insurer, and not merely for the exercise of good faith. *Presson v. Boone,* 108 N. C., 78; *Bd. Education v. Bateman,* 102 N. C., 52; 11 Am. St., 708; *Morgan v. Smith,* 95 N. C., 396; *Havens v. Lathene,* 75 N. C., 505; *Commissioners v. Clarke,* 73 N. C., 257, and other cases therein cited. Bonds of administrators, executors, guardians, etc., only guarantee good faith. *Moore v. Eure,* 101 N. C., 11; 9 Am. St., 17; *Atkinson v. Whitehead,* 66 N. C., 296.

But the defendants contend that there was no law authorizing the clerk to receive these funds, and therefore the bond is not liable. Here the clerk appointed the commissioner to make the sale, without bond, and on approving his report received and receipted for the proceeds as clerk, took out his costs and entered

the amount due each heir at law on his docket, and disbursed a portion of said fund to the parties entitled. This would seem a receipt of the fund by the clerk "by virtue of his office." *Cox v. Blair,* 76 N. C., 78; *McNeill v. Morrison,* 63 N. C., 508; *Judges v. Dean,* 9 N. C., 93.

But if this were otherwise the clerk received it "as clerk," and so receipted for it. This was certainly a receipt of the money "under color of his office," and, indeed, this is (398) admitted in the answer. The older decisions were made when these words were not in the statute. "The broad and comprehensive provision" embracing money received by "color of his office" was enacted to cover the defect by the Code, sec. 72, and was construed in *Thomas v. Connelly,* 104 N. C., 342, to embrace all cases where the officer received the money in his official capacity, but when he may not be authorized or required to receive the same. In such case the bond is responsible for the safe custody of the fund so paid in. *Presson v. Boone, supra; Sharp v. Connelly,* 105 N. C., 87; *Thomas v. Connelly,* 104 N. C., 342; *Cassidey ex parte,* 95 N. C., 225; *Brown v. Coble,* 76 N. C., 391; *Greenlee v. Sudderth,* 65 N. C., 470; *Broughton v. Haywood,* 61 N. C., 380.

While the charter of the Piedmont Bank (Private Laws 1891, ch. 41, sec. 2) authorizes public officers to deposit in said bank any monies in their custody, it specifies that this shall be subject to the provisions of chapter 470, Laws 1889, which provides that no such provision in any corporation charter "shall operate or be construed to relieve them from official responsibility, or their sureties from liability on their official bonds."

The plaintiffs, claimants of this fund, are entitled to maintain this action. Code, sec. 1883; *Daniel v. Grizzard,* 117 N. C., 105.

No error.

(399)

BEACH v. SOUTHERN RAILWAY COMPANY.

(Filed 2 December, 1902.)

REMOVAL OF CAUSES—*Local Prejudice—Foreign Corporations—Domestication—Laws* 1899, *Ch.* 62.

Where a foreign corporation domesticates under Laws 1899, ch. 62, it becomes a corporation resident here and cannot remove an action to the Federal Courts on the ground of local prejudice.

ACTION by Mary L. Beach, administrator of W. E. Beach, against the Southern Railway Company, heard by *Judge W.*

A. Hoke, at August Term, 1902, of BURKE. From a judgment for the plaintiff the defendant appealed.

J. F. Spainhour and *M. Silver* for the plaintiff.
Chas. Price, Geo. F. Bason and *S. J. Ervin* for the defendant.

CLARK, J. When this case was called for trial the defendant, the Southern Railway Company, moved for an order to proceed no further with the cause, for the reason that it had been removed to the Circuit Court of the United States on the ground of local prejudice, presenting copies of the petition, affidavit, bond and order of removal from said Circuit Court. The presiding judge being of the opinion that the defendant, originally a foreign corporation, but since "domesticated" in this State under Laws 1899, ch. 62, could not remove an action to the Federal Court on account of local prejudice (*Allison v. R. R.,* 129 N. C., 336), refused to stay action, and proceeded with the trial. The defendant excepted.

In such case it is optional with the State Court to proceed with the trial. *Stone v. South Carolina,* 117 U. S., 430, cited *Crehore v. Ohio,* 131 U. S., 243; *Howard v. R. R.,* 122 N. C., 953, 954. A case on "all fours" is *Lawson v. R. R.,* 112 (400) N. C., 390; also *Bierbower v. Miller,* 30 Neb., 161; 9 L. R. A., 228. The trial having proceeded to verdict and judgment, which went against the defendant, it appealed to this Court, assigning four grounds of exception, but the other three are without merit and were abandoned in this Court.

A foreign corporation which has voluntarily accepted the terms prescribed by the statute of this State under which it may do business here, and has "domesticated" as provided in said statute, has become a domestic corporation as therein provided, and cannot remove an action against it to the Federal Court. This has been fully considered, after elaborate argument by counsel for this defendant, and was so held in *Allison v. R. R.,* 129 N. C., 336; and also in *Debnam v. Tel. Co.,* 126 N. C., 831 (in which case the statute is copied), and *Layden v. Knights of Pythias,* 128 N. C., 546, the reasoning of which cases we adopt and make a part of this opinion.

We do not understand the defendant's counsel to deny that, as a matter of fact, the defendant, the Southern Railway Company, has "domesticated" by filing its charter and acceptance in the office of the Secretary of State, as required by Laws 1899, ch. 62, admission of which fact has been made in this Court (*Harden v. R. R.,* 129 N. C., at p. 359; 55 L. R. A., 784) in so many cases, and is a matter as universally known as that it is a

corporation. Indeed, in this present case, the defendant's counsel submitted that "this case should take the course pursued in *Allison v. R. R.*, 129 N. C., 336," in which the legal effect of such domestication was presented and decided, and we are fixed with judicial notice that the effect of "domestication" by this defendant was proved or admitted and its legal effect decided in that case. *Knight v. Land Asso.*, 142 U. S., 161. The decision in *Allison's case* that this defendant, the Southern Railway Company, is a domestic corporation, is *res judicata* of which the court below had judicial notice.

The answer alleges that the defendant was "a corpo-
ration duly created and organized under the laws of the (401)
State of Virginia, and is and was at the time mentioned
a citizen of the said State of Virginia," but without averring affirmatively that it was "not a corporation or citizen of this State," and such allegation has been held insufficient in *Thompson v. R. R.*, 130 N. C., 140, and *Springs v. R. R.*, 130 N. C., 186, whose reasoning we adopt as a part of this decision.

It is true that in the petition in the United States Circuit Court, a copy of which is filed in this case, it is averred that the defendant "is, and was at the commencement of this suit, a non-resident of the State of North Carolina, . . . and is not a citizen of North Carolina." This Court having decided otherwise on the facts admitted by this defendant, in former cases, we do not understand that this is a denial of the fact so often admitted by the defendant's counsel in this Court, and so well known as to be common knowledge that the defendant has "domesticated" in the manner required by chapter 62, Laws 1899. We understand this to be merely a denial that the legal effect of such "domestication" has been to make the defendant a corporation of this State, a resident or citizen thereof, and that it is neither more nor less than an affidavit by this defendant that the decision of this Court on that point is not law, and that the object of this appeal is to have the repeated rulings of this Court that "domestication" has that effect reviewed on writ of error. If such averment in the petition of a legal conclusion is decisive, then the counsel and not the court would determine the right to remove. *Tucker v. Life Asso.*, 112 N. C., 796; *In re R. R.*, 137 U. S., 451.

On careful reconsideration of those opinions, some of which are above cited, we are constrained to reaffirm them and to hold that the defendant, having complied with the terms required before it was allowed to do business here, and having become "domesticated" in the manner enacted by the statutes of
this State, has become a corporation resident here, and (402)

that in holding that this cause could not be removed to the United States Circuit Court on the allegation of local prejudice the court below committed

No error.

PHILLIPS v. WISEMAN.

(Filed 2 December, 1902.)

DOWER—*Adultery of Wife—The Code, Sec.* 2102—*Laws* 1893, *Ch.* 153.

A wife who commits adultery and is not living with her husband at the time of his death is thereby deprived of her dower.

ACTION by M. A. Phillips against Blake Wiseman and Sarah A. Phillips, heard by *Judge W. A. Hoke* and a jury, at May Term, 1902, of MITCHELL. From a judgment for the plaintiff the defendants appealed.

A. C. Avery for the plaintiff.
S. J. Ervin for the defendant.

COOK, J. Some years after the marriage of plaintiff with M. P. Phillips he (M. P. Phillips) abandoned her and took up with the defendant Sarah A. Phillips, *alias* McKinney, and continuously lived in adultery with her until his death. By his last will and testament he devised the land described in the petition to said Sarah, and his widow, the plaintiff, dissented therefrom and instituted this special proceeding to recover her dower therein.

The verdict of the jury establishes the fact to be that after her husband had abandoned and separated himself from her, and while he was living in adultery with said Sarah, the (403) plaintiff committed adultery. Defendant Sarah pleads such adultery in bar of plaintiff's right to dower in the husband's lands under section 2102 of the Code, wherein it is provided that "If any married woman shall commit adultery and shall not be living with her husband at his death, she shall thereby lose all right to dower; . . . and any such adultery may be pleaded in bar of any action or proceeding for the recovery of dower"; and insists that plaintiff is barred thereby. His Honor rendered judgment in favor of plaintiff, and said Sarah appealed.

Applying the statute to the facts found plaintiff is barred

from recovering dower in her husband's lands, and his Honor erred in rendering judgment for the plaintiff. She committed adultery during their marriage, and was not living with her husband at his death. It is not contended that there was any act of condonement. The fact that he did wrong can be no excuse for her to do likewise. His violation did not justify her in violating her marriage vow. So the statute creating dower rights is framed for the benefit of the guiltless—not those *in pari delicto*. We have carefully examined all of the statutes and amendments bearing upon this subject, including the acts of 1893, ch. 153, which is strongly relied upon by the learned counsel for plaintiff, to see if any exception is made expressly or by intendment in favor of the wife who, by reason of the fault or wrongdoing of her husband, or by reason of separation from him, has been led into evil ways, and can find none which can be so construed. It is a great hardship and a gross wrong for the adulteress to become the owner of his lands, to the exclusion of her who "had been a faithful, true and dutiful wife up to the time when he deserted her," and but for his disreputable conduct it is most probable that she would never have fallen; *sed ita lex scripta est*. And the judgment of the court below must be

Reversed.

(404)

CITY OF WINSTON v. CITY OF SALEM.

(Filed 2 December, 1902.)

TAXATION—*Personal Property—Situs Corporations—Partnerships—Laws* 1899, *Ch.* 15, *Sec.* 14—*Laws* 1891, *Ch.* 40, *Sec.* 41; *Ch.* 307, *Sec.* 50—*Constitution, Art. VII, Sec.* 9.

Where a corporation or partnership has its place of business in one town with part of its personal property stored in another town, such property is only taxable in the town where its place of business is located.

COOK, J., dissenting.

ACTION by the city of Winston against the city of Salem, heard by *Judge Thos. J. Shaw,* at September Term, 1902, of FORSYTH. From a judgment for the plaintiff the defendant appealed.

A. H. Eller for the plaintiff.
Watson, Buxton & Watson for the defendant.

CLARK, J. The Reynolds Tobacco Company (a corporation) and Hanes & Company (a partnership) are tobacco manufacturers, each having its principal office and factory building in Winston, and each using warehouses just across the street in Salem (the towns being divided only by a street), in which they temporarily store leaf tobacco, as bought from time to time, until it is removed to the factory in Winston for manufacture. The question is whether the leaf tobacco thus stored on 1 June, 1900, was taxable in Winston or Salem. The said parties have paid the taxes thereon in Winston under an agreement that said taxes will be paid over by said city to the town of Salem if the courts shall adjudge that the latter is entitled to the same.

If this action is properly constituted in court, which we do not wish to be understood as deciding, for no recovery (405) is asked by the plaintiff, who has the fund in possession, the question is settled in favor of the power of taxation of said tobacco by the city of Winston by the very terms of the statute then in force. Laws 1899, ch. 15. Section 14 thereof provides that "All personal property, except such shares of capital stock and other property as are directed to be listed otherwise in this act, shall be listed in the township in which the person so charged resides on 1 June. The residence of a corporation, partnership or joint stock association shall be deemed to be in the township in which its principal office or place of business is situated."

The Constitution, Art. VII, sec. 9, requires that "All taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property *in the same.*" The towns of Winston and Salem are in the same township, and the charters of both, in conformity to the above constitutional provision, grant them power to levy and collect taxes upon "all real and personal property within its corporate limits." Private Laws 1891, ch. 40, sec. 41 (1), and chapter 307, section 50.

As to the *situs* of realty there can be no doubt, but the *situs* of personalty for purposes of taxation from time immemorial has been a matter for the law-making power, which has provided different rules for different kinds of personalty, and has changed them from time to time. There is nothing in the above cited section of the Constitution which indicates an intention to restrict legislation as to the *situs* of personal property (which at common law always followed the person, hence its designation), and no decision has so construed that section. It seems to us that sound public policy requires that the Legislature be left free, as always heretofore, to prescribe regulations as to the *situs* of personal property, and unless the constitutional pro-

vision were plain and explicit to the contrary, we cannot hold the statute to be unconstitutional. (406)

As the above cited section (section 14, chapter 15, Laws 1899) located the *situs* of this property (which is not "property directed to be otherwise listed in the act") in the place where the corporation or partnership has "its principal office or place of business," it follows that by the terms of the respective charters this tobacco was taxable in the town of Winston. This is the general rule. "Where a corporation had its place of business in one town, with a part of the personal property stored in another town, such property is only taxable in the town where its place of business is located." *Ferry Co. v. Middletown,* 40 Conn., 65; *R. R. v. Alexandria,* 17 Gratt. (Va.), 176. See also note 5, page 186, Burroughs on Taxation, with a large number of cases cited, holding the same doctrine.

Error.

FURCHES, C. J., concurring. I concur in the opinion of the Court because I believe it states the law as it is written, and not because I think the law is right. If I considered that I had the power to do so I would change it and agree with the dissenting opinion of my brother *Cook.* But personal property is supposed to attend the person of the owner, and upon that idea is taxable where the owner resides, and in most cases this is proper and convenient; as where a taxpayer has small amounts of personal property in different townships or in different counties it would be inconvenient for him to list such property in the township or county where it happened to be on 1 June. And the uniform rule has been to list personal property for taxation in the county, township or town where the owner resides. While this is the rule under this presumption, that such property attends the person of the owner, it has for a long time, if not always, been held that this presumption (or fiction, as it is sometimes called) is subject to be changed by legis- (407) lative enactment, as has been done by providing that guardians should list their ward's estate in the township where the ward resides, and by providing that stock on a farm should be listed where the farm is listed. But none of these legislative acts provide for the case at bar. It is governed by the general law that personal property must be listed in the town or township where the owner resides. Indeed it seems to me that the Legislature, in making the exceptions it has, construed the general act to be that it must be listed where the owner resides, in all cases not so excepted from the general rule, under the doctrine of *expressio unius est exclusio alterius.* And while I think

it is the law as now written, to my mind it may work great hardship and wrong. As I understand the law as it is now a man may own or have rented a storehouse in town in which he has $50,000 worth of goods, which receive the protection of the town government under its police authority and the benefits of the town trade; and yet if he happens to live outside of the corporate limits his $50,000 worth of property escapes the payment of one cent of taxes to support the town government. This I think should be remedied, but I cannot do it. It seems to me that the Legislature might do it by providing that property in or connected with the *use of a house* should be listed for taxation where the house is listed, as it is provided that stock on a farm shall be listed where the farm is listed.

DOUGLAS, J., *dubitante*. I am very much impressed with the strength and consistency of the reasoning in the dissenting opinion of *Justice Cook*. If it is not the law it should be the law. Suppose that a man should have a large warehouse or factory in the city of Winston, where he was actively engaged in the regular transaction of his business, and where he kept stored large amounts of tobacco, he would not be liable
(408) for any municipal tax whatever except, perhaps, a license tax, if he happened to live a few feet beyond the corporate limits. The fact that he lived in another city would make no difference in the principle. A cotton broker in Raleigh, similarly situated, would be equally exempt. He would have all the benefits of a city with practically none of its burdens. He would have all its facilities for transacting business, buying, selling, shipping and banking, with police and fire protection for the price of his license. If he had a thousand bales of cotton stored in the city every bale would, in contemplation of law, be located at his home. It can hardly be said that such a system of taxation results in the practical uniformity contemplated by the Constitution, whatever may be its theoretical nature. And yet it may be that the *situs* of personal property is within the control of the Legislature. If so we must await legislative action.

COOK, J., dissenting. By section 14, chapter 15, Laws 1899, cited and sustained in the opinion of the Court, the Legislature undertakes to fix the *situs* of personal property (that which is tangible, substantial and valuable by reason of its corpus) for taxation in the *township* in which the owner *resides* or where the corporation, partnership or joint stock association has its *principal office* or *place of business*. So that in this view a

person owning personal property of *very great* value situate and in use in a township or city, which may be in debt and required to levy taxes to meet its obligations, might move his residence out of *that* township or city into a township or city which *owed* no *debt,* and thus escape taxation therein, and yet receive all the benefits and protection enuring and resulting from such township or city indebtedness; so likewise could a corporation, partnership or joint stock association obtain a like advantage by the removal or location of the *principal* office or principal place of business. If this be so, then the nonresi- (409) dents of the township or city would receive equal benefit and protection with the residents and pay nothing for it, leaving the burden of paying for the same upon the residents, based upon the fancied idea that the personal property follows the person. To my mind it is clear that this fiction was exploded, and so intended, by our Constitution in ordaining that all taxes levied . . . shall be uniform and *ad valorem* upon *all* the property in the *same*—in the county, city, town or township where it may abide, remain, be kept or placed by the owner, to the end that each article of value should *there* bear its proportionate part of the burden of taxation in consideration of the advantages, benefits and protection which it *there* has and enjoys.

Plaintiff and defendant are two separate and distinct municipalities, situated in the same (Winston) township, in Forsyth County, existing under separate charters. They adjoin each other and are separated by a street (First street), which runs east and west, and which is owned and maintained by plaintiff.

The R. J. Reynolds Tobacco Company, a corporation having its principal office and factory building in Winston, and P. H. Hanes & Company, a co-partnership, the several members of which reside in Winston, and also having its principal office and factory situate therein, are engaged in the manufacture of plug tobacco and in buying, storing and preparing leaf tobacco for manufacture. On 1 June, 1900, and for several years prior thereto, they had in buildings, leased for a term of years for such purpose, leaf tobacco kept therein for storage until ready to be removed to the factories in Winston for manufacture. As both of the owners of the leaf tobacco so kept for storage in Salem have their principal offices and factories in Winston, and the individual members of the co-partnership reside therein, plaintiff claimed that the tobacco so stored and kept in Salem was a subject of taxation for munici- (410) pal purposes by it, and listed the same for taxation, and insist that the taxes are due to it; while the defendant claims

that said leaf tobacco being kept and stored within its corporate limits was liable to taxation by it, and accordingly listed the same for taxation for its municipal purposes, and claims the taxes due thereon.

So the question presented in this appeal is, do the taxes assessed upon the leaf tobacco so stored and so kept in Salem belong to plaintiff under its assessment, because the owners reside in and have their principal office and factory in Winston? Or, to state it in a different way, should the tobacco so stored and kept in Salem be listed for taxation for municipal purposes by the city of Winston, where the owners, corporation and copartnership had their principal office, or by Salem, where the property was stored and kept until ready and needed for use at the factory?

As all personal property is movable, it cannot be said to be permanently located anywhere; therefore it cannot have a fixed or unchangeable abode. While movable at the owner's will, it does not in fact necessarily accompany its owner, but must be and exist where it is placed in the service or use for which he has designed it. Where the same is placed for an indefinite time awaiting the use for which it is designed, or being used in the service of its owner while there in carrying on his business of a permanent nature, or for an indeterminate period, its presence there must be generally considered to have such an actual *situs* as would draw to it that legal protection for which it should be liable for taxation, if not otherwise prescribed by law.

But the *situs* of property subject to taxation by the county, city, town or township is expressly fixed by Article VII, section 9 of the Constitution, which requires the levy to be "upon all property in the same," and that it shall be uniform and
(411) *ad valorem*. The section is as follows: "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."

So it is necessary to determine what is meant by all property "in the same." When is property "in the same" (city here) within the meaning of that section? This being determined, there can be no question as to the *situs*, as fixed by the Constitution. Real property being permanently located, there can be no question as to its *situs;* but on account of the movability of personal property in its use and service of its owner there is some difficulty in determining *when* it is "in the same" (county, city, town or township) as a subject of taxation. It is clear that it is not contemplated by the Constitution that it is "in

the same" while in transit; otherwise it would be taxable in each and every municipality through which it might pass on 1 June. Nor can it be held that it would be exempt from taxation by the municipality of its usual *situs* or abode if temporarily in its use it be removed therefrom shortly before 1 June, or should such temporary removal be made for the purpose of evading taxation by the municipality from which it is removed.

The meaning of the language of the Constitution does not admit of a doubt or allow a question to be raised concerning the *situs* of property for taxation after it is determined where the owner has located it for his use or in his service. Its *situs* is fixed by the place where it is kept for use and service, and not by the residence of the owner.

With this understanding of section 9, Article VII, of the Constitution, as applied to that class of personal property which does not *in fact* accompany the person of its owner (the value of which grows out of its *corpus* or materiality, as distinguished from that class which is intangible and is but the evidence of right or interest in the *corpus* or materials of value which in fact does or in fiction of necessity must accompany (412) its owner), we think the plaintiff had no right to tax the leaf tobacco stored and kept in Salem. Whether the owner be a corporation or a natural person its *situs* for taxation is where it is kept by its owner, where the owner allows it to abide, to remain; there it must of necessity be under the protection of the legal authority enforced, and should bear its proper part of the expenses, which I understand to be the principle underlying this section of our Constitution.

The charters of plaintiff and defendant are in conformity with Article VII, section 9. Each is granted the power to levy and collect taxes upon "all real and personal property within the (its) corporate limits including" . . . Private Laws 1891, ch. 40, sec. 41 (1); chapter 307, section 50.

The facts agreed in this case show that the buildings of the respective owners were leased for a term of years and that leaf tobacco was continually and continuously stored therein, and there prepared for manufacture. They kept a stock of tobacco there upon which they drew for the factory to manufacture, and as they drew out would replenish the stock. So the conclusion is irresistible that the tobacco being put and kept in Salem by its owners for the purpose of storing and preparing for future use, it there acquired its *situs* for the purpose of taxation.

(413)

SOUTHERN LOAN AND TRUST COMPANY v. BENBOW.

(Filed 2 December, 1902.)

1. EVIDENCE—*Fragmentary — Supplementary Proceedings—Assignments for Benefit of Creditors—Admissions.*

In an action to set aside an assignment for the benefit of creditors, a part of the evidence of the defendant, previously given in supplementary proceedings, may be introduced by the plaintiff without introducing the whole.

2. EVIDENCE—*Letter.*

A witness may refresh his recollection by a letter if he is able to guarantee that it represents his recollection at the time it was written, though he has no recollection of the facts stated therein, independent of the letter.

3. JUDGMENTS—*Estoppel—Assignments for the Benefit of Creditors—Receiver—Supplementary Proceedings—Res Judicata.*

Where a receiver in supplementary proceedings sues to recover a note as the property of a debtor, the judgment against him is not binding on any creditor, except the one who instituted the proceedings.

4. INSTRUCTIONS.

An instruction upon facts not represented by the evidence is erroneous.

DOUGLAS, J., dissenting.

ACTION by the Southern Loan and Trust Company against D. W. C. Benbow and others, heard by *Judge Thos. J. Shaw* and a jury, at December Term, 1901, of GUILFORD. From a judgment for the defendants the plaintiff appealed.

J. N. Wilson and *E. K. Bryan* for the plaintiff.
J. T. Morehead and *King & Kimball* for the defendants.

MONTGOMERY, J. The following named judgment creditors of D. W. C. Benbow, viz.: the National Bank of Greensboro and Rowe Wiggins, the Atlantic National Bank of Wil-
(414) mington, the Peoples National Bank of Lynchburg, Va., and the National Bank of Greensboro and others, and the Wilmington Savings and Trust Company, of Wilmington, N. C., the last named being a creditor whose claim was not in judgment, brought several actions against the defendant D. W. C. Benbow and J. S. Cox, his assignee, the object of which several actions was to have a certain deed of trust executed by Benbow to Cox set aside for fraud, and to secure liens claiming priority over every other creditor, not suing before its suit was

commenced, upon the property conveyed in the deed of trust to secure their several debts. The action of the first named creditor was commenced on 13 April, 1894; of the second, on 1 May, 1894; of the fourth, on 14 May, 1894; of the fifth, on 25 May, 1895; and of the third, on 1 May, 1894. These actions were not pressed and nothing seems to have been done with them until the June Term, 1899, of Guilford Superior Court, when it was agreed that the first mentioned should be tried and the others to abide the result of the first case.

An issue of fraud was submitted to the jury in that case and found in favor of the plaintiffs, whereupon judgment was rendered that the Wilmington Savings and Trust Company recover of the defendant D. W. C. Benbow its debt—the principal, interest and costs. It was further adjudged by the court that the deed of assignment from Benbow to Cox was executed with the intent to hinder, delay and defraud his creditors, and was therefore void; and it was further adjudged that the plaintiffs in the several suits named, by reason of the bringing of said actions and the nature of the same, were entitled to and should have priority of lien on the property described in the deed of assignment over all other creditors. (The priorities of these several plaintiffs, as among themselves, were waived.)

A commissioner was appointed in said judgment to advertise and sell the property mentioned in the deed (415) for the payment of the judgment indebtedness. A few days before that judgment was rendered, to-wit, at a special term of the Superior Court of Guilford, of 22 May, 1899, in the case of W. H. Ragan, receiver of the property and estate of D. W. C. Benbow, against J. S. Cox, trustee, D. W. C. Benbow, Mary E. Benbow and Chas. D. Benbow, a judgment was entered that the plaintiff was not entitled to recover possession of a certain note executed by B. J. Fisher to D. W. C. Benbow and by him transferred to his wife, Mary E. Benbow, and that the note was the property of the executor of Mary E. Benbow, who had died after the commencement of the action. The last mentioned suit of Ragan, receiver, against Cox, D. W. C. Benbow and others, was commenced in May, 1894. The National Bank of Greensboro, at February Term, 1894, had recovered two judgments against D. W. C. Benbow for large amounts, and in its effort to collect the money on its judgments supplementary proceedings were resorted to, and in those proceedings Ragan was appointed receiver of the estate and property of D. W. C. Benbow.

In the present action the plaintiff, who was duly appointed trustee in bankruptcy of D. W. C. Benbow, brings this action

as such trustee against the defendants, alleging that the deed of trust made by Benbow to Cox was executed to hinder, delay and defraud his creditors; that just before Benbow filed his petition to become a bankrupt he had purchased the judgments against him heretofore mentioned, with his own money and effects, and procured the said judgments to be assigned to his son, the defendant Chas. D. Benbow, to defraud his creditors; and that in pursuance of this scheme he procured the judgment of June Term, 1899, of the Superior Court of Guilford, heretofore referred to, to be entered, by which the deed of assignment was declared void and the property conveyed in the deed condemned to be sold to satisfy the judgment creditors named in the (416) judgment. The prayer for relief was that Charles D. Benbow be declared to be the owner of the judgments in trust for the plaintiff as trustee in bankruptcy of the creditors of D. W. C. Benbow, and that all the parties be restrained from selling or interfering with the property conveyed in the deed of assignment until the further order of the court, and for such other relief as the plaintiff may be entitled to.

Afterwards the property was sold by the commissioner and purchased by Chas. D. Benbow, and the sale was confirmed, the plaintiff making a special appearance in the action for the purpose of agreeing that the proceeds of the sale should stand in the place of the property sold, and be answerable to the plaintiff for any judgment that might be obtained by it in the action. The allegations of fraud in the complaint were denied in the answer, as was also the allegation that the defendant D. W. C. Benbow had purchased the judgments against himself with his own money and effects, and had them assigned to his son, Chas. D. Benbow, in fraud of his creditors. The defendants also denied that D. W. C. Benbow caused the judgment of June Term, 1899, to be entered, and it was denied that D. W. C. Benbow had fraudulently transferred the Fisher note to the defendant Mary E. Benbow.

The following issues were submitted to the jury:

1. Was the deed of assignment executed by D. W. C. Benbow to J. S. Cox, assignee, on 23 January, 1894, executed for the purpose of hindering, delaying or defrauding his creditors?

2. Was the Fisher note of $17,235 transferred by D. W. C. Benbow to his wife at a time when he was insolvent, and without valuable consideration?

3. Was the Fisher note for $17,235 transferred by D. W. C. Benbow to his wife with intent or purpose of hindering, delaying or defrauding his creditors?

4. Were any of the judgments mentioned in the complaint,

to-wit, the Peoples National Bank of Lynchburg, the (417) National Bank of Greensboro, J. Davenport, Jr., the First National Bank of Richmond, the Union Bank of Richmond, Miss Rowe Wiggins, the Atlantic National Bank of Wilmington, the Wilmington Savings and Trust Company of Wilmington, the Bank of Guilford, purchased with the money derived from the Fisher note, or any part thereof, and if so, which judgment or judgments, naming them?

5. Did defendant D. W. C. Benbow purchase the judgments mentioned in the complaint and have the same assigned to Chas. D. Benbow for the purpose of hindering, delaying or defrauding his creditors?

6. Was the decree in the creditors' suits, condemning the property of D. W. C. Benbow to the payment of the judgments taken after filing of the petition in bankruptcy by D. W. C. Benbow, without the trustee in bankruptcy having been made a party?

7. In an action heretofore tried in this court wherein W. H. Ragan, receiver of the property of D. W. C. Benbow, appointed in supplementary proceedings instituted by the National Bank of Greensboro and the Bank of Guilford, creditors of Benbow, against J. S. Cox, trustee, Chas. D. Benbow, executor of Mary E. Benbow, deceased, D. W. C. Benbow and others, was it found as facts by the jury (1) that assignment and transfer of the due bill of B. J. Fisher by D. W. C. Benbow to Mary E. Benbow was not made to obstruct, hinder and delay or defraud the creditors of said D. W. C. Benbow; (2) that said transfer and assignment were not invalid for any other reason, and did the court upon such verdict adjudge that Chas. D. Benbow, as executor of Mary E. Benbow, was the legal owner of said note?

On the trial the plaintiff offered to read in evidence that part of the examination of D. W. C. Benbow in the supplementary proceedings which concerned the Fisher note for the purpose of showing that there was no valid consideration (418) to support the transfer of that note from said Benbow to Mary E. Benbow, his wife; and he also offered to introduce and read that part of Mrs. Benbow's evidence in the supplementary proceedings. His Honor refused to allow those parts of the evidence of Benbow and his wife to be read, the defendants objecting on the ground that those parts of the evidence were fragmentary, and that the entire record of all their evidence had to be offered. We think that the evidence ought to have been admitted.

We know that to arrive at the true meaning of a person's declaration or admission we must hear all and each part of that

declaration or admission. We cannot arrive at the true meaning by taking detached parts of an admission or declaration unfavorable to the declarant, and leave out the part or parts which might be explanatory and favorable. Mr. Greenleaf, in his first volume on evidence (16 Ed.), sec. 201, says: "This general principle, however, raised two sorts of questions: first, whether the party offering the admission *must,* as a preliminary condition, put in the whole or other parts of the conversation, document, etc.; second, whether the party whose statement it is *may* afterwards, by way of explanation, put in the other parts or other statements. It does not seem to be generally required that the party offering the admission must put in, at the same time, any more than that which he desires to use, whether a speech or conversation, or a writing." The same rule is laid down in *Gossler v. Wood,* 120 N. C., 69; *Roberts v. Roberts,* 85 N. C., 9.

We have said that his Honor was in error in excluding the evidence, even though it was only a part of the evidence of the defendants on the question of the consideration upon which the Fisher note was transferred to Mrs. Benbow. In looking at the entire evidence of the defendants given in the supplementary proceedings the part offered was about all that was said (419) on the subject. The plaintiff put the whole evidence in after his Honor refused to allow the parts which were offered to be read, reserving his exception. The evidence was lengthy and covered many questions and many other matters of alleged fraud, and was calculated to mislead the jury. For the purpose of showing that the defendant D. W. C. Benbow purchased the judgments against himself with his own money and effects the plaintiff offered to show by R. R. King that D. W. C. Benbow purchased these judgments. A letter signed by King was shown to him, in these words: "No. 7, Raleigh, N. C., 30 January, 1899. Mr. Chas. U. Williams, Richmond, Va.: Just before leaving home this a. m. (Dr. Benbow asked me to write and ask you to have the notes of the Union Bank and others on North State Improvement Company, sent to the Greensboro National Bank of Greensboro, to be delivered to him when he pays balance) of suit on compromise. I suggest that you accompany these with a statement showing balance and saying that all court costs must be arranged also. I expect to return home on next Thursday. (Benbow says he wants to pay you at once.) Am here getting Legislature to repeal some repudiation legislation enacted at two last sessions. Yours truly, R. R. King."

The witness said that he had no recollection of writing that

letter nor of what it contained independent of the paper itself. He was further asked these questions: "After looking at that paper can you state whether you wrote it or not?" He answered, "This paper says so, but independent of that I have no recollection." He was asked again, "Did you write that letter?" "I *think* that is my handwriting." There were four or five other letters of the same nature shown to the witness, and he made the same statement about them all. When asked about one of the letters, if any statement in that paper is true, he answered, "Yes, I need not repeat that."

It is to-day generally understood that there are two sorts of recollection which are properly available for a (420) witness, to-wit, past recollection and present recollection. In the latter and usual sort the witness either has a sufficiently clear recollection or can summon it and make it distinct and actual, if he can stimulate and refresh it, and the chief question is as to the propriety of certain means of stimulating it—in particular of using written or printed notes, memoranda or other things, as refreshing it. In the former sort the witness is totally lacking in present recollection, and cannot revive it by stimulation; but there was a time when he did have a sufficient recollection, and when it was recorded, so that he can adopt his record of his then existing recollection and use it as sufficiently representing the tenor of his knowledge on the subject. First, the record memorandum, note, entry, etc., must have been made at or *about the time* the event recorded. Whether in a given case it was made so near that the recollection may be assumed to have been then sufficiently fresh must depend on the circumstances of the case. Second, the witness need not have made the record himself; the essential thing is that he should be able to guarantee that the record actually represented his recollection at the time, and this he may be able to do either by virtue of his general custom in making such records or by his assurance that he would not have made the record if he had not have believed it correct. Greenleaf on Evidence, sec. 439 (a), 439 (b).

The witness said, in reference to the time and date of the letter, "I have no recollection independent of that, and I have no recollection of writing that letter, and have no recollection of any of the matters therein referred to. At about that period and subsequent thereto I had a great many conversations with Dr. Benbow about these matters and with his counsel." Applying all these tests laid down by Mr. Greenleaf to the testimony of the witness we think that it was competent and ought to be received.

(421) His Honor instructed the jury that the plaintiff could bring his action and have the questions involved therein determined and passed upon by the jury, and "that you will not permit the answer to the last issue, which relates to the decree of the court in the case of Ragan, receiver, against Cox, trustee, and others, to influence you in passing upon the second, third and fourth issues, or any of the issues, so far as that is concerned." The defendants did not appeal from that instruction, but in the argument here it was contended that the court which tried the case upon the pleadings was without jurisdiction of the subject-matter of the action. It was argued that Ragan was a receiver, appointed in supplementary proceedings, and therefore he represented the creditors of D. W. C. Benbow, and that in his suit to recover possession of the Fisher note, there was a judgment against him and in favor of Mrs. Benbow, and therefore that the creditors were bound by that judgment. But the supplementary proceedings in which Ragan was appointed were not in a general creditor's bill properly constituted, but in a single creditor's suit, in which the creditor was trying to enforce his own particular demand.

The judgment, therefore, bound none of the creditors, except that one who instituted the supplementary proceedings in his own behalf, and not for the other creditors.

It was argued also here that on the main branch of this suit the five judgment creditors named were proceeding in behalf of themselves and all other creditors of D. W. C. Benbow to set aside the deed of trust and to subject the property conveyed therein to the payment of the debts due to all the creditors. But the fact is, as we have already seen, there was no general creditors' bill, but there were five separate suits, and they were never even consolidated. One was tried, with an agreement on the part of the other four that they would abide the result of the trial.

(422) While the charge of his Honor is, in the main, correct, we think, in one serious particular, there was error, which was excepted to by the plaintiff. It was on the question of the consideration for which the note of $15,000, made in 1890, was given by Dr. Benbow to his wife, and which was afterwards alleged to have been credited with the Fisher note, which had been assigned by Dr. Benbow to his wife. The substance of Dr. Benbow's testimony was about this: "The Fisher note is in the National Bank of Greensboro. It was not delivered to Cox, assignee, because I had transferred it to my wife, by endorsement, on 22 January last, the day before my assignment. I made this transfer to her as a credit upon a note she held against

me for a larger amount, leaving a balance of $715 and accrued interest. The note held by my wife was dated 1 September, 1893, and that was the true date, it being a renewal of one given a year previous, that was a renewal note which was also given as a renewal note for one given in March or April, 1890, which was the first note. The amount of the first note was about $15,000. The consideration of the note given in 1890 was a gift, based upon a calculation of money belonging to her, given to her by her father; this money was not willed to her by her father, but given to her before her father's death. I was married in 1857. This money was the proceeds of sale of negroes which her father sold, and amounted to $2,500, and the money was given to her at different times before the war, and she gave it to me when her father gave it to her. I account for the difference between the $2,500 and the $15,000 by the addition of interest at six per cent. These notes to my wife were kept in my safe, and they were never out of my possession. When the transfer of the Fisher note was made, she immediately returned it to me. This Fisher note is a due bill."

He was solvent when he executed the $15,000 note, and he said that he gave it to her from the fact that she had asked him on several occasions to give her, in her own right, a home. He further said that, before 1890, Mrs. Benbow repeatedly urged
him, in consideration of her having furnished him the (423)
$2,500, to purchase and settle upon her a home, and that
he recognized the justice of her claim, but that he had no suitable property himself for the purpose; so he executed to her the note for $15,000, and that that amount was made by the addition of interest from the time she let him have the money.

Mrs. Benbow's evidence was, in substance, as follows: "I had, for several years before the spring of 1890, insisted upon Dr. Benbow's giving me property to be my own, particularly a home and its appurtenances, which he had from time to time promised to do, particularly when he asked me to join in two mortgages for $25,000 each, to enable him to borrow money to use in his business as a stockholder in the North State Improvement Company. He promised me, as soon as that was paid off, he would comply with my request. In the early spring of 1890 he came to me, at the head of the dining room, and told me he was now out of debt; that he had no real estate of his own that was suitable for a residence for me, and had concluded to give me the money with which to purchase me a home, and, in addition thereto, for such other purposes as I wished to use it. He handed me his note, or due bill, for, as near as I can remember, about $15,000, which I took. Several times since, he has told

me that he renewed it at the end of each year, including the accrued interest. On the 22d of January last, as a payment on said note, Dr. Benbow transferred to me the note spoken of in his examination as the Fisher note, which payment he endorsed by way of credit on my note."

As we have said, the note for $15,000 was executed in 1890, when Dr. Benbow was solvent. The Fisher note was alleged to have been paid as a credit on it when he was insolvent and the day before he made his assignment.

His Honor properly told the jury that when Dr. Benbow received $2,500 in money from his wife, before the war, it became his; and if that was the only consideration for the
(424) execution of the $15,000 bond, that the said note was not a valid debt of Dr. Benbow as against his creditors; and that if the jury found from the evidence that the Fisher note was transferred to Mrs. Benbow as a payment upon the note, if based upon such consideration, the transfer was without a valuable consideration, and they should answer the second consideration "Yes." But he instructed the jury that if they should find from the evidence that Mrs. Benbow joined with Dr. Benbow in the execution of two certain mortgage deeds, for $25,000 each, and that at the time it was agreed between her and Dr. Benbow that if she would sign the same he would give her a home, and that afterwards, in 1890, it was agreed between him and his wife that in place of a home he would give her his note for $15,000, with which to purchase a home, and pursuant to that agreement he executed and delivered to her his note, and that he transferred to his wife the Fisher note as a payment on his note to his wife, and she had accepted it as such, then such a transfer of the Fisher note would be for a valuable consideration, and they should answer the second issue "No." And he further charged: "If you should find that the $15,000 note was not given to her in consideration of any former promise to give her a home if she would sign the mortgage deed, or if the jury should find from the evidence that there was no agreement between Benbow and his wife, at the time of the execution of the mortgages before referred to, to the effect that if she would sign the mortgages he would give her a home, or if they should find that the mortgage deeds were never signed by Mrs. Benbow, then there was no valuable consideration for the transfer of the Fisher note." There was error in that part of the charge.

There is no evidence that the signing of the mortgage deeds by Mrs. Benbow was the consideration for the promise. New trial.

DOUGLAS, J., dissenting.

Cited: S. c., 135 N. C., 304.

(425)

RATLIFF v. RATLIFF.

(Filed 2 December, 1902.)

1. ISSUES.

Issues are sufficient if every ground of contention may be presented by appropriate evidence thereon.

2. EVIDENCE—*Records—Deeds—Registration—The Code, Sec.* 1251.

The record of a registered deed is competent evidence without producing the original where no rule of court for the production of the original has been issued.

3. EVIDENCE—*Records—Revenue Stamps—Deeds.*

It is not necessary that it appear from the record of a deed that there was a revenue stamp on the original to make it competent as evidence.

4. EVIDENCE—*Handwriting—Deeds—Probate—Witnesses—Subscribing—The Code, Sec.* 1246, *Subsec.* 10.

It is sufficient to allow the registration of a deed if the probating witness testifies that he is well acquainted with the handwriting of the subscribing witness and had numerous business dealings with him during his lifetime.

5. EVIDENCE—*Declarations—Estates.*

Declarations made by one in possession of land, characterizing or explaining his claim to ownership or in disparagement of his own title, are competent.

6. NONSUIT—*Dismissal—Laws* 1897, *Ch.* 109—*Laws* 1899, *Ch.* 131—*Laws* 1901, *Ch.* 594.

Where a defendant introduces evidence after making a motion to dismiss at close of evidence for plaintiff, he thereby waives any rights he had under said motion.

7. EVIDENCE—*Handwriting—Proof—Comparison.*

If there is a paper in evidence, the signature to which is proved or admitted to be genuine, another signature whose genuineness is in issue may be compared with it.

8. EVIDENCE—*Ejectment—Trusts.*

The evidence in this case as to the dower of the widow is irrelevant.

9. EVIDENCE—*Handwriting—Proof.*

A handwriting may be proved by a witness who became acquainted therewith four years after the signature in question was made.

10. EVIDENCE—*Declarations—Estates.*

The declarations of a party in his own favor as to his estate in lands are incompetent.

11. WITNESSES—*Corroboration—Evidence.*

A witness may testify as to statements made to others to corroborate himself.

(426) ACTION by W. U. Ratliff and others against J. H. Ratliff and others, heard by *Judge Thos. A. McNeill* and a jury, at December (Special) Term, 1901, of ANSON. From a judgment for the plaintiffs the defendants appealed.

J. A. Lockhart, Robinson & Caudle and *Bennett & Bennett* for the plaintiffs.

H. H. McLendon for the defendants.

CLARK, J. There is no valid objection to the issues, as every ground of contention could be presented by appropriate evidence upon the issues submitted by the court. *Patterson v. Mills,* 121 N. C., 266; *Coley v. Statesville, ibid.,* 315.

There was no error in admitting the records from the register of deeds showing the deed, as there recorded, from Horne and wife to Ratliff, dated 11 September, 1869, and in not requiring the introduction of the original deed. Code, sec. 1251, provides: "The registry or duly certified copy of the record, of any deed, power of attorney or other instrument required or allowed to be registered or recorded, may be given in evidence in any court, and shall be held to be full and sufficient evidence of such deed, power of attorney or other instrument, although the party offering the same shall be entitled to the posses-
(427) sion of the original, and shall not account for the non-production thereof unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for, according to the course and practice of the courts." Here there was no affidavit, nor suggestion even, that the registration was not correct, and no rule of court requiring the introduction of the original deed. The production of the original at the trial cannot be required when such rule of court has not been previously obtained. *Devereux v. McMahon,* 108 N. C., 134; 12 L. R. A., 205.

This disposes also of the exception to the introduction of the registration of the agreement of 10 September, 1869, if the probate is legal. As to this the defendant excepts on the ground:

1. That it does not appear from the registration that there was any revenue stamp on said agreement. This need not appear. *Haight v. Grist,* 64 N. C., 739; *Sellars v. Johnson,* 65 N. C., 104.

2. That the proof of the handwriting of the subscribing witness was insufficient. This instrument was not recorded till 22 March, 1901. It appears from the probate that the parties and the subscribing witnesses were then all dead, and the probating witness testified that he "was well acquainted with the handwriting of M: V. Horne (the subscribing witness to said agreement), and had numerous business dealings with him during his lifetime; that to affiant's best knowledge and belief the signature of the name of M. V. Horne to the aforesaid agreement, as witness to the same, is in said Horne's true handwriting, and no one else's." This is a compliance with the Code, sec. 1246 (10).

The plaintiffs' contention is that the above deed to the defendant's father was a voluntary deed, without valuable consideration, and is to be taken in connection with said agreement, making one transaction, and that said agree- (428) ment is an acknowledgment of a trust to hold said land for life, and then for his children by his first wife (who are the plaintiffs), which first wife was the daughter of the grantor in said deed. The grantee, in 1893, conveyed the land, without valuable consideration, to the defendants, his children by his second wife, and has since died. The defendants contend that the agreement was not executed by their father, but is a forgery. There are several exceptions (four to eight inclusive) to the admission of evidence that Watt Ratliff, the grantee in said deed and alleged signer of said "agreement," admitted that he had received the land under an agreement to hold for his life, and then for the land to go to the plaintiffs, his children by the first wife; that he paid nothing for it and had declined to sell it because of this trust upon it. Those exceptions are without merit. The rule is thus stated in *Shaffer v. Gaynor,* 117 N. C., at page 24: "Declarations made by one in possession of land, characterizing or explaining his claim to ownership, or in disparagement of his own title, are competent, not only as evidence against the declarant, but against all claiming under him." The evidence of these witnesses is of a declaration tending to disparage and qualify the title of Watt Ratliff in the land and an admission of a trust. It is competent against him and against the defendant, who claims through a voluntary deed from him. *Nelson v. Whitfield,* 82 N. C., 51; *Roberts v. Roberts, ibid.,* 32; *Nelson v. Bullard, ibid.,* 37; *Yates v. Yates,* 76 N. C., 142; 1 Greenleaf Ev., sec. 109.

The ninth exception, for refusal of nonsuit at the close of the plaintiffs' evidence, is without merit, both because there was evidence to go to the jury and because the exception is waived

by the defendant himself thereafter introducing evidence. *Means v. R. R.*, 126 N. C., 428; *Parlier v. R. R.*, 129 N. C., 263.

Nor did the court err (tenth exception) in refusing de-
(429) fendants leave to introduce what they claimed was the original deed of 11 September, 1869, from Horne and wife to Watt Ratliff. Evidence is irrelevant, even when not incompetent, and is properly rejected unless it tends to prove some controverted fact. Here the said deed of 11 September, 1869, had been pleaded in the complaint and admitted in the answer and, besides, its registration was in evidence without any suggestion of incorrectness therein, and there was no rule of court to produce the original. But the defendants contend that they wished to introduce it for the purpose of comparing the handwriting of Martin V. Horne, the subscribing witness thereto, with the handwriting of M. V. Horne, the subscribing witness to the alleged "agreement," but this is not the proper method to attack the genuineness of his signature. That should be done by the evidence of witnesses who are familiar with his handwriting. If there is a paper in evidence, the signature to which is proved or admitted to be genuine, another signature whose genuineness is in issue can be compared with it, but here this paper was not in evidence and the plaintiffs refused to admit that it was genuine. *Tunstall v. Cobb*, 109 N. C., 316, and cases there cited. The defendant then offered to prove that the probate ordering said paper to registration was in the handwriting of James M. Covington, formerly judge of probate of that county. But as the deed was irrelevant this could not make it so, and to admit it for the purpose of handwriting would add to the controversy the dispute as to genuineness of Covington's handwriting. All this has been so fully discussed in *Tunstall v. Cobb, supra*, that no further consideration is needed.

The evidence offered by defendants to show that after Watt Ratliff's death all his realty, except this and one small tract, was allotted to his widow for dower, was properly excluded as
irrelevant, as were the deeds, expressed in their face to
(430) be in consideration of love and affection, executed by Watt Ratliff and wife to the defendants, the children of the second marriage.

The defendants then offered to prove the handwriting of Martin V. Horne, the subscribing witness to the "agreement," by John C. McLaughlin, the clerk of the court. He stated that he did not know the handwriting of Horne in 1869 but became familiar with it in 1873, and thence up to his death, but did not know it prior to that time. The defendants then proposed to ask the witness if the name of M. V. Horne, purporting to be

signed to the agreement dated 10 February, 1869, was in M. V. Horne's proper handwriting. The plaintiffs objected to his testifying unless he could state that he was acquainted with Martin V. Horne's handwriting at that time (1869). The witness stated that he did not know what his handwriting was at that time; whereupon the evidence was excluded, and the defendants excepted. In this there was error. *Keith v. Lathrop,* 10 Cush., 453; 1 Greenleaf Ev., sec. 577; Lawson Exp. Ev., Rule 47, p. 332. There was no presumption that the handwriting had so changed from 1869 to 1873 as to be unrecognizable; that lapse of time and the possibility of change were matters for the consideration of the jury, but did not make the testimony incompetent. In like manner it has been held that the greater or less remoteness of time as to which the witness was acquainted with the character of one impeached was a matter for the jury, not for the court. The genuineness of the "agreement" is a vital point for the defense, and the exclusion of this evidence is a material error, which entitles the defendants to a new trial.

There are several exceptions for the exclusion of instruments, as administration bonds, constable bonds and the like, alleged to be signed by M. V. Horne, which the defendants wished to introduce for purposes of comparison, but these were properly excluded. *Tunstall v. Cobb, supra; S. v. De-* (431) *Graff,* 113 N. C., 693; *Jarvis v. Vanderford,* 116 N. C., 147; *Cobb v. Edwards,* 117 N. C., 244; *S. v. Noe,* 119 N. C., 849.

The judge also properly excluded evidence offered to show declarations of Watt Ratliff in his own favor, tending to show he held a fee simple title. *Avent v. Arrington,* 105 N. C., 377; *Shaffer v. Gaynor, supra.*

The testimony of George Ratliff that he had made statements to others of the same matters testified to by him on the trial were competent to corroborate him. *Burnett v. R. R.,* 120 N. C., 517, where the numerous cases to that point have been collected; and there have been several since.

The other exceptions are either covered by what we have herein decided or are matters, like exceptions to the charge, which may not arise on another trial.

For the error as to the fourteenth exception there must be a New trial.

FURCHES, C. J., and DOUGLAS, J., concur in this opinion. But they think the court erred in refusing to allow the plaintiffs to introduce the original deed.

Cited: Warehouse Co. v. Ozment, 132 N. C., 848; *Hatcher v. Dobbs,* 133 N. C., 241; *Davis v. Evans,* 133 N. C., 321;

Jones v. Warren, 134 N. C., 392; *Jackson v. Tel. Co.,* 139 N. C., 357; *Martin v. Knight,* 147 N. C., 580; *Hill v. Bean,* 150 N. C., 437; *Busbee v. Land Co.,* 151 N. C., 515.

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PETTEWAY v. McINTYRE.

(Filed 2 December, 1902.)

1. AGENCY—*Contracts.*

The contracts stated in this case constitute, as a matter of law, the relation of principal and agent.

2. AGENCY—*Contracts—Questions for Jury—Harmless Error.*

Where certain contracts, as in this case, constitute, as a matter of law, the relation of agency, the submission of the question of agency to the jury is harmless if the jury finds that the relation exists.

ACTION by Charles A. Petteway against T. A. McIntyre and another, heard by *Judge O. H. Allen* and a jury, at October Term, 1901, of the Superior Court of ONSLOW. From a judgment for the plaintiff the defendants appealed.

Meares & Ruark, Duffy & Koonce and *W. D. McIver* for the plaintiff.

Rountree & Carr for the defendants.

MONTGOMERY, J. On 29 October, 1897, the Parmelee-Eccleston Lumber Company, of New Jersey, a corporation, and Ernest V. Baltzer, of Wilmington, N. C., entered into a paperwriting which is called by the parties thereto a lease. It consists of nine pages of closely printed matter. In it it was recited as a part of the preamble that the company owned a valuable mill plant for the manufacture of lumber at Jacksonville, Onslow County, N. C., together with valuable standing timber, timber options, timber rights and privileges, and logs, in the counties of Onslow and Jones, North Carolina, and that Baltzer was desirous of cutting, logging and hauling the timber and of
(433) manufacturing the same and the logs; and for that purpose, by himself and in conjunction with others, was ready to operate the mill and undertake the lumbering operations.

In the paperwriting it was also recited that Baltzer had entered into an agreement with Enoch Ludford to operate the

same mill plant and to cut, log and haul the timber referred to, and to manufacture it into merchantable lumber, upon the terms and conditions in that contract with said Ludford fully set forth. A copy of that contract was annexed and made a part of the contract between the Parmelee-Eccleston Company and Baltzer. It was also recited in the preamble that Baltzer had entered into an agreement with Horace M. Dickford, of Boston, for the sale of the lumber manufactured as aforesaid upon commission, a copy of which contract was annexed and also made a part of the contract between the company and Baltzer. It was also recited that in order to carry out the provisions of all the instruments and agreements above referred to it would be necessary to purchase rail for a log railroad and a locomotive and log cars, and to repair and place in proper condition, as in the contract with Ludford set forth, the mill and plant at Jacksonville.

After those recitals in the premises it was declared: "Now, therefore, in consideration of the premises and for the recitals hereinafter set forth, this indenture, witnesseth: That the said, the Parmelee-Eccleston Lumber Company has leased, and by these presents does grant, demise and lease unto Ernest V. Baltzer all those certain premises situate, lying and being at Jacksonville, Onslow County," etc. The property embraced in the contract, the mill plant, all its fixtures and appurtenances and all the standing timber in Onslow and Jones counties, and their timber rights.

Baltzer was authorized, "upon payment of such stumpage or other charges as the said Parmelee-Eccleston Lumber Company itself was under contract to make, and such (434) charges and disbursements only, to cut and remove all standing timber and logs thereon, and to convert and manufacture the same into lumber, and without any further costs than aforesaid to said Baltzer to exercise all the privileges and authority which the company owned and had, or may hereafter acquire, to any railroad or railroads, and upon or over the rights of way now owned or controlled by the said company, appurtenant to or used by, or in connection with, the said mill at Jacksonville aforesaid, and also the privilege of cutting timber for railroad ties and construction, or for other railroad or mill or logging purposes, and of laying, using, operating, maintaining, taking up and removing such rail and railroad from time to time as its best interest may, in his judgment, require, and any railroad constructed by said Baltzer and all materials entering therein, whether obtained from rights of way of said company or from its lands or elsewhere, shall be and remain the

absolute property of said company, its legal representatives and assigns, and subject to its or their exclusive domination and control for all purposes, to the same extent as though the same and all parts thereof were upon land the property of it or them in fee simple; which said assignment and transfer of timber rights and right to manufacture logs into lumber as aforesaid shall be, however, only for the term of the lease aforesaid, and to terminate with the expiration of said lease, and which indenture of lease and assignment as aforesaid is made for and in consideration of the yearly rent or sum of one dollar, payable annually on 31 December in each and every year of said term; as an additional rent the said Baltzer, for himself, his legal representatives and assigns, agrees that he will promptly, and not less often than once in each month, turn over and deliver to the said Parmelee-Eccleston Lumber Company, or its assigns,

(435) the net proceeds and profits of the business to be conducted under the instrument described in the recitals hereto (copies of which are hereto annexed) and under this instrument, less only such sum or sums of money as shall be necessary to pay the premiums for fire and boiler insurance on said mill plant and its appurtenances and stock on hand, and that he will not apply any portion of the same to any other use or purpose, except by and with the express consent of said company or its assigns. By the term 'net proceeds,' as used in this paragraph, is meant the gross amount of all moneys received from the manufacture and sale of lumber out of the timber hereinbefore referred to, less the following: (a) Amounts due Ludford under his contract as therein set forth; (b) amounts due Dickford under his contract, therein set forth; (c) costs of inspections, clerk hire, stationery, postage, traveling and the like, necessary to the due prosecution of the business and the preservation of its best interests: (d) amount of stumpage necessarily paid by Baltzer, being at the same rate as now contracted for by the Parmelee-Eccleston Lumber Company. The remainder of surplus of income after deducting the foregoing shall be the 'net proceeds,' as the term is used and understood in this instrument, and shall be paid over by said Baltzer to said company or its assigns as rental for said premises, except only as the same is ultimately subject to fire insurance premiums as aforesaid and to Baltzer's contingent interest therein by way of additional compensation, as hereinafter appears."

The additional compensation to Baltzer, provided for in the contract, is in these words: "The Parmelee-Eccleston Lumber Company, for itself, its successors and assigns, agrees that for his labor and services in fulfilling his obligations under the pro-

visions of this lease the said company will, during the term of this lease, except as herein provided, pay said Baltzer the yearly sum of $1,500, in equal monthly installments, commencing with the day of the date hereof, and in addition to (436) this amount, at the close of each year, will pay him the further sum equal to ten per cent of the net proceeds and profits of the business to be conducted as aforesaid. The said company in like manner also agrees that it will cause to be given to said Ludford a sufficient bond in the penal sum of five thousand dollars, conditioned for the faithful performance by said Baltzer of his said contract with said Ludford."

Certain other provisions of the contract were that the company was to furnish the locomotive, log cars and rail, and the necessary bolts and fastenings and switches with which to build and equip the log railroad, and the sum of $2,500 with which to put the mill in order. Baltzer, on his part, among other things, contracted to give his personal services to placing the mill in proper condition for operation, and to aid in securing rail for hauling timber as fast as the same might be needed, and the rolling stock necessary to haul the timber. And he further agreed "to cut, log and haul the same and to manufacture it into lumber to his best interests under the terms of this lease, and to dispose of the same at the best prices which he can obtain; of the reasonableness, however, it is mutually agreed he is to be the sole judge." The time mentioned in the paper-writing, called the lease, during which the term shall last, was from its date, 29 October, 1897, to 31 December, 1900. At the expiration of which term or earlier determination for any cause whatsoever Baltzer, or his legal representatives, would quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted.

The contract between Baltzer and Ludford, made a part of the contract between the Parmelee-Eccleston Company and Baltzer, stipulated that Baltzer would put in good condition the mill and all its appurtenances, and would turn over and lease for the space of three years after the execution of the contract, it having been entered into on 19 October, 1897, all the mill property and appurtenances of the lumber company; and he also agreed to furnish to Ludford the loco- (437) motive and the log cars and the necessary rails and spikes and bolts sufficient to operate a log road or roads for the purpose of procuring timber for the mill under the contract, and to lease the property so purchased upon the terms set forth in the agreement at a nominal rent. Ludford agreed to construct

and operate, at his own expense, the logging roads, Baltzer furnishing the cross-ties, they to be gotten out by Ludford.

It was further agreed that Baltzer was to furnish Ludford with all the standing timber, together with the rights of way now owned by the Parmelee-Eccleston Lumber Company in Onslow County, and such as should be sufficient to operate the plant during the term of the contract.

Ludford agreed further to cut and transport from the forest to the mill all timber of merchantable quality on the property of the company which Baltzer was allowed to cut under his contract with the company, under the directions of Baltzer; and he further agreed to saw the logs, kiln-dry, rip, dress and assort the lumber in accordance with the orders of Baltzer, and to place the lumber manufactured by him under the contract in the rough and dressed lumber sheds in proper order, as he might be directed to do by Baltzer; and he was to have the lumber put upon the cars or place it in bins furnished by Baltzer for that purpose, according to the order of Baltzer. For his compensation Ludford was to receive six dollars per thousand feet for board measure for kiln-dry lumber, dressed according to the order of Baltzer and loaded on the railroad cars at the mill, and four dollars and fifty cents per thousand feet for rough kiln-dried, well-manufactured lumber, according to the orders of Baltzer.

On the same day that the contract between the Parmelee-Eccleston Lumber Company and Baltzer was executed the company and the defendant McIntyre entered into the fol-
(438) lowing contract ("Exhibit D"): "Whereas, the Parmelee-Eccleston Lumber Company has this day entered into an agreement of which the foregoing is a copy and duplicate; and whereas, the said company is not at present in funds to meet its obligations thereunder, and at the same time is anxious to obtain the benefits to be derived therefrom to its mill plant and machinery, and in this way to realize upon its timber rights referred to in the foregoing agreement; and whereas, the said company is already heavily indebted to Thomas A. McIntyre, of the city, county and State of New York, for past advances: Now, therefore, this indenture witnesseth, that the said Parmelee-Eccleston Lumber Company, for and in consideration of the premises and of the sum of one dollar lawful money of the United States, to it in hand paid by the said Thomas A. McIntyre, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargaind, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over

unto the said Thomas A. McIntyre, his executors, administrators and assigns. the said indenture of lease, together with all the rights, privileges, rents, moneys and emoluments of whatsoever kind, nature or extent accruing from said lease to the said Parmelee-Eccleston Lumber Company, and all the estate, right, title, interest, term of years yet to come and property, claim and demand whatsoever of the said Parmelee-Eccleston Lumber Company in and to the said lease:

"To have and to hold the same to him, the said Thomas A. McIntyre, his heirs and assigns, as fully and in as ample a manner as the said Parmelee-Eccleston Lumber Company, its successors and assigns, might hold and enjoy the same, and not otherwise.

"And the said the Parmelee-Eccleston Lumber Company, for itself, its successors and assigns, hereby authorizes and empowers the said Thomas A. McIntyre, his heirs, execu- (439) tors, administrators and assigns, to take and apply to his own or their own use the sum or sums provided therein as rental, and whatever property and moneys accrue to or from said company or its assigns under the terms of said lease, whenever the same shall be due or receivable, and to take and pursue all steps and means for the recovery of said rent or other property as by law are provided, as fully to all intents and purposes as the said the Parmelee-Eccleston Lumber Company, its successors or assigns, might or could do in the premises.

"And it is mutually agreed between the parties hereto that the steel rails, locomotive, rolling stock and other appurtenances in said lease agreed to be furnished by the party of the first part thereto shall be and remain the property of the said Thomas A. McIntyre until said Thomas A. McIntyre is fully repaid, by the receipt of the proceeds of the said agreement or otherwise, the amount of money advanced heretofore or in consequence of this agreement to, for or on account of said company's interest. And the said Thomas A. McIntyre hereby covenants and agrees to and with the said Parmelee-Eccleston Lumber Company to do and perform all the terms and conditions of the said foregoing lease agreement upon the part of the said Parmelee-Eccleston Lumber Company contracted to be done and performed."

And on the said 29 October, 1897, McIntyre and Baltzer entered into the following agreement:

"Agreement made and entered into this 29 October, 1897, by and between Thomas A. McIntyre, of the city, county and State of New York, and Ernest V. Baltzer, of Wilmington, North Carolina:

"Whereas the said Baltzer, by a certain instrument in writing, bearing even date herewith, has entered into an agree-
(440) ment of lease with the Parmelee-Eccleston Lumber Company, a corporation duly existing under and by virtue of the laws of the State of New Jersey, doing business at Jacksonville, North Carolina, a copy of which contract is hereto annexed and made a part thereof; and

"Whereas, said Baltzer, by virtue of the power conferred upon him under said agreement of lease, has entered into an agreement with one Enoch Ludford to operate the mill plant of the said Parmelee-Eccleston Lumber Company at Jacksonville, North Carolina, aforesaid (except gang and circular saws), and to cut, log and haul the timber referred to in the said agreement of lease, and to manufacture said timber into merchantable lumber upon the terms and conditions in said contract with said Ludford fully set forth, a copy of which contract is also hereto annexed and made a part hereof; and

"Whereas, said Baltzer, by virtue of the power also conferred upon him under his agreement of lease with said the Parmelee-Eccleston Lumber Company aforesaid, has entered into an agreement with one Horace M. Bickford for the sale of the lumber manufactured as aforesaid upon commission, a copy of which contract is also hereto annexed and made a part hereof; and

"Whereas, the said the Parmelee-Eccleston Lumber Company has assigned to Thomas A. McIntyre the said agreement of lease and all the profits arising thereunder, and the said Thomas A. McIntyre has assumed all the obligations in said agreement of lease specified to be performed by the said company:

"Now, therefore, in consideration of the premises and of the terms and provisions of this instrument, as hereinafter set forth, and of the sum of one dollar by each of the parties in hand duly paid, the parties hereto mutually covenant and agree as follows:

"1. That said Thomas A. McIntyre will do and per-
(441) form all the terms and conditions as said indenture of lease specified to be done and performed by the Parmelee-Eccleston Lumber Company.

"2. That the said Ernest V. Baltzer will do and perform all the terms and conditions, labor and services in said lease specified to be done and performed by him.

"3. That the said McIntyre will hold the said Baltzer harmless against and from any and all lawful claims or damages which he may suffer as contractor with said Ludford and Bickford and the Parmelee-Eccleston Lumber Company, or either of them, or which he may suffer by the termination of either

or both the Ludford and Bickford contracts, as in said indenture of lease specified; but this guarantee shall not be construed to cover the result of any default or neglect on the part of the said Baltzer.

"And whereas, it is declared in and by the agreement of lease referred to in the first recital hereof that in case of the death or failure from any cause on the part of Baltzer the said agreement of lease should not thereby lapse or determine, but that it should immediately enure to the benefit of such person and his assigns as said Baltzer may designate in writing:

"Now, therefore, I, the said Ernest V. Baltzer, in the event aforesaid, do hereby designate Thomas A. McIntyre and his assigns as the person to whom shall enure the rights, privileges, powers, property and rights of property of every name, nature and kind, with all the responsibilities and subject to all the terms and conditions of said instruments as therein respectively set forth and expressed.

"Except as otherwise provided herein, specifically, the terms and provisions of this agreement shall bind and enure to the heirs, executors, administrators and assigns of the parties hereto.

"In case any further or other instruments should be found requisite for the more completely carrying into (442) effect any of the provisions of this agreement, then the parties hereto will execute the same upon demand."

The plaintiff brought this action in a justice's court to recover from the defendant McIntyre an amount alleged to be due on a contract with Baltzer in his operation of the mill plant, alleging that Baltzer was either the agent of McIntyre or a partner with him in the business. The defendant denied that he was either the principal of Baltzer or a partner with him in the milling business. From the justice's judgment in favor of the plaintiff the defendant appealed to the Superior Court. There was a judgment in that court for the plaintiff.

If those portions of the contract which we have recited and referred to and which relate to the acts to be done by the several parties thereto constituted the whole of those contracts, we would even then not be sure that there was not some evidence going to show a partnership between McIntyre and Baltzer. There are other parts of those contracts, though, limiting and narrowing the duties, rights and privileges of Baltzer, which we will presently notice and discuss and which, when read with the whole of all of the contracts, satisfy us, as a matter of law, that Baltzer was the agent of McIntyre for the purpose of conducting the business mentioned in the contracts. Notwithstanding the agreement between the lumber company and Baltzer

was called a *lease,* yet, through it all can be seen with perfect distinctness the guiding and controlling hand of the company in the management of the business.

No experienced business man, upon reading the four contracts mentioned above, could fail to see that Baltzer was so hampered and embarrassed by the limitations and restrictions of the contract as to be left little of independence, or of judgment, or of action. It seems clear that the purpose of the drafts-
(443) man of the agreements was to enable the company and McIntyre to conduct the hazardous enterprise of saw milling through an agent under the forms of a lease of the property to Baltzer. Baltzer was not allowed to keep in his own possession the original of the agreement with the company, the original of the agreement with Bickford, the original of the agreement with Ludford, or the original of the agreement with McIntyre. He was to assign and deposit them with the company, and he was required, further, to assign and deposit with the company all bonds and undertakings which might be delivered to him for the faithful performance of the contracts. Baltzer further covenanted with the company not to dispose of any right he had under the contracts to any one without the company's permission, the covenant being in the following language: "Baltzer covenants and agrees not to assign or otherwise dispose of any of the contracts, nor this lease, nor any of his rights under them, or either of them, nor of this instrument, nor of any of his rights hereunder, to any person, firm or corporation whomsoever, excepting by and with the consent, in writing, of said company or its assigns, and excepting as provided in the terms of the contracts, copies of which are annexed." He also agreed that in case of his death the lease should not go to his personal representatives. The following is a provision in the contract in reference to that matter: "In case of the death of said Baltzer this lease shall not thereby lapse or become determined, but shall immediately enure to the benefit of such person or his assigns as said Baltzer may have designated in writing." And he further agreed to assign, and did assign, to the company the right to annul the contract whenever the company saw fit to do so. The language used on that point is as follows: "Baltzer further agrees to and does hereby assign, transfer and set over unto said company or its assigns his (said Baltzer's) right to terminate said Ludford and Bickford contracts, or either
(444) of them, or their substitutes, as conferred upon him by the terms of said contracts respectively, and upon the conditions therein expressed, said company hereby agreeing, should it avail itself of such privilege, to pay said Baltzer at

the agreed rate of $1,500 per annum for the remainder of the year after such termination, and also his additional compensation, as hereinbefore set forth, down to the time of such termination." He had reserved the right in his contract with Ludford to end the contract with him upon three months' notice. Baltzer's contract with Ludford, notwithstanding it purported to be a lease of the whole plant, yet, when carefully examined, Ludford had very little power and no discretion. He had to cut the lumber under Baltzer's direction, to saw it under his direction, to pile and load it under his direction, and was compelled to abandon his contract whenever Baltzer demanded it. Indeed only two rooms of the office building of the plant were to be given to Ludford, and in that contract there was reserved for the use of the lumber company access to the office building at all times. The language of the contract on that point was as follows: "The party of the first part reserves to itself an easement for access, for its officers or agents, to and from all parts and portions of the above described property at all times." It is evident from that language that in the draftsman's mind the company was to be the directing power in the management of the business. The presence of its officers and agents at all times upon premises which had been leased and put in the possession of the lessee is incompatible with the idea of a *bona fide lease.*

The defendant McIntyre received, as we have seen, an assignment of this contract between the lumber company and Baltzer, and is affected in law by the several contracts mentioned, just as the lumber company was. In the contract between McIntyre and Baltzer, made after the assignment by the lumber company of its interest of what is called the lease to (445) McIntyre, Baltzer covenants with McIntyre, among other things, as follows: "And whereas, it is declared in and by the agreement of lease referred to in the first recital hereof that in case of the death or failure from any cause on the part of Baltzer the said agreement or lease should not thereby lapse or determine, but that it should immediately enure to the benefit of such person and his assigns as said Baltzer may designate in writing: Now, therefore, I, the said Ernest V. Baltzer, in the event aforesaid, do hereby designate Thomas A. McIntyre and his assigns as the person to whom shall enure the rights, privileges, powers, property and rights of property of every name, nature and kind, with all the responsibilities and subject to all the terms and conditions of said instruments as therein respectively set forth and expressed." McIntyre, under that agreement, got the benefit of the covenant which Baltzer had

made with the lumber company, that in case of his death the lease should not lapse, but should immediately enure to the benefit of such person, or his assigns, as Baltzer might designate in writing. McIntyre, then, had a right to put an end to the contract, which was called a lease, and he had also been substituted for Baltzer in case of Baltzer's death.

In the brief of the defendant McIntyre it was argued that if Baltzer was an agent he was a special agent. But it appears from the contract that he was authorized to operate the sawmill plant, and it is stated in the case on appeal that the plaintiff's debt was contracted by Baltzer in his operation of the mill plant.

His Honor submitted one issue to the jury, to-wit, "Are the defendants indebted to the plaintiff, and if so, in what amount?" and instructed the jury thereon as follows: "8. If you shall find that said business was in fact the business of McIntyre and that McIntyre had employed Baltzer to conduct the same (446) in his own name, and that the work done was within the authority given the said Baltzer by McIntyre, then both Baltzer and McIntyre would be liable, and if so, answer 'Yes,' otherwise 'No.'" The jury answered in the affirmative and for the sum of $95.92.

As we have said the contracts in this case upon their face constituted, as a matter of law, Baltzer the agent of the lumber company, and then of McIntyre by assignment of the lumber company. His Honor ought not to have submitted an issue as to the agency to the jury, but as he did so and the jury made response as the law of the case was, no harm has been done.

No error.

DUNN v. WILMINGTON & WELDON RAILROAD COMPANY.

(Filed 2 December, 1902.)

JURY—*Jurors—Challenges—Peremptory.*

Where a jury has been accepted by the parties, it is error to permit a peremptory challenge to be made.

CLARK and DOUGLAS, JJ., dissenting.

ACTION by Joseph Dunn against the Wilmington and Weldon Railroad Company, heard by *Judge Frederick Moore* and a jury, at December Term, 1900, of DUPLIN. From a judgment for the plaintiff the defendant appealed.

Allen & Dortch, A. D. Ward and *L. V. Grady* for the plaintiff.
Junius Davis and *H. L. Stevens* for the defendant.

FURCHES, C. J. After the jury box was full the plaintiff asked the general question, if any juror had formed and expressed the opinion that plaintiff ought not to recover, whereupon one juror stated that from hearing the evi- (447) dence in the former trial he had formed and expressed an opinion in favor of the defendant; he further stated that "notwithstanding such expression of opinion he could try the case impartially according to the evidence and charge of the court." His Honor thereupon found him a competent juror. To this there was not and could not be any ground of exception. *S. v. Collins,* 70 N. C., 241; 16 Am. Rep., 771; *S. v. Cockman,* 60 N. C., 484. But the court thereupon allowed the plaintiff to challenge said juror peremptorily. The defendant excepted. It is also found that the defendant had at that time exhausted his peremptory challenges.

In this there was error. After the jurors are passed by the parties any further examination of them is not a matter of right but of discretion in the court. If on such examination good challenge for cause is presented the court may allow the juror to be challenged therefor. *S. v. Cunningham,* 72 N. C., 469; *S. v. Davis,* 80 N. C., 412; *S. v. Adair,* 66 N. C., 298.

But the reason of the thing and the precedents do not extend to the allowance of a peremptory challenge after a juror has been passed and accepted. When another juror has been called the routine inquiry of the judge is, "Has the plaintiff (or defendant) any objection to the juror last called?" To allow a party to challenge peremptorily a juror after he has accepted him, or after he has accepted the twelve, would give the plaintiff the manifest advantage that if doubtful of using his peremptory challenge he can wait to see if the other side will not challenge them peremptorily or for cause, and if he fails to do so the plaintiff will, if the court permit, challenge peremptorily such an one as he wishes after the panel is made up.

It is true a party's right is not to select but to reject a juror, and therefore no exception will lie to the rejection of a juror by the other side unless it is prejudicial to himself. (448) But that appears here for the defendant, having exhausted his peremptory challenges in perusing the jury, when the peremptory challenge of the plaintiff was thereafter allowed the defendant was deprived of the right to challenge peremptorily the new juror put in his place. The defendant was not improvident in having exhausted its peremptory challenges in the peru-

sal of the panel. It was not necessary for the defendant to show grounds of a challenge for cause to the new juror. It is enough that he could not challenge him peremptorily.

It is to be regretted that this cause, which has been here three times before, should go off on a matter of this kind, but the rules governing the formation of juries are well settled and material. An innovation, such as the allowance of a peremptory challenge after the acceptance of a juror, is not only an impairment of the legal rights of the opposite party but would lead to great uncertainty in trials in a matter which has long been settled and well understood.

New trial.

DOUGLAS, J., dissenting. I am forced to dissent from an opinion which seems to me to be contrary to the letter and the spirit of the law. The Court, in its opinion, cites neither statute nor precedent for its decision. The reason is obvious. The learned German professor, who undertook to prepare a lecture upon the snakes in Ireland, encountered the same difficulty. The opinion says: "But the reason of the thing and the precedents do not extend to the allowance of a peremptory challenge after a juror has been passed and accepted." The Court entirely overlooks the case of *S. v. Vestal,* 82 N. C., 563, where the State was permitted to *peremptorily* challenge a juror after the entire jury had been passed by both parties. We (449) have no case whatever to the contrary. Again, the opinion says: "When another juror has been called the routine inquiry of the judge is, 'Has the plaintiff (or defendant) any objection to the juror last called?'" This is scarcely consistent with what this Court has said in *S. v. Davis,* 80 N. C., 412, as follows: "And in conformity to this rule of practice is the ancient formula used by clerks both in England and in this country in their address to prisoners before the jurors are drawn: 'Those men that you shall have called and personally appear are to pass between our sovereign (or the State) and you upon your trial of life and death; if therefore you will challenge them, or any of them, your time is to speak to them as they *come to the Book to be sworn and before they are sworn.*'" The italics are by the Court. This case is cited by the Court upon a point not in dispute, as are all its other citations.

The following, written tentatively, express my view of the case as presented to us:

This case is before us for the third time, having been reported in 124 N. C., 252, and 126 N. C., 343. The legal questions

therein decided cannot now be reviewed. The exception upon which the defendant apparently mainly relies is that the court below, in its discretion, permitted the plaintiff to challenge a juror peremptorily after having been passed by the plaintiff.

This exception seems to be based upon a misconception of the statute, which makes a wide distinction between peremptory challenges by the State, especially in capital cases, and those by an individual. Section 1200 of the Code provides that "In all capital cases the prosecuting officer, on behalf of the State, shall have the right of challenging peremptorily four jurors, provided said challenge is made *before* the juror is *tendered* to the prisoner." This section is the only one requiring challenge before tender. Section 1199 relates to challenges by the defendant in criminal cases, and provides that (450) "To enable defendants to exercise this right, the clerk, in all such trials, shall read over the names of the jurors on the panel in the presence and hearing of the defendants and their counsel before the jury shall be *impaneled* to try the issues."

Section 406, governing peremptory challenges in civil suits, is as follows: "The clerk, before a jury shall be *impaneled* to try the issue in any civil suit, shall read over the names of the jury upon the panel in the presence or the hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily four jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court." The italics in these sections are our own. The peremptory challenge under exception was made before the jury were impaneled, and therefore in strict accordance with the terms of the statute. There was no error in its allowance.

The only case from our Reports cited by the defendant in support of its contention is *S. v. Fuller,* 114 N. C., 885; but that case was expressly decided upon the construction of section 1200, as the prisoner was charged with murder. In *S. v. Vestal,* 82 N. C., 563, wherein a misdemeanor was charged, the State was permitted to peremptorily challenge a juror after the entire jury had been passed by both parties but before it was impaneled.

The defendant also cites us to *Ward v. R. R.,* 19 S. C., 521; 45 Am. Rep., 794; but if outside decisions could be permitted to affect the plain words of our statute we would find the general current of authority against the defendant. Abbott's Civil Issues, p. 69, sec. 74. In 17 Am. and Eng. Enc., 1185, it is said: "The right of peremptory challenge is one of the safeguards against possible injustice, and its freest exercise within the limits fixed by the Legislature should be permitted." In

(451) 12 Enc. P. and P., 495, the principle governing peremptory challenges is thus stated: "Unless the time when or the order in which a challenge may be interposed is expressly restricted by statute, the absolute right to challenge a proposed juror peremptorily may be exercised at any time after his appearance and before he is sworn to try the issue or issues involved. The right of peremptory challenge ought to be held open to the last possible period, to-wit, up to the actual swearing of the jury, and no circumstance can bring that right within the discretion of the court so long as it is confined to the number of challenges allowed by law. The allowance of a challenge of this nature after the acceptance of a juror and after he has been sworn in the case is not a strict matter of right, but in the discretion of the court, and for good cause such a challenge may be allowed, either before or after the completion of the panel."

In the case at bar the complaint of the defendant is, not that an objectionable juror was forced upon it, but that it was not permitted to retain a juror who was satisfactory. As was said by *Henderson, J.*, in *S. v. Lamon*, 10 N. C., 175, "Challenge is not given to the prisoner that he should have a particular individual upon his jury, but that he should *not* have one against whom he had an objection." In *S. v. Smith*, 24 N. C., 402, it is said by *Gaston, J.*, that "the right of challenge is a right to reject—not to select—jurors." *Perry v. R. R.*, 129 N. C., 333; 17 Am. and Eng. Enc., 1178.

The other questions are without merit and cannot be sustained. In fact, as far as they are material, they appear to have been substantially decided on the former appeal as they are all questions of law. As the jury found that the plaintiff was not guilty of contributory negligence all instructions as to the issue of last clear chance became immaterial.

(452) The defendant insists that it was not guilty of negligence "if the engine was kept standing upon the side track under steam for use in shifting cars." This is not the law. The fact that the engine was kept there for a lawful purpose, even if it were more convenient to keep it there, does not justify the obstruction of a public highway. Upon the former appeal (124 N. C., 252) it was held that "The use of the highway belongs to the public by common right, and no one may obstruct it without paramount necessity." The rule laid down in *Flynn v. Taylor*, 127 N. Y., 596; 14 L. R. A., 556, quoted in *Tinker v. R. R.*, 51 N. E. (N. Y.), 1032, meets our approval. It is as follows: "Two facts, however, must exist to render the encroachment lawful: (1) The obstruction must

be reasonably necessary for the transaction of business; (2) it must not unreasonably interfere with the rights of the public." The plea of necessity is one of avoidance.

We are not prepared to say, as a matter of law, that the plaintiff was guilty of contributory negligence in traveling upon the highway or that the defendant can relieve itself of all liability for its own negligence simply by making the highway too dangerous for a prudent man to travel. We think there was evidence to go to the jury, and as the question of negligence was submitted to them under proper instructions I see no reason to disturb their verdict. The judgment shall be affirmed upon the express wording of the statute, supported by precedent and authority.

CLARK, J., concurs in the dissenting opinion.

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(453)

RHEA v. RAWLS.

(Filed 9 December, 1902.)

DOWER—*Trust Deed—Equity of Redemption.*

Where an owner of land subject to a deed of trust, to secure two notes, conveys it to another person, subject to the payment of the notes, and such person, as a part of the same transaction, gives a trust deed as security for the payment of the two notes and gives his own notes in place of said notes, these notes being surrendered to the original owner of the land, the widow of the original grantee has no right to dower after the foreclosure of the deed of trust.

ACTION by Harriet E. Rhea against R. R. Rawls and others, heard by *Judge M. H. Justice* and a jury, at June Term, 1902, of BUNCOMBE. From a judgment for the defendants the plaintiff appealed.

W. J. Peele and *G. A. Shuford* for the plaintiff.
Merrimon & Merrimon for the defendant.

FURCHES, C. J. This is a proceeding for dower, in which plaintiff seeks to have dower assigned her as the widow of H. K. Rhea, commenced before the clerk and transferred to term for trial upon issues involving plaintiff's right to dower in an undivided half of the Swannanoa Hotel property.

M. E. Carter was the owner of this property subject to a deed of trust to I. G. Martin to secure the payment of two notes—one due Norcop of $5,022, and one to Buchanan of $700. And

on 1 September, 1883, he sold, and he and his wife conveyed the one-half interest he owned to the said H. K. Rhea, subject to the payment of the Norcop and Buchanan debts. This is expressly stipulated in the deed from Carter and wife to Rhea. And at the same time and as a part of the same transaction Martin, trustee, took a trust deed from Rhea as security for the payment of the two notes to Norcop and Buchanan, Rhea
(454) giving his own notes in place of the Carter notes, which Martin surrendered to Carter. These notes were not paid. Martin sold and the defendant Rawls became the purchaser, paying a full fee simple price, and Martin, the trustee, made him a deed.

The plaintiff cannot recover. The deed from Carter to H. K. Rhea conveyed the property subject to the payment of the two notes held by Martin as trustee, which constituted a trust on the property conveyed for their payment. This was expressly stipulated in the deed from Carter. It would have been necessary to enforce this trust by a decree of court, as there was no power of sale. But Rhea's deed to Martin contained a power of sale, and we think supplied the want of such power in the deed from Carter, as both deeds were made at the same time and were a part of the same transaction.

But at the time Carter conveyed to Rhea he only had the equity of redemption, the legal estate then being in the trustee Martin. *Parker v. Beasley,* 116 N. C., 1; 33 L. R. A., 231. Therefore Rhea never held the legal title to said property. It did not even pass through him as it did in *Bunting v. Jones,* 78 N. C., 242. But it is said a widow may be endowed of an equitable estate. This is so where the husband has an equity that he could enforce if living. But in this case he had none that he could enforce, as he took the title subject to the payment of these debts of Norcop and Buchanan, which were paid by a sale under the deed of trust with the defendants' money. And as the husband would have had no equity the plaintiff has none, as it cannot be contended that the Carter debts to Norcop and Buchanan were paid by the substitution of Rhea's notes for those of Carter. Again it appears that the deed from Carter and wife to Rhea, and the change of notes, and the new trust deed of Rhea to Martin for that of Carter were all a part of the same transaction; that the notes of Norcop and Buchanan furnished the purchase money to Carter, and that Rhea
(455) never paid a dollar of it, so the case of *Bunting v. Jones* applies in full force, and the plaintiff cannot recover for the reasons given in that case.

Affirmed.

BROWN v. ATLANTA & CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 9 December, 1902.)

1. NONSUIT—*Evidence—Demurrer—Laws* 1897, *Ch.* 109—*Laws* 1899, *Ch.* 131—*Laws* 1901, *Ch.* 594—*Railroads.*

A defendant may, at the close of his evidence, make a motion for nonsuit in the nature of a demurrer to the evidence, though his evidence will not be considered.

2. LEASES—*Railroads—Damages—Negligence.*

The lessor of a railroad is liable for the negligence of the lessee in the operation of the road.

COOK, J., dissenting in part.

ACTION by J. B. Brown against the Atlanta and Charlotte Air Line Railway Company, heard by *Judge A. L. Coble* and a jury, at October Term, 1902, of MECKLENBURG. From a judgment for the plaintiff the defendant appealed.

Burwell, Walker & Cansler for the plaintiff.
Geo. F. Bason for the defendant.

MONTGOMERY, J. This action was brought by the plaintiff to recover damages for personal injuries sustained by him while in the service of the Southern Railway Company, the lessee of the defendant, the Atlanta and Charlotte Air Line Railway Company. The defendant, after pleading contributory negligence on the part of the plaintiff, for a further (456) answer and defense denied its liability on the ground that it had leased the property to the Southern Railway Company and was not responsible for the tortious acts of its lessee. The language of that part of the answer was in these words: "12. And for a further answer and defense to said action the defendant says that having leased and conveyed its railroad with all its property, rights and franchises to the lessee, the Southern Railway Company, as alleged in the plaintiff's complaint, this defendant at the time of the injury to plaintiff had no control nor power over the said railroad nor over the management or operation of the same. It had deprived itself of its property, rights and franchises with the consent of the State, which had conferred upon it in its charter the right to convey and lease its railroad and all its property, rights and franchises granted in its charter except the franchises to be and exist as a corporation; that in view of the foregoing, as it is advised, it cannot be held and is not liable in law for the result of any conduct or

alleged misconduct of its lessee, the Southern Railway Company, towards the plaintiff in its operation of the said railroad. Defendant further says that it is advised that to hold it liable in this action and to take from it its property in satisfaction of any judgment which may be recovered in the same will be to deprive it of its property without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States."

At the close of the evidence "The defendant moved for a nonsuit upon the ground, as it appeared from the evidence, that this action was prosecuted against the defendant, the Atlanta and Charlotte Railway Company, the lessor, for the tort committed by the Southern Railway Company, its lessee, in the ope-
(457) ration of its trains over the leased road." The motion was overruled, a judgment in favor of the plaintiff upon the verdict was rendered, and the defendant appealed.

Each and all of the exceptions, with the exception of the one to the overruling of the motion for nonsuit, were abandoned by the counsel of the defendant in this Court.

The plaintiff contends that the court properly overruled the motion for nonsuit for the reason that the defendant did not make the motion at the proper time, that is, when the plaintiff had concluded his evidence, and that when it was made it was after the defendant had introduced its evidence on the execution of the lease, which was not permissible, a defendant not being allowed to move to dismiss upon testimony introduced by himself. The contention is based on the provision of Laws 1897, ch. 109, as amended by Laws 1899, ch. 131. The amendment of 1899 has been repealed by the subsequent amendment of 1901, chapter 594, which latter amendment is substituted for the former one, but for the purposes of this discussion that is immaterial.

The purpose of the motion was not to procure a ruling by the court upon the right of the defendant to lease its road to the Southern Railway Company, for that had been admitted in the answer, but to have a ruling that the whole evidence showed that the plaintiff was injured while in the service of the lessee, and that it was not legally sufficient to establish the plaintiff's claim as against the defendant. If the defendant had proceeded under the statutory provisions above referred to there could be no doubt that the question would have been properly raised. But was the defendant confined to the procedure marked out in those statutes? The motion was substantially "a demurrer to the evidence," and that practice is recognized in many of the States, and always has been with us. The purpose of the prac-

tice is to present to the court, instead of submitting the evidence to the jury, such facts as were shown, and as the evidence tended to prove, for the judgment of the court as to their (458) sufficiency in law to establish the plaintiff's claim against the defendant. If the burden to make out the case is on the defendant the plaintiff might demur to the evidence. The usual practice in this State before the enactment of the statutes above referred to was to proceed as is now provided for, except that now it is discretionary with the defendant whether he will introduce evidence after the motion to dismiss or not, while before these acts that matter was discretionary with the court. But what can be the objection to moving, for the first time, when all the evidence is in, notwithstanding the Act of 1897, ch. 109, as the proper method of demurring to the evidence? Of course the evidence of the demurrant could not be considered. In the case before us there was no evidence offered by the demurrant except on the matter of contributory negligence of the plaintiff. The fact that the Southern Railway Company was operating the train was admitted in the answer and exemption pleaded on that account for the defendant. We will consider the motion as a demurrer to the evidence, though not very clearly expressed and only made at the conclusion of all the evidence, the demurrant's evidence not bearing on the matter embraced in the motion.

But his Honor was correct in his refusing to sustain the demurrer. We will not attempt to add anything further to what has been said by this Court on the responsibility of railroad companies who are lessors for the negligent acts of their lessees. They are both liable. In *Logan v. R. R.*, 116 N. C., 940, the matter was thoroughly discussed and decided, and the opinion has been affirmed in numerous cases since. *Tillett v. R. R.*, 118 N. C., 1031; *Benton v. R. R.*, 122 N. C., 1007; *Perry v. R. R.*, 128 N. C., 471; *Harden v. R. R.*, 129 N. C., 354; 55 L. R. A., 784; 85 Am. St., 747.

No error.

COOK, J., dissenting. I do not concur in that part of (459) the opinion of the Court which holds that the defendant lessor company is responsible for the torts committed by its lessee, the Southern Railway Company.

Under the powers conferred upon defendant company in its charter it had the right to lease, and in exercising the same did lease, its railroad and all its property, rights and franchises (except the franchise to be and exist as a corporation) to the Southern Railway Company; and the latter, the Southern Rail-

way Company, was, as such lessee, operating the same on its own account and was the employer of the plaintiff at the time when the alleged injury occurred, and there was no contractual relation existing between the plaintiff and defendant. In no jurisdiction (except our own) is it held that the lessor company is liable for the contracts or torts of the lessee company, *except* (1) when the lease is made without legal license or authority (in which case the lessee is deemed to be the agent of the lessor); (2) when the license or authority to lease is coupled with an express provision that the lessor shall be and remain liable for the acts of its lessee.

In the case at bar the lease was made under express authority granted in the charter of the lessor company, and there is no provision that it shall be liable for the contracts or torts of its lessee.

This doctrine was first held by this Court in *Logan v. R. R.*, 116 N. C., 904, and was approved in a number of cases thereafter. But when it was again presented to this Court for review (for the first time after I became a member of this Court) in *Harden v. R. R.*, and after a thorough study of the principle involved and examination of the decisions bearing upon the question I became satisfied that it was unsound in law, and thus gave a full expression of my views in my dissenting opinion, to which I now refer, without a rediscussion of the subject.

Cited: Parker v. R. R., 150 N. C., 434.

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(460)

THOMAS v. GWYN.

(Filed 9 December, 1902.)

1. BURDEN OF PROOF — *Principal and Agent — Agency — Commissions—Rents.*

Where a principal sues an agent for rents collected, and the agent admits the collection and alleges that the rents are retained as commissions, the burden of establishing the right to the commissions is on the agent.

2. AGENCY—*Principal and Agent—Contracts.*

Where no term is fixed for the continuance of a contract, either party may terminate it at will.

3. PAYMENTS—*Principal and Agent—Estoppel.*

The acceptance by a principal of a check from an agent, accompanied by a letter recognizing the fact that such check will not be

a full settlement unless so accepted by the principal, does not estop the principal from claiming a balance.

4. AGENCY—*Principal and Agent—Rents—Lease.*

Agents who manage realty are not entitled, on the termination of the agency, to retain commissions on rents to accrue in the future from leases made by them.

ACTION by Mary W. Thomas against W. B. Gwyn and another, heard by *Judge W. B. Councill* and a jury, at September Term, 1902, of BUNCOMBE. From a judgment for the plaintiff the defendants appealed.

T. F. Davidson and *Thos. A. Jones* for the plaintiff.
Merrimon & Merrimon for the defendants.

CLARK, J. The plaintiff alleges that the defendants were her agents to collect rents for her houses, and had collected up to 31 December, 1894, the sum of $366.90, which is due her, but which they refuse to pay over. The defendants admit the retention by them of said sum collected by them as alleged in the complaint, but aver that the plaintiff owes them (461) for commissions and services for which they have retained said sum. The court properly held that the burden of proof was upon the defendants, for if no proof had been introduced on either side, upon the admission in the answer of the collection of $366.90 of plaintiff's money and retention of the same, nothing else appearing, the plaintiff would be entitled to recover. *Cook v. Guirkin,* 119 N. C., 13.

The defendants dissolved partnership and offered that one of them would collect part of the rents thereafter and the other the other part. The plaintiff declined this proposition and discontinued the agency, as she had a right to do. *Abbott v. Hunt,* 129 N. C., 403. The defendants then sent in a statement of account, charging commissions on rents which would thereafter fall due on leases made by them, and deducted therefor $366.90, sending the plaintiff a check for the difference. The defendants now claim that the acceptance of said check is an estoppel upon the plaintiff to claim the balance, and rely upon *Ore Co. v. Powers,* 130 N. C., 152, and cases there cited. But they are not in point. In those cases the check or draft was sent with a statement therein or in the letter that it was in full settlement, and the creditor accepted it or used it without demur. In the present case the defendants, in their letter of transmission, recognize that the check will not be a full settlement unless so accepted by the plaintiff, and say therein: "We cannot, as a mat-

ter of course, undertake to predict with absolute certainty what a court of law will decide, but whatever is decided we will have to abide by. Decision adverse to us would not shake our firm belief in our moral right to this money." The plaintiff promptly notified the defendants that she accepted the draft only "on account," and reserved the right to collect the balance of $366.90, which had been retained as commissions on future rents.

The only point in the case, therefore, is as to the right
(462) to retain these commissions on future rents. These rents may or may not be collected. There was no contract shown authorizing such charge, and it would not arise by implication. The agents who shall hereafter collect them will of course charge therefor, and if the original agents can also charge that would throw an additional charge upon the owner whenever an agent is changed. It was in evidence for the defendants, by one of themselves: "We never had any formal contract of any kind. I was asked to take charge and collect the rents, and I did so, and retained five per cent in all cases," and this course of dealing had continued eleven or twelve years. On cross-examination he said it was usual to collect this commission "as the rents accrued," and that they had deducted five per cent on all the rents they had collected; that the $366.90 was five per cent on rents thereafter to accrue. He said that five per cent covered the trouble of securing a tenant and drawing up the lease, collecting and remitting rents and keeping a supervision of the property and keeping it in repair. As all these duties terminated with the termination of the agency, save the first named, there could be no implied contract or *quantum meruit* to justify a charge of five per cent on rents not yet accrued, and as the defendants' testimony fails to show that the plaintiff was informed of any custom to that effect, and there was no express contract authorizing it, his Honor properly sustained the demurrer to the defendants' evidence.

No error.

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(463)

HOPKINS v. NORFOLK & SOUTHERN RAILROAD COMPANY.

(Filed 9 December, 1902.)

1. NONSUIT—*Evidence.*

On a motion for nonsuit the evidence of the plaintiff must be taken as true and construed most favorably for him.

2. FISHERIES — *Nets — Damages — Navigable Waters — Water and Water Courses—The Code, Sec.* 3385.

A company injuring fishing nets in a navigable stream by unnecessarily and wantonly running its boats into the same is liable for damages.

ACTION by E. B. Hopkins and another against the Norfolk and Southern Railway Company and another, heard by *Judge George A. Jones* and a jury, at Spring Term, 1902, of TYRRELL. From a judgment of nonsuit the plaintiffs appealed.

W. M. Bond for the plaintiffs.

Pruden & Pruden and *Shepherd & Shepherd* for the defendants.

DOUGLAS, J. This is an action to recover damages for the destruction of fishing nets by the steam tug and barge of the defendants. Among other allegations in the complaint are the following:

1. That during the spring of 1901 they were engaged in fishing Dutch and pound nets in the waters of Scuppernong River, where they had the right in law to fish same.

4. That on the said day (1 May, 1901), while the said nets of plaintiffs were setting in said water catching fish at large profit to them, said nets were run over, greatly damaged and partially destroyed by said transfer barge and said tug-boat, being lashed together.

5. That said injury to and destruction of said nets was caused by the negligence of those operating said boats, (464) they being employees of defendants, in failing to navigate them so as to avoid nets, as there was plenty of water for them to do so, and there was no necessity, either from stress of weather or from any other cause, to make them run over said nets; that said nets were injured willfully, wantonly, unlawfully and unnecessarily, and three nets were injured or destroyed.

The plaintiff introduced evidence tending to show that the defendants' boats ran over and injured the plaintiffs' nets on 1 May, 1901, between sunset and dark; that it was not too dark to see the nets, but that they could have been seen at a distance of 400 or 500 yards before reaching them; that the river at that place is between 300 and 400 yards wide; that the nets did not extend into the regular channel of the river where boats usually passed, but left a clear channel from 125 to 150 yards in width, along which the boats could have gone with ordinary care without inconvenience or danger and without injuring the nets. There was also evidence tending to show the amount of damage.

At the conclusion of the plaintiffs' testimony the defendants moved for judgment as of nonsuit. This motion was granted.

It is well settled that on a motion for nonsuit or its counterpart, the direction of a verdict, the evidence of the plaintiff must be accepted as true and construed in the light most favorable for him. *Moore v. R. R.*, 128 N. C., 455; *Coley v. R. R.*, 129 N. C., 407, 413, and cases therein cited. In *Purnell v. R. R.*, 122 N. C., 832, *Justice Furches*, speaking for the Court, says: "This motion is substantially a demurrer to the plaintiff's evidence, and this being so and the court having no right to pass upon the weight of evidence, every fact that plaintiff's evidence proved or *tended* to prove must be taken by the court to be proved. It must be taken in the strongest light as against (465) the defendants." Thus construing this evidence there can be no doubt that the case should have been submitted to the jury. Therefore there was error in the judgment of nonsuit.

The right of navigation is paramount but not exclusive. If the nets had been across the channel of the river, or had been in any other way a bar to navigation, they could have been run over with impunity by any vessels that might have found it reasonably necessary to do so. *Lewis v. Keeling*, 46 N. C., 299; 62 Am. Dec., 168; *S. v. Baum*, 128 N. C., 600. But there must be some such necessity. As was said by this Court in *Lewis v. Keeling, supra*, "There must be no wantonness or malice, no unnecessary damage, but a *bona fide* exercise of the paramount right of navigation." This rule is not only uniformly recognized by the courts in awarding compensatory damages, but is further enforced by section 3385 of the Code by providing a penalty of one hundred dollars for every such injury.

The defendants rely upon *Baum's case, supra*, but that case recognizes only the *paramount* right of navigation, and is based upon the *obstruction* of a navigable stream.

There was error in taking the case from the jury.

Error.

Cited: Brittain v. Westhall, 135 N. C., 495; *Craft v. R. R.*, 136 N. C., 50; *Kearns v. R. R.*, 139 N. C., 476, 481; *Biles v. R. R., ib.*, 529; *Wrenn v. Morgan*, 148 N. C., 104.

(466)

MCCALL v. ZACHARY.

(Filed 9 December, 1902.)

1. JURISDICTION—*Superior Court — Bonds — The Code, Sec.* 543—*Public Officers.*

Where an action is brought to recover the fees of an office, amounting to $500, and in the same action judgment is asked against the sureties on a $200 bond given in a *quo warranto* proceeding, the Superior Court has jurisdiction.

2. FORMER ADJUDICATION—*Bonds — Offices — Fees — Estoppel—Quo Warranto.*

Judgment as to the title to an office in a *quo warranto* proceeding is not an estoppel to an independent action to recover the fees of the office.

3. ACTIONS—*Joinder—Fees—Quo Warranto—Bonds.*

An action for the fees of an office and one on the bond given in the *quo warranto* proceedings may be joined.

ACTION by R. S. McCall against W. W. Zachary, heard by *Judge W. B. Councill,* at August Term, 1902, of MADISON. From a judgment for the defendant the plaintiff appealed.

Frank Carter (*V. S. Lusk* and *Pritchard & Rollins* on the brief) for the plaintiff.

Geo. A. Shuford and *J. M. Gudger* for the defendant.

FURCHES, C. J. The plaintiff was the duly elected solicitor of Madison County Criminal Court, but the defendant, under an appointment by the judge of said court, took possession of said office before the term of the plaintiff had expired. The plaintiff thereupon, by and with the permission of the Attorney-General, brought an action of *quo warranto* for the possession of said office, which terminated in his favor (125 N. C., 249), in which action it was held that he was the right- (467) ful solicitor of said court and the defendant was not, and that the plaintiff was entitled to the office and the fees and emoluments thereof. Upon the institution of said action of *quo warranto* the defendant, as he was required to do by act of Assembly, entered into bond in the sum of $200, payable to said McCall, with the defendants Ebbs and Redmon as sureties of Zachary, that he would account for and pay over to the plaintiff all such fees and emoluments as Zachary might recover by virtue of his incumbency of said office, if the plaintiff should succeed in recovering the same. But although the plaintiff

succeeded in said action and recovered said office the defendant Zachary has failed and refused to account and pay over said fees so received by him while he so wrongfully held said office, the plaintiff alleges, to the amount of $500. This action is brought to recover said fees and emoluments so wrongfully received by defendant Zachary while he was so wrongfully in the occupation and possession of the same.

To the plaintiff's complaint, in which he alleges these facts, the defendant demurred, first, for that the court had no jurisdiction, as it appeared from the complaint that the action was brought on a bond for $200; second, for that the complaint and exhibits show that said bond was given in the action of *quo warranto,* which has been tried and judgment for the plaintiff for the office, but there is no judgment in that action for costs, and the matter is *res judicata;* third, for that several causes of action are improperly united in the same action—one for the amount of fees received by defendant Zachary and the other for the sum of $200, the amount of the bond to secure the plaintiff against loss on account of Zachary's holding the office and receiving the fees and emoluments thereof.

The first ground of demurrer is not true in fact and cannot be sustained. The action is not brought on the bond of
(468) $200 but to recover the fees the defendant received while he wrongfully held said office, amounting, as plaintiff alleges, to $500. This gave the court jurisdiction, and the bond of $200 is only an incident to the recovery. It is like that of a bail bond or a prosecution bond, or a bond given by a defendant in an action of ejectment to secure costs and *damages,* and does not affect the jurisdiction. It is true that recoveries on such bonds as those mentioned may be had in the action in which they are given, but that is by statute. Code, sec. 543. It is a well recognized rule that when a court once gets jurisdiction of an action it retains the jurisdiction and proceeds to pass upon and determine all matters incident thereto. *Chambers v. Massey,* 42 N. C., 286, cited and approved in *Luton v. Badham,* 127 N. C., 96; 53 L. R. A., 337; 80 Am. St., 783; *Lutz v. Thompson,* 87 N. C., 334.

If there ever would have been any difficulty in the plaintiff's proceeding as he did in this action that has been cured by the joinder of the legal and equitable jurisdiction in one court and in the same action. Under the present system we have adopted to a very great extent the equity practice, in which it was always allowed to give separate judgments against different defendants, according to the merits of the case. So there can be no objection to the court's giving judgment against Zachary for $500

and against the sureties on his bond for $200, which would be discharged by the defendant Zachary paying the whole judgment or by their paying that amount if Zachary did not. They stood as to the $200 as any other surety in a judgment does.

The second ground of demurrer cannot be sustained. The *quo warranto* action was by the State, in the exercise of its high prerogative right, to see that its offices are held and exercised by its rightfully elected officers. To this extent the State was interested; but as to who received the fees, it, as a State, had no interest; that was a private matter between (469) the parties, which they must settle themselves, according to the general principles of law, if the parties have to resort to the courts for a settlement. So the matter of fees was not involved in the former action, and could not have been. *McCall v. Webb,* 126 N. C., 760. And as the matter of fees and emoluments were not and could not have been recovered in the *quo warranto* action they could not have been adjudicated, and if they could have been they were not, and there can be no estoppel. *Glenn v. Ray,* 126 N. C., 730. But they may be collected in an independent action. 1 Enc. Pl. and Pr., 1018.

The defendant's third ground of demurrer—that there are several causes of action improperly united in one action—cannot be sustained. This ground has been substantially answered by what we have already said, that there is but one cause of action. The $200 is not the cause of action but the nonpayment of the $500 in fees that the defendant Zachary has wrongfully received, which belonged to the plaintiff. If these fees had been paid that would have discharged the $200 bond which was given to secure their payment, and is only an incident to the cause of action, and does not affect the jurisdiction of the court. Code, sec. 184, provides for making all persons interested in the event of an action parties, and the sureties were interested in the event of this action and were properly made parties thereto. If there had been different causes of action (as there were not), they grew out of the same transaction and might well have been joined in one action. *Young v. Young,* 81 N. C., 91; *Benton v. Collins,* 118 N. C., 196, and cases cited.

There was error in sustaining the demurrer. The plaintiff is entitled to recover the amount of the fees and emoluments received by the defendant Zachary, and $200 of this amount against Ebbs and Redmon, if his recovery is that much or more against the defendant Zachary. (470)

Error.

Cited: R. R. v. Hardware Co., 135 N. C., 78; *McCall v. Webb, ib.,* 365, 372.

SMITH v. PARKER.

(Filed 9 December, 1902.)

MORTGAGES — *Foreclosure — Injunction — Principal and Surety — Releases.*

In an action to restrain the foreclosure of a mortgage given by sureties to secure the debt of the principal, it being alleged that an extension was granted the principal without the consent of the sureties, the sale will be restrained until the final hearing.

ACTION by C. A. Smith and others against Haywood Parker and others, heard by *Judge Frederick Moore*, at chambers, in Asheville, N. C., on 27 and 28 June, 1902. From a refusal to dissolve a restraining order the defendants appealed.

Thos. A. Jones for the plaintiffs.
Merrick & Barnard for the defendants.

CLARK, J. This is an appeal from a refusal to dissolve a restraining order and from granting an injunction to the hearing. It appears in the affidavit of plaintiffs that C. A. Smith, as principal, and A. C. Smith, his wife, and W. D. Justice and Susan P. Justice, his wife, as sureties, executed a bond for $1,500 to the defendant Frances Kohler, and to secure the same executed a deed in trust to the other defendant, Haywood Parker, upon property belonging to the said sureties, C. A. Smith having no interest in said land except a contingent tenancy by curtesy, and that defendant Kohler's agent in making the transaction well knew that A. C. Smith, W. D.
(471) Justice and Susan P. Justice were sureties; that at maturity of the bond the creditor extended the time for payment for four months in consideration of payment of interest in advance for said period, and this was done without the knowledge or consent of the sureties; that the trustee has advertised the land for sale; that the defendant Frances Kohler is a nonresident of the State and without sufficient property in this State to respond in damages. There were counter affidavits.

An extension of time without consent of sureties discharges them, and also any security given for the debt. *Fleming v. Barden*, 127 N. C., 214; 53 L. R. A., 316; *Jenkins v. David*, 125 N. C., 161; 74 Am. St., 632; *Smith v. B. and L. Asso.*, 119 N. C., 257; *Hinton v. Greenleaf*, 113 N. C., 6. Receipt of interest in advance is *prima facie* evidence of a binding contract of forbearance. *Scott v. Fisher*, 110 N. C., 311; 28 Am. St., 688; *Hollingsworth v. Tomlinson*, 108 N. C., 245. The affidavits and counter affidavits raise a serious contention and the injunction

was properly continued to the hearing, when the disputed matters of fact may be determined by a jury. *R. R. v. R. R.*, 125 N. C., 96; *Whitaker v. Hill*, 96 N. C., 2.

Harrington v. Rawls, ante, 39, is conceded by the defendants' counsel to be exactly in point, but they contend that that decision conflicts with *Hutaff v. Adrian*, 112 N. C., 259, which they suggest must have been overlooked in deciding *Harrington v. Rawls*. On the contrary we think the two decisions are in entire accord. In *Hutaff v. Adrian* (decided February Term, 1893) it was said that, taking the allegations of the complaint as true, the defendant's bond and mortgage were barred by the statute of limitations, hence the purchaser at a mortgage sale would get no title, for the mortgage was dead, which is a question of law, and the plaintiff being in possession, no injunction would lie merely to prevent such cloud upon title, though it would lie if there were a dispute as to the amount due, (472) which is an issue for a jury, in order to prevent a sale which would put the mortgagor at a serious disadvantage since he did not know how much was due.

Soon after that decision the enactment of chapter 6, Laws 1893, reversed the above doctrine to the extent of allowing parties in possession to restrain a sale of land under an alleged lien pending in an action to have it declared invalid. *Mortgage Co. v. Long*, 113 N. C., 127. Besides, independent of that statute, here there is a disputed issue of fact, whether the mortgage has been released by an extension of time to the principal, and this should be determined by a jury, for this makes a dispute whether anything is due which, it was said in *Hutaff v. Adrian*, would authorize an injunction to the hearing. *Jones v. Buxton*, 121 N. C., 285. It would be a hardship upon the mortgagor to compel him to rely upon an extraneous fact like a release being established after a sale under a mortgage in an action of ejectment by a purchaser, when by an injunction to the hearing the disputed issue of fact can be determined before a sale. Such injunction cannot harm the mortgagee, who if he succeeds will sell and collect the debt with interest added; whereas, if no injunction is allowed and the disputed issue of release can only be determined after sale, the mortgagor will be either forced to pay the debt or run the risk of the property being sold at an inadequate price (since no one will buy under such circumstances except a speculator), and thus would lose the value of the land in excess of the mortgage if, on a trial in ejectment, the jury should find there was no release.

No error.

Cited: Menzel v. Hinton, 132 N. C., 662.

(473)

BENEDICT v. JONES.

(Filed 9 December, 1902.)

APPEAL — *Dismissal — Docketing — Transcript — Rules of Supreme Court—Rules* 5 *and* 17.

Where an appellant fails to docket a case on appeal seven days before the call of the district to which it belongs, the appeal will not be dismissed if the appellee fails to move to dismiss at the first opportunity; but the appellant may docket the case at any other time during the term if done before the appellee moves to dismiss.

ACTION by M. E. Benedict against H. C. Jones and others, heard at May Term, 1902, of BUNCOMBE.

Plaintiff, appellee, moves to dismiss the appeal for that it appears from the record that the case was tried and final judgment entered at May Term, 1902, of BUNCOMBE, and that the counter case on appeal was served on defendant, appellants', counsel 31 July, 1902; and that independent of such date the appellee says it was the duty of appellant's counsel to file the transcript in time for the appeal to be heard at the present term of the Supreme Court, but that the transcript was not filed till 26 November, 1902, too late under the rule for the appeal to be determined at this term, and asks that the appeal be dismissed. From judgment for the plaintiff the defendants appealed.

F. H. Busbee for the plaintiff.
No counsel for the defendants.

CLARK, J. The case was tried below in May, 1902, and the transcript was docketed here 26 November, 1902, which was too late to permit of the appeal being argued at this term, it being within less than seven days before the call of the district
(474) to which it belongs. Rule 5, 128 N. C., 634. After it was docketed the appellee moved to dismiss. This was too late. *Rollins v. Love,* 97 N. C., 210; *Barbee v. Green,* 91 N. C., 158.

The uniform ruling of this Court has been in accord with the above decisions, and may be thus summed up: An appeal must be docketed not later than the termination of the next term of this Court beginning after the trial below (with the exceptions specified in the *proviso* to Rule 5, 128 N. C., 634). If not docketed at such term by the time required for hearing, at such term the appellee may docket a certificate under Rule 17 then or at any time during the term, if before the appellant dockets

the transcript, and have the appeal dismissed. But if the appellee is dilatory and the appellant dockets the transcript at that term, before the appellee moves to dismiss, though too late to secure a hearing, then the appeal will not be dismissed. *Packing Co. v. Williams,* 122 N. C., 406; *Smith v. Montague,* 121 N. C., 92; *Speller v. Speller,* 119 N. C., 356; *Haynes v. Coward,* 116 N. C., 840; *Paine v. Cureton,* 114 N. C., 606; *Triplett v. Foster,* 113 N. C., 389.

There have been changes, as will be seen by the above cases, as to the time during such next term by which an appeal must be docketed to secure a hearing at that term. Originally it must have been docketed "during the call of the docket of the district to which the appeal belongs," and of course the first time at which the appellee could have moved then to dismiss for failure to docket was at the end of the call of the district. Then the time was moved up so as to require docketing "during the first two days of the call of the district"; later the time for docketing to secure a hearing was "before the beginning of the call of the district," and now it must be docketed "seven days before the beginning of the call of the district," and of course the right of the appellee to docket and move to (475) dismiss has moved up accordingly and has accrued upon default to docket by the time required in order to secure a hearing. But this has not affected of course the principle that if the appellee fails to move to dismiss at the first opportunity, under Rule 17, 128 N. C., 638, the appellant can docket the case at any other time during that term provided he does so before the appellee has moved to dismiss under said rule. Of course if the appeal is not docketed till after the termination of such next ensuing term it will be dismissed. *Burrell v. Hughes,* 120 N. C., 277; *S. v. James,* 108 N. C., 792. The laches of the appellee in not moving to dismiss under Rule 17, as soon as he might, will not authorize the appellant to docket after that term.

The transcript on appeal seems to be defective in that it does not set out the organization of the Court, and possibly in other particulars. *S. v. Butts,* 91 N. C., 524, and other cases cited in Clark's Code (3 Ed.), p. 915. But this may be cured if a writ of *certiorari* is asked in proper time and allowed, or a motion to dismiss may be made on those grounds when the case is reached at the next term. The cause is not before us upon such motions now. The transcript on appeal having been docketed at the proper term, though too late for argument, yet before the appellee moved to dismiss, as authorized by Rule 17, the motion to dismiss must be denied.

Motion denied.

Cited: Worth v. Wilmington, post, 532; *Curtis v. R. R.,* 137 N. C., 309; *Ammons v. R. R., ib.,* 707; *Craddock v. Barnes,* 140 N. C., 428; *Laney v. McKay,* 144 N. C., 632.

(476)

FLEMING v. SOUTHERN RAILWAY COMPANY.

(Filed 9 December, 1902.)

1. RAILROADS — *Master and Servant — Negligence — Automatic Couplers—Personal Injuries.*

   The failure to equip a locomotive with an automatic coupler in general use is negligence as much as a failure to so equip a car.

2. RAILROADS — *Master and Servant — Negligence — Automatic Coupler—Personal Injuries—Rules.*

   Where a rule of a railroad company forbids an employee from making couplings of cars otherwise than by a stick, such rule does not literally prohibit the employee from going between an engine and car to couple them, if it is practically impossible to make the coupling with a stick.

3. RAILROADS — *Master and Servant — Contributory Negligence — Automatic Couplers.*

   The failure of a railroad company to equip its cars and engines with modern self-coupling devices is a continuing negligence, and there can be no contributory negligence by the employee which will discharge the liability of the master.

4. INSTRUCTIONS — *Releases — Private Laws* 1897, *Ch.* 56 — *New Trial.*

   Where the language of an instruction is too broad and is calculated to mislead, if not intended to mislead, and may have misled the jury, a new trial will be granted.

ACTION by D. E. Fleming against the Southern Railway Company, heard by *Judge A. L. Coble* and a jury, at November Term, 1901, of IREDELL. From a judgment for the plaintiff the defendant appealed.

Long & Nicholson for the plaintiff.
L. C. Caldwell for the defendant.

MONTGOMERY, J. The plaintiff, an employee of defendant company, alleged in his complaint that he was ordered
(477) by a conductor of one of the defendant's trains to make a coupling of an engine and a freight car, and in obeying

the order was hurt through the negligence of the defendant, without fault of his own.

In describing the manner in which he was injured he further alleged, "That the coupler on the engine was what was usually called a draw-bar, and of the weight of about 120 to 125 pounds, and of the length of about five or six feet; that one end of the draw-bar was fastened to the engine and the other end reached toward the front of the pilot, and in order to couple with this instrument it was necessary to raise the same about three feet and attach the end thereof to the coupler of the car to which it was desired to make the coupling; that it was impossible to make the coupling without the brakeman getting on the pilot in order to lift the draw-bar and make the attachment; that on this occasion the plaintiff undertook to make this coupling under the direction of his superior, whose orders he was required to obey; and that this draw-bar was one of the old-fashioned methods by which couplings were made." And as to the particular form of the defendant's negligence the plaintiff further alleged that his injuries were caused by the negligence of the defendant, in that it failed to furnish for said engine and for the cars then and there in use upon its track, at the said place, safe and suitable machinery, equipments and devices for the purpose of safely connecting, coupling and operating the said engine and cars upon its said track, and with modern self-coupling devices as required by law, and such failure continued up to the time of the injury received by plaintiff as aforesaid; on the contrary said engine and cars were provided with unsafe, defective, unwieldy and unsuitable machinery, appliances and devices, not adapted to nor answering the purpose of safe use for which they were intended, as the defendant well knew.

The defendant in its answer denied that it was negli-
gent in the manner alleged by the plaintiff, and averred (478)
that the plaintiff was hurt by the careless and negligent
manner in which he made the coupling.

And for a further defense the defendant averred that after the plaintiff was hurt he, for a valuable consideration paid to him by the defendant, executed and delivered to the defendant a full release and discharge of all claims he had against the defendant on account of the injuries complained of in the complaint; and the defendant pleaded the release in bar and estoppel of the action.

The errors assigned by the defendant were, first, because the court admitted incompetent and improper evidence (pointed out in the case on appeal); second, because the court refused to give certain special instructions asked by the defendant and in giving

certain special instructions asked by the plaintiff; and third, because the court failed, as defendant contended, to state in a plain and correct manner the evidence given in the cause, and to declare and explain the law arising thereon, embracing an explanation of its nature, purpose and bearing, etc., to prevent misapprehension by inadvertence and mistake.

The first of the defendant's prayers for instructions was, in substance, that his Honor should tell the jury that if they should find that the car to which the engine was attempted to be coupled by the plaintiff at the time of his injury was equipped with an automatic coupler such as that required by law, and that the engineer was capable and operated his engine with care and caution, then the defendant would not be liable, because not negligent, and the first issue should be answered "No." It was properly refused. There was evidence tending to show that automatic couplers were in general use and on the engines of the defendant company, and that the engine which the plaintiff undertook to link or couple with the freight car was the
(479) only engine of the defendant on that road that was not equipped with a self-coupler at that time. It was also in evidence that engines necessarily have to be coupled with cars, and it seems to us to be as essential that the same kind of a device in the way of a coupler should be attached to an engine as is attached to a car, the end and aim of the law being the protection, as far as possible, of the life and limb of persons in railroad employment.

In the defendant's second prayer for instructions it desired the jury to be charged to answer the first issue "No," because this Court, in the case of *Greenlee v. R. R.*, 122 N. C., 977; 41 L. R. A., 399; 65 Am. St., 734, had declared May, 1898, as "the time" for the equipment of freight cars with automatic couplers. It was stated in the prayer that the plaintiff was hurt in October, 1897. It is not a fact that such time (May, 1898) was fixed as the beginning of the liability of railroad companies for not equipping their cars with automatic couplers.

The plaintiff was injured in December, 1897; Greenlee was hurt in that same year, 1897, but before the plaintiff was, and Greenlee's case was heard in this Court in 1898.

The third prayer was in these words: "If the jury should find from the evidence that the rules of the company forbade any employee to make coupling by going between cars, and should find that the plaintiff knew of such rule and that he signed a paper positively prohibiting an employee from coupling by going between the cars, or any other way, except with a stick, and the plaintiff, in violation of the same, exposed himself to

danger and went between the car and the engine for the purpose of making the coupling, he would be guilty of contributory negligence, and the jury would answer the second issue 'Yes.'" His Honor properly refused to instruct as requested. The rule, taken literally, does not forbid the plaintiff from going between an *engine* and a car for the purpose of making the coupling. The prohibition is against coupling or uncoupling *cars* (480) with a stick. The links and pins that connect cars are easily manipulated by a stick in the hands of a brakeman, who can stand away and from between the cars and make the coupling. That is a very different matter from coupling an engine and a car, where the coupler provided for the engine is a bar of iron five or six feet long and weighing from 100 to 125 pounds, lying across the pilot, and to be raised two or three feet in order to make the coupling. The plaintiff, as a witness in his own behalf, testified that he made the coupling in the usual way, and that in order to get it (the draw-bar) in position you have to raise it up, one end of it; that you cannot raise it up without getting on the pilot; that you have to get on the pilot to raise it up, and he did it in the usual way that brakemen do it. The conductor testified that it was plaintiff's duty to couple the engine and the car.

James Dumphy, a witness for the defendant and in the defendant's employment as yard master at Asheville in 1898, said the usual way was to couple engine to car, and the rules of the company required it, and that when the draw-bar was down witness always did it with his hands. He said further that it would have been very hard to raise draw-bar with a stick; that it would take a very powerful man to raise bar with a stick; it would be more difficult to make the coupling. That rule of the company, as we have seen, did not literally prohibit the plaintiff from going in between an engine and a car to couple them, and neither does it, when given a fair and just construction, require the plaintiff to use a stick for such coupling. And further, from the evidence in reference to the size and length and weight of the draw-bar and force necessary to raise it, it must have been the company's intention that such coupling should be made with the hand and not with a stick.

The fourth, fifth, sixth and seventh prayers for instructions concerned the alleged contributory negligence (481) in making the coupling, and ought not to have been given.

It has been decided by this Court that "the failure of a railroad company to equip its cars with automatic couplers is a continuing negligence, and where the negligence of the defend-

ant is a continuing negligence, as the failure to furnish safe appliances in general use, when the use of such appliances would have prevented the possibility of the injury, there can be no contributory negligence which will discharge the master's liability." *Troxler v. R. R.*, 124 N. C., 189; 70 Am. St., 580; 44 L. R. A., 313. There can then be no contributory negligence of the plaintiff available to the defendant as a defense in this action, because the plaintiff attempted to make the coupling in discharge of his duty, and because the continuing negligence of the defendant up to the moment of the injury was subsequent to the plaintiff's negligence, if there was any, and is the proximate cause of the injury.

The eight, ninth and tenth of defendant's prayers for instruction will be disposed of when we come to consider the eighth and ninth of the plaintiff's prayers for instruction.

The plaintiff's first prayer was in these words: "First. If you believe the evidence the draw-bar which the defendant had upon its freight engine was not a self-coupling device. The failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence *per se,* continuing up to the time of an injury received by an employee in coupling cars by hand, whether such employee contributed to such injury by his own negligence or not." There was no error in the giving of the instruction by his Honor. The defendant's exception to it no doubt was founded upon the holding by his Honor that it was negligence in the defendant not to equip the engine with an automatic coupler.

The second of the plaintiff's prayers was not given,
(482) and the third was in these words: "If you are satisfied, therefore, by the greater weight of the evidence that the plaintiff went in to make the coupling when the defendant had not furnished the self-coupling device, and received the injury, it is your duty to answer the first issue 'Yes,' and also your duty to answer the second issue 'No.'" It is plain that the exception to that instruction was based on the same view that the defendant took of the first prayer, that is, that it was not negligence in the defendant to fail to equip its *engine* with a self-coupler, and therefore that the jury should have been allowed to pass upon the question of the contributory negligence of the plaintiff. We are quite sure that his Honor did not mean to say or to intimate that if the plaintiff's injury grew out of a matter not connected with the coupler the defendant would be liable simply because the defendant was guilty of negligence in not having equipped its engine with a self-coupler. He had already told the jury in his general charge that the plaintiff must not

only show that he was injured as was alleged in the complaint, but that they must find that the injury was due to the fact that the engine was not equipped with an automatic coupler.

Neither can we think that the jury was misled by the language of the instruction. We think the clear meaning of that instruction, when taken with the other part of the charge on that point, is that the plaintiff was in duty bound to go in between the engine and the car to make the coupling, and that because of a failure of the company to furnish a self-coupling device he could not be held as contributing to his own injury, if he was hurt while between the engine and car performing his duty. If the plaintiff had been injured while engaged in making the coupling under a state of facts as testified to by himself, he would not have been debarred of the right to maintain his action, even if he had been injured by an act of negligence on the part of the defendant not connected with (483) the defective coupler, or even by a lawful act of the defendant's agent or employee, because the continuing negligence of the defendant in not properly equipping the engine with a self-coupler must be concurrent with the act which produced the injury, and the one would be as much a proximate cause of the injury as the other. Of course after the coupling had been made and completed if the plaintiff had then committed some negligent act, as by standing too near the track as to be hurt by the moving engine or car, then the negligence of the defendant in not properly equipping the engine would not be the proximate cause of the injury, and the plaintiff's negligence would have been a matter for consideration.

The bare fact that a railway company has failed to properly equip its cars with automatic couplers, and is therefore negligent, does not of itself make the company liable for an injury to an employee. The injury must be connected with and proceed from that particular negligence, and the employee must be in the discharge of his duty.

For the reason that this case has been under an *advisari* for a term, and for other reasons satisfactory to us, we have, notwithstanding our conclusion to order a new trial for an error pointed out, discussed and decided the matters raised in the case on appeal, with the exception of his Honor's instruction upon the matters connected with the defense of the release and discharge set up by the defendant in its answer, and the defendant's prayers for instruction—eight, nine and ten—in relation thereto. And what we shall now say concerning those matters will be merely incidental, and only in connection with the de-

fendant's exceptions to the eighth and ninth of the plaintiff's special requests for instructions.

His Honor, after having charged the jury upon the matter of the release and discharge and refusing certain special requests of the defendant for instructions, gave the eighth and
(484) ninth asked by the plaintiff, as follows: "8. A rule of the railroad company agreed to by the plaintiff may be waived or abrogated for the company by the conductor making an order contrary to such rule, when it was the duty of the plaintiff to obey such order." "If you find by the greater weight of evidence in this case that the plaintiff signed the paper 'B,' and agreed not to couple cars except with a stick; if you further find that the conductor ordered him to make the coupling, you are instructed that the conductor had the power to waive or abrogate the said contract."

"9. The Legislature has enacted that any contract or agreement, express or implied, made by any employee of said company to waive the benefit of an action which he may have against the company for injuries shall be null and void. 'And it seems,' says the Supreme Court, 'that the Legislature intended to put an end to such intention by saying, in the first section of the act, that he shall have a right of action for injuries caused by such defective machinery, and providing in the second section that he cannot waive this right by contract, express or implied.'"

We need not discuss the correctness of the eighth special instruction of the plaintiff, which his Honor gave, for the reason that what we have said above in discussing the refusal of his Honor to give the third prayer requested by the defendant makes it unnecessary. (It may be interesting to observe, however, that there is a marked difference between the language of the agreement made by the plaintiff in this case, not to go between the cars for the purpose of coupling them, and the language of the agreement on the same subject in the case of *Mason v. R. R.*, 114 N. C., 719.)

We think there was substantial error in the giving of the instruction asked by the plaintiff above set forth (numbered nine); the language was too broad and was calculated (not to say intended) to and may have misled the jury, and directed
(485) their minds to the release and discharge set up by the defendant in its answer.

The language of section 2 of the Fellow-servant Act, chapter 56, Private Laws 1897, does not read as it is quoted in the instruction. The language is, "That any contract or agreement, expressed or implied, made by any employee of said company to waive the benefit of the aforesaid section shall be null and

void." It does not read that any contract, etc., made by an employee of said company to waive the benefit of an action *which he may have* against the company for injuries shall be null and void. The first section of said act in its application to employees who have been injured by defects in the machinery, ways or appliances of railroad companies, provides that such persons shall be entitled to maintain an action against such company; and section two of the same act provides that the injured employee's contract to waive the benefit of the first section shall be null and void. That is, upon entering the service of a railroad company, or afterwards before an injury might happen, the injured employee will not be bound, looking to the future, by any contract he may have made with the company waiving the right to maintain an action for his injury. The words "which he may have against the company for injuries," as they appear in the instruction, have a double aspect; they look both to the future and to the past, and the jury may have applied that language to the release and discharge which the defendant had procured after the injury. And the last section of the instruction (number nine), a quotation from the opinion of this Court in *Coley v. R. R.*, 128 N. C., 534, we can see might have had a most injurious effect upon the defendant's rights. It could have had no application to the matters embraced in the eighth instruction requested by the plaintiff, which his Honor gave. The whole instruction might reasonably have been considered by the jury as a statement made to them by his Honor that there could be no release and discharge, even (486) for a valuable consideration, by an employee who had been injured by the defective machinery of a railroad company.

As we have said we do not discuss in this opinion the matters relating to the release and discharge and the alleged fraudulent character of the paper-writing.

For the error pointed out there must be a

New trial.

Cited: Elmore v. R. R., post, 581; *Flemming v. R. R.,* 132 N. C., 716; *Elmore v. R. R., ib.,* 875; *Dermid v. R. R.,* 148 N. C., 193.

STEWART v. KEENER.

(Filed 16 December, 1902.)

1. GRANTS—*Priority—Title—Public Lands—Ejectment.*

Where there are two grants by the State covering the same land the second conveys no title.

2. LANDLORD AND TENANT—*Sub-tenant—Estoppel—Ejectment.*

A sub-tenant while in possession of land is estopped to deny the title of the landlord.

3. EVIDENCE—*Sufficiency—Landlord and Tenant—Ejectment.*

The evidence in this case is sufficient to support a verdict that the defendant did not enter the premises as sub-tenant of the plaintiff.

ACTION by Henry Stewart against Benj. Keener and others, heard by *Judge Frederick Moore* and a jury, at Spring Term, 1902, of MACON. From a judgment for the defendants the plaintiff appealed.

J. F. Ray for the plaintiff.
H. T. Robertson for the defendants.

(487) FURCHES, C. J. This is an action of ejectment, in which the plaintiff undertakes to derive his title from a grant of the State to K. Elias and others, dated 19 February, 1883, and mesne conveyances from said grantees to himself; and also upon the ground that the defendants are his tenants, and are thereby estopped to deny his title. The defendants denied the tenancy and the plaintiff's title and right to recover. And for the purpose of showing that the plaintiff had no title the defendants introduced a grant to Jackson Johnson, dated in 1856, which was shown to cover the land in controversy.

This being so, the plaintiff derives no title under the grant to Elias and others and mesne conveyances therefor, for the reason that the State having granted the land to Johnson in 1856, it had no title to convey to Elias and others in 1883. *Rowe v. Lumber Co.*, 129 N. C., 97.

It is a rule of law that if one enters upon and takes possession of land as the tenant of another he is estopped to deny the title of his lessor while he remains in possession. And any one entering and taking possession under the tenant so let into possession becomes the tenant of the original lessor, and is also estopped to deny his title. *Conwell v. Mann*, 100 N. C., 234; *Bonds v. Smith*, 106 N. C., 553, and cases cited.

It seems to be conceded that Andy Webb entered as a tenant of the plaintiff's assignors, and when he left the premises the defendant Ben Keener entered and took possession, and it is contended by the plaintiff that he did so by reason of an understanding and agreement with Andy Webb that he should do so. And this being so, Keener became the tenant of the plaintiff and is estopped to deny the plaintiff's title. The contention of the plaintiff states the law correctly and presents the question of fact for the jury. The plaintiff, for the purpose of establishing this fact, introduced the defendant Keener as a witness, who testified that he was the tenant of Frame; that he leased from Frame; that the lease was in writing, and he entered (488) under the written lease; that Webb moved out the same day he moved in, "but he never said anything to Webb about his moving there; he made no arrangement with Webb about moving there."

This evidence was offered by the plaintiff and seems to be all the evidence in the case as to how Keener got possession, and seems strongly to disprove plaintiff's contention that Keener took possession under an agreement with Webb, or under a collusive arrangement between him and Webb.

But this question was left with the jury fairly and fully in the charge of the judge, and they found that issue for the defendants. This covers all the exceptions discussed in the defendant's brief, and seems to be the only exception necessary to discuss. We see no error.

Affirmed.

Cited: Dew v. Pyke, 145 N. C., 305.

BIRD v. BRADBURN.

(Filed 16 December, 1902.)

VERDICT — *Setting Aside—Judge—Discretion—Appeal—Findings of Court—Findings of Fact—The Code, Sec.* 548.

Where the trial judge sets aside the verdict as a matter of discretion it is not necessary for him to find the facts, and no appeal lies therefrom.

ACTION by J. W. Byrd against J. F. Bradburn, heard by *Judge Frederick Moore* and a jury, at May Term, 1902, of JACKSON. From an order setting aside a verdict for the defendant the defendant appealed.

Walter E. Moore for the plaintiff.
Coleman C. Cowan for the defendant.

(489) CLARK, J. On the coming in of the verdict in favor of defendant the plaintiff's counsel moved to set aside the verdict and for a new trial. After argument of counsel the court, at the same term, granted the motion, set aside the verdict and ordered a new trial, and the cause was continued. The defendant requested the court to find the facts and state its reasons upon the record for setting aside the verdict. The court declined to do so beyond stating that the verdict was "set aside in the exercise of the discretion which is vested in the court, in order that the case may be properly tried hereafter and justice done to all the parties."

The power of the court to set aside the verdict as a matter of discretion has always been inherent, and is necessary to the proper administration of justice. The judge is not a mere moderator, but is an integral part of the trial, and when he perceives that justice has not been done it is his duty to set aside the verdict. His discretion to do so is not limited to cases in which there has been a miscarriage of justice by reason of the verdict having been against the weight of the evidence (in which, of course, he will be reluctant to set his opinion against that of the twelve), but he may perceive that there has been prejudice in the community which has affected the jurors, possibly unknown to themselves, but perceptible to the judge—who is usually a stranger—or a very able lawyer has procured an advantage over an inferior one, an advantage legitimate enough in him, but which has brought about a result which the judge sees is contrary to justice. In such, and many other instances which would not furnish a legal ground to set aside the verdict, the discretion reposed in the trial judge should be brought to bear to secure the administration of exact justice. This being an exercise of discretion, it could subserve no possible purpose to find the facts (*Allison v. Whittier,* 101 N. C., bottom of page 494); indeed, in view of the effect in a new trial, it would be sometimes important that the facts (490) should not be spread upon the record.

It is only when a new trial is granted as a matter of law that such action is reviewable, and then the facts should be found. When the verdict is set aside as a matter of discretion it is not necessary to find the facts; *Allison v. Whittier, supra;* and no appeal lies, *Braid v. Lukins,* 95 N. C., 123; *Jones v. Parker,* 97 N. C., 33; and if no reason is given it is presumed that the new trial was granted as a matter of discretion, and

the appeal will be dismissed. *Braid v. Lukins, supra; S. v. Braddy,* 104 N. C., 737.

The appellant relies upon *Moore v. Edmiston,* 70 N. C., 471; *Johnson v. Bell,* 74 N. C., 355; *Carson v. Dellinger,* 90 N. C., 226, that the judge, if requested, should put on record his reasons for setting aside the verdict that his action may be reviewed. Code, sec. 548. These cases state that if his action was not in the exercise of his discretion it is reviewable, and therefore his reasons should be given if asked. That has been done here, for the judge has stated, when requested to give his reasons, that the verdict was set aside "in the exercise of the discretion which is vested in the court." This matter has already been discussed and decided at this term. *Wood v. R. R., ante,* 48.

Appeal dismissed.

Cited: Elmore v. R. R., post, 578; *Abernethy v. Yount,* 138 N. C., 342; *Jarret v. Trunk Co.,* 142 N. C., 469; *S. v. Hancock,* 151 N. C., 700.

(491)

JOHNSTON v. CASE.

(Filed 16 December, 1902.)

1. EXECUTION—*Sales—Equitable Title.*

Where a mortgagee conveys land the vendee gets only an equitable title, and a deed of a sheriff to a purchaser at a sale under execution against the vendee of the mortgagee conveys no title.

2. ADVERSE POSSESSION—*Color of Title.*

A party claiming title by adverse possession under color of title derives no benefit from the possession of a third party unless he can connect his title with that of the third party.

3. ADVERSE POSSESSION—*Tenancy in Common.*

The possession by one of several tenants in common of land is sufficient to defeat the claim of adverse possession by a third person.

4. BOUNDARIES—*Adverse Possession—Color of Title—Description.*

Where there is a general description and a particular description in a deed, introduced as a color of title, the particular description will control, and the general description will only be considered for the purpose of identifying the land.

5. DEEDS—*Seal—Registration—Evidence—Color of Title.*

A paper writing without a seal, though registered as a deed,

conveys nothing and is not admissible in evidence to show color of title.

CLARK, J., dissenting.

ACTION by Thos. D. Johnston and others against Jesse Case and others, heard by *Judge Frederick Moore* and a jury, at May Term, 1902, of BUNCOMBE. From a judgment for the plaintiffs the defendants appealed.

(492) *Merrimon & Merrimon, G. A. Shuford* and *Chas. A. Moore* for the plaintiffs.

Jones & Jones and *Reed & Van Winkle* for the defendants.

FURCHES, C. J. This is an action of ejectment, and it is alleged by the plaintiffs and admitted by the defendants that James Case, the ancestor of the defendants, at one time was the owner of the land in controversy. And the plaintiff undertook to show that he had acquired the title of James Case, and is now the owner of the land. He undertook to do this by a mortgage deed from James Case to William Case, dated 24 December, 1850; a deed from William Case to W. L. Henry, dated 15 March, 1855; a deed from Sumner, sheriff, to George Brooks, dated 11 September, 1869; a deed dated 13 November, 1882, from parties claiming to be the heirs of George Brooks to Samuel Brooks; a deed of trust from Samuel Brooks and wife to H. B. Stevens, dated 4 February, 1893, and a deed from H. B. Stevens, trustee, to Thos. D. Johnston, the plaintiff, dated 8 April, 1896. And the plaintiff further claims that if he has failed to show that in this way he has acquired the title of James Case to the land in controversy then, by color of title and adverse possession, that he has shown color of title to said land, and such adverse possession as to ripen into title, and that he is entitled to recover on that account.

During the progress of the trial the defendants noted many exceptions, as appears of record, and upon judgment being rendered against them they appealed.

We do not propose to consider all the exceptions taken but only such of them as are necessary to a disposition of the case on appeal.

The court properly held and instructed the jury that no title passed to George Brooks by the sale and deed of Sheriff
(493) Sumner. *Sprinkle v. Martin,* 66 N. C., 55. This being so, all the evidence offered for the purpose of tracing the title from James Case to W. L. Henry, and all the conversations alleged to have taken place between James Case and said Henry,

or any one else, as to whether he held under Henry and as his being Henry's tenant, were irrelevant, incompetent and improperly allowed as evidence. It may not have appeared to be so when it was offered, as the case may not have been sufficiently developed at that time to show its irrelevancy. But if this were so when it appeared that the sheriff's deed conveyed no title, as he was attempting to sell a mixed equitable estate (as in *Sprinkle v. Martin, supra*), he should have excluded it, and should have so charged the jury. This he did not do, but erroneously charged the jury if they found that James Case ever held under W. L. Henry the plaintiff would be entitled to have counted such time so held by him as adverse possession. This was error. The plaintiff could only have had the benefit of such adverse possession of those who held under him or those under whom *he derived his title.* And as he derived no title from Henry, he could not have the benefit of Henry's possession nor of any one holding possession under him. If there was such holding under Henry it would tend to strengthen Henry's title; but the plaintiff does not connect himself with Henry and gets no support from any title Henry may have had.

The plaintiff must recover upon the strength of his own title, and it would be as fatal to his action to show that the title is in Henry as it would be to show that it was in the defendants, as the plaintiff has failed to connect himself with Henry's title.

The plaintiff having failed to connect his title with that of Henry, the defendants are entirely disconnected with the plaintiff's title, if he has any, and free from any estoppel on account of their being the heirs at law of James Case. That may have existed as between them and Henry's title, but not (494) between them and the plaintiff's title. And the court erred in charging the jury that the defendants, who were *femes covert* or infants, were estopped and barred by adverse *possession* the same as if they were *femes sole,* or of full age.

The plaintiff being unable to connect himself with the Henry title (if he had one), or any other title derived from James Case, the common source of title, he must fail unless he can recover under color of title and adverse possession. And as the defendants are the heirs at law of James Case they are tenants in common, and the possession of any one of them would be sufficient to exclude the claim of adverse possession on the part of the plaintiff if they have been in possession and have not agreed to hold under the plaintiff or those under whom he claims since the date of the sheriff's deed.

But the color of title is *not title.* It is only a shadow and not a substance; but for the purpose of quieting titles and to prevent

litigation about State claims the law has provided that where one enters into the open, notorious possession of land *under color of title*—this shadow—and remains continuously in said adverse possession for seven years, claiming it as his own, the law will protect such possession; that such long possession under color of title in the eyes of the law ripens such color into title. But that shadow or color only extends to the boundaries marked by the color—the deed, and can extend no further; though they may be circumscribed, as they will not even cross another line unless there is *actual possession* across that line, or lappage, as it is called. And if there is a general description and also a particular description or boundary lines they will control, and the general designation will only be considered for the purpose of identifying the land. This is so where the land is actually conveyed and the title passed under the deed. *Midgett v. Twyord,* 120 N. C., 4. And certainly it must be so where
(495) the deed is not a title but only a color of title. *Smith v. Fite,* 92 N. C., 319.

The paper-writing, without a seal, called a deed, dated as of 1869, but written in December, 1887, as contended and not denied, and registered on 8 December, 1887, was improperly admitted in evidence. It was not a deed and conveyed nothing. *Patterson v. Galliher,* 122 N. C., 511. And if it was color of title, and we do not think it was, it should not have been allowed in evidence, as it was, to W. L. Henry, with whose title (if he had any) the plaintiff's chain of color had no connection, if he ever had any; and if any one could have gotten any benefit from this paper it would be the W. L. Henry estate, which has no connection with the plaintiff's chain of colorable title or deeds. As we have stated, the benefit of possession for the purpose of ripening title can only be claimed when it is held by or under the plaintiff, the party claiming its benefit or *those under whom they claim;* and, as we have also stated, to establish Henry's title (if that could be done) would be to defeat the plaintiff's action.

But this paper was not a *deed;* its registration was not authorized, and it could amount to no more than an unauthorized statement of William Case, not under oath, and should not have been admitted in evidence. But if it had been proved in such a way as to have been admissible in evidence (if that could have been done), it could not have the effect to enlarge the lines of the plaintiff's color. The deeds of the plaintiff did not convey the title, indeed they conveyed nothing; and he now claims it by *color* and *adverse possession.* This color only extends to the boundary lines, and they cannot be enlarged so as to change the color by showing what was intended to be conveyed. It is

the *color* and adverse possession that gives title. But we will not discuss this matter further as we have shown that this paper has nothing to do with the plaintiff's claim of title or color of title.

There was error in the respects pointed out in this opinion, for which the defendants are entitled to a (496) New trial.

CLARK, J., dissenting. The deed from Sheriff Sumner to George Brooks, 1869, has been before this Court, and has been expressly adjudged to be color of title. *Mfg. Co. v. Brooks,* 106 N. C., 107. The plaintiffs and those under whom they claim have been in continuous possession thereunder until the intrusion of the defendant upon the *locus in quo* recently. The *title* of the plaintiffs needs no strengthening. The alleged defect is as to the boundaries. Tract No. 2, conveyed in said deed, is described as "A tract lying on both sides of Bent Creek and beginning on a maple tree, and runs west 100 poles to a small chestnut tree; thence west 10 poles to a stake; thence east 100 poles to a stake; thence north 100 poles to the beginning; containing 100 acres, more or less." A description 100 poles west to a stake, thence 10 poles west to a stake, thence 100 poles east to a stake, is palpably an error, and the surveyor testified that such boundaries would not connect—of course. The court thereon charged correctly: "In arriving at the boundary of a tract of land, when you come to consider all the evidence, if you are satisfied that a mistake has been made in the call of a deed from all the evidence, then it will be your duty to correct that mistake. For instance, if the call of the deed is for north when it is manifest that it ought to be south, it is the duty of the jury to correct the mistake and run south, and so with any other call as to course and distance. It is the duty of the plaintiff to satisfy you, when he claims under color of title, not only of his possession, but of the extent of his possession, and the deed is the evidence of the extent of that possession there as it is written in the face of it or as the same may be corrected upon the evidence, in accordance with the principles I have already laid down to you." This charge is fully sustained by *Higdon v.* (497) *Rice,* 119 N. C., 623, and cases there cited.

The evidence here relied upon to correct these boundaries is the following: In the above deed from Sumner, sheriff, to Brooks (1869) there is, besides the above defective description (which, being specific, would control were it not defective), this further description, "being the land sold by William Case to W. L. Henry." The specific description being unintelligible

and plainly deficient, we can clearly resort to the boundaries of said tract as set out in the deed from Case to Henry, which are thus referred to and made a part of a conveyance from Sumner, sheriff, to Brooks. This does not make the deed of Case to Henry any part of the plaintiff's chain of title, but the reference thereto incorporates the boundaries therein into Sumner's deed to Brooks. *Id certum est quod certum reddi potest.* If Case's deed to Henry had been registered there would be no trouble, but being lost it was competent for any one who knew the boundaries to testify what they were. The said deed from Case to Henry having been lost, William Case, the grantor therein, re-executed the same, adding the following memorandum: "The above is a duplicate of a deed heretofore executed by me to William L. Henry and his heirs for the said lands, which deed was lost before it was registered. This is a duplicate of the same tenor and date (15 May, 1855) as near as I can make it. Wm. Case." This deed was duly probated and registered in 1887, and is set up in defendant's answer.

Upon the above evidence his Honor charged: "If you find that the deed from William Case to W. L. Henry was made and executed in 1855, and that the deed that has been introduced as a true copy or duplicate is a deed of re-execution of the boundaries contained in the deed of 1855, then the description in the deed from Case to Henry would be incorporated in the
(498) deed from Sumner, sheriff, to Brooks. It is the duty of the plaintiffs to satisfy you that this is the deed, or a duplicate of the deed of 1855, before you can incorporate the boundaries in the sheriff's deed." This is supported by *Hemphill v. Annis,* 119 N. C., p. 516; *Euliss v. McAdams,* 108 N. C., 511; *Farmer v. Batts,* 83 N. C., 387; *Cox v. Hart,* 145 U. S., 376.

Now that since the act of 1885 a deed is not color of title till registered, the reference in a deed to boundaries contained in an unregistered deed of course cannot be incorporated into the registered deed by such reference. But in 1869, when the deed of Sumner, sheriff, to Brooks was executed, an unregistered deed was color of title, and therefore a reference to boundaries in such unregistered deed could be made part of a subsequent conveyance of the same land. It was incumbent upon the plaintiffs to satisfy the jury that such were the boundaries in the lost deed. It is not a question of title but of boundaries, and hence a decree of re-execution was not necessary, nor is it material that there is no seal to the re-execution of the paper. It is pleaded in defendant's answer. The boundaries of this tract (No. 2) set out in the re-executed deed are: "Lying on both sides of Bent Creek

and beginning on a maple, and runs west 100 poles to a small chestnut tree; thence south 100 poles to a stake; thence east 100 poles to a stake; thence north 100 poles to the beginning; containing 100 acres, more or less." The only difference between this boundary and that in the deed of Sumner, sheriff, to Brooks is "thence south 100 poles to a stake," in lieu of "thence west 10 poles to a stake." The acreage is the same, and the surveyor testified that this description from the re-executed deed of Case to Henry would exactly correspond with the boundaries of the tract claimed by the plaintiffs. Such corrections have been often allowed.

Cited: S. c., 132 N. C., 795; *Mayo v. Staton,* 137 N. C., 681.

(499)

SHELTON v. WILSON.

(Filed 16 December, 1902.)

1. TENANCY IN COMMON—*Joint Tenants—Ejectment—Parties.*

   A tenant in common may maintain ejectment against a third person.

2. PLEADINGS — *Limitations of Actions — General Denial — Ejectment—The Code, Sec.* 141—*Adverse Possession.*

   In ejectment the defendant may show, under the general denial, title by adverse possession under color of title without specially pleading the title.

ACTION by W. M. Shelton and wife against W. Wilson and others, heard by *Judge T. A. McNeill* and a jury, at Spring Term, 1900, of TRANSYLVANIA. From a judgment for the plaintiffs the defendants appealed.

No counsel for the plaintiffs.
George A. Shuford for the defendants.

CLARK, J. In 1853 Benjamin Wilson died seized of a tract of 700 acres of land. By his will he devised the same to his wife, Jane Wilson, "to be possessed and enjoyed, to enable her to raise, support and school" their children, and when the youngest child should become of age, or at the death of the widow, "what property remains to be equally divided between them, taking into consideration what they have received." There were eleven children. In February, 1860, Matthew M. Wilson,

one of said children, conveyed to his sister Laura Shelton "all his interest" in said 700 acres, without warranty. The plaintiffs are her children. In 1883 Jane Wilson, who till then had continued to live on said farm, using it as her own, caused the same to be divided among the ten children then living, and executed deeds for their respective tracts, described by metes and
(500) bounds, and put them each in possession, reserving to herself a life estate in one certain tract. Matthew M. Wilson, on 18 September, 1884, divided his tract into two, and conveyed one to his son Columbus and the other to his daughter Sarah E. Bolen, and it was in evidence that they have been in possession ever since unless the order appointing a receiver herein in 1896 (who has received no rents) is an interruption.

On 5 January, 1889, an action for the recovery of said land was brought by these plaintiffs against Matthew M. Wilson and William Bolen. The case on appeal adds Sarah E. Bolen, but the record of said cause sent up as part of the record herein shows that Sarah E. Bolen was not a party, and the record controls. At September Term, 1891, the plaintiffs took a nonsuit. On 30 August, 1892, the plaintiffs brought this action against Matthew M. Wilson, and service was made by publication against him, he being a nonresident. On his death, in 1897, his five children and William Bolen, the husband of his daughter Sarah, were made parties defendant.

The objection as to the deeds to plaintiffs from their co-tenants need not be considered, for one tenant in common can maintain an action of ejectment against third parties. *Yancey v. Greenlee,* 90 N. C., 317; *Gilchrist v. Middleton,* 107 N. C., at page 684; *Winborne v. Lumber Co.,* 130 N. C., 32.

The fifteenth exception is to the following paragraph in the charge: "In no view of the evidence is the plaintiffs' claim barred by the statute of limitations." The deed from Jane Wilson to Matthew M. Wilson, in 1883, was color of title, as were also the deeds from Matthew M. Wilson to Columbus Wilson and Sarah E. Bolen in September, 1884. There was evidence that they have been in possession ever since, certainly until the receivership in this case in 1896, since which
(501) time the evidence of possession is conflicting. Columbus Wilson and Sarah E. Bolen were parties to no action till joined herein in 1897, and their title had then ripened. Even if Sarah E. Bolen had been, as stated in the case on appeal (which is contradicted, however, by the record), a party to the action begun in 1889, she was not made a party to the new action begun 30 August, 1892, within twelve months after the nonsuit taken in September, 1891, and the statute ran as to her from

18 September, 1884, till made a party in 1897. The conveyance from Matthew M. Wilson to Laura Shelton in 1860, under which the plaintiffs claim, contained no warranty, and is not an estoppel upon Columbus Wilson and Sarah E. Bolen, who claim under the deeds to them from Matthew M. Wilson in 1884, and seven years' possession thereunder. It was not required that the defendants should plead the seven years statute. Code, sec. 141. This defense can be shown under the general denial of the plaintiffs' title. *Cheatham v. Young,* 113 N. C., 161; 37 Am. St., 617; *Mfg. Co. v. Brooks,* 106 N. C., 107.

In view of this error it is unnecessary to consider the other exceptions and the interesting questions which they present.

Error.

COMMISSIONERS OF McDOWELL COUNTY v. NICHOLS.

(Filed 16 December, 1902.)

PRINCIPAL AND SURETY—*Sureties—Public Officers—Contribution —Indemnity Bonds.*

One who is about to become a surety with others may stipulate with the principal, without the knowledge of the other sureties, for a separate indemnity for his own benefit.

ACTION by the commissioners of McDowell County (502) against R. L. Nichols and others, heard by *Judge W. A. Hoke* and a jury, at August Term, 1902, of McDOWELL. From a judgment for the plaintiffs the defendant W. A. Conley appealed.

S. J. Erwin for sureties on bond except Conley.
J. T. Perkins for the defendant Conley.

MONTGOMERY, J. The defendant R. L. Nichols, as sheriff of McDowell County, executed two bonds to the State of North Carolina, conditioned for the collection and settlement of all the public taxes. One of the bonds was dated 31 August, 1899, and the other one was dated 31 August, 1900. Both bonds covered one and the same term of office, and certain of the other defendants executed the first bond as sureties, and certain of the other defendants executed the second bond. Nichols, the sheriff, made default in the settlement of the first year's taxes, and was in default at the time of the execution of the second bond—the renewal bond. The commissioners of the county brought suit for the amount of the deficiency against the sureties on both

bonds. The pleadings having been filed, the cause was referred to Edmund Jones to take and state an account of the questions of law and fact arising upon the pleadings. The sureties on the last bond, that of 1890, raised no question as to their liability equally with the sureties on the first bond in their answer. The referee decided that they as a matter of law were so bound, and no exception was entered. *Poole v. Cox,* 31 N. C., 69; 49 Am. Dec., 410; *Oats v. Bryan,* 14 N. C., 451; *Coffield v. McNeill,* 74 N. C., 535. It appeared before the referee that on 31 August, 1899, Nichols, the sheriff, executed a deed of trust to D. E. Hudgins, as trustee, to indemnify W. A. Conley, one of the sureties on the bond of 1899, against loss on account of (503) his liability as bondsman, and that Conley refused to sign the bond until the indemnity had been given; that he signed it on 5 September, 1899, when the commissioners received and approved it, and that the bond had been signed by the other sureties on the last-mentioned date. There was no evidence that the sureties had any knowledge of the indemnity given to Conley at the time it was given, or before they had executed the bond. The amount realized from the sale of the property by Hudgins, trustee, was $2,614.59, which has been paid to the plaintiffs. In adjusting the liabilities of the co-sureties amongst themselves the referee held, as a matter of law, that each of them on both the bonds was entitled to share in the benefit of the payments made by the trustee upon his payment of his proportionate part of the recovery against the principal and sureties. The defendant Conley excepted to that finding of the referee, and upon the confirmation of the report by the court he entered the same exception.

The doctrine of contribution among co-sureties does not arise by contract between them, but it grows out of an equitable principle—the principle that equality is equity among persons who stand in the same situation. Does the defendant Conley stand in the same situation as do the other co-sureties? If he does not, then the principle above stated does not apply, "for equality among persons whose situations are not equal is not equity." Do Conley and the other sureties, then, occupy the same and equal situation? The answer to the question depends upon whether or not one who is *about to become* a surety with others can stipulate with the principal, without the knowledge of the other sureties, for a separate indemnity for his own benefit, primarily. We believe it can be done, and that it cannot be reached and applied to the equal benefit of all the sureties unless it was procured through fraud or unless it can be shown that al- (504) though it was executed for the benefit of one alone, yet

it was intended for the benefit of all. The true principle underlying this question is stated with great clearness in *Hall v. Robinson,* 30 N. C., 56, where the Court said: "The relief between co-sureties in equity proceeds upon the maxim that equality is equity; and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter security to any extent, it enures to the benefit of all. The risk and the relief ought to be co-extensive." And in each and all of the cases in our Reports (and they are numerous) where the principle is upheld and the indemnity applied to the common benefit of all the sureties, the indemnity was procured subsequently to the execution of the obligation. In the case before us the *risk* was never a common one between Conley and the other sureties. Before he had any relation or connection with the other sureties, and before he would assume any responsibility, he stipulated with the principal for a separate indemnity. When Conley signed the bond he had already stipulated for separate indemnity, and the other sureties have no right to complain of an act of precaution which they might have availed themselves of and to reach the benefit of that indemnity, provided it was executed in good faith or unless they showed that it was intended for the benefit of all, which they could have shown, if it had been true, in an equitable proceeding as this was. The equitable doctrine ought not to be extended so far as to reach the matter of indemnity stipulated for before the relation of co-surety exists. Until that relation is brought about the sureties have each the right to look out for his own separate indemnity; afterwards the procuring of indemnity is and ought to be for the common benefit, on the principle mentioned in this opinion." And this has been decided by this Court in *Long v. Barrett,* 38 N. C., (505) 631. *Ruffin, C. J.,* for the Court, there said: "As one, when he is about to become a surety with others, may stipulate for a separate indemnity from the principal to him, and the co-sureties would be only entitled to a surplus after his reimbursement. *Moore v. Moore,* 11 N. C., 358; 15 Am. Dec., 523. So there can be no doubt that after two persons have become sureties for a common principal they may, by agreement between themselves, renounce their right to take benefit from any securities they may respectively obtain, and each look out for himself exclusively for an indemnity from the principal or for contribution from another co-surety."

Error.

BOND v. WILSON.

(Filed 16 December, 1902.)

1. VERDICT—*Jury—Correction of Verdict—Negotiable Instruments —Trial.*

In an action on a negotiable instrument, where the jury allows credits thereon, but fails to find the dates thereof, it is not error for the trial court to direct them to retire and find the dates of the credits.

2. LIMITATIONS OF ACTIONS — *Negotiable Instruments — Payments—Endorsement.*

In an action on a negotiable instrument a letter written by the defendant to the agent of the plaintiff, referring to an account between the defendant and agent of the plaintiff and showing the credits entered on the notes, is some evidence to be submitted to the jury that the credits were entered by the authority of the defendant.

ACTION by Lou N. Bond and others against J. W. Wilson, heard by *Judge W. B. Councill* and a jury, at June Term, 1902, of BURKE. From a judgment for the plaintiffs both the (506) parties appealed.

John T. Perkins, A. C. Avery and *E. J. Justice* for the plaintiffs.

Thomas N. Hill and *Avery & Ervin* for the defendant.

MONTGOMERY, J. The defendant claimed several credits on account of payments made by him upon the notes sued on but which were not endorsed upon the notes themselves. One was for the amount of $800, which the defendant averred he had paid for a mill wheel at the request of the agent of the plaintiffs; and another was for the payment of $240 freight bill on the wheel. When the jury brought in the verdict and it was read by direction of the court it was seen that, while the jury had allowed the two credits, they had omitted to mention the dates the credits should bear. Whereupon his Honor directed the jury to retire and state in writing the date upon which the payment of the thousand and forty dollars for the mill wheel and freight should be entered. They returned with their verdict, finding the credit as of 1 January, 1876. The plaintiff excepted to the direction of the court requiring the jury to amend their verdict, insisting that "the verdict as at first rendered was, in contemplation of law, a finding by the jury that the said $1,040 should be credited as of the first day of the term; that instead of that the court interfered with the province of the jury and

the rights of the parties in violation of the law in directing a finding of a specific time for entering said credit." We are unable to see any just ground for complaint on the part of the plaintiff in the particular mentioned. It was an imperfect verdict as at first rendered, but the finding of the date of the payment made it complete, and in no sense was it contradictory. It was the proper thing to have done, as well as the just thing, if the verdict was right in the first instance. (507) Juries are constituted for the very purpose of finding the material facts in a case, and when the court discovers a failure on their part to find all of the material facts it can direct the jury to retire and amend the verdict. In *Wright v. Hemphill,* 81 N. C., 33, the jury returned their verdict to the clerk and had separated for the night, and upon his Honor coming upon the bench in the morning he ordered them to retire and complete their verdict. That was an action for the recovery of personal property, and the verdict as handed to the clerk fixed the property in the defendant, but there was an omission to find the value of the property and assess the damages for detention. There the Court said: "It is always proper for the judge, when the jury return their verdict in open court, to see that it is responsive to every material issue of fact submitted to them, and if it be not so, to refuse to receive it, and direct a jury to retire and make up and bring in a complete verdict." In *Willoughby v. Threadgill,* 72 N. C., 438, the jury returned a verdict to the clerk at dinner recess in favor of the plaintiff for a sum certain, *without interest.* When his Honor resumed his sitting the verdict as rendered and entered by the clerk was brought to his attention, and the jury being in the courtroom, his Honor directed them to take their places, and, after instructing them in the law as to the rule of interest, asked them to retire and to amend their verdict according to his instructions. That course was approved by this Court. Of course, as was said in that case, such a course would not be admissible in criminal actions. The other exceptions are without merit.

No error.

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

DEFENDANT'S APPEAL IN SAME CASE. (508)

MONTGOMERY, J. This case is exactly like it stood when it was here before, 129 N. C., 387, except that the plaintiffs offered in evidence a certain letter written by the defendant to Samuel McD. Tate, after the commencement of this suit, bearing on

the question of the alleged payments made by the defendant on the notes sued on, in addition to the evidence on that point at the first hearing. The letter, dated at Raleigh, 18 January, 1897, is in the following words and figures:

"When at home would have called to see you but was too unwell. I find the bonds are largely overpaid; had no idea of the payments made by you, except the first, and did not know how much it was. Is there anything you could possibly hold on to until it is adjudicated? My books show cash paid for Walton house, $2,300.

"Credited by and paid at sale	$ 644.56
Credited by amount entered on notes	509.94
Credited by	154.90
Credited by	310.03
Credited by	258.21
	$1,877.58"

The above was an account between Tate and Wilson (the defendant) of a fund in the hands of Tate belonging to Wilson—the proceeds of the sale of a piece of real estate in Morganton. The second credit given to Tate of $509.94 Wilson admitted was placed by Tate on Wilson's notes due to the plaintiffs by direction of Wilson. That credit was made on 3 June, 1884, on the $3,000. The third credit of $154.90 was made, by direction of Wilson, by Tate on the $2,000 note on 12 August, 1884. The fourth amount, $310.02, is endorsed as a credit on the
(509) $3,000 on 11 September, 1890; and the fifth amount, $258.21, is endorsed as a credit on the $2,000 note August, 1883. The last two amounts, if entered on the bonds by Tate with the authority of the defendant, defeat the defendant's plea of the statute of limitations. Considering the business relations between Tate and Wilson we are inclined to the opinion that the letter was some evidence to be submitted to the jury of the payments. Several years had elapsed between the sale of the Walton property by Tate for the defendant and the entries made by Tate (they were in his handwriting) on the notes; and even up to the letter written in 1897 no protest had been made against the disposition of the fund in Tate's hands, or inquiry made of the fund. The evidence was submitted to the jury under proper instruction by his Honor, together with that of the defendant, and the weight of it was for them. It was more than a scintilla or suspicion. The instruction prayed for by defendant that the

notes were barred by the statute of limitations on the evidence was properly refused.

No error.

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

Cited: S. c., 137 N. C., 147.

McCLURE v. FELLOWS.

(Filed 16 December, 1902.)

SERVICE OF PROCESS — *Summons — Publication — Attachment — The Code, Secs.* 161, 199, 218, 219, 352 *and* 567.

In attachment, the Code, sec. 218, requires the issuance and *return* of summons *not served* as a basis for publication of summons.

CLARK, J., dissenting.

ACTION by W. K. McClure against C. A. Fellows and (510) others, heard by *Judge W. A. Hoke,* at May Term, 1902, of MITCHELL. From a judgment for the plaintiff the defendants appealed.

J. T. Perkins for the plaintiff.
S. J. Ervin for the defendants.

COOK, J. The defendants entered a special appearance and moved to vacate the attachment and dismiss the action upon the ground that *no summons had* issued, and that the levy of the attachment was void and of no effect. His Honor overruled the motion, and defendants excepted and appealed.

From the facts agreed it appears that the summons was filled out and signed by the clerk, but *never issued* to the sheriff or to any one for him, but *remained* in the office of the clerk. An order of publication of the summons and of the warrant of attachment was duly signed by the clerk, and the same was duly published. So the question raised by defendants' exception for our decision is, did the publication pursuant to the order of the clerk dispense with the *issuing* of the summons?

There are only two ways by which a civil action may be commenced: 1. By issuing a summons; the Code, sec. 199. 2. By submitting a controversy without action; the Code, sec. 567.

When the former method is resorted to the action is *commenced* when the summons is *issued* (sec. 161), and not until that is done. But if the defendant sees proper to do so he may appear without a summons and thereby waive its issuance. *Moore v. R. R.*, 67 N. C., 209; *Middleton v. Duffy*, 73 N. C., 72; *Etheridge v. Woodley*, 83 N. C., 11; *Fleming v. Patterson*, 99 N. C., 404. However, no such waiver was made in this case.

The summons was not *issued*. It did not pass from the hands of the clerk. It was never delivered to the sheriff nor to
(511) any one for him, expressly or impliedly. Therefore it was never issued. *Webster v. Sharpe*, 116 N. C., 466 (at page 471). It was in process of issuance, and had it been delivered to the sheriff, or to some one for him, its issuance would have become complete and been in force and of effect from the time of the filling out and dating by the clerk.

The plaintiff contends that the order by the clerk of the publication of the summons and notice of attachment and the actual publication thereof, as required by statute (Code, secs. 219 and 352), dispensed with the formality of issuing a summons to the sheriff, who would have (knowing the defendants to be nonresidents and not within his county) to make a return of *non est inventus*, and that the defendants were in no way prejudiced by the fact that the *summons* was not issued from the clerk's office; that as full and actual notice was given to defendants by the publication when and where to come and defend their property as if the summons had in fact been issued; that the court acquired jurisdiction of the property levied upon under such order and publication, and that it would have been useless for the clerk to have handed to the sheriff the summons for him to enter thereon, "Not to be found in North Carolina after due search," and then to hand it back to the clerk, when the fact that defendants were not residents and could not be found in the State already appeared to the court by affidavit.

This contention cannot be sustained, for it is contrary to the express requirements of the Code and the rulings of this Court.

Attachment is a provisional or ancillary remedy, and derives its life and support from the *action*, which can exist only when constituted in one of the ways above stated. So, there being no *summons* to support the action and no waiver of the same, all the proceedings had were not only irregular but void. *Marsh v. Williams*, 63 N. C., 371 (at page 373).

The service attempted to be made by publication was a
(512) nullity, for no summons had been issued, and therefore none could be served. The warrant of attachment may be granted to *accompany* the summons or at any time after the

commencement of the action (Code, sec. 348), but not before. Here the attachment issued, but no summons. So it was void and of no effect. *Marsh v. Williams, supra.*

Error.

FURCHES, J., concurring. After full consideration I regret that I feel it my duty to concur in the opinion of the Court written by *Justice Cook,* as it necessarily overrules the case of *Best v. Mortgage Co.,* 128 N. C., 351, an opinion in which I concurred.

I agree with *Justice Clark* that *Best v. Mortgage Co.* fully sustains the plaintiff's contentions, and under that decision the plaintiff's action should be sustained. But that case is in direct conflict with *Webster v. Sharpe,* 116 N. C., 466, and *Marsh v. Williams,* 63 N. C., 371, and cannot stand if they stand. They cannot stand together.

Best v. Mortgage Co. is wrong or *Webster v. Sharpe* and *Marsh v. Williams* are wrong. As this is so, I feel it my duty to agree with that opinion which seems to me to be sustained by reason and the necessary construction of statutes. The Code has abolished attachments as original actions, and made them only *ancillary remedies* given in an action then subsisting. *Marsh v. Williams, supra.* And all actions must be commenced by *issuing a summons* (except in one instance pointed out in the opinion of the Court). The issuance of a summons is more than simply filling it out, it must be *issued* as well. *Webster v. Sharpe,* cited in *Currie v. Hawkins,* 118 N. C., 593. I am therefore satisfied that the opinion of the Court (by *Justice Cook*) is sustained by reason, principle, the statutes and the authorities cited, and that *Best v. Mortgage Co.* is not. It (513) is said this objection is only technical, and it makes no difference whether the summons *was issued* or not; that if it had been issued it could never have been served as the court had evidence before it that the defendant was a nonresident. If it be admitted that the defendant was a nonresident, still he might have been in the county and liable to be served.

But if it be conceded that the *issuance* of the summons in this case was technical, still it was fundamental in constituting the action in court, and must be observed. The action in *Marsh v. Williams* was dismissed for the reason that no summons had been issued. And in my opinion when the Court finds that it has committed an error, and thereby brought its own opinions in conflict with each other, the sooner it is corrected the better, unless the opinion has become what is called *stare decisis* and a rule of property.

DOUGLAS, J., concurring. I concur in the opinion of the Court as delivered by *Justice Cook,* upon the express words of the statute. Section 199 of the Code provides that "Civil actions *shall* be commenced by issuing a summons." Section 218 simply provides for *service* of the summons by publication. It does not pretend to do away with the issuing of the summons, nor does it provide that the publication shall take the place of the summons. There can be no service of the summons unless there is an existing summons to be served.

This, I think, clearly appears from section 219, which prescribes how the summons shall be served by publication, and ends with the following provision: "And no publication of the summons nor mailing of the summons and complaint shall be deemed necessary." It does not say that no issuing of the summons shall be necessary, and yet it could just as easily have said so if such had been the intention of the Legislature. I think there is a material difference between this case and *Best*
(514) *v. Mortgage Co.,* 128 N. C., 351. That case holds
(2 Syl.) that "The Code, sec. 218, does not require the issuing and *return* of *summons not served* as a basis for publication of summons." The italics are mine, and emphasize the effective words of the decision. There may be some unguarded expressions in the opinion, but these must be construed with regard to the facts of the case.

CLARK, J., dissenting. The appellee not having filed a brief, as required by Rule 36 (as amended at this term), we could not permit oral argument by him, and hence were without the benefit of hearing from that side. The rule requiring printed briefs experience has demonstrated to be an absolute necessity for the careful consideration and dispatch of the steadily increasing volume of business in this Court, and must be strictly and impartially adhered to. Notice has long been given that the Court would be forced to adopt such rule, which we believe is in force in the highest courts of all our sister States.

Fortunately for appellee, however, the only point presented on this appeal has been recently and clearly decided by this Court in an opinion (*Best v. Mortgage Co.,* 128 N. C., 351) which was followed by the judge below. It having been made to "appear to the satisfaction of the court" by affidavit that the defendants were nonresidents of the State; that a cause of action existed against them, and that after due diligence they could not be found in the State, service was ordered to be made by publication as provided on that state of facts by the Code, sec. 218. That section does not require that nonresidence should be made

to appear by issuance to the sheriff and a return "not to be found in my county," but requires that it shall appear "by affidavit to the satisfaction of the court that he cannot be found within the State," which course was followed in this case.

It appears from the "facts agreed" that this "action was begun by publication of summons, returnable to (515) April Term, 1899, of Mitchell Superior Court"; that "the affidavits for attachment and publication were in due form and sufficient in form under the laws of North Carolina for the purposes for which they were intended, to-wit, to procure an order for the publication of summons and the issuance of attachments." It further appears in detail by the case agreed that the attachment of property and publication and affidavits, and every step required in such proceedings were regular from start to the return term save that the defendants contend that there was no summons issued in said case, and this is a motion at that term to dismiss the action and dissolve the attachment on that ground.

The authorities and the statute are of course uniform that an attachment is ancillary and can only be granted when there is an action pending, that is, begun by issuing a summons. *Marsh v. Williams,* 63 N. C., 371. There was a regular summons in this case, and it was regularly served by publication instead of by personal service, since the latter could not be had, the defendants being nonresidents, and it appearing to the court "by affidavit to the satisfaction of the court" (as the statute requires) that "after due diligence defendants could not be found in this State." Why, then, issue thereafter a summons to the sheriff? The statute does not require it, and the precedents say it is not necessary, and nothing could be accomplished by doing so. The summons in such case is "issued" when it is ordered to be published and is sent to the printer to be served by publication as truly as when it is handed to the sheriff to be served personally. The "service is by publication," and that was regularly had, and jurisdiction was obtained by attachment of the property, and that was also regularly had in this case.

The cases of *Houston v. Thornton,* 122 N. C., 365; 65 Am. St., 699, and *Webster v. Sharpe,* 116 N. C., 466, relied on by (516) defendants, hold merely that as to the statute of limitations the summons is "issued" in cases where there is a personal service when it leaves the clerk's office to be handed to the sheriff. They do not hold that that is the only mode of "issuance" of summons. On the contrary when the service is to be by publication the summons is issued when it leaves the clerk's office to be served in that way. In both cases the actual

service is later, in publication at the end of the prescribed time, and in personal service when the defendant is found and served by reading the summons to him and leaving him a copy.

In the late case of *Best v. Mortgage Co.*, 128 N. C., 353, this identical point was decided by a unanimous Court after full consideration, and it is said: "The Code, sec. 218, does not require the issuance and return of summons not served as a basis of publication of summons. It provides merely 'where the person on whom service of summons is to be made cannot, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court,' etc., then an order for publication of summons may be made." And it is also said in the same: "As the affidavit then filed sets forth that the defendant was a nonresident, and that fact is not denied, it could have served no purpose to have issued a summons merely to be returned with an endorsement of the fact of nonservice by reason of nonresidence of defendant."

The statute requires such fact to be shown "by affidavit to the satisfaction of the court," and not by such perfunctory presumption as that the defendant is a nonresident of the State, because the sheriff may return "not to be found in my county," where there are ninety-six other counties in the State. The statute is more just to the defendant and was strictly followed in this case.

Our precedent above cited is not only recent, by a unanimous Court, and directly in point, but it is supported by the (517) rulings in other States, exactly "on all fours." *Bannister v. Carroll*, 43 Kan., 64; *Larimer v. Knoyle, ibid.*, 338; *Green v. Green*, 7 Ind., 113; *Wood v. Bissell*, 108, *ibid.*, 229; *Mills v. Corbett*, 8 How Pr., 500; *Bank v. Richardson*, 34 Oregon, 536; 75 Am. St., 664; *Goodale v. Coffee*, 24 *ib.*, 354; *Easton v. Childs*, 67 Minn., 242; *Huffman v. Brung*, 83 Ky., 400, and there are many others. In equity a subpœna was not necessary when nonresidence was made to appear by affidavit, and publication was made. *Erwin v. Ferguson*, 5 Ala., 167.

The law presumes that every man is in possession of his property, either in person or by some agent, and that the actual levy and seizure of the property will give him notice of the attachment or seizure, and the publication of the summons is for the sole purpose of notifying him when and where he may come and defend his property. *Cooper v. Reynolds*, 77 U. S., 309; *Bernhardt v. Brown*, 118 N. C., 700; 36 L. R. A., 402.

The defendant further objects that this attachment was not at that time indexed on the judgment docket as required by chapter 435, Laws 1895. That is not a pertinent objection on

this motion, and can only arise on a contest for priority of liens between creditors.

Cited: Grocery Co. v. Bag Co., 142 N. C., 180, 2.

(518)

SIMPSON v. ENFIELD LUMBER COMPANY.

(Filed 16 December, 1902.)

NEGLIGENCE—*Railroads—Fires—Logs and Logging—Damages.*

Where a person sells standing timber to a lumber company, giving it the right to construct a railroad to remove the same, the company is not liable for damage caused by fire communicated by its engine, if properly equipped and operated.

CLARK and DOUGLAS, JJ., dissenting.

ACTION by W. P. Simpson against the Enfield Lumber Company, heard by *Judge George H. Brown* and a jury, at April Term, 1902, of HALIFAX. From a judgment for the plaintiff the defendant appealed.

E. L. Travis for the plaintiff.
Day & Bell and *T. N. Hill* for the defendant.

COOK, J. On 6 August, 1900, plaintiff sold and conveyed by deed to the defendant, in consideration of $2,000 paid him, all the timber upon his tract of land (583 acres) measuring ten inches and above in diameter at the stump, and granted to defendant the right "to construct, maintain and use such roads, tramways and railroads . . . on and upon said land as it may deem necessary for cutting and removing said timber . . . and shall have the right and privilege of locating said road . . . and the use of such trees, undergrowth and dirt as may be necessary to construct and maintain the same; . . . that said party of the second part shall have the term of one year from date of deed within which to cut and remove said timber."

Pursuant to the provisions of said deed defendant company entered upon said land, constructed its railroad, cut and removed timber, and on 14 September, when the train was making its last load of timber from the land, a fire originated (519) on said railroad, "right at the track, right on the side,

most by the tie," shortly after the engine had passed, and thence spread to and ignited plaintiff's woods (lying on both sides of the track), burning the unsold timber and undergrowth; and this action is brought to recover damages for such burning. Verdict and judgment in favor of plaintiff, and defendant appealed.

Plaintiff admits that the engine was in proper order, equipped with proper spark arrester, and that there was no negligence in that respect. But the ground of negligence upon which he relies is that an accumulation of leaves, brush and combustible material was permitted by defendant company to be and remain upon the right of way and near the right of way and when the track was constructed, instead of carrying off this combustible material defendant company piled it up alongside of the track and in dangerous proximity to it, and that sparks fell upon such and ignited the same, which communicated the fire to his land, causing damage complained of.

There is only one witness, Candace Williams, who testified to the origin of the fire, the substance of which is above quoted. She says she was 200 yards off and saw two little puffs of smoke rise up after the engine passed. She further testified that she was on that track a great deal of the time, and she had to pass backwards and forwards, and saw the condition of it before the fire and how it was laid down; "it was just cut down place enough for the train to go over and then put down the ties, and just ran the track anyway. There was nothing in the world taken away, just put the trees and bushes out of the way so the train could go along; the rubbish and things were lying all along up and down the sides. They never racked out anything in the world, just laid the cross-ties right on top of it." It appears that it was a temporary structure and was in use less than
(520) two months. No one saw any sparks emitted from the engine, nor did any one know positively that any were emitted, nor that the fire caught in the rubbish or that there was any rubbish where it caught; but the circumstances furnished sufficient evidence to warrant such a finding of fact.

The material question involved in the case on appeal is raised by the second, fifth and twelfth exceptions. The second and fifth are taken in the refusal of the judge to nonsuit the plaintiff, and the twelfth to the following part of his charge to the jury: "If the defendant permitted the brush and combustible material to accumulate on its roadbed and a fire was communicated to the same by its engine and burnt over the plaintiff's land, then it would be negligence, and you will answer the first issue, 'Did

the defendant negligently and wrongfully burn the plaintiff's timber, as alleged in the complaint?' 'Yes.'"

So the question raised is one of construction of the contract: Upon whom did the duty rest under its terms of providing against fire?

The principle of eminent domain is not involved in this contract nor in this case on appeal. No franchise is claimed, nor was any exercised. For his own private purposes an individual has as much right to construct, equip and operate a railroad for doing his own hauling as he has to use horse or other power for such purposes. Upon their contract defendant acquired no right of property in the land or right of control or possession thereof other than for the use therein expressed. Plaintiff knew when he made the contract that fire was necessary for generating steam in running the locomotive upon the railroad, and must be deemed to have had notice of the probable danger from sparks necessarily emitted from an engine; and having retained absolute control and possession of all the land lying adjacent to the track (as well as to that upon which the track laid, except so far as it was in use for the train and maintenance (521) thereof), it was his duty to have protected his adjacent land from the sparks and spread of fire. The contention of plaintiff is based upon the theory that the rules applicable to incorporated railroad companies (*quasi* public corporations, common carriers) apply to defendant company, but they do not. *Quasi* public corporations, with their right of eminent domain, have an easement in all the land condemned for right of way, and have the right to enter thereon when needed for their use, and even when not needed for their use they have the *right* to enter in order to remove whatever may be thereon, which would endanger the safety of its passengers or which might, if undisturbed, subject it to liability for injury to adjacent lands or property. *Ward v. R. R.*, 109 N. C., 358, and 113 N. C., 566; *Shields v. R. R.*, 129 N. C., 1. Wherefore such corporations, having such right of entry upon and control over *their* right of way, are held liable if grass and inflammable material are allowed to negligently accumulate thereon and become ignited from sparks, causing damage to adjacent land-owners by the spreading of the fire. *Black v. R. R.*, 115 N. C., 667; *Shields v. R. R., supra.*

Under defendant's contract it had no right of way of specific width. Its domain and control extended no further than to put down its track on plaintiff's land and run its trains over it, and to use the ground in removing the timber and loading it on the cars, and such as was necessary in cutting and removing the

timber from the land, and the use of such trees, undergrowth and dirt as would be necessary in constructing and maintaining its road. No right is given it to enter upon the lands for the purpose of cleaning the rubbish therefrom; the rubbish belonged to plaintiff; and having no right to remove the same it cannot be held liable for its remaining there.

But it may be argued that it cut and put rubbish there,
(522) and therefore is liable for its being there. Be that so, yet it had a right to do that much, but had no right to do more without subjecting itself to an action of trespass. It had no defined rights of way under its contract for which it assumed any liability. Its duty under the contract was to so use its property as not to injure the property of plaintiff, and this the defendant did by properly equipping its machinery and *operating* it in a prudent and careful manner. Plaintiff entered into this contract with full knowledge of the dangers incident to running a locomotive across his land. He well knew of the condition of the woods through which the track would be constructed and of the inflammable matter which had accumulated thereon and would thereafter be likely to accumulate. So the duty under the contract rested upon plaintiff to protect his property and not that of defendant company. Having failed to provide against it plaintiff became his own insurer and assumed the risk rather than go to the expense of cleaning off or firing against the sparks which would probably escape from the engine.

Under this express contract between two private parties no duty arises from one to the other, except such as appears in terms or necessarily arises by implication from its context. And it nowhere appears therein that the defendant company obligated itself to assume the control and liability of a right of way such as is imposed upon a public railroad corporation. A public railroad corporation goes where it is licensed by law, carrying the dangers incident to its operation with it, even in spite of the protest of a landowner whose land it condemns and uses; while, as between the parties to this contract, the defendant company ran its locomotive over plaintiff's land with his consent, in order to enable defendant company to carry out a contract made with plaintiff which enabled plaintiff to sell
(523) his timber and defendant company to purchase it.

There is no provision in the contract which imposes, by expression or implication, upon defendant company the duty of cleaning off the rubbish either from its track or the land adjacent to it, nor does it appear therefrom that it was in the contemplation of the parties that defendant company should

assume any liability on account of the condition—foul or otherwise—of the plaintiff's land. If such had been their intention it ought to have been expressed. As it is not expressed it cannot be inferred, for defendant company might have refused to enter into such a contract and declined to purchase the timber. The rule of so using one's own property as not to injure the property of others was complied with by defendant company in using a properly equipped engine and operating it carefully and in a prudent manner, which is admitted to have been done.

There is error in the instruction excepted to and in not sustaining the motion to nonsuit.

New trial.

DOUGLAS, J., dissenting. I cannot concur in the opinion of the Court because it is based upon what seems to me an erroneous principle of law. The opinion holds that it was error in the court below to give the following instruction: "If the defendant permitted the brush and combustible material to accumulate on its roadbed, and a fire was communicated to the same by its engines and burnt over the plaintiff's land, then it would be negligence, and you would answer the first issue 'Yes.'" It is admitted that this instruction would be correct if the defendant were a regular railroad company; but I fail to find any distinction either in principle or precedent. On the other hand some authorities hold private railroads to a higher degree of responsibility than those that are public, on the ground that the latter have a public license to operate. I do not (524) think that makes any difference. The principle of eminent domain is in no way concerned. The power of condemnation is given to railroad companies simply to enable them to acquire the lands necessary for their construction. They may acquire such lands by purchase; and it is evident that the law deems this the proper method to pursue, as it permits the condemnation of land only in the event of the railroad company being unable to agree with the owners for its purchase. Code, sec. 1943. Moreover, by condemnation, a railroad in this State can never acquire more than an easement in the land, while by deed or grant it may acquire any interest therein, including the absolute fee. The defendant is a corporation, but whether it had the chartered right to build a railroad is immaterial to this question, as it entered upon the plaintiff's land admittedly under the contract set out in the record.

It is contended that the defendant owed no duty to the plaintiff inasmuch as it did not contract to keep its roadbed clear. I am not aware of any statute requiring an ordinary railroad

company to keep its track clear of combustible matter. It is held by the courts with practical unanimity that a failure to do so is evidence of negligence, or in certain cases may be negligence *per se*. This is simply one phase of the rule of the prudent man. Would a man of ordinary prudence, operating a railroad through his own land, permit the track to become so foul as to be in constant danger of catching fire from coals dropping from the engine, when the probable result of such fire would be the loss of a large amount of valuable timber? Would a man of ordinary prudence pile up leaves and other combustible matter near his house and adjoining the place where hot ashes are habitually thrown out? Would he have the right to pile them away from his own house but in a dangerous proximity (525) to another's house and ash-pile?

The fact that the engine was properly equipped with a spark arrester has little or no bearing upon the question. Where the roadbed itself is covered with combustible matter the danger is not so much from the sparks that come out of the smokestack as it is from the live coals that drop from the ash-pan. In such cases the danger from the latter is much greater on account of the larger size of the coals and their greater capacity to retain and communicate heat. Of course they are not thrown as far as sparks, and in fact cannot well get beyond the ditches. Ordinarily they fall between the rails, but when the engine is rapidly rounding a curve they may be thrown beyond the rails and down an embankment, if there happen to be one. This danger may be increased or lessened by use of the dampers at each end of the ash-pan; but these dampers must necessarily be controlled to a great extent by the needs of the engines. The only safe way is to clean off the roadbed—and I see no reason why in this particular a lumber road should not be held to the same degree of care as an ordinary railroad. They both use the same dangerous agency, causing the same character of loss, and in both cases the danger can be avoided by the same means involving the cheapest labor and the simplest tools. A coal from one is as dangerous as a coal from the other, and a common hand with a rake or a hoe can clean off one as easily as he can the other. There may be some difference as to the width of the right of way, but that does not affect the principle.

In the case at bar the defendant was evidently in full possession of its track or roadway and ditches, which constituted its right of way. These, I think, it was required to keep clear of combustible matter. I do not think it could be required to clean up the land beyond its ditches, but at the same time it did not have the right to pile up combustible matter in such immediate

proximity to its track as to be in constant danger of being (526) set on fire by its engine.

I cannot find any case directly in point, nor is any cited by the Court. In *Garrett v. Freeman,* 50 N. C., 78, the defendant was held liable for damage caused by fire escaping from a log pile he was burning on his own land. *Judge Pearson,* speaking for the Court, says: "A prudent man would not permit a log pile to be made so near the fence (from three to five yards), with a dead pine between the pile and fence, nor would he permit fire to be set to it without having the trash raked from around it." In *Robinson v. Morgan,* 118 N. C., 991, it was held that the plaintiff, although having no cause of action under the Code, might recover as at common law for negligently permitting fire to escape. In 2 Shearman and Red. on Neg. it is said, in section 688: "One who uses a steam engine on his own land ought to use the ordinary means for confining sparks, especially if he burns wood; and he is liable if for want of such precautions the sparks set fire to a neighbor's property. He is also bound to use ordinary care to keep his own grounds in such condition that any fire set thereon by the engine shall not be communicated thence to adjacent premises."

From reason and analogy, if not from direct authority, I am compelled to dissent from the opinion of the Court.

CLARK, J., concurs in the dissenting opinion.

Cited: Craft v. Timber Co., 132 N. C., 157; *Simpson v. Lumber Co.,* 133 N. C., 95.

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(527)

LIVERMON v. ROANOKE & TAR RIVER RAILROAD COMPANY.

(Filed 16 December, 1902.)

1. NEGLIGENCE—*Railroads—Fires.*

In an action for damages by fire caused by a railroad engine, the permitting of the track and right of way to become covered with dead grass and combustible material is at least evidence of negligence on the part of the railroad.

2. NEGLIGENCE—*Railroads—Fires.*

Where wood is piled on the right of way of a railroad by its consent, and fire is communicated to the wood by means of inflammable material on the right of way, the railroad company is liable for the destruction of the wood.

LIVERMON *v.* R. R.

ACTION by A. T. Livermon against the Roanoke and Tar River Railroad Company, heard by *Judge George H. Brown* and a jury, at April Term, 1902, of BERTIE.

This is an action for the recovery of the value of cord wood burned through the negligence of the defendant while piled up along its track awaiting shipment. The material portions of the complaint are as follows:

2. That on or about 28 February, 1899, the plaintiff was the owner of a large quantity of cord wood, which was of the value of $200, and which had been by him placed in the vicinity of the defendant's line of railway, preparatory to its shipment to market by the defendant's trains.

3. That on or about 28 February, 1900, the defendant, by means of fire negligently permitted to be communicated from its locomotive to said wood, did unlawfully and wrongfully burn the same, to plaintiff's damage, $200.

4. That defendant, on or about 28 February, 1900, unlawfully and negligently permitted weeds, grass and stubble and other inflammable material to accumulate on the line of railway, and adjacent to which the plaintiff's said wood was placed
(528) for shipment over its road, and to which sparks were negligently permitted to escape from its locomotive to inflammable material, grass and stubble, etc., hereinbefore mentioned, and thereby communicating fire to the said wood, and by which the same was totally destroyed, and to his damage, $200.

The answer denies every allegation in the complaint, and then proceeds as follows:

5. That some cord wood was placed near defendant's track in the fall of the year 1899 or the following winter.

6. That if said cord wood was placed on defendant's right of way, near its track by plaintiff, then said plaintiff negligently contributed to his own injury in that he placed said wood near defendant's track without the permission of this defendant, and nearer to its track than a man of ordinary prudence and care would place it, and too near to defendant's passing engines or locomotives to be safe from fire, and nearer to the track than the defendant's rules allow; that the defendant directed plaintiff to remove said wood, and offered to furnish a car for shipment of same in order to get it away, notwithstanding it had never given the plaintiff authority to place it there; but plaintiff refused to allow it to be shipped and failed to remove it, but on the contrary allowed it to remain at the place it was until it became dry and easy to ignite, and if the same was burned it was without the fault or negligence of this defendant; and such con-

tributory negligence the defendant especially pleads and sets up in bar of any recovery in this action.

The jury found that the wood was burned by the negligence of the defendant, and that the plaintiff did not contribute by his negligence to his own injury. There was competent evidence tending to sustain these findings. Among other evidence there was testimony to the effect that the defendant's right of way was covered with dead grass and other inflammable material adjacent to the wood; that the fire was first seen on the said right of way about a foot from the cross-ties and (529) sixty feet from the wood, about a minute or so after the passage of one of the defendant's trains; that the wood was piled on the right of way nine feet from the track, by permission of the defendant, for the purpose of shipment; that the wood remained there from August and September, 1899, to 28 February following, when it was burned; that the reason for the wood remaining there so long was the refusal of the defendant to ship any of the wood until there was a *train load* ready for shipment; and that it was the custom of the defendant to permit wood to be so piled for shipment.

The following is the *entire* evidence for the defendant:

"Pruden, conductor of the railroad, testified that plaintiff's wood was placed only four or five feet from the end of the cross-ties; have seen other wood along right of way, but further off from the track. Cross-examined: Wood is generally placed not closer than six feet; in fact the rule of the company requires all wood to be placed not nearer than six feet from the cross-ties. I never measured distance of wood from ties; only saw it."

L. C. Hedgepeth testified: "I was notified to remove this wood, that the section master wanted to put in a switch there. I stated that I did not own the wood, but I repeated to plaintiff that company wanted this wood removed, that they desired to put in a siding there. I did not repeat it to plaintiff at the request of any one, but of my own motion. A negro delivered me the message. I don't know who sent him." Judgment for plaintiff; appeal by defendant.

No counsel for the plaintiff.

St. Leon Scull for the defendant.

DOUGLAS, J:, after stating the case. At the close of the plaintiff's evidence the defendant moved for a judgment as of nonsuit. This was properly refused. Permitting its track and right of way to become covered with dead grass and com- (530) bustible material was at least evidence of negligence. The

defendant, after introducing evidence, offered various prayers for instruction, among which were the following:

"9. Upon the whole evidence the plaintiff cannot recover.

"10. Upon the whole evidence the defendant is not guilty of negligence, and the plaintiff cannot recover."

In view of the substantial evidence tending to prove negligence these prayers were manifestly improper, and would have been so in any event. Where there is no evidence tending to prove negligence, or nothing more than a mere scintilla, the court may so instruct the jury, but in all such cases the evidence must be construed most strongly against the party asking for the direction of the verdict, as it is practically a demurrer to the evidence. All contradictions must be solved in favor of the opposite party, taking his evidence as true and construing all the evidence in the light most favorable to him. *Cowles v. McNeill,* 125 N. C., 385; *Coley v. R. R.,* 129 N. C., 407, cases there cited. The form of the prayer is itself objectionable as it assumes that equal weight is to be given to all the evidence. The prayer should be substantially to the effect that there is no evidence tending to prove the negligence of the defendant or the plaintiff, as the case may be. A mere scintilla is not considered evidence.

Two of the defendant's prayers were given, as follows:

"1. If the jury shall find from the evidence that the plaintiff piled or raked up the wood on defendant's right of way, very near the track, without obtaining consent of defendant, then and in that event the plaintiff assumed all risk of fire from defendant's engine, and plaintiff cannot recover."

"8. The plaintiff must go further and show more than that the right of way was not clear of stubble, etc., but must also show to the satisfaction of the jury that the fire originated from defendant's engine before plaintiff can be allowed to recover."

The court further charged the jury as follows, to which (531) defendant excepted:

"1. If the jury find that the wood was placed on the right of way by consent of defendant for shipment, and that along that section of the road the track and right of way were foul and littered with inflammable material, and that sparks were communicated from defendant's engine to this inflammable material, and that such fire spread and extended to plaintiff's wood and destroyed it, you will answer the first issue 'Yes.'

"2. If you find that defendant had a rule and regulation prohibiting the placing of wood, delivered on right of way, within six feet of said roadbed, and that plaintiff did place his wood within six feet of said roadbed, that would be negligence on the part of plaintiff; and if you further find that the sparks from

the engine were communicated directly from the engine to this wood, by reason of its dangerous proximity, it would be contributory negligence, and you will answer the second issue 'Yes.' "

We see no error in these instructions of which the defendant can complain, and in fact it might well be questioned whether the second one is not too favorable to the defendant, inasmuch as it holds the plaintiff to the observance of a rule which does not appear to have been brought to his knowledge. We think that these instructions, with the prayers given, fairly and sufficiently present the defendant's case. The remaining prayers were properly refused.

There are many exceptions to the evidence, none of which can be sustained. It was proper and necessary for the plaintiff to show that the wood was placed on defendant's right of way with its permission, for the purpose of shipment, and that it was not close enough to the track to interfere in any way with the passage of a train. In the absence of error the judgment must be

Affirmed.

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(532)

WORTH v. WILMINGTON.

(Filed 16 December, 1902.)

1. APPEAL—*Rules of Court—Rules* 5, 17—*Dismissal.*

   A motion by the appellee to docket and dismiss made before the docketing of the transcript, though not at the first opportunity, will be allowed.

2. APPEAL—*Dismissal—Rules of Court—Rules* 5, 17—*Transcript.*

   Where the trial judge fails to settle a case on appeal, so that the transcript may be docketed seven days before the call of the district, the appellant must docket so much of the record as he can obtain or, if none is obtainable, make affidavit of that fact and move for *certiorari.*

ACTION by W. E. Worth against the city of Wilmington. Action by the plaintiff to reinstate this case.

Meares & Ruark for the plaintiff.
E. K. Bryan for the defendant.

CLARK, J. The appellant failed to docket his transcript on appeal seven days before the beginning of the call of the docket of the district to which it belongs. Rule 5, 128 N. C., 634. The appellee might have then moved to docket and dismiss. Rule

17, 128 N. C., 638. The appellee did not move to dismiss at this his earliest opportunity, but he subsequently made the motion before the appellant docketed, and the appeal was dismissed. The appellant now moves to reinstate:

1. Because the appellee did not move to dismiss at the first opportunity. But he could so move at any subsequent time, provided it is done before the appellant dockets his appeal, just as the appellant can docket at any time during that term subsequent to the required time, provided he does so before the appellee moves to docket and dismiss under Rule 17. *Benedict v. Jones, ante,* 473, and cases there cited.

2. The appellant moves to reinstate because, as he al-
(533) leges, the judge had not settled the "case on appeal" in time to permit the same to be sent up and filed seven days before beginning the call of the docket of the district to which the appeal belongs. But in such case it was the duty of the appellant to docket the rest of the record, or all that he could obtain (or if none obtainable, with affidavit of that fact), and move for a writ of *certiorari.* This has been uniformly held, and numerous cases are cited in *Burrell v. Hughes,* 120 N. C., 277, upon which the Court said: "There are *some* matters at least which should be deemed settled, and this is one of them," and several cases since are cited in *Norwood v. Pratt,* 124 N. C., 745. Since which last case the Court has followed the rule therein settled without deeming it necessary to add any opinions to those already published and reiterated so often. The motion to reinstate is denied.

Motion denied.

Cited: S. v. Telfair, 139 N. C., 555.

GREEN v. GREEN.

(Filed 18 December, 1902.)

1. DIVORCE — *From Bed and Board — Evidence — Sufficiency—The Code, Sec.* 1286.

A divorce from bed and board will be granted the wife if it is shown that the husband made foul and injurious accusations, refused to bed with her and denied she was his wife.

2. DIVORCE—*Bed and Board—Evidence—Competency.*

In an action for divorce by a wife, from bed and board, evidence of the acts of the husband within six months before the commencement of the action is not competent.

GREEN *v.* GREEN.

ACTION by Maggie V. Green against John A. Green, heard by *Judge M. H. Justice* and a jury, at September Term, 1902, of JACKSON. From a judgment for the defendant the plaintiff appealed. (534)

Walter E. Moore for the plaintiff.
Coleman C. Cowan for the defendant.

CLARK, J. This is an action for divorce from bed and board. The complaint alleges, in substance, that on or about 4 September, 1900, the defendant cursed and abused the plaintiff, drawing back his fists to strike her (which plaintiff avoided by stepping back), and told her to leave his house, that he did not respect or love her, and this in the presence of a neighbor, and states her conduct to show that she did not provoke it; that the defendant was jealous, and if she spoke to any man or went to any neighbor's house the defendant would get mad and would not speak to her for several days, and that she did nothing to cause jealousy, stating her conduct; that for at least six months prior to 4 September, 1900, the day the plaintiff was driven from the defendant's house, he had slept in the storehouse and refused to stay in the dwelling house and sleep with this affiant, though she had often begged him so to do, and had withdrawn during that time all marital intercourse from the plaintiff, and had denied his being father of their children; whereupon she avers that such indignities have rendered her condition intolerable and life burdensome. Code, sec. 1286.

The plaintiff testified that she was 25 years old, and the defendant 59; that they had been married six years and had two children, and testified somewhat more in detail to the state of facts above set out, and introduced, without objection, a long letter from the defendant written in November, 1900, soon after the separation, in which, among other insulting things, he repeats that the children are not his, and charges that they were begotten by the plaintiff's uncle. Upon demurrer to the evidence the court gave judgment of nonsuit. In this (535) there was error.

In *Coble v. Coble,* 55 N. C., 392, it is said that it is not necessary that to render the plaintiff's condition intolerable and life burdensome there should be a striking, or even a touching of the body, but foul and unjust accusations often repeated, with a withdrawal of intercourse and refusing to bed with his wife, and (in that case) threats of deadly violence, were sufficient. Here we have all these except the last, and in addition we have here the offer to strike and the express charge of the illegitimacy of

the children. Would it be reasonable, should these facts be sustained by a verdict, to compel the plaintiff to again bed and board with the defendant by refusing a judicial separation and alimony for her support? The defendant, according to the allegation and evidence, has already given himself such separation from bed and board by abandoning the plaintiff, living separate and apart from her and refusing conjugal relations, and it appears is defending this action simply to avoid contributing to her support. In *Erwin v. Erwin,* 57 N. C., 82, the facts were almost identical with those in this case.

The complaint states the circumstances specifically, giving time and place, as required. *Martin v. Martin,* 130 N. C., 27, and *Ladd v. Ladd,* 121 N. C., 118, and numerous cases cited therein; also specifically her conduct on the occasions referred to, that it may be seen that her allegation that there was "no provocation on her part" was not a conclusion of law or fact drawn by herself. *Jackson v. Jackson,* 105 N. C., at p. 438, and cases there cited, and *O'Connor v. O'Connor,* 109 N. C., 139. The answer denies the allegations of the complaint, but sets up no counter allegations of conduct on the part of the plaintiff in bar of a divorce, notwithstanding the complaint.

The letter of November, 1900, it is true, was written within six months of bringing the action, and it may be (which (536) we do not decide) should have been ruled out if excepted to; but it was only a reiteration of what was already in evidence, save the charge that the plaintiff's uncle was specifically named as the father of the children, whose paternity he had before disclaimed, according to the plaintiff's evidence. This additional indignity having been within six months before action brought was clearly incompetent, and that part of the letter should have been excluded by the court *ex mero motu,* but in withholding the case from the jury there was

Error.

WATKINS v. KAOLIN MANUFACTURING COMPANY.

(Filed 18 December, 1902.)

1. MORTGAGES—*Trust Deeds—Trustee—Damages.*

The owner of land may bring an action for damages thereto though she has executed a deed of trust thereon.

2. PLEADINGS—*Complaint — Sufficiency — Personal Injuries—Damages.*

A complaint alleging that the plaintiff was greatly disturbed in body and mind, to her damage, sufficiently alleges a personal injury.

3. ISSUES—*The Code, Sec.* 260—*Pleadings.*

The issues submitted in this case were raised by the pleadings.

4. DAMAGES—*Personal Injuries—Fright—Nervousness.*

An action for damages will lie for physical injury or disease resulting from fright or nervous shocks caused by negligent acts.

ACTION by Flora J. Watkins against the Kaolin Manufacturing Company, heard by *Judge Fred Moore* and a jury, at May Term, 1902, of JACKSON. From a judgment for the plaintiff the defendant appealed.

Walter E. Moore and *Shepherd & Shepherd* for the (537) plaintiff.

Coleman C. Cowan for the defendant.

COOK, J. The substantial questions raised by the defendant's assignments of error are:

1. Could the cause of action for damage done to the house and land be maintained by plaintiff trustor?

2. Does the complaint state a cause of action for physical injury to plaintiff?

3. Does a cause of action lie for physical injury resulting from fright and nervousness caused by negligent acts?

As to the first question it is clear that the plaintiff had the right to bring this action for damages done to the freehold. She owned the premises in fee, subject to a deed of trust executed thereon to secure a debt. The conveyance of the title to the trustee did not disturb her possession or ownership as to trespassers and tort feasors. So long as the property was of sufficient value to secure the payment of the debt the trustee and *cestui que trust* could sustain no loss or injury by reason of damages done to the premises, therefore the loss by reason of the damage would fall upon the trustor, the equitable owner, and she being the party really injured had a right to maintain the action. She was in possession of the land, and being the equitable owner had the right to recover in an action of ejectment, although the legal title was in the trustee. *Murray v. Blackledge,* 71 N. C., 492; *Farmer v. Daniel,* 82 N. C., 152; *Condry v. Cheshire,* 88 N. C., 375; *Taylor v. Eatman,* 92 N. C., 601; *Graves v. Trueblood,* 96 N. C., 495.

The trustee, holding the legal title, might have been made a

party to the action, but his recovery would have enured only to the benefit of the trustor, which could be of no concern to the trespasser or tort feasor. A judgment in an action between the equitable owner in possession and the defendant for
(538) damages to the premises would be a bar to an action by the trustee. So no loss could befall the defendant. Had defendant deemed the trustee a necessary party to the action he should have demurred (Code, sec. 239, subsection 4) or answered (section 241), otherwise it will be deemed to have been waived. Section 242.

As to the second question: Plaintiff alleges that she "became so nervous and frightened from the negligent and careless conduct and blasting of defendant that she could not sleep at night, and was greatly disturbed in body and mind, as well as for herself and the safety of her children as the destruction of her property, to her great damage, in the sum of nineteen hundred and ninety-nine dollars." To sustain this allegation she was allowed to prove that the blasting rendered her almost helpless; that she could not go about her daily duties, and could not keep on her feet to attend to her children; that it has affected her ever since and has caused her female trouble out of its regular course. Under the old system of pleading this variance would be fatal, but under the provisions of the Code the rule is greatly modified, and pleadings must be liberally construed for the purpose of determining their effect with a view to substantial justice between the parties. Code, sec. 260. From a liberal construction of plaintiff's allegation it appears that the alleged negligent blasting greatly disturbed her in body and mind, causing her to become so nervous and frightened that she could not sleep at night, causing her great damage; and as the result she proves that she was *physically* injured as above stated, to which defendant excepted, but did not allege that it was misled by such a variance; therefore plaintiff was not called upon to amend her complaint so as to conform to the proof, and the variance is deemed immaterial. Code, sec. 269; *Lilly v. Baker,* 88 N. C., 151; *Patrick v. R. R.,* 93 N. C., 422; *Lawrence v. Hester,*
(539) 93 N. C., 79; *Usry v. Suit,* 91 N. C., 406; *Bank v. Burgwyn,* 116 N. C., 122. It appearing that the defendant was not misled the variance between the allegation and proof must be deemed to have been immaterial. *Gibbs v. Fuller,* 66 N. C., 116. Plaintiff, in her complaint, did not allege that she had been rendered almost helpless in consequence of such fright and nervousness or that she could not go about her daily duties, and has been afflicted ever since with female trouble out of its regular course; but if defendant had alleged that it had been

misled by such proof and had proved the same to the satisfaction of the court, the judge may have ordered that the complaint be amended (sec. 269, Code), for amendments to pleadings which further justice speed the trial of causes, are allowed on proper terms. *Commissioners v. Blair,* 76 N. C., 136. It clearly appears from the language of the allegation that plaintiff intended to charge that physical injury was done to her—"was greatly disturbed in body, . . . to her great damage"—and we think it does state a cause of action for physical injury. If defendant was misled and not put upon proper notice by it that plaintiff would offer evidence of *injuries to her person* resulting from fright, then it had its remedy under section 269 of the Code. Or if defendant did not understand the precise nature of the charge made in the complaint it had its remedy by applying to the court for an order to have it made more definite and certain (Clark's Code, sec. 261, and cases there cited). It does not appear from the record that any substantial rights of the defendant were affected by the failure to more fully set out plaintiff's cause of action, in which case the court properly disregarded the alleged defect in the pleadings. Code, sec. 276.

Counsel having disagreed upon the issues, they were framed by the judge, and it is contended by the defendant that there was error in submitting the fourth and fifth issues, (540) for that they were not raised by the pleadings; *Miller v. Miller,* 89 N. C., 209; *Christmas v. Haywood,* 119 N. C., 130; and that where the pleadings do not distinctly and unequivocally raise an issue it should not be submitted. *Sprague v. Bond,* 113 N. C., 552. But an issue was raised by the pleadings. Bearing in mind the requirement of the statute (sec. 260) that "in the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties," this contention cannot be sustained. Plaintiff's allegation is that she was "greatly disturbed in body, . . . to her great damage." . . . The fourth issue is, "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" And the fifth, "What compensatory damages, if any, is the plaintiff entitled to recover for her personal injuries?" Instead of alleging that she was "injured" she alleged that she was "disturbed in body," to her great damage. "Disturb," says Webster, primarily means "to throw into disorder or confusion; to derange; to interrupt the settled state of; to excite from a state of rest." So, substituting the word "injured" for "disturbed in body," and the words "for her personal injuries" for "the disturbance in body," did not change the issue with respect to the damage complained

of, in the sense in which the words "disturbed in body," coupled with "to her great damage," are used in the allegation, which we understand to be that her body was thrown into a state of disorder, and thereby injured.

As to the third question, we are of the opinion that an action will lie for *physical* injury or disease resulting from fright or nervous shocks caused by negligent acts; from common experience we know that serious consequences frequently follow violent nervous shocks caused by fright, often resulting in spells
(541) of sickness, and sometimes in sudden death. Whether the physical injury was the natural and proximate result of the fright or shock is a question to be determined by the jury upon the evidence, showing the conditions, circumstances, occurrences, etc. But it must also appear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, or that the injury resulted from gross carelessness or recklessness, showing utter indifference to the consequences, when they should have been contemplated by the party doing such acts. As a condition precedent to recovery in such cases it must appear that the defendant must or ought to have known of plaintiff's perilous position or condition, against which he should have to exercise care, otherwise such injury could not be within the contemplation of the actor, and put him upon notice as to this special care.

In the case at bar defendant company's servants acted with utter indifference to the plaintiff's safety, and knew that plaintiff was a woman and that she and her little children lived and were in her house only sixty steps away, and exposed to the danger; and after being asked by her to direct the blasting so as not to throw the rocks upon her house, continued to blast, throwing the stones from the size of a gallon bucket down to small stones upon and through her house and into her yard and garden (depositing as much as a wagon load of rock in her yard, and several wagon loads in her garden), making it necessary for her and her children to secret themselves in the basement behind a stack chimney, and even there they were in danger. From the fright and nervous shocks received from such blasting she testified that she was rendered almost helpless and could not go about her daily duties, and could not keep on her feet to attend to her children, and has been affected ever since; that it has caused her female trouble out of its regular course. They, knowing that plaintiff was a woman, and knowing (or ought
(542) to have known of) the weaknesses of a woman, should have contemplated the effects likely to be produced upon her by such danger and fright.

We do not wish to be understood as holding that an action in a case like this would lie for mental suffering and anguish from which no *physical* injury or disease directly resulted, as that question is not squarely presented in this appeal.

In *Bell v. R. R.*, L. R. 26 Ir., 428, the leading case in support of such action, it is held that if such bodily injury (serious impairment to health) might be a natural consequence of fright, it might be an element of damage for which a recovery might be had. Sedgewick on Damages (8 Ed.), sec. 861, in commenting upon it, says: "The principle adopted in this case would seem to be the true one. The negligence of the company being admitted, any injury directly resulting should be compensated."

In *Purcell v. R. R.*, 48 Minn., 134; 16 L. R. A., 203, the plaintiff, a pregnant woman, was frightened by the negligent conduct of defendant in running its cars, miscarried, and suffered permanent injury: Held, that a cause of action would lie.

In *Mack v. R. R.*, 52 S. C., 323; 68 Am. St., 913; 40 L. R. A., 679, the plaintiff threw himself down between and along the cross-ties just outside of the rail, bruising and injuring his person and barely escaped being struck by the locomotive, and was terribly frightened and shocked, his mind was affected and partially destroyed, his reason unbalanced, and for a long time was made ill and sick and suffered great mental anguish and physical pain arising from the terrible nervous shock and fright: Held, that an action would lie. *Sloane v. R. R.*, 111 Cal., 668; 32 L. R. A., 193, is cited as an authority, but does not apply to the principle involved. There the recovery was had for mortification, nervous effects and injuries suffered by reason of the plaintiff being put off the car by the (543) conductor, after having purchased a proper ticket, which was taken up by the conductor before reaching the station to change cars, and he failed to give her a check to be used on the connecting line.

Those which hold *contra* are *Haile v. R. R.*, 60 Fed., 557; 23 L. R. A., 774; which holds that where a passenger on a railroad train receives no bodily injury from an accident caused by the company's negligence, but is made insane by the excitement and suffering resulting therefrom, the company is not liable in damages, since insanity is not a probable or ordinary result of exposure to railroad accidents. *Ewing v. R. R.*, 147 Pa., 40; 14 L. R. A., 666; 30 Am. St., 709; by negligence of defendant's employees a car was derailed and thrown against plaintiff's house, subjecting her to fright and nervous excitement, permanently weakening and disabling her, exhibits no cause of action. Mere fright, occasioned by accident, producing permanent injury to

the nervous system, is a result too remote to be actionable. *Mitchell v. R. R.,* 151 N. Y., 107; 34 L. R. A., 781; 56 Am. St., 604; plaintiff was frightened by defendant's negligence in allowing its horses to nearly strike her, from the fright of which she miscarried: Held, no action lies where there is no immediate personal injury. In *Coultes v. Victoria Ry. Commission,* L. R., 13 App. Cases, 222, held, that damages for a nervous shock or mental injury caused by fright at an impending negligent collision are too remote. *White v. Sanders,* 168 Mass., 298; rock thrown through a window and frightened a woman, who suffered from nervousness: Held, not to be actionable. *Spade v. R. R.,* 168 Mass., 285; 38 L. R. A., 512; 60 Am. St., 393; the conductor negligently put a drunken man off the car; plaintiff became frightened by the row and suffered (544) mental and physical pain and anguish, and was put to great expense, but no physical injury or disease followed from it: Held, that the action would not lie. *Wyman v. Leavitt,* 71 Me., 227; 36 Am. Rep., 303, is to like effect, but the Court adds that "whether fright of sufficient severity to cause physical disease would support an action we do not now inquire."

After a careful examination of all of the defendant's assignments of error we find no substantial error, and the judgment is Affirmed.

Cited: Hinton v. Moore, 139 N. C., 45; *Kimball v. Howell,* 143 N. C., 405; *Britt v. R. R.,* 148 N. C., 39.

LOVE v. ATKINSON.

(Filed 18 December, 1902.)

FRAUDS, STATUTE OF—*Vendor and Purchaser—Contracts.*

A vendor who signs a contract for the sale of land cannot enforce the payment of the purchase money by the vendee if he has not signed the contract, though the vendee has paid a part of the purchase money and has been put in possession.

ACTION by W. B. Love and others against E. C. Atkinson and others, heard by *Judge Fred Moore* and a jury, at May Term, 1902, of JACKSON. From a judgment of nonsuit the plaintiffs appealed.

Walter E. Moore and *D. L. Love* for the plaintiffs.
W. B. & H. R. Ferguson for the defendants.

MONTGOMERY, J. This action was brought to enforce the collection of a balance due on a contract to pay the purchase money for a tract of land bargained to be sold by the plaintiff to the defendant. The contract was in the nature of a bond for title, properly executed by the plaintiff, but not signed by the defendants, or either of them, or by the lawfully au- (545) thorized agent of either of them. The statute of frauds was pleaded in bar of any recovery by the plaintiff. The plaintiff offered evidence tending to show that at the time of the execution of the bond for title by the plaintiffs the defendant Atkinson accepted the same, paid $75 in cash of the purchase money, and had it registered; that the plaintiffs surrendered the possession of the premises to the defendants, and that the defendants have been cutting lumber from and building a railroad and houses upon the same; that the defendants are still in possession and have refused to pay the balance of the purchase money although the plaintiffs, in proper time, had tendered a proper deed for the land and premises; and that the defendants have never given notice to the plaintiffs of any intention to abandon the contract or to surrender the possession of the land to the plaintiffs. The evidence was refused by his Honor, and upon intimation by the court that the plaintiffs could not recover they took a nonsuit and appealed.

The question presented for decision is this: Can the vendor who has executed a written contract for the sale of land enforce the contract and compel the vendee, who has partly performed the contract and who has been put in possession of the premises, but who has not himself signed the contract, to pay the purchase money? It is not now an open question. In *Rice v. Carter,* 33 N. C., 298, where there was a written contract for the sale of land executed by the vendor, but not assigned by the vendee, the defendant relied on the statute of frauds. The Court said there: "The contract in this case was for the sale of land. The defendant signed no memorandum or note in writing whereby he can be charged, and we are at a loss to see any ground at all plausible to support an action against him upon a mere verbal promise. *Laythroop v. Bryant,* 2 Bing. N. C., 744. The defendant there had signed a written contract to convey land. The plain- (546) tiff (like the defendant in this case) had only made a verbal promise to pay the price, and it was urged for the defendant that he ought not to be held liable under his written promise, inasmuch as the plaintiff was not bound by his verbal promise; but, said the Chief Justice, "Whose fault was that? The defendant might have required the plaintiff's signature. It was taken for granted and as a thing not debatable that the party

who did not sign the memorandum or note in writing was not liable, and the idea of his being liable was not even suggested."

In *Simms v. Killiam,* 34 N. C., 252, the Court, through *Chief Justice Ruffin,* said: "It was argued at the bar that the policy of the act was to protect owners of real estate from being deprived of it without written evidence, under their own hands, and that a promise to pay money for land is not within the mischief. But the danger seems as great that a purchase at an exorbitant price may, by perjury, be imposed on one who did not contract for it, as that by similar means a feigned contract of sale should be established against the owner of the land. Hence the act, in terms, avoids entirely every contract of which the sale of land is the subject in respect of a party, that is, either party who does not charge himself by his signature to it after it has been reduced to writing." In that case the writing was signed by the vendor but not by the vendee, the purchase money paid, possession taken of a large portion of the land.

In *Mizell v. Burnett,* 49 N. C., 249; 69 Am. Dec., 744, *Pearson, J.,* for the Court, said: "So if the vendor binds himself in writing and is content to take the verbal promise of the purchaser to pay the price it is his own fault, and he must blame himself for the folly of getting into a situation where he is bound, but the other party cannot be charged if he chooses to insist upon the statute."

To the like effect are the cases of *Wade v. New Bern,*
(547) 77 N. C., 460; *Edwards v. Kelly,* 53 N. C., 69; *Hargrove v. Adcock,* 111 N. C., 166.

This has not always been the rule in North Carolina. The first case under the statute was that of *Ellis v. Ellis,* 16 N. C., 180, where it was decided that our statute ought to receive the same construction with the English statute. The English courts had decided that a substantial part performance of a parol contract would take the case out of the statute, as where the purchaser had been put in possession of bargained premises, upon the ground that it would be a fraud in the party refusing to execute it under such circumstances. This case, however, was reviewed very soon thereafter and reversed. 16 N. C., 341.

In *Barnes v. Teague,* 54 N. C., 277; 62 Am. Dec., 200; the Court said that the case of *Ellis v. Ellis* was reviewed and the decree reversed in 16 N. C., at p. 341. The Court went on to say: "Our courts having discarded the construction of the English courts as to part performance, . . . we have no hesitation in saying that a defendant may, in his answer, admit the parol contract without depriving himself of the protection

of the statute by his plea or answer, and that the Court cannot, under such a state of things, decree a specific performance."

It does not alter the case to say that the present contract was in writing and signed by the plaintiff, the vendor; that it was not altogether in parol. It was a parol contract so far as the defendant vendee is concerned, and cannot be enforced against him, he pleading the statute of frauds, although admitting the contract.

In *Dunn v. Moore,* 38 N. C., 364, the same principle is announced, the position of the parties, plaintiff and defendant, however, being reversed. In that case (a parol contract for the sale of land) the plaintiff alleged that he had agreed to buy the land from the defendant, had paid a part of the purchase money, and had been given possession of the premises, and that upon his desiring to pay the balance of the pur- (548) chase money and procure a deed the defendant refused to receive the money or make the deed. The object of the bill was twofold, either to compel the defendant to make a deed for the land to the plaintiff or for a decree for an account for the value of the improvements and for the money paid. The Court said: "The plaintiff is not entitled to any decree for the conveyance of the land claimed, neither is he entitled to an account, and that the land should be held as security as for what might be due to him. If the defendant Moore had admitted the contract as set forth in the bill, and that he had put the plaintiff into possession, on the authority of *Baker v. Carson,* 21 N. C., 381, and of *Albea v. Griffin,* 22 N. C., 9, we should, upon the plaintiff's substantiating by evidence his payments and improvements, have referred the case to the master for a report; and this upon the ground, not that this Court could in a case of this kind, give the plaintiff anything by way of damages for the violation of a contract, but because the defendant, after making the contract and putting the plaintiff into possession, ought not to be allowed to put him out without returning the money he had received and compensating him for his improvements. It would be against conscience that he should be enriched by gains thus acquired to the injury of the plaintiff."

In *Luton v. Badham,* 127 N. C., 96; 53 L. R. A., 337; 80 Am. St., 783, it was held that one who had entered upon land and placed thereon improvements, under a parol contract to convey, can recover from the vendor who refuses to execute the contract the value of the improvements, though the contract be denied by the vendor; and to that extent the case of *Dunn v. Moore,* 38

N. C., 364, was overruled. *Luton v. Badham, supra.* But that question is not involved in this appeal.

Error.

Cited: Hall v. Misenheimer, 137 N. C., 187.

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(549)

RAVENAL v. INGRAM.

(Filed 18 December, 1902.)

1. COVENANTS — *Warranty — Deeds — Judgments — Possession— Ouster.*

To constitute a breach of warranty there must be an ouster or a disturbance of the possession, and a judgment against a grantee is not sufficient.

2. PLEADINGS—*Complaint—Covenants—Warranty—Ouster.*

A defective allegation of ouster in an action for breach of covenant of warranty will be treated as a defective statement of a good cause of action if the defendant takes no exception thereto.

3. PLEADINGS — *Complaint — Covenants — Warranty — Ouster — The Code, Sec.* 260.

In an action for breach of a covenant of warranty, to defend the title against all persons claiming under the covenantor, a failure to allege that the party alleged to have recovered the land from the plaintiff claimed under the covenantor, renders the complaint defective, which defect may be taken advantage of at any time.

4. COVENANTS—*Warranty—Parties.*

A grantee without warranty may maintain an action against a prior grantor with warranty.

5. COVENANTS—*Warranty—Parties.*

A warranty is a covenant real and runs with the estate and cannot be assigned or separated from it.

6. COVENANTS—*Seizure—Parties.*

A covenant of seizure does not run with the land and may be assigned separate from it.

7. CHAMPERTY AND MAINTENANCE—*Parties—Covenants—The Code, Sec.* 177.

An agreement assigning the right to sue for a breach of a covenant of warranty, without consideration, and for the purpose of bringing suit, is champertous, and the assignee cannot maintain the action, he not being the real party in interest.

RAVENAL *v.* INGRAM.

ACTION by S. P. Ravenal, Jr., against C. L. Ingram, (550) executor of John Ingram, heard by *Judge M. H. Justice* and a jury, at November Term, 1901, of MACON. From a judgment of nonsuit the plaintiff appealed.

H. G. Robertson for the plaintiff.
F. S. Johnston for the defendant.

FURCHES, C. J. This is an action for breach of covenants contained in three deeds made by John Ingram, the defendant's testator; one contained a deed to T. J. Corbin, one in a deed to D. N. Evitt, and one in a deed to H. E. Gibson. The plaintiff is a subsequent purchaser of the land mentioned in the two first-named deeds, which he holds under deeds without warranty.

The plaintiff then alleges that one Henry Stewart, at Spring Term, 1899, of Macon Superior Court, recovered a judgment for said land, and thereby the plaintiffs have been disturbed and deprived of their possession. It requires more than the judgment of court to constitute a breach of warranty. There must be an ouster, or a disturbance of the possession equivalent to an ouster. *Mizell v. Ruffin,* 118 N. C., 69. And no right of action accrues upon a covenant of warranty until there is such ouster or disturbance. *Mizell v. Ruffin, supra.*

The plaintiff's complaint is very defective in its statement of ouster; but as it says that, owing to the action of Stewart, he has been disturbed and *deprived of his possession,* and the defendant seems to have treated this as a sufficient averment, by not demurring or by not taking any special exception to said averment, we will treat this part of the complaint as a defective statement of a good cause of action, and not as a statement of a defective cause of action. *Ladd v. Ladd,* 121 N. C., 118.

But there is another defect in the complaint which is (551) much more serious. The warranties in the two deeds mentioned, to Corbin and Evitt, are special warranties, and are as follows: "do hereby covenant to warrant and defend the title to the aforesaid described land against the claim or claims of any and all persons claiming through or under us." Therefore, to create a breach of the warranty, it was necessary to aver and show that Stewart recovered upon a title *derived from the said John Ingram, the grantor.* This the plaintiff *does not allege;* and we must suppose that it was not true, or it would have been alleged, as it was the crucial point in his case. If they had been general warranties, although the complaint would then have been defective, we will not say but what it might have been sustained as a defective statement of a cause of action, under our liberal

practice. The Code, sec. 260. But, as liberal as our practice is, a complaint so vitally defective as this is cannot be sustained, and such defect may be taken advantage of at any time, even in this Court. *Mizell v. Ruffin, supra.*

From the brief filed, it would seem that the principal question intended to be presented was, whether a grantee without warranty could maintain an action against a prior grantor with warranty. This doctrine seems to be well settled in this State that he can. Where one conveys with general warranty, another without warranty, another with warranty, and still another without warranty, and the last vendee is evicted by title paramount to the warranting grantor's, he may sue either of the warranting grantors, but not both of them. *Markland v. Crump,* 18 N. C., 94; 27 Am. Dec., 230; Pearson's Law Lectures, 185. But, under the plaintiff's defective complaint, this point in the case is not reached.

This disposes of the action, so far as the two first warranties are concerned. But the plaintiff includes in his action a claim for damages on account of a breach of warranty in the (552) deed to Gibson. This he cannot maintain, whatever rights Gibson may have. The plaintiff does not claim to have a deed for this tract, but bases his action and claim to recover on the following contract:

"HIGHLANDS, N. C., 3 February, 1898.

"I, H. E. Gibson, covenant and agree that if the suit brought against me by Henry Stewart should be decided against me, that I will grant and will assign to S. P. Ravenal, Jr., my right to sue John Ingram on the covenant of warranty contained in the deed of conveyance from him to me; provided, however, that S. P. Ravenal, Jr., will pay over the surplus recovered from John Ingram to me, after repaying himself the amount he shall have to expend in the defense of said suit, and the $10 paid me this day.

"Witness my hand and seal, this 3 February, 1898.

"H. E. GIBSON. [Seal.]"

The plaintiff does not claim to be the owner of this tract of land, and Gibson could not assign the covenant of warranty without assigning the land. The warranty is a covenant, real, and runs with the land (the estate), and cannot be assigned or separated from it. *Markland v. Crump, supra.* But this deed also contains a covenant of seizin, which is a personal covenant, and does not run with the land, and was broken when the deed was made, if the grantor, Ingram, did not then have the title.

Pearson's Law Lectures, 185. But this agreement does not convey this chose to the plaintiff, if it could be conveyed, but only says if Stewart succeeds in his suit he will give the plaintiff a right to bring a suit on it, upon condition that plaintiff will pay him all he recovers, except the costs of the action and the $10 the plaintiff paid him that day. So the plaintiff was to get nothing out of the suit, except the pleasure of having a lawsuit with the defendant. It is clearly a champertous transaction of the first water, and is *void. Barnes v. Strong,* 54 N. C., 100; *Munday v. Whissenhunt,* 90 N. C., 459.

Besides, the Court requires all actions to be brought in (553) the name of the true owner or party in interest. The Code, sec. 177. And, as the plaintiff could not maintain this action, even were it not champertous, but the contract under which he brought the suit is champertous and void, he certainly cannot do so.

For the reasons we have stated, the plaintiff cannot succeed in this action, and the judgment of the court below is

Affirmed.

HARRIS v. BALFOUR QUARRY COMPANY.

(Filed 18 December, 1902.)

1. PLEADINGS—*Proof—Variance—Negligence—Personal Injuries—Damages.*

   In an action for damages for personal injuries, there being no allegation in the complaint that the injury of the plaintiff was caused by the negligence of the defendant company acting through its vice-principal, or that he was such vice-principal, having authority to employ and discharge hands, proof of these averments is not admissible.

2. PLEADINGS—*Complaints—Master and Servant—Negligence.*

   A complaint in an action for damages for personal injuries to an employee, through the incompetency of a vice-principal, must allege that the employer had knowledge of such incompetency.

3. NEGLIGENCE—*Master and Servant—Personal Injuries—Accident—Damages.*

   The evidence in this case for damages for personal injuries is sufficient to show that the injury to plaintiff was caused by an accident.

CLARK and DOUGLAS, JJ., dissenting.

HARRIS *v.* QUARRY CO.

ACTION by I. G. Harris against the Balfour Quarry Company, heard by *Judge W. B. Council* and a jury, at May Term,
(554) 1902, of HENDERSON. From a judgment for the plaintiff the defendant appealed.

No counsel for the plaintiff.
Merrick & Barnard for the defendant.

COOK, J. There is error in the admission of the evidence to which exceptions 1, 2, 3, 6 and 7 are taken.

The negligence complained of and alleged in the complaint is that defendant company required him to work under a boss, captain or superintendent, and that it was its duty, under their contract, to furnish a boss or superintendent to look after, to see to and protect the safety of its employees, and to guard them against dangers incident to the business of blasting rocks by the use of dynamite, gunpowder and other explosives which were dangerous. And that, on the occasion of plaintiff's injury, the defendant company's boss or superintendent informed plaintiff that it was safe and free from danger to drill out a hole that had been drilled, loaded with explosives, tamped and attempted to be fired, saying at the time that said explosive had been fired and that there was no danger, and ordered plaintiffs and others to drill out the hole; and he, relying upon the skill, knowledge and judgment of said boss, obeyed the order, and in doing so the explosion took place, doing him great injury, which directly resulted from the gross negligence and carelessness of defendant company in having failed and neglected to furnish a man, as it agreed to do, who was skilled and experienced and who possessed the requisite knowledge and ability to protect the plaintiff from such injury, as it should have done and as it had contracted and agreed to do.

So the gravamen of the alleged negligence is that the injuries were caused by the incompetency of the defendant's boss or superintendent, in directing the execution of the work in
(555) an unsafe and dangerous manner, and in ordering the plaintiff to do a hazardous act, which was not so known to be by the boss, Burgess, on account of his incompetency, inexperience and lack of skill.

The evidence excepted to was introduced for the purpose of showing, and did show, that Burgess was a foreman and vice-principal, and that he had authority to employ and discharge hands and employees, and had control over them, but did not tend to show that he was incompetent, inexperienced and unskilled. There is no allegation in the complaint that plaintiff's

injury was caused by the negligence of defendant company, acting through Burgess as its vice-principal, or that he was such vice-principal, having authority to employ and discharge hands and to control them in their work. So the evidence was incompetent and should have been excluded. Proof without allegation is equally as ineffective as allegation without proof; therefore "the court cannot take notice of any proof unless there is a corresponding allegation." *McKee v. Lineberger,* 69 N. C., 239; *McLaurin v. Conly,* 90 N. C., 50. Hence, "A plaintiff is not allowed to declare on one cause of action and prove another, because, if such variances are tolerated, however diligent the defendant may be, he cannot so prepare his defense as to meet surprises." *Smith v. B. & L. Assn.,* 116 N. C., at p. 111; *Willis v. Branch,* 94 N. C., 142; *Conly v. R. R.,* 109 N. C., 692.

The only evidence offered to show that Burgess, the boss, was incompetent or unskilled and inexperienced in his business was that of the witness Holdert, which was erroneously admitted over defendant's objection (exceptions 4 and 5), for the reason that the witness failed to show any such special knowledge as would render him competent as an expert. But, had he qualified himself as an expert, it would not have been of any advantage to plaintiff, as he failed to allege in his complaint that defendant company knew of such incompetency when he was hired, or kept him in its employment after acquiring (556) such knowledge. *Hagan v. R. R.,* 106 N. C., 537; *Hobbs v. R. R.,* 107 N. C., 1; 9 L. R. A., 838.

There are many other exceptions, which are unnecessary to be considered, as there was error not sustaining defendant's motion to nonsuit, to which exceptions nine and ten were taken. The evidence of plaintiff and defendant, taken separately and together, fails to show negligence upon the part of defendant company. After the two holes had been drilled, varying in the estimate of depth from six to twelve feet, they were charged with powder, and at the word "fire" the battery was applied and an explosion occurred. Whether the explosion took place in *one* of the holes was a matter of doubt by Burgess, Fowler and Edney (the two others engaged with plaintiff). But after going around and looking down, talking about it and making an examination, Fowler and Edney came to the conclusion that *both* holes went off, and said to Burgess that they had gone off. Then Burgess told them if they thought it had gone off to clean it out. Edney and Fowler got ready to do so, and needed the help of plaintiff, who under Burgess's order went to help them, and while cleaning it out with the drill the explosion took place, doing the injury to plaintiff. The testimony fails to show any neglect of

duty. The manner of cleaning out by "churning" was the usual way, and it was not contended to have been done negligently. An examination had been made by Fowler and Edney (the latter having been killed and the former badly injured), who were competent and experienced workmen (as shown by the evidence), under the supervision of Burgess, the foreman, and in their judgment, from what they saw while investigating, the "hole did go off," and they undertook to clean it out. But in fact the explosion had not taken place in this hole, but it had in the other;

(557) they were mistaken; so the evidence shows an accident caused by mistake and not by neglect of duty, for which the plaintiff cannot recover.

New trial.

CLARK, J., dissenting. In addition to what is so well said in the dissent of *Mr. Justice Douglas,* it should be noted that there was strong evidence of negligence upon the testimony offered by the defendant. Burgess, a witness for defendant, testified that he was in charge of the work, "the only boss there"; that when there was any doubt about a hole having been fired it was unloaded with a spoon, which he says was reasonably safe; that when there was no doubt of its having gone off then the hole would be churned. According to all the evidence there was the gravest doubt about the hole having been fired, but instead of having it unloaded with a spoon or boring another hole Burgess, according to the plaintiff's evidence, ordered him to assist Edney and Fowler, who were "churning" it, which Burgess says was only an admissible process when it was *sure* that the charge had been fired. These parties "lifted the drill up pretty high and dropped it down pretty hard" in the hole, which exploded the cap in the powder charge, blowing off the plaintiff's arm, putting out an eye and otherwise seriously injuring him, besides killing Edney and wounding Fowler. Burgess was in sole charge of the work, the vice-principal, and it was gross negligence in him if, as was in evidence, he put the men to "churning" the hole without ascertaining whether it had been fired, especially when he had just stated that he did not think it had been fired, and there is evidence that Fowler kept saying he thought the hole had not been fired. It was negligence, under those circumstances, if he ordered the plaintiff to assist in churning. When called upon by Edney and Fowler the plaintiff says he did not go to their aid till ordered to do so by Burgess.

(558) The principles laid down in *Hagan v. R. R.,* 106 N. C., 537, and *Hobbs v. R. R.,* 107 N. C., 1; 9 L. R. A., 838, apply only where an employee is injured by the neg-

ligence of a fellow-servant. At that time, prior to the passage of the fellow-servant law (chapter 56, Private Laws 1897), a railroad company (as is still the case with other employers) was not responsible for the injury to an employee caused by the negligence of a fellow-servant; but those cases point out there was an exception if the employer knew the fellow-servant was incompetent when he was hired, or kept him in its employment after acquiring such knowledge. Those cases have no application whatever when, as in this instance, the negligence is alleged to be the negligence of a vice-principal, an *alter ego,* for his negligence is the negligence of the master. The liability of the employer for injury caused by the negligence of a fellow-servant, being an exception to the general rule, it was held that the exception must be pleaded, so that the employer would be prepared to meet such allegation. But here the sole question is whether the vice-principal (whether he was competent or incompetent) acted with due care in examining whether the charge had been fired, or whether, without due care as to such examination, he negligently ordered the plaintiff to assist in "churning" a hole, which should have been unloaded, as Burgess himself states, with a spoon, unless he was sure it had been fired. Whether there was due care, causing the horrible explosion which occurred, killing one man and severely wounding another and the plaintiff, was an issue of fact which only a jury could determine.

As was well said by *Furches, J.,* in *Coley v. R. R.,* 128 N. C., at p. 542: "The question of prudence and the ideal prudent man are *always a matter for the jury.*" There being evidence tending to show that Burgess, the vice-principal, was not as prudent as the defendant's duty to the plaintiff required him to be, we have but one tribunal which has the legitimate power (559) to decide the fact whether he was negligent or not. The Constitution, Art. I, sec. 13, guarantees the right of trial by jury in criminal cases, and section 19 of the same article, guaranteeing it in civil actions, says: "The ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." There is no exception as to actions for negligence. There is no intimation that in such cases juries are incompetent, either to grasp the facts or to impartially determine them. In my judgment appellate courts, sitting out of hearing and sight of the witnesses, without knowledge of their character or their bearing on the stand, and of the other incidents of the trial, cannot be too careful lest under the guise of holding that there is no evidence they may not infringe upon the constitutional right guaranteed to the plaintiff and all others in similar cases. The trial judge and the twelve jurors

have been of opinion not only that there was evidence, but the jury have been unanimous that the preponderance of evidence was in favor of the plaintiff. The majority of this Court, laboring under the disadvantage of not hearing the testimony as actually delivered, may think the preponderance the other way. But when the facts are controverted, negligence—the rule of the prudent man—is always a question for the jury, not a matter of law for the Court. *Montgomery, J.*, in *Ellerbee v. R. R.*, 118 N. C., at p. 1030; *Williams v. R. R.*, 119 N. C., 750. It is only when there is no scintilla of evidence for the plaintiff that this Court can rightfully hold that the case should not have been submitted to a jury. An appellate court composed of five judges, and with the benefit of usually more elaborate argument and with more time for consideration, is provided to review errors of law alleged to be committed by a single trial judge on the circuit, but the Constitution is careful to restrict our jurisdiction "to review, upon appeal, any decision of the courts
(560) below upon any matter of law or legal inference." There is no power lodged here to review the findings of fact by a jury upon disputed matters of fact. The incompetency or negligence of the boss, unlike the incompetency or negligence of a fellow-servant, is the incompetency or negligence of the defendant.

DOUGLAS, J., dissenting. I cannot concur in the opinion of the Court, as it seems to me to establish a dangerous innovation in pleading and a most unjust discrimination between the plaintiff and defendant. Section 260 of the Code provides that "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view of substantial justice between the parties." Of course the plaintiff must state the material facts constituting his cause of action so as to give the defendant reasonable notice of what it will be called upon to answer; but it would be equally useless and impracticable to set forth in detail each particular fact constituting the alleged negligence. The entire system of Code pleading is intended to effect substantial justice without regard to immaterial technicalities. This is evident from a bare citation of the Code. Section 269 says: "No variance between the allegation in a pleading and the proof shall be deemed material unless it *has actually misled the adverse party,* to his prejudice, in maintaining his action upon the merits. Whenever it shall be alleged that a party has been misled that fact *shall be proved* to the satisfaction of the court, *and in what respect he has been misled;* and thereupon the judge may order the pleading to be

amended upon such terms as shall be just." Section 270 provides: "Where the variance is not material and provided in the preceding section, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs."

Section 271 provides that "Where, however, the allegation of the cause of action or defense to which the proof (561) is directed is unproved, not in some particular or particulars only, but in the *entire scope and meaning,* it shall not be deemed a case of variance within the preceding section, but a failure of proof."

Section 276 provides that "The court and the judge thereof shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." The italics are my own.

In the case at bar there does not seem to be any variance in the pleading, but simply a want of particularity. Can it be contended that in the case at bar it has been alleged or proved to the satisfaction of the Court that the defendant has been actually misled by the complaint, or that the cause of action is unproved in its entire scope and meaning? And yet these are the absolute requirements of the statute before such an exception can be entertained. Was it not the duty of the defendant to move in the court below, and if it was silent there where the objection, if valid, might have been remedied, can it now be heard? It is not denied that the complaint states a cause of action, and if the defendant wanted more particulars why did it not ask for them?

My second objection is the unjust discrimination between the plaintiff and the defendant. In damage suits why should the plaintiff be required to set forth in full every particular fact relied on to show the negligence of the defendant, and yet the defendant be permitted to show any act within the range of human conduct under the bare allegation that the negligence of the plaintiff contributed to his own injury? In *Cogdell v. R. R.,* 130 N. C., 313, this question was distinctly raised, in relation to which this Court says, on page 319: "In its answer defendant avers 'that the death of the intestate was not caused by any negligence of defendant, but was caused (562) by the negligence and fault of the 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 evi-

dence 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 that a bill of particulars be prescribed in the Code."

The plea of contributory negligence is an affirmative defense in the nature of confession and avoidance, which by express statutory provision must be alleged and proved. Why should the plaintiff be held to a stricter rule than the defendant under similar circumstances? Why cannot an equal measure of right be given with an impartial hand?

My view of the merits of this case is briefly this: If the defendant employed a skillful and competent superintendent, and he used all the means which would have been employed under the circumstances by a man of ordinary prudence and equal skill to determine whether the second blast had been fired, the defendant would not be liable; but this is a fact for the determination of the jury.

Cited: *S. c.*, 137 N. C., 205.

(563)

FARTHING v. ROCHELLE.

(Filed 18 December, 1902.)

1. EVIDENCE—*Parol—Description—Boundaries — Specific Performance.*

   In an action for the specific performance of a contract for the sale of land, parol evidence is not admissible to identify the land where it is described in the contract to convey as "your lot."

2. EVIDENCE—*Boundaries—Specific Performance.*

   In an action for the specific performance of a contract for the sale of land, evidence of former negotiations, or of a subsequent deed, is not competent to locate land described in the contract if the contract does not refer to those transactions.

3. SPECIFIC PERFORMANCE—*Married Women.*

   In an action for the specific performance of a contract to sell land, if the vendee knew at the time of the making of the contract that the vendor was a married man, he cannot refuse to take the title because the wife refuses to join in the deed.

ACTION by G. C. Farthing and another against C. W. Rochelle, heard by *Judge T. J. Shaw* and a jury, at September Term, 1901, of DURHAM.

This is an action for the specific performance of a contract for the sale of land. It is based upon the following correspondence:

"Exhibit A."

"6 March, 1901.

"To C. W. Rochelle, Reidsville, N. C.

"I will give you two thousand dollars for your lot, if accepted to-night." "G. C. FARTHING."

"Exhibit B." (564)

"8:10 a. m., 7 March, 1901.

"Reidsville, N. C.

"G. C. Farthing: Will accept your offer.

"C. W. ROCHELLE."

"Exhibit C."

"Reidsville, N. C., 7 March, 1901.

"MR. FARTHING:—In reply to your message last night I did not make my reply complete. It should have read thus: 'Your offer accepted if not already sold.' Brady, the Jew, has offered Elliott $2,000, and I wrote Elliott the first of this month to close a deal with him. So if he had made a deal previous to last night at 9 o'clock I will have to call in the acceptance of your offer. See Mr. Elliott, please, and see if he has made or closed the deal with Brady. I was so excited over the announcement of a telegram for me, delivered at my residence and after I had retired, too, that I could not collect myself sufficient to put the reply in proper shape. The cause of my becoming so wrought up over it was that my mother has been very sick for the past three weeks, and I was sure it was a message announcing her death or that she was dying.

"So you can imagine how I felt, and if Elliott has made a deal with Brady before 9 o'clock last night I hope you will pardon me for the incomplete message sent you and not think hard of me for this incomplete message or reply; but, on the other hand, if the deal referred to has not been made, let me hear from you and I will fix up deed and send you in a short time. "Yours respectfully,

"C. W. ROCHELLE."

"Exhibit F." (565)

"Durham, N. C., 12 March, 1901.

"Mr. C. W. Rochelle, Reidsville, N. C.

"DEAR SIR:—Yours of the 11th inst. to hand, in which you say for me to suggest a way for you to make me a lawful deed

and you will sign it, although your wife still refuses to sign it. So, in compliance with your request, I will suggest for you to make a deed in regular form and sign it before the clerk of the court and have his seal attached, and forward same to me or A. J. Draughan, and I will pay you two-thirds of $2,000, or $1,333.33, and will deposit one-third, or $666.67, in either of our banks, subject to your wife's order when she assigns the deed, or at her death. I know she can dower one-third of same, and no more. Trusting this will be entirely satisfactory to you and that you will follow my suggestion at once, I am,

"Yours truly,

"G. C. FARTHING."

The following is the charge of the judge, as set out in the record:

"His Honor, after explaining the nature of the action as set out in the pleadings, and after reading his notes of the evidence, charged the jury, among other things, as follows:

"If you believe the evidence you will find that plaintiff Farthing sent to the defendant the telegram of 6 March, and that the defendant sent to the plaintiff Farthing the reply dated 7 March. The two telegrams do not sufficiently describe the property to admit parol evidence to identify the land.

"(To which charge plaintiffs excepted; exception 6.)

"The court likewise charged that if the plaintiffs have not shown by a preponderance of the evidence that A. G. Elliott was the Elliott referred to in the letter of 7 March, the jury will answer the first issue 'No.'

"(To which charge plaintiffs excepted; exception 7.)

(566) "The court likewise charged the jury that the acts and declarations of A. G. Elliott in relation to the property in dispute could not be considered by the jury as bearing upon the question of his being an agent of the defendant. But if the jury found from the evidence in this case, other than the acts and declarations of A. G. Elliott, that said A. G. Elliott was the agent of the defendant, then they would have a right to consider and should consider his acts and declarations as evidence in determining their answer to the issues.

"(To which the plaintiffs excepted; exception 8.)

"The plaintiffs requested his Honor to charge the jury as follows:

"1. If you believe the evidence you will answer the second issue 'No.'

"2. If you believe the evidence you will answer the third issue 'Yes.'

"3. There is no evidence that the plaintiffs defrauded or overreached defendant in the transaction about the lot, and will answer the second issue 'No.'

"4. If you believe the evidence you will answer the first issue 'Yes.'

"The court gave Nos. 1 and 3, and refused Nos. 2 and 4, and plaintiffs excepted to the refusal to give No. 4. (Exception 9.)"

The issues were as follows:

"1. Did defendant enter into a contract with plaintiff to sell and convey to him a lot of land in Durham, described in the complaint, as therein alleged? Answer: 'No.'

"2. Would the specific enforcement of said contract be oppressive? Answer:—

"3. Are the plaintiffs now, and have they always been, able, ready and willing to perform their part of the contract, as alleged? Answer:—"

The judgment was in accordance with the verdict.

There were exceptions to the exclusion of evidence. The (567) plaintiffs appealed from the judgment rendered.

Winston & Fuller and *Boone, Bryant & Biggs* for the plaintiffs.

Manning & Foushee for the defendant.

DOUGLAS, J., after stating the facts. We see no error in the trial of the action, either in the charge of the court or its refusal to charge, or in the exclusion of evidence. The description of the land in the telegraphic offer was simply "Your lot." which may have been situated either in Durham or Reidsville, or in or out of the State of North Carolina. It is not even stated that there is a house on it. It seems that the farthest that this Court has gone in admitting a skeleton description of land is in *Carson v. Ray,* 52 N. C., 609, where the land was described as follows: "My house and lot in the town of Jefferson, in Ashe County, North Carolina." It was shown that the grantor owned but one house and lot in said town. In the case at bar there are no words of location, either in the offer or acceptance, while it appears from the tax books introduced by the plaintiffs that the defendant owned three different lots of land located in or near the city of Durham. What he owned elsewhere does not appear. The charge was therefore correct that "the two telegrams do not sufficiently describe the property to admit parol evidence to identify the land." *Murdoch v. Anderson,* 57 N. C., 77; *Fortescue v. Crawford,* 105 N. C., 29. It seems that this part of the charge referred to the telegrams taken by themselves, and

that his Honor left to the jury the question of the identity of the land as affected by the other testimony. The jury found for the defendant, but we gravely doubt whether it would have been legally possible to locate the land under any testi-
(568) mony. It seems to us that Laws 1891, ch. 465, did not intend to do away with the necessity of all description, and thus practically nullify the statute of frauds, but simply such particularity of description as would frequently be beyond the immediate reach of the ordinary vendor. There must be some form of description to which the evidence can be directed and by which it can be fitted to the land. We see nothing in the pleadings to cure the invalidity of the contract.

The evidence of former negotiations, in no way connected with the present transaction, is not admissible as evidence to locate the land. The same objection applies to the defendant's deed to Brady, made after the commencement of the suit, and in which no reference is made to this litigation. This deed conveys two lots. Whatever may have been its materiality as to the other issues was avoided by the verdict of the jury upon the first issue, which would seem to end the case.

We may add that the court properly refused to give the plaintiffs' second request for instructions. It is admitted by the plaintiffs that the defendant at the time of the alleged contract was a married man; that the plaintiffs knew this, and that the defendant's wife is still living, and refused and still refuses to join in a conveyance of this property to the plaintiffs. The plaintiffs, therefore, knew at the time what interest in the land the defendant had the legal power to convey, and can demand no more, even if the telegrams constituted a binding contract. *Fortune v. Watkins,* 94 N. C., 304.

We can only add that the circumstances under which the offer was made, as disclosed by the plaintiffs' testimony, do not appeal very strongly to the conscience of the Court. The judgment is Affirmed.

Cited: Rodman v. Robinson, 134 N. C., 505; *Modlin v. R. R.,* 145 N. C., 224; *Lewis v. Gay,* 151 N. C., 170.

(569)

ELMORE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 18 December, 1902.)

NEGLIGENCE — *Contributory Negligence — Couplers — Defective — Railroads.*

In an action by a brakeman for damages for personal injuries, the injury being caused, not by a defective coupler, but because the plaintiff negligently used his foot to push the bumper in place, while doing the coupling, he cannot recover.

CLARK and DOUGLAS, JJ., dissenting.

PETITON to rehear this case, reported in 130 N. C., 506.

Day & Bell, J. B. Batchelor, T. B. Womack and *Shepherd & Shepherd* for the petitioner.

Allen & Dortch and *Isaac F. Dortch* in opposition.

MONTGOMERY, J. The plaintiff's own testimony upon the question of the defendant's negligence is not consistent, it seems to us, with the allegation of the complaint; and it also seems to us that his Honor, in the charge, had some difficulty in understanding what the contention of the plaintiff was as to the proximate cause of the plaintiff's hurt. In the complaint, as it was first drawn and filed, the plaintiff alleged that the defendant was, in September, 1900, operating a train of cars on its line of railway between Wilmington and Hamlet, with the couplers on the train of cars out of repair and defective "to such an extent that the cars in said train and other cars belonging to the defendant at Clarkton, which were to be made a part of said train, could not be coupled without going between said cars; that on that date there were four cars upon the side track at Clarkton, and as the train approached that place it was uncoupled, leaving the cab on the main track below the beginning of the side track, the balance of the cars being carried along the main track to a place above the other end of the side track." The (570) remaining portion of the complaint was as follows: "(3) That plaintiff was ordered by the conductor in charge of said train, whose orders the plaintiff was bound to obey, to remain near the cars on the main track below said side track for the purpose of coupling those cars to the cars upon the side track, and the said cars upon the side track were put in motion by defendant, and were negligently permitted to roll very rapidly, by means of what is known as 'kicking' cars along said side track, and on the main track, and negligently and violently to come in contact with the cars on the main track, where the plaintiff was. (4) That at the said time and place the defendant negli-

gently permitted the coupler attached to the cars on said side track to remain out of repair so that the lip was closed, which made it necessary for plaintiff to go between said cars in order to couple the same. (5) That on said day, at said town of Clarkton, while the plaintiff was endeavoring to perform the order of said conductor, and while he was coupling said cars, he was greatly injured and damaged by reason of the negligence of defendant, as herein set forth, and by other acts of negligence, his foot was crushed to such an extent that his big toe and a part of his foot had to be amputated; he suffered great physical and mental pain and anguish, and was compelled to incur great expense, and was disabled from work, and has been permanently injured, to his great damage $10,000."

The complaint was afterwards amended, the amendment consisting of the allegation that the conductor well knew that the order to couple the cars could not be performed without going between them on account of the condition of the cars; and in the further allegation that the plaintiff was in no fault on his part.

It is to be seen from the complaint, then, that the allegation as to defective couplers on the train, before it was uncoupled at the siding, was a general allegation, bearing no more particularly on the cab than on any of the freight cars which composed the train; while it appears from the fourth allegation of the complaint that the coupler attached to the car on the side track, which car was to be shoved back and coupled with the cab, was the particular car equipped with the defective coupler. And yet, on the trial, that particular car and coupler disappeared practically from the case, and the plaintiff's whole testimony was in respect to an alleged defect in the coupler on the cab.

(571)

It is stated in the case on appeal that all of the evidence was sent up, and after a careful perusal of it it seems evident from the plaintiff's testimony (and that without being confused by the cross-examination) that he was uncertain where to fix the negligence of the defendant, *i. e.*, whether his hurt was caused from trying to remedy the defective coupler on the cab or that on the freight car, or both. By the amendment of the complaint he alleged in a general way that the conductor knew that the coupling could not be made without going between the cars on account of the condition of the cars. He did not allege that the conductor knew that there was any defect in the *coupler* on the cab or in that on the particular freight car which was to be attached to the cab. On his examination as a witness, however, he said that Captain Byrd, the conductor, knew that the coupler

on the cab was out of fix to the extent that the link or chain was gone—missing.

The coupler was a standard automatic coupler, such a one as is required by law to be attached to cars, and the only defect in the one on the cab was the missing link; and, as we have seen, the plaintiff said that the conductor knew that link was missing when he ordered the plaintiff to go to the cab and make the coupling when the cars on the siding should be pushed back against it. The only effect of the missing link was (572) that it rendered it necessary, in order to produce a coupling of the cars, that the lip of the coupler should be opened by the hand, and as the plaintiff testified that he was ordered to make the coupling, and that the conductor knew that the link was missing, let us assume that he was authorized under the order to go to the car and open the lip. He did that, and when it was done the coupler was in as good condition for coupling as if the link had not been missing in the first place. That is to be emphasized, for there is no evidence, not even in the plaintiff's own testimony, to the effect that the coupler had any other defect about it. We know he said that the bumper was turned towards him and was not in the center, and that he had to kick it to get it into the center to make the coupling with the approaching freight car; but all that is mere opinion evidence. The fact still remained that there was no other defect except the missing link.

This Court in *Greenlee v. R. R.*, 122 N. C., 977; 41 L. R. A., 399, decided that it was the duty of railroad companies in this State to equip their cars with self-couplers, and by act of Congress all cars that are operated in interstate commerce are required to be so equipped; and it would seem to be almost bordering on the absurd for this Court to say that we can have no common knowledge of what a self-coupler is, or that we will receive as evidence that a self-coupler is defective simply because the bumper is not exactly in the center. We know it must be to some extent movable, so as to adjust it to curves of the track, and no greater mobility was shown by the plaintiff than that.

When the plaintiff, therefore, had opened the lip of the coupler on the cab, in the manner described by himself, he had discharged the order which had been given him by the conductor. (The conductor testified that he gave him no such order, and that the coupler was in good condition.) But the plaintiff said that after he had discharged his duty—that is, (573) after he had opened the lip of the coupler—he looked up the side track and saw the cars coming rapidly, and noticed that the coupler on the cab was not in the center, and, to carry out

the order of the conductor to make the coupling, he kicked at the bumper on the cab to get it in the center, and his foot was instantly caught between the couplers on the two cars and badly crushed.

We are not disposed to modify in the least the decision made in *Greenlee v. R. R.*, 122 N. C., 977; 41 L. R. A., 399, in which we decided that the railroad companies in this State should equip both their passenger and freight cars with self-couplers; and we are of the opinion that a neglectful failure to keep the couplers in proper condition and repair would be as culpable as if the cars had never been so equipped.

But, as we have said in the case before us, the plaintiff was not hurt by the failure of the company to have a self-coupler on the car or for a failure to keep it in repair. The plaintiff, when he opened the lip of the coupler, had restored it to its full usefulness, and in his kicking the bumper afterwards when he saw the freight cars rapidly approaching him and, indeed, so near to him as to be right upon him—for his foot was caught before he could get it down—he violated a rule of the company which he knew of, and which rule put the blame on himself. That he contributed to his own injury is too clear to admit of doubt, from his own testimony. According to the plaintiff's evidence the order was given by the conductor, not upon a certain emergency without the opportunity of reflection, and obedience was a choice of two dangers.

The petition to rehear is allowed, and there must be a

New trial.

(Petition allowed.)

(574) FURCHES, C. J., concurring. I did not hear this case argued. The first I knew of it was in conference when I was told that the Court was evenly divided, and the case was stated to me. As I understand from this statement the point of difference was as to whether the case fell under the decisions of Greenlee and Troxler, as the road had provided itself with automatic couplers, when I said I thought it did, and gave my vote in favor of the plaintiff, and the opinion was in that way based on Greenlee and Troxler. And I am still of the opinion I then expressed, that if the defendant had allowed its coupler to remain broken four or five months without repairing the breach it was the same in effect as if it had not supplied itself with the automatic coupler. And in concurring in the opinion of the Court it must not be understood that I do not sustain Greenlee and Troxler and the other opinions cited for the plaintiff sustaining the doctrine announced in those cases, for I do.

But being applied to for a rehearing I examined the case more thoroughly than I had done, in connection with the model of two cars with automatic couplers, and came to the conclusion that the plaintiff's injury was *not caused* by the defect in the coupler, but was one of those unfortunate accidents that always have happened and always will happen to those engaged in such dangerous work as railroading. It would be hard for me to describe this coupler to one who has not seen and examined one. But it consists of what is called "knucks" on each end of the car, which open and shut, something like a man's hand, and to effect the coupling one or both of these must be open when the impact of the cars takes place, and the jar caused by this impact causes the hands or knucks to close. And the bolt spoken of is a small key or pin which falls when the knucks are closed, and prevents them from opening until this key or pin is raised. The wire spoken of as being broken attaches to this pin at one end and a crank at the other end. This pin can only be raised by the hand when this chain is broken. But rais- (575) ing the pin with the chain and crank or with the hand does not open the knucks; this can only be done with the hand, and necessitates the party opening them to go between the cars, whether the pin is raised with the chain and crank or with the hand.

In this case it appears from the evidence that the plaintiff had raised the pin with his hand and was out of danger, and would not have been hurt but for the fact that he discovered, on the approach of the car which was to cause the impact and which was to be coupled with the caboose, that the draw-head to which the automatic coupler was attached was not in the center of the car, and he kicked it to put it in the center so as to strike the draw-head of the caboose, and in doing this his foot was caught and he was injured. The plaintiff testified: "I took my fingers to pull up the draw pin to open the lip of the coupler, and when I had found that the bumper on the draw-head was towards me, and I saw it was not in the center, I looked at the other cars and saw that the bumper on them was not open, but was closed. If they had been open I would have opened the lip and stood outside, and it would have made its own coupling. I saw how the situation was, and I had to push my foot down and push this bumper in the center." In order to allow for the curves in the road it is necessary to allow the draw-heads or "bumpers," as they seem to be called by the plaintiff, to have a small lateral play. And when they are uncoupled on a curve they are sometimes left standing out of the center. This cannot be prevented. But it is utterly *impossible for a man to*

raise this pin with his foot by kicking or otherwise. And while I agree to the doctrine in the *Greenlee case* and in the *Troxler case, as I understand them,* I cannot agree that they apply to the facts in this case. I agree that the defendant was guilty of negligence in allowing this chain to remain out of re-
(576) pair for so long a time; but this does not entitle the plaintiff to recover unless it caused the injury. Negligence alone does not give a right of action. The negligence complained of must be the *cause* of the injury. I never supposed that it would be contended that the cases of Greenlee and Troxler would entitle an employee of a railroad company to recover damages for any injury he might receive from the company while in its employment, whether the defective coupler had anything to do with the injury or not. It seems to me that it might as well be held that if the plaintiff had been lying on top of the car asleep, and the jar of the impact had caused him to fall off and break his leg, he might recover because the coupler was out of fix, as to hold that the plaintiff can recover for the injury in this case when the defective coupler had nothing at all to do with the injury.

I am compelled to treat this matter coolly in the discharge of my duty as I understand it, without any effort to create sensation or alarm, and without conflicting with the cases of Greenlee and Troxler. In my opinion the petition ought to be allowed.

CLARK, J., dissenting. This is a petition to rehear the decision in this case, 130 N. C., 506. No fact is shown to have been overlooked, nor any direct authority, and upon examination of the briefs on the former trial it will be seen that the petition simply presents the same points for reargument. In *Dupree v. Ins. Co.,* 93 N. C., 239, *Smith, C. J.,* quoting *Chief Justice Pearson* in *Watson v. Dodd,* 72 N. C., 240, says: "No case ought to be reheard upon a petition to rehear unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court." This has been often quoted with approval, among other instances by *Furches, J.,* in *Capehart v. Burrus,* 124 N. C., at p. 50.

The amended complaint alleges that "The defendant
(577) was operating a train of cars" at the time and place of the injury to the plaintiff, on which then, "and for a long time prior thereto, it negligently permitted the couplers to be out of repair and defective to such an extent that the cars in said train, and other cars belonging to the defendant at Clarkton, which were to be made part of said train, could not be coupled without going between the cars." Is not this a clear

allegation of negligence and of a violation of the U. S. Act of 1893? The complaint further alleges that the train being uncoupled, and a part left below the beginning of the switch and a part above it (both on the main line), "the plaintiff was ordered by the conductor in charge of said train, whose orders the plaintiff was bound to obey, to remain near the cars on the main track, below said side track, for the purpose of coupling those cars to the cars upon the side track, which order the said conductor well knew could not be performed without going between said cars on account of the condition of the cars, and the said cars were negligently permitted to roll very rapidly, by means of what is known as 'kicking cars,' along said side track and on to the main track, and negligently and violently came in contact with cars where plaintiff was"; that by reason of the defendant having "negligently permitted the coupler attached to the cars on said side track to remain out of repair" the lip was closed, "which made it necessary for the plaintiff to go between said cars in order to couple the same," and that "while the plaintiff was endeavoring to perform the order of said conductor and while coupling said cars, and without fault on his part, he was greatly injured and damaged by reason of the negligence of the defendant, as herein set forth," etc. Here the allegation is explicit of negligence in permitting couplers to be and remain out of repair, both on the train on the main line and on cars on the side track, which were kicked hard, and that they could not be coupled without going in between the cars; also negligence in violently kicking them back, and (578) in the conductor ordering the plaintiff to make the connection, "which order the conductor well knew could not be performed without going between said cars," on account of the defective couplers. There was evidence tending to prove each and every allegation above stated, and the jury, which under the Constitution and laws is guaranteed to every litigant, no matter how humble, as the sole tribunal which may determine issues of fact, has sustained the charges, and the jury were unanimous, as the law requires of the triers of fact. And the parties, in order to secure triers of fact to which neither side could have any legal objection, had been allowed such challenges as were proper, for there is no exception on that ground. Had there been, notwithstanding, any ground to believe that the verdict was against the weight of the evidence, or to suspect that justice had not been done for any other reason, the trial judge, who heard the evidence and knew all the incidents of the trial, had full authority to set the verdict aside. *Bird v. Bradburn, ante,* 488. His refusal to do so cannot be reviewed

by us. We, who did not hear or see the witnesses, cannot possibly be more competent than the jury and the trial judge to determine, from the imperfect transmittal of the evidence on paper, without tone or emphasis, as to the weight to be given to the respective parts thereof.

There was evidence that "the coupler had been out of fix three months; that the conductor knew it; that the link was gone; that *with that link gone the cars will not couple to save your life without using some means to open the thing;* that in the condition that coupler was in *it was not possible to couple without taking hold with hand or foot.*" All these sentences are quoted from the evidence in the record. And further, it is stated in the evidence sent up: "The coupler was broken. It was an automatic coupler. The link that pulls up the draw-pin (579) was out, *so you could not use the coupler without the use of the foot or something";* and further, "You cannot couple if the draw-pin won't work." Even the superintendent of the defendant says: "If the statement made by the young man is true, and the chains were gone, it would be necessary for him to go in and lift it up." It has been suggested that the absence of the link was not a very material fact; but the evidence by which a jury must reach its conclusions, according to the weight they may give it, contains this: "Question. Does that link have anything to do with the coupling? Answer. Yes, sir. You cannot couple if the draw-pin won't work." Again: "Question. Why did you not have time to go and see to them while they were standing still? Answer. The cars were rolling when the captain instructed me to go couple them." The conductor says: "The cars started and had cleared the switch when I started down to the depot"; and the plaintiff's evidence is: "Question. Where were you when the cars commenced moving? Answer. I was standing there by Captain Byrd, and he said, 'Son, you run up and couple those cars while I run up to the warehouse and get orders.'" To order the plaintiff to go in to make the coupling, especially when the cars were moving, was of itself negligence, even before automatic couplers were required (*Mason v. R. R.*, 111 N. C., 482; 18 L. R. A., 845; 32 Am. St., 814 (1892); and it is doubly so now when, as here, there is evidence in the record that the conductor knew that the coupler was out of order, and well knew that the coupling in that condition could not be made without going in between the cars.

Aside from the negligence of the conductor in giving such order, the permitting the couplers to remain out of order more than three months was itself a violation of the Federal statute

(2 March, 1893, 27 Stat., 531), and negligence. In a remarkably well-considered case in the U. S. Circuit Court for Iowa, *Voelker v. R. R.*, 116 Fed., 867 (decided just after (580) the opinion in this case was filed in June last), *Shiras, J.*, holds that "A carrier, by permitting couplers, originally sufficient, to become worn out and inoperative, is within the prohibition of the act of Congress, 2 March, 1893, against using cars in interstate commerce not equipped with couplers, coupling automatically." Also he says that the company was liable where, the coupler being out of order, the employee "undertook to fix it so the coupling might be made, and while so engaged he was caught between the cars and received injuries causing his death." This is "on all fours," except that here the negligence of the defendant crippled their man but did not kill him. In that case, as in this, the defendant urged that it was error to permit the jury to determine that the "condition of the coupler was the proximate cause of the injury." *Judge Shiras* overruled the objection and makes the following pertinent ruling, without which the statute would become a delusion and cease to be any protection to the hundreds of thousands of laboring men whose lives and limbs were for so many long years exposed to needless peril for the lack of such statute. He says:

"The statutory requirement with respect to equipping cars with automatic couplers was enacted in order to protect railway employees, as far as possible, from the risks incurred when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers or because the company, through negligence, has permitted the couplers, originally sufficient, to become worn out and inoperative, then the company is certainly not performing the duty and obligation imposed upon it by the statute, and is clearly therefore chargeable with negligence in thus using an improperly equipped car; and the company is bound to know that if it calls upon one of its employees to make (581) *a coupling with a coupler so defective and inoperative that it will not couple by impact, and that to make the coupling the employee must subject himself to all the risks and dangers that inhered in the old and dangerous link-and-pin method of coupling, it is subjecting such employee to the very risk and danger which it is the purpose of the statute to protect him against, so far as that is reasonably possible. Subjecting an employee to risk of life and limb by calling upon him to use appliances which have become defective and inoperative through the failure to use proper care on the part of the master is cer-*

tainly negligence, which will become actionable if injury results therefrom to the employee, and liability therefor cannot be avoided by the plea that if the company was thus guilty of actionable negligence in this particular, it cannot be held responsible therefor because it was guilty of another act of negligence which aided in causing the accident.—This accident happened because Voelker, in the performance of his duty, was called upon to place his person in a position where he MIGHT *be caught between the cars he was expected to couple together. He was required to place himself in this dangerous position because of the negligent failure of the company to have upon the car a coupler in proper and operative condition, and certainly this negligent failure of the company was the proximate cause of the accident."*

This is practically the same ruling which this was the pioneer Court to make in *Greenlee v. R. R.*, 122 N. C., 977; 41 L. R. A., 399 (26 May, 1898), and which has been reiterated in *Troxler v. R. R.*, 124 N. C., 189; 44 L. R. A., 313; 10 Am. St., 580, and so many cases since, down to and including *Fleming v. R. R., ante,* 476. Those cases practically settle also the issue of contributory negligence, for as the injury would not have happened and the plaintiff would not have had to go between the (582) cars at all if the couplers had been in proper condition, it is immaterial whether he went in negligently or not, for the negligence of the defendant in not having couplers, and in good working order, was the proximate cause. *Voelker v. R. R., supra.*

In *Harden v. R. R.*, 129 N. C., 355; 55 L. R. A., 784; 85 Am. St., 747, the Court affirmed the judge below, who had charged (quoting from *Greenlee's case*) as follows: "If you find that the freight train was not fully provided with modern self-acting couplers, and that the plaintiff *would not have been injured had the cars been so provided,* you will find the first issue 'Yes' and the second issue 'No.'" This ruling has just been reiterated in *Fleming v. R. R., ante,* 476.

There was some conflicting evidence, but that was the province of the jury. The plaintiff's testimony above referred to is that if the coupler had been in good condition he would not have had to go in between the cars nor to kick the bumper, and he is corroborated by the superintendent of the defendant company, who says if the coupler was in the condition the plaintiff testified it was "necessary for him to go in and lift it up." Whether his manner of "lifting it up" was negligent or not is immaterial in view of our uniform decisions from *Greenlee's case* down to *Fleming v. R. R., ante,* 476, that the proximate cause, the *causa*

causans, is the negligence of the railroad company in not complying with the law which requires it shall have automatic coupling apparatus, which will not require an employee to go in between the cars at all.

The plaintiff could not assume a risk which the law forbids the railroad company to impose upon him. Besides, assumption of risk does not apply to railway employees in this State since the act which is printed as chapter 56, Private Laws 1897. *Coley v. R. R.,* 128 N. C., 534, and other cases sustaining it, which are collected and reaffirmed in *Mott v. R. R., ante,* 234. Indeed, on the evidence here, assumption of risk would (583) not apply to any employee. *Lloyd v. Hanes,* 126 N. C., 359; *Smith v. Baker,* App. Cas. (1891), 325, cited and approved; *Williams v. Birmingham Co.,* 2 B. D. (1899), 338.

Humanity, justice and the soundest principles of public policy alike require that the act of Congress, 2 March, 1893, and the principles laid down by *Judge Shiras* in the above-cited case of *Voelker v. R. R.,* and by the uniform rulings of this Court from *Greenlee's case* down to *Fleming's,* should be sternly upheld and rigidly enforced. In the report of the interstate commission for 1902 it is said that in 1893, when the act requiring automatic car couplers was enacted, there were 433 men killed and 11,277 wounded in coupling cars in this country, and that by reason of the gradual enforcement of that law the number of killed and wounded in car coupling for the year ending 30 June, 1902, aggregated a little over 2,000; a diminution of more than 9,500 in the number of men killed and wounded annually, though the number of railway employees has increased 200,000 in the same period of time, which at the same ratio, would have caused 15,000 men to have been killed and wounded annually in coupling cars, if there had been no enforced use of automatic couplers by the law. The commission says the decrease of accidents in that particular (car coupling) has been 68 per cent fewer killed and 81 per cent fewer injured than in 1893 (without adding in the further loss which would have occurred among the additional 200,000 employees), which decrease they attribute to this legislation and its enforcement by the courts. They point out that in no other particular have injuries to passengers or employees been diminished, but that in fact there is a decided increase.

If the law is effectively enforced the annual loss still existing of 2,000 killed and wounded in manual coupling will entirely disappear. But if, notwithstanding the law requires automatic car couplers, they can be left off or (which is (584) the same thing) allowed to remain out of repair, and

when an employee is ordered in to make the coupling, which has become nonautomatic, these powerful corporations can contest before the jury whether the railroad company is not relieved from all responsibility because the employee might have done the act illegally required of him in a more prudent manner, and carry that contest up from court to court, then the provisions of a law which was enacted for the protection of this vast body of useful and industrious men is a nullity, construed away by the courts, and they are handed over to the tender mercy of a power which saw with indifference the number of killed and wounded in coupling cars mount up, year after year, till the figures reached the annual total of near 12,000. In that steady increase there was no halt until the force of a humane and irresistible public opinion compelled the use of automatic couplers, though their life and limb saving properties had been well known to railroad managers for a quarter of a century. *The evidence is that this injury to the plaintiff could not possibly have happened if this law had been complied with by the defendant.*

This Court, which was the pioneer to lay down, independent of legislative enactment, the requirement of justice that such appliances should be used, should not be the first to construe away the efficacy of what is now a Federal statute, applicable to the defendant and all other railroads throughout the Union engaged in interstate commerce.

DOUGLAS, J., dissenting. Dissenting *in toto* from the opinion of the Court, except in so far as it approves the *Greenlee* and *Troxler cases,* both in its view of the law as applicable to this case and its assumption of fact, I shall briefly notice but one or two of its apparent errors. The opinion seems rather to (585) forestall dissent by assenting "That it would seem almost to border on the absurd for this Court to say that we can have no common knowledge of what a self-coupler is." In spite of this dictum I venture to assert that neither this Court nor the average citizen has any common knowledge of the mechanical constitution of an automatic or self-coupler. The only fact that would seem to be of common knowledge is that a coupler that will not couple itself is not a self-coupler; and that a coupler which has to be pulled and pushed into place is not automatic. A model was exhibited to this Court, which was not used below, and was not proved to be similar to the coupler on the cars. This was a mere illustration of the general working of automatic couplers, and was not proof of any fact in controversy. There are in fact different kinds of self-couplers, those most generally seen being the Janney and M. C. B. (Mas-

ter Car Builders). I do not know the difference, but believe that the latter includes any coupler approved by the association. Many of these patent couplers are interchangeable, but still there is some difference.

Again, the opinion characterizes certain testimony of the plaintiff as "mere opinion evidence," when in fact it appears to me a plain statement of existing facts—that the bumper was not in the center and had to be kicked into the center to make it couple. This fact does not seem to have been denied by any one. Again, the opinion says: "The fact still remained that there was no other defect except the missing link." This may or may not be true. If the coupler was negligently arranged, so as unnecessarily to allow so much lateral play as to destroy its character as a self-coupler, this would be an evident defect. Again, the opinion says that "When he had opened the lip of the coupler . . . he had discharged the order which had been given him by the conductor." I do not think so. His order was to couple the cars; and if it was necessary to kick the coupler on the incoming car, a method which is shown (586) by the testimony to be frequently resorted to by railroad men, then he was still carrying out his orders. But all these are findings of fact, which I respectfully submit are not within the province of this Court.

Again, the opinion says: "That he contributed to his own injury is too clear to admit of doubt, from his own testimony." This gratuitous assertion of fact should be left to the jury.

This Court is not authorized to set aside the verdict of a jury simply because a majority of its members would not concur therein were they jurors. In any event if this Court undertakes to perform the functions of a jury in finding the facts, it would seem that it should at least do so by a unanimous verdict.

Cited: S. c., 132 N. C., 867.

HENRY v. MCCOY.

(Filed 20 December, 1902.)

GRANTS — *Senior Grantee — Junior Grantee — Parties — The Code, Secs.* 2780, 2786, 2788 *and* 177.

A grant cannot be set aside at the suit of a junior grantee on the ground of fraud practiced on the State.

HENRY *v.* MCCOY.

ACTION by John S. Henry against Winfield McCoy and others, heard by *Judge M. H. Justice,* at November Term, 1902, of MACON. From a judgment for the defendants the plaintiff appealed.

Horn & Mann for the plaintiff.
No counsel for the defendants.

(587) MONTGOMERY, J. It appears from the complaint that on 1 April, 1899, H. H. McCoy entered into the entry taker's office of Macon County a tract of land; that he died in 1899, without having paid the State and without having taken out a grant for the land; that within the time required by the statute his sister, Pearlie McCoy, on 31 December, 1901, paid for the land entered by her brother, and procured a grant from the State to be made out in his name. It appears further in the complaint that the plaintiff, J. S. Henry, on 8 September, 1900, entered in the same office the same tract of land, and on 14 March, 1902, obtained a grant from the State for the same.

This action was brought by the plaintiff against the defendants, who are heirs at law of H. H. McCoy, to have the grant issued to H. H. McCoy declared void, and for possession of the tract of land. The grounds assigned by the plaintiff for his action are fraud on the part of Pearlie McCoy in procuring the warrant, and that Ammons, who made the survey for McCoy, was not the surveyor, and was neither bonded nor sworn; that he was not a deputy surveyor, and that the chain-carriers were not sworn. There was a demurrer to the complaint in the following words: "1. That plaintiff's complaint does not state a cause of action. 2. That from said complaint it appears that the defendants have the oldest grant, as well as the oldest entry, for the land described in the complaint. 3. For that a State grant cannot be attacked for the reasons, or any of the reasons, mentioned in said complaint. 4. That said complaint fails to show wherein any fraud was practiced on plaintiff by defendants." His Honor sustained the demurrer, and the plaintiff appealed.

We see no error in the ruling. The defendants have the oldest grant; the entry was regularly made and within the time allowed by law; the price of the land was paid by the sister of (588) H. H. McCoy, who was then dead, and the grant made in the name of the deceased enterer, which was the proper course. Code, sec. 2780. The plaintiff made his entry of the land before the grant was issued to McCoy, but he did not procure his grant until after the McCoy grant had been issued. If

there was any fraud practiced by Pearlie McCoy upon any one, it was upon the State and not upon the plaintiff. If Ammons was not the surveyor duly sworn and qualified, or if the chain-carriers were not sworn, they are matters that the plaintiff cannot complain of, he being a junior grantee. This action was brought under section 2786 of the Code. In *Carter v. White,* 101 N. C., 30, the action was brought under the same statute. The Court said there: "In the construction of the statute it is held that the remedy is open only to the senior against a junior grantee, inasmuch as none can be aggrieved unless he has an interest in the subject-matter of the obnoxious grant when it is issued, which a junior grantee has not; and the purpose is to remove a cloud overshadowing a previously acquired title. This question was before the Court for the first time in *Crow v. Holland,* 15 N. C., 417. In that case the Court said: "Did the Legislature, when it passed the act of 1798 (section 2786 of the Code), suppose that a junior patentee could be *aggrieved* because the State had been imposed on or defrauded by an elder patentee? Was not the tenth section enacted for the benefit of those persons who held patents from the king, lords proprietors or the State, and should be *aggrieved* by their titles being clouded or endangered by a color of title which might be set up under a junior grant for the same land obtained since 4 July, 1776?" The Court then cited numerous authorities from the English and American courts to the effect that a junior patentee could not be aggrieved because the State had been imposed on or defrauded by an elder patentee, and concluded the opinion by saying: "Considering these authorities as (589) decisive, satisfied that it is the established rule of the common law that no one is prejudiced by the king's grant but he who had a prior grant for or an ancient vested right in the same thing, that no other subject could have a *scire facias* to repeal the king's grant, that in all other cases the *scire facias* must be brought by the king *jure regio* himself to repeal his own grant, it seems to us demonstrable, on examining the whole act of 1798, that this broad, ancient, wise and well-established distinction is observed and kept up by the General Assembly." The remedy is for the State, when the State has been defrauded, and a *scire facias* may also be sued out by an individual when such individual is aggrieved. To the same effect is the case of *Ray v. Castle,* 79 N. C., 580.

No error.

CLARK, J., concurring. In *Crow v. Holland,* 15 N. C., 417, it is held that a grant can only be set aside at the suit of the

State (see Code, sec. 2788) *or* of a prior grantee (see Code, sec. 2786). In the present case the Court merely holds that a grant cannot be set aside at the suit of a junior grantee on the ground of fraud practiced on the State, citing *Carter v. White,* 101 N. C., 33. But as the plaintiff cites and relies upon *S. v. Bland,* 123 N. C., 739, it is well to note that that case has no bearing here. It held that since the Code, sec. 177, "requiring all actions to be brought by the party in interest," Code, sec. 2788, authorizing the State to bring actions to annul grants, applies "only to those cases in which upon the cancellation the title to the realty would revest in the State, which is thus the party in interest," which was the case in *S. v. Bevers,* 86 N. C., 588, which is cited. It is further said: "If this were not so, parties contesting the validity of grants alleged to be junior (590) could overwhelm the State with costs of litigation in which it has no interest." In that case, accordingly, it being "averred in the complaint and admitted by the demurrer that the State has no interest in the land," but that the action was brought for the benefit of the senior grantee, the Court held that he, having a right to bring a direct action under the Code, sec. 2786, "should have sought it at his own cost and charges, as required by the Code, sec. 177," and dismissed the action, which had been brought by the State. There is nothing therein contained which tends to support the plaintiff's contention that a junior grantee can maintain an action to set aside a senior grant for fraud practiced on the State.

DOUGLAS, J., concurs in result.

THOMAS v. SOUTHERN RAILWAY COMPANY.

(Filed 20 November, 1902.)

1. BAGGAGE—*Carriers of Passengers—Negligence—Contracts.*

A common carrier cannot contract with a passenger against the loss of baggage by its negligence.

2. APPEAL—*Assignment of Error—Case on Appeal—Facts Agreed—Damages.*

Where, in an action against a railroad company for damages for loss of baggage by fire, the "facts agreed" are defective, in that the essential element of negligence upon which the validity

of the contract depends is not determined and stated, the case will be remanded that this may be ascertained by a jury, if not agreed upon by the parties.

COOK, J., dissenting.

ACTION by J. S. and J. R. Thomas against the South- (591) ern Railway Company, heard by *Judge M. H. Justice,* at September Term, 1902, of HAYWOOD. From a judgment for the plaintiffs the defendant appealed.

Crawford & Hannah and *Robert D. Gilmer* for the plaintiffs.
George F. Bason for the defendant.

CLARK, J. The "facts agreed" are defective in that the essential element of negligence upon which the validity of the contract depends is not determined and stated. The law is well settled and thus summed up in 2 Fetter on Carriers of Passengers, sec. 580: "A common carrier of passengers is an insurer of the passenger's baggage against all loss or damage, except for that caused by the act of God or by the public enemy." Section 627: "A common carrier of a passenger's baggage may, by express contract, relieve himself from his common law liability as insurer; but by the weight of authority he cannot exempt himself from liability for negligence of himself or his servants.

In *Capehart v. R. R.,* 81 N. C., at p. 444; 31 Am. Rep., 505, *Ashe, J.,* citing *Smith v. R. R.,* 64 N. C., 235, and *Glenn v. R. R.,* 63 N. C., 510, and other authorities, says that the common carrier cannot stipulate against any loss caused by negligence. To same purport, *Wood v. R. R.,* 118 N. C., at p. 1063; *Brown v. Tel. Co.,* 111 N. C., at p. 191; 32 Am. St., 793; 17 L. R. A., 648; citing from Cooley on Torts, 687, says: "The old principle that one cannot provide by contract against liability for negligence applies to every species and degree of negligence or tort."

The facts here agreed admit the destruction of the trunk "by fire in a wreck of the train caused by a slide of dirt and rocks upon the track." There is a presumption of negligence from the fact that the train was derailed by running (592) into a pile of dirt and rocks upon the track. 2 Fetter, *supra,* sec. 482. *Res ipsa loquitur.* This presumption is not rebutted in the facts agreed. It is not agreed that there was no negligence, and the plaintiff contends that the defendant admits negligence by submitting the case upon the validity of the contract on that state of facts. The validity of such contract, as applied to the facts of any case, depends upon whether there was negligence on the part of the defendant, and upon

the facts agreed, if there were not a presumption of negligence, there is certainly no presumption to the contrary, and the case should go back that this may be ascertained by a jury, if not agreed upon by the parties.

Error.

DOUGLAS, J., concurring. I concur in the opinion of the Court that this case should be remanded in order that the essential fact of negligence may be found by verdict or agreement. In fact I am somewhat inclined to think that the plaintiff is entitled to judgment on the facts agreed under the decision of this Court in *Marcom v. R. R.*, 126 N. C., 200, where it is said: "The principles governing the case at bar are well settled. It is the duty of every railroad company to provide and maintain a safe roadbed, and its negligent failure to do so is negligence *per se*. . . . As the law places upon the company the positive duty of providing a safe track, including the incidental duties of inspection and repair, its unsafe condition, whether admitted or proved, of itself raises the presumption of negligence. This is always the case where there is a failure to perform a positive duty imposed by law. The burden of proving such a failure of legal duty rests upon the plaintiff, but when that fact is proved or admitted the burden of proving all such facts as are relied on by the defendant to excuse its failure
(593) rests upon the defendant. Its plea, then, is in the nature of confession and avoidance.

If it be contended that no presumption of negligence arises against the defendant from the naked fact of obstruction stated by the case agreed, there is certainly no presumption in its favor. The landslide may not originally have been caused by the negligence of the defendant, but that would not excuse the failure of proper inspection or negligently permitting the roadbed to remain in a dangerous condition without repair and without warning, after its condition was or might have been discovered by due diligence. In the view most favorable to the defendant its negligence is an open question.

COOK, J., dissenting. Upon the facts stated in the case agreed plaintiff is bound by her special contract with defendant company, and can recover only the sum of one hundred dollars for the baggage destroyed by fire in the wreck.

There is a distinction between a passenger ticket in the ordinary form, which is regarded as a mere voucher or token, and a ticket which is and purports on its face to be the entire contract between the carrier and passenger. 5 A. and E. Enc. Law (2 Ed.), 560.

The regular local first-class fare was three cents per mile; but in buying a thousand mile ticket, paying for that much mileage at one time, which could be used from time to time at convenience, until exhausted, the plaintiff obtained transportation at a reduced rate—two and one-half cents per mile—and defendant received the lump sum, which was an advantage to both parties.

The right to make such a special contract is too well settled to be controverted. It was founded upon a valuable consideration, which consisted in a reduction of the fare. The limit of one hundred dollars for liability on account of (594) the baggage was a reasonable and valid one. Compensation for the carriage of baggage is included in the passenger's fare (*R. R. v. Cox,* 29 Ind., 360; 95 Am. Dec., 640; *Warner v. R. R.,* 22 Iowa, 166; 92 Am. Dec., 389), so that which was being taken by plaintiff in excess of the amount agreed upon was not covered by the contract and fare paid, but was being carried without compensation. Plaintiff's failure to read the ticket was not the fault of the defendant. She knew that she was obtaining transportation at a reduced rate, and being required to sign the ticket in the presence of the witness who attested her signature had express notice that she was obligating herself in some way; it does not appear that she did not *understand* the contract, nor that she did not read it *after* signing it and before boarding the car; she had it in her possession and could have done so. This being a special contract, as distinguished from an ordinary passage ticket, and in writing and signed, there was no obligation resting upon defendant's agent to read it or to notify her of its conditions and limitations.

Counsel for plaintiff argue orally and by brief that defendant cannot contract against its negligence, and therefore a recovery should be had for the full value, and cite the authorities to sustain that proposition of law. But the facts in the case agreed do not show that the destruction of the trunk was caused by defendant's negligence.

The sliding of dirt and rocks upon the track, causing the wreck of the train, nothing else appearing, does not show or raise presumption of negligence, and this is the only fact as to the wreck submitted to us.

(595)

KISER v. HOT SPRINGS BARYTES COMPANY.

(Filed 20 December, 1902.)

PLEADINGS —*Complaint—Answer—Allegata—Probata—Negligence.*

In this case the evidence offered by the plaintiff does not sustain the allegations of the complaint as to the negligence of the defendant.

CLARK and DOUGLAS, JJ., dissenting.

ACTION by Thomas A. Kiser, by his guardian, against the Hot Springs Barytes Company, heard by *Judge W. B. Councill* and a jury, at August Term, 1902, of MADISON. From a judgment for the plaintiff the defendant appealed.

(607) *Gudger & McElroy* and *C. B. Mashburn* for the plaintiff.

Merrimon & Merrimon for the defendant.

MONTGOMERY, J. The plaintiff in a civil action is required to set out in his complaint a plain and concise statement of the facts which constitute his cause of action. On the trial he must make good his allegations by competent evidence. The defendant is supposed to state in his answer his defense to the allegations of the complaint, and to be prepared at the trial with evidence to make good his defense. It seems to us, from a careful reading of the complaint, that the plaintiff offered no evidence to sustain his allegations. The plaintiff, a young man nineteen years of age, in the original complaint alleged that he was employed by the defendant company in January, 1897, to operate what is known as the dryer in the defendant's business of manufacturing lumber, and that he continued in that line of work until 19 April, 1899, when he was transferred, by order of the superintendent, to work on the planer in the cooper shop of said defendant's works; that the machinery was dangerous, and that he was ignorant of the dangers attending the operation of the machinery he was put to work upon; and that the

(608) defendant company "grossly and carelessly neglected to inform him of the danger connected with the operations of said planer, and carelessly and negligently permitted the said Thomas A. Kiser to attempt to run and operate said machinery, as he had been ordered to do as aforesaid, without instructing him in regard to the correct manner in which the said machinery should be operated and managed." He further alleged in the complaint that on account of the said negligence

of the defendant he, while attempting to carry out the instructions of his employer, received a severe and dangerous wound in his hand, to his great damage. In the complaint there was the further allegation that the defendant had permitted, carelessly and negligently, the planer to become encumbered and choked with shavings, so that it concealed from view the knives of the planer and impeded its operation, and that while in that condition the defendant, through its superintendent, ordered the plaintiff to aid in its operation, and negligently failed to instruct the plaintiff in the manner of operating the machinery and to point out its dangers.

And further, that the plaintiff was ignorant of the manner of operating the planer, and unable to see the dangerous parts of the machine on account of the accumulation of shavings, and that the plaintiff received his injury through the negligent failure of the company to instruct him and inform him in the operation of the machinery, and in negligently failing to point out its dangers. Afterwards the plaintiff filed another complaint, with two causes of action, the first of which contained the same allegations as were set forth in the original, but with the addition that the father of the plaintiff made the contract with the defendant company for the employment of his son, the plaintiff, and that it was expressly stated at the time of the contract of employment that the plaintiff should not be required to work in any department of the said defendant (609) company's establishment where there was danger of receiving injury from the operation of the machinery; that under that agreement and contract the plaintiff entered the service of the defendant and operated the dryer until 19 April, 1899, when he was transferred to the cooper shop to work on the planer, and received the injury of which he complained. The second cause of action was for damage for a violation of the contract of employment, the breach complained of being the transferring of the plaintiff to the work on the planer from his work at the dryer.

All of the evidence tended to show that the plaintiff was not put to the work of manipulating or operating the planer, but was engaged in bearing off to a convenient place the dressed lumber as it came from the machine. In fact it does not appear clearly that the plaintiff was directed to work at the machine. In his own testimony he says: "I went up to help make barrels, and that (getting out some timber with which to make the barrels) was the first thing I saw that needed to be done. I saw that there was no lumber planed and that Mr. Sowers was back there. I could see that there was no lumber planed when

I went up, and that is why I went to work at the planer. My brother did not tell me to go to the planer and Terry did not tell me anything, only to go up to the factory and help make barrels. I never had any order from any one to work at this particular machine. I never talked to my brother or Terry about any machine in the cooper shop. I can't be mistaken about this. I do not remember that Terry was in the factory that day or the evening before. I did not go to the machine voluntarily and commence work exactly."

His own testimony showed that no instructions about the dangerous character of the machine was necessary. He knew the knives were there and that they were dangerous. It would have been of no service to him to have been told by the (610) company's superintendent to be careful and not to come in contact with the knives. This is not a case like that of *Sims v. Lindsay,* 122 N. C., 678, where the plaintiff, a young girl wholly inexperienced and not having been instructed in the care of the machine, on being required by her employer to operate with her hands an ironing machine, which was dangerous in its construction and operation, was injured in the performance of her work. As to the allegations that the contract was made with the defendant by the father of the plaintiff, the proof was all the other way. The father testified that the contract he made was with another operator of the machinery, a man by the name of Doherty, although, as we have already stated, it had been alleged in the complaint that he had made the contract with the present defendant. His exact language was as follows: "Never had any contract with any one but Doherty about how my son was to be worked; contract with Doherty on or about January, 1897, as near as I can recall; contract was my son was not to be put anywhere where skill was required; no doubt about this; do not know that the word 'skill' was used, but he was not to be put anywhere where there was any danger of being hurt; I knew the concern changed hands; my son continued to work after the change; I made no contract except with Doherty; son got 75 cents or 80 cents under him; after the change got little more, 85 cents to 87 cents." On that point the plaintiff testified as follows: "Terry paid me 87 cents, and Doherty 75 cents per day; I was working at the mill when it was sold, and after sale was off two or three months; I then went back and commenced work for Terry; I engaged to work for him myself; first work was unloading ore off of railroad cars; this lasted a day or two; I made no special contract to run the dryer." Terry said: "When I took charge as manager I found William Kiser there, and continued him in

his work. I employed Thomas Kiser, the plaintiff, at the instance of his father and brother William. Both asked (611) me to give him work; think William told me Tom had worked at the mill before; won't be positive; Tom was not employed for any specific work."

The plaintiff and the manager of the company at that time, months after Doherty had ceased to control and the business had been discontinued, both agreed that the contract was made by and between them, the father not being privy to it. This view of the case makes it unnecessary to discuss the question as to the defendant being negligent or whether the plaintiff contributed to his own injury, so ably argued by the counsel. There was no evidence going to support the allegations of the complaint, and judgment as of nonsuit ought to have been entered against the plaintiff, agreeably to defendant's motion.

Error.

CLARK, J., dissenting. The complaint alleges that the plaintiff, a minor at the time of the injury, was employed by the defendant under a contract with his father; that he was "to operate the dryer, a position in which no special skill or knowledge of machinery was required," and that it was expressly agreed "that the plaintiff should not be required to work in any department . . . where there was danger of receiving injury from the operation of machinery, . . . the defendant being informed that he was unskilled in the use of machinery and ignorant of the dangers attending its operations." That the defendant had a planer which it failed to provide with proper appliances to insure the safety of its employees, which was also defective and out of repair, so that it became clogged, and that the defendant negligently ordered the plaintiff to assist in operating said planer, and negligently failed to inform him of its defective and dangerous condition, or to instruct him in its use, and plaintiff being ignorant thereof, and of the (612) dangers attending its operation, and knowing if he refused to obey he would be discharged, began work at said planer when ordered, and his right hand becoming caught in the machine, all the fingers and part of the thumb were cut off, permanently disabling the plaintiff. This is the substance, somewhat condensed, of the complaint.

J. A. Kiser, the plaintiff's father, testified that his contract was that his son was not to work where there was any danger from machinery, and that his son was moved without his knowledge or consent and put to work in cooper shop, where his fingers were cut off by the knives of the planer.

William Kiser testified that he was ordered by Superintendent Terry to make thirty-two barrels that day, and asked for more help, and two men were sent him and commenced work, one of them the plaintiff; that he knew the plaintiff did not know anything about the machine, and he started to him to show him about the machine, but the plaintiff was cut before he got there; that shavings were piled about the machine so that plaintiff could not have seen the knives if he had known they were there; that he had been trying for several days to get the shavings moved out of the way, and had told Superintendent Terry this ought to be done; that there was a protector or hood over the knives in front, but none over the rear knives, and if there had been it would have prevented any one getting hurt; that the shavings cut by the front knives fall over the under knives; that if this machine had had the same appliances that are on other planers he knows that it would not have clogged.

The plaintiff testified that he had been working at the dryer; that Terry ordered him to go up and help in the barrel factory; that he was injured while trying to get the shavings out of the way so the plank would come through the machine; that (613) he tried to knock the shavings away, and his hand was cut while doing this; that he had no instructions prior thereto about operating this machine; that he could not see the knives which cut his hand, the shavings being in the way, besides he could not see them without getting down and looking; that there was a rake in the mill, but it could not be used to any advantage because the shavings were piled up.

W. H. Sowers, witness for the defendant, said, on cross-examination, that he did not see the rake there that morning, it may have been covered up in the shavings; that this was a dangerous piece of machinery for an inexperienced man to work at without instructions, and he does not know of any instructions being given to the plaintiff as to this machine; that the accumulation of shavings would have something to do with preventing a party from seeing the danger of the machine; that the evening before the accident he heard William Kiser tell Terry that a good many shavings had accumulated, and he would like to have them removed; that the accumulation of shavings increased the danger of all who came around the planer; that when the plaintiff was injured the shavings were piled up all around the planer two or three feet deep, except where the feeder and off-bearer stood, some four feet away; that this machine was not one with modern appliances or it would not have been necessary to rake the shavings from it; that these modern appliances take away the shavings by suction, and also protect the hands from

exposure to the knives; that such modern appliances have been in use to his knowledge six or eight years; that the plaintiff, prior to the evening before, had never worked in the shop. This was in cross-examination of one of the defendant's witnesses. There was other evidence for the plaintiff, and evidence in contradiction by the defendant, but on a motion to nonsuit it is only necessary to consider if there is any evidence tending to show negligence; if so, its weight is for the jury.

There is both allegation and evidence, as above appears, that the defendant agreed that the plaintiff would (614) not be put to work at dangerous machinery; that the plaintiff, a minor, was inexperienced and unaware of the danger attendant upon a planer, which the defendant's witness says was a dangerous machine for an inexperienced worker, and that suddenly, in violation of the contract, the defendant's superintendent ordered the plaintiff to work at said machine, without giving him any instructions, and when the machine was clogged by shavings, concealing the knives underneath, which, besides, had no guards upon them; that the machine was unprovided with modern appliances, which the defendant's witness stated had been in use to his knowledge six or eight years, and which he says would have prevented any accumulation of shavings, and have also protected the plaintiff's hands; the same witness further said he saw no rake there that evening, and it may have been covered up in the shavings, which were piled up two or three feet deep all around the planer. This was certainly testimony tending to prove negligence, which the judge properly submitted to the jury. That under these circumstances, not seeing the knives underneath and seeing guards on the knives above, and being wholly uninstructed as to this machine, which was entirely new to him, and seeing no rake around, the plaintiff should have attempted to clear the shavings away with his hands, the only method he knew, does not present such a state of facts that the court can declare, as a matter of law, that the defendant's allegation of contributory negligence was proved. Contributory negligence is an affirmative defense, and if there is no evidence the jury must answer it "No." *Sims v. Lindsay*, 122 N. C., 678. Here, there being conflicting evidence, the jury answered that issue "No," and the first issue "Yes," and if there was any error in such responses it was not an error of law but an error of fact, and hence not reviewable on appeal.

In *Turner v. Lumber Co.*, 119 N. C., at p. 399, this Court said: "If the plaintiff was inexperienced in the (615) use of machinery, and the knives were so arranged as to make them a hidden danger, such a danger is not to be obvious

to inspection, then if the defendant, by the use of ordinary care, could have foreseen the happening of the accident, it became its duty either to provide an adequate protection against the knives or to give the plaintiff proper warning of the danger." Here it did neither.

Among many similar cases that can be cited are *Myers v. Lumber Co.,* 129 N. C., 252, where shavings were allowed to accumulate and the plaintiff slipped and fell against a saw running naked without a guard; also *Dorsett v. Mfg. Co., ante,* 254, in which the plaintiff was caught in cogwheels revolving near him. In both these cases and many others similar it was held that the question of negligence was for the jury. This is a far stronger case, for in neither of the above two cases was the plaintiff young and inexperienced nor put to work at a dangerous machine without instructions, and contrary to his father's contract, which was that he should not be exposed to such risks.

The other exceptions are without merit, and require no discussion.

DOUGLAS, J., concurs in the dissenting opinion.

Cited: Mathis v. Mfg. Co., 140 N. C., 532.

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(616)

SMITH v. ATLANTA & CHARLOTTE AIR LINE RAILWAY COMPANY.

(Filed 20 December, 1902.)

1. APPEAL—*Review—Questions Not Considered Below.*

In an action for personal injuries, questions as to the speed of the engine causing the injury and certain rules of the railroad company, which were not submitted to the jury as evidence of negligence, will not be considered on appeal.

2. NEGLIGENCE—*Railroads—Employees—Contributory Negligence.*

In an action against a railroad company for an injury to an employee, it appearing that such employee was painting a switch target within four feet of the rail and was struck by a switch engine, the engineer of such engine had a right to assume that the person injured was in possession of all his faculties, and not being hampered by any obstruction that would prevent his instantaneous avoidance of danger, would step out of danger.

CLARK and DOUGLAS, JJ., dissenting.

PETITION to rehear this case, reported in 130 N. C., 344.

Burwell, Walker & Cansler for the plaintiff.
Geo. F. Bason for the defendant.

MONTGOMERY, J. The argument of the plaintiff's counsel on the rehearing was addressed to three alleged errors made in the decision on the former hearing:

1. It was contended that the Court erred in treating the plaintiff as if he were a trespasser on the track of the defendant, instead of as an employee.

2. That the speed of the train was an important factor in the case, and that we gave it no consideration.

3. That the rules which were prescribed by the company for the operation and regulation of its trains in respect to its employees were not considered for any purpose in the former opinion. (617)

It was argued that if those errors had not been made the erroneous conclusion which the Court arrived at could not have been reached. For all practical purposes the facts necessary for a proper consideration of the case are set out in the former opinion (130 N. C., 344).

In the discussion which is to follow we will leave the first alleged error to be treated with the question of the defendant's negligence.

As to the second assignment of error, concerning the speed of the engine in connection with the plaintiff's hurt, it is sufficient to say that on the trial below it had no significance. The defendant's fourth prayer for instructions was as to its right to run its engine, so far as the plaintiff was concerned, at any rate of speed it chose. His Honor read the prayer to the jury, and said: "There was no evidence that the rate of speed caused the injury, and therefore the rate of speed will be excluded from the consideration of the jury as evidence of negligence on the first issue."

In reference to the third alleged error on the part of this Court, that we did not give consideration to the rules of the company, it is sufficient to say that in the charge to the jury his Honor neither recited these rules nor made any reference to them as bearing upon the plaintiff's rights or the defendant's negligence, and there was nothing for us to consider about them.

The only question, then, which remains for consideration is whether or not the Court was in error in the conclusion it arrived at in the former opinion.

That part of the charge of his Honor which we thought was

erroneous is set out in full in the former opinion, and it is not therefore necessary to insert it here.

The plaintiff was not employed to do work which required him to go upon the track of the defendant company, and (618) so far as the evidence discloses he did not put his foot upon it. He was employed to do the simplest of all mechanical work—to paint some switch targets in the defendant's shifting yard at Charlotte. The targets were four feet from the railroad, and the position was perfectly safe if the plaintiff had remained at the outside of the target. The track was perfectly straight for about six hundred feet, and there were no obstructions of any kind for that distance along the way. The plaintiff placed the paint bucket between the rail and his feet, and in the act of a second, stooping over to dip his brush in the paint, his head was stricken by a passing engine, and he was badly hurt. He said that there was no signal given by bell or whistle. Under these facts we are of the opinion, as we were when the case was before us last, that the engineer had a right to assume that the plaintiff would have stepped out of danger if he had peradventure gotten too near the track, or that he, the plaintiff, would not put his head in danger by leaning over to dip his brush in the paint as the engine was passing by. It seems to us no reasonable man could have thought that the plaintiff, under the circumstances of this case, would need any caution or signal.

This view of the conduct of the defendant's engineer is fully sustained in *Aerkfetz v. Humphries,* 145 U. S., 418. There the plaintiff was a repairer of tracks in the switch yard of the defendant. The tracks were straight and without obstructions in either direction. He was at work at the time of the accident in the yard when the switch engine, pushing two cars, moved slowly along the track upon which he was at work, the speed of the engine being that of a man walking. The plaintiff stood with his back to the approaching cars, engaged in his work, without looking backward or watching for the engine, until he was run over by the first car. The plaintiff there was an experienced man in work about the yard, as was the plaintiff (619) in the case before us. They both knew all about the shifting of cars and the general work about switch yards. The differences in the main facts of the two cases are that in the case of *Aerkfetz v. Humphries, supra,* the engine was moving at a slower speed than was the engine in our case, and the plaintiff there was engaged in working on the track, while in the present case the plaintiff was not employed to work on the track. The speed of the engine, as we have seen, does not have

any bearing, as we have pointed out. The Court decided in *Aerkfetz v. Humphries* that the defendant was not negligent. It is not necessary for us to go so far as the Court went in that case; and we do not undertake to decide that there would be no negligence on the part of a railroad company for one of its engineers, without signal or warning, to run down its employees who are engaged in work on its tracks. When such a case is presented, then will be the proper time to consider it.

The counsel of the plaintiff referred us to numerous decisions from the courts of other States, in which it has been held to be negligence on the part of railroad companies to run over with their engines or cars their employees while engaged in work upon their tracks, without having given proper warnings, that is, that the employees have the right to expect warning. They are not cases like the one before us. The petition to rehear is dismissed.

Petition dismissed.

CLARK, J., dissenting. The plaintiff was not a trespasser, but had been ordered by his superior to paint the switch target between the two tracks, where he was working when struck by the engine. While this target was four feet (less seven or eight inches for the fans or wings) from the rail, the projection of the car and steps, twenty-nine inches, left but a few inches (eleven or twelve) of space. The defendant's engine and cars came down one track and passed to plaintiff's rear, and then came rapidly up another track, moving backwards (620) with a car in front, without ringing the bell, and running at a high rate of speed—ten or fifteen miles per hour, according to the defendant's own witness, and twenty-five to thirty miles an hour, according to the plaintiff's witness—and struck him on the back as he leaned over to dip his brush in the paint, cutting a hole in his back and lacerating his shoulders and head, and paralyzing his right arm. The plaintiff was preoccupied with his work, and could not be expected to look both to the front and rear and keep up his work too. It is in evidence that the rules of the company required the bell to be rung to give notice to those at work on or near the track, and that this notice was customary. The plaintiff had a right to rely upon the observance of the rules and the custom, both of which were known to him, and of course to the engineer too. The engineer, approaching from the rear, could see the plaintiff 600 feet away on a straight track, preoccupied with his work. Under such circumstances the rapid speed and the failure to observe the rules and the custom, by ringing the bell, were evidence of negligence to go to the jury.

The court charged the jury that if the plaintiff was not put at work in a dangerous place, but was comparatively safe, and suddenly turned and got in the way of the engine when it was too late to stop it, the jury should answer the first issue "No." The jury answered the first issue "Yes," thereby finding that the engineer was negligent in not avoiding the injury by giving the signal required by the rules for the safety of those working on *or near* the track. The rules of the company were in evidence, and require the engineer, if any person is on or so near the track as to be in danger, to ring the bell of his engine when shifting, and to blow the whistle if necessary, and to use every possible means to prevent an accident. There was also evidence
(621) that it was the custom always to ring the bell while running the engine for shifting at this passenger station.

The former opinion of the Court (130 N. C., at p. 346) says that the *only* error found in the trial below was in leaving it to the jury to determine whether the engineer, seeing the preoccupation of the plaintiff, and not giving signal to warn him, was negligent and the proximate cause of the injury. But surely all the above circumstances, the evidence of running twenty-five or thirty miles an hour, the failure to observe the rules and the custom to ring the bell, the sight by the engineer of the plaintiff 600 feet away, intent on his work, were properly submitted to the jury, especially when coupled, as they were, with the instruction that if the plaintiff was not at work in a dangerous place, but suddenly turned and got in the way of the engine when it was too late to stop it, to answer the first issue "No."

The target, according to the evidence, was four feet from the middle of the rail, and the fan, which the plaintiff was painting when struck, extended seven or eight inches toward the rail, leaving the space forty or forty-one inches, while the step of the car extended twenty-nine inches from the rail, reducing the space to eleven or twelve inches. The plaintiff, a tall man, when he leaned over to dip his brush in the paint, occupied, he says, more than that space to the right. Relying upon the regulation and custom of shifting engines to ring the bell, he was struck from behind, while thus stooping, by an engine which, by some of the evidence, bore down on him at the rate of twenty-five miles an hour, and without giving any signal, as required. The plaintiff's work was between two tracks, and he could not look both ways at once.

That we have not direct precedents in our courts is due to the fact that till recently an injury caused by the negligence of a fellow-servant was not actionable. But there are many precedents elsewhere, cited in the very able brief of the defendant's

counsel. In *Erickson v. R. R.*, 41 Minn., 500; 5 L. R. A., 786, it was held that one rightfully in close proximity (622) to the track, employed by the defendant, was not required to look out for passing engines, as in the case of trespassers or licensees, but that the company owed him the duty of *"active vigilance"* in giving proper signals and warnings of the approach of engines and trains. The Court says: "The plaintiff had the right to rely on the continued performance of this duty, without the necessity, while engrossed in his work, of keeping constant lookout for approaching trains." There are numerous cases to same effect which might be added.

That the plaintiff had the right to rely upon the custom to ring the bell is held in *Stanley v. R. R.*, 120 N. C., 514; *Norton v. R. R.*, 122 N. C., 936; Beach Cont. Neg., sec. 67. The plaintiff was rightfully at his place; and even if he had not been, the defendant should have sounded its usual warning. *McLamb v. R. R.*, 122 N. C., 862; *McCall v. R. R.*, 129 N. C., 298.

I think *Judge Hoke* committed no error in leaving the matter to the jury, and that the petition should be allowed.

The whole evidence is not set out in this dissent, for it can very rarely be appropriate, since this Court has no power to review the action of the jury. All that is necessary is to set out only such part of the evidence as, taken most strongly for the plaintiff, would justify, or not, the submission of the disputed matter to the only tribunal which is authorized to decide issues of fact.

DOUGLAS, J., concurs in the dissenting opinion.

Cited: Lassiter v. R. R., 133 N. C., 245.

(623)

DARGAN v. CAROLINA CENTRAL RAILROAD COMPANY.

(Filed 20 December, 1902.)

1. EMINENT DOMAIN—*Right of Way—Railroads—Laws* 1854-'55, *Ch.* 225—*Laws* 1872-'73, *Ch.* 75.

Where the charter of a railroad company authorizes it to procure a right of way by purchase or condemnation, any subsequent use by the owner of land condemned thereunder is subject to the after necessity of the use of the land by the company for the purposes granted under the charter.

2. EMINENT DOMAIN—*Right of Way—Damages—Remedies.*

Where the charter of a railroad company provides a way of redress for damages for land taken under the power of eminent domain, the statutory remedy supersedes the common-law remedy.

3. EMINENT DOMAIN — *Right of Way — Limitations of Actions — Laws* 1854-'55, *Ch.* 225—*Laws* 1872-'7, *Ch.* 75—*Married Women.*

Where the charter of a railroad company provides that an action for damages for land taken for right of way shall be brought within two years from the completion of the road, a husband against whom the statute had run, by conveying the land to his wife, does not give her a cause of action.

DOUGLAS, J., dissenting.

ACTION by Milton Dargan and Nora Dargan, his wife, against the Carolina Central Railroad Company, heard by *Judge W. S. O'B. Robinson* and a jury, at January Term, 1901, of UNION. From a judgment for the defendant the plaintiffs appealed.

Redwine & Stack for the plaintiffs.
Adams & Jerome and *J. D. Shaw* for the defendant.

MONTGOMERY, J. The defendant, the Carolina Central Railway Company, was chartered in 1873, under chapter 75,
(624) Laws 1872-'73. By the provisions of the act of incorporation, and also under chapter 225, Laws 1854-'55, the defendant being the purchaser of the Wilmington, Charlotte and Rutherford Railroad, the defendant was authorized to procure a right of way by either purchase or proceedings in condemnation. In both acts of Assembly it was also provided that, in the absence of any contracts in relation to the land through which the railway might pass, it would be presumed that the land over which the road might be constructed, together with a space of 100 feet on each side of the center of the railway, had been granted to the company by the owners, and that unless the owner at the time that part of the railway which might occupy the land, or those claiming under him, was finished, should apply for an assessment of the value of the land so taken, within two years next after that part of the road which might be on the land was finished, the owner, or those claiming under him, should be forever barred from recovering the land or having any assessment or compensation therefor. By section 9, chapter 75, Laws 1872-'73, the dwelling house and burial grounds were exempted from invasion on the part of the railway company, without the consent of the owner or the order of the Superior Court; and by the act of 1854-'55 the exemption was the residence and *garden*. The evidence in this case shows that the land, which

was actually taken possession of by the defendant in 1892 or 1893, was within 100 feet from the center of the track, and was then used as a garden by the plaintiffs; and it was admitted by the plaintiffs that the garden, which is the subject-matter of the dispute, was used for railroad purposes, and was necessary for the conducting of its business and the enjoyment of its rights under its charter. But it was not attempted to be shown that the land was used as a garden when the road was finished upon the lands of the plaintiffs. It is immaterial, therefore, the constructive possession of the whole of the strip of land by the completing of the railroad track being in the defend- (625) ant, whether the actual possession in 1892 or 1893 was under act of 1854-'55 or the act of 1872-'73, as the land was not, at the time of the construction of the track, used either as a garden or as a burial ground. The use made of the land by the plaintiffs subsequent to the completion of the railroad track was subject to the after necessity of the use of the whole hundred feet, including the part which is the subject of this action, wherever it became necessary to be so used by the company for the purposes granted under the charter. When it became necessary for the defendant to take the land for the purposes averred in the answer and admitted by the plaintiffs, that is, for the purpose of conducting the defendant's business, it was authorized to do so. *Sturgeon v. R. R.*, 120 N. C., 225; *Shields v. R. R.*, 129 N. C., 1.

The plaintiffs, in the brief of their counsel, contended that if the plaintiffs were not entitled to recover the land they ought to be allowed compensation for the value of the land, as under condemnation proceedings. The complaint set forth simply the cause of action in the nature of ejectment, but there was a prayer for general relief. We think, however, that as there was a provision in both the acts referred to contemplating the assessment of damages, and furnishing the means of assessment, that remedy must be pursued, and that the plaintiffs were not entitled to it in the present action. In cases involving the right of eminent domain the common law remedy is superseded by the statutory remedy, and aggrieved parties are compelled to seek redress under provisions of the statute. *McIntire v. R. R.*, 67 N. C., 287; *Land v. R. R.*, 107 N. C., 72.

The provision for the assessment in the way of compensation for lands taken by the defendant under the acts referred to was by application to the clerk of the Superior Court of the county in which the land is situated, and the appointment of commissioners for that purpose. It is better for us to (626) say further that the plaintiffs in this case cannot recover

in any form of procedure. Under both of the acts referred to married women and infants are not affected until two years after the removal of their respective disabilities; but when the railroad was completed through the land the land was the property of the husband of the *feme* plaintiff, and his right to have assessment as for compensation was barred at the end of two years from the completion of the road. His conveyance to his wife, the *feme* plaintiff, was of date of 1893, long after the road was completed.

The ruling of his Honor, which resulted in a nonsuit, was proper, as was the judgment.

No error.

DOUGLAS, J., dissenting. This is an action for the recovery of real estate and damages for its detention. The plaintiffs, in support of their title, offered in evidence a deed from J. S. Helms to Milton Dargan, executed 6 January, 1871, and registered 28 December, 1885, in book 16, page 677; and also a deed executed by Milton Dargan to Nora Dargan, his wife, on 7 March, 1893, and registered 9 March, 1893, in the office of the register of deeds of Union, in book 23, page 685.

The plaintiffs introduced witnesses tending to prove that the *feme* plaintiff had been married to her co-plaintiff for thirty years; that she and her husband had been in possession of the lot described in the complaint, claiming the lot under the deeds, until the erection of a stock pen by the defendant, which, it was admitted by the plaintiffs, was within one hundred feet of the railroad track of the defendant; that plaintiffs were in the actual possession of said lot, under known and visible boundaries, at the times of the entry of defendant, and forbid the entry; that the defendant took possession of the lot in 1893, about the last of the year; that the piece of land was
(627) used as a garden and orchard at the time the defendant entered and took actual possession of the lot by the erection of the stock pen, and that the rental value of the lot was some fifteen to twenty dollars per year.

The plaintiffs offered in evidence the Acts of the General Assembly passed in 1854-'55, ch. 225; Laws 1871-'72, ch. 131, and Laws 1872-'73, ch. 75, and Laws 1881, ch. 5. The plaintiffs also introduced the summons in the case.

There was evidence offered by the defendant tending to show that the defendant took possession of the lot, which is the land described in the complaint, and wholly within the right of way of defendant, in December, 1892; that it was necessary for the defendant to use the lot for the purpose of erecting a stock pen,

where horses and other animals could be unloaded and fed or loaded on its trains, and that this place was especially suited for that purpose; that the stock pen was erected in December, on the right of way; that plaintiff admitted on the trial that the stock pen was on the right of way; that the rental value of the land was five dollars per year.

Upon the admission of plaintiffs that the stock pen was within one hundred feet of the railroad track, and was used for railroad purposes necessary for the proper enjoyment of its rights under its charter, and that the lot sought to be recovered by the plaintiffs is that covered by the stock pen, his Honor intimated an opinion that plaintiffs were not entitled to recover in this action, and plaintiffs submitted to a nonsuit and appealed. Judgment of nonsuit as set out in the record, to which the defendant excepted and appealed to the Supreme Court.

The complaint is in the nature of ejectment. The answer denies the essential articles of the complaint, and proceeds as follows:

The defendant, further answering and for a further defense, alleges:

"1. That it is admitted that the defendant is in the possession of so much of the said lot of land described (628) in article two as lies within one hundred feet of the center of the track of the defendant, and has been in possession of the same, exercising acts of ownership on it as its right of way, claiming it and using it as necessary to the operation of defendant's railroad for more than five years before the commencement of this action, and since the defendant entered upon said 100 feet of said land for the purpose of constructing its road, and the plaintiff ought not to be allowed to maintain this action, and the same is barred by the statute of limitations.

"2. That the defendant, under its charter, is entitled to 100 feet on each side of its track from the center thereof for right of way, and has been in the use, occupancy and possession of so much of the land described in article two of complaint as is situated within said 100 feet on the south side of its track, using, occupying and possessing the same as its right of way for more than five years since defendant entered upon said land for the purpose of constructing its road, and for more than five years before the commencement of this action, and for more than two years since defendant's road was in operation, and more than two years before the commencement of this action, and the same is barred by the statute of limitations.

"3. That more than five years had elapsed before the com-

mencement of this action after plaintiffs' cause of action accrued, and same is barred by the statute of limitations.

"4. That more than two years had elapsed before the commencement of this action after plaintiffs' cause of (action) accrued, and the same is barred by the statute of limitations."

Upon the foregoing facts I am of the following opinion:

This is an action for the recovery of land, but it appears from the argument that the real question at issue is whether the defendant shall be permitted to keep the land without com-
(629) pensation. The defendant company was incorporated under chapter 75, Laws 1872-'73, and claims also as the successor by purchase of the Wilmington, Charlotte and Rutherford Railroad Company, incorporated under chapter 225, Laws 1854-'55. It is well settled that private property cannot be taken, directly or indirectly, even for a public purpose, without just compensation. *R. R. v. Davis,* 19 N. C., 451; *S. v. Glenn,* 52 N. C., 321; *Cornelius v. Glenn, ibid.,* 512; *Johnston v. Rankin,* 70 N. C., 550; *Staton v. R. R.,* 111 N. C., 278; 17 L. R. A., 838. It has been expressly held that under the Fourteenth Amendment to the Constitution of the United States, a State cannot appropriate private property to public use without compensation. *R. R. v. Chicago,* 166 U. S., 212.

It is equally well settled that the denial of an *adequate* remedy for enforcing the right is a denial of the right itself, and the adequacy of the remedy must be determined by its practical results. In *Dargan v. R. R.,* 113 N. C., 596, this Court has said: "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." That case, decided in favor of the plaintiff, was between the same parties as the case at bar, and construed the same statutes. In *Henderson v. Mayor,* 92 U. S., 259, the Court says: "In whatever language the 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, 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." In *R. R. v. Chicago, supra,* the Court says, on page 236: "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, can-
(630) not convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." In *Brickett v. Aqueduct Co.,* 142 Mass.,

394, the Court says that "A statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void."

As there is no contention that the plaintiffs have ever received any compensation for the land in suit, an affirmation of the judgment would have the effect of taking the land away from them and giving it to the defendant against their will, and without just compensation. We would also deny to them the due process of law allowed as of common right to the citizen when suing a natural person. Before we can allow to a corporation this privilege of exemption from the ordinary law of the land we must find (1) that the statute gives the plaintiffs a remedy exclusive in terms or by direct implication, and (2) that such exclusive remedy is complete and adequate.

We are met at the threshold of this case by a difficulty appearing upon the face of the record. While it was argued upon the provisions in the statutes of incorporation, these statutes are nowhere pleaded in the answer; and as they are private statutes the defendant cannot rely upon any special exemption therein contained. In *Durham v. R. R.,* 108 N. C., 399, this Court says: "It is not questioned that private statutes must be pleaded (Code, sec. 264), and that they must be proved when they become necessary as evidence." Code, sec. 264, prescribes how they shall be pleaded, as follows: "In pleading a private statute or right derived therefrom it shall be sufficient to refer to such statute by its title and the day of its ratification, and the Court shall thereupon take judicial notice thereof." 20 Pl. and Pr., 596.

This would determine the result of this appeal, but as the answer may be amended upon a new trial, we will (631) proceed to discuss the statutes as if they had been pleaded.

The next question is, do the statutes provide a remedy, adequate and exclusive, to which the plaintiffs may resort to obtain just compensation for their land? The only provisions for condemnation proceedings that we can find in either act are in section 26 of the act of 1854-'55, and section 9 of the act of 1872-'73, which are substantially similar. The material words of the latter section are as follows: "Sec. 9. That when any lands or rights of way may be *demanded* by said company or *condemned,* . . . and for want of agreement as to the value thereof, or from any other cause, the same cannot be or is not purchased from the owner or owners, the same may be taken at a valuation to be made by three commissioners, or a majority of

them, to be appointed by the clerk of the Superior Court of the county where some part of such land or right of way is situate: . . . *Provided,* that on any application for the appointment of commissioners under this section it shall be made to appear to the satisfaction of the Court that at least ten days previous notice has been given by the *applicant* to the *owner* of the land so proposed to be condemned," etc. The italics in quoting these statutes are ours. The same section provides that "the proceedings of said commissioners, accompanied with a description of said land or right of way, shall be returned, under the hand and seal of the commissioners, to the court from which the commission issued, there to remain a matter of record, and the lands or right of way so valued by said commissioners *shall thenceforth vest* in the said company as long as the same shall be used for purposes of said railway or branches, *whenever and so soon as the amount of said valuation may be paid or tendered.*"

From these sections it appears that (1) the right to demand the appointment of such commissioners is given exclu-
(632) sively to the railroad company; (2) such commissioners cannot be appointed until the land has been *demanded* or *condemned* by the railroad company, (3) nor can they be appointed until after the said railroad company has given ten days' notice to the owner of the land; (4) that the said land shall not *vest,* even for the purposes of an easement, until its assessed value has been *paid or tendered* to the owner. None of these conditions precedent appear in the case at bar, and hence the land has never vested in the defendant. As the plaintiffs are given no remedy at all under the acts in question they are entitled to the ordinary process of law. Mills on Eminent Domain, sec. 88, says: *"While 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 compensation 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 proves 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 on Em. Dom., secs. 227, 228, 229, 230, 231; Lewis on Em. Dom., secs. 364, 365, 366, 456; Enc. Pl. and Pr., 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; 4 Thomp. Corp., secs. 5590 and 5621. (633)

We come now to consider the effect of section 28 of the act of 1854-'55, and section 11 of the act of 1872-'73, which are substantially similar. The latter section is as follows: "Sec. 11. That in the *absence of any contract* or contracts in relation to the land through which said railway or any part of its branches may pass (signed by the owner thereof or his agent, or some claimant or person in possession thereof, and which may be confirmed by the owner thereof), it shall be presumed that the land over which said road or any of its branches may be constructed, together with a space of 100 feet on each side of the center of said railway and the additional space provided for in the foregoing section, has been granted to said company by the owner or owners thereof; and said company shall have good right and title thereto, and shall hold and enjoy the same *as long as the same shall be used for the purposes of said railway,* unless the person or persons owning the land at the time that part of said railway which may *occupy said land* was finished, or those claiming under him, her or them, shall apply for an assessment for the value of said lands as heretofore directed within two years next after that part of the road which may be on said land was finished; and in case the same owner or owners, or those claiming under him, her or them, shall not apply within two years next after the said part was finished, he, she or they shall forever be barred from recovering said land or having any assessment or compensation therefor; but nothing herein contained shall affect the rights of *femes covert* or infants until two years after the removal of their respective disabilities."

We have seen that the acts do not give the owner of the land the right to have it assessed, but if we assume that they do so by *implication,* we must hold that such remedy is simply cumulative, and does not deprive the owner of his common law remedies. In other words we cannot, by *mere implication,* write into a statute words that exempt a corporation from the ordinary process of law. (634)

But even supposing that this may be done, the statute must be at least reasonably construed; and it is evident from the

face of the acts that such a presumption is intended to apply only to such land as is *occupied* by the said railroad. This is the word used, and its meaning is further illustrated by the provision that the railroad company "shall hold and enjoy the same as long as the same shall be used for the purposes of said railway." It is therefore evident that it was not intended that the two years statute of limitations should begin to run until after the railroad company had taken possession of the land. How can it be otherwise? As long as the plaintiffs remained in the undisturbed use and enjoyment of their land what cause of action did they have? They could not bring trespass or ejectment, because no one had trespassed, and they themselves were in undisputed possession. They could not ask to have the value of the land assessed against the defendant because the defendant had never "demanded" the land; and surely a man cannot make a railroad company buy his land simply because it is within 100 feet of its track. The act does not require the defendant to condemn 100 feet on each side of its track, but simply fixes that as the maximum limit. Where land is valuable it is highly probable that the company would not care to pay for more than it needed. It is well settled that no statute of limitation can run against the owner in possession. There must first be an ouster. In *Lewis v. Covington,* 130 N. C., 541, this Court says: "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* (citing authorities).

(635) 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 the possession of the land sued for."

In the case at bar suppose the defendant had been sued by the plaintiffs twenty years ago it could have said, "If you sue me in ejectment, I am not in possession of your land; if you sue me for trespass, I have never been on your land; if you seek to make me pay for it, I do not want it." No action could have been maintained by the plaintiffs until the ouster in 1893, which, according to their testimony, was after the land was conveyed to the *feme* plaintiff. As she has constantly been under coverture no statute of limitations has ever started to run against her.

There is another fatal defect. The act provides that such a presumption shall arise only in the absence of any contract in relation to the land. Such absence of contract is a condition precedent to the presumption, and must be averred and proved by the defendant before it can avail itself of any such presump-

tion. This it has failed to do. If there was any such contract it would have been in the possession of the defendant, who might have recorded it, have kept it or have destroyed it. The last course would have best subserved its own interest. In any event the defendant alone had the proof, and we cannot say that it can remain silent and take the plaintiff's land under a naked presumption founded upon an implication in a private statute that has never been pleaded.

There is another question that has neither been raised nor argued in this case. Section 3 of Article VIII of the Constitution provides that "All corporations shall have the right to sue and shall be subject to be sued, in all courts, *in like manner as natural persons.*" A decision of this question is not necessary to a determination of this appeal, but being of constitutional obligation, it is worthy of most serious consideration.

Cited: Brinkley v. R. R., 135 N. C., 660; *Barker v. R. R.*, 137 N. C., 220; *Beasley v. R. R.*, 147 N. C., 365.

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FITZGERALD v. ALMA FURNITURE COMPANY.

(Filed 20 December, 1902.)

1. NEGLIGENCE—*Infants—Minor—Personal Injuries—Contributory Negligence.*

   In this action to recover damages for injury to an infant employed in a furniture factory, the trial judge properly left the evidence as to the youth of the child (here nine years old), his inexperience, ignorance of the nature and dangers of the work, and the failure of the company to instruct him as to the dangers incident to the work, to the jury on the questions of the negligence of the company and the contributory negligence of the infant employee.

2. EVIDENCE—*Infants—Personal Injuries.*

   In an action by an infant to recover damages for injuries received while working in a furniture factory, the evidence of his father that he did not hire his son to the company, is competent. (Summary of age limit in other States and foreign countries, by CLARK, J.)

FURCHES, C. J., and MONTGOMERY, J., dissenting.

ACTION by William Fitzgerald, by next friend, against the Alma Furniture Company, heard by *Judge Thos. J. Shaw* and

a jury, at February Term, 1902, of DAVIDSON. From a judgment for the plaintiff the defendant appealed.

Watson, Buxton & Watson for the plaintiff.
King & Kimball for the defendant.

CLARK, J. The plaintiff, who sues by his next friend, testified that when nine years old, one day when his father was absent from home (and he did not return until after the little boy was injured), he went to the factory of the defendant to get work; the foreman offered him twenty-five cents a day, and put him to work "tailing a moulder" and pulling sawdust to the furnace; the next day he tailed the planer, and the next day about 1 o'clock he was put to work on the sander,
(637) which is a machine with rollers and sandpaper on the rollers, run by belts; that when he went to work at it a man was running the machine and stood at its front end, and he was at the back end; the man told him to take the planks as they came out of the machine; he worked there an hour and a half before he got hurt; the planks were one foot wide, one and a half feet long and about an inch thick; he had never worked in a factory before and had never seen a sander. He further said that the man in charge of the machine left to go after planks but did not stop the machine; while the man was gone he leaned up against the machine and laid his hand on it, was caught, and his hand was mashed; he "hollered," some one came and raised up the machine; his hand was mashed between the rollers; he had hired himself for three weeks, and told the foreman he was a schoolboy. On cross-examination he said he was then four feet high; he was not instructed about the machine; he did not climb up on the machine, and does not know how his hand touched the wheel; does not know where he put his hand, but didn't think it was where the lumber came out; he knew it would hurt to put his hands on the moving wheels; says he would not have been hurt if he had stood off from the machine; didn't remember what he leaned against the machine for, just never thought of himself, he reckons, and leant up against it; his hand could not get in there unless he put it in there. It was a pretty dangerous place where he was working; the sandpaper on the rollers was going round as fast as it could; don't think he put his hand in, but it couldn't have got in unless he put it in; one roller ran one way and one the other; was standing on his feet when he got hurt; did not get off the floor.

The plaintiff's father testified that he lived on a farm in the country; that he did not hire his son to the defendant, and

knew nothing about it; when he got back home his boy was in the bed with his arm dressed; an abscess rose on it; the doctor came to see the boy every day for ten days, and (638) he was in bed for two months, and has suffered greatly.

Another witness testified, who thought that if the boy was only four feet high, he must have climbed upon the machine and stuck his hand in; that there was no danger from leaning against the machine, and it had an iron casting all around it, and there was no danger about the machine unless you put your hand in. This, in substance, is the evidence. The defendant did not offer any evidence, but moved to dismiss upon the evidence of the plaintiff.

During the discussion of the evidence his Honor remarked to the plaintiff's counsel that he had not made out a case unless it was negligence in the defendant to employ the plaintiff at all (to which there is no exception), and submitted the question upon all the evidence and attendant circumstances to the jury, who found that the defendant was negligent and the plaintiff was not guilty of contributory negligence.

The Court charged the jury, at the request of the plaintiff: "If the jury find from the evidence that the plaintiff, at the time of the injury, was a boy nine years and five months of age; that he only had the intelligence of ordinary boys of his age; that he had never seen a machine like the one he was helping to operate until 1 o'clock of the day he was injured; that he did not have the capacity to understand the mechanism of the machine or its dangerous parts; that because of his want of age and experience, and while waiting for the man operating, he threw his arm upon the machine to rest himself, and for the further reason that the defendant's agent who employed him and failed to warn him against danger, then it will be the duty of the jury to consider these matters in passing upon the question as to whether the plaintiff was guilty of such negligence as the law terms 'contributory negligence,' which would justify the jury in finding the second issue 'Yes.'" The defendant excepted to this, but we find no error. This hypothetical (639) summary was a state of facts which the jury would be justified in finding from the evidence, and it could not be error in telling the jury they should consider that state of facts, if they found them to be facts, in passing upon the second issue.

To none of the other instructions did the defendant except. Whether they were not too favorable in some particulars to the defendant is not before us as the plaintiff is not appealing. The Court gave certain charges at the request of the defendant. The other prayers for instructions were properly refused.

Nor was it error to permit the father to testify that he did not hire his son to the defendant. The complaint alleged that it was negligence to employ a boy of the plaintiff's tender years, lacking in capacity to understand and appreciate the dangers incident to his employment, and unfit by reason of his youth and inexperience, as the defendant well knew, to be set at such work without instructing or cautioning him, though he was wholly ignorant of the dangerous character of the same.

There was evidence strongly tending to prove that state of facts, and the real point in the case is raised by the motion to dismiss, *i. e.,* whether the facts, the youth of the child, his inexperience, his ignorance of the nature and dangers of the work and the failure to instruct him, made it negligence to employ him. The reason of the thing and all the best authorities sustain that it was not error of which the defendant could complain to submit this evidence to the jury. Cooley on Torts, page 652, says: "The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured. Such cases occur most frequently in the employment of infants. . . . The
(640) duty of the employer to take special cautions in such cases has sometimes been emphatically asserted by the courts."

The law, says Thompson Neg., 978, "puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business, and of instructing him how to avoid them. Nor is this all: the master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to it, in substantially the same state as if he were an adult."

These be wise and just words, and were so esteemed by the Supreme Court of Ohio, which cited with approval both the above extracts in *Rolling Mill v. Carrigan,* 46 Ohio St., 283; 15 Am. St., 596. Further citing like authorities from the decisions of sister States, that Court further held that an infant employee whose employer has not instructed him, as it was his duty to do, and who, while in the discharge of his employment, suffers an injury by reason of such neglect, may maintain an action therefor notwithstanding he did, by reason of his youth and ignorance, some act which contributed to his injury, but

which he was not advised would be likely to injure him. To same purport cases cited in the notes to that case, 15 Am. St., 603, and *Smith v. Irwin* (51 N. J., 507), 14 Am. St., 699, and notes.

In *Tagg v. McGeorge,* 155 Pa. St., 368; 35 Am. St., 889, it was held that the master is liable for the injury resulting when he puts a young and inexperienced person to work with a dangerous machine without giving suitable instructions as to the manner of using them, and warnings as to the hazard of carelessness in their use. See also notes to this case, 35 Am. St., 889. To the like purport is *Norton v. Volzske* (158 Ill., 402); 49 Am St., 167, and cases cited therein and in the notes (641) thereto.

In Bailey Per. Inj., sec. 2766, it is said: "Persons who employ children to work with dangerous machinery or in dangerous places should anticipate that they will exercise only such judgment, discretion and care as is usual among children of the same age, under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from dangers incident to the situation in which they are placed; and as a reasonable precaution in the exercise of such care in that behalf, it is the duty of employer to so instruct such employees concerning the dangers connected with their employment, which dangers, from their youth and inexperience, they may not comprehend or appreciate, that they may, by the exercise of such care as ought reasonably to be expected of them, guard against and avoid injuries arising therefrom"; and further adds that an infant who, by reason of his youth and inexperience, is injured, when not properly instructed and warned as to the dangers incident to his work, may recover therefor. See also sections 2774, 2777 and 2789. In section 2767 (also in 1 S. and R. Neg., 73a) it is said, quoting authorities, that over fourteen years of age the law presumes capacity and intelligence, and under that age the presumption is the other way. The duty of masters to infants is also summed up in similar language to the above authorities in 1 Sher. and Red. Neg., secs. 73 and 219.

In Watson Per. Inj., sec. 114, it is said: "The defendant will be liable if negligent, though it is the act of the child injured which is proximate to his own injuries, if such act is of a character naturally to be expected of a child and in accordance with the usual indiscretions and errors of judgment characteristic of immature years." It does not appear, and cannot be ascertained, how this injury occurred. The little sufferer, in his artless testimony, says he does not know; that (642)

he did not put his hand in, and he could not have been hurt if he did not, yet he was hurt. If, as is probable from his account, he thought to rest his tired little legs by leaning against the machine (as he said he did), and dropping asleep he unconsciously flung his arm over the top to rest himself or to keep from falling, or if (as defendant contends), with the curiosity and lack of judgment nature makes incident to nine years of age, he climbed upon the machine "to see the wheels go round," and touched them, this, there having been, as he testifies, no instruction nor warning from the employer as to the danger, would, upon the above authorities, justify the finding of the jury.

There is no exception presented as to contributory negligence, but it may not be inappropriate to recall that in *Ward v. Odell,* 126 N. C., 946, this Court said (approving the charge of the court below, who was the same judge who tried this cause), that if the immaturity and inexperience of a child of eleven years old was the cause of his exposing himself to danger, he was not guilty of contributory negligence, and added: "The factory superintendent put these children to work, knowing their immaturity of mind and body, and when one of them thus placed by him in places requiring constant watchfulness is injured, every sentiment of justice forbids that the corporation should rely on the plea of contributory negligence." There was a dissent in the case, but not upon this point.

The court below did not charge in this case that employing a child of nine years of age in such dangerous work, especially without instruction, was *per se* negligence. Whether it would be error to refuse to so charge is not before us and cannot be presented here, for the plaintiff is not appealing, and we can only pass upon exceptions to the charge, or refusal to charge, duly noted in apt time.

(643) But as it is a subject of growing importance to lawyers, as well as in public interest generally, it may be well to cite, as indicative of the conclusion to which the maturer judgment of mankind is tending, the age below which legislative construction in other States had made it illegal, and therefore negligence *per se* and irrebuttable, to employ any child in a factory, at the close of the year 1901. This list is taken from the State Laws in our library, and as to the foreign countries from the official publications of the U. S. government.

It is illegal to employ any child in a factory under *fifteen years of age* in *Florida, Rhode Island, Washington* and *Switzerland,* or under *fourteen years of age* in *Colorado, Connecticut, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michi-*

gan, Minnesota, Nebraska, New Hampshire, New York, Oklahoma, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming, New South Wales, New Zealand, Ontario, Queensland and *Sweden.* In *Manitoba* it is illegal to employ children in any factory under sixteen years of age; in *Ohio* it is illegal to employ in a factory girls under sixteen and boys under fifteen. In *Louisiana, New Jersey* and *Quebec* the age limit is, girls, fourteen; boys, twelve. In *Pennsylvania, France, Germany, Victoria* and *South Australia* the age limit is thirteen. In the following it is illegal to employ children in any factory under twelve years of age: *California, Maine, North Dakota, Virginia, Austria, Belgium, Denmark, Great Britain, Holland, Norway* and *Russia.* During the present year *Kentucky, Maryland* and perhaps others have enacted laws making under fourteen years the limit, and *Virginia* has adopted the twelve-year limit. In *Porto Rico* children under sixteen are prohibited by law from working in factories more than six hours in twenty-four, and in *Great Britain* children under fourteen years can work only seven hours per day, and all under twenty-one are prohibited night work.

(644)

"The sob of the child in its helplessness,
Curses deeper than the strong man in his wrath."

With this consensus of opinion in nearly the entire civilized world it might be that it would not have been error if the judge had held that it was negligence *per se* to put a child of the tender age of nine years to work on a dangerous machine which he had never seen before, without any instructions or warning, and to leave him there by himself without stopping the machine. But, however that may be, it certainly was not error to leave the question of negligence to the jury with the charge given in connection therewith, which was very favorable to the defendant.

No error.

MONTGOMERY, J., dissenting. The allegations of the complaint, substantially stated, are: First, that the defendant employed the plaintiff, a child of nine years of age, to work for it around a machine called a "sander," used for sandpapering lumber, and which consisted of a large iron frame "upon which were adjusted a system of drums covered with sandpaper, over which there revolved rapidly a system of iron rollers or cylinders when in operation, and which said rollers or cylinders were unguarded and uncovered, and exceedingly dangerous when operated by an experienced workman. Second, that the plaintiff was inexperienced in the use and ignorant of the dangerous

character of said machine, and that the defendant, knowing of his youth and inexperience and ignorance, employed the plaintiff and set him to assisting in sanding pieces of lumber with the machine. Third, that the defendant carelessly and negligently omitted to give the plaintiff instructions in relation to his work, or to caution him as to the dangers incident thereto.

There is an allegation of the complaint in these words: "That the plaintiff, by reason of his tender years, lacked the capacity to understand and appreciate the dangers incident to his
(645) employment, and was unfit, by reason of his youth and inexperience, to be set at such work, which the defendant well knew, but carelessly and negligently so engaged him in it." There was another allegation that the child was badly hurt while he was engaged in his work, and that the injury was permanent.

At the end of the plaintiff's testimony the following statement in the case on appeal appears: "The defendant here moved the court to dismiss the complaint under Laws 1897, ch. 106, for the reason that the defendant was not shown, in any aspect of the testimony, to have been negligent. During the discussion of this motion the court stated to the plaintiff's attorneys that unless it was negligence in the defendant to employ the plaintiff at all the plaintiff had not made out a case."

Upon a careful review of the evidence we are of the opinion that his Honor made no mistake in his conclusions upon the effect of the evidence, and yet he submitted the matter to the jury, and there was a verdict for the plaintiff.

That was error. The jury should have been instructed that there was no evidence tending to show that the defendant was negligent, as alleged in the complaint.

The following is the whole evidence in the case:

The plaintiff, being sworn, testified in his own behalf as follows:

"I was eleven years of age 1 August, 1901, and was hurt on Wednesday, 3 January, 1900. I went to work in the defendant's factory on 1 January, 1900, and had never before worked in any factory. My father was not at home on Monday, Tuesday nor Wednesday, the day that I was hurt. I went to the factory on Monday morning to get employment. I asked Mr. Redding if I could get work there, and he said yes. Mr. Grissom, the foreman of the factory, said he would give me twenty-five cents per day, and I hired to him, and he put me to 'tailing a moulder and pulling sawdust to the furnace.' I tailed
(646) the moulder the first day, tailed a planer some the next day, and tailed the moulder and planer some the day I

went to work on the sander. I went to work on the sander about 1 o'clock. A sander is a machine with rollers and sandpaper on the rollers, and is run by belts. The machine was running when I went to it. Ellison was running the machine and stood at its front end, and I stood at the rear or back end. Ellison told me to go and take the planks as they came out of the machine. I worked there an hour and a half taking the planks out of the machine before I got hurt. The planks were one foot wide and one and a half feet long, and about an inch thick. I had never seen a sander before. The planks being sanded were safe doors. When I got hurt Ellison had left the machine to go after more planks. This was the only time he left the machine. He did not stop the machine. When I took a plank out I was standing where I always stood. While Ellison was gone I leaned up against the machine and laid my hand on it, and it was caught, and I hollered. Somebody came and raised up the machine and took my hand out. My hand was mashed up. Nobody explained the machine or warned me where the dangerous places were. I hired for three weeks, and told the foreman I was a schoolboy. I was taken to Dr. Staunton, and my hand bled very much. My arm rose about a week after I was hurt. I had never before been in a factory to stay any time, but had been in furniture factories several times, but had not examined the machines. My hand was mashed between the rollers."

On cross-examination plaintiff testifies:

"Mr. Redding did not tell me about the machine. I don't remember whether the machine was higher than my head. I was then four feet high. A sander is higher than a moulder. I could stand on the floor and see on top of the sander, and could see inside of the machine and see the rollers with the sandpaper on them running. I don't know whether I could stand on the floor and reach over the top of the sander (647) and put my hand down on the sandpaper. If I were to stand on the floor and lean up against the back of the machine it would be safe, and I would not touch the machinery and it would not hurt me. I was not hurt by the cogwheels on the side of the machine. I did not climb up on the machine. When standing on the floor I could lean up against the machine and could not touch the wheels, but could see the wheels running. I do not know how my hand touched the wheel. I was then four feet tall, and the plank came out of the end of the machine, about midway between the bottom and top of the machine. The end of the machine was covered up. The only place open was where the plank came out. I don't know where I put my hand,

but don't think it was where the timber came out. There was no timber coming out when I was hurt. I was not expected to go up and touch the machine. I knew it would hurt me. I knew it would hurt to put my hand on the moving wheels. I could see the sandpaper running. I did not have to put my hand on the machine in order to take the plank away. The plank might fall on the floor, and I could then pick it up. When I see a wheel turning over I know it would hurt. I would not have been hurt if I had stood off from the machine, and that was my proper place to stand. The timber was light. I would take two at a time and put them on the truck. It was better to wait and take two at a time. I don't remember what I leaned against the machine for. I could see if I put my hand between the rollers it would get hurt. My hand could not get in the machine if I had not put it in there. I don't know how long it was after I took out the last plank before I was hurt. It was about two minutes, I reckon. I was not hurt while taking out plank and putting it on the truck. I don't remember what I leaned against the machine for; just never thought of
(648) myself, I reckon, and leant up against it. It was a pretty dangerous place where I was working, as the timber would come out and push you backwards if you did not look. I got pushed against the truck that way one time. The distance from the sander to the wall was as far as from me to you (about twelve or fifteen feet), and about the same distance from the sander to any other machine. The sandpaper on the rollers was going round as fast as it could. I could see if I put my hand between the rollers it would get hurt. If I had stood off where I ought to have stood I would not have gotten my hand in. I don't think I put it in, but it would not have got in unless I put it in. It was better to stand away from the machine to take the plank out."

On redirect examination the plaintiff testified:

"The plank was nearly the same length and width. One roller ran one way and another another. One roller was over the top of the other. I don't remember which roller had the sandpaper on it. I was standing on my feet when I got hurt. I did not get off of the floor. I am five feet high now. I don't know whether I have grown a foot or not.

"E. H. Fitzgerald, father of the plaintiff, being sworn, testified for the plaintiff, in substance, that he lived in High Point; that he was father of the plaintiff; that he worked on a farm in the country; that he was not in town the day the plaintiff hired to defendant; and over defendant's objection testified that he did not hire the plaintiff to the defendant, and that he knew

nothing about it. Defendant's objection overruled; exception. That when he got back the plaintiff was in bed with his arm dressed; that the doctor came to see him every day for a week or ten days; that there was an abscess on his arm from which the plaintiff suffered; that plaintiff remained in bed till the first week in March.

"On cross-examination witness testified that the doctor's bill was paid by the defendant.

"H. B. Crouch, witness for the plaintiff, being duly sworn, testified that he was working for defendant the (649) day the plaintiff was hurt, and that when he got to the machine the plaintiff had his hand out of the machine; that when he first looked round on hearing the plaintiff holler Albion Sheperd was getting the boy out. I have worked at sanders. The bed or frame of this sander was 36 inches wide and 5 feet 9 inches long, and 3 feet and 10 inches high. There were three sand drums in the machine, and the plank passes over the sand drum, and the rollers above feed the plank through. There are six or eight rollers, which are about three inches in diameter. It is 10 inches from where the plank comes out at the end to the top of the machine. The sand drums run towards the front and the rollers run towards the back of the machine. From the place where the planks come out to the floor is three feet. If the plaintiff stuck his hand far enough it would reach the sand drum.

"On cross-examination the witness testified: The machine is 36 inches wide, 46 inches high and 5 feet 9 inches long. If the plaintiff was only 4 feet high at the time he was injured he could not stand on the floor and reach over and touch the rollers. If you look over the top of the machine you can see the rollers turning over, all of them, if no timber was in the machine. I think the plaintiff would have had to get up on the machine to get to the rollers. Don't think he could stand on the floor and touch any roller that would hurt him. I don't think the plaintiff could stand on the floor and look into the machine. There is no danger in leaning up against this machine. It is about one foot from where plank comes out of the machine to the first roller, and this roller is ten inches from the top of the machine, and when the plaintiff was standing on the floor he would have to reach over the top of the machine and towards the front one foot and then down towards the floor ten inches before the roller would be touched. It does not look to me like he could have got his hand in without (650) climbing up. The machine has an iron casting all around it, from bottom to top, and he could not have got his hand in

the place where the timber comes out. The sander was ten or fifteen feet from any other machine. All the wheels inside can be seen by looking over the top of the machine. There was no danger about this machine unless you put your hand in it. Boys are generally employed to do such work as the plaintiff was doing, and a boy the size and age of the plaintiff could do it in safety. There is an apron six or eight inches wide projecting out across the end of the machine at a point about ten inches from the top, so that one could not lean directly up against the casting on account of this apron. The proper place to stand to tail this machine is about two feet from the back. There is no danger from belts in working near this machine as they are at the front end and run at an angle of forty-five degrees or more.

"On redirect examination witness testified: Boys are employed to do this work because they are cheaper than men.

"Recross-examination: If the plaintiff was as much as four and a half feet high when hurt he could not have stood on the floor and touched a single roller that would have hurt his hand. The rollers next to back of machine do not revolve when there is no timber going through, and I do not think the plaintiff could have been hurt by a feed roller.

"Re-redirect examination: If the plaintiff looked over the top he could see the feed roller running. The sand drums run all the time. They are about eighteen inches in diameter.

"Plaintiff rests."

From the evidence it is clear that the defendant had taken every precaution to encase the machinery, and thereby to render it as safe as could reasonably be done to those who were employed about it; and that any danger connected with its operation was fully known and appreciated by the plaintiff. No instruction, therefore, was necessary to be given him. So
(651) far as the whole evidence goes the defendant was not negligent, either in the character of the machinery used, in the provision made for protection against harm to its employees, or in its failure to instruct the plaintiff as to any danger connected with his work.

There was testimony given by one of the employees of the defendant that little boys were employed to do the work which the plaintiff was engaged in when he was hurt because their labor was cheaper than that of men. If the writer of this opinion had the power to correct that evil practice and bad example it would be corrected at once. The employment of children of the age of this plaintiff by manufacturing establishments is revolting to the sensibilities of all generous minds, and

the personal injuries which often come to these little sufferers while engaged in such work arouse the sympathies and also the indignation of great numbers of our people, of those who have children especially. If the writer was a member of the legislative body his vote would be to prevent, by stringent enactment, the employment of children under twelve years of age in connection with dangerous machinery. But it is the function of the judiciary—the duty of the Court—to expound the laws, not to make them. According to the testimony the plaintiff, at the age of nine years, and employed because his labor was cheaper than that of a man, has been maimed for life, and yet we as a Court, in my opinion, can grant him no relief under the laws of the Commonwealth.

FURCHES, C. J. I concur in the dissenting opinion.

Cited: Rolin v. Tobacco Co., 141 N. C., 305; *Leathers v. Tobacco Co.,* 144 N. C., 350.

(652)

LEWIS v. CLYDE STEAMSHIP COMPANY.

(Filed 20 December, 1902.)

1. REMOVAL OF CAUSES—*Petition—Affidavit—Citizenship—Corporations—Pleadings.*

   A petition for the removal of an action from a State to a Federal Court on account of a diversity of citizenship, which fails to specifically state that the defendant is a corporation existing under the laws of another State, naming the State, is defective.

2. REMOVAL OF CAUSES—*Petition—Filing—Time—Time to Plead—Pleadings.*

   A petition for the removal of a cause from a State to a Federal Court must be filed within the time fixed by the Federal statute, though the time for filing pleadings in the State Court is extended.

3. EVIDENCE—*Sufficiency—Salvage—Admiralty—Contracts—Title.*

   In this action to recover salvage for saving a vessel, the evidence is sufficient to be submitted to the jury as to whether the defendant contracted to pay salvage and had any substantial interest in the vessel.

4. CONTRACTS — *Ultra Vires — Corporations—Pleadings—Pleas at Law—Confession and Avoidance.*

   In an action to recover salvage for saving a vessel, a defense

that the contract is *ultra vires* is in the nature of a plea of confession and avoidance.

FURCHES, C. J., and MONTGOMERY, J., dissenting.

ACTION by A. I. Lewis against the Clyde Steamship Company, heard by *Judge F. D. Winston* and a jury, at March Term, 1902, of CARTERET. From a judgment for the plaintiff the defendant appealed.

A. D. Ward and *D. L. Ward* for the plaintiff.
Rountree & Carr for the defendant.

(653) DOUGLAS, J. This was an action to recover salvage or compensation for saving a vessel called the "City of Jacksonville," which was stranded on Whalebone Inmet Beach. The summons in this case was issued returnable to the March Term, 1901, of the Superior Court of Carteret County, and as no complaint was filed at that term an entry was made as follows: "Time to file pleadings." On 31 July, 1901, the plaintiff filed his verified complaint, demanding judgment for $2,444.74, and on 17 August, 1901, the defendant filed its petition and bond for the removal of said cause to the U. S. Circuit Court, and served notice on the plaintiff that at the next term of the Superior Court of Carteret County a motion would be made to have said cause removed. At the September Term, 1901, of said court, the defendant made its motion to have said cause removed, which motion was refused. The defendant filed its exception.

The motion was properly refused on two grounds, either of which would have been sufficient. The petition states that the defendant petitioner "was, at the time of the commencement of this suit, and still is, a citizen of the State of Delaware, and of no other State, and a nonresident of the State of North Carolina." It is well settled that a petition for removal must, in addition to the allegation that the defendant is a nonresident of the State of North Carolina, specifically state that the defendant is a corporation existing under the laws of another State, giving the name of the State by which it was created. *Springs v. R. R.*, 130 N. C., 186; *Thompson v. R. R., ibid.*, 140; *Ins. Co. v. French*, 18 How., 404; *Mullen v. Dows*, 94 U. S., 444; *Pennsylvania v. Quicksilver Co.*, 10 Wall., 553. Moreover, the petition was not filed within the time limited by the federal statutes of removal. *Howard v. R. R.*, 122 N. C., 944. It is contended that the defendant was not required to file its petition for removal until after the filing of the complaint,
(654) inasmuch as the right of removal would be governed by the sum demanded. This does not alter the effect of the

statute. If the complaint had not been filed within the first three days of the term to which it was returnable the defendant could have moved to dismiss. If it failed to do so and, on the contrary, consented to an extension of time for the filing of pleadings beyond the return term, it lost its right of removal. The answer alleges that the defendant was misled by the statements of the plaintiff's counsel as to the sum that would be demanded in the complaint, but we cannot find any proof of this allegation. In our view of the case it resolves itself almost entirely into an issue of fact. The plaintiff alleges that he was employed by defendant company, acting through its duly constituted officers, that he faithfully performed the services required of him, and earned the compensation demanded. He testified, among other things, that he went to the general office of the defendant in New York City where he made the contract declared on, with men whom he knew to be officers of the company. He further testified that the vessel in question wore the Clyde colors; that there was a large C on the flag fastened to the flag-staff; that the life-preservers, buckets, bedclothes, tableware, boats and oars were all marked C. S. C. He also said he had some correspondence with the Clyde Steamship Company, the defendant in this action. This was at least some evidence tending to prove that the plaintiff made a contract with the defendant as alleged, and that the defendant had some substantial interest in the vessel. The defendant denies these allegations in its answer, but fails to offer any proof, except two papers from the records in the U. S. Custom House in New York, tending to show that the vessel belonged to the De Bary Bays Merchants' Line of New York, of which Marshall Clyde was president. The credibility and weight of this evidence were for the determination of the jury, who found that the plaintiff did contract with the defendant to render the services set out in the complaint, and that the defendant (655) was indebted to the plaintiff, on account of such services, in the sum of $2,000. They also found that the defendant did not own the vessel at that time and that the contract was not in writing. Under the view taken of the case in the court below, in which we concur, these latter issues do not seem to be material.

The defendant's counsel contend that the contract sued on was *ultra vires* of the defendant. Even if the evidence had tended to sustain this contention we think that such a defense is in the nature of confession and avoidance. There are various exceptions to the evidence, as well as to the charge of the court,

none of which can be sustained. In the absence of essential error the judgment is

Affirmed.

FURCHES, C. J., dissenting. The defendant offered evidence that it was not the owner of the vessel called the "City of Jacksonville," but that it belonged to the De Bays Merchants' Line of New York, and the jury found that the defendant was not the owner of the "City of Jacksonville." It also appears that the defendant never had any benefit from the plaintiff's services on said vessel. This being so the plaintiff could only recover upon his contract, if he could recover at all. He could not recover on the doctrine of *quantum meruit,* as he got no benefit. It is admitted that the defendant is a corporation, and as such could only contract by deed through its agent, and they could only make a contract, which would bind the defendant, when made within the line and scope of the business of the corporation. The officers could not make a contract with the plaintiff to repair a vessel which the defendant company did not own and had no interest in, that would be binding upon the defendant company. Such a contract, if made (and this is denied), was *ultra vires,* and had no binding force or effect on the defend-
(656) ant. This is shown from the facts and testimony in the case, and it is found by the jury that the defendant was not the owner of the "City of Jacksonville," the vessel wrecked, and received no benefit from the plaintiff's labor. And the Court calls this a plea in confession and avoidance, and a matter of fact for the jury. This is new to me, that *ultra vires* is a question of fact to be found by the jury. The evidence and findings that the defendant was not the owner of the vessel and never received any benefit from the services of the plaintiff, I think, showed the *ultra vires* of the contract (if ever made), and presented a question of law for the court and not for the jury. The plaintiff makes out his case—must recover upon his right of action; and if he made out a case for the defendant that was sufficient; the defendant need not show anything.

MONTGOMERY, J., concurs in the dissenting opinion.

Cited: S. c., 132 N. C., 904.

(657)

DEBNAM v. CHITTY.

(Filed 20 December, 1902.)

1. STATUTES—*Legislative Journals—Yeas and Nays—Presumptions—Taxation—The Constitution, Art. II, Sec.* 14.

The constitutional provision that the yeas and nays on the second and third readings of a bill to raise money by taxation or by borrowing shall be entered on the journal is mandatory, and the failure to record those voting nay on such a bill renders the act void, and if no one votes in the negative, the journal should so state.

2. ESTOPPEL—*Bonds—Recitals.*

The recitals in bonds that they are issued in compliance with all the requirements of the Constitution and laws of the State do not estop those issuing the bonds from contesting their legality.

3. FORMER ADJUDICATION—*Judgment—Bonds.*

A judgment in an action that bonds are not illegal because of irregularity in the election authorizing the same does not estop those issuing the bonds from contesting the validity thereof in a subsequent action, for the reason that the act authorizing the bonds was not passed in accordance with the requirements of the Constitution.

4. FORMER ADJUDICATION—*Bonds—Judgments—Coupons.*

A judgment in a Federal Court establishing the validity of the coupons to certain bonds does not estop those issuing the bonds from denying the validity of the bonds.

FURCHES, C. J., dissenting; CLARK, J., dissenting in part.

ACTION by T. H. Debnam against J. C. Chitty, tax collector in Murfreesboro Township, Hertford County, heard by *Judge George A. Jones,* at October Term, 1902, of HERTFORD.

This is an action to declare invalid certain bonds issued by Murfreesboro Township, in Hertford County, and to enjoin the payment thereof. From a judgment for the plaintiff the defendant appealed.

Winborne & Lawrence for the plaintiff. (675)

No counsel for the defendant.

DOUGLAS, J. As this case stands upon demurrer, all (676) the allegations of fact contained in the complaint must be taken as true for the purposes of this appeal. However, we have not been satisfied with this legal presumption, but have personally examined the original Journal of the House of Representatives, and find that neither act was passed in accordance

with the mandatory provisions of the Constitution. We will give the entry on one reading as an example. We find on one page of the Journal the following *written* entry:

"H. B. 948, a bill to incorporate the Murfreesboro Railroad Company, passes its third reading by the following vote, and is ordered to be sent to the Senate without engrossment." On the following page is a *printed* blank which, with the entries in ink, reads as follows:

"H. B. 948; S. B. ------ Messrs. Speaker (here follows the printed names of *all* the members of the House, with a simple dash (—) opposite ninety-four names). Ayes, 94; nays, ----; total, ----."

The only written entries are the figures "948" after the capital letters "H. B.," the dashes opposite the names, and the figures "94" after the word "ayes." The dotted lines after the letters "H. B." and "S. B.," and after the words "ayes" and "nays" and "total," are all printed. There is not the scratch of a pen after the words "nays" and "total." From this it appears that ninety-four members, whose names are marked, voted in the affirmative; while there is no statement as to those voting in the negative. If there were any members voting in the negative their names should have been entered upon the Journal, while if there were none so voting that fact should be *affirmatively* stated. To say that the mere failure to fill out a printed blank is an affirmative declaration that there were no nays is a proposition that does not commend itself either to our views of language or of law. If it were affirmatively stated that
(677) there were no nays, or that only 94 members voted, the case would be different. Again, if the Journal gave the names of 120 members voting in the affirmative, we would take judicial cognizance of the fact that there were only 120 members of the House, and that therefore there could be no nays; but there are 26 members on the third reading and 50 members on the second reading who are not accounted for. We may know as a matter of fact that members are frequently absent, but there is no such presumption. If there were any presumption at all it would seem to be that the members of the Legislature were present during its sessions in the performance of the responsible duties for which they were elected. Aside from this we can only repeat what this Court has so often said, that where the names of the members voting in the negative are not given it must *affirmatively* appear on the Journal that there were none so voting. *Smathers v. Commissioners,* 125 N. C., 480-486; *Commissioners v. DeRossett,* 129 N. C., 279. Section 14 of Article II of the Constitution of this State 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 reading of the bill shall have been entered on the Journal.*" The italics are ours. This Court has uniformly held that these provisions of the Constitution are *mandatory,* and that any act of the Legislature passed in violation thereof is, at least to the extent of such repugnance, absolutely void. *Bank v. Commissioners,* 119 N. C., 214; 34 L. R. A., 487; *Commissioners v. Snuggs,* 121 N. C., 394; 39 L. R. A., 439; *Charlotte v. Shepard,* (678) 120 N. C., 411, and 122 N. C., 602; *Rodman v. Washington,* 122 N. C., 39; *Commissioners v. Call,* 123 N. C., 308; 44 L. R. A., 252; *Commissioners v. Payne,* 123 N. C., 432; *McGuire v. Williams,* 123 N. C., 349; *Smathers v. Commissioners,* 125 N. C., 480; *Glenn v. Wray,* 126 N. C., 730; *Commissioners v. DeRossett,* 129 N. C., 275; *Black v. Commissioners,* 129 N. C., 121; *Hooker v. Greenville,* 130 N. C., 472. In *McGuire v. Williams, supra,* this Court says: "It must be considered a settled rule that the provisions of the Constitution in relation to municipal indebtedness and taxation are mandatory, and will be strictly enforced by this Court. So great is their effect that any act repugnant thereto, at least to the extent of that repugnance, will be declared null and void *ab initio,* not only without legal effect, but without legal existence. It makes no difference when or how such unconstitutionality appears to us."

In *Commissioners v. Call,* 123 N. C., 308, this Court says: "An act of the Legislature passed in violation of the Constitution of the State, or in disregard of its mandatory provisions, is, to the extent of such repugnance, absolutely void; and all bonds issued thereunder bear the brand of illegality stamped upon their face by the hand of the law."

In *Norton v. Shelby County,* 118 U. S., 425, the Supreme Court of the United States says: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Under these authorities we are compelled to hold that the bonds in question, having been issued in clear violation of constitutional prohibi-

tions, are null and void, and have been so *ab initio.* The defendant contends that the people of the township issuing the bonds are bound by the recitals therein to the effect that they were issued "in compliance with all the requirements of
(679) the Constitution and laws of the State of North Carolina." This is not a recital of fact but the mere statement of a legal conclusion. This point has been directly decided both by this Court and the Supreme Court of the United States. We have repeatedly held that all the constitutional requirements are *mandatory,* and not directory, and that where there is no lawful power to issue bonds such want of power can neither be cured by recitals nor eliminated by estoppels. *Commissioners v. DeRossett, supra; Commissioners v. Call, supra.* In *Dixon County v. Field,* 111 U. S., 83, 92, it was held that the estoppel arising from recitals in the face of the bonds never extended to nor covered matters of law, and could arise only "upon matters of fact which the corporate officers had authority to determine and certify." In *County of Davies v. Huidekoper,* 98 U. S., 98, 100, the Court says: "There must be indeed power which, if formally and duly exercised, will bind the county or town. No *bona fides* can dispense with this, and no recital can excuse it." In *U. S. v. Macon County Court,* 99 U. S., 582, the Court says: "The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not been unfrequently *gross carelessness* on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond the municipality is not bound." The rule has been clearly laid down in the leading case of *Anthony v. Jasper,* 101 U. S., 693, where *Chief Justice Waite* says: "Dealers in municipal bonds are charged with notice of the laws of the State granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality, the *bona fide* holder is
(680) protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created."

The defendant contends that "the plaintiff is estopped from denying the validity of said bonds and coupons by the judgment in the controversy of W. T. Brown against the Board of County Commissioners of Hertford County." That case was submitted upon an agreed state of facts in a controversy without action, and the validity of the act under section 14 of Article II of the

Constitution was in no way involved. Not only was it not decided, but it was not even alluded to in any stage of the proceedings. Therefore it cannot operate as an estoppel under the uniform decisions of this Court. In *Glenn v. Wray,* 126 N. C., 730, this Court says: "The plaintiffs are not estopped by the decision in *Claybrook v. Commissioners,* 117 N. C., 456. That was an action to impeach the validity of the bonds now in question, but upon the ground of irregularity in the election, and that alone. The decision therein is conclusive that the bonds are not invalid on that ground. The present action is to attack their validity upon the entirely different ground that the act authorizing an election was not passed in the mode required by the Constitution. This was not within the scope of the litigation in *Claybrook v. Commissioners,* and has not been passed upon. Hence it is not *res judicata.* . . . Of course the payment of interest by the commissioners would be no estoppel. *Commissioners v. Payne,* 123 N. C., 432, and cases cited at page 489." In *Slocumb v. Fayetteville,* 125 N. C., 362, *Justice Furches,* speaking for the Court, says: "The other important question is this: It is not alleged or denied in either the complaint or answer whether the acts, chapter 18 and chapter 118, were passed and ratified as required by Article II, section 14, of the Constitution of this State, or not. This must have been done to make the bonds valid. And the determination of *this case* will not prevent the question from hereafter being presented; and while the judgment in this case might (681) work an estoppel, we do not say it will as to the plaintiff Slocumb; it certainly would not as to the other persons, not parties to this action. . . . We therefore affirm the judgment appealed from. But if these acts were not passed according to the constitutional provisions cited above, parties taking the bonds may find no protection in this judgment."

The same caution is reiterated in *Black v. Commissioners,* 129 N. C., 121, on page 128.

It is contended that the plaintiff is estopped by the judgments in the United States Circuit Court. In no event could these judgments operate as an estoppel in any degree beyond the coupons then actually due and embraced in the judgments. *Nesbitt v. Riverside District,* 144 U. S., 60. As to such coupons, a majority of this Court think they are *res judicata.*

The courts of this State will never sanction the repudiation of a lawful debt; but we are here to declare the law and not to make it. If any hardship results we can only deplore what we are unable to remedy. The Constitution of this State is plenary notice to the world of its organic law. There can be no *bona*

fide holders of unconstitutional obligations, nor can ignorance of public statutes and legislative journals be deemed otherwise than willful or negligent. The Journals are published for the information of the public, and are widely distributed and easily accessible, fully as much so as the public records of a county. Surely no one would be heard to say that he was the *bona fide* owner of a piece of land simply because he held a deed thereto, when an inspection of the records would show that his grantor had no power to convey.

We are frequently reminded of the hardships arising from declaring bonds invalid after they have been sold and paid for. We see no way of deciding upon their validity before the
(682) question is presented to us, and this question can be, and frequently has been, presented and decided before the issuing of the bonds. *Charlotte v. Shepard,* 120 N. C., 411, and *Commissioners v. DeRossett,* 129 N. C., 275. If parties prefer to take the risk of buying the bonds before the determination as to their legality, they cannot complain of the consequences.

The decisions of this Court upon these matters have been uniform, and were foreshadowed by those upon kindred subjects.

In *S. v. Patterson,* 98 N. C., 660, it was held, quoting the syllabus: "The provisions of the Constitution, in respect to the forms and methods to be observed by the General Assembly in the enactment of laws, are mandatory."

In the opinion the Court says, on pages 262 and 264: "The answer to these and like questions must be, that requirements of the Constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such act cannot be complete—such thing is not effectual—until done in the way and manner so prescribed. . . .

"The purpose of thus prescribing an enacting clause—'the style of the acts'—is to establish the act—to give it permanence, uniformity and certainty—to identify the act of legislation as of the General Assembly, to afford evidence of its legislative, statutory nature, and to secure uniformity of identification, and thus prevent inadvertence, possible mistake and fraud. Such purpose is important of itself, and as it is of the Constitution, a due observance of it is essential. The manner of the enactment of a statute is of its substance. This is so in the nature of the matter as well as because the Constitution makes
(683) it so." In *Commissioners v. Coler,* 180 U. S., 506, 517, the Court, after quoting from *Patterson's case,* refers to

the subsequent decisions of this Court as follows: "After the decision in *S. v. Patterson,* rendered as above stated before the bonds in suit were issued, it might have been anticipated that the same Court would hold as they did in the subsequent cases above cited, that the entering of the yea and nay vote on the second and third readings of an act of the class mentioned in section 14 of Article II of the State Constitution was a condition precedent that could not be dispensed with under any circumstances."

The bonds now in question are dated 19 September, 1887; but it appears from the record that they were not actually issued until after the determination of the Brown suit in 1888. Therefore they were issued after the decision in *Patterson's case,* which was determined in 1887. The same principle was decided in practical effect in *Galloway v. R. R.,* 63 N. C., 147, determined by this Court at its January Term, 1869, less than one year after the adoption of the Constitution. There an act directing the State Treasurer to issue certain bonds of the State to the Chatham Railroad Company was declared *void* on the ground that the General Assembly had no power to pass it without submitting the subject to a vote of the people. In the opinion of the Court, delivered by *Pearson, C. J.,* among the constitutional provisions held to be mandatory are expressly mentioned those of section 14, Article II, as far as they applied to the State, then the party in interest. If the provisions applying to the State are mandatory, those in the same section applying to counties and cities must be equally so. The following is an extract, beginning on page 152 of the opinion: "In the second clause the two exceptions have the effect to make it read, 'Shall have no power to give or lend the credit of the State *in any case whatever, except,'* etc., 'unless the subject be submitted to a vote of the people'; so the intention to restrict the (684) power of the General Assembly in regard to increasing the public debt in any mode or manner is as strongly expressed as the English language can do it. In matters of construction the Court is not to confine itself to the particular section, but is to consider the entire instrument in order to find the general purpose and the object arrived at.

"'To maintain the honor and good faith of the State untarnished the public debt regularly contracted before and since the rebellion shall be regarded as inviolable, and never to be questioned.' Article I, section 6. 'No law shall be passed to raise money on the credit of the State, directly or indirectly, for the payment of any debt, etc., unless the bill is read three times on three different days, and *unless the yeas and nays on the*

second and third readings of the bill shall have been entered on the Journal.' Article II, section 14. (The italics are ours.) 'The General Assembly shall,' etc., Article V, section 4. Here we have a declaration of a purpose to maintain the honor of the State and pay off the public debt—a rebuke of hasty legislation in reference to raising money and pledging the faith of the State—and an announcement that although the debt is so large that it cannot be paid off for years, yet the interest must be paid promptly and a sinking fund provided for the discharge of the principal. This purpose could not be effected without putting a stop to the increase of the public debt by restricting the power of the Legislature." In that case it was not alleged that the yeas and nays were not entered upon the Journal, and hence that question was not directly at issue; but the inclusion of section 14, Article II, among the mandatory provisions of the Constitution is a clear intimation of what the Court would have decided had the question been involved.

In *Scarborough v. Robinson,* 81 N. C., 409, the Court, at the close of its opinion, expressly disclaims any intention of
(685) passing upon the effect of Article II, section 14, of the Constitution, as it was not before them. The uniformity, in letter and spirit, of the decisions of this Court through so long a series of years has created a settled rule of law which we deem it our duty to follow.

The judgment of the court below is

Modified and affirmed.

FURCHES, C. J., dissenting. The purpose of this action is to perpetually enjoin the enforcement and collection of $25,000 in bonds issued by the township of Murfreesboro, in aid of the construction of a railroad in said township. The action is not only to enjoin the payment of the outstanding bonds and coupons not yet sued on, but also to enjoin the collection of two judgments recovered in the U. S. Circuit Court for the Eastern District of North Carolina on a part of said coupons, which judgments have not been paid. The judgment of the court below sustained the prayer of the plaintiff and granted the injunction, including the judgments of the U. S. Court, as well as the outstanding bonds and coupons. And the opinion of this Court affirms the judgment of the court below. I dissent from that part of the opinion which enjoins the enforcement and collection of the two judgments mentioned.

This opinion coming in during the last days of the Court, I have not the time to discuss the grounds of my objection, and will have to content myself with a simple statement of the same.

The action presents a rather strange state of facts. A man by the name of Brown, who sued for himself and all other taxpayers (as the present plaintiff does) before the bonds were issued, in which he insisted that the commissioners had not the right to issue said bonds, and it was so held in the court below. But the commissioners appealed to this Court (686) (*Brown v. Commissioners,* 100 N. C., 92), and this Court reversed the judgment of the court below, holding that the commissioners had the right to issue the bonds, and they were issued. After they were issued and sold, and the defendants got the money for them, the plaintiff, another taxpayer, brings this action to enjoin their collection, and the defendants demurred to the plaintiff's complaint, and made no defense in this Court by brief or argument.

I do not think the act, intended to authorize the issue of these bonds, was passed according to the constitutional requirement, for the reasons given and the authorities cited in the opinion of the Court; though I do not think that *Bank v. Commissioners,* 119 N. C., 214; 34 L. R. A., 487, cited in the opinion of the Court, is authority for that position. That case came to this Court by appeal, in which a new trial was given the plaintiff; and on the second trial the constitutional question was presented. There had been no final judgment, and the same case was still pending in the same Court. But there are many other authorities cited in the opinion of the Court which do sustain that position. Neither do I think the action of Brown, in which it was decided that the commissioners had the right to issue the bonds, is an estoppel upon the plaintiff in this action for two reasons: The first is, that the constitutionality of the act of the Legislature intended to authorize their issue is not presented and passed upon in that action, and for that reason the plaintiff is not estopped—it is not *res judicata.* The authorities sustaining this position are collected and cited in the opinion of the Court. And he is not estopped for the further reason that the facts upon which the judgment of the Court was based in the case of *Brown v. Commissioners* were agreed facts, which could only bind the parties agreeing to them. *Black v. Commissioners,* 129 N. C., 121. But besides this general rule as to agreed facts, it was expressly agreed in that case they should not be binding on any one, as follows: "None (687) of the admissions herein contained are in anywise to affect either party or to be regarded as made, except for the purpose of the submission of this controversy." Taking this special agreement in connection with the general rule that agreed facts shall not constitute an estoppel, I cannot doubt the

correctness of the view taken in the opinion of the Court that the suit of Brown is not an estoppel.

But as to the judgments of the Circuit Court of the United States (and I place no stress upon the fact that they are judgments of a Federal Court) I differ from the opinion of the Court. The repealing act of the Legislature of 1895 that plaintiff claims abolished the Murfreesboro Township, was pleaded in the Federal Court, and expressly passed upon by the following issue and response of the jury: "Has Murfreesboro Township been abolished? Ans.: The corporation has been, but the right to tax the territory exists." And another issue submitted is as follows: "Were the bonds legally issued and delivered? Ans.: Issued prematurely; but it does not affect plaintiff." So it would seem that both these questions have been submitted and passed upon, though the opinion of the Court seems to lay stress upon the fact that neither of these questions had been passed upon. And thereupon it bases an argument in which it is contended that there is no estoppel. The Court contends that because the act of 1887, upon which the commissioners undertook to issue these bonds, was unconstitutional for that purpose it is void for all purposes. I thought it was general learning that this was not so, and it was so expressly held by this Court in the case of *Rodman v. Commissioners,* 122 N. C., 39. There the Legislature had created a public school district, in which it had provided for levying a special tax to support the school. But, like the act under consideration, the ayes and nays were not recorded as the Constitution requires they should be (688) to authorize the levy of the special tax. And this Court held the act was constitutional as to the establishment of the school district, but unconstitutional so far as it undertook to authorize the levy of a special tax to support the school.

But if there was service on the defendants the Court had jurisdiction, both of the defendants and of the subject-matter, and the judgments were regular and cannot be attacked in this collateral way. *Harrison v. Hargrove,* 120 N. C., 96; 58 Am. St., 781. In that case it was held that where the Court found as a fact that service had been made the judgment could not be collaterally attacked. And in the first action, upon which the judgment in the Federal Court was taken, the defendants appeared and put in an answer; and in the others, where the defendants did not appear, the Court found as a fact and adjudged that the defendants had been duly served with process. And, as I understand the Court, the only ground upon which it puts its opinion that the defendants had not been properly served is that the act of 1895 abolished the township. But that question

was raised by the answer, submitted to the *jury* by the court, and found against the defendants, upon which finding judgment was given against the defendants, and they *did not appeal;* and it seems to me that should be the end of that matter.

The three pages of the opinion seem to be devoted to a general discussion of the subject of repudiation. And the Court, before it commences this discussion, says it might close but so much had been said about the decisions of this Court repudiating obligations it proceeds to moralize upon the subject of repudiation. But it seems to me that these three pages were really intended as an illumination to enable the Court to escape from the darkness produced by the *moral,* if not legal, repudiation of an honest debt.

I do not concur in the opinion of the Court as to enjoining the judgments mentioned above. (689)

This was written as a dissenting opinion to the opinion of the Court as it was originally written.

CLARK, J., dissenting in part. Chapter 365, Laws 1887, authorized Murfreesboro Township to subscribe $25,000 to the Murfreesboro Railroad Company, and provided for an election to be held in said township for submitting the question of subscription to the voters therein. The election was regularly held and, the subscription being adjudged carried, the bonds were issued. A tax having been levied to pay interest on said bonds, this action is brought by a taxpayer of said township to restrain the collection thereof on the ground that the act of the Legislature was not passed in the mode required by Article II, section 14, of the Constitution. The plaintiff in his brief admits that the bill was properly passed in the Senate, but contends that there is a defect in the second and third reading in the House, in that the nays were not entered, and it does not appear that there were no nays. That this must affirmatively appear is true, for the constitutional requirement is mandatory. *Smathers v. Commissioners,* 125 N. C., at p. 486; *Commissioners v. DeRossett,* 129 N. C., 279.

There being some doubt as to the accuracy of the printed journals, a certified transcript of the passage of this act from the manuscript journals has been made a part of the record, from which it appears as follows:

"House Journal, 41st day.

"H. B. 948. Passes its second reading, ayes, 70" (names being entered); "noes, none."

"House Journal, 46th day.

"H. B. 948. Passed third reading by following vote: (690) Ayes, 94" (giving names); "nays, ____"

The expression "Passes by the *following vote,* ayes, 94" (giving names); "Nays, ____," is as express and intelligent a declaration that there were no negative votes as if the word "none" had been used.

"Nays, ____," after the words, "Passes by following vote," and giving those voting aye, can convey no other meaning. Is it not hypocritical to say that "nays, ____," did not mean that there were no names in the negative.

The Constitution requires that the "ayes" and "noes" shall be entered on the journal, and it cannot be seen that this requirement has been complied with when it does not affirmatively appear that there were no "noes"; but that fact does sufficiently and clearly appear from above transcript of the Journal of the House. It is but just to the plaintiff to say that when he brought this action and filed his complaint he had only before him the printed journals, which omit the words (on the third reading in the House) "nays, ____," which do appear in the manuscript journal.

The plaintiff further contends, however, that the bill was not legally passed, in that the third reading in the House and the first reading in the Senate were on the same day. The journals show that the third reading in the House was on the 46th day in that house, and that the first reading in the Senate was on the 47th day of the session of that body, but the plaintiff contends that these were in fact the same day, 28 February, 1887. This would seem a contradiction in the record, but taking the plaintiff's contention to be true, this does not invalidate the passage of the bill. The Constitution, Art. II, sec. 14, provides that such acts are invalid "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 (691) 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."

These requirements seem to have been complied with in every particular. There is no requirement that the bill shall be read on six different days. The requirement is "passed three several readings, which readings shall have been on three different days" in each house. There is this requirement for care and deliberation in each house, but there is no prohibition that the first reading in the second house may not be on the same day as the third reading in the house in which it first passed. Such

expedition is unusual, but the bill, being a new matter in the second house, an interval after its passage on its last reading in the other house before its introduction and first reading in the second house cannot add to the deliberation and thought to be given its passage in the latter body. The courts cannot dispense with any requirement of the Constitution, but neither can they add any requirement not therein imposed. There were other points presented on the appeal, but in the view which I take of the validity of the passage of the act they are altogether immaterial and need not be considered.

Cited: Asheville v. Webb, 134 N. C., 77; *Comrs. v. Trust Co.,* 143 N. C., 111; *Burgin v. Smith,* 151 N. C., 570.

(692)

IN THE MATTER OF THE TAXATION OF THE SALARIES OF JUDGES.

TAXATION—*Judges—Salaries—Constitution of North Carolina, Art. IV, Sec. 23—Income Tax.*

Where the Constitution provides that the salaries of judges shall not be diminished during their continuance in office, the salaries are exempt from taxation.

To THOS. S. KENAN, *Clerk of the Supreme Court.*

DEAR SIR:—I herewith hand you the correspondence between Attorney-General Gilmer and myself with regard to the right of the Legislature to tax the salaries of the judges. And in doing so I wish to say that it is a full, able and, indeed, an exhaustive discussion of the subject involved, and in my opinion a correct decision of the question.

It has been read to the Court sitting in conference, and approved without a dissenting voice. It was then ordered by the Court that the Attorney-General's opinion, together with my letter to him and this letter to you, be filed and preserved among the records of your office, and be published in the 131st volume of the Supreme Court Reports.

It was then resolved that the Court would consider this opinion of the Attorney-General as settling the matter therein discussed, to the same extent as if it were the opinion of this Court.

Very respectfully,

D. M. FURCHES,
Chief Justice.

18 December, 1902.

IN THE MATTER OF TAXATION OF SALARIES OF JUDGES.

(693) NORTH CAROLINA—Supreme Court.

RALEIGH, 19 November, 1902.

HON. ROBERT D. GILMER, *Attorney-General of North Carolina.*

DEAR SIR:—The members of this Court have heretofore been of opinion that their salaries were not subject to taxation, and for that reason (except one judge for the last two years) have not listed them for that purpose. But the corporation commission has decided that they are, and has directed the county commissioners to proceed to collect the same. And as all the members of this Court, as are also all the judges of the Superior Court, are interested in the question, which would make it embarrassing if not incompetent for them to sit upon its hearing, therefore, as you are the legally constituted adviser of the government, the Court has decided to ask your opinion upon this important question. And for that purpose the Court has requested me to write you this letter, and whatever your opinion may be it will be filed for the guidance of this Court in the matter.

Hoping you will favor the Court with such opinion at as early a day as it may suit your convenience, the Court respectfully awaits the same.

Very respectfully, etc., D. M. FURCHES,
Chief Justice Supreme Court North Carolina.

16 DECEMBER, 1902.

To the HON. DAVID M. FURCHES,
Chief Justice of the Supreme Court of
North Carolina, Raleigh, N. C.

DEAR SIR:—I beg to acknowledge the receipt of your favor of recent date, in which my opinion is asked upon a question (694) involving the liability of the official salaries of the Chief Justice and the Associate Justices of the Supreme Court of this State to taxation. In discharge of the duty imposed upon me by section 3363, subsection 4 of the Code, I have the honor to submit the following:

The doctrine that the power to tax is an essential element of government, and that the Legislature, in its exercise, is limited only by constitutional provisions, is elementary and fundamental. The power to tax the salary of a State officer is admitted, unless there is some provision in the organic law forbidding it. Such a prohibition upon legislative authority, if any exists, must appear in the Constitution of the State. Section 18, Article IV, of that instrument is in the following words:

"The General Assembly shall prescribe and regulate the fees, salaries and emoluments of all officers provided for in this article, but the salaries of the judges shall not be diminished during their continuance in office." Section 21, of the Constitution of 1776, provided "That the Governor, Justices of the Supreme Courts of law and equity . . . shall have adequate salaries during their continuance in office." Revised Code of North Carolina, page 16.

In the amended Constitution of 1835 the constitutional provision, with reference to the salaries of judicial officers, was changed, and the following article enacted: "The salaries of the judges of the Supreme Court or of the Superior Courts shall not be diminished during their continuance in office." Revised Statutes of North Carolina, Vol. I, sec. 2, p. 23. And the same inhibition against diminution appears in the article quoted above from the Constitution adopted in 1868. Under the Constitution of 1776 it will be observed that the judges were to receive "adequate salaries." "What was an adequate salary," remarked Attorney-General Batchelor in 1856, in passing upon a question similar to the one submitted, "was, *ex necessitate,* to be determined by the Legislature, which had the power of (695) fixing it. As this was a discretionary power, that body could declare an "adequate salary" to be any sum it thought proper. This power was liable to abuse, and though it would have been a violation of the spirit of the Constitution to have fixed these salaries at a sum clearly inadequate, yet the Legislature, being unchecked by any other department of the government in the exercise of this discretion, could violate at will the spirit of this part of the Constitution. By it the power of reducing the salaries of the judges during their continuance in office is taken away. They may be increased, but cannot be diminished. But to secure them effectually against diminution this provision should extend to indirect as well as to direct legislation. The power to lessen these salaries by direct legislation is now nowhere claimed; yet the passage of this act is an assertion by the Legislature of the power to diminish them indirectly; and if the Legislature has such power it can be used to any extent to which, in its wisdom, it may see proper to carry it."

While Attorney-General Batchelor, in his opinion, made no reference to the case of *McCulloch v. State of Maryland,* 4 Wheaton, pp. 316, 207, his argument is sustained by the reasoning of *Chief Justice Marshall,* who delivered the opinion of the Court in that case—"that the power to tax involves the power

to destroy." This doctrine is exemplified in many cases decided by the Supreme Courts of other jurisdictions, declaring that the internal revenue acts of the Federal Government requiring stamps on processes of State courts are unconstitutional interferences with their proceedings.

Smith v. Short, 40 Ala., 385; *Craig v. Dimock,* 47 Ill., 308; *Warren v. Paul,* 22 Ind., 276; *Fifield v. Close,* 15 Mich., 505; *Walton v. Bryenth,* 24 Howard's Practice Reports, 357; (696) *Jones v. Keep,* 19 Wis., 369; *Bumpass v. Taggart,* 26 Ark., 298; 7 Am. Rep., 623; *Forcheiner v. Holly,* 14 Fla., 239; *Latham v. Smith,* 45 Ill., 29; *Wallace v. Cravens,* 34 Ind., 534; *Pargoud v. Richardson,* 30 L. An., 1286; *Sporrer v. Eifler,* 48 Tenn., 633; *Carpenter v. Snelling,* 97 Mass., 452; *Davis v. Richardson,* 45 Miss., 499; 7 Am. Rep., 732.

The principle announced in *McCulloch v. State of Maryland, supra,* has been affirmed by the Supreme Court of this State. In *King v. Hunter,* 65 N. C., at pp. 612-613 (6 Am. Rep., 754), *Reade, J.,* says: "It has been considered how far an office or officer may be taxed. And it is considered as settled that the State has no power to tax an officer of the United States, or *vice versa;* because 'the power to tax includes the power to destroy,' as was said by *Chief Justice Marshall* in *McCulloch v. State of Maryland,* 4 Wheaton, p. 207. And if a State were allowed to tax a United States officer one dollar, it might tax him to the full amount of his salary, and thus 'arrest all the measures of the government.' And so the United States cannot tax a State officer for the same reason." Upon a similar principle the Federal courts have held that the United States Government cannot tax the income of State officials.

The case of *United States v. Ritchie,* Federal Cases, Book 27, Case 16,168, involved the right of the Federal Government to tax the income of the State's attorney for the county of Frederick, in the State of Maryland. The Court held that "the United States has no more right to tax these agencies than the State government has to tax the means and agencies to carry on the Federal Government." In *Day v. Buffington,* Federal Cases, Book 7, Case 3,675, *Clifford, Circuit Justice,* held that "The salary of a judge of the court of record, payable out of the treasury of the State, is not legally taxable as income under the internal revenue laws of the United States." This (697) ruling was affirmed by the Supreme Court of the United States (78 U. S., 113).

In *Freedman v. Sigel,* Federal Cases, Book 9, Case 5,080, it was held that "The United States cannot impose a tax on the salary of a judge of a Superior Court of the city of New York

by imposing a tax upon such salary as the income of such judge."

In *Dobbins v. Commissioners,* 16 Peters, at p. 450, *Mr. Justice Wayne,* speaking for the Supreme Court of the United States, says: "Does not a *tax* by a State upon the office, diminishing the recompense, conflict with the law of the United States *which secures it to the officer in its entireness? It certainly has such an effect.*"

In the foregoing cases the decisions of the courts rest upon the principle that the government of the United States has no right to tax the means, agencies and instrumentalities of the State government, and neither has the State government the right to tax the means, agencies and instrumentalities of the Federal Government. In the case of *Sweatt v. R. R.,* Federal Cases, Book 23, Case 13,684, *Clifford, Circuit Justice,* says: "By the word 'means' is meant the *revenue, taxes* and public securities, as applied both to the United States and the several States, and the prohibition extends to the salaries of the . . . judicial officers." . . .

Section 8, Article I, of the Constitution of North Carolina, provides that "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other"; that each shall act within its own sphere, just as fully "as if the line of division was traced by landmarks and monuments visible to the eye."

The constitutional provision hereinbefore recited effectually removes from the domain of legislative authority the enactment of any statute the effect of which is to diminish, either directly or indirectly, the official salary of a judicial (698) officer during the continuance of his term. When the Constitution imposes a limitation upon legislative action it must be assumed that the people who framed the instrument, through their representatives, regarded the matter as sufficiently important to be removed from the control of their agents, unless sitting as members of a body of equal dignity with that which enacted the constitutional provision. The Convention of 1868 seems to have had in mind that principle, recognized from the beginning by our courts, that the unrestrained right to tax involves in law the right to destroy. The word "unrestrained" is used with due regard to its significance. *If the power to tax* is conceded, the barriers erected by the constitutional limitation are swept away, and one branch of the State government is placed at the mercy of another. If the General Assembly has the power to impose a tax of one per cent on the official salary of a judicial officer, upon the same principle it could lay a duty

which would cripple, if not completely paralyze, the whole system of the administration of justice in State tribunals.

It is freely admitted that in the absence of dire political revolutions the exercise of such destructive power on the part of one branch of the government toward another is not likely to be invoked; but the improbability of the nonexercise of the power does not affect the principle. Upon this point I quote the following language from the Supreme Court of Michigan: "The argument that such prohibitory action (the power to tax) is improbable has no force whatever in determining the existence or nonexistence of the power. There is no legislative power possessed by any Legislature which it may not lawfully carry to an extreme where extreme action is deemed expedient by the majority of the members. And where a power of destruction has been conferred it is always possible that it may be exercised, although it may be very improbable." The foregoing
(699) citation is from the case of *Fifield* and *Close, supra,* and that learned jurist, *Judge Cooley,* concurred in the opinion of the Court.

The Federal Constitution contains a provision similar to that appearing in the Constitution of our own State—that the salaries of the judges shall not be diminished during their continuance in office. Under an act of Congress imposing a tax of three per cent on the salaries of all the officers in the employment of the United States government, the Treasury Department held that judicial officers were embraced within its terms. On 16 February, 1863, *Judge Taney,* who was then Chief Justice of the Supreme Court of the United States, addressed a letter to the Honorable, the Secretary of the Treasury, and from it the following paragraph is taken: "The act in question, as you interpret it, diminishes the compensation of every judge three per cent; and if it can be diminished to that extent *by the name of a tax* it may, in the same way, be reduced, from time to time, at the pleasure of the Legislature." It is true that the act of Congress, passed upon by *Chief Justice Taney,* as well as in the case of *Commonwealth v. Mann,* 5 Watts and Sergeant, p. 403, cited by Attorney-General Batchelor (Appendix, 48 N. C. Report), the tax levied was deducted from the compensation fixed by law and retained in the treasury. But in what way the method of collecting the tax imposed upon the salary affects the question involved I am utterly unable to perceive. The principle announced by *Chief Justice Taney,* as well as by the Supreme Court of Pennsylvania in *Commonwealth v. Mann, supra,* operates upon the power to tax, and not upon the incidental means employed to collect.

In *New Orleans v. Lea* it is held by the Supreme Court of Louisiana (14 La. An., 197) that "The article of the Constitution which declares that the judges, both of the Supreme and inferior courts, shall at stated times receive a salary, (700) which shall not be diminished during their continuance in office, exempts the salary of a judge from taxation." The case of *McCulloch v. Maryland, supra,* is cited, and the Court says: "If the right to tax the salary of judges be conceded there would be no limitation, but the discretion of the Legislature to do it, to such an extent as virtually to abolish the means of conducting the judicial department. Its existence ought not to depend upon the will of a co-ordinate department."

I find only one case which holds that the salary of a judge, protected by a constitutional provision similar to ours, is liable to taxation, and that is the case of *Commissioners v. Chapman,* decided by the Supreme Court of Pennsylvania in 1829, 2 Rawls, p. 73. The opinion is brief, and no authorities are cited. The doctrine laid down is not in consonance with the reasoning employed by the same Court fourteen years later in *Commonwealth v. Mann, supra.*

Two, at least, of my predecessors in office have held that the official salary of a judge is not liable to taxation, Attorney-General Batchelor, *supra,* and Attorney-General Walser, Public Documents 1899, Document 8, p. 95; and so far as I am advised this administrative construction of the Constitution has until recently been accepted as the correct interpretation of the Constitution.

Following the paragraph hereinbefore cited from *King v. Hunter, supra, Mr. Justice Reade,* speaking for the Supreme Court of our State, says: "It is not doubted, however, that the State may tax any other property, the objet being revenue and not the destruction of the office. But the people have been so jealous even of this power that it is proyided in the Constitution that the salaries of the most important officers shall not be altered during their term of office, and this is understood to exempt their salaries from taxation, because to tax is (701) to diminish, or it may be to destroy." The learned justice was considering the question "How far an office or officer may be taxed," and the paragraph, viewed in its setting, has more than the force of a mere *dictum.*

Chancellor Kent says: "We look essentially to the State courts for protection. They touch, in their operation, every chord of human sympathy and control our best destinies. It is their province to reward and to punish. Their blessings and their terrors will accompany us to the fireside and be in constant

activity before the public eye." In view of these important functions abiding in our judicial tribunals we must conclude that when the people, in convention assembled, declared that the salaries of the judges should not be diminished during their continuance in office, they meant to withdraw from taxation, either directly or indirectly, such salaries, "Because the power to tax is to diminish, or it may be to destroy."

Very respectfully,

ROBT. D. GILMER,
Attorney-General.

STATE v. TUTEN.

(Filed 16 September, 1902.)

ARGUMENTS OF COUNSEL — *New Trial — Improper Remarks of Solicitor—Trial.*

The improper remarks of the solicitor in this case constitute ground for a new trial.

INDICTMENT against Stephen Tuten, heard by *Judge George A. Jones* and a jury, at May Term, 1902, of BEAUFORT.

This is a criminal action wherein the defendant has been convicted of selling spirituous liquors by the small measure without license. Upon the trial the defendant testified as a wit-
(702) ness in his own behalf. The State offered one John W. Warren to prove the sale. This was the only evidence offered by the State. Upon cross-examination of the defendant the solicitor asked him whether he had not been charged with the murder of John Cayton. The defendant replied that he had been charged with the said murder, and that he had been committed to jail upon the finding of the coroner's jury; that he had had no opportunity to appear before the inquest and was not present when it was held; that the grand jury of the county had investigated the charge of murder and had ignored the bill against him. The said Cayton had been murdered in the county of Beaufort, being shot in his house at night, about 1 February, 1902.

When the solicitor addressed the jury, among other things, he said: "This moonshine business must be broken up; Cayton's murder was caused by the moonshine business, and you should put a stop to it." There was no evidence offered as to the murder of Cayton except the testimony upon the cross-ex-

amination of defendant above stated, and there was no evidence offered to show by whom Cayton was murdered or for what cause he was murdered. When the solicitor made to the jury the remarks above quoted the counsel for the defendant arose and asked the court to stop the solicitor from commenting upon the murder of Cayton and the cause for it; that the remarks were improper and tended to prejudice a fair trial of the defendant. As soon as this objection was made by counsel for defendant the solicitor partially turned from the jury and said: "I do not charge Tuten with the murder of Cayton or say that he was connected with it. I take it all back; but I do say that his murder was caused by this moonshine business, and it should be broken up." Defendant excepted. When the solicitor made this statement the court did not interpose or make any correction or comment or caution the jury.

The defendant was convicted.

From a verdict of guilty, and judgment thereon, the (703) defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Charles F. Warren for defendant.

DOUGLAS, J., after stating the facts: The above is the only exception appearing in the record. In our view of the law it must be sustained upon the principle laid down by this Court in *Perry v. R. R.*, 128 N. C., 471. In this case, as in that, the solicitor stated a fact which there was no evidence tending to prove and which in its very nature would tend to prejudice the defendant. It is true the solicitor disclaimed any intention of charging the defendant with the murder of Cayton, but he immediately repeated the injurious assertion that "Cayton's murder was caused by this moonshine business, and it should be broken up." It is well known that the term "moonshine business" refers to the unlawful manufacture or sale of spirituous liquors. Like the common law offense of "owling" applied to the unlawful exportation of wool, it derives its name from the fact that it is carried on principally at night, or at least in secret.

This was the offense for which the defendant was being tried, and the jury might have believed that the appeal to them by the solicitor to break up the business was a plea for the conviction of the defendant, who stood charged with a crime that had led to one murder and might lead to others.

The motive of the solicitor in making the statement is not as important as its probable effect upon the jury. The best of

motives sometimes lead to the most dangerous results, and if in the calmer deliberation of an appellate tribunal we see that the defendant may have been prejudiced by the inadvertent act of court or counsel, and thus deprived of that impartial
(704) trial that is guaranteed to him by the law of the land, it is our duty to grant him a new trial.

The State lays great stress upon those cases which say that much must be left to the discretion of the judge below as to when and how he will correct the error, either by stopping the counsel or cautioning the jury; but in the case at bar the court did neither.

It is urged that the jury were too intelligent to be prejudiced by any such remark. This may be true, and yet it does not affect the spirit of the law which seeks by well-established rules to prevent the possibility of prejudice. An opposite course would do away with the entire law of evidence and permit the introduction of all testimony of every kind and description, competent or incompetent, relevant or irrelevant, that either side may see fit to offer. In all such cases the intelligence of the jury must be guided by the wisdom and experience of the law.

In conclusion we may repeat what was said in *Perry v. R. R., supra:* "If that were all we would hesitate to interfere, but counsel went far beyond any testimony in the case, and over the objection of the defendant related facts within his personal knowledge, not of common information, and which were not in evidence. These facts were essentially damaging in their nature, and coming from so high a source were capable of producing the most dangerous prejudice. That the counsel intended no impropriety, which we cheerfully admit, does not alter the case. The fact remains that such statements, coming from one of his high character and exalted position in his profession, became only the more dangerous when addressed to jurors whose confidence he justly possessed. Such statements were not in evidence and were not properly admissible in the argument of counsel. For the failure of his Honor to interfere, at the request of opposing counsel, a new trial must be ordered."

New trial.

Cited: Hopkins v. Hopkins, 132 N. C., 30; *S. v. Tyson,* 133 N. C., 696; *S. v. Peterson,* 149 N. C., 537.

(705)

STATE v. KNOTTS.

(Filed 16 September, 1902.)

INTOXICATING LIQUORS—*Laws 1897, Ch. 411, Sec. 1.*

Laws 1897, ch. 411, sec. 1, making it unlawful to sell intoxicating liquors within certain distances of certain places, prohibits sales within one mile of such places, though in an adjoining county.

INDICTMENT against T. G. Knotts, heard by *Judge Francis D. Winston* and a jury, at November Term, 1901, of HALIFAX. From a verdict of guilty, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Day & Bell and *J. C. L. Harris* for the defendant.

CLARK, J. The defendant was convicted of selling vinous liquors within one mile of Littleton Female College. The evidence showed that the defendant sold a quart of wine in Halifax County, within one mile of said college, which is located in Warren County. The defendant asked the court to charge the jury that the act only applied to Warren, and not to Halifax, and, if they believed the evidence, to find the defendant not guilty. This instruction was properly refused.

The statute in question (Laws 1897, ch. 411), following the customary form in such statutes, gives a list of counties, followed by the names of places in each county and the distance from each place within which it is prohibited to sell spirituous or vinous liquors, and is as follows:

"Section 1. It shall be unlawful for any person to manufacture, sell or otherwise dispose of, with a view to remuneration, any spirituous, vinous, malt or other intoxicating liquor within certain distances of certain *places,* as follows: (706) Alamance County—Within two miles of the Big Falls Christian Church. Burke County—Hartland Chapel, within one-half mile. Warren County—Within one mile of Littleton Female College: *Provided,* that this act shall not conflict with the Littleton Dispensary Act."

The legislative power to pass such statutes has always been sustained. *S. v. Barringer,* 110 N. C., 525. It is clear, from the express language of the statute, that it was intended to prohibit the sale of the kinds of liquor designated within the specified distances of the places named, and the use of the names of the counties was merely to identify the several localities, and not

for the purpose of restricting the distances to territory within the county named. *S. v. Snow,* 117 N. C., 774. The town of Littleton is in Halifax and partly in Warren. Littleton Female College lies partly in Warren County, almost on the county line, and it would have been no protection to have restricted the sale of liquor to the Warren side. The language of the prohibition is, "within one mile of Littleton Female College," and the defendant has sold wine within that limit.

There was not at that time (nor has there been since) any "Littleton Dispensary Act"; so the language of the proviso fails. There was a dispensary act passed for Warren County in 1899, but we need not consider that act, for (if it could have any application) by its terms it applies only to the territory in Warren County. Nor does the standing provision in our Revenue Acts, that there shall be no tax on the sale of wine by anyone "selling wines of his own manufacture, at the place of manufacture," apply, for it is each time provided, "nothing in *this section*" shall prohibit such sale; and such exemption from taxation does not repeal the prohibition of sale in any territory for which prohibition has been enacted. Besides, the Revenue Act has
(707) always contained a provision empowering the county commissioners to issue license, "except in territory where the sale of liquor is prohibited by law." Laws 1901, p. 142, lines 20 and 21; *S. v. Witter,* 107 N. C., 792.

The other exceptions need no discussion, and, indeed, were not pressed in this Court.

No error.

STATE v. WILCOX.

(Filed 30 September, 1902.)

HOMICIDE—*Trial—Disturbance of Court—Law of the Land—New Trial.*

Where, on the trial of a person for murder, during the closing argument for the prisoner, about one hundred persons leave the court room and a fire alarm is given, the trial judge finding as a fact that these demonstrations were made for the purpose of breaking the force of the argument of counsel, a new trial will be granted.

INDICTMENT against James Wilcox, heard by *Judge George A. Jones* and a jury, at March Term, 1902, of PASQUOTANK. From a verdict of guilty of murder in the first degree, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *G. W. Ward* for the State.

E. F. Aydlett and *W. M. Bond* for the defendant.

MONTGOMERY, J. "No person ought to be taken or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land." And that provision of our State Constitution applies as well to the procedure and manner (708) of trial in our courts of justice as it does to the great principles of law which underlie our society. Under the law of the land, all persons charged with crime are as much entitled to a fair and unprejudiced trial as they are to the protection of their persons, their property or their reputation. They have the right, under the same Constitution, to have counsel for their defense, and any willful interruption of such counsel while conducting such defense, intended to disconcert and embarrass, is not only unlawful as obstructing and preventing a fair trial, but is deserving of the condemnation of all good citizens.

In this case the prisoner was arraigned on an indictment for murder, and was convicted of that crime in the first degree. The evidence was entirely circumstantial; and while that character of evidence may in its very nature produce a high degree of moral certainty in its application, yet it is never to be forgotten that it requires the greatest degree of caution and vigilance in its application.

In reading the record in this case, it hardly seems possible that the jury could have given that cautious and vigilant attention to the evidence which the law required of them, or to the presentation of the prisoner's case to them by his counsel that thought which the importance of the case demanded. In their immediate presence, one hundred people, in their deliberate purpose to prejudice the rights of the prisoner, committed a great wrong against the Commonwealth and a contempt of the court. On the outside of the courthouse greater improprieties took place, for the purpose of prejudicing the prisoner with the jury. No such demonstrations were ever witnessed in our State before, and, for the honor of the Commonwealth, such ought never to be repeated.

In the statement of the case by his Honor, he said: "After the evidence was all in, and while one of the coun- (709) sel was making the closing argument for the prisoner, about one hundred people, being about a fourth of those present in the court room, as if by concert, left the room. Soon thereafter, while the same counsel was addressing the jury, a fire

alarm was given near the courthouse, which caused a number of other persons to leave the court room. The court is of opinion, and so finds the fact, that these demonstrations were made for the purpose of breaking the force of the counsel's argument. But the court does not find that the jury were influenced thereby. There is no motion made by the prisoner to set aside the verdict in consequence of said conduct."

Sufficient excuse was made here by the counsel for the prisoner for the failure to make the motion for a new trial in the court below to justify the Attorney-General in consenting to an agreement to consider the motion as having been entered at the proper time, which he did. In such a case as this it was not indispensable that a finding by his Honor that the jury had been influenced by the conduct of the offenders should have been made. The disorderly proceedings assumed such proportions as to warrant this Court in declaring that the trial was not conducted according to the law of the land. The propriety of our ruling is strengthened by the circumstances that contempt proceedings were not commenced against those offending, and that no motion was made to set the verdict aside for a new trial after such unheard-of demonstrations. The counsel for the prisoner, in his argument here, in response to a question, stated that if the verdict had been set aside the prisoner would have met a violent death on the instant.

The prisoner must not only be tried according to the forms of law—these forms being included in the expression, "the law of the land"—but his trial must be unattended by such influences and such demonstrations of lawlessness and intimidation
(710) as were present on the former occasion. The courts must stand for civilization, for the proper administration of the law in orderly proceedings. There must be a new trial of this case.

New trial.

CLARK, J., concurring. The judge having found as a fact that the demonstrations, within and without the court room, were made "for the purpose of breaking the force of the counsel's argument," the magnitude and nature of those demonstrations were such as to require a new trial. The administration of justice must not only be fair and unbiased, but it must be above any just suspicion of any influence, save that credit which the jury shall give to the evidence before them. It is of vital importance to the public welfare that the decisions of courts of justice shall command respect, but this will be impossible if there is ground to believe that extraneous influence of any kind whatever has been brought to bear.

(711)

STATE v. TAYLOR.

(Filed 30 September, 1902.)

1. FALSE PRETENSES—*Agency—The Code, Sec.* 1025.

It is sufficient, to constitute the offense of obtaining goods under false pretenses, that the false representations were made to an agent of the owner of the goods.

2. FALSE PRETENSES—*Agency—The Code, Sec.* 1025.

In an indictment for false pretenses, the fact that the false representations were made to an agent of the owner of the property, and that the agent was not empowered to pass title to the property, does not change the offense to larceny.

3. FALSE PRETENSES—*Indictment—The Code, Sec.* 1025—*Laws* 1891, *Ch.* 205.

An indictment for false pretenses must charge that the offense was done feloniously.

INDICTMENT against D. L. Taylor, heard by *Judge George H. Brown,* at August Term, 1902, of CRAVEN. From an order quashing the indictment the State appealed.

Robert D. Gilmer, Attorney-General, and *D. L. Ward* for the State.

W. D. McIver for the defendant.

COOK, J. Counsel for the defendant moved to quash the bill of indictment on the ground that the facts stated therein did not constitute an indictable offense, and for defects apparent on the bill. His Honor sustained the motion to quash upon the ground that the facts set out in the bill did not constitute the offense of obtaining goods under false pretenses, and then offered to grant leave to the solicitor to send a new bill to the grand jury. The solicitor declined to send a new bill, upon the ground that the bill stated the facts relied on, and excepted and appealed.

The bill of indictment was as follows: "The jurors for (712) the State, upon their oath, present: That D. L. Taylor, late of the county of Craven, on the____day of May, 1899, at and in the county of Craven and State aforesaid, unlawfully and knowingly, designing and intending to cheat and defraud Emma Wynne of her goods, moneys, chattels and property, did then and there unlawfully and designedly falsely pretend to one Mike Fisher, the agent of the said Emma Wynne, knowingly, that a certain cow, then in the possession of said Mike Fisher, agent of said Emma Wynne, the property of the said Emma Wynne, was

his cow. That said Emma Wynne had sold the said cow to him, D. L. Taylor, for a debt of $10 due him by the mother of the said Emma Wynne; whereas, in truth and in fact, had not sold or transferred the said cow to him, the said D. L. Taylor, as he, the said D. L. Taylor, then and there knew to be false, by color and means of which said pretense and pretenses, he, the said D. L. Taylor, did then and there unlawfully, knowingly and designedly obtain from the said Mike Fisher, agent of said Emma Wynne, the said cow, being then and there the property of the said Emma Wynne, with intent to cheat and defraud the said Emma Wynne, to the great damage of the said Emma Wynne, contrary to the form of the statute of such case made and provided, and against the peace and dignity of the State."

Section 1025 of the Code, under which this bill is drawn, prescribes: "That if any person shall knowingly and designedly, by means of, . . . or other false pretense whatsoever, obtain from any person . . . any money, goods or property, or other thing of value, . . . with intent to cheat or defraud any person, . . . such person shall be guilty of a misdemeanor for fraud and deceit, and imprisoned in the penitentiary: . . . *Provided, further,* that it shall be sufficient in any indictment for obtaining or attempting to obtain any (713) such property by false pretenses, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with the intent to defraud."

Counsel for defendant contends that the bill cannot be sustained, because the false representations are charged to have been made to the *agent* and not to the principal. This contention cannot be sustained; for it is well settled that it is not necessary that the pretense should be made to the principal; but if made to an agent, by means of which the property of the principal is obtained, it is sufficient. McLain Criminal Law, sec. 683; *S. v. Crawley,* 39 N. J., 264; Wharton Crim. Law, sec. 2145.

Counsel further argued that if the above contention is not sound, then the agent was entrusted with the *possession only* of the property, and had no authority to pass the title of the principal to the defendant; and, if so, then, inasmuch as only the *possession* passed, and the owner, his principal, did not *part* or intend to part with her *title,* a bill for false pretense will not lie. Upon the general principle, this is so, for that, if the possession

was obtained by fraud, with intent at the time of receiving it to convert to his own use, and the owner intended to part with the possession *only,* and not with the *title* to the property, the offense would be larceny; while if the owner intended (though upon the fraudulent representation) to part with the title as well as possession, it would be a case of obtaining goods under false pretense. This position is well sustained by the authorities. *Smith v. People,* 53 N. Y., 111; 13 Am. Rep., 474; *Reg v. Robins,* 6 Cox Crim. Cases, 420; *Kelly v. People,* (714) 13 N. Y., 509; *Reg v. Kilhan,* 11 Cox Cr. Cases, 561; *S. v. Vickery,* 19 Tex., 326; *Pitts v. State,* 5 Tex., 122; *Com. v. Barry,* 124 Mass., 325.

But our statute so modifies the general principle that the question of title or ownership is not material. It provides that it shall be sufficient to allege that the party accused did the act "without alleging any ownership of the chattel," and on the trial it shall be sufficient to prove that the party accused did the act charged with an intent to defraud, without alleging an intent to defraud any particular person. So the gravamen of our statutory offense is the fraudulent obtaining possession of the property with the *intent to cheat and defraud,* and it is not necessary to allege or prove that any particular person was cheated, or who owned the property. The intent of the Legislature, with reference to the principle involved, is *expressly* stated in the statute itself, and is as follows: *"Provided,* that if on the trial of anyone indicted for such misdemeanor it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not by reason thereof be entitled to be acquitted of the misdemeanor, and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts."

His Honor erred in quashing the bill, upon the grounds stated, to-wit, that the facts set out in the bill do not constitute the offense of obtaining property under false pretense, under our statute.

But counsel further contends that the bill is insufficient, in that it fails to charge that the offense was done feloniously. This exception to the bill is sustained, and for this reason it should have been quashed. Laws 1891, ch. 205; *S. v. Skidmore,* 109 N. C., 795.

Affirmed.

(715)

STATE v. GOULDING.

(Filed 21 October, 1902.)

FISH AND FISHERIES—*Clam Beds—The Code, Secs.* 3391, 3393—*Laws* 1893, *Ch.* 287, *Sec.* 2—*Laws* 1895, *Ch.* 160—*Laws* 1897, *Ch.* 13—*Laws* 1901, *Ch.* 250.

Under sections 3391 and 3393 of the Code, clam beds may be laid off and persons indicted for taking clams therefrom.

INDICTMENT against George Goulding, heard by *Judge Henry R. Bryan,* at Fall Term, 1901, of CARTERET. From an order granting the warrant the State appealed.

Robert D. Gilmer, Attorney-General, and *A. D. Ward* for the State.

D. L. Ward for the defendant.

CLARK, J. This was a criminal proceeding, begun before a justice of the peace and taken by appeal of the defendant to the Superior Court, charging the defendant for unlawfully and willfully entering, gathering and taking away clams from the clam beds of one Effie Gillikin, said bed being situated in North River, without her permission, in violation of the Code, sec. 3393. In the Superior Court the warrant was quashed, and the State appealed.

This presents the question whether private clam beds in public waters are now authorized. The Code, sec. 3391, authorized the clerks of the Superior Courts to grant license to make oyster or clam beds in the waters of the State, in the manner prescribed by section 3390; and section 3393 made it a misdemeanor to take away oysters or clams therefrom. Chapter 287, section 2, Laws 1893, repealed section 3391 of the Code, but prescribed a new mode in which beds might be authorized. Said chap-
(716) ter 287, Laws 1893, was itself repealed by chapter 160, Laws 1895 (except as to Onslow County). This repeal of the repealing statute reinstated the Code, sec. 3391, except as to Onslow County, which is not here in question. *Brinkley v. Swicegood,* 65 N. C., 626; Endlich on Statutes, sec. 475; Sutherland on Statutes, secs. 162, 168.

Chapter 160, Laws 1895, was itself repealed by chapter 13, Laws 1897, and new provisions enacted, applying only to oyster beds. Thus we have again a repeal of the Code, sec. 3391, since this put in force again the statute of 1893, which repealed that section of the Code. But still the clam bed would be authorized by the mode prescribed in the act of 1893, and there is no con-

troversy here as to the mode, but only as to the power to authorize clam beds, and that has never been repealed. Chapter 250, Laws 1901, is the latest act, and applies only to oyster beds; but section 23 thereof expressly repeals the above-cited statutes of 1893 and 1897, the effect of which is to put again in force the statute of 1895 and the above-cited section (3391) of the Code, unless they were in conflict with said act of 1901. But, so far as the matter now in hand is concerned, the Code, sec. 3391, is additional to and not in conflict with the act of 1901.

There has been at no time a repeal of section 3393, making it a misdemeanor to take clams or oysters from their beds without consent of the owner. The only change has been made in the alternate enactment and repeal of section 3391, as to the manner of allowing private clam or oyster beds to be laid off in public waters. The last statute provides a new method of laying off such oyster beds, but leaves in force the old authority (Code, sec. 3391) to lay off clam beds.

If this bed has not been properly laid off, that would be a matter of defense on the proof, and is not urged, and, indeed, could not be, upon a motion to quash the warrant.

In quashing the warant, therefore, there was

Error.

Cited: Odom v. Clark, 146 N. C., 554.

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(717)

STATE v. MCKNIGHT.

(Filed 21 October, 1902.)

PHYSICIANS AND SURGEONS—*Practicing Medicine — Licenses — Osteopathy—Laws* 1885, *Ch.* 117—*Laws* 1889, *Ch.* 181—*The Code, Secs.* 3124, 3132.

An osteopath is not required to secure license to practice his profession.

INDICTMENT against Harry P. McKnight, heard by *Judge W. S. O'B. Robinson* and a jury, at August Term, 1902, of MOORE. From a judgment of guilty, on a special verdict, the State appealed.

Indictment for practicing medicine without license, tried before *Robinson, J.,* and a jury, August Term, 1902, Moore Superior Court. The jury returned the following special verdict:

"That the defendant advertised in the *Free Press,* a newspaper

published in Southern Pines, Moore County, North Carolina, before the finding of the bill of indictment herein, his profession or business, in the following words, to-wit: 'Dr. Harry McKnight. All acute and chronic diseases successfully treated without drugs or medicines. Office hours, 9 to 11 A. M.; 2 to 5 P. M.; 7 to 8:30 P. M. Second floor, brick building, opposite depot.'

"That about the first of the year 1902 the defendant came to Southern Pines, in Moore County, opened an office, at the door of which he placed his sign, in these words, 'Office of Dr. Harry McKnight,' and began the treatment of acute and chronic diseases, without drugs or medicines; that the defendant had numerous patients, and claimed to treat as many patients as any other physician in Southern Pines; that his treatment of said patients did not consist in the administration of drugs or medicines, but in manipulation, kneading, flexing and rubbing the body of his patients, and in the application of hot and
(718) cold baths, and in prescribing rules for diet and exercise, and made use of these different processes for different patients; that the defendant took supreme charge of the cases of his patients, with a view of effecting a cure and restoring his patients to sound bodily health; that the defendant was engaged in the general practice of osteopathy, and professed to effect the cure of diseases by the practice of that science; that he also practiced hypnotism and suggestion under hypnotism, such as deep breathing, and magnetic healing, and the like, for the purpose of effecting a cure and restoring his patients to sound bodily health; that the defendant exhibited a diploma issued by the Columbia College of Osteopathy, duly incorporated under the laws of Illinois, conferring upon the defendant the degree of 'Doctor of Osteopathy,' dated 13 May, 1900, but the defendant was not licensed to practice medicine or surgery or any of the branches thereof, nor to prescribe for the cure of diseases, for fee or reward, as required by chapter 34 of the Code of North Carolina, and the amendments thereto; that the defendant charged a fee or reward for his services in the treatment of his patients; that upon two occasions he used a small surgeon's knife in opening an abscess in the mouth of one Shedd, but charged no fee for his services.

"That all the foregoing facts took place in Moore County, North Carolina, prior to the finding of the bill of indictment, and during the year 1902. If, upon the foregoing finding of facts, the court adjudges the defendant guilty, then the jury find him guilty; and if the court adjudges the defendant not guilty, the jury returns for its verdict not guilty."

The court being of opinion that the defendant was not guilty, as charged in the bill of indictment, the jury, in accordance therewith, returned a verdict of not guilty, and judgment was entered discharging the prisoner. Appeal by the State.

Robert D. Gilmer, Attorney-General, and *W. J. Adams* (719) for the State.

Harry P. McKnight, in propria persona, for defendant.

CLARK, J. Chapter 117, Laws 1885, amending the Code, sec. 3132, under which this bill was drawn, reads as follows: "Section 3122. And any person who shall begin the practice of medicine or surgery in this State, for fee or reward, after the passage of this act, without first having obtained license from said board of examiners, shall not only not be entitled to sue for or recover, before any court, any medical bill for services rendered in the practice of medicine or surgery, or any of the branches thereof, but shall also be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned at the discretion of the court for each and every offense: *Provided,* that this act shall not be construed to apply to women who pursue the avocation of midwife; and, provided further, that this act shall not apply to regularly licensed physicians and surgeons resident in a neighboring State." This last clause has since been modified. Laws 1889, ch. 181.

The constitutionality of this act was discussed and affirmed. *S. v. Call,* 121 N. C., 643. The simple question, therefore, upon the facts set out in the special verdict is whether one who practices "osteopathy" is indictable if he has not procured the license required for any one by the above section before beginning "the practice of medicine or surgery."

The special verdict finds that the defendant's "treatment of his patients did not consist in the administration of drugs or medicines, but in manipulation, kneading, flexing and rubbing the body of his patients, and in the application of hot and cold baths, and in prescribing rules for diet and exercise, . . . that the defendant was engaged in the general practice of osteopathy, and professed to effect the cure of diseases (720) by the practice of that science; that he also practiced hypnotism and suggestion under hypnotism." It is also found that "upon two occasions he used a small surgeon's knife in opening an abscess in the mouth of one Shedd, but charged no fee for his services."

The only surgery was "without fee or reward," an act of

charity, and that was incidental and not in the usual course of the practice of osteopathy. It cannot be said that one "practices medicine and surgery" when he uses neither drugs, medicine nor surgery.

Section 3124 requires the "Board of Medical Examiners" to examine all applicants "to practice medicine or surgery," in "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, *materia medica,* therapeutics, obstetrics and the practice of medicine," almost all of which would be useless knowledge to exact of an osteopath who declines to use medicine, drugs or surgery, and whose treatment consists solely in kneading, flexing and rubbing the body, applying hot and cold baths, and prescribing diet and exercise.

It cannot be conceived that the Legislature would require the above examination for a profession which eschews the use of drugs and surgery. The medical society of this State being "allopaths," would certainly not recognize an "osteopath" as one of their body any more than they would a "homeopath," nor license any one to pursue that calling with their diploma as his authority so to do, and if they would not, and we were to hold it indictable to practice osteopathy without such license, it would be a judicial prohibition upon the exercise of that phase of healing.

In *Smith v. Lane,* 31 N. Y., 632, construing a statute very similar to ours, it is said: "To entitle a person to a certificate under this provision it would be necessary that he should (721) be qualified either to practice medicine or surgery in all its branches. If that was not made to appear, he could receive no certificate under the provisions of this act. For that reason it appears to be quite manifest that the object of the Legislature in the enactment of this chapter was only to provide for regulating the practice of medicine or surgery, as those terms are usually and generally understood, and confining them to such significance it is evident that they would not include the occupation of the plaintiff. The practice of medicine is a pursuit very generally known and understood, and so also is that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating or alleviating bodily diseases, while the functions of the latter are limited to manual operations usually performed by surgical instruments or appliances. It was entirely proper for the Legislature, by means of this chapter, to prescribe the qualifications of the persons who might be entrusted with the performance of these very important duties. The health and safety of society could be maintained and protected in no other manner. . . .

No such danger could possibly arise from the treatment to which plaintiff's occupation was confined."

In *S. v. Leffring,* 61 Ohio St., 39; 46 L. R. A., 334, the same conclusion was reached; and also in *Nelson v. St. Board Health,* 22 Ky., 438; 50 L. R. A., 383. From this last case we learn that osteopathy originated with Dr. A. T. Still, of Kirksville, Mo., 1871, and that at a college of osteopathy in that State in 1900 (when that opinion was filed) there were over five hundred students from twenty-nine States, besides several from Canada. And there are doubtless other colleges of osteopathy, for the special verdict finds that the defendant exhibited a diploma from the Columbia College of Osteopathy in Illinois.

It is argued to us that the science, if it be a science, of osteopathy is an imposition. Of that we, judicially (722) speaking, know nothing. It is not found as a fact in this verdict. We only know that the practice of osteopathy is not the "practice of medicine or surgery," as commonly understood, and therefore it is not necessary to have a license from the board of medical examiners before practicing it. If it is a fraud and imposition, and injury results, the osteopath is liable both civilly and criminally. Certainly "baths and diet" could be advantageously prescribed to many people, and rubbing is well enough if the patient is not rubbed the wrong way. The real complaint is that osteopaths restrict themselves to these remedies and do not resort to drugs and surgery, but that very fact establishes that they do not violate the law requiring a license to practice medicine and surgery. Doubtless there is an appeal to the imagination, but that is a necessary ingredient in all systems of healing. Who does not know that a prescription by a physician in whom the patient has implicit confidence is oftentimes more effective than the same treatment by one in whom he has none, and that at times bread pills and other harmless prescriptions are administered with good results? The aim of medical science, which is now probably the most progressive of all the professions, is simply to "assist nature." Osteopathy proposes to do that by other methods than by the use of medicines or the surgeon's knife.

We attach no weight to the argument that the defendant hung out his sign and advertised himself as "Doctor." The special verdict finds that he had a diploma from a college of Osteopathy bestowing that title upon him. There are many kinds of doctors besides doctors of medicine, as doctors of law, doctors of divinity, doctors of physics and veterinary doctors, and others still. Besides in this country, so far at least as titles go, "honors are easy." We know from common knowledge that

(723) druggists' clerks are ordinarily addressed as "Doctor"; justices of the peace are usually called "Judge," and a teacher of the saltatory art always styles himself "Professor," while "Yarborough House Colonels" and "Honorables" by courtesy of like tenor are almost as

> "Thick as autumnal leaves that strew the brooks,
> In Vallombrosa."

Certainly the courts cannot abate a man as a nuisance because some one gives him, or he gives himself, a title.

If the General Assembly shall deem osteopathy a legitimate calling it may see fit possibly to secure educated and skilled practitioners by requiring an examination and license by learned osteopaths of applicants for license; but certainly the examination would be on subjects appropriate to secure competency therein, and not on an entirely different course of learning, such as that prescribed for applicants to practice "medicine or surgery." *S. v. Gravett,* 65 Ohio St., 289; 55 L. R. A., 791. Dentistry is not the "practice of medicine or surgery" but it is a related profession, as is also pharmacy, and each has its prescribed course of examination of applicants for license. Whether the same rights and dignity shall be bestowed on osteopathy is a matter for the General Assembly, or if it is found to be a fraud and imposition, its exercise is indictable. It seems that it more nearly approximates "nursing," in many respects (though different in others), when taught as a profession, as it now is.

The State has not restricted the cure of the body to the practice of medicine and surgery—"allopathy," as it is termed—nor required that before any one can be treated for any bodily ill the physician must have acquired a competent knowledge of allopathy, and be licensed by those skilled therein. To do that would be to limit progress by establishing allopathy as the State system of healing, and forbidding all others. This would be as foreign to our system as a State church for the cure of (724) souls. All the State has done has been to enact that when one wishes to practice "medicine or surgery" he must, as a protection to the public (not to the doctors), be examined and licensed by those skilled in "surgery and medicine." To restrict all healing to that one kind, to allopathy, excluding homeopathy, osteopathy and all other treatments, might be a protection to doctors in "surgery and medicine," but that is not the object of the act and might make it unconstitutional, because creating a monopoly. The State can only regulate for the protection of the public. There is also "divine science" (which

some one has said is neither divine nor a science), and there may be other methods still. Whether these shall be licensed and regulated is a matter for the law-making power to determine before any question in that respect can come before the Court. Certainly a statute requiring examination and license "before beginning the practice of medicine or surgery" neither regulates nor forbids any mode of treatment which absolutely excludes medicines and surgery from its pathology.

All that the courts can declare upon the facts found in the special verdict is that the defendant's practice is not "the practice of medicine or surgery," and no license from the medical board of examiners is required.

No error.

Cited: S. v. Biggs, 133 N. C., 732; *Eubank v. Turner,* 134 N. C., 82; *S. v. Hicks,* 143 N. C., 693.

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(725)

STATE v. FREEMAN.

(Filed 28 October, 1902.)

ARSON—*Evidence—Threats—Sufficiency—The Code, Sec.* 985, *Subsec.* 6.

Where the only evidence against a person accused of burning a barn is threats made by him, without any evidence connecting him with the execution of said threats, or with the offense charged, the trial judge should withdraw the case from the jury.

INDICTMENT against J. L. Freeman, heard by *Judge Walter H. Neal* and a jury, at May Term, 1902, of GUILFORD. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
C. M. Steadman and *A. W. Cook* for the defendant.

PER CURIAM. Indictment for burning a barn with live stock, under the Code, sec. 985 (6). The only evidence against the defendant was threats made by him, without any evidence whatever connecting him with the execution of said threats or with the offense charged. The judge should, as prayed, have withdrawn the case from the jury. *S. v. Rhodes,* 111 N. C., 647, is exactly in point. Indeed the Attorney-General, with commendable frankness, conceded as much on the argument here.

Error.

(726)

STATE v. BLACKLEY.

(Filed 28 October, 1902.)

ESCAPE—*Evidence—Sufficiency—Questions for Jury—The Code, Sec.* 1022.

In an indictment for an escape, there being evidence that the officer tried in good faith to prevent it, the questions of good faith and diligence of the officer are matters for the jury.

INDICTMENT *against* F. M. Blackley, heard by *Judge Thos. J. Shaw* and a jury, at November Term, 1901, of GRANVILLE. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General for the State.
Royster & Hobgood and *J. W. Graham* for the defendant.

FURCHES, C. J. This was an indictment for an escape, under section 1022 of the Code. The defendant was a constable in Granville County, and one Rogers was put in his custody with a mittimus from the justice of the peace who had investigated the case against Rogers, upon a warrant charging him with rape. The facts, that the defendant was a constable; that Rogers was tried upon a warrant charging him with rape; that sufficient cause was found to commit him to jail, and that he was committed to the custody of the defendant with a mittimus, were shown in evidence, and are not denied. This made a *prima facie* case of guilt against the defendant under section 1022 of the Code, and threw the burden on the defendant of showing that he was not guilty. The statute itself provides that after the *prima facie* case is made out "it shall then lie upon the defendant to show that such escape was not by his consent or negligence, but that he used all legal means to prevent the same, and acted with proper care and diligence."

(727) The defendant, for the purpose of showing that he was not guilty, went upon the witness stand in his own behalf, and testified as follows:

"Rogers was committed to my custody by the justices of the peace about 8 o'clock in the evening. I took him to Lyon's store, and the justices wrote out mittimus and handed it to me. C. H. Parham came to me at the store and said there was a crowd coming out from Oxford to lynch Rogers, and I heard this from several other parties—Pete Kearney, Phil. White, Tom Mitchell and others whose names I do not recall, told me so. There had been several lynchings in Granville County; I

had no buggy at the place of trial; I lived two miles from there by the road, but one and a quarter miles by path. When I heard these rumors about the lynching I took Rogers and Phil. White, and when I got into the woods I told Phil. White to go and summon some men and arm them, and to bring them on to my house, and that we would do something to protect this man. I arrested Rogers on the Saturday before, and this was on Tuesday night. I had had him in custody from then until the trial. I did not put him in the jail. The justices of the peace told me to keep him in my custody until Tuesday, when the trial was had. I did keep him in my custody, and he made no attempt and showed no disposition to escape. After I sent Phil. White back I went on to Mr. Dement's house and woke him up and summoned him to help me. I then went on to my own house and saw Ed. Blackley, who is no kin to me but about twelfth or thirteenth cousin, and works at my place, and summoned him as a guard. I carried the prisoner to my house, but did not keep him there on account of my wife's condition. She was nervous and delicate—had been an invalid for two years. I went from my house first to the cornfield, and the dew was so heavy that Mr. Dement suggested that we go back into the old field. Ed. Blackley went after our supper and brought it, and after we had eaten it we agreed to carry Rogers a (728) mile away. It was pretty quick after supper that I saw a crowd coming. It was bright moonlight, and they were in their shirt-sleeves. They shot four or five times when they were about as far as across the courthouse from me, and kept coming and started shooting again, and as they shot again I ran, and shot behind me. I ran into the cotton patch, and Rogers was right with me. They caught me, and Rogers fell into the ditch. I told them they ought to give the man a fair trial, and ought not to take him and butcher him up. They took Rogers off while some of them held me down and cursed me, and said if I didn't hold my mouth they would kill me. There were twelve or fifteen in the crowd; they held me three or four minutes. There were handkerchiefs over their faces. I do not know who they were. While they had me down they shot two or three times. Sam Ball's people lived thirty-five or forty yards from there, and they heard it. I told them to get off of me and not to do this thing. I tried to make them turn Rogers loose. They cursed me. I was saying nothing while running. Dement and Blackley were with me when we started to run. Dement stopped and Blackley stopped in cornfield. I was in front of both of them. I had heard nothing of Rogers's friends trying to rescue him. I had no reason to believe they would."

On cross-examination this witness testified:

"I have been constable three years. I drink something, but never drink when I have business to attend to. Rogers did not have pistol while in my custody. I will not say he did not have pistol on the trial, because I had nothing to do with him after I turned him over to the justices of the peace. After I turned him over to them he went to the store, and I did not watch him. I did carry him to see his sweetheart on Saturday night before the trial. He was my friend; I did not handcuff him;
(729) did not tie him. I never tie white men. Only one man went with me and prisoner from Wilton. There were one hundred representative men there when I left the store, and I could have deputized them to assist me. I deputized Philip White across the road. I heard it from a dozen men that Rogers was to be lynched. Two of his brothers and his friends were there. He had a heap of friends there. I went away from there across the road into a thick body of woods with but one man, and I honestly thought there was a crowd coming to mob him. Phil. White is not kin to me. I based my judgment on the information given me by Parham. Parham was drinking some. He has been in court. Did not hear Judge Graham say report as to lynching by people from Oxford was false. I knew he was to be tried that evening, and did not bring my horse because I was driving his horse to my buggy. I had sent my buggy home the evening before, but did not send Rogers's horse. Some one rode my horse up there and I sent him home to be fed as they went into trial. After I heard report of lynching I decided not to bring him to Oxford that night. I did not hear report until after he was committed to me. As soon as I got the mittimus I carried him off. I had not formed the opinion not to carry him to Oxford when I sent my horse and buggy home. I did not say to the crowd at the trial 'Stand back, this man is not going to jail.' I did not get hurt at the shooting, nor was my skin bruised or hurt anywhere. There are three different roads from Wilton to Oxford. Sheriff Fleming was at trial during the afternoon. Excitement was pretty high after he was found guilty. I did not believe they would find Rogers guilty. I had reason to believe there would be trouble. I did not ask Sheriff Fleming to stay and assist me. After the trial was over it was dark. I knew of ten or twelve buggies leaving there and coming to Oxford. I did not consult Graham, Hobgood or any of the justices as to how I should care for the prisoner.
(730) Four or five representative citizens from Oxford were there. I did not take Rogers to my house to spend the night. I knew my wife's condition before I took him there. I

made up my mind to go by way of Franklinton and come to Oxford. When I left Wilton Rogers's brothers and friends could have seen us if they had looked. There were thick woods there, into which we went. I did not tell my wife where we were going. We were one-fourth mile from road, and the night was quiet and still. We were in the old pine field as far as from here to the door from the path. They walked down the path and stepped back and commenced shooting. They hit no one, though they shot twelve or fifteen times. They found me about half past nine o'clock. I did not regard this as a safe place to stay all night, but regarded it as safest place. We had just eaten supper but had not had time to get away. I do not know how they knew where we were unless some one watched us. My wife did not know where I was. I ran before firing a shot. I had a pistol with five loads in it. No. 38 caliber. As I ran I shot behind me. I have not seen Rogers since they took him away from me that night. I know everybody in that community. Only four of the crowd came close to me. The others did not get in ten steps of me. There were three of us and prisoner. Rogers had a pistol. I did not know he had one until he commenced firing. I did not search him that day. I heard since the trial that he had one on the trial. I was afraid he was going to be lynched, and we all talked about his going to be lynched. I reckon all those with me had guns. I did not try to hit any one, and no one on either side got hurt so far as I ever heard of."

On redirect examination:

"I was arrested day before yesterday in this case. I was not bound over to court. I was summoning witnesses for sheriff, and was out all night. During the trial at Wilton I was walking about and trying to keep the crowd off the law- (731) yers and magistrates. I sent my horse home about 4 o'clock in the afternoon. When the justices put Rogers in my custody on Friday they told me I could take him and go around with him to see his witnesses and his lawyers, and I could keep him with me. From the time he was arrested and placed in my custody up to the time of the trial he was never out of my presence. I slept with him every night."

At the close of the defendant's evidence the court informed the defendant's counsel that if the defendant's evidence was believed he was guilty, and the court so charged the jury. Defendant excepted. Verdict of guilty; judgment, and appeal by defendant.

In this there was error. The statute (Code, 1022) provides that the defendant may "show that such escape was not by his

consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence." The defendant swears that the escape was not with his consent, and that he acted in good faith in trying to prevent it. He testifies that he was told by a number of persons that a crowd was coming from Oxford to lynch the prisoner; it was then night; and to avoid the lynchers he concluded not to carry Rogers to Oxford that night but to conceal him until morning, and for that purpose he took him into a dark wood. There was great excitement at the close of the trial, and he did not summon any of the large and excited crowd to assist him, but did summons others after he left the place of trial. But his principal object was to conceal him until morning. There had been several lynchings in Granville County, and he believed the report that a crowd was coming from Oxford to lynch Rogers; and when they were attacked and Rogers taken from him by force he thought it was the lynchers, and he begged them not to lynch him but to let him have a fair trial.

It was suggested on the argument that what the de-
(732) fendant testified to was not true; that he was playing false; that it was the friends of Rogers who attacked and rescued Rogers for the purpose of liberating him, and not for the purpose of lynching him. Suppose this was so (and we do not say but what there are circumstances tending to show this to be the case), did the court have the right to pass upon this fact and say it was so? Or was it not a matter to be passed upon and found by the jury?

To sustain the judgment of the court we would have to hold that the court had the right to try the fact of good faith, of due diligence, and that he had not used due diligence, or that the defendant was in a conspiracy with the friends of Rogers to release him, and did not believe a mob was coming from Oxford to lynch him, but that story was only a sham and falsehood to cover the fraud of releasing him. This may all be so, but they were such facts as a jury must pass upon and not the court.

It cannot be contended that if the defendant acted in good faith, that he believed the report that a crowd was coming from Oxford to lynch Rogers, that for the purpose of preventing this he concluded to go in hiding and not to carry Rogers to Oxford that night, and that he and those with him were set upon by a masked, armed force and the prisoner Rogers was captured and taken off, while he was held and ordered to keep quiet under threats of death, that the defendant would be guilty. And to find that this was not so would be to find that the defendant had sworn falsely. This the court had no right to find. Wher-

ever a question of good faith, or of negligence or reasonable care, or the truth or falsity of a witness's evidence is to be passed upon, it is a matter for the jury and not for the court. A judge cannot even weigh the evidence. *S. v. Locke,* 77 N. C., 481. Where the trial involves a question of intent it becomes a question for the jury and not for the court. *S. v. Hopkins,* 130 N. C., 647. It is like finding the felonious intent in (733) a trial for larceny. *S. v. Coy,* 119 N. C., 901. Where a party is indicted for an assault and battery the question of excessive force is a question for the jury and not for the court. *S. v. Goode,* 130 N. C., 651. *S. v. Lewis,* 113 N. C., 622, which was an indictment for escape, the Court held that if the defendant was too sick to give the matter his personal attention that would excuse him if he had used *due diligence* in selecting his deputy who had the prisoner in charge, and these were questions of fact to be found by the jury. There is error.

New trial.

STATE v. BISHOP.

(Filed 18 November, 1902.)

HOMICIDE — *Murder — First Degree—Premeditation and Deliberation—Evidence—Sufficiency—Laws* 1893, *Ch.* 85.

There is not in this case sufficient evidence of premeditation to sustain a conviction of murder in the first degree.

CLARK and MONTGOMERY, JJ., dissenting.

INDICTMENT against June Bishop, John Belfield and Jas. Stevenson, heard by *Judge George H. Brown* and a jury, at April Term, 1902, of BERTIE. From a verdict of guilty of murder in the first degree and judgment thereon the defendants appealed.

Robert D. Gilmer, Attorney-General, and *L. L. Smith* for the State.

W. R. Johnson for the defendants.

FURCHES, C. J. The prisoners are indicted for the (734) murder of Thomas Stevenson; found guilty of murder in the first degree, and are now under sentence of death. The evidence discloses the following facts:

C. T. Peele is a merchant in Bertie County, and on the morn-

ing of 9 April Joe Peele left an order at his store to let Jim Stevenson have twenty pounds of meat and a sack of meal; that evening about 4 or 5 o'clock Peele's wagon drove up to the store with the prisoners in it. Melton Belfield, it seems, came up about the same time. It seems that they had been to some kind of a gathering at a place called Kelford that day, and were returning. It further appears that all three of the prisoners and Melton Belfield went into the store, and Jim asked for the meat he was to get. Peele, the owner, and Stevenson, the deceased, who was a clerk, were both in the store. Jim said he wanted to look at some shoes, and the deceased said to Peele, "You show him the shoes and I will go and weigh the meat," which seems to have been in another room. About this time Melton Belfield commenced to curse the deceased, calling him the meanest thing he could think of, among others, a "son of a bitch." The deceased said he would not take that, and reached up and got his pistol. Peele ordered them all out, and they all went but Melton. He did not go at once; and Jim came back in the store and took him by the arm and tried to get him out. But it does not seem that he succeeded as Peele says he gave Melton some "soda" and went with him to the door, and turned to go and weigh the meat, and met the deceased going to the door. He then heard pistols firing; turned back, and they were all out of doors, and the deceased was shot. There were quite a number of shots, he thinks as many as ten or fifteen, but he saw no one shoot but Melton, and did not see either of the prisoners have a pistol nor take any part in the fight. These are as near the facts as we can get them from Peele's evidence.

(735) It seems that the deceased was shot in four places, and as many as seven shot holes were in his clothing, and, from the evidence of Dr. Capehart, the shots were fired from behind. Some of the witnesses, who were some distance from the place of the homicide, thought there were as many as twenty shots. It does not appear whether the deceased's pistol was empty or loaded. No witness saw either of the prisoners shoot, nor have a pistol. Stevenson was killed almost instantly. Melton Belfield escaped, and was afterwards killed in being arrested.

This was an unfortunate affair. Two men are dead and three are now under sentence of death. The prisoners are further unfortunate; the man that was killed was a white man and the prisoners are negroes and are kin to Melton Belfield.

The charge of the court is not sent up, and we must presume it was correct, except as to the refusal to give the special instructions asked by the prisoners. These were as follows:

"1. That upon the evidence the jury cannot find a verdict of murder in the first degree.

"2. That upon the evidence the jury cannot find a verdict of murder in the second degree.

"3. That upon the evidence the jury should render a verdict of not guilty."

From the many decisions of this Court since the act of 1893, dividing murder into two degrees, the law of murder in the second degree, manslaughter, excusable and justifiable homicide is the same as before the passage of that act, except as to the punishment, which is not capital now. *S. v. Rhyne,* 124 N. C., 847. And, outside of the enumerated cases, such as "poisoning, lying in wait," etc., to make the crime murder in the first degree and a capital felony, *the State must prove,* in addition to malice, that the killing was done with "deliberation and premeditation." And it is held that such deliberation and premeditation does not mean that the prisoner intended to kill at the (736) moment he gave the fatal blow. This is not sufficient. But he must have coolly and deliberately considered the consequences of his act before putitng it into execution, in order to make the killing murder in the first degree and a capital felony. *S. v. Foster,* 130 N. C., 666, which case carefully reviews the statute and the decisions of this Court thereon, and is an authority for the law as stated above. And we see no evidence in this case showing or tending to show "premeditation" or "deliberation" on the part of the prisoners, if they did the killing. The store at which the killing took place was a public place, to which parties were invited and expected to go. They were, therefore, not trespassers nor intruders; and when the difficulty commenced between Melton Belfield and Thomas Stevenson (the deceased), and they were ordered out of the store, the prisoners immediately went out, and Jim Stevenson went back in the store, took Melton by the arm and tried to get him out. Melton did not go out immediately, and Peele gave him some "soda," and he then went out. Peele then turned and started to the wareroom to weigh the meat, and met the deceased going to the door with his pistol, and very soon thereafter the firing commenced. Peele at once turned back, and, when he got to the door, Melton (deceased) and the prisoners were all out in the road, about fifteen feet from the store. The deceased was down. And he saw no one shoot except Melton. Besides, this store being a public place, where all persons were invited to go, the undisputed evidence is that one Joe Peele had that morning left an order at the store to let Jim Stevenson have twenty pounds of meat and a sack of meal; and that evening Peele's wagon drove up, with the prisoners in it or with

it, and they went in the store, and Jim asked if Peele had left the order, and was told that he had.

Upon these facts the court, though specially requested
(737) to do so, refused to instruct the jury "that, upon the evidence, the jury cannot find a verdict of murder in the first degree." In refusing to give this instruction there was error.

But to entitle the State to a verdict for anything, it must prove the killing by the prisoners. That Thomas Stevenson was killed, there is no dispute. But the evidence strongly tends to show that he was killed by Melton Belfield, and the prisoners deny that they killed him. Admitting that there was some evidence tending to show that there were other shots fired besides those Melton fired (and this is the only evidence showing or tending to show that anyone but Melton fired), not a single witness points out or identifies anyone except Melton that did fire. It may be well said, from this evidence, that if any shots were fired except by Melton and the deceased, it was by some one of the prisoners, but which one, or which two, was it that fired? No witness says or undertakes to say which one it was. Indeed, they say they cannot say which one, nor can they say that they all fired. Unless this could be done, then, in the entire absence of any evidence that the killing was the result of a conspiracy, agreement or understanding between the prisoners, or the prisoners and Melton Belfield, to commit the murder, none of the prisoners can be convicted. If they could, it would be to convict an innocent man rather than fail to convict a guilty man. This is not the law. Where two or more are indicted for murder, and the evidence shows that one of the prisoners is guilty, but the evidence fails to show which one, they must all be acquitted.

"Although it may be positively proved that one of two or more persons committed a crime, yet it is uncertain which is the guilty party, all must be acquitted. No one can be convicted till it is established that he is the party who committed the offense."

Campbell v. People, 16 Ill., 17; 61 Am. Dec., 49.

(738) If the evidence showed that all the prisoners participated in killing James Stevenson, then they would all be guilty of the same offense, if guilty at all. But we submit that the evidence does not show this to be the fact in this case. And as it is contended on the part of the State that it does, and as the entire evidence is made a part of the case on appeal, we insert as a part of this opinion the entire evidence; and we are satisfied, upon an examination of the entire evidence, it will not show, as the State contends it does (1) that the "four went in a body"; (2) "that soon thereafter . . . all four were chasing the

deceased and firing at him as he ran"; (3) "that all four jumped in a wagon and drove hurriedly off," (4) "firing at him as he ran"; (5) "all engaged in the joint common assault"; (6) "the pursuit by four men following up one who is fleeing and trying in vain to escape"; (7) "that the prisoners and Melton going off together"; (8) "the deceased acknowledged himself vanquished by fleeing, and was pursued by superior numbers"; (9) "and again after he was down and all four participating in the last bloody and savage act"; (10) "when (if the evidence is believed) the four men pulled out their pistols and commenced firing upon one man, and continued to pursue and fire upon him while falling"; (11) "the evidence is that in a few minutes all of them were using pistols"; (12) "the white man is seen out of doors, running for his life, with all four chasing him, and four pistols barking on his back"; (13) "then all four men jumped in the wagon and drove off."

We say that a careful perusal of *all the evidence* will fail to show that the above statements were proved, as is claimed to have been done by the State.

The common-law definition of murder is stated by Sir Michael Foster, on page 255 of his Crown Laws, as follows: "In every charge of murder, the fact of the killing being first proved, all the circumstances of accident, necessity or infirmity are to be satisfactorily proved by the prisoner, unless they (739) arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appears." This definition of murder, at common law, has been adopted by the courts of this State, and has never been departed from, so far as we know. This definition applies to murder in the second degree, since the act of 1893, dividing murder into two degrees.

But it is now claimed for the State that the common-law definition presumes "malice and premeditation." If this were true, that, when the killing was shown, "premeditation" was presumed, the State need only show the killing to make it murder in the first degree. If this were so, it at once emasculates the statute of 1893, and every murder would be murder in the first degree, unless the prisoner could prove the negative—that he did not *premeditate*. But the statute itself expressly provides that, to make the offense murder in the first degree, the State must prove the "premeditation."

There was error also in refusing to give the second and third prayers for instructions.

Error.

The evidence is as follows: "Your name is C. T. Peele? Yes, sir. Did you know Mr. Stevenson? Yes, sir. Please state all the facts concerned with the killing of young Mr. Stevenson. On the morning of 9 April Joe Peele came to our place of business and told me to let Jim Stevenson have twenty pounds meat and sack of meal. About an hour a wagon passed the door. About 4 or 5 o'clock Peele's wagon drove up. Jim Stevenson walked in and said, 'Did Mr. Peele leave word here to get any meat?' I told him 'Yes.' We waited a few seconds, and about that time Jim Stevenson said, 'We want to look at some shoes,' and Mr. Stevenson said, 'You go and show them the shoes
(740) and I will weigh the meat and meal.' Stevenson went in the grocery room and I went for the shoes. Melton Belfield came in and cursed, and in a few minutes June Bishop said, 'Stevenson (meaning the clerk), come on and weigh the meat.' John Belfield said come on over where they were, and laughed. Melton Belfield was in there, quarreling, and I ordered him out, because he was bringing on trouble. What happened then? Melton kept cursing, and Mr. Stevenson spoke to him and said he was getting tired, and reached up and got his pistol, and Melton remarked he was not scared of him. I walked around the counter and gave soda to Melton and told him to get out. That was at the door. I was going to the door. Mr. Stevenson was around the counter. I was at the door. Nobody in the store but us three. All rest went out door (the other three men). John Belfield came back in there and was at the door. He came in there and took hold Melton's arm and asked him to come out, but he did not come out. John went out. I went with Melton to the door, and Melton called Mr. Stevenson a damned son of a bitch, and Mr. Stevenson made for the door. The three (defendants) were standing there. What other men were there? I don't know. I left Mr. Stevenson standing in the door and went to the grocery room. I got about half-way and heard pistols fire, and when I got back I saw Melton shoot Mr. Stevenson. When you got to the door did you see these other three men? Yes, sir. How far were they? Fifteen or twenty yards. How many shots were fired? Fifteen. (Here the witness showed the positions.) How near was Mr. Stevenson to the wagon? He was right at the wagon. When you saw the last shot fired, where did you see these three men? In the road. How far was Mr. Stevenson? Right there. Saw no other men but the prisoners and some women? They were behind Melton Belfield. When I went to the door he fired the last shot and was standing over him. You say Jim Stevenson was one of
(741) the main ones—what did they all do then? They were

hollowing to Melton to come on, come. I ran to Mr. Stevenson and found him dead. How long did he live? A few minutes—died right there on the road. Did you find any of the bullets? Yes, sir; I found one in the grocery room. Any hole in the side of the house? Yes, sir; it went in the front, back through, and hit box and fell in it; it was a 32. Where was that hole in side of house? It went in diagonally. (Here witness showed how it went in.) When you went out first, where was Melton Belfield? He was just a few steps off. Where was he standing? Nearly in the direction of that hole. Did you find any other bullets? Yes, sir; in the store; it fell out of his clothes. Is that the bullet? Yes, sir; 38. Did you bring those clothes here? Yes, sir. (Clothes were here presented and examined and holes shown to the jury.) Did you order these parties out? Yes, sir. Did they go out? All but Melton. Did the other three come back? Yes, sir; Melton remained in. What did he say? Melton called Mr. Stevenson a damned son of a bitch. What else did he call him? Damned scoundrel—poor white rascal. What connection are they? Melton and John Belfield are brothers, and June Bishop and Jim Stevenson are Melton's brothers-in-law."

Cross-examination by W. R. Johnson: "You stated they went in there to do some trading. Who was the leader? Melton. When you ordered them out, did these three prisoners go out? Yes, sir. They did not take any part in the row, did they? Not specially. Didn't these men go to Melton and ask him to come out? John did. It appeared to you that they were trying to stop the trouble? Did you find Mr. Stevenson's pistol? Yes, sir. Did he shoot Melton Belfield? I do not know. Did you see pistol in Mr. Stevenson's hands? No, sir. Did these three men here appear to be peaceable? Not particularly; they were quarreling. John called back after Mel- (742) ton, didn't he? Yes, sir. These three men were not taking any part in the shooting affray, were they? I don't know; I was in the grocery room. How long were you gone in the back room? I came back soon as I heard the pistols firing. You ran, did you? Yes, sir. They were trying to get Melton away? Yes, sir. They were not trying to hurt Mr. Stevenson? No, sir. When Mr. Stevenson went out of the door, did you hear Mr. Stevenson say he was going to kill the damned black son of a bitch? No, sir. How far was Mr. Stevenson lying? About fifteen steps. There was nothing to indicate that he was pulled out there? I do not think he would have run out there. He was after Melton Belfield? Yes, sir. Did you see any pistols in the hands of these fellows? No, sir. They were doing every-

thing they could to get him away from there? Yes, sir; John hollowed to him to come out. You do not pretend to say that Mr. Stevenson did not go out of the door? (Here the witness was asked by the solicitor where the man was shot, and the witness showed him.) The bullets could have been shot in him after he fell, couldn't they? I did not see but one shot."

By the solicitor: "When you heard them crying, 'Come on, come on,' that was when you saw the last shot fired? Yes, sir."

Evidence of J. L. Andrews, for State: "Where do you live? In Roxobel. Please state everything you heard or saw concerning this killing. I heard a few reports of shooting. Where were you? In my house. How far off? Thirty-seven yards from Peele's store. I thought they had been down to the celebration at Kelford, but it lasted so long I thought something was the matter. How many shots were fired? Fifteen or twenty. What did you finally do? I went to the door and saw Melton Belfield standing right over Mr. Stevenson, and he shot him as I got to the door. I stepped to the door with the
(743) determination of going there, and Belfield ran. Did you see any other person? No, sir; no one but Belfield and Stevenson. You could see no other persons but those two? I could not think of anything else. Did you find anything about the place after he fell? Next day I picked up a ball just about the place Mr. Stevenson was lying; it was a 32. You know nothing about what happened inside the door? No, sir. You directed your attention just to those two? I couldn't think of anything else."

Cross-examination: "Your store is thirty-seven yards from Peele's door? Yes, sir. You said when you came out you did not see anything but Melton Belfield bending over Mr. Stevenson, shooting? Yes, sir. If these men (the prisoners) had been there, you could have seen them? The shooting was about over. I say, if these men had been engaged in it, you could have seen them? Yes."

By the solicitor: "What position was Stevenson in when you got there? Leaning on his left arm, and commenced leaning over till he fell, and dying in a few seconds."

By attorney for defendant: "Can you swear there were as many as fifteen or twenty shots? Yes, sir; sounded like popcrackers."

Evidence of A. T. Liverman, for State: "Your name is Mr. A. T. Liverman? Yes, sir. Were you present in Roxobel on the evening of this shooting? Yes, sir. About 5 o'clock on the 9th April—I did not look at the clock—I went in same direction, about thirty yards; I heard several pistols. I looked and

looked the road, and saw several men who seemed to be engaged in a wrangling, and firing went on, and I remained there, when over four or five shots were fired; then three reports, with slight lapse of time between the shots. After that I don't know what took place. I know there were several more pistols. I saw five men—four around one who seemed to be trying to get away. I saw four men who seemed to be pressing around the men. One man was trying to get away. The four men were (744) trying to stop him. Two men seemed to be behind the wagon. I saw him when he was falling. He appeared whiter than other four. I saw one man at his feet and one man at the fallen man and one there. Just as he was falling, the pistols were firing repeatedly. I saw two men leave on right of the wagon, and one on left of the wagon, and one seemed to remain a little longer. The last man that remained then ran off, and somebody was hollowing, and I heard some one say, 'Drive, drive.' I was about 160 yards from where the firing began. I went about 120 yards from where Mr. Stevenson fell. You could not tell who the men were? No, sir; the shooting was so rapid I thought some stray bullet might come down this way, and kept aside. As soon as I stepped out I saw last man leave. Do you recall the last shot? No, sir; the men were standing over him, and the four men seemed to be bending over toward Mr. Stevenson. The wagon did not come towards you? No, sir; there were as many as fifteen or twenty shots. What other men besides the four men and the shot man? None at all."

Cross-examination: "Could you not recognize any of the men? No, sir; there was so much smoke, etc.; I could not tell who was doing the shooting. You don't pretend to swear that any of these men (the prisoners) fired shot? No, sir.

Evidence of Dr. A. Capehart: "Where do you live? Town of Roxobel, this county; the town is situated at cross-roads; it crosses the road coming from Hertford County at right angles. Do you know where the murder was committed? At the crotch of the road, nearly in front of Peele's store. At what angle was Mr. Peele's store? They came from Kelford there, in the left angle, this side. Did you see any part of what occurred? I did. Tell the jury—where were you when you first saw anything of this occurrence? I was sitting in my home, and my attention was arrested by rapid firing. I looked out (745) of my window and saw a number of men; it's about 125 yards to Peele's store. Four or five men seemed to be engaged in what appeared to be gun shooting. Almost coincidentally with the firing, my eye rested on one of the party falling. I saw three or four men standing around this man, and it ap-

peared that he was being attacked. I saw three flashes of pistols almost at the same time, in different positions and from different directions. These parties who were around the man, nearly prostrate, were firing on him. I knew there were more than one pistol being used, because I could tell from the flashes. I saw three of them scamper off; the fourth remained and fired parting shot. In the meantime the three that ran off were calling to this man, saying, 'Come on, Melton; hurry, hurry.' Some of them got in the wagon and said, 'Drive.' There was a wagon intervening between Peele Bros.' store. (Here the witness referred to the diagram.) Did you see anyone in the road but those four? I think not. Did you recognize anyone at the time? I did not. Did you identify these three men (the prisoners)? I did not. Go on and state what you did. Some one came over and asked me to come out. I went, and he was dying, lying on his back, when I got there. Describe all about it. He was taken from the road and was carried to the store and was shrouded. Four balls entered his body—one on the left side of his neck; one of the balls had hit him in the back and was in the region of the kidneys; the third ball hit about six inches to the left of the spinal column, between the eighth and ninth ribs, and ranged internally; the fourth ball hit him in the shoulder—hit on outer border of shoulder—did not hit blade—passed in diagonally and entered the lung. The ball that hit him in the neck went through lapel of the coat in the collar. What effect would that have on him? All of them would have been neces-
(746) sarily fatal, except possibly the one in the neck. From your examination, in your opinion, what position should they have been in? It would have been necessary for a man to be standing from the side to be hit in the neck; and the ball that hit him in the shoulder, the man must have been standing from the rear of the left side; one in the kidney was found almost vertically down; one between eighth and ninth ribs would have also been fired from the side; was shot from behind every time; none from the front. How many bullets in the clothes? Four in the coat and shirt, and this, I think, made seven. The one shot in lower part of his coat did not enter his body—was taken away. Did you see the ball found in the grocery room? Yes, sir; I found the ball that entered the grocery department from the right of the door; it must have been fired from the left. How far from main store from where you saw the man fall? Twelve or fifteen yards. How many shots, in your estimation, did you hear? Fifteen or twenty."

Cross-examination: "Firing before I looked out of my win-

dow, and when I looked out I saw flashes. At least twelve or fifteen shots were fired."

Re-examination: "Who was doing the shooting? I don't know. You did not identify them? I did not. Did you recognize the man that got up in the wagon? I did not."

Evidence B. F. Burket, for the State: "Do you live in Roxobel? Yes, sir. Where were you at the time of the shooting? I was in Mr. Tyler's store. How far? Two hundred yards. How was your attention directed to it? By shooting; I was behind store, cutting wood. What did you see? I saw four or five men together. Could you tell who they were at time? No, sir; I could tell after they ran off; I saw last shot. Did you hear anything? I heard them hollowing, 'Come on, come on, come on, Melton.' Who were they? Melton Belfield and the three prisoners—John Belfield, James Stevenson and (747) June Bishop. Were they the ones you saw in the crowd around the deceased man? Yes, sir. Do you know how many shots you heard? I could not tell."

Cross-examination: "How far were you from the scene of trouble? Two hundred yards from trouble to Mr. Tyler's store. Were you going at the time towards the shooting? No, sir. When you came out, you stopped still? Yes, sir. They were 200 yards and you recognized them? Yes, sir. Do you mean to swear on your oath that you knew these men and could identify them, on your oath? Yes, sir. Did you see either of these men firing pistols? No, sir. Could you not tell there were more than one doing the firing? Smoke was coming from more than one. Could you see the different puffs of smoke? Yes, sir. What was the position of the men? All together. Did you know who they were? No, sir. Did you see these men with pistols? No, sir. Were not these men trying to get Melton Belfield away from there? I don't know."

By the solicitor: "You could not recognize the men in the mix-up? No, sir. You recognized the men, as you stated? Yes, sir."

Evidence of Ellen Belfield, for the defendant: "Just tell what you saw. Well, I know Mr. Stevenson shot Melton Belfield twice. I am his mother. Where had you been that day? Kelford; I went in the store after pepper. Where had you been? Kelford; nobody with me but John. I went in Mr. Peele's store—me and John. I got my pepper. Mr. Stevenson handed it over the counter, and Melton called him a son of a bitch again. Mr. Stevenson said, 'I wasn't going to take that.' Mr. Stevenson came out with his pistol. After I saw the blood running, it frightened me. I saw the pistol in his hand when he came out

of the store. I saw Melton and Mr. Stevenson shooting.
(748) Who fired the first shot? Mr. Stevenson shot twice before Melton shot at all. Where did Melton get his pistol? I saw him get it from his hip pocket. He pulled it out and shot four times. Mr. Stevenson did not pass on by Melton? No, sir. Was John in the store? Yes, sir. At what time did he come out? All were out there when the shooting commenced; John came out before Melton. Did you see John with a pistol? No, sir. Hear him say anything about the firing? I did not see but two pistols."

Cross-examination: "You the mother of Melton and John? Yes, sir. Were any of these men drinking? I don't know. Where were you? I was in the store when Melton got after Mr. Stevenson about the meat and meal and cursed him; then Melton got out of the store, and Mr. Stevenson came to the door and shot twice, and Melton shot four times. Facing? Yes, sir. After he was on the ground he shot three or four times. You remember about this matter, when it was brought up before the magistrate's trial, and did you say when he made the shot you saw some man on your left? I don't know what happened after that. I left them all in a bunch. What do you mean? I heard two pistols, Mr. Stevenson's and Melton's. You say Mr. Stevenson shot twice and Melton four times. Who was that you saw shooting when you testified before the magistrate, when you turned your back? The reason I turned my back was because I was sick."

Evidence of Louisa Stevenson, for defendant: "Where had you been on day shooting took place? Kelford. Who went there with you? I went there on the wagon. Who was with you? Dora Savage, Melton and myself; June Bishop on cart; stopped at Mr. Peele's to buy some sugar. Who went in there with you? Brother June and sister. June went in there to get some groceries Mr. Peele asked him to get. You were in
(749) the store all the time it took place? I was in there before. He (Melton) came in there and asked Mr. Stevenson about some groceries, and Mr. Stevenson told him he had given it to another, and he told Mr. Stevenson Mr. Peele told him to get thirty pounds of meat. Melton told Mr. Peele Mr. Stevenson cursed at him, and that he had to trade at his store, but if that was the way his clerk did he would not trade there any more. He told Mr. Stevenson he would not curse him any more. They did not run on any more before they were mad. He called Mr. Stevenson a poor son of a bitch. Mr. Stevenson told him he would not take that again, and he called Mr. Stevenson a God damned black son of a bitch. Mr. Peele ordered him out, and Mr. Stevenson followed him and said, 'You damned narrow-

faced son of a bitch.' He had a pistol by his side, and came out and met Melton face to face. He shot him twice. Was Mr. Stevenson standing still? No, sir; they met and shot, standing. When Mr. Stevenson shot him he was running. He put his hand in his pocket for his pistol, and shot him until he was down and done shooting. When he shot Mr. Stevenson he shot and kept shooting. When Melton and Mr. Stevenson were shooting so, the horses ran off, and a little boy got them, and Melton ran and got up. Where were these men (the prisoners)? They were not around this white man; were around the buggy and wagon. I did not see any of them shoot. Did any of these men say anything to Melton? Jim Stevenson told Melton, 'You done got the meat and meal; come on out.' He would not come out, and they left him alone."

Cross-examination: "How many times did you see Melton and Mr. Stevenson shoot when they were facing one another? Mr. Stevenson shot twice and he shot Melton about the head. When Melton shot Mr. Stevenson, Mr. Stevenson jumped by and shot him when he was passing. Were they the only two men in the wrangle? Only two were shooting. You came up before the magistrate? Yes, sir. You remember saying in that (750) trial that you saw June Bishop near Mr. Stevenson, with his hand in his hip pocket? Yes, sir. Did you hear June Bishop tell Mr. Stevenson he could shoot as many times as Mr. Stevenson could? Yes, sir. What else did you hear June say? He told him (Melton) to use his things, that if he don't he would use his. You did not see June Bishop shoot? No, sir. Did you testify in magistrate's trial that somebody shot from behind you, and that June Bishop was behind you? I told you the ball passed me. Which way was it? Passed by me."

Evidence of Ella Bishop, for defendants: "Tell what you know. You are June Bishop's wife? Yes, sir. Well, go on and state what you know. Melton and Jim Stevenson came on the wagon and asked Mr. Stevenson at the door about some meat and meal. I didn't go in the store. Did these three men (the defendants) come out before Melton and Mr. Stevenson? They came out and heard Melton in there, quarreling, and went back in there to get him out. Then June and John came out. When they were all in the grocery room Melton came up from the shoe shop and said to Mr. Stevenson, 'How much meat is that?' and he (Mr. Stevenson) said, 'Twenty-eight pounds,' and that was what brought on the row. Who came out first, these three men or Melton? John and June came out before Melton. Did you see Mr. Stevenson with the pistol? Yes, sir. How far was Melton from him? Mr. Stevenson made three short steps for

him before he fired. When Mr. Stevenson shot he ran by Melton, and Melton shot him in the back. I did not see but two pistols. These three men did not have any pistols."

Cross-examination: "Melton had one pistol? Yes, sir. What size shot? Thirty-two or thirty-eight. How many times would Melton's pistol fire? Five times. Mr. Stevenson's pistol was fired four times. Nine shots were fired in Roxobel. I am June Bishop's wife."

(751) Evidence of Isaac Jacob, for defendants: "Tell what you know about this shooting. Were you in it? No, sir. Did you go to Kelford? Yes, sir. Did you get out of the wagon when these men stopped at store? Who went in the store? I don't know. What was the first thing you saw? I saw a man (Mr. Stevenson) come out of the door, and Melton went and met him, and Mr. Stevenson fired off at him twice and Melton fired at him three times. That's all I saw. Did you see these other men? No, sir. Did Mr. Stevenson stand still when Melton was shooting? Yes, sir. When Melton shot him he went towards Melton and passed on by him."

Cross-examination: "Mr. Stevenson shot first and twice? Yes, sir. Did you see the crowd around Mr. Stevenson? No, sir; I saw him when he passed Melton; was behind the wagon, and when Melton shot two times he whirled about. When they were face to face, was it possible for Melton to shoot him in the back? He could not shoot him in the back."

Evidence of Sheriff T. C. Bond, for defendant: "State whether or not you saw wound in Melton Belfield's head when you brought him from Weldon? Yes, sir. I did not examine it. Did it look like it was recently inflicted? Yes, sir."

New trial.

DOUGLAS, J., concurring. I concur in the conclusion of the Court that there was no evidence of premeditation to go to the jury, and that therefore the prisoners should not have been convicted of murder in the first degree. There seems to be such a vital misapprehension of the evidence, on the part of some of us, that it seems eminently proper that the evidence should be published in full. If I took the same view of the evidence as some of my brethren, either of its substance or its lawful deductions, I would certainly vote for affirmance, as I have no scruples in hanging a man who is guilty of premeditated murder.

(752) But there must be some proof of such premeditation. At common law the killing with a deadly weapon implied malice, and where such killing was admitted or proved beyond a reasonable doubt, the prisoner was presumed to be guilty of mur-

der, and the burden rested upon him of showing such facts as he relied on in mitigation or excuse. *S. v. Byrd,* 121 N. C., 684, and cases therein cited.

There was then but one degree of murder, and that was a capital felony. This was changed by chapter 85, Laws 1893, which divided the crime of murder into two degrees, the second degree being punishable only by imprisonment. Since the passage of said act, the presumption arising from the killing with a deadly weapon extends only to murder in the second degree; and the State is still required to prove beyond a reasonable doubt the facts necessary to bring the homicide within the statutory definition of murder in the first degree. *S. v. Booker,* 123 N. C., 713, and cases therein cited.

I am aware that this construction of the act of 1893 was not unanimous at first, as shown in *S. v. Fuller,* 114 N. C., 885, but it was settled before I came upon the bench, and needed not, though it has received, my cordial approval. If it is correct, these prisoners could not have been found guilty of murder in the first degree, in the absence of any proof of premeditation. It should be remembered that Melton Belfield, who brought on the fight and admittedly shot the deceased, is not the one now on trial. He has paid for his crime with the penalty of his life, having died of wounds received in his arrest for this killing. The prisoner now before us is John Belfield, who, according to the testimony of Peele, the principal witness for the State, took hold of Melton's arm and tried to get him to leave the store, evidently in order to avoid any difficulty. Acting the peace maker is surely no evidence of premeditation.

It is always a matter of regret and concern to me that (753) the question of life and death should depend upon my single vote, but I have no right to shirk the responsibilities of my position, and must decide the question in strict accordance with my convictions of duty.

I concur in the opinion of the Court to the extent that there should be a new trial.

CLARK, J., dissenting. There are no exceptions to evidence nor to the charge. The only exceptions are to the refusal of the judge to give the following prayers for instruction: (1) That, upon the evidence, the jury cannot find a verdict of murder in the first degree. (2) That, upon the evidence, the jury cannot find a verdict of murder in the second degree. (3) That, upon the evidence, the jury should render a verdict of not guilty. It is therefore necessary to consider only the evidence against the prisoners; for if there was any evidence it was not error to refuse these prayers.

It was in evidence that the three prisoners and Melton Belfield (afterwards killed in resisting arrest) composed a party of two brothers and their two brothers-in-law, who went to Peele's store in Roxobel on 9 April, 1902. They were colored men, and the deceased, Thomas Stevenson, was a young white man, who was clerking in Peele's store.

A. T. Liverman testified that, about 5 P. M., 9 April, 1902, he was at Roxobel. "Heard several pistols; looked and saw several men who seemed to be engaged in wrangling and firing; firing went on, and I remained there, when over four or five shots were fired; then three reports, with slight lapse of time between the shots. After that I don't know what took place. I know there were several more pistols; saw five men—four around one who seemed to be trying to get away. I saw four men who seemed to be pressing around the man. One man was trying to get away. Two men seemed to be behind the wagon. *The* (754) *four were trying to stop him.* I saw him when he was falling. He appeared whiter than the other four. I saw one man at his feet and one man at the fallen man and one there. Just as he was falling the pistols were firing repeatedly. I saw two men leave on right of wagon and one on left of the wagon, and one seemed to remain a little longer. The last man that remained then ran off, and somebody was hollowing. I heard some one say, 'Drive, drive.' I was about 160 yards from where the firing began. I went about 120 yards from where Stevenson fell." He says he did not then recognize any of the men. He further testified that there were fifteen or twenty shots, and no one was at the place of the shooting besides the four men and the shot man, and that at the last shot the four men seemed to be bending over towards Stevenson, the deceased.

Dr. A. Capehart testified: "I was sitting in my home, and my attention was arrested by rapid firing. I looked out of my window and saw a number of men—it's about 125 yards to Peele's store. Four or five men seemed to be engaged in what appeared to be gun shooting. Almost coincidentally with the firing, my eye rested on one of the party falling. I saw three or four men standing around this man, and it appeared that he was being attacked. I saw three flashes of pistols almost at same time, in different positions and from different directions. *These parties who were around the man, nearly prostrate, were firing on him.* I knew there was more than one pistol being used, because I could tell from the flashes. I saw three of them scamper off. The fourth remained and fired a parting shot. In the meantime the three that ran off were calling to this man, 'Come on, Melton; hurry, hurry.' Some of them got in a wagon and said,

'Drive.'" He said, further, that he did not recognize any of the men during the firing; that when it was over, he went to deceased, who was dying; that four balls had entered the body, three of which would have proved fatal, and that (755) seven bullets pierced the clothing; that all the balls entered from behind—*none in front;* that one ball in the neck must have been fired from the side, and that the ball that hit the deceased in the shoulder must have been fired by a man standing in the rear of his left side; that the ball in the kidney ranged almost vertically down. He says deceased fell twelve or fifteen yards from the door of the store, and that fifteen or twenty shots were fired.

B. F. Burket testified that he saw the shooting; that he knew them when they ran off; that he saw the last shot; he heard them hollowing, "Come on, Melton." He was asked, "Who were they?" and replied, "Melton Belfield and the three prisoners—John Belfield, James Stevenson and Junius Bishop." He says *they were the men he saw in the crowd around the deceased man.* On cross-examination he said the *puffs of smoke were coming from more than one pistol.*

Louisa Stevenson, a witness for the prisoners, in her testimony, stated that she saw the prisoner June Bishop standing near deceased, with his hand on his hip pocket, and that he told Melton to "use his things, and if he didn't he would use his"; and that Bishop was behind her when a shot came from that direction.

June Bishop's wife, witness for prisoners, in her testimony, said that Melton's pistol would fire five times.

C. T. Peele testified, among other things, that Melton Belfield and the other prisoners *came together to the store* that day; that Melton began quarreling, and he ordered him out; that Melton called the deceased a damned son of a bitch, a damned scoundrel, a poor white rascal; that the deceased reached up and got his pistol; that he went to the rear of the building, and when he got back the deceased was out some fifteen or twenty yards in front of the store; that Melton Belfield and the prisoners were the only persons out there, except some women; that some fifteen shots were fired, and that as he went to the door (756) the last shot was fired, which was by Melton Belfield; that he did not see any pistol in the hands of deceased; that there were seven bullet holes in his clothes (which were shown to the jury); that when he ordered him out of the store, Melton remained in, and the other three went out, but came back into the store. On cross-examination, he was asked, "There was nothing to indicate that he (deceased) was pulled out there?"

to which he replied, "I do not think he would have run out there."

J. A. Andrews testified that fifteen or twenty shots were fired; that just as he got to the door Melton Belfield was standing right over deceased, and shot him just then and ran off; that the shooting was over, and he saw there then only those two men.

There was some additional evidence for the State and some evidence for the defense, but it is not our province to weigh the testimony. That belongs to the jury. The only question before us is whether there was any evidence for the State of murder in the first degree.

If the above evidence is to be believed, four colored men, brothers and brothers-in-law, went in a body to the store where a young white man was clerking. One of them (Melton) commenced quarreling, and Melton called the clerk most insulting names, when the clerk reached for his pistol, and the negroes were ordered out by Peele. Melton refused to go; the other three went out, but came back. Soon thereafter, according to the testimony of several witnesses, all four were chasing the deceased *and trying to prevent his escape,* firing at him as he ran, and that fifteen or twenty shots were fired. The evidence of the physician is that the deceased was struck by seven shots, all from the rear, and three of them fatal; that after he fell Melton Belfield stood over him and fired a last shot; that the others called on him to come, to hurry up, and all four jumped in a wagon and drove hurriedly off.

(757) Upon this evidence the killing was an assassination, without provocation, in front of his store, of an unoffending young man, who was entitled to the security of life and person at the hands of the law. It was, if the evidence is believed, a joint killing by four men, all participating therein. The deceased was trying to escape, and four men were surrounding him to prevent it, firing at him as he ran, some fifteen or twenty shots being fired, which was more than one or even three pistols could have fired, and all seven of the bullets which struck him coming from the rear.

It is not law that when one is killed, several being engaged in the joint or common assault, that only he is guilty who can be shown to have fired the fatal shot. If such were the case, it would be a perfectly safe pastime for two men or more to chase down and shoot a fellow-mortal; for no one, not even the shooters, could say who did the slaying. On the contrary, the law has ever been that if one is guilty of murder in the first degree, all who were present, aiding, abetting or encouraging the perpetra-

tion of the crime, are guilty of the same degree of murder as he who fired the shot.

As far back as *Reg v. Wallis,* 1 Salk, 334 (1703), it was held that if several made a riot and a man is killed, all are principals in the murder, *Holt, C. J.,* saying: "Who actually did the murder is not material; the matter is that a murder was committed, and the other is but a circumstance, and all are principals." In a late English case—*Queen v. Salmon,* 6 L. R., 79 (Q. B. Div., 1880)—where three were recklessly firing at a target with long-range rifles, and a boy was unintentionally killed, but it could not be shown by which, all three were held guilty of manslaughter (the degree of crime upon those facts).

Even if any one of the prisoners did not fire a fatal shot, or any shot at all, if he were there, acting in support of those who were chasing the deceased and shooting at him, or encouraging or aiding those who did the shooting, he was guilty (758) as those who fired the three fatal shots. Wharton Cr. Law, sec. 211; *S. v. Walker,* 98 Mo., 95; 1 Bishop Cr. Law (6 Ed.), sec. 636. It is not necessary to show that these four men went there with a preconcerted plan to act together. That they did act together, and united in a common effort to kill the deceased, makes all guilty of the same degree of crime.

Four witnesses testify that fifteen or twenty shots were fired, which is as much as three to four five-shooters would have fired if all their barrels were emptied. All these witnesses testify that the four men were engaged in chasing the deceased, trying to head him off. These four men were identified as the prisoners and Melton Belfield. No provocation was shown to have been given to the three prisoners by the deceased, and, as to Melton, it was Melton who gave the provocation. It ought to take no citation of authority to establish that all four are responsible, irrespective of which ones fired the three fatal shots, and that in such a chase four men after one, and time elapsing enough to fire fifteen or twenty shots, there was evidence of premeditation, far more than was in *Dowden's case,* or in any of the other cases cited below.

If this is not murder, in what way could these four negroes have committed murder in the first degree, unless they had lain in wait for their victim? Is it any less murder because, instead of ambush, they resorted to numbers, and in more reckless defiance of law they chased and *headed him off* and shot him to death with fifteen or twenty pistol shots, in open daylight, in front of his store?

One solitary case is cited as authority that, four men being in pursuit of deceased, no one can be convicted unless it can be

shown who fired the three fatal shots. That case is *Campbell v. State,* 16 Ill., 17; 61 Am. Dec., 49; but an examination shows that the charge there approved was: "If it is uncertain from the evidence in the minds of the jury which one out of two or
(759) more persons inflicted the stab, that would operate to acquit the prisoner, *unless there is proof that the prisoner aided or abetted* the person ascertained to have killed him." This qualification puts the case in line with the uniform ruling of all courts. When two or more unite in an act which results in death, all are guilty, though only one gave the fatal stab, blow or shot. 1 Wharton Cr. Law, sec. 396, and cases cited; also *Dumas v. State,* 62 Ga., 58; 1 Bishop Cr. Law, sec. 629 (2), and cases cited; Wharton Cr. and Pl., sec. 301, and cases cited; *S. v. Johnson,* 7 Oregon, 210; *Brennan v. People,* 15 Ill., 511; *Ruloff v. People,* 45 N. Y., 213; 2 Greenleaf Ev., secs. 40, 41. But it cannot be necessary to add more cases, for the doctrine is based upon reason and is universally recognized. When several combine in an unlawful act, as here, in chasing the deceased and firing at him, all who are present, aiding and abetting, are equally guilty, whether all fired at him or not. This is fully and ably discussed in *Spies v. People,* 122 Ill., 1; 3 Am. St., 320, and notes. This was the celebrated Anarchist case. In *People v. Mather,* 4 Wend., 230; 21 Am. Dec., 122, it was well said by *Marcy, J.* (later the celebrated Secretary of State of the United States): "The fact of conspiring need not be proved; if parties concur in doing the act, although they were not previously acquainted with each other, it is a conspiracy." Here, if the only fatal shot had been fired by Melton, these prisoners, if five witnesses have sworn the truth (and of that the jury are the judge), were all present, actively aiding by "trying to head the deceased off," and three of them present, if not all four, emptying their five-barreled pistols at him, as the testimony concurs that fifteen to twenty shots were fired. Dr. Capehart testified that he saw *three pistols flash at once. S. v. Straw,* 33 Me., 554; *Doan v. State,* 26 Ind., 495; *Washington v. State,* 36 Ga., 222; *Rex v. Perkins,* 4 Carr and Payne, 537.

In *S. v. Gooch,* 94 N. C., at p. 1014, the Court cites and approves the following: "In *Rex v. Cox,* 4 C. & P., 538, the
(760) rule is thus laid down: 'If two persons are engaged in pursuit of an unlawful object, the two having the same object in view, and, in pursuit of that common object, one of them does an act which is the cause of death, in such circumstances that it amounts to murder in him, it amounts to murder in the other also.' To the same purport, *S. v. Whitt,* 113 N. C., at pp. 718-720, which very much resembles this case. In *S. v.*

Gooch, 94 N. C., at p. 1013, the Court cites with approval Lord Hale's Pleas of the Crown, Vol. 1, p. 440, which thus lays down the doctrine on the subject: 'If divers persons concur in an intent to do mischief, as to kill, rob or beat another, and one did it, they are all principals; and if many be present and only one gives the stroke whereof the party dies, they are all principals, if they came for that purpose.' "

But it is contended that there is no evidence of a deliberate and premeditated killing. The statute does not restrict murder in the first degree to cases in which the slaying has been done by lying in wait, or poisoning, or has been planned beforehand. The premeditation or deliberation may take place after the parties meet, and this may be deduced from the attendant circumstances, the absence of provocation, the numbers brought against the deceased, the pursuit by four men following up one who is fleeing and trying in vain to escape, the standing over him after he is down, fatally wounded, the firing the last shot into the prostrate body, the other three with smoking pistol barrels standing by, and then their calling him to "Come on, hurry up, let us drive," and going off together.

In *S. v. Foster*, 130 N. C., at p. 671, the last case before this Court, it is said: "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 the first degree, and not violate the law nor their oaths as jurors." It (761) should not be necessary to cite cases, for, as the Court said, our authorities are uniform to that effect, but among them we may quote:

In *S. v. Dowden*, 118 N. C. (quoted in *S. v. Foster, supra*), at p. 1153, it is said: "This Court has not followed the intimations of some of the courts of other States, that in order to constitute deliberation there must be evidence of a definite design, formed on some occasion previous to the meeting at which the killing was done, and cherished up to and at the time of putting it into execution; . . . the question of the time that elapses between the determination to kill and the killing being immaterial."

In *S. v. Gadbury*, 117 N. C., 811, where there was no lapse of time, but one shot fired, and that without warning, *Furches, J.*, held that whether this was murder in the first degree or the second degree was a question for the jury. The same judge (*Brown*) followed that ruling in this case.

In *S. v. Dowden, supra*, the shooting was done, not with a multitude as here, but by one man, and "in ten or fifteen

seconds" after the deceased told the prisoner to get off the engine, and this Court unanimously sustained a verdict of murder in the first degree, *Avery, J.*, saying: "If the prisoner weighed the purpose of killing *long enough to form a fixed design* to kill, and at a subsequent time, *no matter how soon or how remote,* put it into execution, there was sufficient *premeditation and deliberation* to warrant the jury in finding him guilty of murder in the first degree. *S. v. Thomas,* 118 N. C., 1113; *S. v. Norwood,* 115 N. C., 790; 44 Am. St., 498; *S. v. Covington,* 117 N. C., 834; *S. v. McCormac,* 116 N. C., 1033."

In *S. v. McCormac,* 116 N. C., 1036, the Court says, quoting Kerr on Homicide, sec. 72: "The question whether there has been deliberation is not ordinarily capable of actual proof (762) but must be *determined by the jury* from the circumstances. It has been said that an act is *done with deliberation however long or short a time intervenes after the intent is formed* and before it is executed, if the offender has an opportunity to recollect the offense." The Court then goes on to say: "In arriving at a conclusion they (the jury) would naturally look to the testimony as to the *conduct of the prisoner at and about the time of the homicide* and the attendant circumstances to throw light upon the question, *rather than to a computation of the time intervening between the formation and execution of the design.*" Is not that the law in this case? If not, why not?

In *S. v. Covington,* 117 N. C., 834: "The only evidence of the circumstances under which the homicide was committed was the prisoner's alleged conversation that he entered a store to commit larceny; the deceased got between him and the door; that 'I watched my chance and jumped on the old man and wrenched his pistol and the old man hollered murder'; then I shot him through the body. The old man said, 'You have got me.' I aimed to shoot him, and this must have been when I shot him in the neck; and I shot him again." The Court held that it was proper to instruct the jury that "In no view of the evidence was the defendant guilty of murder in the second degree or manslaughter, but the jury should *find the prisoner guilty* of murder in the *first degree* if they believed that evidence, or acquit if they did not." Why then is it not at least evidence of murder in the first degree that all four in this case were engaged in *trying to head off* a fleeing man, and at least three and doubtless all four were *aiming* to shoot him (as four witnesses testify there were fifteen to twenty shots) and aiming so well that seven bullets struck him, three of them fatal and all in the rear, and when not a single witness testifies as to any legal provocation,

and as to absolutely no provocation at all by deceased toward these three prisoners. This case has been repeatedly cited as authority since, and has never been questioned. (763) In *S. v. Thomas,* 118 N. C., 1120, citing *S. v. Covington,* it is said that the expression of the prisoner, "I aimed" to kill him, justified a verdict of murder in the first degree, because (on the facts on that case) it tended to show that the prisoner formed the design to kill, "Not in the heat of passion aroused by combat, but when the deceased acknowledged he was vanquished." Here there was no combat shown by deceased as to these prisoners, and if it were shown that there was an altercation with Melton the deceased acknowledged himself vanquished by fleeing, and was pursued by superior numbers, fifteen or twenty shots fired, shot every time in the rear, and again after he was down, and all four participating in the last bloody and savage act.

In *S. v. Norwood,* 115 N. C., 793; 44 Am. St., 498, it is said that if the prisoner "deliberately determined to take the child's life by putting pins in its mouth it is immaterial how soon after resolving to do so she carried her purpose into execution," and there are several other cases all to the same effect. It is useless to add to those citations for in *S. v. Foster,* 130 N. C., at p. 671, the Court reiterated that "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 murder in the first degree, and also at last term the unanimous Court in *S. v. Conley,* 130 N. C., at p. 686, approved the following charge of *Judge Coble:* "By premeditation is meant thought beforehand, *for any length of time however short.*"

The law is thus clearly and admirably stated by Dr. Wharton, 1 Wharton C. L. (9 Ed.), sec. 380, with a long list of authorities to support his text: "To establish the predicate of 'premeditated,' which under most of the statutes is an essential incident of murder in the first degree, it has been said that a positive previous intent to take life must be shown, but this (764) opinion has since been recalled by the Court that delivered it, and is *opposed to the weight of authority everywhere.* And it has also been said that where the fact of death alone is proved the presumption is that it is murder in the second degree, it being incumbent on the prosecution to rebut this by something, however slight, from which premeditation can be inferred. But be this as it may—and when analyzed the position varies very little from that of the crown writers on murder, who draw the presumption of malice aforethought, not from the fact of death, but from the nature of the wound, instrument,

etc.—there is a substantial concurrence of authority on the general meaning of *premeditation*. It involves a prior intention to do the act in question. It is not necessary, however, that this intention should have been conceived for any particular period of time. It is as much *premeditation* if it entered into the mind of the guilty agent *a moment before the act* as if entered ten years before. And the reason of this is obvious. (Here follows the reasons.) Hence judges have generally united in holding that while there must be some sort of premeditation, *i. e.*, the blow must not be the incident of mania or the sudden paroxysm of passion, such as suspends the intellectual powers—whether there has been such *premeditation is for the jury*. . . . The question, in other words, is one of fact, not of arbitrary technical law." His Honor therefore properly left it to the jury in this case. The above is buttressed upon cases so numerous and from so many States that citation of them is omitted here, as they can be found by turning to the section (380) above quoted.

Again in the same work, at section 117, it is said, citing very numerous authorities which can there be found, without repeating them here: "It is constantly laid down that intent at the time of action is enough. It is not meant to assert by this that a person who, under sudden impulse, kills another is (765) guilty of murder. To say this would be unwarranted for the reason that we have no means of saying that a particular impulse is sudden. What we have a right however to say, and what the law means by this maxim to say, is this, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer (as a presumption of fact, but not of law) that the blow was intended prior to the striking, although it may be at a period of time inappreciably distant." The authorities cited are very numerous and uniform and sustain the text, and show that our decisions conform to those elsewhere. It may, perhaps, be thus succinctly stated: At common law and up to the statute dividing murder into two degrees, killing with a deadly weapon being shown, malice and premeditation were presumptions of law. Now a killing being shown, murder in the second degree is a presumption of law; and if, further, the killing with a deadly weapon is shown, indicating design, then whether there was premeditation is a question of fact for the jury, and they have a right to infer premeditation from the nature of the weapon or other attendant circumstances. In such cases that question

is always one to be submitted to the jury, and it was not error to submit it to them on the facts of this case.

When (if the evidence is believed) these four men pulled out their pistols and commenced firing upon one man, and continued to pursue and fire upon him while fleeing, that was evidence of a deliberately formed intent to kill, and that intent necessarily preceded the actual killing. It also showed concert of action. The evidence that all the shots came from the rear, and that when the deceased was down, fatally wounded, a shot was fired by one of the number, the others standing by encouraging him and calling to him to escape with them, is evidence confirmatory of a previously formed intent to kill.

When it is shown that the parties did combine and act together in the execution of an unlawful purpose, a previ- (766) ous agreement to do so need not be shown (*People v. Mather,* 4 Wend., 230; 21 Am. Dec., 122); but there is evidence of the latter which the jury were well warranted in considering. Four colored men, nearly related, go together to a store; they all go armed, for the evidence is that in a few minutes all of them were using pistols; one of them grossly insults a white man without provocation, and when ordered out refuses to go, but reiterates the grossest insults, calculated to bring on a fight, while his three companions, who had gone out, return into the store; soon after the white man is seen out of doors running for his life, with all four chasing him and four revolvers barking on his track; seven shots strike him, all from the rear; he is shot again after he is down, then all four jump into a wagon and drive off. No witness, not even those for the defense, states that there were any words or any movements by the deceased against these three prisoners, yet there is evidence that they pursued him and aided in compassing his death. Is not this unprovoked participation in the tragic death of the deceased some evidence of that premeditated, deliberate killing which constitutes murder in the first degree?

"What *all* the evidence shows" is solely for the jury, not for the Court; and the jury have decided that it proves beyond a reasonable doubt that the prisoners are guilty of murder in the first degree—beyond any reasonable doubt in the minds of any one of the twelve impartial men who heard the evidence and whose province it was to pass upon the facts. This Court cannot sit as a revising jury to pass upon their action. If it be conceded (which I do not claim) that we are wiser and more impartial than the jury who found the verdict, we are at the double disadvantage of not having heard the witnesses nor been present at the trial, and that the law does not give us

(767) power to weigh the evidence. *Smith, C. J.*, in *S. v. Hardee*, 83 N. C., at p. 622, says: "Nor will the Court look into the evidence to ascertain if the verdict was rendered upon testimony which ought not to have convicted," citing *S. v. Storkey*, 63 N. C., 7, and *S. v. Davis*, 80 N. C., 384.

There are only two accounts given of the slaying of the deceased. That of the State's witnesses above recited, which if believed is strong, and it should seem conclusive, evidence of murder in the first degree. The other version is that of the four witnesses for the defense, three of whom are women and near relatives of the prisoners. Their account is that there was a fight between deceased and Melton, and deceased fired two shots and Melton three, and no one else fired or had any part in the difficulty, and if this is true the prisoners are guilty of nothing. Aside from the relationship and the fact every one knows the women left when the shooting began, there is the fact that deceased's clothes showed seven bullet holes, all in the rear, and no one else is shown to have been struck. What was the truth of the transaction was for the jury, to whom his Honor left the determination of the facts under a charge not excepted to, and it is not for this Court to reverse their finding of the facts.

In *S. v. Smith*, 126 N. C., 1116, it was held by a unanimous Court, through *Montgomery, J.*, that "Where there is evidence, more than a scintilla, on the part of the State going to show premeditation and deliberation on the part of the prisoner indicted for murder, it is for the jury to pass upon the guilt of the prisoner and the degree, if guilty."

And further, "The credibility of the witnesses and the weight of the evidence are for the jury and not for the appellate court, although it may differ from the jury as to the weight of the evidence where it is conflicting."

The presiding judge could have set aside the verdict, and would have done so in this case, in the discharge of his (768) duty, if he had thought the evidence did not justify the verdict. That power is wisely vested in him who heard the evidence and saw the bearing of the witnesses on the stand. The only authority committed to us is to pass upon the assignment of errors of law, which in this case is the allegation that there was *no evidence*. In such case we can only consider the evidence against the appellants, and if there is any evidence, more than a mere scintilla, it is for the jury, and the jury alone, to say whether the evidence is overcome by the evidence for the defense. That is their province not ours. Three out of the four witnesses for the defense in this case, as already stated,

are women nearly connected with the prisoners, and what weight that fact should have in considering the credit to be given their testimony was for the jury to decide. *S. v. Lee,* 121 N. C., 544. The jury also knew, as we cannot know, the character of the witnesses and the credit which should be given to the testimony of each. For wise purposes trial by jury was established by our ancestors, and has been continued and declared inviolable by our present Constitution. Any impairment of their powers or curtailment of them by the appellate court revising the judgment of the jury upon the weight of the evidence, is contrary to the organic law and our unbroken line of decisions. If the Court can pass that line for the prisoners in a State case there is nothing to hinder like action in any other. To judges of fact grounds of challenge are always allowed. To judges of law there are none. Therefore they should be all the more careful not to infringe upon the province of those to whom the Constitution and the laws have committed the ascertainment of the facts.

The prisoners have had a fair trial before a learned and impartial judge, with two able counsel to defend them. It speaks well for the forbearance of the law-abiding people of Bertie that this is so. I have been unable to discover any error or any wrong done the prisoners in this trial.

MONTGOMERY, J., dissenting. At the time of his death (769) Stevenson was a salesman in the employment of Peele, a witness in the case. The three prisoners, together with Melton Belfield (now dead), on the day of the homicide went to the store of Peele for a lawful purpose so far as the evidence discloses. Before the shooting commenced the prisoners were peacemakers. On his cross-examination Peele said, in answer to the question, "They did not take any part in the row, did they?" "Not specially." "When you ordered them out did these prisoners go out?" "Yes, sir." Peele further testified that upon hearing pistol firing he returned from the back room of the store to the front door; he then saw Melton Belfield shoot Stevenson; that he fired standing right over him, and that he saw no pistols in the hands of prisoners. But the evidence of Liverman and that of Dr. Capehart went to prove that the prisoners were engaged in the shooting and under circumstances tending to show premeditation on their part to kill Stevenson; and upon that evidence, doubtless, the jury convicted them of murder in the first degree. A very short time elapsed between the moment when the prisoners were peacemakers and the time when they did the shooting, according to the evidence of the

two last named witnesses, it is true; but premeditation is not a question of time. If the intent to kill springs from a sudden gust of passion and the act of killing is simultaneous with the formation of the intention, then there is no premeditation. But if the purpose to kill has been considered long enough to fix in the mind the determination to do the act, and then subsequently, either remotely or immediately, the killing is done, premeditation exists. *S. v. Dowden,* 118 N. C., 1145; *S. v. Foster,* 130 N. C., 666. I think there was no error.

Cited: S. v. Cole, 132 N. C., 1092.

(770)

STATE v. HINTON.

(Filed 18 November, 1902.)

HIGHWAYS—*Roads—Residence.*

A person is not liable to road duty where he is temporarily employed, he having a place of domicile elsewhere.

INDICTMENT against Irvey Hinton, heard by *Judge O. H. Allen* and a jury, at January Term, 1902, of WAKE. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
Thos. M. Argo, for the defendant.

DOUGLAS, J. The defendant was convicted of refusing to work the public roads in Wake Forest Township, he being a resident of the city of Raleigh.

But one point need be considered for the determination of this case, as it strikes at the root.

On the trial the court below was asked by the defendant to instruct the jury that "If they believed the evidence as a whole the defendant was entitled to a verdict of not guilty." This was refused by the court, who in lieu thereof charged the jury that "If they believed from the evidence, beyond a reasonable doubt, that the defendant left Raleigh with his wife and went to Mr. Haywood's, his wife taking all of her things with her from Mr. Adams's, and the defendant having a sleeping room at the Baptist University, where he slept as a servant but lived with his wife, and during the vacation at the college they went

to Mr. Haywood's under an agreement, she to cook for an indefinite period and he to work as a laborer for two months, unless called back sooner, and he was not so called back, and while he was so working he was summoned to work the road, being one of the hands on Haywood's plantation, (771) and had willfully refused to work, they should find the defendant guilty."

In the charge as well as the refusal to charge there was error. It appears from the evidence that the defendant had permanent employment in the city of Raleigh, where he worked for at least ten months in the year, and where he paid taxes and voted. He worked at the Baptist University, where he also slept, but says that he lived with his wife at Mr. Adams's. Whether he meant that he took his meals at the latter place or merely considered it his home does not clearly appear, nor do we think it material, as both places are in Raleigh. During the vacation at the university he was permitted to work elsewhere, and he made a contract to work on Mr. Haywood's farm for sixty days unless sooner recalled to the university, to pay off an old debt. His wife also worked at the same place and for the same purpose, she receiving $3 per month with board for her services, and he $7. That they should both work during their vacation at such moderate wages to pay off an old and uncollectable debt is to their credit. We say "uncollectable," because he appealed *in forma pauperis.*

The defendant did not acquire a residence in Wake Forest Township, where he had been only three weeks when summoned to work the road, nor is there any evidence tending to show that he had any such intention. On the contrary all the evidence tends to prove that he was there purely for a temporary purpose, with the expressed intention of returning to Raleigh on or before the expiration of the sixty days.

But it is contended that he acquired a temporary residence at Haywood's, still retaining his domicile in Raleigh. Suppose he had worked around by the week or day, would he have been liable to work on every road near which he happened to be when the road hands were called out?

Again, it is urged that his wife "moved her things to Mr. Haywood's." Whether she carried them on her head (772) or in a two-horse wagon does not appear. In any event we are not prepared to say that the temporary location of a wife's personal belongings draws to them in law the residence of the husband.

We have decided this case upon the reason of the thing, which does not seem to be in conflict with any authorities or precedents

called to our attention. We do not think that the law intends to impose upon any one the double burden of working the roads in different districts at the same time; and as the defendant had paid taxes for working the streets of Raleigh, admittedly the place of his domicile, we do not think he could be required to work the roads in any or every district where he happened to be temporarily employed.

New trial.

Cited: S. v. Yoder, 132 N. C., 1115.

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(773)

STATE v. ELLSWORTH.

(Filed 18 November, 1902.)

1. FORMER CONVICTION—*Pleas—Burden of Proof—Criminal Law.*

On the trial of a plea of former conviction, it being in the nature of a civil proceedings, the burden is on the defendant.

2. FORMER CONVICTION—*Verdict—Pleas—New Trial.*

Where the verdict on a plea of former conviction is contrary to the weight of evidence, the trial court may set aside the verdict and order a new trial.

3. FORMER CONVICTION—*Former Jeopardy—Pleas.*

The trial of a plea of former conviction before trial on the merits is an interlocutory proceeding and not the subject of a subsequent plea of former jeopardy.

4. FORMER CONVICTION—*Appeal—Verdict.*

An order setting aside a verdict on preliminary trial of a plea of former conviction is reviewable on appeal from a judgment on the merits.

INDICTMENT against Geo. Ellsworth and another, heard by *Judge T. A. McNeill* and a jury, at February Term, 1902, of ANSON.

From an order setting aside a verdict sustaining a plea of former conviction and granting a new trial the defendants appeal.

Robert D. Gilmer, Attorney-General, for the State.
H. H. McLendon for the defendants.

CLARK, J. The defendants were indicted for breaking into a storehouse with intent to commit larceny, without specifying any articles, and their sentence on conviction was affirmed on appeal. *S. v. Ellsworth,* 130 N. C., 690. During the pendency of that appeal, and before the decision of this Court therein had been rendered, an indictment was tried (774) against the defendants for larceny of certain articles alleged to have been stolen by them from said storehouse immediately after their felonious breaking into the same. To this the defendants interposed the preliminary plea of former conviction, declining to plead to the merits till this plea had been disposed of.

The plea of former conviction is not a plea upon the merits. It is not an inquiry as to anything that the defendant has or has not done, and is not therefore of a criminal nature. It is a collateral civil inquiry as to what action the Court has taken on a former occasion. The burden from the start is on the party offering it, and if it is not proven by him by a preponderance of evidence the issue must be answered "No." So distinct is this collateral issue from the criminal inquiry that it is held that they should be tried separately. *S. v. Winchester,* 113 N. C., 641; *S. v. Respass,* 85 N. C., 534. It is held an "interlocutory plea," and that no appeal lays for defendant therefrom, but he can note his exception. *S. v. Pollard,* 83 N. C., 597. When the plea of former conviction (or former acquittal) is not sustained then the criminal trial begins unaffected by the interlocutory inquiry which has been taken as to the former action of the Court. *Com. v. Goddard,* 13 Mass., 455. So far from involving the criminal trial the plea of former conviction is a confession, and therefore it should be tried separately. There is a single issue on a trial for a criminal offense to which the response must be "guilty" or "not guilty." The issue here submitted was, "Have the defendants been formerly convicted of the crime wherewith they now stand charged?" There was no conflict in the evidence and the answer depended upon an inspection of the two indictments by the court. Being of opinion that they were as a matter of law for different offenses, the judge instructed the jury that if they believed the evidence to answer the issue "No." He might have directed (775) a verdict, for there was no evidence in favor of the party upon whom lay the burden of proof (*Spruill v. Ins. Co.,* 120 N. C., 141) if the judge was right in his legal conclusion upon inspection of the indictments. The jury, however, found the proposition of law, the only matter before them, differently from the judge and responded "Yes." Whereupon he set the

verdict aside because "contrary to the weight of the evidence and against the instructions of the court."

The court cannot set aside a verdict of not guilty, though it may treat such verdict as a nullity when it has been procured by fraud (*S. v. Tilghman,* 33 N. C., 513; *S. v. Swepson,* 79 N. C., 632), and put the defendant on trial again. But this was not a verdict of not guilty. It was an interlocutory inquiry as to former action by the court, and the verdict by the jury being in the face of the instructions of his Honor and unsustained by any evidence, he could not do otherwise than set aside the verdict. The defendants have not been in jeopardy. 17 A. and E. Encyc. Law, 592; *S. v. Hager,* 61 Kan., 504; 48 L. R. A., 254. Their guilt has not been inquired into by a jury on this bill. With this verdict set aside there still remains a new trial upon this plea of former conviction, and if that is found against them then the plea of not guilty will be tried unaffected by these preliminary inquiries, which are in the nature of a plea of abatement. So purely is this a collateral inquiry that when, as here, the plea turns upon an inspection of the two indictments, the court may decide the plea without the intervention of a jury, or may charge the jury that the plea is not sustained by the evidence. 9 Enc. Pl. and Pr., 640, and cases there cited, and *Martha v. State,* 26 Ala., 72, in which *Chilton, C. J.,* says: "This is no invasion by the Court of the province of the jury, for it is the duty of the Court to declare the legal effect of the record insisted on by the prisoner (776) as sustaining her pleas" of former acquittal.

In a somewhat similar inquiry in *S. v. Haywood,* 94 N. C. (for forgery), at p. 848, the preliminary issue, "Is defendant sane and capable of conducting his defense?" was found by the jury "No." The trial court set aside this verdict because against the weight of the evidence. This was tacitly recognized on appeal as valid for the defendant was immediately put upon trial for the forgery and convicted, and a new trial was granted on appeal for an objection to a grand juror which, it was held, was not waived by the trial upon this preliminary plea, though it was held that it would have been if not made before the plea of not guilty was entered.

In *S. v. Lee,* 65 Conn., 265; 27 L. R. A., 498; 48 Am. St., 202, *Hammersley, J.,* well says: "A theory seems at times to have prevailed which assumes that the punishment of crime is a sort of invasion of natural right, and that a person accused of crime should be exempt from established rules of law binding on all other citizens, and therefore a procedure which proves incompetent to the correct application of legal principles in

criminal trials can be changed, like any other rule of practice, when the change may tend to protect an accused from unjust punishment, but becomes a fundamental principle of jurisprudence that cannot be altered when the change may tend to secure his just punishment. It needs no argument to dispel such illusion or to demonstrate that the natural rights of the individual as well as the interests of public order are best served, and the essential principles of jurisprudence are most accurately followed, when the proceedings in a criminal prosecution include such protection against injustice that the final disposition of the cause will not only settle the controversy but settle it in accordance with law. . . . 'Putting in jeopardy' means a jeopardy which is real and has continued through every stage of one prosecution, as fixed by existing laws relating to procedure. While such prosecution remains undeter- (777) mined, the one jeopardy has not been exhausted. The jeopardy is not exhausted by an indictment followed by a *nolle,* nor by a *nolle* after the trial has commenced when the prisoner does not claim a verdict." 2 Swift Digest, 402; *S. v. Garvey,* 42 Conn., 233; nor by the discharge of a jury in case of the sickness of a judge. *Nugent v. State,* 4 Stewart & Porter (Ala.), 24 Am. Dec., 746; the sickness of juror, *Rex v. Scalbert,* 2 Leach C. C., 620; *Rex v. Edwards,* 2 Camp., 207n; *Com. v. Merrill,* Thacher Cr. Cases, 1, and innumerable other instances, which the learned judge cites with accompanying authorities, and it will be noted that all these apply to events after a trial upon the general issue has begun.

Our conclusion is that "A plea of former acquittal or former conviction not being of matter involved in the general issue—not being matter which goes to the question of guilt—a judgment (or verdict) sustaining it cannot be in the nature of an acquittal." *S. v. Hager,* 61 Kan., at p. 507; 48 L. R. A., 254.

It was held in *S. v. Pollard,* 83 N. C., 597, as above stated, that no appeal lay from a judgment overruling an interlocutory plea of former conviction, since the criminal trial upon the plea of not guilty must still take place, and if the defendant is acquitted on that the appeal and incidental delay would be in vain, and therefore he should merely note his exception and have the interlocutory judgment reviewed if the final judgment is against him. For a stronger reason no appeal lays here from setting aside the verdict on the interlocutory plea, when there remains still both the new trial upon the interlocutory plea, and if that should go against the defendants, then the criminal trial upon the plea of not guilty, and if either of these go in favor of the defendants such appeal as this would be useless. The

(778) defendants should have simply noted an exception to setting aside the verdict.

The point whether the indictment covers the same offense as that on the former trial was also discussed before us, but need not be considered as the verdict was set aside because against the weight of the evidence, which is a matter of discretion (it not being a criminal matter); and further, because the conviction of the defendants for the burglary having been affirmed by this Court since the trial of the interlocutory plea in this case, and they being (as counsel state) now undergoing sentence therefor in the State's prison, we have no doubt a *nol. pros.* will be entered in this cause below.

Appeal dismissed.

DOUGLAS, J., dissenting. I have a natural repugnance to the mixing up of criminal and civil proceedings and the inextricable confusion necessarily arising therefrom. The Code says:

"Section 125. Remedies in the courts of justice are divided into (1) Action; (2) Special Proceedings."

"Section 126. An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense."

"Section 127. Every other remedy is by a special proceeding."

"Section 128. Actions are of two kinds, (1) Civil; (2) Criminal."

We are told that the trial of a plea of former conviction is "a collateral civil inquiry." What is a collateral civil inquiry? Is it an action or a special proceeding? It does not seem to me to be either, and if neither I see neither room nor warrant in the Code for its judicial creation. The action at bar

(779) is certainly criminal, as the defendants are charged with larceny, which may send them to the penitentiary for ten years. I do not see anything civil about it, no matter what definition of the term we may choose. It is true the defendants are already in the penitentiary serving a ten-years sentence for the same unlawful act, but it seems that it is not enough. This splitting up of one act into two distinct offenses cannot meet my approval. It is illogical and dangerous, and frequently false; in fact a mere creation of judicial speculation. The plea of former conviction is neither an action nor a special proceeding. It is merely a defense to a criminal action, just as much so as the plea of not guilty. Either plea found in the defendant's favor is just as effectual as the other, and in fact in some jurisdictions the defense of former conviction or acquittal may

be shown under the general issue without being specially pleaded. P. Enc. Pl. and Pr., 631. Pleas, being purely defensive and therefore having no independent existence, are governed in their determination by the nature of the action in which they are interposed. The fact that in many of them the burden of proof is imposed upon the defendant does not turn them into civil inquiries. In trials for murder the burden of proving self-defense rests upon the defendant, but surely it is not a civil inquiry. It is said that "the plea of former conviction is not a plea upon the merits." That is true in a moral sense, but it goes to the essence of the action. It is a plea in bar and not in abatement, and therein it differs materially from the plea of insanity as interposed in *S. v. Haywood,* 94 N. C., 848, cited by the Court. If a defendant is insane at the time of the commission of the offense he is irresponsible, and therefore not guilty of the crime. This is in bar. If, however, he becomes insane after the commission of the offense, his plea is in the nature of abatement, and protects him only while he remains insane. *S. v. Pritchett,* 106 N. C., 667; 10 Enc. Pl. and Pr., 1215, 1216. On the other hand, the plea of former (780) conviction, when sustained, is a complete bar to any further prosecution. The defendant stands as fully acquitted of the present charge as if there had been a verdict of not guilty. One is equally free whether he has never owed the debt or has paid it. Upon such a finding he is entitled to his discharge, and when that finding is set aside he is again placed in jeopardy. I cannot divest myself of the idea that a man is in legal jeopardy when he is in danger of being sent to the penitentiary, nor can I regard any proceeding that sends him there as civil in its nature. To say that an action itself is criminal but that the defense thereto is civil, involves an inconsistency foreign to my opinion of the law. From my view of the law it would follow that the court below had no power to set aside a verdict substantially of acquittal as being against the weight of evidence. I fully concur in the intimation of the Court that a *nol. pros.* should be entered below.

Cited: S. v. White, 146 N. C., 610; *S. v. Cale,* 150 N. C., 807.

(781)

STATE v. FINGER.

(Filed 25 November, 1902.)

1. WITNESSES — *Preliminary Examinations — Evidence—Infants—Review.*

Whether an infant has the capacity to testify is a matter in the discretion of the court and is not reviewable.

2. EVIDENCE—*Rape.*

On the prosecution of a negro for an assault with intent to commit rape on a white girl, evidence that the girl or her companions associated with negroes is irrelevant.

3. INSTRUCTIONS—*Evidence—Rape.*

In an indictment for an assault to commit rape, the defendant having testified that he was not where the girl was on the day of the alleged assault, it is not error for the trial court to refuse to charge that the jury might consider certain evidence as tending to show that the defendant was playing with the girl.

4. EVIDENCE—*Sufficiency—Rape.*

There is in this case sufficient evidence to be submitted to the jury on the question of the guilt of the accused of an assault with intent to commit rape.

INDICTMENT of Clarence Finger, heard by *Judge H. R. Starbuck* and a jury, at April Term, 1902, of LINCOLN. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for the defendant.

MONTGOMERY, J. The defendant was convicted of assault with intent to commit rape upon Lethe Wise, a child under ten years of age. After an examination of the child, who was tendered as a witness, as to her capacity to testify, his Honor
(782) found that she was of sufficient intelligence, and she was allowed to give testimony over the defendant's objection and exception. It was a matter in the discretion of his Honor, and we cannot review his ruling in this Court. *S. v. Manuel,* 64 N. C., 601; *S. v. Edwards,* 79 N. C., 648. The defendant's counsel offered to prove that the Weaver family ate with negroes and associated with them constantly, which testimony his Honor refused to receive. We cannot understand how it could be thought to be competent evidence. If it was true that little Bessie Weaver, the companion of Lethe, was, through her family connection, the associate and companion of colored people, that

did not give the defendant, who was a colored boy seventeen years of age, the right or the privilege to assault Lethe. The third exception was to the refusal of his Honor to allow Mrs. Taylor, a witness, to answer the question, "Do you know the manner of associating between the Wise family and the negro race?" The exception cannot be sustained. The law makes no presumption that white persons who associate with negroes are debased in character, and even if the little girl Lethe were a woman instead of a child, and a lewd woman in addition, still the defendant had no right to commit an assault upon her.

The defendant's counsel asked several special instructions, all of which were given except the fifth and seventh, which were declined. The fifth instruction asked was in these words: "That the jury have a right to consider, and it is their duty to consider, any evidence that tends to show such a state of relation existing between the witness Lethe and her associates and family, and the defendant (being a negro), that he was on such familiar terms with them as would warrant the belief that he was playing with Lethe on this particular occasion." The defendant, in his examination, said that he never went to the granary, where the children were, on that day—wheat threshing day; that he was at the machine all that day, (783) throwing down wheat. How could he ask, then, any instruction to the jury that he was playing with the children in the act with which he was charged by the witness? Or suppose that he was intimate with the children, did that authorize him to play with them in such manner as Lethe testified? The instruction was properly refused.

The seventh prayer for instruction was that there was no competent evidence for the jury of any assault with intent to commit rape. That was properly refused. His Honor had held that Lethe was a competent witness, and she testified to facts tending to show the assault.

Upon a careful consideration of the whole evidence in this case we have grave doubt about the guilt of the defendant. The child's examination before the justice of the peace, the delay in the prosecution of the defendant, his conduct after the offense was committed, cause us to suspect some sinister purpose at the bottom of his prosecution. Dr. Crowell, a witness for the defendant, testified that he examined the private parts of the child Lethe at the trial term of the court, and that he found no rupture or any indication of penetration. But they were all circumstances for the jury, and the duty of finding the facts and the responsibility of the finding were with them.

There was no error in the rulings of his Honor, and the judgment is

Affirmed.

Cited: S. v. Mehaffey, 132 N. C., 1065.

(784)

STATE v. PEOPLES.

(Filed 25 November, 1902.)

1. JURY—*Grand Jury—Civil Rights—Constitutional Law—Negroes—Constitution of United States — Fourteenth Amendment — The Code, Sec.* 1722.

   The exclusion of all persons of the negro race from a grand jury, which finds an indictment against a negro, where they are excluded solely because of their race or color, denies him the equal protection of the laws in violation of the Constitution of the United States.

2. INDICTMENTS—*Grand Jury—Motion to Quash—The Code, Sec.* 1741.

   A motion to quash an indictment against a negro is the proper remedy where negroes have been excluded from the grand jury solely on the ground of color.

INDICTMENT against Will Peoples, heard by *Judge A. L. Coble* and a jury, at April Term, 1902, of MECKLENBURG. From a verdict of guilty and judgment thereon the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
W. H. Green for the defendant.

MONTGOMERY, J. A true bill for "gaming" was found against the defendant by the grand jury at April Term, 1902, of the Superior Court of Mecklenburg County, and at the same term he was tried and convicted of the offense found against him. Judgment was pronounced that the defendant be imprisoned in the county jail for six weeks, to be assigned to work on the public roads of the county, and the defendant has appealed from the judgment to this Court. On his arraignment for trial, and before plea and before the jury were empaneled, he moved through his counsel to quash the bill of indictment for the reasons substantially stated as follows:

1. Because the list of thirty jurors drawn by the county

commissioners and summoned by the sheriff, from which (785) the grand jury were drawn and which found the bill against the defendant, was improperly selected and summoned, the list not having been taken from a revised jury list, as required under sections 1722, 1723, 1724, 1725, 1726, 1727, 1729 and 1730 of the Code, and the amendments thereto; and that said jury list had not been revised or purged since June, 1898, and then revised with partiality so as to discriminate unjustly and purposely against competent persons of the negro race, to which the defendant belongs, on account of such person's race or color.

2. Because the officers whose duty it was to revise the jury list and to draw the panels to be summoned by the sheriff, from which the grand and petit juries were drawn, had revised, selected and summoned the thirty-six jurors for the term of the court for said county, from which the grand jurors were drawn that found the true bill against the defendant, with the unlawful and avowed purpose of discriminating against persons of the negro race who of right, being competent, should not have been excluded from the jury lists on account of their race or color, to the prejudice of the defendant.

3. Because such unjust and unlawful discrimination against the defendant deprived him of a fair and impartial trial in that court, as is guaranteed to him under the Constitution and laws of North Carolina, and the Thirteenth and Fourteenth Amendments to the Constitution of the United States, and the acts of Congress thereunder.

4. Because, in the defendant's belief, he could not get an impartial trial, as guaranteed him by the laws of the land, under such unjust discrimination against him, on account of his race and color, there being about fifty-five thousand population in Mecklenburg County, one-third of whom are of per- (786) sons of the negro race, who pay taxes on more than a quarter of a million dollars' worth of property, and the greater number of whom are equal to the average jurors as serve in the several courts.

The defendant prayed that a subpœna *duces tecum* be issued from the court to the chairman of the board of commissioners of Mecklenburg County, to the register of deeds, to the clerk of said board, and to the sheriff of said county, requiring them to bring their several records pertaining to the drawing and summoning of jurors for that term of court, and also the jury box and boxes, and to give such information to the court respecting the selecting and summoning of jurors that might be asked of them and of which they might have knowledge.

The prayer embraced also a number of other witnesses. 2. That the motion to quash the bill of indictment be granted; that the list of jurors selected and summoned for this term of the court be set aside, because the officers who selected and summoned the jurors had corruptly and avowedly discriminated against the rights of the defendant so as to prevent a fair and impartial trial under the law of the land, by excluding from the jury list competent persons of the colored race. The motion was followed by an affidavit of the defendant as follows: "That he is informed and believes, and doth so aver, that the cause set forth in affiant's motion to quash the bill is true and well founded in fact and in law, to the best of affiant's own knowledge and belief. Affiant further states that he is informed and believes, and doth ever aver, that it is the well-conceived and avowed purpose of the county commissioners and sheriff of said county and State to so manage the soliciting and summoning of the several jurors to sit as jurors in this court, either as grand or petit jurors or both, so as to wrongfully and unjustly discriminate against defendant's right to a fair and impar-
(787) tial jury of good and lawful men, by shutting out or by keeping off the jury panels competent and lawful persons of defendant's race; and that affiant verily believes, and doth aver, that said officers have so acted in selecting and summoning the panels of jurors to attend at this term of court, said grand jury being a continued panel or Spring Term panel, selected by the county commissioners 6 January, 1902; and that affiant believes that he cannot get a fair and impartial trial in this court, or in any other such court, to which he is entitled under the laws and Constitution of North Carolina, and the Thirteenth and Fourteenth Amendments and Acts of the Congress of the United States thereto, under such unfair and avowed discrimination against the affiant's just right to a fair and impartial trial in this court, on account of affiant's race and color; and affiant further sets forth and firmly avers that he believes that the grounds of his motion to quash the indictment are reasonable and just, and are warranted by the Constitution and laws of North Carolina, the Thirteenth and Fourteenth Amendments to the Constitution, and the acts of Congress thereunder, and the just and reasonable consideration of mankind, and that he ever believes and avers." Sworn to and subscribed before the clerk of the Superior Court on 22 April, 1902.

The court overruled the motion and refused the prayer for subpœna *duces tecum* on the grounds "That the court had not the power to quash the bill of indictment on the grounds set out in the defendant's motion and affidavit, and could not in-

vestigate the matters alleged in the motion and affidavit under a motion to quash." The defendant excepted, entered his plea of not guilty, and proceeded to trial. He then challenged a panel of the petit jury on the grounds heretofore set out. The court overruled the challenge, and the defendant excepted.

The question for decision is not whether a grand jury, in the finding of a true bill against a negro, or a petit (788) jury by whom the indictment is tried, shall be composed in whole or in part of the defendant's own color, but it is whether, "In the composition or selection of jurors by whom he is indicted or tried, all persons of his own race or color may be excluded by law solely because of their race or color, so that by no possibility can a colored man sit upon the jury." The only qualifications which the laws of North Carolina impose for jury service are the payment of taxes for the preceding year and good moral character and sufficient intelligence. Code, sec. 1722. The defendant does not, and indeed could not justly complain of the laws of the State in reference to the manner in which provision has been made for the constitution and selection of juries. His complaint is that, notwithstanding it is required by our laws that such of its citizens as possess the proper qualifications shall be placed on the jury lists, the colored race, of which he is a member, although many of them possess the requisite qualifications, are excluded by the officers who are charged by the law with the duty of selecting jurors, solely because they are of that race. If the facts be such as the defendant declares them to be what, if any, wrong has he suffered; and if any, what remedy has he, if any? If he has suffered any wrong, the fact that it may have been caused through the administrative officers of the State, instead of by legislative enactment, does not relieve the situation. It would still be a wrong. *Carter v. Texas,* 177 U. S., 442.

It was argued here for the State that the individuals who composed the grand and petit juries were possessed of the requisite qualifications for jurors, as prescribed by law; that no harm was shown to have been done to the defendant because of a failure to have negroes on the jury, and therefore that he had no grievance. But is not that an erroneous and superficial view of the matter? In the opinion in the case of *Strauder v. West Va.,* 100 U. S., 303, *Mr. Justice Strong,* (789) for the Court, said: "The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law as jurors because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them affixed

by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of that race that equal justice which the law aims to secure to all others."

The right of trial by jury is guaranteed to every citizen of the State. It is ordained by section 13 of Article I of the Constitution of North Carolina that "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petit misdemeanors, with the right of appeal." And it goes for the saying that the makeup, constitution and selection of juries is an extremely important part of the protection and benefits intended to be secured by jury trial. The most primitive as well as the most advanced idea of a jury is that it is a body of men selected and drawn to determine the rights of parties under indictment and in other judicial proceedings, and composed of the neighbors, associates and persons having the same legal status in the community as the litigants or the accused. We know of common knowledge that prejudices sometimes exist in communities against certain classes which control the judgment of juries in their deliberations, and therefore operate to deny such classes such privileges as others enjoy; and race antipathy is as old as historic time, however much some philanthropists and independent thinkers have done or may be doing to eradicate it. It is difficult to understand how the conduct of the officers, whose duty it is to select jurors in Mecklenburg County, if it is such (790) as it is declared to be in the motion and affidavit of the defendant, can be considered as fair and undiscriminating against colored persons in that county who may be tried for a criminal offense against the State, or who may be parties in civil actions. It is incomprehensible that while all white persons entitled to jury trials have only white jurors selected by the authorities to pass upon their conduct and their rights, and the negro has no such privilege, the negro can be said to have equal protection with the white man. How can the forcing of a negro to submit to a criminal trial by a jury drawn from a list from which has been excluded the whole of his race purely and simply because of color, although possessed of the requisite qualifications prescribed by the law, be defended? Is not such a proceeding a denial to him of equal legal protection. There can be but one answer, and that is that it is an unlawful discrimination. A wrong, then, has been done against the defendant if the facts set forth in the motion and affidavit be true, and in this age of the world there must be a remedy for every wrong.

What was the defendant's remedy? The very one he sought to have applied. By section 1741 of the Code it is provided that "All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and empaneled to try the issue by motion to quash the indictment, and if not so taken the same shall be deemed to be waived." It was urged in this Court for the State that a plea in abatement was the only course of procedure which the defendant could follow in this case. But in *S. v. Haywood,* 94 N. C., 847, this Court said that "The regular and appropriate method of making objection to a grand juror under the general practice, when the fact upon which it depended did not appear in the record and had to be established by proof, is by plea and abatement, and if it does so appear, by a motion to quash." But the Court went on to say that "In our practice the distinction has (791) not been recognized as important, and the motion to quash has been held proper in either case." The Court went on further to say, "But, whatever difference may be supposed to exist as to the two methods of raising the objection, they are removed and the practice settled by statute" (quoting the Code, sec. 1741). The discrimination which is alleged to have been practiced against the defendant is one that has been passed upon by the Supreme Court of the United States and held to be contrary to the Fourteenth Amendment of the Constitution of the United States, and therefore unlawful. *Strauder v. West Va.,* and *Virginia v. Rives,* 100 U. S., 303 and 313; *Neal v. Delaware,* 103 U. S., 370; *Carter v. Texas,* 177 U. S., 442. In the last mentioned case the facts and manner of procedure in the State court of Texas were just as they are here.

There was error in the judgment of the court and error in the refusal of his Honor to grant the motion and have the matter set out in the motion and affidavit properly considered and tried. The case is remanded to that end.

Error.

CLARK, J., concurring. I concur in the conclusion that the presiding judge should have heard the evidence, found the facts and rendered judgment thereon, and that only because the United States Supreme Court, the final tribunal upon all Federal questions, has so decided. *Carter v. Tex.,* 177 U. S., 442; *Gibson v. Miss.,* 162 U. S., 565; *Neal v. Delaware,* 103 U. S., 370; *Strauder v. W. Va.,* 100 U. S., 303, and *Va. v. Rives, ibid.,* 313. We must bow to that authority, though I am constrained to believe that the argument of *Mr. Justice Field,* in his dissenting opinion in *Neal v. Delaware,* 103 U. S., at pp. 405-409, clearly

demonstrates that the Thirteenth, Fourteenth and Fif-
(792) teenth Amendments conferred "no warrant for any legislation of Congress interfering with the selection of jurors in the State courts." *Chief Justice Waite* also dissented in that case, and *Mr. Justice Field* reiterated in that dissent what he had so well said in his previous dissent, a very able one, in *Ex parte Virginia,* 100 U. S., 349-370, in which dissenting opinion *Mr. Justice Clifford* concurred. Among other things in that dissent *Mr. Justice Field* particularly says (100 U. S., at p. 368): "If, when a colored person is accused of a criminal offense, the presence of persons of his race on the jury by which he is to be tried is essential to secure to him the equal protection of the laws, it would seem that the presence of such persons on the bench would be equally essential if the court should consist of more than one judge, as in many cases it may; and if it should consist of a single judge, that such protection would be impossible. A similar objection might be raised to the composition of *any appellate court* to which the case, after verdict, might be carried."

After this delicate suggestion, that to be consistent the United States Supreme Court should insist upon the admission of colored members, *Mr. Justice Field* proceeds: "The position that in cases where the rights of colored persons are concerned justice will not be done to them unless they have a mixed jury, is founded upon the motion that in such cases white persons will not be fair and honest jurors. If this position be correct there ought not to be any white persons on the jury where the interests of colored persons only are involved. That jury would not be an honest and fair one of which any of its members should be governed in his judgment by other considerations than the law and the evidence; and that decision would hardly be considered just which should be reached by a sort of compromise, in which the prejudices of one race were set off against the
prejudices of the other. To be consistent those who hold
(793) this notion should contend that in cases affecting members of the colored race only the juries should be composed entirely of colored persons, and that the presiding judge should be of the same race."

I can add nothing to the force of *Mr. Justice Field's* argument, but I can express my concurrence in his view that the last three amendments to the United States Constitution were not *intended* to authorize Federal interference with the composition of juries in State courts. The Fourteenth Amendment is the only one relied on, and that cannot apply because "A jury *demodistate linguae*" has never in this country been embraced

in "due process of law," nor requisite to the "equal protection of the laws." If recognition of each race is required in the composition of juries it is equally essential in the composition of the judiciary. Both are constituent elements in the administration of justice.

In this State the laws exclude no one from the jury or grand jury because of race, neither does it exclude any one from the bench on that ground. If the words "due process of law" and "equal protection of the laws" warrant Federal interference and inquiry as to the manner of selecting jurors when negroes do not appear on the panel, the same rule will warrant investigation of the mode of selecting judges because no negroes are on this or the lower bench. Under the Constitution of the Union, as our fathers made it, the State prescribed the method of selecting its own juries and judges, and supervised the execution of its own laws in reference thereto. Like *Justice Field,* I see no warrant for Federal interference under powers conferred by the Fourteenth Amendment.

The above cited decisions of the United States Supreme Court all hold that only when the alleged discrimination against colored jurors is by virtue of the provisions of the Constitution or statutes of the State does the right to remove exist, and that when the alleged exclusion of colored jurors is by (794) virtue of the method of administering laws which contain no such discrimination, the sole remedy is by appeal to the highest court of the State, and thence by writ of error to the Federal Supreme Court. In *Gibson v. Mississippi,* 162 U. S., 565, *Harlan, J.,* reviews the uniform decisions to that effect, and sustains (at page 589) as valid the legal requirements in Mississippi "That no person should be a grand or petty juror unless he was a *qualified elector* and able to read and write, . . . and should possess good intelligence, sound judgment and fair character."

DOUGLAS, J., concurring in result. In concurring in the conclusion of the Court, which I do without hesitation, I deem it sufficient to say that the defendant has been denied a constitutional right. Whether he has been injured or not by such deprivation is not for me to say. The mere fact that a substantial right intended for his protection has been denied him is sufficient to influence my judgment. Whether the juries were in fact improperly drawn remains to be proved, but for the purposes of this discussion we must assume the truth of the defendant's allegation, because he has been denied the opportunity of proving it. As this is a right claimed by the defendant under

the Federal as well as the State Constitution, and which has been so recently decided and fully discussed by the Supreme Court of the United States, any further discussion on my part is entirely unnecessary. *Carter v. Texas,* 177 U. S., 442. This would end the matter but for some expressions in the opinion of the Court. I may frankly say that while verdicts are sometimes rendered that do not meet my approval, I cannot concur in any statement that any classes are, as a rule, unable to obtain justice on account of the prejudice of the average juror. This may happen in individual cases, especially in criminal trials where there is great public excitement; and wherever it (795) appears a new trial should promptly be granted. My views as to the character, powers and responsibilities of the jury are expressed in *Cable v. R. R.,* 122 N. C., 892, 900.

I fully concur in the conclusion of the Court that the defendant is entitled, irrespective of his color, to the fullest protection of the law; and that he may rightfully demand all the rights guaranteed to him by the Constitution of this State and of the United States, as well as every legal remedy necessary for their protection and enforcement. A denial of the remedy would be a denial of the right.

Cited: S. v. Daniels, 134 N. C., 644.

STATE v. WISEMAN.

(Filed 25 November, 1902.)

1. JUSTICES OF THE PEACE—*Jurisdiction—Constitution, Art. IV, Sec. 27—Laws* 1901, *Ch.* 182—*Criminal Law.*

   Where a statute permits a fine of as much as ten dollars for each hog permitted to run at large, and the warrant of a justice charges the running at large of ten hogs, the justice has no jurisdiction.

2. SUPERIOR COURTS—*Jurisdiction.*

   Where a justice of the peace has no jurisdiction of a criminal action heard by him, owing to the amount involved, the Superior Court acquires no jurisdiction on appeal if tried on the warrant.

INDICTMENT against S. Wiseman, heard by *Judge H. R. Starbuck,* at August Term, 1902, of MITCHELL. From an order dismissing the appeal the State appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for the defendant.

FURCHES, C. J. This is a criminal action, commenced (796) before a justice of the peace, under chapter 182, Laws 1901. The warrant charges that the defendant allowed ten hogs to run at large off his premises in violation of the provisions of the first section of said act. And the second section thereof is in the following language: "That any person or persons violating the provisions of section 1 of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than two dollars nor more than ten dollars for each and every offense, for each head of stock so allowed to run at large." The defendant was found guilty in the justice's court of allowing eight head of hogs to run at large off his premises in violation of said act, and was fined two dollars for each hog, making $16. The defendant appealed from this judgment to the Superior Court, where he was again tried upon the *same warrant,* and was again found guilty. But the court arrested the judgment and dismissed the action for want of jurisdiction, and the State appealed.

This statute makes a violation of section 1 a misdemeanor, and does not prescribe any punishment, except as to each hog. But Article IV, section 27, of the Constitution fixes the jurisdiction of justices of the peace, and limits it in criminal matters to cases in which the fine *cannot exceed fifty dollars* or the imprisonment thirty days. And under this statute the fine is limited to ten dollars for *each hog*—"the fine shall not exceed ten dollars for each hog so allowed to run at large." And, although he was only fined two dollars a hog, or sixteen dollars for the eight, he might have been fined as much as eighty dollars, this being thirty dollars in excess of his jurisdiction. It is therefore plain to see that the justice of the peace did not have jurisdiction.

But the State contends that the Superior Court had jurisdiction of the offense, and, the case having been carried to that court by appeal, that gave the Superior Court jurisdiction of this offense, and it should have proceeded to judgment. (797) This would have been so if there had been a bill sent in that court and found "a true bill," as in *S. v. Neal,* 120 N. C., 613; 58 Am. St., 810. The jurisdiction of the Superior Court would then have arisen upon the bill of indictment, and not by virtue of the warrant of the justice of the peace. The justice of the peace had no jurisdiction; the warrant itself showed that, and ousted him of jurisdiction; and as it gave him none, it could

give the Superior Court none. While the Superior Court has jurisdiction of *such* violations of the criminal law as that charged against the defendant, it had no jurisdiction over the defendant until he was properly before the court, upon a bill found, or by appeal from a justice of the peace who had jurisdiction to try and punish the defendant. In cases where bills are found in the Superior Court, its jurisdiction is original. But in cases of appeal from justices of the peace, its jurisdiction is derivative, and it has no more or greater jurisdiction than the justice of the peace had; and if the justice had none, the Superior Court had none. It was, in fact, trying the defendant on a piece of paper containing a charge against him for violating the criminal law of the State, but without its being authorized by a grand jury or a justice of the peace having jurisdiction of the offense, and was therefore not authorized to prefer the charge nor to try the case, and the appeal conferred no jurisdiction on the Superior Court.

We see no error, and the judgment is

Affirmed.

(798)

STATE v. McCALL.

(Filed 2 December, 1902.)

1. ARSON—*Evidence—Collateral Facts—Accessories.*

On a prosecution for being accessories before the fact to arson, evidence of a prior crime to cover up which the arson was supposed to have been committed is inadmissible.

2. ARSON—*Evidence—Corroborative Evidence—Accessories.*

In an indictment against accessories before the fact, the principal having testified to the facts of the crime, evidence that the principal confessed the crime is admissible as substantive evidence against him, but is only corroborative evidence as to the guilt of the accessories.

INDICTMENT against Alexander and Samuel McCall, heard by *Judge W. B. Councill* and a jury, at April Term, 1902, of BURKE. From a verdict of guilty, and judgment thereon, the defendants appealed.

Robert D. Gilmer, Attorney-General, and *J. T. Perkins* for the State.

Locke Craig, R. S. McCall and *J. C. L. Bird* for the defendants.

FURCHES, C. J. The defendants are indicted for burning Concord Methodist Church. The offense is alleged to have been committed in McDowell County, by Jack Keaton, as principal, and the defendants, Alexander McCall and Samuel McCall, as accessories before the fact. The defendant Keaton plead guilty, and the McCalls plead not guilty, and the case was moved to Burke County for trial. Samuel is the son of Alexander McCall, and it was shown that, some time before the church was burned, a mill belonging to Rom. Brown had been burned, and Alexander McCall was charged with burning the mill, and had been arrested on that charge before the church was burned. And it was admitted by the State on the trial (799) that he had been tried and acquitted of burning the mill.

The theory of the State was that Keaton burned the church, but was induced to do so by the defendants, the McCalls, to allay suspicions against Alexander McCall as to his being the party who burned the mill; and for the purpose of establishing the truth of this theory the State introduced Keaton as a witness. On his examination he was interrogated by the State as follows: "Was Alexander McCall arrested for burning the mill, when the church was burned?" to which he answered "Yes." "Where were you the night the mill was said to have been burned—where did you stay that night?" "I stayed at Alexander McCall's." "Where was Alexander the fore part of that night—was he at home or not?" "No, he was not at home." "Did you see him when he came in?" "No, I did not see him when he came in." "Saw him next morning?" "Yes." "You noticed his clothing next morning?" "Yes." "What was their condition?" "His clothing was wet—lying on a chair by his bed." "Do you know what Alexander McCall carried his matches in—do you happen to know that, on the night the mill was burned?" "Yes." "What did he say about Alexander McCall having matches?" "He had them in a match safe that belonged to his daddy." "Did he tell you what he used to set the mill on fire?" "He said he used oil." "Did he tell you how he carried the oil?" "In a bottle."

The above questions and answers were allowed by the court, over the objection of the defendants, and they excepted.

The State also introduced M. L. Kaylor, who testified that he said to Keaton on the day of the preliminary examination, " 'Young man, you've got yourself into a pretty bad box.' He just touched my arm and turned me around and said, 'The McCalls had this thing done to cover up the burning (800) of the mill.' He said, 'If I am put on the stand I will tell the truth about it.' "

Another witness, by the name of Perry, was put on the stand by the State, and testified, in answer to a question asked by the State, that Keaton said "he had burned the church, and that he was hired to burn the church by Alexander McCall and Samuel McCall, one or together." The evidence was admitted by the court, over the objection of the defendants, and they excepted.

The defendants were not on trial for burning Brown's mill, and any evidence as to that, not necessarily connected with the burning of the church, was incompetent and should not have been allowed. And the evidence of Keaton, as to the absence of the defendant Alexander McCall the night the mill was burned, as to his wet clothing the next morning as to the use of matches and the box he carried them in, and the use of oil carried in a bottle, was incompetent and should not have been allowed. *S. v. Graham,* 121 N. C., 623; *S. v. Shuford,* 69 N. C., 486; *S. v. Frazier,* 118 N. C., 1257; *S. v. Jeffries,* 117 N. C., 727; *S. v. Alston,* 94 N. C., 930.

The mill was burned some time before the church was burned, and before Keaton said the defendants induced him to burn the church; and the statements he made as to the absence from home of Alexander McCall, his wet clothing, the matches and oil, have no connection with burning the church, nor with the conversation he detailed as to their inducing him to burn the church. It was not necessary to support the State's theory, as Alexander had already been charged with burning the mill and had been arrested on that charge before it was alleged that the McCalls induced Keaton to burn the church, according to his own testimony.

(801) The evidence of Kaylor and Perry is of the same character, and is treated together, and was competent, although Keaton had submitted and was not on trial. But as to the defendants, the McCalls, his guilt was still involved, and was an issue in the trial, for the reason that he was charged as principal and the McCalls as accessories before the fact of burning the church; and if he was not guilty, the McCalls could not be guilty. It became in this way necessary for the jury to pass upon the guilt of Keaton; and, this being so, the evidence of Kaylor and Perry was substantive evidence as to Keaton's guilt, but was only corroborative evidence as to the guilt of the McCalls. It could only be used for the purpose of corroborating the evidence of Keaton given on the trial of the case, and the jury was the judge of that—whether it did or not, and to what extent, if at all. But it seems to have been treated as substantive evidence by the court in its charge to the jury, whereas it was the duty of the court to have instructed the jury as to its charac-

ter, and to have explained to them in what respect it was substantive evidence, and in what respect it could only be considered as corroborating Keaton, if they should find that it did corroborate him. And then it could not be used as establishing the truth of the statements made by Keaton, but only for the purpose of giving credit to his testimony. *S. v. Parrish,* 79 N. C., 610.

These errors, we think, were calculated to seriously prejudice the defendants on the trial, and entitles them to a new trial.

New trial.

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(802)

STATE v. HAGAN.

(Filed 9 December, 1902.)

1. EVIDENCE — *Demurrer — Waiver—Aider—Homicide, Laws* 1897, *Ch.* 109—*Laws* 1899, *Ch.* 131.

Where an accused demurs to the evidence of the State, and afterwards introduces testimony which supplies a defect therein, his right to assign the overruling of the demurrer as error is thereby waived.

2. HOMICIDE—*Manslaughter—Instructions.*

Where the solicitor does not ask for a verdict of murder against the accused, and there is no evidence of self-defense, the killing being admitted or proved, an instruction that if the jury believe the evidence they should find the prisoner guilty of manslaughter is proper.

INDICTMENT against W. E. Hagan, heard by *Judge W. B. Councill* and a jury, at October Term, 1902, of MADISON. From a verdict of guilty of manslaughter, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
No counsel for the defendant.

MONTGOMERY, J. The indictment charged the prisoner with murder. After the evidence of the State was concluded, the prisoner demurred to the evidence, on the ground that it did not tend to prove that Cody, the deceased, died from the wound inflicted upon him by the prisoner. The demurrer was overruled, and the prisoner excepted. The prisoner then introduced evidence, a part of which made it clear that Cody died from a gunshot wound given him by the prisoner. If the State had not introduced evidence sufficient to go to the jury that Cody died

from the wound, and the judge was in error in overruling the demurrer, a matter which we need not decide, the error (803) was cured by the course afterwards followed by the prisoner in offering evidence supplying that which the State lacked. The introduction of such evidence was a waiver of the prisoner's right to rely on the ruling as error. 6 Enc. Pl. and Pr., p. 455. In *S. v. Groves,* 119 N. C., 822, the trial judge overruled the demurrer, and this Court said that in refusing to allow the prisoner to introduce evidence, and charging the jury upon the evidence of the State, admitted to be true by the demurrer, his Honor committed no error. The Court further said in that case: "As stated in that opinion (*S. v. Adams,* 115 N. C., 775, 784), if the defendant has evidence he should give the jury the benefit of it, and (unless his own evidence proves the case against him) it will be still open to him to ask an instruction that there is not sufficient evidence to go to the jury. But if he demurs on that ground, the Court will not permit him to take 'two bites at a cherry' by fishing for the opinion of the Court and afterwards introducing testimony, if the demurrer is overruled." Laws 1897, ch. 109, and 1899, ch. 131, apply to civil actions and special proceedings; but if they could be applied to criminal actions, the same rule that we have laid down, viz., that the first motion to dismiss (demurrer to the evidence) of the State, would be of no avail to the plaintiff, unless at the conclusion of the whole evidence it was renewed; and then it would have to be heard upon the whole evidence. *Parlier v. R. R.,* 129 N. C., 262.

In the case before us the solicitor entered of record that he would not ask for a verdict of murder in the first degree, and on the argument did not insist on a conviction for murder in the second degree. At the conclusion of the evidence, his Honor explained the difference between murder and manslaughter, and instructed the jury that there was no evidence that the prisoner fought in self-defense, and that, as the solicitor did not insist on a verdict for murder in the second degree, they should (804) return a verdict of guilty of manslaughter, if they believed the evidence, and if they did not believe the evidence they should return a verdict of not guilty. We cannot see how the prisoner could have reasonably excepted to that instruction. There was no evidence that he fought in self-defense. He was therefore guilty of murder in the first degree, or murder in the second degree, or of manslaughter. He escaped on a conviction for the lightest of the crimes. No error.

Cited: Prevatt v. Harrelson, 132 N. C., 253; *S. v. Fowler,* 151 N. C., 732.

STATE v. FOY.

(Filed 16 December, 1902.)

LARCENY—*Intent—Felonious—Evidence—Sufficiency.*

The evidence in this case is not sufficient to convict the accused of larceny, as it does not show that the taking was done under circumstances inconsistent with an honest purpose.

INDICTMENT against Will Foy, heard by *Judge Thomas J. Shaw* and a jury, at July Term, 1902, of FORSYTH. From a verdict of guilty, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
J. S. Lanier for the defendant.

COOK, J. Whether there was any evidence tending to show that defendant was guilty of the larceny of the box of candy is the question raised by defendant's demurrer to the evidence. The only evidence introduced was that testified to by the witness Barbee, as follows: "I am employed as clerk by Mrs. W. J. and Clarence Cromer, candy makers and confec- (805) tioners, in the city of Winston. Defendant, Will Foy, had been working there for some time. On Monday, about 16 June, 1902, I saw a box of candy in the back room, under a table. I could not tell who put it there. I watched it every day to see if I could catch the defendant, Will Foy, taking it away. On Friday of the same week I sent Will Foy in the room where the box of candy was to get some sugar, and thought that was a good way to catch him, if he put it there. Will Foy, the defendant, went after the sugar, and while he was gone I waited and watched for him to see if he got the candy. He came back with the sugar and also the box of candy. I said, 'Will, what have you got there?' He did not say anything. I 'phoned for a policeman, and Policeman Miller came and sought the defendant and took the box of candy away from him." Cross-examined: "I waited from Monday until Friday, trying to catch the defendant. During the whole time the box of candy remained in the other room, under the table. I could have prevented it from being stolen, but wanted to catch the one who put it under the table, so I could have him punished. I sent the defendant in the room where the candy was for some sugar, for the purpose of catching him if he should take it. I had been missing some candy, and I wanted to catch the thief, whoever he was."

To constitute the crime of larceny, there must be *evidence* of a

felonious intent in the taking. Something more than the mere act of taking is necessary to be shown before the jury can proceed to inquire into the intent. There must be evidence to show that the taking was done under circumstances inconsistent with an honest purpose, such as when done clandestinely, or, when charged with, denies the fact (4 Bl., 232); or secretly (*S. v. Sowls,* 61 N. C., 151; *S. v. Ledford,* 67 N. C., 60; 2 Archbold C. Prac. and Pl., 6 Ed., 366-364); or forcibly (*S. v. Powell,*
(806) 103 N. C., 424; 4 L. R. A., 291; 14 Am. St., 821; *S. v. Grigg,* 104 N. C., 882; *S. v. Coy,* 119 N. C., 901); or by artifice (*S. v. Deal,* 64 N. C., 270); and that there was an original felonious intent, general or special, *at the time* of the taking (*S. v. Arkle,* 116 N. C., at p. 1031). The evidence of the State's witness fails to show any act done by defendant inconsistent with an honest purpose or inconsistent with the duties of his employment. The box of candy was lying under the table, where, by inference, it appears, it did not belong, and there is no evidence to show that defendant had put it there or that he knew it was there. He was working for the firm, and was sent by the witness in the room after some sugar, and returned with the sugar and also the box of candy, bringing them both to the witness, clerk of the firm, who had sent him. Being asked (having the sugar and the box of candy), "What have you got there?" did not say anything, and was forthwith arrested. There is no more evidence to show that he took the candy feloniously than the sugar. He was ordered to bring the sugar, and also brought the candy, which was out of its usual place, but the taking of both was under the same conditions and circumstances. There was no artifice, trick, secrecy, concealment, force or appropriation of either. The fact of his bringing the candy, together with the sugar, was no evidence that he had placed the candy where it was found. The evidence was insufficient, and his Honor erred in not sustaining defendant's demurrer.

Error.

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(807)

STATE v. PUGH.

(Filed 16 December, 1902.)

LARCENY—*Evidence—Sufficiency.*

The only evidence against the accused, indicted for larceny, being that a sailor accused him of stealing his clothes, which charge he denied at that time and at the trial, is not sufficient to sustain a verdict of guilty.

STATE *v.* DIXON.

INDICTMENT against Eugene Pugh, heard by *Judge E. W. Timberlake* and a jury, at May Term, 1902, of NEW HANOVER. From a verdict of guilty, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, for the State.
B. G. Empie for the defendant.

CLARK, J. The defendant was convicted of the larceny of a suit of clothes, and sentenced to ten years in the State's Prison. The only evidence was that a sailor accused the defendant of having stolen his suit of clothes out of a bag which the defendant was carrying for him, and the defendant denied the charge, when made. The judge should have charged the jury, as requested, that there was no evidence. The sailor was not at the trial, nor was there any witness who testified to any circumstances bearing upon the alleged commission of the offense. The remark of the sailor was hearsay, and was only competent as a *quasi* admission if the defendant had failed to deny the charge. This the defendant did promptly, when so charged, and also went upon the stand and denied it at the trial. There was not the scintilla of any evidence against him.

Error.

(808)

STATE v. DIXON.

(Filed 16 December, 1902.)

1. JURY — *Jury List — Purging — Abatement—Quashal—Pleas—The Code, Secs.* 1722, 1728.

   The merely purging the jury list of the names of those who had not paid their taxes, without adding any new names thereto, does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners.

2. EVIDENCE—*Contradictory Witness—Witnesses—Coroner—Inquest—Homicide.*

   The statements made by a witness at the inquest by a coroner, though the inquest was not legal, are competent to contradict such witness in a trial for the murder.

3. DYING DECLARATIONS—*Evidence—Statements—Homicide.*

   The statements by a person in his dying hours, after he had stated that he was dying and had asked for prayers, as to how he was shot and who shot him, are competent as dying declarations.

4. EVIDENCE—*Circumstantial Evidence—Homicide.*

In an indictment for murder, it is competent to show that gun-wadding found at the place of the shooting contained a part of the same matter as the pages of a magazine, a copy of which magazine was found at the house of the accused with those two pages torn out.

5. EVIDENCE—*Motion—Homicide.*

In an indictment for murder, evidence tending to show improper intimacy between the accused and the wife of the deceased is competent.

6. EVIDENCE—*Harmless Error—Homicide.*

The evidence that a gun found in the possession of the accused, after the shooting, had belonged to a witness, and had been lost two years before the shooting, when accused worked for the witness, if error, is harmless.

7. FINDINGS OF COURT—*Assignment of Error—Appeal.*

The recital of facts in an assignment of error cannot be considered unless such facts are found by the judge and set out in the case on appeal.

8. EVIDENCE—*View—Homicide—Trial.*

The fact that the jury had in full view the gun with which the killing was alleged to have been done, and the court docket, in the absence of a finding by the trial judge that the accused was prejudiced thereby, is not error.

9. HOMICIDE—*Murder—Evidence—Instructions—Verdict.*

Where all the evidence tends to show a killing by shooting from ambush, and there is nothing to contradict this, it is proper to instruct the jury to find the accused guilty of murder in the first degree, or not guilty.

10. APPEAL—*Escape—Trial—Practice—Homicide.*

In a capital case, where the accused escapes, the court may, in its discretion, either dismiss, determine or continue the appeal.

(809) INDICTMENT against Cyrus Dixon, heard by *Judge F. D. Winston* and a jury, at Spring Term, 1902, of JONES. From a verdict of guilty of murder in the first degree, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *A. D. Ward* for the State.

Thomas B. Womack for the defendant.

CLARK, J. The prisoner was convicted of murder in the first degree of Godfrey Webber. The appeal was most fully argued

here, and every exception which counsel thought might avail the prisoner was taken below, as fifty exceptions appear in the record, though on fuller consideration these were reduced, as was proper, to thirteen errors assigned in the case on appeal. After careful consideration, we have been able to find nothing prejudicial to the rights of the prisoner, and must affirm (810) the judgment.

It would serve no good purpose to go over, one by one, each assignment of error, and discuss them in a lengthy opinion, since opinions are for guidance in other cases, and there is little presented by the exceptions which has not already been decided, or the discussion of which would be of service in any other case. We have none the less carefully considered and passed upon each error assigned in the record. Among the errors assigned, those perhaps most earnestly pressed were:

The plea in abatement and motion to quash on the ground that the county commissioners, in June, 1901, added no new names to the jury list, and merely purged the box by taking out the names of those who had not paid their taxes, was properly overruled. It has been too often decided to be questioned that "the regulations contained in sections 1722 and 1728 of the Code, relative to the revision of the jury list, are directory only, and, while they should be observed, the failure to do so does not vitiate the *venire,* in the absence of bad faith or corruption on the part of the county commissioners." *S. v. Perry,* 122 N. C., at p. 1021, and numerous cases there cited. Those cases are not overruled in *Moore v. Guano Co.,* 130 N. C., 229, which merely holds that the conduct of the county commissioners in that case went beyond mere irregularity, and was as to a matter so serious in its nature as to invalidate the panel drawn in such manner.

To contradict the testimony of witnesses for the defense, the court allowed evidence of their statements made (some of them in writing), under oath, at the coroner's inquest. The prisoner excepted, on the ground that the coroner was not legally authorized to hold such inquest. That was immaterial. Contradictory statements, no matter when or where made, were competent.

The deceased was shot, about 7 P. M., 22 November, 1901, by some one lying in ambush along the road. In (811) his dying hours (he died that night, after being carried home), after stating that he was dying, and asking for prayers, he stated he was first shot from behind, and when he fell the man rushed out and shot him while lying on the ground, on his back (which was corroborated by the physician's testimony as to the range of the shot), and said that his assailant was a small white man, and that he looked like Cyrus Dixon, and, when he ran off,

that he ran like him. This testimony was competent as dying declarations. There was evidence of the tracks of a man running from the place to a branch which led up back of Dixon's house; that the tracks were measured and an impression taken by cutting paper to fit in the track, and this pattern corresponded with the prisoner's shoes. It was further in evidence that the gun wadding picked up at the place of the killing, between the stump from behind which the shooting was done and where the deceased fell, was part of pages 361 and 362 of "The Delineator" magazine, and that at Dixon's house the magazine was found with those pages torn out. Another copy of "The Delineator" of the same date was produced, and the matter on pages 361 and 362 contained the same matter as was on the wadding thus picked up. The prisoner objected, because the genuineness of the last copy was not proved by the publishers. We cannot sustain the objection. The whole was a circumstance, properly left to the consideration of the jury.

There was evidence tending to show improper intimacy between the prisoner (who was twenty-one years of age) and the wife of the deceased, who was twenty, while the deceased was older; that on one occasion the prisoner had sought to hire a horse and buggy to take "his gal" to church; that when questioned as to who she was, he had replied, pointing to the deceased, "She is that old man's wife," and, when cautioned, had said that (812) she was "already his"; that he had carried her in a buggy to a camp meeting, and there had introduced her as a "Miss Lina Hall, from the Banks"; that he had said the deceased had told him to let his wife alone, and had threatened him, but he said, "Damned if powder and shot are not cheap for me as for old man Webber"; that he had refused to take service where Webber was employed, "because," as he said, "there was an unpleasantness between them"; that on one occasion he and Webber's wife had gone into the woods "to get tooth brushes," accompanied by a negro woman, and had sent the negro woman back; that the afternoon just before the slaying, he had bought some new caps for his gun, and that when his gun was examined, soon after the killing, it had new caps and bore signs of having been recently fired. These and many other circumstances went to the jury, together with such evidence as the prisoner offered in rebuttal or contradiction. One witness testified that the gun found in the prisoner's possession had been his two years before, but had been lost, he knew not how, and that at the time of its disappearance the prisoner was working at his place. The prisoner contended that this tended to charge him with larceny and was prejudicial. It did not tend to show larceny, this possession

after the lapse of two years; and while its relevancy is not very apparent, its admission was not reversible error. Even if it had been charged (which was not), and even had it been shown that the prisoner stole the gun, the jury could not have therefrom concluded that, beyond a reasonable doubt, the prisoner waylaid and slew the deceased. The facts of this case, in many particulars, resemble those in *S. v. Outerbridge,* 82 N. C., 617.

The prisoner assigns as error that the jury, during their deliberations, had the gun and the court docket in full view. The recital of facts in an assignment of error cannot be considered by the court unless such facts are found by the judge and set out in the case on appeal. *Patterson v. Mills,* 121 (813) N. C., at p. 269; *Merrell v. Whitmire,* 110 N. C., 367; *Walker v. Scott,* 106 N. C., 56. But even if the above had been so found and set out, we do not see that they could prejudice the result. It is not enough that there was opportunity, but the court must find that in fact the jury were prejudiced by such matters. *S. v. Tilghman,* 33 N. C., 513.

The judge properly told the jury that they should return a verdict of murder in the first degree or not guilty. All the evidence tended to show a killing by shooting from ambush, and there was nothing to contradict this, and the sole question, if the evidence was believed, was simply whether the prisoner was, beyond all reasonable doubt, the slayer. *S. v. Rose,* 129 N. C., 575. We find no error in the judge's charge in any of the matters excepted to.

It has been stated to us by the Attorney-General that he has been informed that the prisoner has escaped jail since the argument. We are not advised whether the report has been verified, nor do we know whether the prisoner has been retaken or not. If the reported escape is not true, the report is immaterial; if it is true, it is not ground for any favor. In a capital case, even when the escape is before argument here, "the Court may, in its discretion, either dismiss the appeal or hear and determine the assignments of error, or continue the case." *S. v. Cody,* 119 N. C., 908; 56 Am. St., 692; *S. v. Anderson,* 111 N. C., 689, and *S. v. Jacobs,* 107 N. C., 772; 22 Am. St., 912, in two of which cases the appeal was dismissed. One who thus dismisses himself abandons his appeal and has no ground to invoke a review of the trial by the appellate Court. Certainly, when the escape is after argument here, the Court should dispose of the appeal, unless it prefers to dismiss and leave the judgment below in force.

Affirmed.

Cited: Moore v. Palmer, 132 N. C., 976; *S. v. Parker, ib.,* 1015; *S. v. Register,* 133 N. C., 750; *S. v. Boggan, ib.,* 763; *S. v. Teachey,* 138 N. C., 595; *S. v. Keebler,* 145 N. C., 562; *S. v. Banner,* 149 N. C., 521; *S. v. Spivey,* 151 N. C., 684.

(814)

STATE v. RAY.

(Filed 16 December, 1902.)

ORDINANCES—*Invalid—Police Power—Cities and Towns.*

An ordinance of a town requiring stores to be closed at 7:30 in the evening is invalid.

CLARK, J., dissenting.

INDICTMENT against J. D. Ray, heard by *Judge George A. Jones,* at September Term, 1902, of HALIFAX.

Following is the ordinance:

"*Ordinance* 41½.—It shall be unlawful for barrooms, groceries, dry-goods stores and other places where merchandise is bought and sold (except drug stores for the sale of drugs and medicines only) to be kept open later than 7:30 o'clock P. M., except Saturday. Anyone violating this ordinance shall be fined five dollars for each and every violation.

"1. It shall be the duty of the chief of police to ring the town bell every day, except Saturdays and Sundays, at 7:30 o'clock P. M., as a notice to all to obey this ordinance.

"3. This ordinance shall go into effect on Monday, 7 July, and remain in full force and effect until 1 October, 1902, unless repealed by the town commissioners before that time.

"This 4 July, 1902."

From a verdict of guilty on a special verdict, and judgment thereon, the defendant appealed.

Robert D. Gilmer, Attorney-General, and *E. L. Travis* for the State.

W. A. Dunn for the defendant.

(815) FURCHES, C. J. The defendant is the owner of a dry-goods and grocery store (not of liquors) in the town of Scotland Neck, Halifax County.

Scotland Neck is an incorporated town, and on the "fourth of July," 1902, the commissioners of said town passed this ordinance:

"It shall be unlawful for barrooms, groceries, dry-goods stores and other places where merchandise is bought and sold (except drug stores for the sale of drugs and medicines only) to keep open later than 7:30 o'clock P. M., except Saturdays. Anyone violating this ordinance shall be fined five dollars for each and every violation."

The defendant admits that he is the owner of a dry-goods and grocery store in the town of Scotland Neck, and that he has kept it open later than 7:30 P. M. since 7 July, 1902, the date at which said ordinance was to go into effect, but pleads not guilty, and a special verdict was returned, finding the facts as above.

It is admitted that the charter of said town gives no special authority for the passage of such an ordinance, and that the commissioners had no authority for the passage of said ordinance, except the general powers incident to municipal corporations.

This presents squarely the question of corporate power to pass and enforce such an ordinance without any legislative authority to do so, except the fact that it is a chartered municipality. It is therefore not necessary that we should discuss the power of the Legislature to pass such an act or to authorize a municipality to pass such an ordinance, and we do not enter into the consideration of that matter.

It must be admitted that the enforcement of this ordinance would be to deprive the defendant of his natural right—would be to interfere with the free use and enjoyment of his property, used in such a way as not to interfere with the rights of others. It is not shown, nor is it suggested, that defendant's keeping his store open after 7:30 interfered with the *rights* of (816) anyone else. It was said that the other merchants in Scotland Neck were willing to close their stores at 7:30, but the defendant was not, and the ordinance was passed to compel him to do so, for the reason that if he kept open the others would be compelled to do so, or to give the defendant the benefit of the trade of the town after that time. But did this give the commissioners the right to close the defendant's store?

It would seem that no legislative power exists, under our form of government and our ideas of personal liberty, as to allow such to interfere with the rights of ownership and dominion over his own property, except such interference be exercised for the protection and benefit of the *public*. When such interference is authorized, it is under the doctrine of eminent domain, or what is known as the police power of the government. The attempted exercise of the power in this instance is clearly not under the doctrine of eminent domain, but it is said to be under the police

power of the government. If the State could exercise such power (and we do not say it could), can a municipal corporation do so without express authority from the State? The general rule is, that a municipal corporation can only exercise such powers as are expressly given in its charter, or such as are necessarily implied by those expressly given. This doctrine is well expressed in 1 Dillon Mun. Corp., sec. 89, which is copied by *Justice Avery* in *S. v. Webber,* 107 N. C., 962; 22 Am. St., 920, and is approved and adopted by this Court in that case: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt
(817) concerning the exercise is resolved by the courts against the corporation, and the power is denied." The same doctrine is probably more pointedly stated as applicable to the case now under consideration, in *S. v. Thomas,* 118 N. C., 1221, as follows: "An ordinance, says Dillon (1 Mun. Corp., sec. 325), cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant; and, in cases relating to such rights, authority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit. If the general power to pass by-laws, intended for local government merely, carries with it, by implication, the authority to restrict the use of private property by prescribing the hours when a person shall be permitted to occupy his own house, then cities and towns need nothing more than the enactment of a law creating them, with the incidental grant embodied in section 3799 of the Code, to give them equal authority with the Legislature itself to restrict and regulate the rights of personal liberty and private property within the limits of the municipality. No such latitudinarian construction was intended by the Legislature to be given by the statute, and its attempted exercise was therefore unlawful."

It seems to us that these authorities settle the question and plainly show that this ordinance was unlawful and cannot be enforced.

It is said that towns are constantly exercising such power over barrooms where liquors are sold. This power, so far as our investigation goes, is expressly given in the charters. But if there is any case where it is not, it must be understood that they stand on a very different footing to the sale of dry goods and

family groceries. Liquor itself is regarded as an evil, an enemy of civilization and of good government. *Bailey v. Raleigh,* 130 N. C., 209; *S. v. Barringer,* 110 N. C., 525. Its sale without a license is condemned and prohibited by law, (818) and the regulations closing such shops might well be put upon the implied power as being for the public good. But however that may be, that is not the question before the Court, and what has been said as to the sale of liquors has only been said to meet an argument of the State.

It is also said that the State of California has exercised such power without express legislation, and that the Supreme Court of the United States affirmed the judgment of the California court. But when those cases are examined it will be found that they were cases where the business of ironing was carried on all night in a thickly settled portion of the city of San Francisco, consisting of old wooden buildings near the sound, where the wind usually blew hard, which made it very dangerous to carry on such work at late hours of the night, on account of fire. And the opinions rest upon the ground that it was for the *public good,* the protection of the public from the danger of fire, that the city was allowed to prevent such persons from carrying on such work at such late hours of the night. But the Supreme Court of the United States only affirmed the ruling of the State court, which is the rule of that court where there is no Federal question involved. So it amounts to no more than a decision of the Supreme Court of California against the repeated decisions of our own Supreme Court. And were we to admit that the distinction does not exist between the California case and this case, which we have pointed out, the question then is, shall we adhere to our own decisions, when we are not able to see any error in them, or shall we adopt the opinion of the court of California? We prefer to follow our own decisions, and are of the opinion that the corporate authorities of Scotland Neck were not authorized to pass the ordinance under consideration, and it is void.

There is error, and under the special verdict the defendant was entitled to an acquittal and discharge. The (819) judgment of the court below is

Reversed.

CLARK, J., dissenting. On 4 July, 1902, the town of Scotland Neck passed an ordinance prohibiting "barrooms, groceries, dry-goods stores and other places where merchandise is bought and sold (except drug stores for the sale of drugs and medicines only) to be kept open later than 7:30 P. M., except Saturdays," under penalty of five dollars for each violation, and it was made

the duty of the chief of police to ring the town bell at 7:30 P. M. every day, except Saturdays and Sundays, as notice. The ordinance prescribed that it was to be in force from 7 July to 1 October. The defendant admits that he comes within the class specified, and did not comply with the ordinance, but kept open his store for the sale of dry goods and groceries later than 7:30 P. M. and conducted his business just as if the ordinance had not been passed.

The sole defense is that the ordinance is invalid. The judge below sustained the action of the mayor, who imposed a fine of five dollars, and the defendant appealed. The object of the ordinance, as was stated on the argument, and as is readily apparent, was to give the clerks and other employees of stores a rest from toil in the hot months of July, August and September, after 7:30 P. M. At that season the days are hot and long, business is dull and purchases can readily be made by the community without inconvenience before 7:30 P. M. To avoid any reasonable objection, Saturday nights are excepted and the "early closing" is limited to the three hottest and dullest months in the year. It seems strange that anyone should object to this modest concession to the clerks and others who for small compensation are at work from sunrise till late at night the balance of the year.

(820) So reasonable is the regulation that by common consent the merchants of most of the towns probably in the State have for years by voluntary agreement adopted it. But as one merchant in a town, by holding out against it, can force all other stores to keep open, thus compelling all the clerks and other employees to forego this small concession, the commissioners had no other means to secure the cessation of work so beneficial to the health and comfort of a large and useful class in the community than by the passage of this ordinance.

There can be no questions of the reasonableness of such an ordinance; and if this action of the local legislature did not correctly express the wishes of their constituents, or did not prove satisfactory, public sentiment would soon cause its repeal, or at least the matter would be corrected by the election of a board of commissioners of a different cast. *Hellen v. Noe,* 25 N. C., 493. Certainly, if the power to pass the ordinance exists, the propriety of its passage is a matter that can be better determined by the commissioners elected by the people of the town and conversant with the surroundings and the wishes of their constituents than by five lawyers assembled in a public building in Raleigh.

The ordinance being a reasonable one, the only possible question is that of the power to pass the ordinance. The charter of

the town (Private Laws 1901, ch. 342, sec. 15) broadly gives its commissioners the usual powers conferred on towns and cities by the Code, ch. 62. Among the powers conferred expressly by that chapter are, independent of the inherent and incidental powers of every municipal corporation, those of the Code, sec. 3799: "They shall have power to make such by-laws, rules and regulations for the better government of the town as they may deem necessary, provided the same be not inconsistent with this chapter or the laws of the land." And section 3802: "They may pass laws for . . . preserving the health of the citizens." In *Hill v. Charlotte,* 72 N. C., at p. 56, the Court says: "We conceive that *nothing can be clearer* than that when (821) a general authority is given to a municipal corporation, to be exercised through its proper legislative officers, to make ordinances for the good government, health and safety of the inhabitants and their property, it is thereby left entirely to the discretion of those authorities *to determine what ordinances are proper for those purposes.*"

In *S. v. Austin,* 114 N. C., at p. 856; 41 Am. St., 817; 25 L. R. A., 283, *Burwell, J.,* speaking for the Court, after setting out in full the above (section 3799 of the Code), says emphatically: "This is an express grant of authority to the officers of this municipal corporation to exercise within the territory made subject to their control *the police power of the State,* the only expressed restriction upon their action being that the rules and regulations made by them shall not be inconsistent with the laws of the land." There is no law forbidding a regulation giving clerks and other employees "in stores, barrooms and groceries" a breathing spell after 7:30 P. M. on five days during the three hottest and dullest months of the year. If the Legislature can confer such power on any municipality (as is admitted), the above decision holds that it has been done. It is a most reasonable regulation, a humane and just regulation, and in the interest of the public health and comfort, and detrimental to the interest of no one. As was well said by *Daniel, J.,* in *Hellen v. Noe,* 25 N. C., 499, with that confidence in the capacity of the people for self-government and ability to regulate for the best their own local matters, which marked the utterances of that Court: "If a majority of the citizens of the town deem the ordinance impolitic or injurious to the people of the corporation, they have the power in their own hands to remedy the evil; but we cannot say that this ordinance is either against the general law or is in itself unreasonable." The people are the best judges of their own interest and wishes; and, as *Judge Daniel* says, the (822) correction should be left to them, unless an ordinance is

on its face in violation of some statute enacted by the will of the lawmaking power of the whole State, or is so unreasonable in its nature as to be beyond the police power confided to the municipality by virtue of the general statute.

A case almost on all-fours with this, in the terms of the ordinance, and presenting certainly the very question of the power of the town to pass such an ordinance as this, has been held in favor of the power by the Supreme Court of the United States. *Barbier v. Connolly,* 113 U. S., 27. An ordinance of the city of San Francisco closed all laundries and wash houses "from 10 o'clock at night till 6 o'clock in the morning." Those opposing the measure argued that the motive was to discriminate against the Chinese. Those defending it said it was because such occupation was dangerous on account of liability from fires. The court, adhering to the settled ruling that the motive in passing a statute or ordinance cannot be considered unless it appear on the face thereof, held: "The provision is *purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies.* . . . The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced. . . . This is a matter for the determination of the municipality in the execution of its police powers."

The validity of the same ordinance was again presented in *Soon Hing v. Crowley,* 113 U. S., 703, and was more fully and elaborately discussed, and the following points, having no reference whatever to the danger from fires, were decided: "The objection that the fourth section is void, on the ground that it deprives a man of the right to work at all times, is equally without force. However broad the right of every one to fol-
(823) low such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men, notwithstanding the liberty that is guaranteed to each. It is liberty regulated by just and impartial laws. Parties, for example, are free to make any contracts they choose for a lawful purpose, but society says what contracts shall be in writing and what may be verbally made, and on what days they may be executed and how long they may be enforced, if their terms are not complied with. So, too, with the hours of labor. On few subjects has there been more regulation. How many hours shall constitute a day's work, *at what time shops in cities shall close at night,* are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld, not from any

right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and *in the heated rooms of our cities;* and their validity has been sustained by the highest courts of the States."

After these two explicit and unanimous decisions of the highest Court known to our laws, that any town, "possessed of the ordinary powers," has the right to pass "such beneficent and merciful" ordinances for the health and comfort of the toilers "in the heated rooms" of our towns and cities, by "prescribing hours for closing at night," no one has ever since contested the validity of such ordinances in that Court, and the State courts have been as humane. Not till now has any court recorded a decision to the contrary.

The above cases began in the United States Circuit Court and went thence to the Federal Supreme Court. But the Supreme Court of California has cited those cases and (824) heartily endorsed the principles therein laid down (*In re Hang Ki,* 69 Cal., 152), quoting with approval, "The provision is purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies."

In Missouri, under a statute worded like our Code, sec. 3799, above cited, a city ordinance closing stores, shops and other places of business at 9 a. m. on Sunday was held valid. *St. Louis v. Cafferata,* 24 Mo., 94. It seems there was no State prohibition as to opening stores on Sunday.

In *S. v. Freeman,* 38 N. H., 426, it was held that a town ordinance prohibiting restaurants from being kept open after 10 o'clock at night was valid and authorized by a statute not so broad as our Code, sec. 3799. To same purport *Hudson v. Geary,* 4 R. I., 485. And there are other authorities to the same effect as *Judge Field* says in *Soon Hing v. Crowley, supra,* and none to the contrary. The validity of an ordinance closing barrooms at a specified hour is impliedly recognized as valid and authorized by the Code, sec. 3799, in the discussion in *S. v. Thomas,* 118 N. C., 1221, which holds invalid not the requirement to close the bar, but the prohibition of the proprietor to remain in it after it was closed.

In 1 Dillon Mun. Corp., sec. 400 (4 Ed.), it is said: "Under a general power to pass any other by-laws for the well-being of the city its council may, by ordinance, prohibit saloons, res-

taurants and other places of public entertainment to be kept open after a specified hour, and objections that such by-law was unreasonable and deprived the citizen of the constitutional right of 'acquiring property' were not considered to be well taken."

If the town commissioners of the progressive and growing town of Scotland Neck thought it would conduce "to the (825) better government and aid to preserve the health of many of its citizens" (Code, secs. 3799 and 3802) to close the places of business (except for sale of drugs and medicines) at 7 p. m. on five days in the week during July, August and September, and that in so ordering they were executing the wishes of a majority of their constituents, are they not the best judges thereof, subject to correction only at the ballot box when a new board is chosen? Our system of government favors local self-government. Whenever any effort is made in the interest of humanity to lessen the hours of toil and give a breathing spell—a chance, however small, for the enjoyment of life to the employed, a protest is almost always made on the ground stated by *Judge Field* (113 U. S., 703), that "it deprives a man of the right to work at all times." This objection means simply that it deprives the objector of the right to work "the other fellow" at all times, without stint or limit.

Some one has said with more force than truth or elegance that "civilization is hell to the under dog." On the contrary civilization consists in greater humanity and consideration for the comfort, the convenience, the health of those who are not able to compel or to buy that which should be conceded them voluntarily or guaranteed by law. The purpose of a government of law is the protection of the weak, for the strong can take care of themselves. The brief recreation and surcease from toil given by this ordinance during the hot summer evenings to the clerks and other employees of the stores in their town is an act which reflects credit upon the commissioners of Scotland Neck. Their action is warranted by the decisions of the highest court in the Union and of several States, and their power to do so has not till now been denied in any.

Cited: Paul v. Washington, 134 N. C., 372; *S. v. Dannenberg,* 150 N. C., 801.

(826)

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

PALIN *v.* MIDGETT, from DARE; *Aydlett* for plaintiff, *Bond* for defendant. Affirmed.

ATKINSON V. RICKS, from NORTHAMPTON; *Winborne* for plaintiff, *Barnes* for defendant. New trial for newly discovered evidence.

KING V. POWELL, from WARREN; *Green* for plaintiff, *Pittman & Kerr* for defendant. Affirmed upon authority of *Harrington v. Hatton,* 130 N. C., 90; *Pipkin v. Adams,* 114 N. C., 201.

WILLIFORD V. WILLIAMS, from BERTIE; *Martin* for plaintiff, *Smith* for defendant. Affirmed.

WARD V. WARD, from BERTIE; *Smith* for plaintiff, *Martin* for defendant. Affirmed.

COX V. BUCK, from PITT; *Skinner & Whedbee* for plaintiff. Affirmed.

ROYAL V. STREET RAILWAY CO., from CRAVEN; *D. L. Ward* for plaintiff, *Clark* for defendant. Affirmed.

MANUFACTURING CO. V. GRAY, from CRAVEN; *McIver* for plaintiff, *A. D. Ward* for defendant. Affirmed.

EDWARDS *v.* AYSCUE, from VANCE; *Pittman and Harris* for plaintiff. Dismissed under Rule 15 for failure to prosecute appeal.

TYSON V. BARNES, from EDGECOMBE; *Fleming & Moore* for plaintiff, *Fountain & Howard* for defendant. Affirmed on authority of *King v. Cooper,* 128 N. C., 347.

LUMBER CO. V. WILMINGTON IRON WORKS, from PENDER; *Stevens* for plaintiff, *Meares* for defendant. Defendant's petition to rehear dismissed.

WOOD V. ROWE, from ONSLOW; *Thompson* and *A. D. Ward* for appellee. Motion to docket and dismiss appeal under Rule 17 allowed.

KOONCE V. INSURANCE CO., from ONSLOW; *Thompson* and *A. D. Ward* for appellee. Motion to docket and (827) dismiss appeal under Rule 17 allowed.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

SUTTON v. ERSKINE, from LENOIR; *Pollock* for appellee. Motion to docket and dismiss appeal under Rule 17 allowed. (Same order in another case between same parties.)

PARKER v. RAILROAD CO., from WAYNE; *Allen & Dortch* and *Isaac F. Dortch* for plaintiff, *Munroe, Elliott* and *Daniels* for defendant. Affirmed. Cited: *S. c.*, 133 N. C., 336.

ARNOLD v. HARDY, from HARNETT; *Murchison & Johnson* for plaintiff, *Spears* and *Argo* for defendant. New trial.

ARNOLD v. DENNIS, from HARNETT; *Murchison & Johnson* for plaintiff, *Stewart & Godwin* for defendant. New trial.

BAKER v. RALEIGH COTTON MILLS, from WAKE; *Douglass & Simms* for plaintiff, *Battle & Mordecai* for defendant. Affirmed.

CARROLL v. RAL. TEL. CO., from WAKE; *Snow* for plaintiff, *Battle & Mordecai* and *W. N. Jones* for defendant. Affirmed.

ROSEMOND v. RAILROAD CO., from WAKE; *Argo* for plaintiff, *Day & Bell* for defendant. Affirmed.

YOUNG v. HODGES, from HARNETT; *McLean & Clifford* for appellee. Motion to docket and dismiss appeal under Rule 17 allowed.

TUDOR v. WILSON, from WAKE; *Busbee & Busbee* for appellee, *Ryan* for appellant. Motion to docket and dismiss appeal under Rule 17 allowed and motion to reinstate denied.

MCQUEEN v. FAIRLEY, from ROBESON; *Patterson & McCormick* for plaintiff, *B. F. McLean* for defendant. Affirmed.

SCOTT v. CITY OF GREENSBORO, from GUILFORD; *Barringer* for plaintiff, *Scales & Taylor* for defendant. Affirmed on authority of *Peterson v. Wilmington*, 130 N. C., 76.

BYRD v. GREENSBORO, from GUILFORD; *Barringer* for
(828) plaintiff, *Scales & Taylor* for defendant. Affirmed on authority of *Peterson v. Wilmington*, 130 N. C., 76.

GIBSON v. GILMER, from GUILFORD; *Barringer* for plaintiff. Affirmed.

SEWING MACHINE CO. v. HOUSE & PARKER CO., from ROWAN; *Randleman* and *Miller* for plaintiff, *Jones & Tillett* for defendant. Affirmed.

BRYAN v. TEL. CO., from IREDELL; *Caldwell* for plaintiff, *Jones & Tillett* for defendant. Affirmed.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

THE SOLICITOR v. GLASS, from RANDOLPH; *Jones & Tillett* for plaintiff, *Morehead* and *Robins* for defendant. Affirmed.

LAY v. COTTON MILLS, from GASTON; *Maxwell & Keerans* for plaintiff, *Mason* and *Burwell, Walker & Cansler* for defendant. Affirmed.

HOOD v. TELEGRAPH CO., from MECKLENBURG; *Maxwell & Keerans* for plaintiff, *Jones & Tillett, F. H. Busbee* and *Strong* for defendant. Plaintiff's petition to rehear dismissed and former ruling affirmed. Cited: *Bryan v. Tel. Co.*, 133 N. C., 606.

JOHNSON v. MACHINE WORKS, from MECKLENBURG; *Maxwell & Keerans* for plaintiff, *Burwell, Walker & Cansler* for defendant. Plaintiff's petition to rehear dismissed.

FISHER v. BROWN, from CABARRUS; *Montgomery & Crowell* and *Self & Whitener* for plaintiff, *Means* and *Caldwell* for defendant. Affirmed.

PHARR v. RAILROAD CO., from MECKLENBURG; *Clarkson & Duls* and *Bennett* for plaintiff, *Bason* for defendant. Affirmed.

SHIELDS v. SHIELDS, from MECKLENBURG; *McNinch* for plaintiff, *Hawkins* for defendant. Affirmed.

FINK v. ALLEN, from CABARRUS; *Crowell* for plaintiff, *Means* and *Smith* for defendant. Affirmed.

ORR v. SIMMS, from MECKLENBURG; *Maxwell & Keerans* for plaintiff, *Jones & Tillett* for defendant. (829) Affirmed.

HOWARD v. RAILROAD, from CATAWBA; *Armfield & Turner, Yount* and *Femister* for plaintiff. Affirmed. Cited: *S. c.*, 132 N. C., 709.

ROWE v. SHUFORD MFG. CO., from CALDWELL; *Femister* and *Yount* for plaintiff, *Self & Whitener* and *Perkins* for defendant. Affirmed.

STATE v. RAILROAD CO., from BURKE; *Attorney-General* and *Avery & Ervin* for State, *Bason* and *S. J. Ervin* for defendant. Affirmed.

STATE v. LOCKEY, from BURKE; *Attorney-General* for State, *Avery & Ervin* and *Newland* for defendant. Affirmed.

WITHEROW v. GALLERT, from RUTHERFORD; *Martin & Eaves* for plaintiff, *McBrayer & Justice* for defendant. Affirmed.

CASES DISPOSED OF WITHOUT WRITTEN OPINIONS.

WILSON v. ABRAMS, from POLK; *Zachary* for plaintiff, *Gallert* for defendant. Affirmed.

MOSELEY v. MCKINNEY, from RUTHERFORD; *Eaves & Rucker* for plaintiff. Affirmed.

STATE v. STANTON, from MADISON; *Attorney-General* for State. Appeal dismissed.

HAZZARD v. LYMAN, from BUNCOMBE; *Jones & Jones* for plaintiff, *Davidson* and *Weaver* for defendant. Affirmed.

MILES v. RAILROAD CO., from MADISON, two cases; *Gudger & McElroy* for plaintiff, *Bason* for defendant. Affirmed.

DUCKWORTH v. DAVENPORT, from TRANSYLVANIA; *Rhuford* for plaintiff, *Zachary & Moore* for defendant. Affirmed.

BENEDICT v. JONES, from BUNCOMBE; *J. C. Martin* and *F. H. Busbee* for plaintiff, *Craig* for defendant. Affirmed.

STATE v. NEELY, from MACON; *Attorney-General* for State, *Ray* for defendant. Error, upon authority of *S. v. Reams*, 121 N. C., 556.

THRASH v. RAILROAD, from CHEROKEE; *Dillard & Bell* (830) for plaintiff, *F. H. Busbee* for defendant. Affirmed.

NELSON v. BLANTON, from SWAIN; *Fisher* for plaintiff, *Brison & Black* for defendant. Affirmed.

FAIN v. EARLY, from CHEROKEE; *Norvell* for defendant. Affirmed on authority of *Bank v. Blossom*, 92 N. C., 695.

SMYTHE v. AYERS, from GRAHAM; *Dillard & Bell* for plaintiff, *Morphew* for defendant. Affirmed.

PENDER v. RAILROAD CO., from SWAIN; *Fisher* for plaintiff, *Bason* for defendant. Affirmed.

ADAMS v. RAILROAD CO., from SWAIN; *Fisher* for plaintiff, *Bason* for defendant. Affirmed.

HERREN v. NAT'L. ABRASIVE CO., from HAYWOOD; *Crawford & Hannah* for plaintiff, *W. B. & H. R. Ferguson* for defendant. Affirmed.

BURCH v. ELIZABETH CITY LUMBER CO., from CHOWAN; *W. M. Bond* for plaintiff, *Pruden & Pruden, Shepherd & Shepherd* for defendant.

FURCHES, C. J. The facts in this case are substantially the

same as those in *Monds v. Elizabeth City Co., ante,* 20. The two cases were argued together, and it was agreed by counsel that a decision in one case would decide the other. Therefore, for the reasons given in *Monds' case,* the judgment below in this case is affirmed.

Cited: Bunch v. Lumber Co., 134 N. C., 116.

(831)

AMENDMENT TO RULES—PRINTED BRIEFS REQUIRED.

(EFFECTIVE 29 OCTOBER, 1902.)

The following will be substituted in the place of the present Rules 32, 34 and 36 (see 128 N. C., 643-645):

RULE 32—PRINTED BRIEFS.—Printed briefs of both parties shall be filed in all cases except in pauper appeals. Such briefs may be sent up by counsel ready printed, or they may be printed under the supervision of the clerk of this Court, if a proper deposit for cost of printing is made, as specified in Rule 29. They must be of the size and style prescribed by that rule. The briefs are desired to cover all the points presented in the oral argument, though additional authorities may be cited if discovered after brief filed.

RULE 34—APPELLANT'S BRIEF.—The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except that as to an exception that there was no evidence it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exceptions and assignments of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment, and if statutes are material, the same shall be cited by the book, chapter and section. Such briefs, when filed, shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application. If not filed by 10 a. m. on Tuesday of the week preceding the call of the district to which the cause belongs, the appeal will be dismissed on motion of appellee when the call of that district is begun, unless, for good cause shown, the Court shall give further time to print brief.

(832) RULE 36—APPELLEE'S BRIEF.—Add to Rule 36, on page 645, 128 N. C., the following: Said briefs shall be filed before the beginning of the call of the district to which the cause belongs, shall be noted by the clerk on his docket, and a copy furnished by him to opposite counsel on application. On failure to file said brief by that time the cause will be heard and disposed of without argument from appellee, unless, for good cause shown, the Court shall give further time to print brief.

RULE 37 is amended by striking out "10," in line 3, and inserting "20."

This shall be effective on and after 29 October, 1902.

(Amended as above 4 February, 1903.)

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